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For their dedication and hard work to the publication of Volume 8

Dual Agency: Rebutting the Presumption That an Employment Relationship Permits Discovery of Confidential Physician-Patient Communications

Darko Bilic*

I. Introduction

Currently, hospitals employ more physicians than ever before.[1] Unsatisfying work-life balance and exorbitant operating costs drives physicians from solo practice.[2] Between 2000 and 2010, analysts noted a thirty-four percent increase in the number of hospital-employed physicians.[3] Likewise, research indicates that hospitals will employ seventy-five percent of newly hired physicians by 2014.[4]

Acknowledging this trend, this article evaluates how the increased percentage of hospital-employed physicians affects patients' privacy interests. This article specificallys addresses the contradicting legal obligations physician-patient relationships and employer-employee relationships impose on physicians. Part II discusses the obligations physicians' fiduciary status' in physician-patient relationships impose on them. Part III discusses the legal obligations physicians' agent status' in employer-employee relationships impose on them. Finally, Part IV discusses dual agency and proposes a solution to the dilemma plaguing hospital-employed physicians.

II. Physician-Patient Relationship: Physician's Fiduciary Duties to the Patient

The physician-patient relationship is confidential.[5] When a patient seeks treatment from a physician, they enter into a relationship where the physician holds all the power: patients need medical treatment, and physicians hold

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* J.D., expected May 2015, Arizona Summit Law School; B.S. in Justice Studies, May 2011, Arizona State University.

[1] Ann S. O'Malley et al., *Rising Hospital Employment of Physicians: Better Quality, Higher Costs*, Health Sys. Change (2011).

[2] Erika Mekies, *Hospital Employment of Physicians*, 60-MAY Fed. Law. 40, 40 (2013).

[3] Robert Lowes, *Number of Physicians Employed by Hospitals Snowballing*, Medscape Med. News (Jan. 24, 2012), http://www.medscape.com/viewarticle/757386.

[4] Mark Crane, *Hospital Employment of Physicians Continues to Grow*, Medscape Med. News (July 6, 2012), http://www.medscape/com/viewarticle/766967.

[5] *See infra* Part II.A.

"exclusive" ability to treat.[6] In other words, the physician's medical knowledge exceeds the patient's.[7] Likewise, patients' needs for medical treatment further diminishes their abilities to bargain in physician-patient relationships.[8] As such, physicians are fiduciaries within physician-patient relationships.[9]

A. Delegation of Powers and Risk of Abuse

The fiduciary is a party, who "has a partial or full monopoly over the means for satisfying the needs of the other party."[10] Within the medical context, the physician holds all the bargaining power and the patient must trust the physician to provide the appropriate medical treatment.[11] Consequently, patients delegate their powers to physicians.[12]

Patients delegate their powers by disclosing confidential information to physicians who use this information to render accurate treatments.[13] In exchange, physicians become obligated to keep this patient information confidential.[14] This agreement is commonly known as the physician-patient privilege.[15]

The existence of a risk that fiduciaries could abuse their powers "to the detriment of the entrustor" justifies these obligations.[16] Patients risk embarrassment by confiding their "most profound secrets" to their physicians.[17] Thus, possessing these profound secrets tremendously empowers physicians and creates a risk that these physicians might "abuse [their] power[s] to the detriment of [their patients]."[18] Accordingly, fiduciary obligations exist to ensure such abuse does not occur.[19]

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6 Andrea K. Marsh, *Sacrificing Patients for Profits: Physician Incentives to Limit Care and ERISA Fiduciary Duty*, 77 WASH. U. L. Q. 1323, 1333 (1999).

7 *Id.* (noting that disparity of knowledge is inherent in the physician-patient relationship).

8 *Id.* (noting that dependence is inherent in the physician-patient relationship relation).

9 Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 796 (1983).

10 *Id.* at 795.

11 Marsh, *supra* note 6 (warning that "disruption of trust could lead to lower quality care if it dissuades patients from seeking medical attention early or from following the advice of their physicians.").

12 Frankel, *supra* note 9, at 809.

13 Bernard Friedland, *Physician-Patient Confidentiality: Time to Re-Examine a Venerable Concept in Light of Contemporary Society and Advances in Medicine*, 15 J. LEGAL MED. 249, 256 (1994).

14 *Id.* at 253.

15 *See infra* Part III.B.

16 Frankel, *supra* note 9, at 810.

17 Friedland, *supra* note 13.

18 Frankel, *supra* note 9, at 809.

19 The policy behind the physician-patient privilege is to "encourage patients to freely and candidly discuss medical concerns with their physicians by ensuring that those concerns will necessarily be disclosed to a third person." Steinberg v. Jensen, 534 N.W.2d 361, 368 (Wis. 1995),

B. Fiduciary Duties

Fiduciary obligations are legal regulations ensuring fiduciaries do not abuse their powers.[20] Fiduciaries participate in accomplishing this task through self-regulations.[21] In the medical field, the Hippocratic Oath, the Code of Medical Ethics of the American Medical Association, and other codes of ethical behavior exemplify self-regulation.[22] Self-regulations are ethical obligations discouraging physicians from abusing their powers over patients through rewards, imposed control, monitoring, and other nonjudicial regulation.[23] However, ethical obligations are not the only means of ensuring a fiduciary fulfills his or her obligations.[24]

Additionaly, state legislatures have enacted legal obligations discouraging physicians from abusing their fiduciary status'.[25] Legal obligations include laws "impos[ing] . . . fiduciary obligations" on a fiduciary.[26] For example, the physician-patient privilege prohibits physicians from disclosing a patient's confidential information without obtaining consent.[27] When a breach occurs, courts permit patients to file civil actions against the breaching physicians.[28] In addition to civil actions, state appellate courts generally review physician-patient privilege issues to prevent inadvertent disclosures causing irreparable harm.[29]

Ironically, there are also legal obligations mandating disclosure of confidential information.[30] Employment imposes such obligations on physicians.[31]

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cited with approval in Christopher J. Smith, *Recognizing the Split: The Jurisdictional Treatment of Defense Counsel's Ex Parte Contact with Plaintiff's Treating Physician*, 23 J. LEGAL PROF. 247, 249 (1999).

[20] Frankel, *supra* note 9, at 807.

[21] *Id.* at 815.

[22] Friedland, *supra* note 13, at 251.

[23] Frankel, *supra* note 9, at 811.

[24] Smith, *supra* note 19, at 248 (the physician-patient privilege is statutory in most states).

[25] *See id.*

[26] Frankel, *supra* note 9, at 825.

[27] Friedland, *supra* note 13, at 251.

[28] *Id.*

[29] *See, e.g.*, Estate of Stephens v. Galen Health Care, 911 So. 2d 277, 279 (Fla. Dist. Ct. App. 2005) (accepting jurisdiction because disclosure of privileged information cannot be remedied).

[30] *See infra* Part III.

[31] *See infra* Part III.A.

III. EMPLOYER-EMPLOYEE RELATIONSHIP: PHYSICIAN'S DUTIES TO THE HOSPITAL

Eliminating employment obligations ensuring physicians provide quality care to their patients.[32] However, hospitals are liable for the acts of their employees.[33] As such, these hospitals have an important interest in communicating with physicians they employ.[34] Consequently, this important interest justifies obligating physicians to disclose material information to their employers.[35]

Yet, such disclosures jeopardize physicians' patient relationships.[36] These disclosures also violate statutory laws enforcing the confidentiality of the physician-patient communication.[37] As a result, disclosure obligations create a catch-22 dilemma for physicians whose duties to an employer directly contradict their duties to patients.[38]

A. Physician's Negligence, Hospital's Liability

Under agency law, an agent has authorization to act on behalf of the principal.[39] An agent is a "party who . . . a business entity [hires] to perform a task connected with the business."[40] A principal"is a party who employs an agent."[41]

Once the employment relationship exists, the principal becomes liable to third parties for agent actions.[42] This liability exists under three theories: (1) vicarious liability; (2) ostensible agency; and, (3) corporate negligence.[43]

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[32] Marsh, *supra* note 6.

[33] *See infra* Part III.A.

[34] Marin R. Scordato, *Evidentiary Surrogacy and Risk Allocation: Understanding Imputed Knowledge and Notice in Modern Agency Law*, 10 FORDHAM J. CORP. & FIN. L. 129, 131 (2004) ("[T]he 'imputed knowledge rule' . . . charges the principal with information obtained by the agent within the scope of the agent's service for the principal.").

[35] *Id.*

[36] Marsh, *supra* note 6 (disclosure could damage the trust essential to the physician-patient relationship).

[37] Scordato, *supra* note 34, at 152 ("Either [physicians] would convey the information to their principal[s] and violate the confidentiality owed to the third party or they would honor the confidentiality and deprive the principal[s] of important knowledge which the [principals would] nevertheless be legally deemed to possess.").

[38] *See infra* Part III.E.

[39] Scordato, *supra* note 34, at 129.

[40] *An Efficiency Analysis of Vicarious Liability Under the Law of Agency*, 91 YALE L.J. 168, 169 (1981) [hereinafter *Vicarious Liability*].

[41] *Id.*

[42] Scordato, *supra* note 34, at 129-130.

[43] Cassandra P. Priestley, *Hospital Liability for the Negligence of Independent Contractors: A Summary of Trends*, 50 J. MO. B. 263, 263 (1994).

1. Vicarious Liability

Under vicarious liability, hospitals are liable for acts of physicians under their control.[44] Control exists when an agent's "conduct in the performance of . . . services is controlled or is subject to a right of control by the principal."[45] Numerous factors show the existence of control, including:

> (a) [T]he extent of supervision upon which the parties agree,
> (b) [W]hether the agent is engaged in an occupation or business independent or distinct from that of the principal,
> (c) [T]rade practices regarding the degree of supervision that an employer normally exercises,
> (d) [T]he agent's skill level,
> (e) [W]hether the employer supplies tools and the place of work,
> (f) [T]he employer's power to terminate the agency,
> (g) [T]he method of payment,
> (h) [W]hether the agent's work is part of the employer's regular business, and
> (i) [W]hether the parties believe they are creating a master-servant relation.[46]

Direct employment facilitates establishment of a hospital's control.[47] When direct employment does not exist, "the payment of a salary" can satisfy the vicarious liability requirements instead.[48]

For example, in *Gilstrap v. Osteopathic Sanatorium Co.*[49] a plaintiff alleged the defendant hospital, "acting through its agents and servants," caused the death of her husband.[50] In response, the defendant hospital alleged that no evidence could establish the physician, who caused the death of plaintiff's husband, was the defendant's agent.[51] The surgery the negligent physician performed was outside the general purpose for which the defendant hospital was maintained and conducted.[52]

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[44] Priestley, *supra* note 43, at 264; *see generally* Restatement (Second) of Agency § 220(2) (1958).

[45] *Vicarious Liability*, *supra* note 40.

[46] *Id.* at 170-71.

[47] *See id.* at 168 ("If a tort is committed within the scope of the agent's employment, the existence of control is a sufficient but not a necessary condition for the imposition of vicarious liability.").

[48] Arthur F. Southwick, *Vicarious Liability of Hospitals*, 44 MARQ. L. REV. 153, 167 (1960).

[49] 24 S.W.2d 249 (Mo. Ct. App. 1929).

[50] Gilstrap v. Osteopathic Sanatorium Co., 24 S.W.2d 249, 250 (Mo. Ct. App. 1929).

[51] *Id.* at 251.

[52] *Id.*

Nevertheless, the defendants permitted the physician to operate in defendant's hospital.[53] Furthermore, the defendant hospital employed the physician for the same salary, whether he "treated 1 or 150 patients."[54] As such, the court held that the physician was acting "within the apparent scope of his authority as a staff physician."[55]

Likewise, the deceased husband was not aware of limitations on the physician's authority.[56] The court noted:

> There is in general no particular mode in which an agency must be established; and it is immaterial what terms . . . the patients [use], or by what name the transaction is designated, if the requisite elements of such statutes are otherwise deducible from the facts taken as a whole.[57]

Instead of a particular mode of agency establishment, courts use three rationales to justify imposing vicarious liability on the principal.[58] First, the principal "reaps the benefits of [agent's] endeavors," and thus the principal "should bear the cost of the agent's endeavors."[59] Second, vicarious liability "spreads the cost of torts to principals" who possess "deeper pockets" than their agents and are able to spread the loss by imposing higher prices for their goods and services onto the society as a whole.[60] Third, vicarious liability "guarantees that no agency activity is undertaken unless the principal and the agent together are willing to bear the tort costs of activities."[61] These rationales justify holding the principal liable even when vicarious liability requirements cannot be satisfied.[62]

2. Ostensible Agency

Even when vicarious liability requirements cannot be satisfied, a hospital can be liable under ostensible agency when patients are justified in relying on the hospital for treatment.[63] Under this theory, the hospital does not actually employ the physician; however, the hospital holds out the physician as an

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[53] *Id.* at 252.
[54] *Id.* at 255.
[55] *Id.* at 256.
[56] *Id.*
[57] *Id.*
[58] *Vicarious Liability*, *supra* note 40, at 171.
[59] *Id.* at 171-72.
[60] *Id.* at 172.
[61] *Id.*
[62] *See infra* Part III.A.2.
[63] Priestley, *supra* note 43, at 265.

employee.[64] Consequentially, "the 'holding out' of the physician as [an employee] . . . estops the defendant hospital from asserting the true relationship as a defense to the imposition of vicarious liability."[65]

Courts do not want a "patient in pain" to "inquire whether doctors are employees or independent contractors."[66] Instead, agency is established when the principal "intentionally, or by want of ordinary care causes a third person to believe another to be his agent."[67] As such, the hospital's control of the physician is inferred.[68]

3. Corporate Negligence

Finally, a hospital is liable under corporate negligence for failure to "exercise reasonable care while provid[ing] services to the patient."[69] These services include "(1) performing administrative functions, (2) selecting competent staff, (3) supervising health care delivery, and (4) inspecting the facilities and equipment."[70] Duties under the theory of corporate negligence are non-delegable, and hospitals are obligated to "uphold a proper standard of care."[71]

Consequently, these theories create vast potential for hospital liability for employee negligence.[72] Furthermore, situations where defendants employ plaintiff's treating physicians are becoming more common as the percentage of hospital-employed physicians grows.[73] As a result, the confidential nature of the physician-patient relationship frustrates the ability of hospitals to communicate with some of their employees.[74]

For example, in *Royal v. Harnage*[75] an employee of the defendant hospital negligently performed a surgery, killing a patient.[76] The patient's personal rep-

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[64] *Id.*

[65] Southwick, *supra* note 48, at 170.

[66] *Id.* at 169 (citing Stanhope v. L.A. Coll. of Chiropractic, 128 P.2d 705, 708 (Cal. Ct. App. 1942)).

[67] *Id.*

[68] Priestley, *supra* note 43, at 265.

[69] *Id.* at 266.

[70] *Id.*

[71] *Id.*

[72] Southwick, *supra* note 48, at 169.

[73] *See, e.g.*, Lee Mem'l Health Sys. v. Smith, 56 So. 3d 808, 814 (Fla. Dist. Ct. App. 2011) (observing "the recent trend toward the employment of physicians by hospitals" as "driven by economic and financial forces affecting the medical profession and our health care system" and noting that the defendant hospital, Lee Memorial, "happens to employ some or all of the [plaintiff's] treating physicians.").

[74] *See supra* Part II.A.

[75] 826 So. 2d 332 (Fla. Dist. Ct. App. 2002).

[76] Royal v. Harnage, 826 So. 2d 332, 334 (Fla. Dist. Ct. App. 2002).

resentative filed a wrongful death action against the negligent physician.[77] Consequently, the plaintiff asserted a claim against the hospital under two theories: vicarious liability for the physician's negligent conduct and direct liability for the negligent supervision of its employees.[78]

During the suit, the representative alleged that Florida's statutory physician-patient privilege prohibited the defendant hospital from communicating with employees who previously treated the decedent.[79] Disagreeing, the *Royal* court reasoned that the physician-patient privilege did not prohibit the hospital from communicating with its physician-employees regarding the decedent's treatment.[80] As such, "the filing of the lawsuit does not create a privilege where none existed in the past."[81]

More importantly, the *Royal* court noted that "restrictions on the lawyer-client relationship and on free communication during pretrial litigation have repeatedly been regarded as causing sufficient irreparable injury."[82] Permitting employers to "discuss a pending lawsuit with its employees" is an existing competing interest.[83] Accordingly, the hospital's "attorneys should . . . be able to speak with the [hospital's] employees and agents as the corporate entities can only function through them."[84]

B. Physician-Hospital Communications

The physician-patient privilege prohibits physicians from disclosing confidential information obtained through physician-patient communications.[85] Generally, a patient impliedly waives the physician-patient privilege when they place the medical treatment at issue in litigation.[86] However, the patient "is the only person who may waive the privilege"; thus, the physician-patient privilege still applies to physicians whose conduct is not at issue.[87]

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[77] *Id.*

[78] *See id.*

[79] *Id.*

[80] *Id.* at 336.

[81] *Id.*

[82] *Id.* at 337 (citing Alachua Gen. Hosp., Inc. v. Steward, 649 So. 3d 357 (Fla. Dist. Ct. App. 1995)).

[83] *Lee Mem'l Health Sys.*, 40 So. 3d at 108 (citing *Estate of Stephens*, 911 So. 2d at 280).

[84] *Estate of Stephens*, 911 So. 2d at 282, *cited with approval in Lee Mem'l Health Sys.*, 40 So.3d at 108.

[85] Smith, *supra* note 19, at 247.

[86] Friedland, *supra* note13, at 258.

[87] Smith, *supra* note 19.

The physician-patient privilege prohibits *ex parte* communication between defendant-hospitals and certain hospital employees innocent of malpractice.[88] The confidential nature of the physician-patient relationship allows a physician to obtain information from patients those that patients would normally not disclose.[89] As such, the physician-patient relationship and the physician's fiduciary status obligate physicians with the responsibility to not abuse their powers by disclosing confidential information to the defendant hospital.[90]

Nevertheless, prohibiting hospitals from communicating with their employees can be frustrating.[91] Thus, hospitals are utilizing the employment relationship to bypass restrictions imposed by the physician-patient privilege.[92]

C. Physician-Patient Privilege Not Applicable

In order to bypass the physician-patient privilege, hospitals are successfully arguing that the physician-patient privilege cannot restrict *ex parte* communications between hospitals and physicians.[93] Specifically, Florida and Arizona courts found this argument to be persuasive, as noted by three cases: (1) *Estate of Stephens v. Galen Health Care*;[94] (2) *Lee Memorial Health System v. Smith*;[95] and, (3) *Phoenix Children's Hospital, Inc. v. Grant*.[96]

1. Estate of Stephens v. Galen Health Care

In 2005, a Florida appellate court dealt a blow to patients' privacy rights by holding that the physician-patient privilege does not restrict employer-employee communications not considered "disclosure[s]."[97] In *Estate of Stephens v. Galen Health Care,* a patient died in a defendant's hospital.[98] Consequently, the patient's estate filed a medical malpractice action against the hospital.[99] Strategically, the plaintiffs did not assert claims against the dece-

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[88] *See, e.g.*, Duquette v. Superior Court, 778 P.2d 634, 642 (Ariz. Ct. App. 1989) (holding that "defense counsel in a medical malpractice action may not engage in non-consensual ex parte communications with plaintiff's treating physician.").

[89] *See supra* Part II.A.

[90] *See supra* Part II.B.

[91] *See supra* Part III.A.

[92] *See infra* Part III.C-D.

[93] *See infra* Part III.C.1.-III.D.

[94] 911 So. 2d 277 (Fla. Dist. Ct. App. 2005).

[95] 40 So. 3d 105 (Fla. Dist. Ct. App. 2010).

[96] 265 P.3d 417 (Ariz. Ct. App. 2011).

[97] *Estate of Stephens*, 911 So. 2d at 282.

[98] *Id.* at 279.

[99] *Id.*

dent's physicians.[100] Without asserting negligence against these treating physicians, the plaintiffs did not waive the statutory physician-patient privilege.[101]

Florida's legislature enacted the physician-patient privilege to protect "the patient's interest in keeping the details and nature of his medical treatment confidential . . . ."[102] Yet, the *Stephens* trial court permitted defendants to communicate with decedent's former treating physicians.[103] On appeal, a Florida appellate court explained that a hospital, as a corporation, "can function only through its employees and agents, and its 'knowledge' of information . . . depends solely on information . . . its agents and employees [acquired and reported]."[104] Thus, the *Stephens* court held the physician-patient privilege should not prohibit a doctor from "discussing the patient information with the hospital's risk manager . . ." because "[the doctor] is *employed by* or is an *agent of* a hospital corporation."[105]

Nonetheless, the appellate court quashed the trial court order permitting *ex parte* communication[106] between defendants and decedent's former treating physicians.[107] The order was too broad and failed to identify whether defendants employed the physicians with whom they sought to communicate.[108] The trial court's order perished, but the notion that employer-employee communications are not "disclosures" remains good law.[109]

2. Lee Memorial Health System v. Smith

Construing *Estate of Stephens*, another Florida appellate court addressed whether Florida's statutory physician-patient privilege precluded a defendant hospital from communicating with its employees providing "post-incident treatment" to the plaintiff's daughter.[110] In *Lee Memorial Health System v. Smith*, plaintiffs alleged that defendants provided negligent care to their daughter.[111] However, the treating physicians at issue only provided "post-incident follow-

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100 *Id.* at 278.

101 *Id.* at 279.

102 *Id.* at 280.

103 *Id.* at 279.

104 *Id.* at 281.

105 *Id.* at 282.

106 *Ex parte* communications are defined as "extra-judicial disclosures by a person to an opposing party in a lawsuit." Smith, *supra* note 19, at 247. Such communications arise when "one party meets with the person informally without opposing counsel being present." *Id.*

107 *Estate of Stephens*, 911 So. 2d at 283.

108 *Id.*

109 *See infra* Part III.C.2.

110 *Lee Mem'l Health Sys.*, 40 So. 3d at 107.

111 *Id.*

up treatment."[112] As such, these physicians were not liable for the underlying allegations—the negligent care of plaintiffs' daughter.[113]

The trial court prohibited *ex parte* communication between these treating physicians and the defendant hospital, reasoning that the *Estate of Stephens* decision did not permit *ex parte* communications "not concern[ing] the events giving rise to the malpractice complaint."[114] Reversing, the appellate court explained that the physician-patient privilege did not apply and that the context of these communications is not relevant.[115] Instead, the physician-patient privilege did not apply because communications between the employer and its employees are not "disclosures."

3. Phoenix Children's Hospital, Inc. v. Grant

Concurring with Florida courts, an Arizona appellate court held, in *Phoenix Children's Hospital, Inc. v. Grant*, that "a hospital's right to discuss a plaintiff/patient with its employees exists because the employment relationship exists."[116] In *Grant*, a defendant's employee "negligently placed a feeding tube into [a child's trachea]."[117] As a result, the child's parents asserted medical malpractice claims against the hospital and the negligent employee.[118] Simultaneously, physicians employed by the defendant hospital continued treating the child.[119] As the litigation progressed, the plaintiffs sought to prohibit *ex parte* communications between defendant hospital and defendant hospital's employees not "affirmatively alleged" in the suit.[120] Like Florida, Arizona's legislature enacted a statutory physician-patient privilege to encourage "full and frank disclosure of medical history and symptoms by a patient to his doctor."[121] Accordingly, the physician-patient privilege prohibited the defendant "in a medical malpractice action [from engaging] in ex parte communications with a plaintiff's treating physicians without the plaintiff's consent."[122]

Nevertheless, Arizona common law imputes "the knowledge of a corporate agent" onto the corporation "if [the knowledge] is acquired by the agent within

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112 *Id.* at 108.
113 *Id.* at 107.
114 *Id.*
115 *Id.*
116 Phx. Children's Hosp., Inc. v. Grant, 265 P.3d 417, 421 (Ariz. Ct. App. 2011).
117 *Id.* at 418.
118 *Id.*
119 *Id.*
120 *Id.*
121 Lewin v. Jackson, 492 P.2d 406, 410 (Ariz. 1972) (construing ARIZ. REV. STAT. ANN. § 12-2235 (2003)), *cited with approval in Phx. Children's Hosp., Inc.*, 265 P.3d at 419.
122 *Phx. Children's Hosp., Inc.*, 265 P.3d at 418 (citing *Duquette*, 778 P.2d 634).

the scope of his or her employment and relates to a matter within his or her authority."[123] As such, a "conclusive presumption exists that agents communicate their knowledge to their employer[s]."[124] Therefore, the court concluded that the physician-patient privilege did not prohibit the defendant hospital from communicating with its employees "who are or were" treating the plaintiff's child.[125]

D. The Imputed Knowledge Rule

The agency law principal of imputed knowledge ("imputed knowledge rule") justifies *ex parte* communication.[126] The imputed knowledge rule assists courts in resolving uncertainty where conflicting reports exist of whether a principal possesses knowledge the principal allegedly possesses.[127] Rule obligates agents to disclose their knowledge to their principals.[128] Consequently, such obligation justifies charging a principal with the knowledge of an agent.[129]

Likewise, under the risk allocation rationale, principal supervise agents and, thus, are in the best position to manage the risk of not receiving notice from those agents.[130] As such, the imputed knowledge rule creates a conclusive presumption that an agent disclosed his or her knowledge to the principal.[131]

Yet, a physician's duty to communicate confidential information to his employer causes this physician to breach his duties to his patients.[132] In cases where such breach occurs, a physician subjects himself to the risk of civil liability.[133] Accordingly, one cannot presume that a physician will breach his duties to a patient in order to fulfill they physician's duties to his employer.[134] Instead, the imputed knowledge rule creates a catch-22 dilemma.[135]

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123 Samaritan Found. v. Goodfarb, 862 P.2d 870, 876 (Ariz. 1993), *cited with approval in Phx. Children's Hosp., Inc.*, 265 P.3d at 421.

124 Fridena v. Evans, 622 P.2d 463, 466 (Ariz. 1980), *cited with approval in Phx. Children's Hosp., Inc.*, 265 P.3d at 421.

125 *Phx. Children's Hosp., Inc.*, 265 P.3d at 422.

126 *See supra* Part III.C.

127 Scordato, *supra* note 34, at 145.

128 Restatement (Second) of Agency § 275 (1958).

129 Scordato, *supra* note 34.

130 *See id.* at 149-150.

131 *Id.* at 146.

132 *Id.* at 147.

133 Friedland, *supra* note 13, at 251.

134 Scordato, *supra* note 34, at 129.

135 *See infra* Part III.E.

E. Contradicting Obligations

A catch-22 exists because employment status forces physicians to breach either the duty to their patients or the duty to their employers.[136] Yet, the contradiction is dismissed as *de minimis* because situations where a defendant employs the plaintiff's treating physician rarely occur.[137] However, such situations are becoming more common as hospitals employ a growing number of physicians.[138] Hence, this dilemma cannot be dismissed as *de minimis*.[139]

Alternatively, this dilemma is dismissed under the rationale that patients should identify the risks where the imputed knowledge rule compromises their confidentiality, and take the proper precautions.[140] In fairness, agents serving two principals are obligated to disclose any information they possess that reasonably might affect either principal in permitting dual agency.[141] However, this rationale is illusory in the health care field, where dual agency issues only arise when patients assert medical malpractice claims against a physician's employer.[142]

First, physicians exclusively control access to medical treatments.[143] To avoid imputed knowledge obligations imposed under an employment relationship, a patient needs treatment from a self-employed physician.[144] Yet, self-employed physicians are becoming less attainable as physicians abandon independent practice for employment within hospitals.[145]

Secondly, determining whether the hospital's interests and the physician's interests are adverse is nearly impossible.[146] Medical malpractice litigation in

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136 Scordato, *supra* note 34, at 152.

137 *Id.* at 153.

138 Mekies, *supra* note 2 (noting that "[p]hysician employment at hospitals remains on a healthy growth path.").

139 *See, e.g.*, Youngs v. Peacehealth, 316 P.3d 1035, 1043 (Wash. 2014) (arguing that a blanket privilege for corporations to communicate with employees "in the era of rapidly consolidating healthcare systems would all but eviscerate" the physician-patient privilege.).

140 Scordato, *supra* note 34, at 153.

141 Restatement (Second) of Agency § 392 (1958).

142 *See* Smith, *supra* note 19, at 256.

143 *See* Marsh, *supra* note 6 ("physicians act as the exclusive source of expertise and help for sick, vulnerable patients").

144 Priestley, *supra* note 43, at 265 ("[O]ne who is in an emergency situation may not have the time and [ability] to make a choice among health care facilities.").

145 *See, e.g.*, *Lee Mem'l Health Sys.*, 56 So. 3d at 813 (noting the recent trend where "physicians in a variety of specialties are employed by hospitals instead of in stand-alone, independent medical practices" and "the fact of the hospital's ownership of the medical practice and employment of the physicians and others working there may not be readily apparent to the physicians' patients and the general public.").

146 *See* Scordato, *supra* note 34, at 155 (noting that "it is not likely that the third party will known in advance, or at all, that the agent with whom she is dealing possesses interests that are adverse to those of the principal.").

which the patient asserts a claim against the hospital but not the treating physician causes the adversity.[147] Under such circumstances, the hospital wants to communicate with the treating physicians in order to discover information about the patient which is material to the hospital's defense.[148] As such, the imputed knowledge rule obligates the hospital-employed treating physician to disclose confidential information.[149] However, the physician-patient privilege forbids disclosure of this information.[150] Thus, a patient's ability to take proper precautions is contingent on an unworldly ability to predict the future occurrence of a medical malpractice incident triggering a physician's duty to his or her employer.[151]

Ultimately, neglecting the catch-22 dilemma will result in patients losing trust in their physicians and disregarding their physicians' advice.[152] Such results are certain to cause the quality of care to decline.[153] Thus, the contradictory obligations of physicians in an employment relationship should be reconciled.[154]

IV. Dual Agency: Exceptions to the Imputed Knowledge Rule

Exceptions to the imputed knowledge rule offer a solution to the contradictory obligations an employment relationship imposes on physicians.[155] These exceptions rebut the presumption that physicians will disclose confidential knowledge to their employers.[156] As a result, physicians are able to fulfill their

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147 *See, e.g.*, *Phx. Children's Hosp., Inc.*, 265 P.3d at 418 (following the incident where a nurse employed by the defendant negligently placed a feeding tube into a minor's trachea, the minor continued to be treated by defendant's "physicians and other personnel.").

148 *See Lee Mem'l Health Sys.*, 56 So. 3d at 813 ("It is extremely important—if not essential—for plaintiff's counsel in a medical malpractice case to interview and consult with his or her client's treating physicians. Such informal contacts enable plaintiff's counsel to discover the facts, formulate legal theories, and develop strategies for the case."); *see also Estate of Stephens*, 911 So. 2d at 281 (underscoring the importance of a corporation being able to speak to its agents and employees by noting that "the hospital, a corporation, can function only through its employees and agents, and its 'knowledge' of information like how its standards for nurse training and patient care are being carried out depends solely on information acquired and reported by its agents and employees.").

149 The imputed knowledge rule "imputes to a principal knowledge or notice received by an agent within the scope of the agent's authority." Scordato, *supra* note 34, at 164.

150 *See supra* Part II.A.

151 *See generally* Mark F. Grady, *Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 Nw. U. L. Rev. 293 (1988) (discussing the difficulty of predicting the occurrence of a negligent event).

152 Marsh, *supra* note 6.

153 *Id.*

154 *See infra* Part IV.

155 Scordato, *supra* note 34, at 147.

156 *See infra* Part IV.A.

obligations under the physician-patient privilege.[157] Likewise, hospitals employing physicians are not charged with logic-defying presumptions.[158]

A. Imputed Knowledge Rule Within Dual Agency

Dual agency creates an exception to the imputed knowledge rule—"the confidential agent exception."[159] Under this exception, knowledge that a dual agent receives within a confidential relationship is not imputed onto the principal.[160] Instead, the imputed knowledge presumption is rebutted.[161]

1. General Rule

Generally, dual agent status does not rebut the presumption that an agent's knowledge is automatically imputed onto the principal.[162] For example, in *Manley v. Ticor Title Insurance Co. of California*, the Supreme Court of Arizona held that "the knowledge of a dual agent is normally imputed to both principals."[163]

In *Manley*, Henry and Donna Manley ("the Manleys") sold real property through George Stika ("Stika"), a real estate agent.[164] Stika arranged to sell the property to an entity known as Pyramid I ("Pyramid)."[165] Pyramid and the Manleys named Ticor Title Insurance Company of California ("Ticor") as their escrow agent.[166] Within this arrangement, Ticor notified the Manleys that Pyramid intended to take out a loan to make construction improvements on the Manleys' property.[167] Because the liens on the property exceed the property's value and sales price, these improvements were necessary for the property to

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157 *See infra* Part IV.B.

158 Scordato, *supra* note 34, at 164 (When an exception to the imputed knowledge rule applies, information received by the agent is not "automatically imputed to the principal," but instead it is required for "the third party in such cases to directly establish the principal's receipt of the relevant knowledge or notice.").

159 Scordato, *supra* note 34, at 143; *see also* Restatement (Second) of Agency § 392 cmt. b (1958).

160 Scordato, *supra* note 34, at 133.

161 *See id.* at 147 ("it is not at all clear that most agents will in fact break the confidentiality owed to the third party and transmit the information to the principal, and the appropriate legal response to this altered probability of agent conveyance is the maintenance of a confidential relationship exception to the imputed knowledge rule.").

162 *See* Wolf v. Lovering, 159 F. 91, 93 (2d Cir. 1908) (holding that the agent was acting for both the seller and the buyer and that the agreement was binding on the seller even if the agent failed to notify the seller of the agreement).

163 Manley v. Ticor Title Ins. Co., 816 P.2d 225, 230 (Ariz. 1991).

164 *Id.* at 226.

165 *Id.*

166 *Id.*

167 *Id.* at 227.

not be "overencumbered."[168] Nevertheless, Ticor discovered that Pyramid intended to use the loans as down payment on the property, which implied that the construction improvements were not going to be made and that the Manleys' property would become "overencumbered."[169] As such, Ticor's internal policy prohibited handling transactions with overencumbered properties.[170] Yet, Ticor's agent noted that legal counsel represented the Manleys, who decided to proceed with the arrangement, and disclosed Pyramid's actual intent to Stika.[171] As a result, Pyramid defaulted on its payments, and the Manleys filed legal action against Ticor for failure to disclose Pyramid's breach of promise to make the necessary construction improvements.[172]

As the underlying issue, the Arizona Supreme Court determined whether Ticor's notice to Stika sufficed as notice to the Manleys.[173] As an agent of the Manleys, "Stika had a fiduciary obligation to reveal all material facts about the transaction to his principals."[174] However, the Manleys contended that Stika was also an agent for Pyramid, and, as a dual agent, notice to Stika was not imputed to the Manleys;[175] instead, Ticor should have directly notified the Manleys.[176] The court rejected this contention, however, holding that "[t]he knowledge of a dual agent is normally imputed to both principals."[177] Accordingly, the dual agent status does not rebut the imputed knowledge presumption.[178]

More importantly, the Arizona Supreme Court also held that the trier of fact must determine whether Stika's interests were adverse enough to impede Stika from informing the Manleys about Ticor's notice.[179] Thus, while as a general rule the knowledge of a dual agent is imputed, the court hinted that exceptions to the imputed knowledge rule do exist.[180]

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168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.*

172 *Id.* at 228.

173 *Id.* at 229.

174 *Id.* at 226 (citation omitted).

175 *Id.* at 229-30.

176 *Id.*

177 *Id.* at 230 (citation omitted).

178 *Id.* (Citation omitted).

179 *Id.*

180 *See infra* Part IV.A.2.

2. Exceptions

The imputed knowledge rule establishes the presumption that an agent will disclose his or her knowledge to the principal.[181] However, the United States Supreme Court recognizes an exception to this presumption, which Justice Joseph P. Bradley provided in *In re Distilled Spirits*[182]:

> When it is not the agent's duty to communicate such knowledge, when it would be unlawful for him to do so, as, for example, when it has been acquired confidentially as attorney for a former client in a prior transaction, the reason of the rule ceases, and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound by his agent's secret and confidential information.[183]

Applying the imputed knowledge presumption to an agent whose interests are adverse to those of a principal defies logic.[184] Accordingly, the Supreme Court established in *American National Bank v. Miller*[185] that the law does not charge the principal "with notice of facts which the agent not only did not disclose, but which he was interested in concealing."[186]

In *American National Bank*, the president ("the president") of the First National Bank of Macon ("the Macon bank") was insolvent.[187] He kept a deposit account with the American National Bank of Nashville ("ANB").[188] Using this deposit account, he presented the Macon bank with a check for $3,000, which the ANB credited before learning of the president's bankruptcy.[189] When the Macon bank attempted to recover the $3,000, the ANB alleged being able to cancel the credit because the Macon bank, as the principal, was charged with notice of the president's insolvency.[190] The Supreme Court disagreed.[191] Reasoning that concealing the facts of his insolvency and

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181 *See supra* Part III.B.

182 78 U.S. 356 (1870).

183 *In re* Distilled Spirits, 78 U.S. 356, 367 (1870).

184 *See, e.g.*, Melms v. Brewing Co., 66 N.W. 518, 522 (Wis. 1896) ("when [communication] would be unlawful for [an agent] to do so, as for example, when it has been acquired confidentially as attorney for a former client, the reason of the rule ceases").

185 229 U.S. 517 (1913)

186 Am. Nat. Bank v. Miller, 229 U.S. 517, 522 (1913).

187 *Id.* at 519.

188 *Id.*

189 *Id.* at 519-20.

190 *Id.* at 521.

191 *Id.* at 522.

his indebtedness to the ANB was in the president's personal interest, the Court did not charge the Macon bank with notice of these facts.[192]

Likewise, disclosure will not be presumed when: (1) the agent is acting nominally "for another in ministerial matters"; (2) the agent is "in reality acting for himself or for another as principle"; and (3) the agent's interests are "adverse to those of the nominal principal."[193] Instead, the adverse interests exception rebuts the presumption because the agent's interests are "adverse to disclosing [his] knowledge."[194]

The adverse interest exception provides that knowledge is not imputed to the principal where the agent conspires with a third person to defraud the principal.[195] For example, the knowledge of an agent is not imputed onto an insurance company when the agent participates in perpetuating a fraud with the insured.[196] Instead, the inquiry is made to determine whose interests the agent was aligned with—"the principle he purported to serve" or "someone else."[197] The agent must have "intended to deceive or perpetrate a fraud upon" the principal.[198] In other words, the agent must "act entirely for his own or another's purpose."[199] The mere fact that the agent "has a conflict of interest or . . . is not acting primarily for his principal" is not sufficient.[200]

For example, suppose "an attorney has two clients, and there has been a fraud perpetrated upon one client and the attorney participated in that fraud . . . ."[201] Under such circumstances, "is it to be presumed in law, in the absence of direct knowledge and notice to the other client, that such client has knowledge of the fraudulent transaction?"[202] The circuit court of Ohio answered this question in *Wright v. Snell*[203]:

> If an attorney, while conducting a transaction for his client acquires knowledge, which it would be a breach of professional confidence for him to disclose, and [another person

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192 *Id.*

193 Aetna Indem. Co. v. Schroeder, 95 N.W. 436, 438 (N.D. 1903).

194 *Id.*

195 Schmidt v. Fortis Ins. Co., 349 F. Supp. 2d 1171, 1199 (N.D. Iowa 2005).

196 *Id.* (citing Smith v. Iowa State Live Stock Ins. Co., 191 N.W. 981, 984 (Iowa 1923)).

197 *Id.*

198 *Id.* at 1203.

199 Restatement (Second) of Agency § 282 (1958), *cited with approval in* Long Island Sav. Bank, FSB v. United States, 503 F.3d 1234, 1249 (Fed. Cir. 2007).

200 Ctr. v. Hampton Affiliates, Inc., 488 N.E.2d 828, 830 (N.Y. 1985), *cited with approval in Long Island Sav. Bank, FSB*, 403 F.3d at 1249.

201 Wright v. Snell, 12 Ohio C.D. 308, 314 (Ohio Cir. Ct. 1901).

202 *Id.*

203 12 Ohio C.D. 308 (Ohio Cir. Ct. 1901).

> employes him], the latter is not chargeable with the knowledge thus acquired and possessed by the attorney.[204]

The circuit court relied on *Melms v. Brewing Co.,*[205] where the Supreme Court of Wisconsin held that the attorney or the agent "cannot be expected to communicate what . . . it would be his legal duty to conceal, or information which, from his relation to the subject-matter or his previous conduct, it is certain that he would not disclose."[206]

In *Melms*, the plaintiffs sought to set aside several deeds which originated from a sale executed in an attempt to defraud creditors of an estate.[207] As such, this sale was fraudulent in law and void.[208] Unfortunately, another party purchased the deed without notice of the initial fraudulent conduct.[209] The latter purchaser was a bona fide purchaser for value without notice of the fraud.[210] However, the attorney who assisted in preparing the original deed and "who was clearly cognizant of the illegality of the same," represented the latter purchaser in obtaining the deed from the fraudulent parties.[211] Accordingly, the plaintiffs argued that the attorney's knowledge of the original fraud must be imputed onto the latter purchaser.[212]

The plaintiffs relied on a general rule: "where a purchaser employs the same attorney as the vendor, he will be affected with notice of whatever such attorney acquired notice, in his capacity of attorney for either vendor or purchaser, in the transaction in which he was employed."[213] The court, however, rejected the argument.[214] Instead, the court reasoned:

> When it is not the agent's duty to communicate such knowledge, when it has been acquired confidentially as attorney for a former client, the reason of the rule ceases, and in such cases an agent would not be expected to do that which would involve the betrayal of professional confidence, and his [agent's secret and confidential ought not bind him].[215]

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204 *Wright*, 12 Ohio C.D. at 314 (citing *Melms*, 66 N.W. 518 (holding that the principal is not charged with the agent's knowledge where the agent's disclosure of his knowledge would have been a breach of professional confidence).

205 66 N.W. 518 (Wis. 1896).

206 *Melms*, 66 N.W. at 522.

207 *Id.* at 521.

208 *Id.*

209 *Id.*

210 *Id.* at 522.

211 *Id.*

212 *Id.*

213 *Id.*

214 *Id.*

215 *Distilled Spirits*, 78 U.S. at 367, *cited with approval in Melms*, 66 N.W. at 522.

Thus, the presumption behind the doctrine of imputed knowledge is rebutted when presumed communication would cause "a breach of professional confidence."[216]

Accordingly, a breach of professional confidence—the confidential agent exception—rebuts the imputed knowledge presumption.[217] The rebuttal, however, is subject to a certain qualification.[218]

3. Qualification

While the law obligates an agent "to communicate to his principal the knowledge he has,"[219] the law presumes an agent will breach "his duty of communication when his interest is to conceal the facts."[220] The exception is based on the rationale that "where an agent, though ostensibly acting in the business of the principal, is really committing a fraud, for his own benefit, he is acting outside of the scope of his agency, and it would therefore be most unjust to charge the principal with knowledge of it."[221] Nonetheless, this rationale does not apply where "the principal adopts the unauthorized act of his agent in order to retain a benefit for himself."[222]

In *Curtis, Collins & Holbrook Co. v. United States*,[223] the Supreme Court qualified its ruling in *American National Bank v. Miller*, which provided that a principal would not be charged with knowledge of an agent who had a personal interest in concealing his knowledge from the principal.[224] The United States sought to set aside patents for land possessed by the Curtis, Collins & Holbrook Company on the ground that these patents were obtained by fraud.[225] Under the Timber and Stone Act, the United States sold land, valued chiefly for timber or stone, to the citizens of the United States, so long as each buyer stated, under oath, that he purchased the land "in good faith to appropriate it to his own exclusive use and benefit."[226] Consequently, agents of a man, known only

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216 *Melms*, 66 N.W. at 523.

217 *See Melms*, 66 N.W. at 522 (Wis. 1896); *see also Aetna Indem. Co.*, 95 N.W. at 438.

218 *See supra* Part IV.A.3.

219 Munroe v. Harriman, 85 F.2d 493, 495 (2d Cir. 1936) (citing *Distilled Spirits,* 78 U.S. at 367).

220 *Id.* (citing *Am. Nat. Bank*, 229 U.S. at 522).

221 Thomas-Houston Elec. Co. v. Capitol Elec. Co., 65 F. 341, 343 (6th Cir. 1894), *cited with approval in Munroe*, 85 F.2d at 495.

222 *Munroe*, 85 F.2d at 495.

223 262 U.S. 215 (1923).

224 *Am. Nat. Bank*, 229 U.S. at 522*, reviewed by* Curtis, Collins & Holbrook Co. v. United States, 262 U.S. 215 (1923) ("We held that . . . knowledge [of its president's insolvency] could not be imputed to the Macon bank merely because the president knew it, for the reason it was not to be inferred that he would communicate such knowledge to his own bank.").

225 *Curtis, Collins & Holbrook Co.*, 262 U.S. at 216.

226 *Id.* at 218-19.

as Tuman, purchased the land under "false oaths in violation of the statute."[227] The agents conveyed the land to another man whom Tuman and C. H. Holbrook ("Holbrook") nominated as their trustee.[228] This trustee conveyed the land to the Curtis, Collins & Holbrook Company.[229]

Unfortunately, Holbrook was aware of the fraudulent purchases and was an incorporator of the Curtis, Collins & Holbrook Company.[230] Nevertheless, the Curtis, Collins & Holbrook Company argued that Holbrook's knowledge could not be imputed onto the company because Holbrook secured the fraudulent titles in violation of the company's instructions for his own profit.[231] The Court, however, did not apply the adverse interest exception.[232] Instead, the Court held that "[t]he interest of Collins, Curtis and Holbrook in the acquisition of the tiles was common" and that "[t]he adverse interests as between them in sharing the fruits of the common business cannot enable the company to retain its share and repudiate the agent with all he knew."[233]

The Court of Appeals for the Second Circuit interpreted the Supreme Court's decision in *Curtis, Collins, & Holbrook Co.* to qualify the exceptions to the imputed knowledge rule: when a principal "retains the property, he adopts the agent's act in procuring it and must in fairness take the accompanying burden of the agent's knowledge."[234] For example, in *Munroe v. Harriman*,[235] Charles A. Munroe ("Munroe") lent shares of stock to Joseph W. Harriman ("Harriman").[236] Harriman then fraudulently "pledged [those shares] as collateral for a loan" from a certain bank.[237] Since Harriman was the president of this bank, Munroe attempted to rescind his shares by alleging that Harriman's knowledge of fraud could be imputed onto the bank.[238] In response, the Second Circuit adopted the "sole actor" doctrine to note that Harriman's will "alone caused the making of the loan and the acceptance of the collateral."[239] As such, the court granted recovery of the shares from the bank by ruling that

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227 *Id.* at 219 (Agents of Tuman made entries under "an agreement to convey the lands to any one he might direct, he paying all the expenses and $100 for each entry, and the entrymen making false oaths in violation of the statute.').

228 *Id.*

229 *Id.*

230 *Id.* at 219, 223-24.

231 *Id.* at 223-24.

232 *Id.* at 224.

233 *Id.*

234 *Munroe*, 85 F.2d at 495 (construing *Curtis, Collins & Holbrook Co.*, 262 U.S. at 224).

235 85 F.2d 493 (2d Cir. 1936).

236 *Munroe*, 85 F.2d at 494.

237 *Id.*

238 *Id.* at 494-95.

239 *Id.* at 496.

"the corporation can claim title only by virtue of the sole actor's act and must accept it burdened with his knowledge of the defect in title."[240]

Subsequently, the Circuit Court of Appeals for the Tenth Circuit, in *Maryland Casualty Co. of Baltimore v. Queenan*,[241] synthesized the application of the imputed knowledge rule to agents serving two or more principals.[242] As a general rule, the "notice to, or knowledge of, an agent while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to, or knowledge of, his principal."[243] However, "[a] principal is not charged with or bound by notice to, or knowledge of, an agent as to matters involved in a transaction in which the agent deals with the principal or another agent of the principal as, or on account of, an adverse party."[244] Finally, "a qualification of the exception [exists] where the agent, although engaged in perpetrating an independent fraudulent act on his own account, is the sole representative of the principal and the principal, with knowledge of the facts, retains the fruits of the transaction."[245] As such, dual agency offers a solution to the contradicting obligations the employment relationship imposes on physicians.[246]

B. Dual Agency Within Health Care

Dual agency exceptions to the imputed knowledge rule are directly applicable to health care law.[247] Employed physicians are dual agents who serve two masters: the patient and the employer.[248] As such, dual agency exceptions are applicable to resolving the pertinent dilemma physicians undertake by entering into an employment relationship.[249]

Specifically, the confidential agent exception, if adopted, can resolve the contradicting obligations expected of employed physicians.[250] The confidential agent exception provides that the imputed knowledge presumption is rebutted when observation of the imputed knowledge rule would result in a breach of

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240 *Id.*

241 89 F.2d 155 (10th Cir. 1937).

242 *See generally* Maryland Cas. Co. v. Queenan, 89 F.2d 155 (10th Cir. 1937).

243 *Id.* at 156-57.

244 *Id.* at 157.

245 *Id.*

246 *See infra* Part IV.B.

247 Some legal journalists have hinted at the application of dual agency to health care law. *E.g.*, Scordato, *supra* note 34, at 133 ("While otherwise sound, . . . [when] the physician obtain[s] the information in question within the scope of a legally confidential relationship or transaction with the individual, . . . the usual operation of the imputed knowledge rule is abated. ").

248 *See supra* Part III.

249 *See supra* Part IV.

250 *See supra* Part IV.A.

professional confidence.[251] The imputed knowledge rule presumes that employed physicians will disclose confidential information they obtained through communications with patients, to their employers.[252] However, the fiduciary status obligates physicians to preserve the confidentiality of their physician-patient relationships.[253] As such, breach of professional confidence will result from observation of the imputed knowledge rule.[254] Thus, the confidential agent exception rebuts the presumption obligating physicians with the duty to disclose confidential information to their employers.[255]

Moreover, the confidential agent exception allows physicians to provide quality health care to their patients, as the employment status does not burden physicians with additional obligations to their employers.[256] Thus, physicians can pursue employment within hospitals or other health care facilities without sacrificing the quality of care their patients receive.[257]

V. Conclusion

Physicians are abandoning independent practice for employment within hospitals. This trend diminishes the quality of health care when courts grant hospitals access to confidential physician-patient communication through the imputed knowledge presumption. This practice weakens physician-patient communications: the patients lose trust in their physicians, and the physicians become entangled in contradictory expectations from their patients and their employers.

Fortunately, this dilemma can be resolved through adaptation of dual agency exceptions to the imputed knowledge rule. Specifically, the confidential agent exception can reconcile the conflicting obligations of physicians who choose to pursue employment within hospitals. This exception allows hospital-employed physicians to preserve their patients' trust. In exchange, their employers, the hospitals, are not charged with the unrealistic presumption that physicians would disclose confidential information in violation of their fiduciary obligations.

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[251] *See supra* Part IV.A.2.

[252] *See supra* Part III.D.

[253] *See supra* Part II.A.

[254] *See supra* Part III.E.

[255] *See supra* Part IV.A.2.

[256] *See* Scordato, *supra* note 34, at 152 (". . . an imputed knowledge rule without a confidential agent exception would work against, and thus to some degree compromise, the social benefits that are sought by the creation and maintenance of legally confidential relationships."); *see also* Marsh, *supra* note *6* ("When a physician bears full responsibility only to patients, the physician remains free to act as a knowledgeable, skilled, and trustworthy advocate in delivering to the patient the best care available.").

[257] *See supra* Part III.E.

Who Pays the Price? Regulation of Data Tracking and Online Behavioral Advertising

Carolyn Gray

I. Introduction

Imagine an online shopping experience tailored to your every desire. You open the Internet browser and start surfing. A local car dealership urges you to buy their new car you have been looking at. A hotel advertises its amenities for that Hawaii trip you have been contemplating. That pair of expensive boots you have been eyeing are finally on sale. Most consumers who use the Internet on a regular basis have had experiences similar to this, time and time again. When consumers use the Internet they subject their online behavior to scrutiny from companies advertising products in more efficient and cost-effective ways.

Companies implement a practice called "online behavioral advertisement" to advertise products by compiling information about consumers' online practices, particularly consumers who may be interested in buying their products, then marketing those products directly to those consumers on their Internet browsers. Online behavioral advertising involves "the collection, use, and distribution of data about consumers' online activities in order to place advertisements that correspond to each consumer's interests."[1] Social media giants like Facebook use online behavioral advertising to increase profits by selling advertising space on their websites, and come into clashes with consumers who worry that these practices compromise their privacy interests.[2] The Federal Trade Commission ("FTC") entered the fray in the mid 1990s, attempting to balance the interests of consumer privacy and corporate entities that want to use more efficient advertising practices aimed at the consumers who may want those products most.[3] Businesses praise the FTC's self-regulation proposals as a healthy compromise, while consumer privacy advocates urge congressional action in the form of a bill formally regulating online behavioral advertising. This article discusses the FTC's balancing act between consumer privacy interests and corporate advertising practices in the online marketplace.

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[1] *See* Catherine Schmierer, *Better Late Than Never: How the Online Advertising Industry's Response to Proposed Privacy Legislation Eliminates the Need for Regulation*, 17 Rich. J.L. & Tech. 1 (2011).

[2] Lane v. Facebook, Inc., 696 F.3d 811 (9th Cir. 2012). For further discussion on Facebook's data tracking practices, see *infra* SECTION II, B.

[3] Schmierer, *supra* note 1, at 5.

Specifically, this article examines what privacy rights consumers may claim against online behavioral advertising, and balances these rights against the expanding online marketplace and corporate interests in maintaining free markets with fewer restrictions. Although the FTC's proposals for online behavioral advertising self-regulation are a step in the right direction, more regulation is necessary. Ultimately, Congress must address consumers' privacy concerns and impose uniform online behavioral advertising regulations that mandate industry-wide standards to provide a meaningful choice to consumers about data collection practices.

Part II of this article discusses various online behavior tracking technologies that have developed over time, and the privacy concerns that are the byproduct of these technologies. Part III examines current regulation of online data tracking and advertising. Part IV discusses proposed legislation and the struggle to reach a balance between promoting market innovation and cost-efficient advertising against consumer privacy concerns. Part V evaluates proposed legislation in light of consumer privacy values and proposes that businesses bear the brunt of regulation, rather than consumers being forced to affirmatively educate themselves and opt-out of data collection.

II. Online Data Tracking Technology

Online advertising began in 1994 when HotWired, a web magazine, sold banner-space advertising to AT&T and displayed it on HotWired's web page.[4] This innovative style of advertising took off in 1996 with the explosion of search engines like Yahoo! and Google selling advertisement spaces on their search result pages.[5] United States online advertising revenue has steadily increased from $8.1 billion in 2000 to $21.2 billion in 2007, and from 3.2% of all advertising to 8.8%.[6] Globally, online advertising is a $45 billion industry.[7] In the twenty years since its creation, online advertising remains an innovative, constantly changing industry where advertisers create new technologies to track consumers' online behavior.[8] This part describes some of the main tracking technologies and their corresponding privacy concerns.

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[4] *See* David S. Evans, *The Online Advertising Industry: Economics, Evolution, and Privacy*, 23 J. Econ. Persp. 37, 38 (2009).

[5] *Id.*

[6] *Id.*

[7] D. Zachary Champ, *Cutting Through the Clutter or Rifling Through the Trash: Online Privacy Expectations, Behavioral Targeted Advertising and Deep Packet Inspection*, 12 Pratt's Privacy & Data Security L.J. 1 (2009).

[8] Evans, *supra* note 4 at 39.

A. *Cookies*

Cookies (or HTTP cookies) carry information between different web pages and offer re-identification of repeat visitors.[9] An ad network usually places a cookie on a consumer's computer, which then tracks their movement across a range of websites.[10] Enhancement in cookie technology since the 1990s has allowed advertisers and websites to use cookies to collect information about consumers' interests and target advertisements based on that information.[11] Initially, cookies were only used by first parties to track a consumer's activity solely on a particular website.[12] Later, as information sharing between websites grew, cookies enabled third parties to track consumers' activity across multiple websites.[13] The parties then use that information to create a user profile and market individualized advertisements to that particular consumer.[14] Browsers now enable consumers to exercise some control over cookies by allowing them to enable or disable cookies on a site-by-site basis, or to block all cookies.[15] Transparency in HTTP cookie use and developing browser privacy settings allows consumers to exercise a reasonable amount of control over downloading and managing cookies.

B. *Flash Cookies*

Flash cookies are a more sophisticated form of cookie that differ from HTTP cookies in a few important respects. Flash cookies carry more information than HTTP cookies and do not have expiration dates by default, whereas HTTP cookies expire at the end of each browsing session unless programmed otherwise.[16] Also, flash cookies are stored separately from HTTP cookies and are more difficult for consumers to see and control.[17] More troubling, while consumers may erase HTTP cookies and clear their browser history, Flash cookies use a "respawning" practice that restores HTTP cookies, thus overriding the consumers' express choices to limit third party tracking.[18]

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[9] Omer Tene & Jules Polonetsky, *To Track or "Do Not Track": Advancing Transparency and Individual Control in Online Behavioral Advertising*, 13 MINN. J.L. SCI. & TECH. 281, 289-92 (2012).

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Tene & Polonetsky, *supra* note 9.

[15] *Id.*

[16] *Id.* at 293.

[17] *Id.*

[18] *Id.*

Additionally, there are two types of data collection that cookies use: passive and active.[19] Passive data collection involves a cookie placed on consumers' computers by advertisers, through spyware and adware, for example.[20] Active data collection involves a consumer's choice to share personal information with the advertiser for some incentive.[21] Frequently, consumers do not expressly consent to the collection of their personal information.[22] While many advertisers share their privacy policies on their websites, most consumers do not read them because they are lengthy, full of legalese, and uninteresting to the average consumer.[23]

C. Mobile Devices

Mobile Internet use is expected to surpass Internet use on computers in the next few years, so data tracking on mobile devices has become increasingly important.[24] Mobile Internet browsing differs from normal Internet browsing because users carry their mobile devices with them at all times; this allows advertisers to track a user's browser activity *and* physical location.[25] Few devices store more personal details about their users than mobile phones, including contact numbers, location, and a unique identifying number that cannot be changed or turned off.[26] Mobile users download applications ("apps") that allow them to play games or search for restaurants, etc., without launching a browser or search engine, replacing regular browsers on mobile devices.[27]

The Wall Street Journal ("WSJ") conducted an investigation of 101 popular mobile apps, determining that fifty-six transmitted the unique device ID to other companies without user awareness or consent.[28] Further, forty-seven apps transmitted location information, and five transmitted personal details like age and gender.[29] Apple's iPhone apps transmitted more data than Google's Android phone apps, despite Apple's claims to limit what can be installed on iPhones through its App Store privacy policies.[30] Although Apple has privacy

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[19] Schmierer, *supra* note 1, at 4.

[20] *Id*.

[21] *Id*.

[22] *Id*.

[23] *Id*.

[24] Tene and Polonetsky, *supra* note 9, at 296-298.

[25] Id.

[26] *Id*.

[27] *Id*.

[28] Scott Thurm & Yukari Iwatani Kane, *Your Apps Are Watching You*, WALL ST. J. (Dec. 17, 2010), http://online.wsj.com/news/articles/SB10001424052748704694004576020083703574602 (last accessed February 15, 2014).

[29] *Id*.

[30] *Id*.

policies regarding non-consensual user data transmission, many apps the WSJ tested violate the rules by sending the user's location to ad networks without permission.[31] The WSJ found that mobile device users are often powerless to limit the tracking.[32] Such users usually cannot "opt-out" of phone tracking or delete cookies, as they can on computers.[33] Many apps do not offer written privacy policies either; the WSJ found that forty-five of the 101 tested apps failed to provide privacy policies on their websites or inside the apps.[34]

Of the 101 apps the WSJ tested, paid apps generally sent less data to third parties than free apps.[35] This is because many app developers offer apps for free, and only profit by selling ads inside the apps.[36] Many developers feel pressured to release more user data to bring in more revenue.[37] Location-targeted ads make two-to-five times more money than untargeted ads, so app developers neglecting location tracking stand to lose an important revenue source.[38] Advertising companies such as Ringleader Digital, which use mobile data tracking, have recently faced increasing lawsuits concerning their "sneaky" tracking tricks.[39] These lawsuits remain unresolved and are not widely publicized; they highlight growing consumer concerns about the unique practices of mobile data tracking.

III. Current Regulation

Section 5 of the Federal Trade Commission Act authorizes the FTC to protect consumers from "unfair and deceptive acts or practices in or affecting commerce."[40] The Bureau of Consumer Protection acts as the FTC's primary enforcer for consumer privacy matters, and the Division of Privacy and Identity Protection aims to protect online consumer privacy, ensure information security, and combat identity theft.[41] The FTC chooses to use its "deceptive practices" authority much more than its unfairness authority, a decision stemming from the 1970s when the FTC executed a broad plan to ban all advertising

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[31] *Id*.

[32] *Id*.

[33] Thurm, *supra* note 28.

[34] *Id*.

[35] *Id.*

[36] *Id*.

[37] *Id*.

[38] Thurm, *supra* note 28.

[39] *See* David Kravets, *Lawsuit Targets Mobile Advertiser Over Sneaky HTML5 Pseudo-Cookies,* Wired (September 16, 2010), http://www.wired.com/threatlevel/2010/09/html5-safari-exploit (last accessed February 15, 2014).

[40] Schmierer, *supra* note 1, at 5.

[41] *Id*.

aimed at children on the grounds that it was "immoral, unscrupulous, and unethical."[42]

In order to attack unfair trading practices, the FTC must show that the injury to consumers is: 1) substantial, 2) without offsetting benefits, and 3) one that consumers cannot reasonably avoid.[43] Emotional distress does not satisfy the standard for substantial injury, but economic harm or threats to public health and safety does.[44] Any harm consumers suffer must be weighed against any benefit they receive because of the allegedly unfair practice.[45] In contrast, a deceptive trade practice exists where: 1) there is a representation or omission, 2) likely to mislead reasonable consumers, and 3) the representation or omission is material.[46] A material misrepresentation or practice is "one which is likely to affect a consumers' choice of or conduct regarding a product."[47] Information is material if it "concerns the purpose, safety, efficacy, or cost of a product or service" or "concerns durability, performance, warranties, or quality."[48] In its investigations, the FTC evaluates deceptive trade practices from the viewpoint of a "reasonable consumer."[49]

A. In re Gateway and In re Sears Holdings Management Corp.

Two recent FTC deceptive online practice enforcement actions include *In re Gateway* and *In re Sears Holdings Management Corp.*[50] The Gateway action occurred when the company altered its privacy policy concerning selling personal customer information to third parties without notifying customers of the changes.[51] The FTC found Gateway in violation of the Federal Trade Commission Act (15 U.S.C. §45) and sanctioned the company. In addition to this sanction, the FTC made Gateway notify consumers of changes in its privacy policy and the manner it collected, used, or disclosed data.[52] The FTC also ordered Gateway not to disclose any personal information collected on the website to any third parties "unless [Gateway] obtains the express affirmative ('opt-in') consent of the consumers to whom such personal information

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[42] *Id*.

[43] *Id*.

[44] *Id*.

[45] Schmierer, *supra* note 1, at 5-6.

[46] *Id* at 6.

[47] *Id*.

[48] *Id.*

[49] *Id*.

[50] Schmierer, *supra* note 1 at 6; *see also* Gateway Learning Corp., 138 F.T.C. 443 (2004); *Sears Holdings Mgmt.Corp.*, F.T.C. (Sep. 9, 2009), http://www.ftc.gov/enforcement/cases-proceedings/082-3099/sears-holdings-management-corporation-corporation-matter.

[51] Schmierer, *supra* note 1 at 6-7.

[52] Gateway Learning Corp., 138 F.T.C. 443, 467-68 (2004).

relates."[53] The FTC also required Gateway to file written reports detailing its compliance with the order and make any documents requested by the FTC available for a period of five years after the 2004 order.[54]

The *Sears Holdings* action occurred when Sears enacted a "My SHC Community" program inviting customers to download software onto their computer for ten dollars, and Sears then used the software to track those consumers' online browsing activities.[55] The FTC found *Sears* in violation of the Federal Trade Commission Act by its material misrepresentation to customers that their participation in the program would "always [be] on your terms and always by your choice" but failing to adequately provide them notice about the information collected by the software in the privacy Statement and User License Agreement.[56] The FTC expressed concern about Sears' practice of taking advantage of customers for a few dollars and not giving them notice about what the company would do with their data.[57] The Sears case is a perfect example of the online advertising industry's lack of concern for consumer privacy and the strategies used to entice consumers into sacrificing their privacy in order for businesses to effectively track their activities and produce better advertisements.

B. The FTC's Self-regulation Principles

Although the FTC's regulatory power may hold industry players accountable for dishonest online practices, the self-regulation guidelines the FTC released in 2008 do not impose sufficient accountability or motivation for the industry to comply with consumer online privacy regulatory standards. The FTC's self-regulatory principles for transparency and consumer education about online data tracking and behavioral advertising include: 1) transparency and consumer control, 3) data security and limited data retention, 4) changes to privacy policies, and 5) sensitive data.[58]

The FTC's transparency and consumer control principle calls for notice to consumers in "a clear, concise, consumer friendly, and prominent statement" informing consumers of data collection practices for behavioral advertising and consumers' decisions on such collection's permissibility.[59] Consumers must also have a "clear, easy-to-use, and accessible method" of choice over the data

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[53] *Id*.

[54] *Id*. at 470.

[55] Schmierer, *supra* note 1 at 7.

[56] *Id*.

[57] *Id.*

[58] D. Reed Freeman Jr., *FTC Proposes Online Behavioral Advertising Privacy Principles*, PRATT'S PRIVACY & DATA SECURITY L.J., at 2 (Jan. 2008.

[59] *Id*.

collection practices, displayed prominently on the website.[60] Under the FTC's data security and retention principles, companies that collect behavioral advertising data would be required to provide data security consistent with FTC enforcement actions and guidelines.[61] This principle would apply even to anonymous data used for behavioral targeting and would vary depending on the type of the data, the nature of the company's business, and the reasonable protections available.[62] The idea is to provide "reasonable security" for data so that it does not fall into the wrong hands.[63]

The FTC's data securities and retention principle would also limit companies' data retention to a period "only as long as is necessary to fulfill a legitimate business or law enforcement need."[64] This means that after data has outlived its usefulness, companies should no longer retain voluminous consumer online behavior data, but should destroy it after a reasonable period of time.[65] This principle tries to balance business' interests in retaining data for reasonable periods of time against consumers' interests in having companies destroy potentially sensitive data that has outlived its usefulness.

The FTC's proposed changes to privacy policies' principle suggest that companies obtain affirmative express consent from consumers before using their data in a way that differs from the uses permitted under the privacy policy in place when the data was collected.[66] This policy is unclear as to whether the usual opt-out standard for data collection would suffice, or whether the higher opt-in standard would be required, a standard, which offers more protection to consumers but places a higher burden on businesses.[67]

Lastly, the sensitive data principle proposes that companies should first obtain affirmative express consent before collecting sensitive consumer data for advertising purposes.[68] Examples of sensitive data include data about children, health, or finances, which could cause harm to consumers if released and used for advertising purposes.[69]

Consumer privacy advocates remark that although the FTC's self-regulation principles constitute a step in the right direction, the FTC ultimately passed responsibility for consumer privacy onto the industry, deferring to the judgment

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[60] Freeman, *supra* note 58, at 2.*Id*.

[61] *Id.*

[62] *Id*.

[63] The Fed. Trade Comm'n, *FTC's Views on Behavioral Advertisin*g, 10 No. 8 E-Commerce L. Rep.at 4 Aug. 2008.

[64] Freeman, *supra* note 58, at 2.

[65] *Id.* at 2-3.

[66] *Id*.

[67] *Id.*

[68] *Id*.

[69] The Fed. Trade Comm'n, *supra* note 63, at 4.

of individual businesses to determine the scope and extent of consumer notice.[70] The FTC attempted to balance the need to encourage industry innovation against the need to ensure that consumers receive clear notice and meaningful choice about online data collection. This article further critiques the FTC's self-regulation principles and current industry standards for online data collection in Part IV.

C. Lane v. Facebook, Inc.

The recent class action case of *Lane v. Facebook, Inc*. between consumers and Facebook over its data collection practices sheds light on the industry's alarming lack of concern for consumer privacy and the current regulatory standards' ineffectiveness.[71] In 2007, Facebook launched a program called Beacon, which allowed Facebook users to share with friends their activity on non-Facebook websites via Facebook.[72] Beacon updated the users' profiles to show certain actions the users took on websites belonging to the companies that contracted with Facebook to participate in the Beacon program.[73] "Although Facebook initially designed the Beacon program to give members opportunities to prevent the broadcast of any private information, it never required members' affirmative consent."[74] Therefore, many Facebook users complained that Beacon published their activities to their profiles without their knowledge or consent.[75] Plaintiff Sean Lane alleged in his complaint that he bought a ring for his wife from Overstock.com and Facebook ruined the surprise by publishing the news to over 700 of his Facebook friends on his profile, alerting to the world that Lane bought a cheap ring online and ruining his surprise to his less-than-pleased wife.[76] Another plaintiff told a college classmate she could not afford to fly to her classmate's wedding, only to have Facebook publish the $400 shoes the plaintiff had recently purchased, causing her to lose a friend in the process.[77]

Just weeks before the lawsuit, after facing thousands of complaints and negative media coverage, Facebook changed the privacy control on Beacon to allow users to opt out of the program. Facebook eventually discontinued the program altogether.[78] The lawsuit began in 2008 and resulted in a $9.5 million

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[70] Katelyn Rimmel, *FTC Guidelines for Behavioral Advertising*, 151 INTELL. PROP. COUNS. 3 (July 2009).

[71] *See* supra note 2.

[72] *Id.* at 816.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *See supra* note 2, at 827.

[77] *Id.*

[78] *Id.* at 816, 827.

settlement, which the District Court for the Northern District of California approved as "fair, reasonable, and adequate."[79]

The settlement proves extremely troubling for consumer privacy advocates, however, and Judge Andrew Kleinfeld wrote a pronounced dissent, disfavoring the District Court's approval of the settlement.[80] Kleinfeld declared that, "some people buy things on the Internet precisely because they want more privacy than they would have at a local store. Beacon discounted their privacy, and broadcasted their purchases to people who users wanted to remain in the dark."[81] Although Facebook promised never to revive the Beacon program, Facebook remained free to do so under a different name. The settlement therefore, did not restrict Facebook's data collection practices in any meaningful way, and the class's injunctive relief "was no relief at all, not even a restriction on future identical conduct."[82]

In his dissent, Kleinfeld scathingly commented that while thousands of class members who suffered damages from past exposure of their purchases received nothing, class counsel received millions from the settlement.[83] Although a handful of named plaintiffs received small portions of the settlement, millions went to a new privacy foundation yet to be created. The Digital Trust Foundation would use $6.5 million of the settlement money to fund projects and initiatives promoting online privacy, safety, and security.[84] Perhaps most troubling of all are the facts that one of the three board members on the new foundation was Facebook's own Director of Public Policy, Timothy Sparapani, and that Facebook's legal counsel acts as an advisor to the foundation.[85]

The *Lane* majority found no conflict of interest in Facebook's choice of a board member and noted that of the over three million class members, only four filed written objections to the settlement. Additionally, the majority found that Facebook could justifiably preserve its role in the settlement process by selecting a board member for the foundation from its own ranks in order to ensure that the foundation would not use the funds in a way that harms Facebook.[86] The majority also rejected the settlement objectors' argument that "Facebook's promise to terminate Beacon is illusory because the original program was nonoperational at the time of the settlement agreement and thus effectively termi-

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[79] *Id*. at 816.
[80] *Id*. at 826.
[81] *Id.* at 827.
[82] *See supra* note 2, at 828.
[83] *Id*. at 828-29.
[84] *Id*. at 829.
[85] *Id.* at 817-818.
[86] *Id*. at 821.

nated."[87] The majority declared that the objectors' argument that Facebook's promise to terminate Beacon provided no meaningful relief lacked merit and upheld the district court's holding that the settlement was "fundamentally fair."[88]

In his dissent, Kleinfeld rejected the majority's argument that a lack of objections from class members constituted substantial proof of the settlement's fairness. He reasoned, "[a] real client may refuse a settlement that is bad for him but benefits his lawyer, but a large class of unknown individuals lacks the knowledge or authority to say no [sic]."[89] He argued that large class actions without individual clients controlling the litigation creates:

> [opportunity for] collusive arrangements in which defendants can pay the attorneys for the plaintiff class enough money to induce them to settle the class action for too little benefit to the class (or too much benefit to the attorneys, if the claim is weak but the risks to the defendant high.[90]

In the end, Kleinfeld noted, Facebook gained the most because it obtained a judgment barring further claims of people "victimized by its conduct" and " . . . preserved the right to do the same thing to them again."[91]

Lane v. Facebook is critical to understanding the current online data collection regulatory climate because it highlights the inadequacy of current regulations and the inability of courts or the FTC to render judgments providing meaningful protection to consumer privacy against unbridled data collection and behavioral advertising. *Lane* shows that, unfortunately, plaintiffs may be unable to obtain effective class action settlements against powerful corporations. This is because class actions often produce settlements weighing heavily in favor of the more powerful party. The party able to more stridently fight to protect its interests prevails to the detriment of the weaker party in class action settlements. This prevents or bars the scores of other potential plaintiffs from seeking relief in the future. Settlements like *Lane* regrettably weigh strongly in favor of powerful corporations and reward plaintiff attorneys for colluding with the corporation for the maximum settlement (including higher attorney's fees). Plaintiffs seeking consumer privacy protection will likely continue to be disappointed by class action settlements without meaningful reform of the online data collection practices and stricter industry regulation.

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[87] See supra note 2 at 825.

[88] *Id.* at 826.

[89] *Id.* at 830.

[90] *Id.*

[91] *Id.*

IV. Proposed Legislation

A. Boucher-Stearns Discussion Draft

In May of 2010, Congressman Rick Boucher (D-Virginia), joined by Congressman Cliff Stearns (R-Florida), introduced a draft of a privacy bill known as the Boucher-Stearns draft.[92] Both were members of the House Energy and Commerce Committee's Subcommittee on Communications, Technology, and the Internet.[93] Key portions of the bill include the requirement that Internet users have the ability to "opt out" of data collection, or that they give explicit consent for the collection.[94] The bill's subheading declares the purpose of the bill: "to require notice to and consent" of Internet users before collection of personal information and disclosure to third parties.[95] The bill broadly defines a "covered entity" to include "a person engaged in interstate commerce [who] collects data containing covered information."[96] Additionally, the bill's covered information includes an individual's: name, contact information, address, social security number, identification numbers, financial information, Internet Provider ("IP") address, Internet profiles, and "any information that is collected, stored, used, or disclosed in connection with any covered information."[97] Covered entities would be required to "render anonymous" the data collected from consenting individuals, meaning that they must protect certain information such that it is unidentifiable with the individual, computer, or device used by the individual to whom the information relates.[98] Sensitive information, subject to higher protections, includes: information associated with an individual's medical records and history, race or ethnicity, religious beliefs, sexual orientation, financial records, and precise location information.[99]

The bill would impose strict requirements from entities to obtain express consent from individuals before collecting (or disclosing) their information. A covered entity would be required to obtain an individual's "express affirmative consent" before disclosing their information to unaffiliated, third parties.[100] Additionally, the bill would require a covered entity to "clearly and conspicuously" display its privacy policy on its website and clearly inform visitors that

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92 *Reps. Boucher, Stearns Release Draft Privacy Bill,* Ass'n of Nat'l Advertisers, http://www.ana.net/content/show/id/1872 (last visited April 4, 2014).

93 *Id.*

94 *Id*.

95 H.R. ___, 111th Cong. (Boucher-Stearns Staff Discussion Draft Bill, May 3, 2010), *available at* http://www.ana.net/content/show/id/1872.

96 *Id.* at §2(4).

97 *Id.* at §2(5)(A-J).

98 *Id.* at §2(9).

99 *Id.* at §2(10).

100 *See* supra note 95, at §3(b)(1).

they may decline consent to data collection.[101] An individual would have to "affirmatively grant" consent for any data collection to be permissible.[102] Finally, any time a covered entity changes its privacy policy, individuals must give "express affirmative consent" to such changes before the entity may enact the changes or use the information for a purpose undisclosed by the privacy policy.[103] Additionally, the bill would require "express opt-in consent" for any disclosure of location-based information concerning an individual.[104]

Although the Boucher-Stearns draft provided strong requirements for express customer consent to data collection, it did not attempt to create a private right of action for individuals who believe their privacy rights have been infringed upon by improper data collection or distribution.[105] The bill attempted to balance corporate interests in data collection and more efficient advertising against consumer Internet privacy interests, but many Internet privacy advocates criticized the bill for not going far enough to protect consumers' privacy rights.[106] After introducing the bill, Congressman Boucher lost his seat in the 2010 mid-term election, and the discussion draft died in the House.[107]

B. Best Practices Act

Congressman Bobby Rush (D-Illinois) introduced the Best Practices Act ("BPA") to the House in February of 2011, shortly after the Boucher-Stearns draft died.[108] The BPA was referred to the Committee on Energy and Commerce, but died in committee. Nevertheless, it constituted a significant step forward in Internet privacy regulation efforts and garnered significant support on both sides of the aisle.[109] The BPA offered essentially the same protections as the Boucher-Stearns draft, but on more expansive terms.[110] The BPA covered publicly available information, defining it as "any covered information or sensitive information that a covered entity has a reason to believe is lawfully made available to the general public," including government records, media, or legally required disclosures to the general public.[111] The BPA defined sensi-

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101 *Id.* at §3(a)(1)-(3).
102 *Id.* at §3(a)(3).
103 *Id.* at §3(a)(4).
104 *Id.* at §6(a).
105 *Id.* at §9.
106 *See supra* note 95.
107 Schmierer, *supra* note 1 at 37-42.
108 Best Practices Act, H.R. 611, 112th Cong., (1st Sess.) (Feb. 11, 2011), *available at* https://www.govtrack.us/congress/bills/112/hr611.
109 *Id.*; *see also* Schmierer, *supra* note 1, at 37-43.
110 *See supra* note 108.
111 *Id.* at §2(7)(A).

tive information to include a person's precise location information, as well as an individual's "activities or relationships associated" with it, including biometric data, such as fingerprints or retinal scans.[112] This would have expanded the scope of protected information that covered entities must obtain consent to collect from consumers. The BPA also included an important exception, declaring that it did not cover information an employee collected about an employee.[113]

This employer-employee exception would have allowed employers to conduct a certain amount of investigation about their current and potential employees without worrying about violating their privacy rights under the BPA. In regulating sensitive information, the BPA declared that the FTC should consider a number of factors, including: the purposes of the collected information, how easily it can identify a specific individual, the nature and extent of the authorized access to the information, the individual's reasonable expectations under the circumstances, and the adverse effects to the individual if someone disclosed the information to unauthorized third parties.[114]

The BPA would have applied not only to covered entities collecting information from consumers, but also to third parties unrelated to the entities.[115] This is an important expansion of regulation that was absent in the failed Boucher-Stearns bill;[116] it would have substantially impacted the regulation of data collection on a fundamental level by recognizing that the structure of collection and dissemination of consumer data is oftentimes complex and implicates various unrelated entities collecting and brokering data to each other.[117] Like the Boucher-Stearns bill, the BPA would have required covered entities to provide notice in a "concise, meaningful, timely, prominent, and easy-to-understand" way.[118] Entities would have had to provide consumers with a "timely, effective, and meaningful notice that [would] enable an individual to understand relevant information and make informed choices" about their data collection.[119] The notice would have to have been "practical or reasonable under the circumstances."[120] The entity would have had to provide an individual with "reasonable means to exercise an opt-out right and decline consent" for data collection and use.[121] Additionally, the BPA would have required "express affirmative consent" from an individual before an entity could disclose their

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[112] *Id.* at §2(8)(A)(VI).
[113] *Id.* at §2(4)(B).
[114] *Id.* at §2(8)(B).
[115] *See supra* note 108, at §2(10).
[116] *See generally*, *supra* note 95.
[117] Schmierer *supra* note 1 at 40-42.
[118] Best Practices Act, *supra* note 108. §102(a).
[119] *Id.* at §102(b)(2)(B).
[120] *Id.*
[121] *Id.* at §103(a)(1-3).

information to a third party, or use software to monitor an individual's Internet browsing and collect information pertaining to it.[122]

In order to foster accountability, the BPA would have required entities to make a private risk assessment of individuals' information collection, use and disclosure before implementing any project that would use the information collected from more than one million people.[123] An entity could have retained data "only as long as necessary to fulfill a legitimate business purpose or comply with a legal requirement," with a six-year maximum time limit for data retention.[124]

One of the most important ways in which the BPA departed from the Boucher-Stearns bill was its proposed grant of a private right of action.[125] For private actions, the BPA would have allowed for damages between 100 and 1,000 dollars, with discretionary punitive damages.[126] It also would have imposed large civil penalties on entities that violate the BPA, with fines up to eleven thousand dollars and total liability up to five million dollars.[127] The BPAwas viewed as a more appropriate balance between business- and self-regulation of data collection, and it garnered strong support from the online media industry.[128] Businesses, however, were concerned that granting a private right of action would result in a waterfall of "unnecessary litigation costs and uncertainty for businesses." The BPA constituted a broader approach at data regulation because it provided a private right of action and applied both to entities collecting and brokering the data.[129] The wider accountability businesses would be held to under the BPA illustrates the growing support privacy advocates had gained in Congress for formal legislation of data collection and online behavioral advertising.[130]

V. WHO MUST BEAR THE BRUNT OF REGULATION?

A study conducted by TRUSTe—an online privacy management services provider—to gauge Internet privacy concerns indicated that consumers are highly aware that their online activities are being tracked in order to facilitate targeted advertising.[131] Additionally, consumers show great concern about

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122 *Id.* at §104(a)(1), (c).
123 *See supra* note 108, at §302(b).
124 *Id.* at §303, 102(d)
125 *Id.* at §604(a); *see also supra* note 95.
126 *See supra* note 108, at §604(a).
127 *Id.* at §603(b)(1), (3).
128 Schmierer, supra note 1 at 40-41.
129 *Id.* at 42.
130 *Id*.
131 *TRUSTe Report Reveals Consumer Awareness and Attitudes About Behavioral Targeting Consumers Indicate A High Level of Awareness that Tracking and Targeting Occur*, MARKET

these tracking practices, even when the information obtained about them is not personally identifiable information.[132] A majority of consumers surveyed were willing to take "necessary steps to assure [sic] privacy online when presented with the tools to control their internet tracking and advertising experience."[133] TheTRUSTe report shows consumers have great desire for increased education, transparency, and choice for data tracking and online behavioral advertising.[134] Consumers have consistently shown a desire for more relevant advertising without being tracked to obtain that advertising.[135]

On the other hand, corporate giant Google asserted that people cannot reasonably expect their emails to be private when emailing a Gmail user (Gmail is an email service provided by Google).[136] Google reasons that when consumers entrust their information to a third party, such as Gmail, those consumers cannot expect the third party to not access their information.[137] Therefore, "people who use web-based email today cannot be surprised if their communications" do not remain private when they "voluntarily turn over [that information] to third parties."[138] Critics of Google's data tracking and consumer privacy practices argue Google deceptively advertised its privacy policies as a way to promote its company and falsely obtain consumer trust and confidence.[139] Google's privacy policies provide it with "nearly unrestricted freedom" to collect and disseminate private consumer information to unrelated third parties.[140] Further, Google may even distribute consumers' information outside the United States to international third parties, a practice beyond the scope of the minimalist consumer protections the FTC provides.[141] Google merely assures users that it will make "good faith efforts. . .when reasonably possible" to inspect the information it collected from them.[142] Consumer privacy advocates criticize the FTC's self-regulation principles (proposed in 2008) as laughable because they fail to provide even minimum enforceable standards of consumer privacy

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WIRED (Mar. 28, 2008, 9:00 AM ET), http://www.marketwired.com/press-release/truste-report-reveals-consumer-awareness-and-attitudes-about-behavioral-targeting-837437.htm.

132 *Id.*

133 *Id.*

134 *Id.*

135 *Id.*

136 Braden Goyette, *Google: Email Users Can't Legitimately Expect Privacy When Emailing Someone on Gmail*, HUFFINGTON POST (Aug. 14, 2013, 8:42 PM ET), http://www.huffingtonpost.com/2013/08/13/gmail-privacy_n_3751971.html (last accessed April 6, 2014).

137 *Id.*

138 *Id.*

139 Brian Stallworth, *Future Imperfect: Googling for Principles in Online Behavioral Advertising*, 62 FED. COMM. L.J. 465, 483-484 (2010).

140 *Id.* at 485.

141 *Id.*

142 *Id.* at 486.

that would remain constant throughout the ever-changing world of the Internet.[143]

How should we balance these starkly contrasting viewpoints in approaching minimum regulations to protect consumer privacy? Must consumers fork over six hundred to one thousand dollars for state-of-the-art, off-the-grid smartphones like the Blackphone (geared towards protecting consumers from data tracking by large corporations and the National Security Agency)?[144] These expensive technological tools which keep users off the grid and relatively untrackable are not affordable for the average consumer, and they fail to solve the larger problem of data tracking and data brokering.[145] Large data brokers compile lists of information on consumers, much like the Yellow Pages, in order to build a dossier on public file, available to the highest bidder.[146]

Admitting that the insufficiency of self-regulation is insufficient is fundamental to increasing awareness and regulation of Internet privacy concerns.[147] "In almost any industry, self-regulation does not work," argues John Simpson, project director of Consumer Watchdog.[148] The online advertising industry "has long struggled with how to deliver relevant ads while respecting users' privacy," declares Nicole Wong, Google's deputy general counsel.[149] At the very least, consumer privacy advocates like Professor Nancy King of Oregon State University argue that a consumer "should have the right to surf the Internet and use [their] mobile phone without being tracked and profiled," and they should have a meaningful choice and opportunity to opt-out of data tracking for online behavioral advertising purposes.[150]

How can consumer privacy advocates increase awareness and regulation of data tracking? One important step includes shifting the burden from consumers to businesses involved in the data tracking and online behavioral advertising industry.[151] This would involve shifting the main focus of regulation from pri-

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143 *Id*. at 487, 491;*see also* Freeman, *supra* note 58.

144 Aarti Shhani, *A Smartphone That Tries to Slip You Off the Grid*, *All Tech Considered*, NPR (Feb. 28, 2014, 3:30 AM ET), http://www.npr.org/blogs/alltechconsidered/2014/02/28/283523473/a-smartphone-that-tries-to-slip-you-off-the-grid (last accessed April 6, 2014).

145 *Id.*

146 Julia Angwin & Dave Davies, *If You Think You're Anonymous Online, Think Again*, *All Tech Considered*, NPR (Feb. 24, 2014, 11:00 AM ET), http://www.npr.org/blogs/alltechconsidered/2014/02/24/282061990/if-you-think-youre-anonymous-online-think-again (last accessed April 6, 2014).

147 *Privacy Group Coalition Urges Data Regulation*, NEWSROOM (September, 2009).

148 *Id.*

149 *Id.*

150 *Profiling Based on Mobile, Online Behavior: Privacy Issue,* NEWSROOM (December, 2010).

151 Tene & Polonetsky, *supra* note 9 at 347-348.

vacy to data protection, including new standards for quality of personal information and allowing for access to information by consumers and businesses for legitimate ends.[152] Shifting the regulatory burden off of consumers' shoulders and onto businesses would make online privacy "a matter of corporate governance" rather than a minimalist privacy concern and consumer responsibility.[153] Additionally, this shift would have a positive effect on the integrity and culture of businesses.[154] Rather than focusing on disclaiming privacy liability in their legal notices, businesses would focus more on integrating privacy into their business models.[155]

Other important shifts include limitations on collection of sensitive data, preventing unexpected use of data for non-marketing purposes, and limited data retention periods.[156] Consumers' sensitive information has limited revenue purposes, and businesses already limit their use out of concern for negative publicity.[157] Limiting collection and retention of this sensitive information involves balancing "consumer sensitivities" and its benefit to corporate interests against privacy risks.[158] The key inquiry is whether collecting and transferring sensitive information would "[harm] users, [interfere] with their self-determination, or [amplify] undesirable inequalities in status, power, or wealth.[159] Limited data retention periods would ensure consumers have a protected "right to oblivion" or "right to be forgotten."[160]

The principles emulated in the burden-shifting arguments are mirrored by the regulations proposed in the BPA.[161] Formal legislation like the BPA would promote consumer privacy rights, and would be a significant compromise between business interests in online advertising and consumer privacy concerns. The BPA not only provided concrete mandates for notice, consent, and privacy policy changes, but it also held third party data brokers under the umbrella of the BPA, rather than only the companies collecting and selling the data.[162] Most importantly, rather than ensuring a waterfall of litigation by private individuals claiming that their rights have been violated, the BPA would have provided a limited right to private action by setting a monetary cap on

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152 *Id.*

153 *Id*. at 348.

154 *Id.*

155 *Id*.

156 Tene & Polonetsky, *supra* note 9at 349- 350.

157 *Id. at 349.*

158 *Id*. at 349.

159 *Id*. at 353.

160 *Id*.

161 Tene & Polonetsky, *supra* note 9 at 353;*see also* Best Practices Act, *supra* note 108.

162 *See generally* Best Practices Act, *supra* note 108.

recovery available to private plaintiffs.[163] This constituted an appropriate balance between corporate interests in limiting liability and consumer interests in recovering for significant privacy invasions. Lawsuits like *Lane v. Facebook, Inc.* are clear evidence of the inadequacies of self-regulation.[164] Online privacy litigation leads to class action lawsuits that fail to provide adequate recovery to the plaintiffs and allow large corporations to escape scot-free by providing corporate-controlled education programs and paying off a select few plaintiffs and their attorneys.[165]

Formal legislation would give the FTC further ability to regulate the online behavioral advertising industry and would be an appropriate balance between corporate and consumer interests. Critics of legislation concede that privacy bills would "do nothing more than formalize the privacy framework already in place through the industry's enhanced version of self-regulation."[166] Formalizing the FTC's self-regulation principles framework would allow the FTC broad authority over the online behavioral advertising industry, and would hold corporations accountable to the principles the FTC espouses. Indeed, while the FTC retains authority to regulate the online behavioral advertising industry, there exists no formal regulation adequately protecting consumer privacy interests. Therefore, a bill such as the BPA would realistically entail a formalization of the principles the FTC already espouses but lacks the authority and means to enforce through self-regulation.

VI. CONCLUSION

Bills such as the Boucher-Stearns discussion draft, and the BPA, reflect evolving attitudes concerning data collection and online privacy.[167] Corporations have a compelling interest in collecting information about consumers in order to deliver targeted advertisements to potential customers. Consumers, on the other hand, have a compelling interest in online privacy, especially when data may be collected about them, sold to third parties without their knowledge or consent, and traced back to consumers in the form of identifying, sensitive information. Online privacy legislation would place the FTC's self-regulation principles into a formal framework that would hold corporations more accountable to consumers and give the FTC a more efficient means of protecting consumer privacy interests. In order for consumers to receive adequate protection of their information, clear notice and a meaningful opportunity to consent to or opt out of data collection must be received. Formal legislation would constitute

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163 *Id.*

164 *See supra* note 2.

165 *Id.*

166 Schmierer, *supra* note 1, at 56.

167 *See generally*, *supra* note 98; *see also* Best Practice Act, *supra* note 108.

the least restrictive means possible to adequately protect consumer privacy and balance that privacy against corporate interests in online behavioral advertising.

The Right to Try to Save Your Life: Arizona Terminal Patients' Right to Try Legislation

Alexander W. John*

Terminally ill patients have precious few *potential* life-saving options available—and fewer still when faced with the daunting hurdles imposed by current Food and Drug Administration ("FDA") regulations.[1] So-called "Right to Try" ("RTT") legislation at the state level attempts to provide terminally ill patients with the medical autonomy required to use safe medication[2] in an attempt to extend or save their lives without having to leave the country.[3],[4] Opponents of RTT laws, however, raise questions about the risk of further harm to terminally ill patients, costs of treatment, issues of federal preemption, and potential lack of oversight during treatment.[5],[6],[7] Ultimately, the juxtaposition of inadequate FDA regulation and the "right to try to save [their] own [lives]"[8] has created a demand for terminally ill patients to find alternate means for attempting alternative treatment. This comment explores the rationale behind enacting a RTT statute in Arizona, discusses its opposition, and notes its impact on those who have been affected by Proposition 303's recent enactment.[9]

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[1] *See, e.g.*, Christina Corieri, Everyone Deserves the Right to Try: Empowering the Terminally Ill to Take Control of their Treatment 1, 4 (Goldwater Institute, 2014).

[2] While Prop 303 covers investigational medicine, investigational biological products, and investigational devices, this comment refers to the three collectively as "investigational medicine" for convenience, and sometimes simply "medicine" for conciseness.

[3] Corieri, *supra* note 1, at 7, 9.

[4] Michael A. Smith et al., State of Arizona Publicity Pamphlet Issued by Ken Bennett, 34-35 (Arizona Secretary of State 2014).

[5] Phil Riske, *Life and death in the Arizona Legislature; Rose Law Group Employment attorney David Weissman weighs in on bills' moral issues*, Rose Law Group Reporter (Oct. 12, 2014, 4:55 PM), http://roselawgroupreporter.com/2014/02/life-death-arizona-legislature/.

[6] *Voter Guide*, League of Women Voters of Arizona Education Fund, 5 (Oct. 12, 2014, 4:59 PM), http://lwvaz.org/files/2014lwvguide.pdf.

[7] David Gorski, *The Compassionate Freedom of Choice Act: Ill-advised "right to try" goes federal [sic]*, Science Based Medicine (Oct. 15, 2014, 3:43 PM), http://www.sciencebasedmedicine.org/the-compassionate-freedom-of-choice-act-ill-advised-right-to-try-goes-federal/.

[8] Corieri, *supra* note 1, at 4, 11.

[9] The terms "RTT" and "Prop 303"are largely used interchangeably throughout this comment. Prop 303 is simply one of several state-level RTT laws throughout the nation.

Proposition 303 ("Prop 303") was the result of the Arizona State Legislature submitting House Concurrent Resolution 2005 to the citizens of Arizona for approbation or rejection by popular vote.[10] Prop 303 did not replace any existing law, but added Chapter 11.1, Title 36 to the Arizona Revised Statutes.[11] Prop 303's enactment had:

> . . . the effect of allowing the manufacturer to make available an investigational drug, biological product or device to an eligible terminally ill patient. It exempts a physician from regulatory action based solely on the physician's recommendation of the drug, product or device to the eligible terminally ill patient and classifies, as a class 1 misdemeanor, any attempt by a state official, employee or agent to block access of the investigational drug, biological product or device to an eligible terminally ill patient.[12]

Prop 303 follows similar recently-passed laws in Colorado and Missouri.[13],[14] Proposed federal legislation would have a similar effect nation-wide.[15] The Arizona House passed Prop 303 on March 4, 2014, and the Arizona Senate followed suit on April 15, 2014.[16] The Arizona legislature passed Prop 303 making factual findings regarding the insufficiency of federal legislation in meeting the needs of terminally ill patients, and the right of patients to make decisions regarding their healthcare.[17] Prop 303 was widely approved by popular referendum in the November 2014 general election with over seventy-eight percent of voter support.[18]

The root cause of the impetus for RTT laws like Prop 303 seems to be the great length of time that it takes to approve new medicines in the United

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[10] SMITH ET AL., *supra* note 4, at 37.

[11] *Id.* at 32.

[12] *Id.* at 37.

[13] *Arizona Terminal Patients' Right to Try Referendum, Proposition 303 (2014)*, BALLOTPEDIA.ORG (Oct. 12, 2014, 7:52 PM) http://ballotpedia.org/Arizona_Terminal_Patients'_Right_to_Try_Referendum,_Proposition_303_(2014).

[14] The beginning of the movement for terminally ill patients' right to try potentially life-saving medicine began in the 1980's during the early AIDS epidemic. CORIERI, *supra* note 1, at 7-8.

[15] H.R.4475 would amend the Federal Food, Drug, and Cosmetic Act so that the federal government could not prevent or restrict manufacturing, importing, distributing, or selling investigational drugs and devices for terminally ill patients. H.R.4475, 113th Cong. (2014)

[16] H.R. Con.Res. 2005, 51st Leg., 2d Sess. (Ariz. 2014).

[17] *See id.*

[18] *See State of Arizona Official Canvass 2014 General*, ARIZONA SECRETARY OF STATE (Nov. 4, 2014), http://www.azsos.gov/election/2014/General/Canvass2014GE.pdf.

States.[19] Before the FDA will make a new medicine available to the general public, it requires a clinical trial process that averages ten to fifteen years and costs around $1,200,000,000.[20] While patients can request exemptions in order to access unapproved medication, that process takes up to an entire month.[21] As the FDA admits, the exemption process requires approximately 100 hours of a physician's time to fill out the paperwork.[22]

Given the great length of time required to approve new medication or receive an FDA exemption, terminally ill patients frequently do not have time to wait for FDA approved medicine.[23],[24],[25] Accordingly, FDA standards may deny terminally ill patients of potentially life-saving medicine.[26] As Christina Corieri, formerly of the Goldwater Institute, so eloquently states, "Each extra day that it takes a doctor to fill out copious amounts of administrative paperwork, a bureaucrat to review an application, or to get on the schedule for an IRB, brings the patient a day closer to death and gives the possibly life-saving medications less time to work."[27] In fact, patients die waiting for government permission to use medicines that could *potentially* save their lives. In 2002, months after submitting her FDA application, Kianna Karnes, mother to four children, died of kidney cancer the *same day* the FDA approved her application.[28]

Core to Prop 303's rationale is the proposition that terminally ill patients have a fundamental right to attempt to save their lives through the use of investigational medicines.[29] Acknowledging reality while speaking after his daughter's death, Kianna Karnes' father noted that while it was uncertain that the medicine his daughter applied to use would have saved her life, it would have been "nice to give her a chance."[30] Legally, the Supreme Court has recognized

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[19] H.R. Con.Res. 2005, 51st Leg., 2d Sess. (Ariz. 2014).

[20] *2013 Profile Biopharmaceutical Research Industry*, PhRMA, 22 (2013) http://www.phrma.org/sites/default/files/pdf/PhRMA%20Profile%202013.pdf.

[21] CORIERI, *supra* note 1, at 10.

[22] *See Investigational New Drug Application*, DEPARTMENT OF HEALTH AND HUMAN SERVICES, FOOD AND DRUG ADMINISTRATION, http://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/Forms/UCM083533.pdf (last visited June 22, 2015).

[23] *See supra* text accompanying notes 20-21.

[24] A terminally ill patient's doctor has determined that the patient has "a disease that, without life-sustaining procedures, will result in death *in the near future* or a state of permanent unconsciousness from which recovery is unlikely." *See supra* note 19. (emphasis added).

[25] *Id.*

[26] *Id.*

[27] CORIERI, *supra* note 1, at 18-19.

[28] Less than a year later, the medicine that Kianna Karnes died waiting for was approved for general use to treat advanced kidney cancer by the FDA. *Id.* at 1.

[29] H.R. Con.Res. 2005, 51st Leg., 2d Sess. (Ariz. 2014).

[30] CORIERI, *supra* note 1, at 1.

a patient's due process right to control his or her medical treatment, noting the existence of the "right to care for one's health and person."[31] While the right to control one's medical treatment has not been explicitly extended to terminally ill patients and investigational medicine, it seems to be consistent with existing legal precedent.[32] Prop 303 also addresses a federalism concern that terminally ill patients and their doctors—not the government—should decide whether to use such medicine.[33]

Lastly, there is the issue of patients leaving the country for medical treatment that is simply not approved in the United States. Dr. Michael Smith and many other concerned citizens point out that oftentimes terminally ill patients will leave the country to seek treatment in countries whose governments have not outlawed the medicine they need.[34] One such family chose to move 5,000 miles to another continent after their eleven-year-old son's bone cancer diagnosis.[35] The move was difficult for the child and his family; the treatments the child needed were simply made unavailable by the FDA, but were approved and available in other countries.[36],[37]

Prop 303's opponents raise several concerns with the statute. One such concern with "Right to Try" laws is that they are not sufficiently comprehensive.[38] Bioethicist Arthur Caplan, Ph.D., argues that RTT laws' failures to address non-terminal ailments makes them "pathetically inadequate."[39] Additionally, Caplan remarks that RTT laws do not address the patient's ability to discover potential treatment options.[40] Moreover, Caplan criticizes that RTT laws do nothing to help patients pay for treatment or travel expenses to reach treatment.[41] Furthermore, Caplan is concerned that RTT laws do not require registration of physicians who may be "crooked doc[s] looking to make a fast buck off of the desperate," or to hold them accountable for harm to patients.[42]

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[31] Doe v. Bolton, 410 U.S. 179, 219 (1973).

[32] CORIERI, *supra* note 1, at 4.

[33] *See supra* note 19.

[34] SMITH ET AL., *supra* note 4, at 34-36.

[35] *Id.* at 35.

[36] *See id.*

[37] As of October, 2014, the child, Diego Morris, was alive and well, living in Phoenix, AZ with his family. *Id.*

[38] *See* Arthur Caplan, *Bioethicist: 'Right to Try' Law More Cruel Than Compassionate*, NBC NEWS (Oct. 15, 2014, 2:43 P.M.) http://www.nbcnews.com/health/health-news/bioethicist-right-try-law-more-cruel-compassionate-n108686 (referencing Arizona's upcoming "Right to Try" referendum).

[39] *Id.* (noting that blindness, dementia, and loss of mobility are not conditions covered by Prop 303).

[40] *Id.*

[41] *Id.*

[42] Caplan, *supra* note 38. (failing to mention negligence tort law medical malpractice actions).

Such criticisms are actually suggestions on how to make Prop 303 and other RTT statutes better. They are not convincing reasons that such laws should not be passed in the first place. For example, just because RTT legislation does not address patients who are disabled—but at no risk of death—does not mean that the terminally ill should be denied treatment options. Our political process can work on addressing the needs of the non-terminally ill at the same time that terminally ill patients are exercising their right to try to save their lives. Likewise, just because RTT laws do not provide financial assistance to terminally ill patients does not mean that terminally ill patients with the means to pay for treatment should not be able to do so. Opponents of RTT statutes like Caplan would let the perfect become the enemy of the good, to the detriment of patients waiting for potentially life-saving treatment.

Furthermore, the criticism that RTT laws such as Prop 303 do not hold physicians accountable for patient harm seem to ignore the well-founded doctrine of negligence tort law medical malpractice actions. If a doctor were to unethically scam patients or care for them in irresponsible ways, there is no indication that existing legal remedies would be insufficient to make patients "whole" or bring "crooked docs" to justice. Simply put, the common law doctrines of negligence and fraud pre-date the FDA regulations at issue in this case by hundreds of years.

Conversely, the reasons to support RTT legislation like Prop 303 are clear and convincing. The fact that patients die waiting for FDA approval to use potentially life-saving medicine—sometimes the very day the FDA finally grants them permission—speaks for itself. Also, the evidence that merely giving patients a choice in their treatment improves their optimism and well-being is strong justification for Prop 303. Of all of the "fundamental rights" that fall under the purview of substantive due process, it seems axiomatic that the right to try to *save your life* is one of them.

Moreover, evidence of patients and their families needing to leave the United States to seek treatment that is easily available in other parts of the world is perhaps the strongest argument that the current FDA regulatory scheme is fatally flawed. Diego Morris would have died in a hospital in Phoenix, Arizona had his parents not made the sacrifice to take him to another continent for legal, life-saving treatment.[43] While it is true that many patients would not see outcomes as positive as Diego's, they should not have to leave the continent to find out. If a terminally ill patient is going to die, it is best that their families need not travel abroad to be by their side in their final days. And, if a terminally ill patient is fortunate enough to find life-saving treatment, they

[43] SMITH ET AL., *supra* note 4, at 34-36.

should not suffer the extra costs and inconvenience of intercontinental travel to do so.

Prop 303's primary impact would be on terminally ill patients in Arizona,[44] all of whom, by definition, will die *without* treatment. Medicine, such as that offered by Prop 303 could give these patients a chance—however small that chance may be—at survival. Such patients may also derive optimism about their prospects from this treatment.[45] Moreover, studies on patient decision making indicate that patients who feel involved and in control of their treatment report improvements in satisfaction, quality of life, and well-being.[46] It is possible that terminally ill patients' only benefits from medicine are optimism, and improved satisfaction, quality of life and well-being—but are not those outcomes their right?

While Prop 303 primarily impacts patients, it affects others as well. Doctors treating patients with investigational medicine would see their paperwork burden greatly reduced from an estimated average of 100 hours under current FDA regulations.[47] These regulations are "incredibly burdensome, time-consuming, and expensive. . ." for private doctors.[48] Polling of specialty doctors—those frequently treating terminally ill patients—reveals that 73% of medical specialists believe that FDA approval delays hurt patients.[49] Additionally, medicine manufacturers may see moderate benefit from Prop 303 due to the law permitting patients to send data "relating to the use of the investigational [medicine]" to the manufacturer.[50] Lastly, Prop 303 potentially affects state actors[51] who prevent or attempt to prevent a terminally ill patient from accessing medicine by making those preventative actions grounds for a class 1 misdemeanor charge.[52]

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[44] Terminally ill patients from nearby states could conceivably travel to Arizona in the search for potentially life-saving medicine as well.

[45] *See* Richard Leff, *Unrealistic optimism in early phase new drug studies*, KEVINMD.COM, (Nov. 5, 2014, 8:40 PM), http://www.kevinmd.com/blog/2011/06/unrealistic-optimism-early-phase-drug-studies.html (suggesting that patients in new drug studies are frequently unrealistically optimistic about the effects of their treatment).

[46] *See, e.g.*, E.A.G. Joosten et al., *Systematic Review of the Effects of Shared Decision-Making on Patient Satisfaction, Treatment Adherence and Health Status*, 77 PSYCHOTHERAPY & PSYCHOSOMATICS 219, 220 (2008).

[47] Investigational New Drug Application, *supra* note 22.

[48] *See* Judy Stone, *The s**t hits the fan – FDA, INDs, and fecal microbiota transplants*, SCIENTIFIC AMERICAN (Nov. 5, 2014, 10:11 PM), http://blogs.scientificamerican.com/molecules-to-medicine/2013/05/20/the-st-hits-the-fan-fda-inds-and-fecal-microbiota-transplants/.

[49] COMPETITIVE ENTERPRISE INSTITUTE, A NATIONAL SURVEY OF ORTHOPEDIC SURGEONS REGARDING THE FOOD AND DRUG ADMINISTRATION AND THE AVAILABILITY OF NEW THERAPIES 1 (2007).

[50] *See supra* note 111.

[51] SMITH ET AL., *supra* note 4, at 33.

[52] Specifically, "officials, employees, and agents" of the State of Arizona. *Id.*

Several viable future developments exist for improving Prop 303's impact on Arizonans. Bioethicist Arthur Caplan's criticisms of RTT statutes are a wellspring of ideas to broaden the effect of Prop 303.[53] Most notably, the scope of Prop 303 could be broadened to include the disabled and chronically ill—groups conspicuously absent from the scope of Prop 303. Amendments to Prop 303 might also address challenges patients may face in traveling to and paying for treatment. Additionally, the Arizona Department of Health Services could compile a database of investigational medicine and publish it as a resource for prospective patients seeking alternative treatment.[54] Lastly, the law could be modified to require registration of physicians treating patients with investigational medicine.

In conclusion, Prop 303 would have a substantial impact on the options available to terminally ill patients, their doctors, and their families. While the critics of RTT laws like Prop 303 focus on the ways that the law is imperfect, their arguments fall short of negating the good that such legislation achieves. Prop 303 gives terminally ill patients the ability to control their medical treatment, and to stay in their homes state while doing so. Ultimately, Prop 303 takes significant steps that begin to remedy the harms caused by inadequate FDA regulation, and advance patients' fundamental rights to try to save their lives.

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[53] *See supra* text accompanying notes 38-42.

[54] A consortium of states with RTT legislation might benefit from collaboration on this effort. *See supra* text accompanying notes 13-14.

Post-Conviction DNA Testing: The Need to Make Post-Conviction DNA Testing an Automatic Constitutional Right

Kara Kerker

I. Introduction

In today's legal and scientific society, the idea of wrongful criminal convictions, resulting from untested or inadequately tested deoxyribonucleic acid ("DNA") seems unlikely. However, news agencies continue to report stories about wrongful convictions and exonerations, so they do happen.[1] There have been exponential steps in DNA science[2] and testing since the first DNA exoneration occurred in 1989.[3] The men and women convicted of crimes in which DNA evidence was available for testing but was not used in the case and subsequent conviction do not always have the advances in DNA evidence available to them.

The Innocence Project, "a national litigation and public policy organization dedicated to exonerating wrongfully convicted people through DNA testing and reforming the criminal justice system to prevent future injustice," attempts to achieve justice for those who were wrongly convicted.[4] The Innocence Project

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[1] *See, e.g.,* Mark Hamblett, *City, State Settle Suit Over Wrongful Conviction*, N.Y. L.J., (Nov. 26, 2014) http://www.newyorklawjournal.com/id=1202677475311/City-State-Settle-Suit-Over-Wrongful-Conviction?slreturn=20141025205804 (New York defendant wrongfully convicted of murder in 1995); Logan Tittle, *Michael Hanline To Be Released After Wrongful Murder Conviction* (Video), Huffington Post Live (Nov. 19, 2014), http://www.msn.com/en-us/video/watch/michael-hanline-to-be-released-after-wrongful-murder-conviction/vp-BBeLFzH (California defendant wrongfully convicted of murder in 1980); Eric Lawrence, *Imprisoned 7 Years For Rape, Detroiter Is Freed After DNA Rules Him Out*, Detroit Free Press (June 20, 2014, 7:34 PM), http://archive.freep.com/article/20140620/NEWS01/306200153/new-trial-rape-DNA-evidence (Michigan defendant wrongfully convicted of rape in 2007).

[2] Justice Ming W. Chin, Michael Chamberlain, Amy Rojas & Lance Gima, *Forensic DNA Evidence: Science and the Law*, History of forensic DNA testing § 2:1 (Westlaw, Database Updated Apr. 2014).

[3] *First DNA Exoneration: Gary Dotson*, Northwestern Law, http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/gary-dotson.html (last visited Dec. 4, 2014); *see also DNA Exonerations Nationwide*, Innocent Project, http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php (last visited Dec. 4, 2014); *Gary Dotson*, Innocent Project, http://www.innocenceproject.org/Content/Gary_Dotson.php (last visited Dec. 4, 2014).

[4] *About Us*, Innocence Project, http://www.innocenceproject.org/about/ (last visited Dec. 4, 2014).

is a non-profit legal clinic founded in 1992 in which law students handle case work under attorney supervision.[5] The Innocence Project suggests that there have been 321 post-conviction DNA exonerations since the first one took place in 1989,[6] with most occurring after 2000.[7] Of the 321 exonerated, 20 served on death row[8] and 16 were convicted of capital crimes but were not sentenced to death.[9] Exonerations occurred in 38 states.[10] Texas ranks the highest among states with post-conviction DNA exonerations with 49;[11] Illinois follows with 43;[12] and New York with 29.[13]

There are several possible reasons for a wrongful conviction, some of which include: systemic procedural issues, ineffective assistance of counsel, suggestive or false eyewitness testimony, coerced confessions, fraudulent or incompetent laboratory analysis, prosecutorial misconduct, mistaken identification, false confessions, biased interpretation of DNA evidence, invalid presentation of DNA evidence by the prosecutor to the jury, or fabrication of evidence.[14] These reasons for a wrongful conviction are all serious and can lead to a long conviction for an individual who is actually innocent of the crime he or she is charged with committing. Because these errors have a substantial impact on individuals charged with a crime, there is a great need to ensure those individuals have a way to receive relief from wrongful convictions.

A defendant may obtain a review of his or her case by filing an appeal after conviction and sentencing.[15] The last possibility the defendant has to challenge

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[5] *Id.*

[6] *DNA Exonerations Nationwide*, *supra* note 3.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *DNA Exonerations Nationwide*, *supra* note 3; *see also Exonerations by State*, INNOCENT PROJECT, http://www.innocenceproject.org/news/StateView.php (last visited Dec. 4, 2014) (showing an interactive map of the United States providing the number of post-conviction DNA exonerations by state).

[11] *Texas: Exonerations by State*, INNOCENT PROJECT, http://www.innocenceproject.org/news/state.php?state=tx (last visited Dec. 4, 2014); *see also Innocence Project of Texas: At a Glance*, INNOCENT PROJECT, http://www.ipoftexas.org/at-a-glance (last visited Dec. 4, 2014).

[12] *Illinois: Exonerations by State*, INNOCENT PROJECT, http://www.innocenceproject.org/news/state.php?state=il (last visited Dec. 4, 2014).

[13] *New York: Exonerations by State*, INNOCENT PROJECT, http://www.innocenceproject.org/news/state.php?state=ny (last visited Dec. 4, 2014).

[14] Kimberly Cogdell Boies, *Misuse of DNA Evidence Is Not Always A "Harmless Error": DNA Evidence, Prosecutorial Misconduct, and Wrongful Conviction*, 17 TEX. WESLEYAN L. REV. 403, 435-36 (2011); *see also DNA Exonerations Nationwide*, *supra* note 3.

[15] *Post Conviction Remedies, Part I: General Principles*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_postconviction_blk.html (last visited Dec. 4, 2014); s*ee generally*, *The Appeals Process*, UNITED STATES COURTS, http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/TheAppealsProcess.aspx (last visited Dec. 4, 2014).

his or her conviction is to petition for Post-Conviction Relief, also known as PCR.[16] PCR rules impose restrictions on when a petitioner may file,[17] when additional pleadings must be filed,[18] and reasons the petitioner may file, such as: the conviction or sentence violated the United States Constitution or the constitution of the state where the judgment was rendered; the conviction occurred under a statute that violated the United States Constitution or the constitution of the state where the judgment was rendered or the conduct was constitutionally protected; the court did not have jurisdiction over the person or subject matter; the sentence imposed exceeded the maximum allowed; there are new material facts that have come to light that were not available during the original proceedings that require the administration of a new proceeding; and/or there is a significant change in the law that requires retroactive application to the conviction or sentence.[19]

The legal process is long, and it often takes significant time for the defendant to even reach the PCR stage. Some states require defendants to exhaust all appellate rights before submitting a petition for PCR,[20] and even then only one PCR petition can be filed asserting all PCR claims.[21] All fifty states have Post-Conviction DNA Testing Rules and/or statutes,[22] but many are limited in scope and substance.[23] Arizona's Post-Conviction DNA Testing statute allows a person convicted of and sentenced for a felony offense to request a DNA test at any time if certain requirements are met.[24] In most states that have Post-Conviction DNA Testing Rules or statutes, the defendant must petition the court (or file a request) for a Post-Conviction DNA test;[25] it is not an automatic right.

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[16] *Post Conviction Remedies, Part I: General Principles, supra* note 15; *see also* 18 U.S.C. § 2254 (2006); *see also* Ariz. R. Crim. P. 32.1.

[17] Ariz. R. Crim. P. 32.4, 32.9; *see also* 18 U.S.C. § 2254 (2006); Tamayo v. Stephens, 740 F.3d 986 (5th Cir. 2014) *cert. denied,* 134 S. Ct. 1021, 187 L. Ed. 2d 867 (time for appeal unreasonable); U.S. ex rel. Bowen v. Mazurkiewicz, 315 F. Supp. 789 (E.D. Pa. 1970) (untimeliness did not establish exhaustion of state remedies); *see* Edward Conners, Thomas Lundregan, Neal Miller & Tom McEwen, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, National Institute of Justice Research Report, 59-60 (June 1996), https://www.ncjrs.gov/pdffiles/dnaevid.pdf.

[18] Ariz. R. Crim. P. 32.6.

[19] *Post Conviction Remedies, Part I: General Principles, supra* note 15.

[20] *Access To Post-Conviction DNA Testing*, Innocent Project, www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php (last visited Dec. 4, 2014).

[21] *Post Conviction Remedies, Part I: General Principles, supra* note 15.

[22] *Access To Post-Conviction DNA Testing*, supra note 20.

[23] *Id.*

[24] Ariz. Rev. Stat. Ann. § 13-4240 (2000); *see also* Ariz. R. Crim. P. 32.12 (text of rule effective Jan. 1, 2015).

[25] *See* Innocence Project, http://www.innocenceproject.org (last visited Dec. 4, 2014) (providing analysis of post-conviction DNA testing access laws in each state and links to each state's post-conviction relief statute).

Arizona has overturned three convictions based on exonerating DNA evidence.[26] Even serving one day of a sentence from a wrongful conviction is an injustice; serving one day of a sentence for a wrongful conviction on death row is an even greater injustice. Requiring a defendant on death row to petition for Post-Conviction DNA testing, rather than requiring testing or retesting of DNA evidence in the defendant's automatic appeal, is an inadequate execution of the legal process. DNA testing and/or retesting of specific evidence in Arizona should be automatically ordered for offenders on death row in an attempt to exonerate the offender and to ensure the trial court did not err in finding that the offender committed the offense in question.

II. WHAT IS DNA?

DNA is the abbreviation for deoxyribonucleic acid, the biological and hereditary material found in humans and almost all other organisms.[27] Nearly every cell in a person's body has the same DNA;[28] however, there are a few identifiers that make a person unique. There are approximately 3 billion bases in human DNA with over 99 percent of those bases being the same in all humans.[29] According to the National Institute of Justice, "only one-tenth of a single percent of DNA . . . differs from one person to the next."[30] Scientists are able to distinguish these small differences by analyzing human biological products that contain DNA to produce a DNA profile unique to an individual.[31] All biological evidence can be subjected to DNA testing, but not all biological evidence is actually subject to testing.[32] Scientists use samples from blood, bone, hair, skin, fingerprints, and other body tissues to establish a profile.[33]

In a criminal case, scientists obtain biological evidence samples containing DNA from crime-scene evidence and a suspect, extract the DNA, and analyze it for the presence of a specific set of DNA markers to produce a unique DNA profile.[34] According to the National Institute of Justice, "[t]he general proce-

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[26] *Arizona: Exonerations by State*, INNOCENT PROJECT, http://www.innocenceproject.org/news/state.php?state=AZ (last visited Dec. 4, 2014).

[27] *What is DNA*, GENETICS HOME REFERENCE HANDBOOK, YOUR GUIDE TO UNDERSTANDING GENETIC CONDITIONS, http://ghr.nlm.nih.gov/handbook.pdf, *reprinted from* http://ghr.nlm.nih.gov/handbook/basics/dna (last visited Dec. 4, 2014).

[28] *Id.*

[29] *Id.*

[30] *DNA Evidence Basics,* NATIONAL INSTITUTE OF JUSTICE, http://www.nij.gov/topics/forensics/evidence/dna/basics/Pages/welcome.aspx (last visited Dec. 4, 2014).

[31] *Id.*

[32] *DNA Evidence: Basics of Identifying, Gathering and Transporting*, NATIONAL INSTITUTE OF JUSTICE http://www.nij.gov/topics/forensics/evidence/dna/basics/Pages/identifying-to-transporting.aspx (last visited Dec. 4, 2014).

[33] *DNA Evidence Basics, supra* note 30.

[34] *Id.*

dure [for analyzing DNA] includes: 1) the isolation of the DNA from an evidence sample containing DNA of unknown origin, and generally at a later time, the isolation of DNA from a sample (e.g., blood) from a known individual; 2) the processing of the DNA so that test results may be obtained; 3) the determination of the DNA test results (or types), from specific regions of the DNA; and 4) the comparison and interpretation of the test results from the unknown and known samples to determine whether the known individual is not the source of the DNA or is included as a possible source of the DNA."[35]

If the sample's profile does not match the individual's provided sample, the individual is excluded as a possible contributor to the DNA sample at the crime scene.[36] If the patterns found in the profile of the sample match, the suspect may have contributed the evidence sample.[37] Additional testing will continue only to attempt to exclude that individual as a possible source of the DNA; once an individual or sample is excluded, no further testing on the sample occurs.[38] There is a point at which the tests conducted have excluded virtually all of the world's population, and an individual cannot be excluded as the source of the DNA by any further testing.[39] At this point, the unique identification of that individual as the source of the DNA sample obtained from the crime scene has been achieved.[40] There are situations when the testing reveals inconclusive results. Results may be inconclusive for a variety of reasons, such as situations where no results or only partial results are obtained from the sample due to the limited amount of suitable human DNA, or situations where results are obtained from an unknown crime scene sample but there are no samples from known individuals available for comparison.[41]

Scientists use Short Tandem Repeat ("STR") technology to evaluate specific regions (loci) found on DNA samples.[42] STR testing is the current standard in the field of forensic DNA analysis.[43] STR regions that are analyzed for forensic testing are of a discriminatory nature, which allows distinction between one DNA profile and another.[44] STR testing can be achieved with less

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[35] *DNA Evidence: Basics of Analyzing*, NATIONAL INSTITUTE OF JUSTICE, http://www.nij.gov/topics/forensics/evidence/dna/basics/Pages/analyzing.aspx (last visited Dec. 4, 2014).

[36] *DNA Evidence Basics, supra* note 30.

[37] *Id.*

[38] *DNA Evidence: Basics of Analyzing, supra* note 35.

[39] *Id.*

[40] *Id.*

[41] *DNA Evidence Basics: Possible Results from Testing*, NATIONAL INSTITUTE OF JUSTICE, http://www.nij.gov/topics/forensics/evidence/dna/basics/Pages/possible-results.aspx (last visited Dec. 4, 2014).

[42] *DNA Evidence: Basics of Analyzing, supra* note 35.

[43] Chin, *supra* note 2.

[44] *DNA Evidence: Basics of Analyzing, supra* note 35.

than half a nanogram,[45] representing fewer than one hundred cells.[46] For example, the likelihood that any two individuals (except identical twins) will have the same 13-loci DNA profile can be as high as 1 in 1 billion or greater.[47] The FBI has chosen thirteen specific STR loci to serve as the standard for the Combined DNA Index System ("CODIS").[48] The purpose of establishing a core set of STR loci is to ensure that all forensic laboratories can establish uniform DNA databases and, more importantly, share valuable forensic information.[49] CODIS is the generic term for the world's largest database of known offender DNA records,[50] accessible by law enforcement agencies to assist in the identification of DNA samples belonging to possible criminal suspects to ensure the confidentiality of the DNA record required by the DNA Identification Act of 1994.[51] CODIS does not store personal identifying information such as name, Social Security number, or date of birth.[52] The only information stored in CODIS is (1) the DNA profile, which is the set of identification characteristics or numerical representation at each of the various loci analyzed; (2) the Agency Identifier of the agency submitting the DNA profile; (3) the Specimen Identification Number, which is generally a number assigned sequentially at the time of sample collection that does not correspond to the individual's Social Security number, criminal history identifier, or correctional facility identifier; and (4) the DNA laboratory personnel associated with a DNA profile analysis.[53] The FBI uses CODIS to manage its National DNA Index System ("NDIS").[54] Federal, state, and local participating forensic laboratories con-

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[45] Chin, *supra* note 2 (a nanogram is one billionth of a gram).

[46] *Id.*

[47] *DNA Evidence: Basics of Analyzing, supra* note 35.

[48] *Id.*

[49] *Id.*

[50] *See* W. Mark Dale, Owen Greenspan & Donald Orokos, *DNA Forensics: Expanding the Uses and Information Sharing*, THE NATIONAL CONSORTIUM FOR JUSTICE, 9 (Sept. 2006), *available at* http://www.bjs.gov/content/pub/pdf/dnaf.pdf (as of June 2006 CODIS contained more than 3.3 million convicted offender profiles).

[51] 42 U.S.C. § 14132 (2006).

[52] *The FBI and DNA: A Look at the Nationwide System that Helps Solve Crimes (Part I)*, THE FEDERAL BUREAU OF INVESTIGATION, http://www.fbi.gov/news/stories/2011/november/dna_112311 (last visited Dec. 4, 2014).

[53] *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System*, THE FEDERAL BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet (last visited Dec. 4, 2014).

[54] *The FBI and DNA: A Look at the Nationwide System that Helps Solve Crimes (Part I), supra* note 52.

tribute DNA profiles to NDIS for CODIS manage.[55] DNA from crime scenes is then compared to the profiles stored in CODIS.[56]

It is important to maintain the chain of custody and to document those who have had physical possession of the evidence to ensure the evidence being analyzed has not been contaminated.[57] If laboratory analysis reveals that DNA evidence was contaminated, it may be necessary to identify persons who have handled that evidence to exclude them as possible suspects.[58] Fewer people handling the evidence better preserves the chain of custody and ensures the evidence remains clear of contamination.[59] CODIS also offers safeguards to ensure that the DNA profiles stored therein are not hacked or accessed by an individual lacking access approval. The computer terminals/servers containing the CODIS software are located in a physically secure space at a criminal justice agency.[60] Access to CODIS is restricted to criminal justice agencies for law enforcement identification purposes.[61] Defendants are also able to access the samples and analyses performed in connection with their case(s).[62] The unauthorized disclosure of DNA data in the National DNA database is subject to a criminal penalty not to exceed $250,000, or imprisonment for a period of not more than one year.[63] Federal law also requires participating laboratories that contribute DNA records to NDIS to comply with the Quality Assurance Standards ("QAS") issued by the FBI Director.[64]

To best preserve DNA evidence, store it in a cold environment.[65] DNA from blood and semen stains more than twenty years old has been analyzed successfully using polymerase chain reactions.[66] STR testing methods use polymerase chain reactions to amplify and produce millions of copies for each DNA segment of interest, and thus permit very minute amounts of DNA to be

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55 *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System, supra* note 53.

56 *DNA Evidence Basics, supra* note 30.

57 *DNA Evidence: Basics of Identifying, Gathering and Transporting, supra* note 32.

58 *Id.*

59 *Id.*

60 *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System, supra* note 53.

61 *Id.*

62 *Id.*

63 42 U.S.C. § 14135(e) (2004); *see also Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System, supra* note 53.

64 *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System, supra* note 53.

65 *DNA Evidence: Basics of Identifying, Gathering and Transporting, supra* note 32; *See also* Chin, *supra* note 2.

66 *DNA Evidence: Basics of Identifying, Gathering and Transporting, supra* note 32.

examined.[67] Samples generally considered unsuitable for testing with current techniques include embalmed bodies (with the possible exception of bone or plucked hairs), pathology or fetal tissue samples that have been immersed in formaldehyde or formalin for more than a few hours (with the notable exception of pathology paraffin blocks and slides), and urine stains.[68]

III. DNA Evidence in the Courtroom

DNA testing is a powerful technology. Prosecutors use DNA testing to link a suspect to a violent crime, identify serial crimes, reconstruct accidents, and exculpate the innocent.[69] DNA testing can be used to protect the public, but it can also be used against defendants to devastating effect. It is important, then, that DNA evidence is used appropriately in the courtroom.

The first instance where a United States court allowed DNA evidence to be presented at trial to convict a defendant occurred in Florida in a rape case in 1988.[70] The court ruled that in light of a new technology being introduced, the crucial question was whether the probative value of the testimony and test is substantially outweighed by its potential prejudicial effect.[71] In *State v. Andrews*, the court admitted DNA evidence, and said that unlike fingerprint, footprint or bite mark evidence, DNA evidence is highly technical, incapable of observation, and requires the jury to either accept or reject the scientist's conclusion.[72] The Florida District Court of Appeals stated that the "evidence derived from DNA print identification appears based on proven scientific principles."[73] As such, the probative value of a DNA test substantially outweighs the potential prejudicial effect; however, the jury determines the credibility and weight given to a DNA test.[74]

DNA evidence, like other evidence presented at trial, must be offered in accordance with the applicable rules of evidence[75]. Two standards determine how to address evidence resulting from a new scientific method[76]: the *Frye*

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[67] *DNA Evidence: Basics of Analyzing, supra* note 35.

[68] *DNA Evidence: Basics of Identifying, Gathering and Transporting, supra* note 32.

[69] Dale et al., *supra* note 50 (as of June 2006, CODIS contained more than 3.3 million convicted offender profiles).

[70] Andrews v. State, 533 So. 2d 841 (Fla. Dist. Ct. App. 1989).

[71] Andrews, 533 So. 2d at 849.

[72] *Id.* at 850.

[73] *Id.*

[74] *Id.*

[75] *See, e.g.,* Fed. R. Evid. 702 (establishing whether expert testimony is admissible where testimony is based on scientific data. Testimony based on reliable principles and methods, and expert has applied the principles and methods reliably to the facts of the case).

[76] Michael P. Luongo, *Post-Conviction Due Process Right to Access DNA Evidence: Dist. Attorney's Office v. Osborne,* 129 S. Ct. 2308 (2009), 29 Temp. J. Sci. Tech. & Envtl. L. 127 (Spring 2010).

standard[77] and the *Daubert* standard.[78] The *Frye* standard requires that the evidence from a new scientific method "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[79] The *Daubert* standard, which followed and replaced the *Frye* standard, allows admission of evidence from a new scientific method when: (1) the technique can and has been tested; (2) the technique has been peer reviewed and published; (3) the known or potential rate of error is low; (4) standards controlling the technique's operation exist and are maintained; and (5) the technique is generally accepted within the scientific community.[80] The federal standard for admitting evidence that is a product of a new scientific method or technique is the *Daubert* standard.[81] Arizona has recently adopted the *Daubert* standard[82] as well, though some courts still use the *Frye* standard[83] when evaluating the admissibility of evidence procured from a new scientific technique. In today's courtroom, DNA evidence is generally admissible under the *Daubert* standard as long as the evidence was properly collected and analyzed.[84]

There are several purposes for which DNA is presented at trial. DNA evidence can identify the source of the sample; place a known individual at a crime scene, in a home, or in a room where the suspect claimed not to have been; refute a claim of self-defense; put a weapon in the suspect's hand; or refute an alibi.[85] DNA evidence can also exclude a suspect who could otherwise be charged with and falsely convicted of a crime.[86] Additionally, using

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[77] *See* Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (establishing "general acceptance" test for admission of new scientific evidence).

[78] *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 588-89, 593-94 (1993) (holding *Frye* test was superseded by Federal Rule of Evidence 702, and adopting five factors for determining admissibility of scientific evidence under Rule 702).

[79] Luongo, *supra* note 76; *see also Frye,* 293 F. at 1014.

[80] *Daubert,* 509 U.S. at 588-89, 593-94; *see also* FED. R. EVID. 702 advisory committee's note (Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony).

[81] FED. R. EVID. 702 advisory committee's note. (Rule 702 has been amended in response to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)).

[82] Brian Pollock & Tore Mowatt-Larssen, *Arizona's Adoption of Federal Rule of Evidence 702: Life under the New, Old, Daubert Standard*, 48-MAR ARIZ. ATT'Y 42 (March 2012).

[83] Luongo, *supra* note 76.

[84] Luongo, *supra* note 76.

[85] *DNA Evidence: Basics of Identifying, Gathering and Transporting, supra* note 32.

[86] *The Case for Innocence: The DNA "Wars" Are Over*, FRONITLINE, http://www.pbs.org/wgbh/pages/frontline/shows/case/revolution/wars.html (last visited Dec. 4, 2014), *excerpted from Convicted by Juries, Exonerated by Science,* THE NATIONAL INSTITUTE OF JUSTICE, (1996) *available at* https://www.ncjrs.gov/pdffiles/dnaevid.pdf; *see also* NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, DNA TECHNOLOGY IN FORENSIC SCIENCE, 156 (National Academy Press, 1992) (cited as NRC report); *see also* MCKENNA, JUDITH, J. CECIL & P. COUKOS, REFERENCE GUIDE ON FORENSIC DNA EVIDENCE, (1994) (reference Manual on Scientific Evidence, Federal Judicial Center).

DNA evidence in both the pretrial and trial stages of the case enables both police and prosecutors to save money in the long run by focusing investigations in a direction more likely to produce an appropriate suspect.[87]

DNA evidence can be a powerful tool for either party if it is used properly. Because of the importance of DNA testing to both parties in a criminal case and the risks associated with the use of DNA testing, it is important to ensure that DNA evidence is not misused. Failure by the court and its representatives to take the importance and risks of DNA evidence into account can lead to wrongful convictions.

IV. Reasons for Wrongful Convictions

Wrongful convictions can occur for several different reasons. The primary causes of wrongful conviction are systemic procedural issues including ineffective assistance of counsel, suggestive eyewitness testimony, coerced confessions, and fabrication of evidence.[88] These procedural issues can result in serious consequences for criminal defendants.

Eyewitness identification mistakes are the leading cause of wrongful convictions.[89] However, in cases lacking DNA evidence, eyewitness testimony can be the most compelling evidence the state has against the defendant.[90] In some cases, the police may inadvertently provide subtle cues to the eyewitness when presented with a photo or in-person line up that indicates the person the police have identified as the suspect.[91] Additionally, eyewitness identification is often persuasive to a jury,[92] who may be swayed by the mere fact that there was an "eyewitness." Despite growing proof that eyewitness testimony is often inaccurate, attorneys continue to base their cases on such identification.[93]

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[87] Edward Conners, Thomas Lundregan, Neal Miller & Tom McEwen, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, National Institute of Justice Research Report, 60 (1996), https://www.ncjrs.gov/pdffiles/dnaevid.pdf.

[88] Boies, *supra* note 14.

[89] *Id.*

[90] Conners et al., *supra* note 87, at 55.

[91] *Eyewitness Identification Reform*, Innocent Project, http://www.innocenceproject.org/Content/Eyewitness_Identification_Reform.php (last visited Dec. 4, 2014).

[92] *Eyewitness Misidentification*, Innocent Project, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited Dec. 4, 2014).

[93] *Eyewitness Identification Reform, supra* note 91 (eyewitness testimony accounted for approximately 72% of the 321 wrongful convictions in the United States overturned by post-conviction DNA evidence).

Improper or unreliable forensic science, also known as "junk science," is the second leading cause of wrongful convictions.[94] Although the scientific world is always changing, and scientists rehabilitate previously unreliable scientific methods regularly, "junk science" is still a problem because it has not been subject to the same rigorous scientific evaluation as other methods.[95] For instance, bite mark comparisons (discussed below) are a kind of "junk science."[96] Despite the notion of "junk science," juries tend to believe the science that is presented to them because they are left with the impression that the evidence is more scientific than it actually is,[97] or they give it more weight than it deserves because "experts" offer it.[98]

Fabrication of evidence resulting from prosecutorial misconduct has been identified in many exoneration cases – the prosecutor may influence eyewitness identification and fabrication as well as other mishandling of evidence.[99] In some instances, scientists fabricated evidence in the form of test results, and reported results when no tests were conducted or concealed test results that were favorable to defendants.[100] Experts can also mislead the jury while on the stand by embellishing findings because the judge and/or jury lacked the background knowledge to know the testimony was not entirely correct.[101]

False confessions have also contributed to wrongful convictions.[102] The Innocence Project has identified several reasons why a defendant may confess to a crime he or she did not commit. Some of those include a combination of duress, coercion, intoxication, diminished capacity, mental impairment, ignorance of the law, fear of violence, the actual infliction of harm, the threat of a harsh sentence, and misunderstanding the situation.[103] To prevent false confessions, the Innocence Project has suggested that all interrogations and subse-

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[94] *Unreliable or Improper Forensic Science*, INNOCENT PROJECT, http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php (last visited Dec. 4, 2014) (unreliable or improper forensic science contributed to 49% of DNA exonerations).

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Unreliable or Improper Forensic Science: Forensic Science Misconduct*, INNOCENT PROJECT, http://www.innocenceproject.org/understand/Forensic-Science-Misconduct.php (last visited Dec. 4, 2014); *see* Conners et al., *supra* note 87, at 55.

[99] Boies, *supra* note 14.

[100] *Unreliable or Improper Forensic Science, supra* note 94.

[101] *Unreliable or Improper Forensic Science: Forensic Science Misconduct, supra* note 98.

[102] *False Confessions*, INNOCENT PROJECT, http://www.innocenceproject.org/understand/False-Confessions.php (last visited Dec. 4, 2014) (false confessions contributed to 30% of wrongful convictions).

[103] *Id.*

quent confessions be recorded.[104] Another suggestion is for police to avoid leading questions when interrogating a suspect.[105]

Additionally, the National Institute for Justice conducted a federally funded study[106] to determine why some innocent defendants were convicted while others were released. The researchers identified ten factors contributing to a wrongful conviction: a younger defendant, a criminal history, a weak prosecution case, prosecution withheld evidence, lying by a non-eyewitness, unintentional witness misidentification, misinterpreting forensic evidence at trial, a weak defense, defendant offered a family witness, and a "punitive" state culture.[107]

Many of the reasons that lead to wrongful convictions of defendants overlap with each other. The need for DNA testing in cases where DNA is available is crucial to prevent wrongful convictions from occurring. More stringent guidelines for collecting, preserving, analyzing, and presenting evidence could minimize the amount of wrongful convictions.

V. Federal Post-Conviction DNA Testing

Federal law allows for an applicant to petition the federal court for DNA testing following a sentence of imprisonment or death pursuant to a conviction for a federal or state criminal offense.[108] The federal courts allow an individual sentenced to prison or death to submit a motion to the federal court in the jurisdiction where the conviction occurred requesting DNA testing; however, the sentenced individual or applicant must present an assertion of innocence before the court will grant an order for post-conviction DNA testing.[109] Federal law requires the court that entered the judgment of conviction to order the DNA testing of the specified evidence.[110] If the individual is convicted of a state criminal offense, when petitioning the federal court for a DNA test the individual must show that there is no adequate remedy under state law to permit DNA testing of the specified evidence.[111] Federal law also requires the individual convicted of a state criminal offense to have exhausted all remedies

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104 *Id.*

105 Conners et al., *supra* note 87, at 55.

106 *Predicting and Preventing Wrongful Convictions*, National Institute of Justice, http://nij.gov/topics/justice-system/wrongful-convictions/Pages/predicting-preventing.aspx (quoting *Predicting Erroneous Convictions: A Social Science Approach to Miscarriages of Justice*) (last visited Dec. 4, 2014).

107 *Id.*

108 18 U.S.C. § 3600(a) (2004).

109 *Id.*

110 *Id.*

111 18 U.S.C. §3600(a)(1)(B)(ii)(I) (2004).

available under that state's law for requesting DNA testing during trial or following conviction and sentencing.[112]

If an individual is convicted of a federal offense in federal court, a showing that all federal remedies have been exhausted is not necessary to petition for DNA testing. However, the individual requesting DNA testing must submit a written motion to the federal court, and that federal court must find that all ten scenarios outlined in the United States Code for Post-Conviction DNA testing apply before an order for DNA testing is given.[113] First, the court must find that the applicant asserted that he or she is actually innocent of the federal offense for which the applicant is serving a prison or death sentence, or that he or she is actually innocent of another federal offense (if evidence of that offense was admitted during a federal death sentencing hearing) and that exoneration would entitle the applicant to a reduced or new sentence.[114]

Next, the court must find that the specified evidence to be tested was secured in relation to the investigation or prosecution of the federal offense in question.[115] The specified evidence to be tested must not have been previously subjected to DNA testing at any point, and the applicant must not have knowingly and voluntarily waived the right to request DNA testing of that evidence, or knowingly failed to request DNA testing of that evidence in a prior motion for post-conviction DNA testing.[116] In lieu of finding that the evidence had not been previously tested, the court could instead find that the specified evidence to be tested was previously subjected to DNA testing, but that the applicant is requesting DNA testing using a new method or technology that is substantially more probative than the prior DNA testing method.[117]

The court must verify the chain of custody of the specified evidence to ensure that it remained in the possession of the government under "under conditions sufficient to ensure that such evidence has not been substituted, contaminated, tampered with, replaced, or altered."[118] The court must find that the proposed DNA testing is not outside the scope of the offense for which the evidence is being tested and that the testing uses scientifically sound methods that are consistent with accepted forensic practices.[119] In the applicant's motion, he or she must identify a theory of defense that is not inconsistent with an affirmative defense presented at trial and that would establish the actual

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112 18 U.S.C. §3600(a)(1)(B)(ii)(II) (2004).
113 18 U.S.C. § 3600(a)(1)-(10) (2004).
114 18 U.S.C. § 3600(a)(1) (2004).
115 18 U.S.C. § 3600(a)(2) (2004).
116 18 U.S.C. § 3600(a)(3)(A) (2004).
117 18 U.S.C. § 3600(a)(3)(B) (2004).
118 18 U.S.C. § 3600(a)(4) (2004).
119 18 U.S.C. § 3600(a)(5) (2004).

innocence the applicant.[120] The identity of the trial.[121] The court must find that testing of the specified evidence may produce new material evidence that would support the applicant's theory of defense and raise a reasonable probability that the applicant did not commit the offense.[122] The applicant must promise to provide a DNA sample for purposes of comparison in the requested testing.[123]

Finally, there is a rebuttable presumption that the applicant's motion was made timely if the motion was made within 60 months of enactment of the Justice For All Act of 2004 or within 36 months of conviction, whichever comes later, unless the motion is based solely on information already submitted and denied or is made only to cause delay or harass.[124] If the applicant's motion was not submitted in a timely manner, the court may consider the motion timely if it finds that the applicant's incompetence substantially contributed to the delay in submitting the motion; the evidence is newly discovered DNA evidence; the motion was not based only on the applicant's claim of innocence and that denial of the motion would be a manifest of injustice; or the applicant shows some other good cause.[125]

Federal law requires the court to find all of the above listed circumstances before the court will grant an order for DNA evidence testing. Applicants are required to go to great lengths to get the federal court to consider testing the specified evidence.

VI. ARIZONA'S POST-CONVICTION DNA TESTING

Arizona law provides an avenue for a defendant seeking post-conviction DNA testing.[126] Arizona currently allows a person who was convicted of and sentenced for a felony offense to request a DNA test from the convicting court at any time;[127] however, a request for DNA testing is not granted unless certain conditions are met. The court may order a test of any evidence that is in the possession or control of the court or that state, which is related to the investigation or prosecution that resulted in the judgment of conviction, and/or that may

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120 18 U.S.C. § 3600(a)(6) (2004).

121 18 U.S.C. § 3600(a)(7) (2004).

122 18 U.S.C. § 3600(a)(8) (2004).

123 18 U.S.C. § 3600(a)(9) (2004).

124 18 U.S.C. § 3600(a)(10)(A) (2004).

125 18 U.S.C. § 3600(a)(10)(B) (2004).

126 ARIZ. REV. STAT. ANN. § 13-4240 (2000); *see* ARIZ. R. CRIM. P. 32.12 (text of rule effective Jan. 1, 2015).

127 ARIZ. REV. STAT. ANN. § 13-4240(A) (2000); *see* ARIZ. R. CRIM. P. 32.12(a) (text of rule effective Jan. 1, 2015).

contain biological evidence.[128] When considering the petition, the court shall order DNA testing if it finds a reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing;[129] the evidence is still in existence, the evidence is in a condition that allows DNA testing to be conducted;[130] and the evidence was not previously subjected to DNA testing, or was not subjected to the DNA testing that is now requested and that may resolve an issue not resolved by the previous DNA testing.[131] Additionally, the court may order DNA testing if it finds a reasonable probability exists that either: the petitioner's verdict or sentence would have been more favorable if the results of DNA testing had been available at the trial leading to the judgment of conviction;[132] or DNA testing will produce exculpatory evidence;[133] the evidence is still in existence and is in a condition that allows DNA testing to be conducted; and the evidence was not previously subjected to DNA testing or was not subjected to the DNA testing that is now requested and that may resolve an issue not resolved by the previous DNA testing.[134]

Without filing a PCR petition, a petitioner in Arizona may not request discovery of DNA evidence.[135] DNA evidence discovery requests are granted at the trial judge's discretion. In Arizona, discovery may be granted in PCR proceedings upon a showing of good cause, which is established if the defendant has alleged a colorable claim.[136] A colorable claim is one that, if its allegations are true, might have changed the case's outcome.[137] In order to assert a colorable claim, a petitioner must show that the evidence appears on its face to have existed at the time of trial but was discovered after trial; the motion must allege facts from which the court could conclude the defendant was diligent in discovering those facts and bringing them to the court's attention; the evidence must

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[128] ARIZ. REV. STAT. ANN. § 13-4240(A) (2000); *see* ARIZ. R. CRIM. P. 32.12(a) (text of rule effective Jan. 1, 2015).

[129] ARIZ. REV. STAT. ANN. § 13-4240(B)(1) (2000); *see* ARIZ. R. CRIM. P. 32.12(c) (text of rule effective Jan. 1, 2015).

[130] ARIZ. REV. STAT. ANN. § 13-4240(B)(2) (2000); *see* ARIZ. R. CRIM. P. 32.12(c) (text of rule effective Jan. 1, 2015).

[131] ARIZ. REV. STAT. ANN. § 13-4240(B)(3) (2000); s*ee* ARIZ. R. CRIM. P. 32.12(c) (text of rule effective Jan. 1, 2015).

[132] ARIZ. REV. STAT. ANN. § 13-4240(C)(1)(a) (2000); s*ee* ARIZ. R. CRIM. P. 32.12(d) (text of rule effective Jan. 1, 2015).

[133] ARIZ. REV. STAT. ANN. § 13-4240(C)(1)(b) (2000); s*ee* ARIZ. R. CRIM. P. 32.12(d) (text of rule effective Jan. 1, 2015).

[134] ARIZ. REV. STAT. ANN. § 13-4240(C)(3) (2000); s*ee* ARIZ. R. CRIM. P. 32.12(d) (text of rule effective Jan. 1, 2015).

[135] Canion v. Cole, 115 P.3d 1261, (2005).

[136] *Id.*

[137] State v. Krum, 903 P.2d 596, (1995).

not simply be cumulative or impeaching; the evidence must be relevant to the case; and the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.[138]

Arizona's post-conviction DNA testing statute (which will be codified into the Arizona Rules of Criminal Procedure in 2015) is inadequate. The statute is inadequate because the convicted individual must file a petition requesting DNA testing that convinces the court that he or she meets the statutory requirements. Additionally, the post-conviction DNA testing statute requires that there is existing DNA evidence available to test; it does not cover situations when DNA is newly discovered.[139] Newly discovered evidence falls under the general PCR statute.[140] The general PCR statute states that a petitioner may only file a petition asserting issues that had not already be addressed on appeal.[141] One other problem with Arizona's post-conviction DNA testing statute is that there is no mechanism for a petition to appeal a denial of a DNA testing request;[142] many other DNA testing statutes contain such a mechanism.[143]

When faced with a wrongful conviction, the process of applying for post-conviction DNA testing and the possibility of denial creates a long, arduous battle for the accused. There are many reasons that a petitioner's request could be denied. In a situation where a petitioner's life hangs in the balance, this is too great a risk. The post-conviction DNA testing statute in Arizona should allow for automatic testing of exculpatory DNA evidence without requiring a formal request.

VII. Post-Conviction DNA Exonerations in Arizona

According to the Innocence Project, Arizona has had three convictions overturned due to DNA exonerating evidence: Larry Youngblood, Ray Krone,

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[138] State v. Bilke, 781 P.2d 28, 29–30, (1989). *See also* State v. Donald, 10 P.3d 1193, 198 Ariz. 406 (Ct. App. 2000), *cert. denied*; State v. Bowers, 966 P.2d 1023, 192 Ariz. 419 (Ct. App. 1998), *cert. denied*.

[139] *See* Ariz. Rev. Stat. Ann. § 13-4240 (2000).

[140] *See* State v. Saenz, 4 P.3d 1030, 1032, 197 Ariz. 487, 489 (Ct. App. 2000); Ariz. R. Crim. P. 32.1(e) (to be entitled to post-conviction relief based on newly discovered evidence, the defendant must show that the evidence was discovered after trial although existed before trial; the evidence could not have been discovered and produced at trial or appeal through reasonable diligence; the evidence is neither solely cumulative nor impeaching; the evidence is material; and the evidence probably would have changed the verdict or sentence).

[141] *Instructions for Post-Conviction Relief Form #302*, The Judicial Branch of Arizona, Maricopa County, *available at* http://www.clerkofcourt.maricopa.gov/faxondemand/302.pdf.

[142] *See* Ariz. R. Crim. P. 32.12 (text of rule effective Jan. 1, 2015).

[143] *Access to Post Conviction DNA Testing*, Innocent Project, http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php (last visited Dec. 4, 2014).

and John Kenneth Watkins.[144] The Arizona Justice Project ("Justice Project"), Arizona's version of the Innocence Project, correctly stated "there is no greater punishment than that imposed on the innocent."[145] In 1998, the Justice Project became the fifth organization created in the United States to help inmates overturn wrongful convictions.[146] The Justice Project is a not-for-profit, primarily volunteer-based, organization that pairs a supervisor or lawyer with a law student from one of three Arizona law schools: Arizona Summit Law School, Arizona State University Sandra Day O'Connor College of Law, and/or the University of Arizona James E. Rogers College of Law.[147] The Justice Project has reviewed over 4,000 cases thus far;[148] however, most of the cases the Justice Project handles do not involve exonerating DNA evidence.[149] From 2008-2013, for cases where DNA testing could possibly demonstrate actual innocence, the Justice Project partnered with the Arizona Attorney General's office and the Arizona Criminal Justice Commission to perform post-conviction DNA testing.[150] There have been at least two cases resulting from the Justice Project's efforts where DNA evidence was used to exonerate the incarcerated individual:[151] Ray Krone and John Watkins.

Larry Youngblood[152] was found guilty of child molestation, sexual assault, and kidnapping in 1985 by a jury and sentenced to concurrent 10.5-year prison terms.[153] The ten-year-old victim described his assailant as a black male with no facial scars, but having a disfigured right eye.[154] Based on the victim's eyewitness testimony, Youngblood, a black male with a scar on his forehead and a disfigured left eye, was identified as the assailant and convicted.[155] At the hospital, semen samples were taken from the victim's rectum and from the

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144 *Arizona: Exonerations by State, supra* note 26.

145 *Helping Inmates with Wrongful Convictions*, THE ARIZONA JUSTICE PROJECT, http://www.azjusticeproject.org/project (last visited Dec. 4, 2014).

146 *Id.*

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id*.

151 *Case Profiles: Wrongful Convictions & Injustices*, JUSTICE PROJECT, http://www.azjustice project.org/profiles (last visited Dec. 4, 2014).

152 *Larry Youngblood*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Larry_ Youngblood.php (last visited Dec. 4, 2014); Arizona v. Youngblood, 488 U.S. 51, 52, 109, S. Ct. 333, 334, 102 L. Ed. 2d 281, 282 (1988) *rev'd* State v. Youngblood, 734 P.2d 592, (1986); State v. Youngblood, 844 P.2d 1152, (1993), *vacated* 164 Ariz. 61, 790 P.2d 759 (1989).

153 *Larry Youngblood, supra* note 152; *Youngblood,* 488 U.S. at 52, 109 S. Ct. at 334, 102 L. Ed. 2d at 282; Youngblood, 734 P.2d, 153 Ariz.; Youngblood*,* 844 P.2d, 173 Ariz., *vacated* 790 P.2d, 164 Ariz.

154 Larry Youngblood*, supra* note 152.

155 Youngblood, 734 P.2d at 593 ; *Larry Youngblood, supra* note 152.

clothing he was wearing at the time of the assault.[156] The clothing was never refrigerated and no testing was done until 15 months after the assault.[157] The state's criminalist "did not attempt to quantify the amount of semen on the swab until a year after the assault had occurred. At that point he found no blood group substances on the swabs."[158] The semen samples were not preserved[159] and both expert witnesses that testified at Youngblood's original trial stated that testing the seminal samples might have exonerated Youngblood.[160]

The Arizona Court of Appeals, Division Two reversed the convictions and sentences of Youngblood on the basis that the state failed to preserve possibly exonerating physical evidence, violating Youngblood's due process rights.[161] State prosecutors petitioned for review, which the Supreme Court of Arizona denied. The Supreme Court of the United States granted certiorari and reversed the Arizona Court of Appeal's decision, stating that the state's failure to preserve potentially useful physical evidence was not a denial of due process, unless the defendant was able to show bad faith by the police department.[162] The Supreme Court's decision reinstated Youngblood's convictions and remanded the case for further proceedings.[163]

On remand, the Arizona Court of Appeals, agreeing with the *Arizona v. Youngblood* dissent, reversed all convictions and dismissed the case.[164] In 1993, the Arizona Supreme Court reversed the Arizona Court of Appeal's judgment, vacated its opinion, and reinstated the convictions and sentences imposed by the trial court.[165] Youngblood's attorneys requested that the degraded semen be tested using new DNA technology.[166] The results exonerated Youngblood, and in 2000, the charges against him were dismissed.[167] In 2001, a match was found after the DNA profile was entered into CODIS.[168]

Although Larry Youngblood's case did not involve a sentence on death row, it illustrates the unreliability of eyewitness identifications. It also illustrates how important preservation of physical evidence is when collected from

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156 *Larry Youngblood, supra* note 152.; *see also* Youngblood, 734 P.2d at 593 .

157 *Youngblood*, 734 P.2d at 593 153 Ariz. at 51.

158 *Id*.

159 *Youngblood*, 734 P.2d at 595 153 Ariz. at 53; *Larry Youngblood, supra* note 152.

160 *Youngblood*, 734 P.2d at 596 153 Ariz. at 54; *Larry Youngblood, supra* note 152.

161 *Youngblood*, 734 P.2d at 597 153 Ariz. at 55; *Larry Youngblood, supra* note 152.

162 Arizona v. Youngblood, 488 U.S., 109 S.Ct., 102 L.Ed.2d; *Larry Youngblood, supra* note 152.

163 Arizona v. Youngblood, 488 U.S., 109 S.Ct., 102 L.Ed.2d; *Larry Youngblood, supra* note 152.

164 Youngblood, 790 P.2d, ; *Larry Youngblood, supra* note 152.

165 Youngblood, 844 P.2d at 1158, at 508; *Larry Youngblood, supra* note 152.

166 *Larry Youngblood, supra* note 152.

167 *Id*.

168 *Id*.

a victim and/or a crime scene. Larry Youngblood's case also showed how useful testing DNA could be to determine the accuracy of a conviction. Youngblood served 9 years for a crime he did not commit; 9 years of his life were taken away while the actual assailant enjoyed freedom.

Ray Krone was found guilty of first-degree murder and kidnapping following his 1992 jury trial and sentenced to death for the murder conviction and a consecutive twenty-one year term of imprisonment for the kidnapping conviction.[169] Krone was convicted by one piece of evidence: a videotape the state used comparing the bite marks found on the victim to a dental impression of Krone's teeth that he provided to the police.[170] Although there was other physical evidence present on the victim such as saliva, which came from "a person with the most common blood type"[171] (type O),[172] and hair, which was consistent with Krone and the victim, no DNA tests were performed.[173]

On direct appeal, Krone stated that he was denied a fair trial when the critical and only evidence against him was not disclosed to him until the night before the trial.[174] Krone argued that the trial court should not have dismissed his motion for a continuance in order to allow his own expert the opportunity to examine the dental impressions left on the victim's body, and make his own video comparing those dental impressions with the dental impressions Krone provided to the police.[175] The appellate court found that Krone was prejudiced by the trial court's denial of Krone's Motion to Continue and that prejudice was not a harmless error.[176] The appellate court reversed his convictions and remanded the matter for a new trial.[177]

In his 1996 trial, Krone was convicted again and sentenced to life in prison after an aggravation/mitigation hearing.[178] Krone filed a PCR petition seeking

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[169] State v. Krone, 897 P.2d 621, 182 Ariz. 319 (1995); *Ray Krone*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Ray_Krone.php (last visited Dec. 4, 2014); State v. Krone, No. CR1992-000212-A (Maricopa Cnty.Super. Ct. 1992) http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR1992-000212 (last visited Dec. 4, 2014); *Ray Krone: Exonerated by DNA after 10 years in Prison*, JUSTICE PROJECT, http://www.azjusticeproject.org/profiles/ray-krone (last visited Dec. 4, 2014).

[170] Krone, 897 P.2d at 622, ; *Ray Krone: Exonerated by DNA after 10 years in Prison, supra* note 169.

[171] Krone, 897 P.2d at 622.

[172] *Ray Krone: Exonerated by DNA after 10 years in Prison, supra* note 169.

[173] Krone, 897 P.2d at 622,

[174] *Id.* at 621.

[175] *Id.*

[176] *Id.*.

[177] *Id.* at 625.

[178] State v. Krone, No. CR1992-000212-A (Maricopa Cnty.Super. Ct. 1992) http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR1992-000212 (last visited Dec. 4, 2014); *see also Ray Krone, supra* note 169.

DNA testing.[179] On April 8, 2002, Krone was released from prison,[180] and on May 2, 2002, the case against Krone was dismissed[181] after DNA testing of the saliva found that the saliva found on the victim's body excluded Krone as the source.[182] The DNA matched an incarcerated man who, at the time of the crime, lived a short distance from where the victim was found.[183]

The Arizona Justice Project attributed Krone's wrongful conviction to an idea called target fixation[184] and "junk science."[185] Target fixation occurs when investigators begin to focus on a particular suspect and start to view the emerging evidence in light of that suspicion.[186] The team at the Arizona Justice Project stated that the field of forensic odontology was "junk science" in that it had not been "subjected to the sort of rigorous peer review and testing that is expected of other forensic sciences."[187] Coupled with an expert witness's testimony explaining forensic odontology, the team at the Arizona Justice Project explained that the jury would be open to bias and could be easily swayed toward siding with the expert.

Although on appeal, Krone was sentenced to life in prison as opposed to death, he had been sentenced to death at his first trial and spent more than two years on death row.[188] His exoneration marked the twelfth former death row inmate, whose conviction proved incorrect due to exonerating DNA evidence tested through post-conviction DNA testing.[189]

In 2003, John Kenneth Watkins was brought to the Gilbert Police Department for questioning in a non-violent crime.[190] However, the police shifted the interrogation to Watkins' involvement in the sexual assault of a 48-year-old woman in Gilbert.[191] The sexual assault assailant fled the scene and the victim went to the hospital where a rape kit was performed.[192] No sperm or semen

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179 State v. Krone, No. CR1992-000212-A (Maricopa Cnty.Super. Ct. 1992) http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR1992-000212 (last visited Dec. 4, 2014).

180 *Ray Krone, supra* note 169.

181 Krone, *supra* note 179.

182 *Ray Krone, supra* note 169.

183 *Id.*

184 *Ray Krone: Exonerated by DNA after 10 years in Prison, supra* note 169.

185 *Id.*

186 *Id.*

187 *Id.*

188 *Ray Krone: Exonerated by DNA after 10 years in Prison, supra* note 169.

189 *Ray Krone, supra* note 169.

190 *John Watkins: Exonerated by DNA*, JUSTICE PROJECT, http://www.azjusticeproject.org/profiles/john-watkins (last visited Dec. 4, 2014).

191 *Id.*

192 *Id.*

was found in the rape kit;[193] therefore, no DNA testing was performed on the rape kit items.[194]

During the interrogation, the police lied to Watkins,[195] telling him that his fingerprints were found at the crime scene when they were not, that witnesses had identified him when none had, that he had failed a voice stress test, and fed him other non-public information.[196] Over four hours passed, at which point Watkins confessed to the crime.[197] The police then put Watkins' photograph in a photo line-up to show the victim,[198] who originally said the only thing she could remember about her assailant was that he was wearing a white t-shirt.[199] Out of the six suspects in the lineup, five were wearing black t-shirts and one, Watkins, was wearing a white t-shirt.[200] The victim chose the suspect in the white t-shirt.[201]

The Maricopa County Prosecutor's Office offered Watkins a plea, which he accepted.[202] Watkins was sentenced to an aggravated term[203] of fourteen years in prison.[204] Watkins filed two post-conviction relief petitions that were both dismissed.[205] He solicited help from the Justice Project to get the evidence from his case tested for DNA,[206] and in August 2009, Watkins and the Arizona Attorney General's Office filed a joint request for a court order for

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193 *Id*.

194 *Id*.

195 *John Watkins: Exonerated by DNA supra* note 190

196 *Id.* ; *see also John Kenneth Watkins*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/John_Kenneth_Watkins.php (last visited Dec. 4, 2014).

197 *John Watkins: Exonerated by DNA supra* note 190; *see also John Kenneth Watkins, supra* note 196.

198 *John Watkins: Exonerated by DNA supra* note 190.

199 *John Watkins: Exonerated by DNA supra* note 190; *see also John Kenneth Watkins, supra* note 196.

200 *John Watkins: Exonerated by DNA supra* note 190; *see also John Kenneth Watkins, supra* note 196.

201 *John Watkins: Exonerated by DNA supra* note 190; *see also John Kenneth Watkins, supra* note 196.

202 *John Kenneth Watkins, supra* note 196.; Watkins v. Ryan, No. CV–09–1852–PHX–DGC (JRI), 2011 WL 1361547, at *1 (D. Ariz. Mar. 11, 2011).

203 *Watkins*, 2011 WL 1361547, at *1.

204 *John Kenneth Watkins, supra* note 196.; *Watkins*, 2011 WL 1361547, at *1.

205 *John Kenneth Watkins, supra* note 196; *Watkins*, 2011 WL 1361547, at *1; State v. Watkins, No. CR2003-034943, (Maricopa Cnty.Super. Ct. 2003), http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR2003-034943 (last visited Dec. 4, 2014).

206 *John Watkins: Exonerated by DNA supra* note 190.

DNA testing,[207] which the court granted.[208] In the interim, Watkins petitioned the United States District Court for the District of Arizona for a Writ of Habeas Corpus.[209] The Petition was dismissed for mootness[210] because the DNA results from skin cells left on the victim by the assailant excluded Watkins as the DNA donor, revealing that he did not perpetrate the crime he had confessed to committing.[211] Watkins was released after 7.5 years in prison,[212] and his case was dismissed in 2010[213] and has not yet been reopened to find the true perpetrator.[214]

John Kenneth Watkins was convicted as a young man, when he was only 20 years old.[215] His wrongful conviction stemmed from a false confession, eyewitness misidentification, and possible police misconduct for providing Watkins false information during the interrogation and creating bias in the photo lineup by showing a photo of Watkins in a white t-shirt when all others shown wore black t-shirts. Watkins had to jump through several hoops to obtain post-conviction DNA testing before he received justice and was released from prison.

Although the three individuals listed above were exonerated, there are likely many more innocent prisoners sentenced to prison for crimes they did not commit, many of which could possibly be on death row. The fact that there were three individuals exonerated through post-conviction DNA testing in Arizona should be a sign that there is a major flaw in the system. As the Justice

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[207] *Id.*; *John Kenneth Watkins, supra* note 196.; Watkins, 2011 WL 1361547, at *1; State v. Watkins, No. CR2003-034943, (Maricopa Cnty. Super. Ct. 2003), http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR2003-034943 (last visited Dec. 4, 2014).

[208] *John Watkins: Exonerated by DNA supra* note 190; *John Kenneth Watkins, supra* note 196; Watkins, 2011 WL 1361547, at *1; State v. Watkins, No. CR2003-034943, (Maricopa Cnty.Super. Ct. 2003), http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR2003-034943 (last visited Dec. 4, 2014).

[209] Watkins, 2011 WL 1361547.

[210] Watkins, 2011 WL 1361547, at *3.

[211] *John Watkins: Exonerated by DNA supra* note 190.; *John Kenneth Watkins, supra* note 196; Watkins, 2011 WL 1361547, at *1; State v. Watkins, No. CR2003-034943, (Maricopa Cnty.Super. Ct. 2003), http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR2003-034943 (last visited Dec. 4, 2014).

[212] *John Watkins: Exonerated by DNA supra* note 190; *John Kenneth Watkins, supra* note 196.

[213] *John Watkins: Exonerated by DNA supra* note 190; *John Kenneth Watkins, supra* note 196; Watkins, 2011 WL 1361547, at *1; State v. Watkins, No. CR2003-034943, (Maricopa Cnty.Super. Ct. 2003), http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR2003-034943 (last visited Dec. 4, 2014).

[214] *John Watkins: Exonerated by DNA supra* note 190.

[215] *Id.*

Project stated, "there is no greater punishment than that imposed on the innocent."[216]

VIII. A Call to Action

Although Arizona provides offenders with a DNA testing opportunity,[217] that opportunity requires the offender to request a DNA test, but, more importantly, requires an offender to know that he must make a request for a DNA test. For those offenders sentenced to spend the remainder of their days in prison or on death row, this requirement for a formal request may come at too high a price, especially to those who are actually innocent of the crime for which they have been convicted.

The team at the Innocence Project suggests several ways to amend current post-conviction DNA statutes so that they offer a meaningful and actual possibility of access to DNA evidence and exoneration to defendants seeking testing. These suggestions include: (1) the incorporation of a reasonable standard to establish proof of innocence at the stage where an individual is petitioning for post-conviction DNA testing; (2) allowing access to post-conviction DNA testing wherever it can establish innocence (even if the petitioner is no longer incarcerated), and including cases where the petitioner pled guilty or provided a confession or admission to the crime; (3) excluding absolute deadlines for when access to post-conviction DNA evidence will expire; (4) enabling judges to order comparisons of crime scene evidence against national and state-level criminal justice databases, including CODIS and IAFIS; (5) requiring state officials to properly preserve and catalogue biological evidence for as long as an individual is incarcerated or otherwise experiences any consequences of a potential wrongful conviction (e.g. probation, parole, civil commitment or mandatory registration as a sex offender), as well as to account for evidence in their custody; (6) disallowing procedural hurdles that stymie DNA testing petitions and proceedings that govern other forms of post-conviction relief; (7) allowing convicted persons to appeal from orders denying DNA testing; (8) requiring a full, fair and prompt response to DNA testing petitions, including the avoidance of debate around whether currently available DNA technology was available at the time of the trial; avoiding unfunded mandates by providing funding to DNA testing statutes; and (9) providing flexibility in where, and how, DNA testing is conducted.[218]

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[216] *The Arizona Justice Project: Helping Inmates with Wrongful Convictions*, Justice Project, http://www.azjusticeproject.org/project (last visited Dec.4, 2014).

[217] Ariz. Rev. Stat. Ann. § 13-4240 (2000).

[218] *Access to Post Conviction DNA Testing, supra* note 143.

As discussed above, there are several purposes for which DNA is presented at trial. Whatever the purpose for obtaining and introducing the DNA evidence, several jurisdictions have recognized a due process right to post-conviction access to DNA evidence under their respective constitutions.[219] Many of these courts have applied the Supreme Court's decision in *Brady v. Maryland*[220] to situations not only involving a defendant's right to be informed of material exculpatory evidence held by the state right at or before trial, but a defendant's right to access state evidence post-trial.[221] For example, the Indiana Court of Appeals, in *Sewell v. State*, reasoned "where the specified evidence is exculpatory, the defendant's right to fundamental due process outweighs the State's interest in nondisclosure."[222] Additionally, other courts have relied on Justice Blackmun's dissenting opinion in *Herrera v. Collins*,[223] to infer that a defendant has a state procedural and substantive due process right to access evidence that could establish his actual innocence.[224] These jurisdictions that have recognized a due process right to DNA testing have pointed out that the mere recognition of a constitutional right to access DNA evidence does not preclude a petitioner from following procedural post-conviction relief statutory guidelines.[225] In some cases, prisoners may have a facially valid due process right to access the state's evidence but are procedurally barred from access.[226] For instance, some states do not grant a request for discovery until a

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[219] Luongo, *supra* note 76.

[220] Brady v. Maryland, 373 U.S. 83 (1963).

[221] Luongo, *supra* note 76.; *see also, e.g.,* Sewell v. State, 592 N.E.2d 705, 707-08 (Ind. Ct. App. 1992) (citing *Brady* as persuasive authority that inmate has right to access state-held evidence for DNA testing ten years after conviction); Matter of Dabbs v. Vergari, 570 N.Y.S.2d 765, 767-68 (App. Div. 1990) (relying on *Brady* to extend constitutional right to prisoner to be informed of possibly exculpatory DNA evidence held by state in post-conviction proceeding); *see also* People v. Dabbs, 587 N.Y.S.2d 90, 93 (App. Div. 1991) (demonstrating instances where State DNA evidence ultimately exonerated the prisoner).

[222] *Sewell*, 592 N.E.2d at 707.

[223] Herrera v. Collins, 506 U.S. 390 (1993).

[224] Luongo, *supra* note 76. (citing *People v. Washington,* 665 N.E.2d 1330, 1336 (Ill. 1996)).

[225] Luongo, *supra* note 76.

[226] *Id.* ; *relying on* Mebane v. State, 902 P.2d 494, 497 (Kan. App. 1995) (holding that as a matter of fundamental fairness a defendant has a right to obtain post-conviction DNA testing but the defendant here was not entitled to access to the State's evidence because it was "highly unlikely that a positive determination of the defendant's guilt or innocence could be made from the results of such test"); Jenner v. Dooley, 590 N.W.2d 463, 472 (S.D. 1999) (recognizing due process right to DNA access, but holding that petitioner failed to qualify because DNA testing would not have been conclusive of innocence); Williams v. State, 791 N.E.2d 193, 194 (Ind. 2003) (holding access to state evidence for DNA testing was not required because testing would not be probative of the perpetrator or exculpatory).

petitioner has shown that the evidence would grant a showing of the accused's actual innocence.[227]

The Supreme Court is reluctant to expand "due process" to encompass a new fundamental right because there are few guidelines for responsible decision making in an uncharted area.[228] To combat this uncharted territory, the Court has established that in order for an asserted right to be deemed fundamental, "the right must be deeply rooted in this nation's history and tradition" and "implicit in the concept of ordered liberty"[229] and recognition of substantive due process requires a careful description of the fundamental liberty interest; vague generalities will not suffice."[230] Because DNA testing is a relatively new science, there is no deeply rooted history and tradition to rely on to establish access to DNA testing pre, during, and post-trial a fundamental right. However, if the Supreme Court would address DNA testing as it addressed the Texas law banning sodomy in *Lawrence v. Texas*,[231] the court would find that statutes limiting a petitioner's access to DNA testing violate substantive due process.

The Court first addressed the issue of sodomy as a substantive due process right in the Georgia case of *Bowers v. Hardwick*,[232] where the court rejected the asserted due process right to consensual sodomy because it lacked a long history and tradition.[233] However, in *Lawrence*, the court recognized consensual sodomy as a substantive due process right because a person's choices concerning the intimacies of their relationship are a "form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."[234] The *Lawrence* court reclassified the issue as one of adults to be free in their private lives from government intrusion, which established the necessary history and tradition for recognition of the substantive due process right.[235] Restructuring the issue of

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[227] Luongo, *supra* note 76. (citing Commonwealth v. Robinson, 682 A.2d 831, 837 (Pa. Super. Ct. 1996) (citing Sewell, 592 N.E.2d at 707). See Herrera, 506 U.S. at 435 n.5 (Blackmun, J., dissenting) (rejecting majority's argument that Herrera cannot bring a substantive due process claim under the 14th amendment); *see also* Dooley, 590 N.W.2d at 472 (establishing petitioner claiming constitutional right to post-conviction access to state evidence for DNA testing must demonstrate the test results would meet the Daubert standard of reliability, that a favorable result would likely result in an acquittal in a new trial, and that testing would not impose an unreasonable burden on the state); *see generally* Ariz. R. Crim. P. 32; ARIZ. REV. STAT. ANN. § 13-4240 (2000).

[228] Luongo, *supra* note 76.

[229] Chavez v. Martinez, 538 U.S. 760, 775 (2003).

[230] Chavez, 538 U.S. at 775-76.

[231] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[232] Bowers v. Hardwick, 478 U.S. 186 (1986).

[233] *Id.*

[234] Lawrence, 539 U.S. at 577-78 (quoting Bowers, 478 U.S. at 216 (Stevens, J., dissenting)).

[235] Luongo, *supra* note 76.

DNA testing to be read, not as trying to find a deeply rooted history and tradition in our nation of a right allowing DNA testing, but as a right to preservation of life, free from government intrusion, would be enough to establish the history and tradition needed to show a fundamental substantive due process right under the Fourteenth Amendment.

The Innocence Project offers a good start, but in order for post-conviction access DNA testing to be beneficial, it needs to be offered as an automatic constitutional right, not as a requested procedural right that does not carry with it a guarantee of access. A prisoner's life hanging in the balance is too high a price to pay for a court's discretion in determining whether the DNA evidence is exculpatory enough to grant testing.

IX. Conclusion

Arizona's post-conviction relief and appeals process for offenders sentenced to death with regard to DNA testing is inadequate in that it does not automatically afford an offender the ability to test and/or retest DNA that was used to convict him at trial or evidence that was not available at trial. A possible solution would include mandating DNA testing of the evidence used to convict an individual that was sentenced to death and automatic testing of any newly discovered evidence that could exonerate the defendant. In order for Arizona and other states to address the inadequacies of post-conviction DNA testing statutes and amend them to recognize the automatic right that exists in preservation of one's own life, the courts must recognize post-conviction DNA testing as a fundamental right to life.

Friends in High Places: Big Business, the NFL, and the Veto of Arizona Senate Bill 1062

Matthew B. Meehan*

On February 26, 2014, Arizona Governor Jan Brewer vetoed Senate Bill 1062 ("SB 1062"); a bill widely interpreted as having the effect of allowing business owners to deny service to gays and lesbians based on the owner's religious beliefs.[1] The effect of this veto and the very public pressures levied at the Governor in the lead-up to her decision has established a new precedent for government action characterized as "anti-gay" legislation. The following will discuss the history of the Arizona legislation, litigation in other states that affected the Arizona legislature's decision to introduce the bill, and the influence business opposition had on the bill's ultimate fate.

I. Federal Legislation and Supreme Court Decisions Prompt the Arizona Legislature to Enact Law Preventing Government from Burdening Exercise of Religion

The narrative that led to the introduction of SB 1062 began in 1993 when Congress enacted the Religious Freedom Restoration Act ("RFRA").[2] RFRA was a reaction to the Supreme Court's decision in *Employment Divison v. Smith*, a case that set aside the "compelling interest test."[3] In *Smith*, the petitioners had been fired from their positions at a private drug rehabilitation organization because they ingested a controlled substance (peyote) "for sacramental purposes at a ceremony of their Native American Church."[4] The U.S. Supreme Court later reversed a decision of the Oregon Supreme Court thereby allowing the Oregon Dept. of Human Resources to deny unemployment bene-

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[1] *See* 2014 Ariz.Legis.Serv. Gov. Veto Message 1 (S.B. 1062)(West); *see also* James Kirk Wall, *Do Arizona Law Makers Understand the Ramifications of the "Anti-Gay" Bill?*, Chicago Now (Sept. 28, 2014, 7:24 PM) http://www.chicagonow.com/an-agnostic-in-wheaton/2014/02/do-arizona-law-makers-understand-the-ramifications-of-the-anti-gay-bill/.

[2] 42 U.S.C. § 2000bb (1993).

[3] *See* § 2000bb(4), *supra* note 2; *see also* Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 885 (1990).

[4] *See id.*

fits to the discharged employees.[5] The Court was careful to note that its position comported with the Free Exercise Clause stating that, "[t]o make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself,'. . . contradicts both constitutional tradition and common sense."[6] Congress, however, was not in agreement, thus enacting RFRA to expressly override *Smith*.[7] RFRA states that, "governments should not substantially burden religious exercise without compelling justification."[8]

However, a subsequent Supreme Court decision prompted the Arizona legislature to enact RFRA-esque legislation. In *City of Boerne v. Flores*, the Court determined that RFRA had exceeded Congress's enforcement powers as applied to state governments, stating that the mandates of RFRA are not, "designed to counteract state laws likely to be unconstitutional because of their treatment of religion."[9] Accordingly, in 2010, the Arizona legislature codified A.R.S. § 41-1493.01, titled "Free Exercise of religion protected," which states, "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is both: (1) [i]n furtherance of a compelling governmental interest, [and] (2) [is] [t]he least restrictive means of furthering that compelling governmental interest."[10] Further, it is important to note, the article defines "*person*" as "a religious assembly or institution."[11]

II. Widely-Publicized New Mexico Case Forbids Business Owners Refusal of Service Based on Religious Objections

In 2006, Vanessa Willock and Misti Collinsworth of New Mexico were informed by an Albuquerque photo studio that it would not photograph the couple's wedding ceremony because it only worked "traditional weddings."[12] The couple filed a complaint against the photo studio with the New Mexico Human Rights Commission, alleging that the studio was in violation of the state's anti-discrimination law; the case would eventually reach the New Mex-

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[5] *See id.* at 872, 890.

[6] *See id.* at 885 (citations omitted).

[7] *Id.*; *see also* § 2000bb(3), *supra* note 2.

[8] *Id.*; *see also* § 2000bb(3), *supra* note 2.

[9] City of Borne v. Flores, 521 U.S. 507, 534-35 (1997).

[10] Ariz. Rev. Stat. Ann. § 41-1493.01(C) (2010).

[11] Ariz. Rev. Stat. Ann. § 41-1493(5).

[12] *See* Richard Wolf, *Supreme Court Won't Hear Care on Gay Wedding Snub*, USA Today, (April 7, 2014, 11:10 AM) http://www.usatoday.com/story/news/nation/2014/04/07/supreme-court-gay-lesbian-marriage-photographer/7304157.

ico Supreme Court.[13] Elane Photography, the appellant, argued that photographing a same-sex commitment ceremony is contrary to their religious and personal beliefs.[14] However, the court found that the studio's refusal of service constituted a violation of the New Mexico Human Rights Act ("NMHRA").[15] Additionally, the court concluded that the NMHRA is constitutional when applied to the *Smith* case—citing dictum which states, "the 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)."[16]

Moreover, around the same time, similar cases were being brought before courts in other jurisdictions. For example, a florist in Washington State was being sued for refusing to provide flowers for a same-sex wedding, and a suit was filed against a Colorado baker who refused to make a cake for a party celebrating the marriage of two men.[17] As these cases gained notoriety among conservative lawmakers, Elane Photography petitioned the U.S. Supreme Court for a writ of certiorari.[18] Eight states (including Arizona) asked the Supreme Court to take up the case so that it could provide legal guidance to officials considering "conscience-based exceptions to public accommodations and same-sex marriage laws."[19] Ultimately, however, on April 7, 2014, the high court denied cert., thereby leaving standing the decision of the New Mexico Supreme Court.[20]

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[13] *See id.*; *see also* Elane Photography, LLC v. Willock, 284 P.3d 428 (N.M. 2012).

[14] Elane Photography, LLC, 284 P.3d at 432.

[15] *See id.*

[16] *See id.* at 432, 441 (*citing Smith*, 494 U.S. at 879).

[17] *See* Steve Kraske & Dave Helling, *Missouri Republican Senator Introduces Bill Allowing the Refusal of Service for Religious Reasons*, THE KANSAS CITY STAR, (Feb. 25, 2014 12:19PM, updated Feb. 26, 2014, 12:11AM) http://www.kansascity.com/news/local/news-columns-blogs-the-buzz/artic. . .duces-bill-allowing-the-refusal-of-service-for-religious-reasons.html.

[18] *See* Jeri Clausing, *Supreme Court Declines to Hear New Mexico Gay Wedding Photography Case,* HUFFINGTON POST, (April 7, 2014, 10:16 AM) http://www.huffingtonpost.com/2014/04/07/supreme-court-gay-wedding-photography_n_5104699.html.

[19] *See id.* ("[E]ight states, Alabama, Arizona, Kansas, Michigan, Montana, Oklahoma, South Carolina and Virginia, had asked the high court to hear the case so lawmakers would have guidance in considering such measures."); *see also*, Wolf, *supra* note 12. .

[20] *See* Clausing*, supra* note 18.

III. SB 1062 Introduced in Wake of New Mexico Case to Limit Effectiveness of City Ordinances Aimed at Protecting Sexual Orientation

Meanwhile in Arizona, in the 2014 legislative session Senator Steve Yarbrough (R-Chandler) introduced SB 1062.[21] Proponents of the bill felt that the New Mexico Supreme Court decision in *Elane Photography* necessitated its enactment.[22] Additionally, SB 1062 was designed to constrain existing ordinances passed by three Arizona cities (Tucson, Phoenix, and Flagstaff respectively), which prohibit discrimination based on sexual orientation.[23]

SB 1062 proposed amendments to A.R.S. §§ 41-1493 and 41-1493.01, the most notable of which was the proposal to amend the definition of "*person*" under § 41-1493(5) from "religious assembly or institution" to "any individual, association, partnership, corporation, church, religious assembly or institution, estate, trust, foundation or other legal entity."[24] Further, the bill would have a provided a legal claim or defense to a person whose religious exercise is burdened regardless of whether the government was party to the proceeding.[25] Lawmakers supporting the bill said that it would adequately provide state-level protection from the government substantially burdening the free exercise of religion.[26] But, detractors were quick to point out that the bill would, in fact, allow business owners the right to deny service to gay and lesbian customers based on their religious beliefs.[27] Moreover, the bill was criticized for lack of legislative necessity because supporters were unable to provide any instance in which an Arizona business owner had been compelled to provide services to a person who offended the business owner's religious beliefs, even considering that the above-mentioned Tucson city ordinance had been in effect since 1999.[28] Notwithstanding initial scrutiny, the bill was sent to the Governor's office after passing both the House and Senate with mostly Republican support.[29]

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[21] *See* Dinita L. James, *Amid SB 1062 Frenzy, Tempe Becomes 4th City to Protect LGBT Status*, 20 No. 11 Ariz. Emp. L. Letter 1 (April 2014).

[22] *See id.*

[23] *See id.*

[24] *See* S.B. 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014); *cf.* § 41-1493(5).

[25] *See* S.B. 1062; *cf.* Ariz. Rev. Stat. Ann. § 41-1493.01(D) (2010).

[26] *See* House of Representatives, SB 1062/HB 2153 Exercise of Religion; State Action, 51st Leg., 2d Reg. Sess. (Ariz. 2014) (memorandum transmitted to the Governor in support of bill passage).

[27] *See* Wall, *supra* note 1.

[28] *Q&A: An Overview of Arizona Service-Denial Bill*, USA Today, (Feb. 25, 2014, 10:31 PM) http://www.usatoday.com/story/news/nation/2014/02/25/arizona-anti-gay-bill/5823133/.

[29] *See id.*

IV. SB 1062 Is Vetoed; Citing Overwhelming Opposition of the Business Community

As SB 1062 reached the Governor's desk it created a media buzz centered around the bill's nefarious consequences, and, unsurprisingly, speculation on whether or not the Governor would veto it. In addition to the public outcry aimed at SB 1062, perhaps more importantly, the business community voiced its strong opposition to the bill.[30] Among the business giants urging the Governor to veto SB 1062 were AT&T, Intel, and Apple, as well as Delta and American Airlines.[31] But, the most significant developments centered around the National Football League's ("NFL") less than subtle suggestions that it was considering pulling Super Bowl XLIX from Glendale if the bill were to become law.[32] Sources close to the situation confirmed that the NFL was indeed putting pressure on the Governor to veto the bill, and one NFL spokesman was quoted as saying: "Our policies emphasize tolerance and inclusiveness, and prohibit discrimination based on age, gender, race, religion, sexual orientation, or any other improper standard. We are following the issue in Arizona and will continue to do so should the bill be signed into law."[33]

Moreover, Arizona had previously entangled itself in a civil rights quandary, which jeopardized Super Bowl hosting. In 1990, the NFL threatened to move the 1993 Super Bowl out of Arizona unless the state recognized the Martin Luther King, Jr. holiday.[34] When voters turned down a referendum that would have made Martin Luther King, Jr. Day an Arizona holiday the NFL, true to its word, moved the 1993 game to Pasadena, CA.[35] Later, in 1992, Arizona voted to recognize MLK Day, but Tempe's Sun Devil Stadium did not host the Super Bowl until 1996.[36]

On February 26, 2014, Governor Jan Brewer vetoed SB 1062. In a letter addressed to Arizona Senate President Andy Biggs, the Governor said that she

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[30] *See* Wall, *supra* note 1.

[31] *See id.*

[32] *See NFL Discusses Moving Super Bowl from Arizona Over 'Anti-Gay' Law*, NY Post, (Feb. 26, 2014, 7:32 PM) http://nypost.com/2014/02/26/nfl-discussed-moving-super-bowl-from-arizona-over-anti-gay-law/; *see also* Erik Brady, et.al, *If Arizona Bill Becomes Law, will NFL Move Super Bowl?*, USA Today, (Feb. 25, 2014, 9:02 PM) http://www.usatoday.com/story/sports/nfl/2014/02/25/arizona-anti-gay-legislation-super-bowl-national-football-league/5821799.

[33] *See NFL Discusses Moving Super Bowl from Arizona Over 'Anti-Gay' Law, supra* note 32; *see also* Brady, *supra* note 32.

[34] *See NFL Discusses Moving Super Bowl from Arizona Over 'Anti-Gay' Law, supra* note 32; *see also* Brady, *supra* note 32.

[35] *See NFL Discusses Moving Super Bowl from Arizona Over 'Anti-Gay' Law, supra* note 32; *see also* Brady, *supra* note 32.

[36] *See NFL Discusses Moving Super Bowl from Arizona Over 'Anti-Gay' Law, supra* note 32; *see also* Brady, *supra* note 32.

was sympathetic to the interests of the bill's proponents and that she is "increasingly concerned about government's encroachment upon our religious freedoms."[37] But ultimately, she felt the bill "could result in unintended and negative consequences," and it "does not seek to address a specific and present concern related to Arizona businesses."[38] Moreover, she acknowledged business leaders' disapproval by stating, "[t]he legislation seeks to protect businesses, yet the business community overwhelmingly opposes the proposed law."[39]

V. Net Effect of Veto is a Positive for the Arizona and Businesses

The Governor's decision to veto SB 1062 was the appropriate and correct executive response to the legislation. Brewer's rejection of the bill is a huge positive for the Arizona business community. Additionally, the Governor was able to ease national scrutiny, which may have worsened had the bill's "unintended and negative consequences" come to fruition.

One measurable positive is that Glendale will host the Super Bowl in 2015, which represents a significant economic boost to the local economy. A study conducted by Arizona State University estimated that when the Glendale hosted in 2008, the game generated an economic impact of more than $500 million across the Phoenix metropolitan area.[40] Additionally, many business leaders forecasted negative economic consequences linked to the perception that Arizona is discriminatory toward the gay and lesbian community. One analyst even suggested that, notwithstanding the veto of SB 1062, wise Arizona employers should "get ahead of the curve" and "adopt[ ] policies prohibiting discrimination on the basis of LGBT status."[41]

Finally, the veto effectively quelled negative media attention, and may have removed a specter of intolerance that had enveloped the state. As the Governor indicated, the bill likely would have had negative, albeit unintended, results. Legal commentators even suggested that, while SB 1062 would be of minimal consequence in litigation, some would "take it as an encouragement to

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[37] *See* 2014 Ariz.Legis.Serv. Gov. Veto Message 1 (S.B. 1062)(West).

[38] *See id.*

[39] *See id.*

[40] *See* Paul Giblin, *NFL Threatens to Move Super Bowl Events from Glendale*, The Arizona Republic, (Sept. 28, 2013, 8:01PM) http://www.azcentral.com/community/glendale/articles/20130926nfl-glendale-super-bowl-events.html.

[41] *See* James, *supra* note 21.

discriminate."[42] As discussed, Arizona had already been on the losing end of a politically charged civil rights debate when the state failed to recognize MLK Day, and had more recently outraged Hispanic civil rights groups by passing SB 1070 in 2010.[43] As of this writing, thirty-five states allow same-sex marriage; the progressive expansion of LGBT rights is undeniable. In the midst of such an overwhelming social policy shift, a state cannot be seen as obstructionist. Its business community, and ultimately its citizens, will suffer the consequences of legislative politicking. For now, the veto of SB 1062 has enabled Arizona to move forward.

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[42] *See* Howard Fischer, *A Legal Analysis of SB 1062*, AZ DAILY SUN, (Feb. 26, 2014, 6:45 AM) http://azdailysun.com/news/local/state-and-regional/a-legal-analysis-of-sb/article_94175e74-9eb7-11e3-866a-001a4bcf887a.html.

[43] *See* S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010); *see also* Randall C. Archilbold, *Arizona Enacts Strongent Law on Immigration*, NY TIMES, (April 23, 2010) http://www.nytimes.com/2010/04/24/us/politics/24immig.html ("The law, which proponents and critics alike said was the broadest and strictest immigration measure in generations, would make the failure to carry immigration documents a crime and give the police broad power to detain anyone suspected of being in the country illegally.").

A Good Death: Increasing the Adoption and Effectiveness of Advance Directives in Arizona

Wendy Metcalf Anderson*

I. Introduction

As Benjamin Franklin's famous quote tells us, "In this world nothing is certain but death and taxes." We know when taxes are due, and, in general, we spend a significant amount of time every year considering the most strategic moves so that we can submit the tax return that is most favorable to our financial health. In stark contrast, most of us do not know when death will arrive, and, in general, we spend virtually no time considering or documenting what our final months, weeks, or days will be like and are therefore unable to direct the process to ensure this same desired outcome with regard to our death.

Advance planning for an end-of-life situation can be an effective way to ensure that we live our final days on our own terms. Advance directives, in various formats, outline the patient's desired treatment options, expressed when he is competent to make such decisions, and would be effective in the event that he loses the capacity to adequately communicate or participate in decisions regarding his own care.[1] Dying patients who have discussed their end-of-life wishes with their physician are more likely to choose fewer life-sustaining treatments and more likely to spend their final days in hospice, rather than a hospital, than those who have not engaged in this type of conversation.[2]

Americans, however, generally do not die in a way they would like.[3] Overall, patients and their families have expressed the desire for quality of life

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[1] Michael Ash & Stephen Arons, *Economic Parameters of End-of-Life Care: Some Policy Implications in an Era of Health Care Reform*, 31 W. New Eng. L. Rev. 305, 314 (2009).

[2] Joshua E. Perry, *A Missed Opportunity: Health Care Reform, Rhetoric, Ethics and Economics at the End of Life*, 29 Miss. C L. Rev. 409, 423 (2010).

[3] Catherine Silburn, *Respecting and Responding to End-of-Life Choices*, Colo. Law. 57 (October 2005).

and to avoid artificially prolonging their dying process.[4] While the majority of Americans would prefer to die at home or at hospice with less aggressive care, studies have shown that seventy-five percent die in a hospital or nursing home, with nearly twenty percent of them in the intensive care unit.[5] As a result, chronically ill and dying Americans are receiving medical care far in excess of what they and their families want.[6] Yet fewer than twenty-five percent of Americans have executed advance directive documents that clearly specify their wishes.[7]

This paper will discuss various advance directives currently in use and the landmark legal cases that created national awareness and debate over the last 40 years. Additionally, this paper will consider the current state of legislation regarding advance directives nationally and in Arizona and will explore the reasons that the laws inadequately serve to better encourage the use and effectiveness of these documents. As its primary purpose, this paper will propose several statutory changes designed to increase the rate of adoption of advance directives in Arizona and improve the availability of such documents when they are needed most – when a patient is physically or mentally incapable of communicating their end-of-life wishes.

II. Advance Directives

There are two primary types of recognized advance directives: instructional and proxy.[8] Instructional directives, commonly known as living wills, are used to ensure that the patient's wishes regarding his end-of-life care are conveyed to his family and physicians, should he be unable to communicate when he is ill or if he lacks the capacity to make a decision.[9] A living will authorizes the continuation or withdrawal of life-sustaining medical treatment if the patient suffers from the specific healthcare situations outlined in the document.[10] It may refer, among other things, to the artificial administration of food and water, pain management, life sustaining procedures and instances for artificial resuscitation.

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[4] *Id.*

[5] 60 Minutes, *The Cost of Dying* (CBS television broadcast Nov. 22, 2009), http://www.cbsnews.com/news/the-cost-of-dying/.

[6] Perry, *supra* note 2, at 426.

[7] Dorothy D. Nachman, *Living Wills: Is It Time to Pull the Plug?,* 18 Elder L.J. 289, 299 (2011).

[8] Dennis P. Stolle, *Advance Directives, AIDS, And Mental Health: TK Preventive Law For The HIV – Positive Client, in* Practicing Therapeutic Jurisprudence: Law as a Healing Profession 83, 98 (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds., Carolina Academic Press, 2000).

[9] *Id.* at 96.

[10] *Id.*

A proxy directive, more commonly known as a healthcare power of attorney, gives the person named by the patient the authority to make healthcare decisions on their behalf if they are unable to do so for themselves.[11] The proxy can consider all circumstances regarding the patient's current medical status and prognosis and the possible care options, and can make a decision based on the patient's known wishes or the proxy's belief as to the patient's wishes.[12] The healthcare power of attorney designation can overcome any limitations of the living will because the proxy is able to react to an immediate situation, unlike a living will which was drafted previously.[13] Advance directives are usually favored as they are seen as the closest approximation or replication of the patient's authentic preferences.[14]

A patient must be legally competent at the moment he is executing an advance directive since he is exercising his right to refuse future medical treatment that could result in his imminent death.[15] Decision-making capacity has been described as having the ability to understand and communicate; to hold stable values and views of life; and to reason and deliberate.[16] The American Bar Association's Commission on Legal Problems of the Elderly has devised an alternate three-part test: (1) that the patient is aware of his or her needs and alternatives for meeting them; (2) that the patient is able to express a preference regarding the alternatives; and (3) that the patient demonstrates a factual understanding of the risks, benefits and alternatives of treatment or no treatment.[17]

Legally competent adults may choose to reject medical treatment that will extend their life, even if removal might result in imminent death. In 1985, in *Tune v. Walter Reed Army Medical Hospital*,[18] the court held that a competent adult patient with a terminal illness has the right to reject life-prolonging treatment or terminate artificial life support even after it has been initiated.[19] The Supreme Court confirmed this position in 1997, in both *Washington v. Glucksberg*[20] and *Vacco v. Quill,*[21] holding that the due process clause protects an individual's right to refuse unwanted medical intervention. The execution of a directive by a competent person is a valid method of communicating that he

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[11] *Id.*

[12] *Id.*

[13] Stolle*, supra* note 8.

[14] CAROL KROHM, M.D. & SCOTT SUMMERS, ADVANCE HEALTH CARE DIRECTIVES: A HANDBOOK FOR PROFESSIONALS 24 (American Bar Association, 2002).

[15] *Id.* at 37.

[16] *Id.*

[17] *Id.* at 34.

[18] Tune v. Walter Reed Army Med. Hosp., 602 F. Supp. 1452 (D.D.C. 1985).

[19] *Id.* at 1456.

[20] Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

[21] Vacco v. Quill, 521 U.S. 793, 796-97 (1997).

wishes to have his life prolonged by artificial means, or not. If a patient is judged to be competent at the time of decision or when a directive was executed, the decisions must be respected.[22] If determined incompetent, others will be designated as surrogate decision makers for him.[23] It is the absence of an advance directive or lack of proof of what the patient would have wanted that leads to state, and possibly judicial, intervention.

III. Landmark Cases

A. Karen Ann Quinlan

In the landmark New Jersey Supreme Court case, *Matter of Quinlan*,[24] Joseph Quinlan sought to be appointed guardian for his incapacitated daughter Karen so that he could have her life-sustaining medical care withdrawn.[25] At age twenty-one, Karen stopped breathing for reasons unknown and suffered brain damage.[26] She was in a chronic persistent vegetative state, unaware of anything or anyone around her and existing at only a primitive reflex level.[27] While there was no known remedy to improve or cure her condition, and she would never return to a cognitive life, Joseph's request to withdraw Karen's life support was opposed by her doctors, the hospital, the county prosecutor, the state of New Jersey, and Karen's guardian ad litem.[28] In the decision, the court reasoned that it would be Karen's own choice, if she were to become lucid for only a moment, to terminate the life-support, even knowing that it would lead directly to her death.[29] The court named Joseph her guardian and, using *Griswold v. Connecticut*[30] and *Roe v. Wade*[31] as authority, held that Karen had a constitutionally guaranteed right to privacy to determine her own medical treatment, as expressed through him.[32] The court delineated a balancing test, holding that the state's interests in the preservation and sanctity of life become

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[22] Krohm & Summers, *supra* note 14, at 37.

[23] *Id.*

[24] Matter of Quinlan, 355 A.2d 647 (N.J. 1976).

[25] *Id.* at 653.

[26] Nachman, *supra* note 7, at 295.

[27] Matter of Quinlan, *supra* note 24 at 655.

[28] *Id.* at 653, 655.

[29] *Id.* at 663.

[30] Griswold v. Connecticut, 381 U.S. 479 (1965). The Griswold Court held that, in forbidding the use of contraceptives, rather than in regulating their manufacture or sale, the Connecticut law was unnecessarily broad and it invaded an area of privacy protected by numerous fundamental constitutional guarantees.

[31] Roe v. Wade, 410 U.S. 113 (1973). The Roe Court held that the right to personal privacy was appropriate, but not unqualified as it must be measured against compelling state interests, in this case, the viability of a fetus.

[32] Matter of Quinlan, *supra* note 24 at 663-64.

secondary to the patient's privacy rights as the treatment becomes more physically invasive despite a poor prognosis.[33]

B. Nancy Cruzan

Following this decision, courts and legislatures explored the limits of the types of medical treatment and care that could be withheld from a patient who had no possibility of recovery as well as what standard would be required for a proxy to claim knowledge of the patient's previously stated desires regarding artificial life support.[34] Absent clear and convincing evidence that the patient would want to terminate the treatment, a proxy could not make the decision to remove life support.[35]

This issue was addressed by the United States Supreme Court in *Cruzan v. Director, Missouri Department of Health*[36] regarding a petition by Nancy Cruzan's parents to remove her feeding and hydration tubes.[37] Nancy fell unconscious and stopped breathing following a car accident at age twenty-five.[38] For seven years, she was in a chronic persistent vegetative state and doctors had determined that there was no possibility she would recover cognitive faculties.[39] The Court considered the issue of whether an incompetent person, such as Nancy, has the right to refuse life-sustaining medical treatment, as requested by her guardian, if there was no clear and convincing evidence that it would be her choice were she competent to make it.[40] The Court held that Missouri had the right to enforce the clear and convincing evidence standard and that the proof offered by the Cruzans regarding Nancy's alleged statements as to her wishes did not satisfy that standard.[41] There was no assurance that her parents' substituted judgment comported with what she would have wanted had she been able to make the decision herself.[42] This was a devastating blow to the family that only sought to end their daughter's suffering.

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[33] *Id.* at 664.

[34] Nachman, *supra* note 7, at 295.

[35] *Id.* at 296.

[36] Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261 (1990).

[37] *Id.* at 265.

[38] M. Rose Gasner, *The Unconstitutional Treatment of Nancy Cruzan*, 7 N.Y.L. SCH. J. HUM. RTS. 1 (1990).

[39] Cruzan, *supra* note 36 at 266-67.

[40] *Id.* at 280.

[41] *Id.* at 284-85.

[42] *Id.* at 286.

C. Terri Schiavo

Fifteen years after the *Cruzan* decision, issues surrounding the removal of life support for patients in a persistent vegetative state captured the attention of the nation as family members fought one another regarding the best interests of Terri Schiavo.[43] In 1990, at age twenty-seven, Terri suffered cardiac arrest and fell into a coma, which progressed to a vegetative state.[44] Terri's husband had been named her proxy, following Florida statutory hierarchy when an incapacitated patient has not specifically named a proxy.[45] After her medical condition remained unchanged for eight years, he sought court approval to have her feeding tube removed; this would imminently lead to her death.[46] The trial judge found evidence of previous statements made by Terri that she would not have wanted to live in her current state compelling and ordered the feeding tube to be removed.[47] In affirming the lower court's decision, the appellate court reasoned that it was their role to allow the trial judge to serve as the patient's proxy to make decisions about life-prolonging treatments when families cannot agree.[48] Terri's parents fought this decision for years, appealing to all three branches of government in Florida and at the federal level, but ultimately lost.[49] A very private family situation was witnessed by the nation in 2005 as media reports covered the events of Terri's last days.[50]

These three high-profile cases demonstrate the need for explicit instructions regarding one's end-of-life wishes. For Karen Quinlan and Terri Schiavo, the court believed that there was clear and convincing evidence that each would choose to discontinue to live in her current physical state and granted the requests to terminate life support.[51] For Nancy Cruzan, the Supreme Court majority did not find clear and convincing evidence of her wishes and refused to grant the request of her parents to have life support removed.[52] As women in their twenties, there would be no reason for them to believe they would suddenly and unexpectedly become incapacitated. In her concurring opinion in *Cruzan* in 1990, Justice O'Connor provided her support for advance directives, stating that surrogate decision making "may be a valuable additional safeguard of the patient's interest in directing his medical care."[53] Had these women

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[43] Lois Shepherd, *Terri Schiavo: Unsettling the Settled*, 37 LOY. U. CHI. L.J. 297 (2006).
[44] *Id.* at 301.
[45] *Id.* at 305.
[46] *Id.* at 304.
[47] *Id.* at 306.
[48] In re Guardianship of Schiavo, 916 So. 2d 814, 818 (Fla. Dist. Ct. App. 2005).
[49] Shepherd, *supra* note 43, at 299.
[50] *Id.* at 311-12.
[51] Matter of Quinlan, supra note 24; Shepherd, *supra* note 43, at 306.
[52] Cruzan, *supra* note 36 at 284-85.
[53] *Id.* at 291-92.

executed advance directives prior to their illnesses, the judiciary, even if used as a last resort, would have had tangible evidence, perhaps even clear and convincing evidence, of what each woman would have wanted for herself.

D. Arizona's Leading Case

Judicial support for legislation regarding advance directives was provided in the Arizona Supreme Court decision *Rasmussen by Mitchell v. Fleming* three years before *Cruzan*, in 1987.[54] According to her physicians, Mildred Rasmussen was in a chronic vegetative state from which there was zero probability of her returning to a higher level of functioning.[55] A public fiduciary sought appointment as her guardian so that he could authorize removal of her feeding tube.[56] There was no evidence that Mildred had ever expressed her wishes regarding her medical care in an end-of-life situation, and her only living relatives agreed to follow the advice of the physicians.[57] The court reasoned that Mildred had a right to privacy that was rooted in the United States Constitution, the Arizona Constitution and the common law.[58]

Mildred died before the appellate court's ruling; however, the judges retained the matter for decision because it was a case of first impression in Arizona and the issues were of great importance to all families and healthcare professionals that would be faced with similar situations in the future.[59] In recognizing the impractical nature of resolving end-of-life disputes through the judicial system,[60] however, the court urged the Arizona legislature to explore the moral, ethical, social, medical, and legal considerations involved in disputes like *Rasmussen*,[61] and to formulate guidelines that would address the rights and interests of all parties involved.[62]

IV. National Legislation

Following the 1990 decision in *Cruzan*[63] and Justice O'Connor's separate opinion,[64] the states responded explosively, with virtually every state enacting

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[54] Rasmussen by Mitchell v. Fleming, 741 P.2d 674 (Ariz. 1987).

[55] *Id.* at 679-80.

[56] *Id.* at 687, 690.

[57] *Id.* at 680, 685.

[58] *Id.* at 681-83.

[59] Fleming, *supra* note 54 at 680.

[60] *Id.* at 691 n4. In note 4, the court cited numerous cases where opinions were issued long after the patient had died to illustrate its belief that the judiciary was not the best forum for resolving end-of-life disputes.

[61] *Id.*

[62] *Id.* at 692.

[63] Cruzan, *supra* note 36.

[64] *Id.* at 287-92.

laws regarding some combination of instructional and proxy designations.[65] The United States Congress passed the Patient Self-Determination Act[66] (the "Act") to enable patients to actively participate in their own health care decisions, even if they are unable to communicate.[67] Additionally, part of the impetus for the Act was to encourage compliance with the states' laws.[68] The Act requires all healthcare facilities that receive Medicare or Medicaid payments to provide written information concerning "an individual's rights under State law . . . to make decisions concerning such medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives."[69] The information must be provided at the time of admission to the facility[70] and any patient who wishes to execute an advance directive must be given that opportunity.[71] If a patient is incapacitated upon admission, the information may be given to family members or surrogates, but this is not required.[72] Studies have shown that most healthcare facilities comply with the requirements.[73] However the rate of execution of advance directives by the public has not significantly increased as a result of the legislation.[74]

V. State Statutes and Arizona Law

The states' advance directives statutes have several provisions in common. Typically there is a witnessing process to ensure the patient's legal capacity to execute the document.[75] The states grant immunity from civil or criminal liability for healthcare professionals who honor the wishes expressed in the patient's living will.[76] Additionally, many states permit the patient to name a proxy decision maker in a healthcare power of attorney.[77] Some statutes allow for total grant of decision making authority, while others restrict the authority to specific decisions expressed by the patient.[78]

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65 Susan Adler Channick, *The Myth of Autonomy at the End-of-Life: Questioning the Paradigm of Rights*, 44 Vill. L. Rev. 577, 591, 628 (1999).

66 Patient Self Determination Act, 42 U.S.C. § 1395cc (1990).

67 Patient Self-Determination Act, in 22 Ill. Prac., The Law of Medical Practice in Illinois § 32:3 (3d ed., 2013).

68 Channick, *supra* note 65, at 591.

69 42 U.S.C. §1395cc.

70 *Id.*

71 Jo-Anne Herina Jeffreys, *Advance Directives: Are They Worth the Paper They're Written On?*, New Jersey Lawyer, the Magazine, N.J. Law 17 (April 1998).

72 Patient Self-Determination Act, *supra* note 67.

73 *Id.*

74 Channick, *supra* note 65, at 592.

75 Gasner, *supra* note 38, at 16.

76 *Id.*

77 *Id.*

78 *Id.* at 17.

A further statutory construction may be included due to the recognition that many people are not comfortable discussing their end-of-life process and will, therefore, never complete the advance directives that state laws permit.[79] Surrogacy statutes define a hierarchy of the people permitted to make decisions on behalf of an incompetent patient.[80] In general, the surrogates would be spouses, parents, adult children, adult siblings, or court-appointed guardians.[81]

Arizona enacted Title 36, Chapter 32 regarding living wills and health care directives in 1992.[82] The law was amended in 2004, adding the state's Healthcare Directives Registry in Article 7.[83] The laws allow for an adult to prepare a living will that controls healthcare decisions made by others on their behalf; one sample living will form is provided.[84] The healthcare power of attorney is recognized as naming a specifically authorized individual to make decisions on behalf of the patient; a single sample healthcare power of attorney form is also provided.[85] In the absence of an executed living will, healthcare power of attorney, or court-appointed guardian, the surrogacy statute will determine who is authorized to make decisions on the patient's behalf, according to any known wishes.[86] The statutory hierarchy for surrogates in Arizona is spouse, adult child, parent, domestic partner, sibling, close friend, and the patient's physician.[87]

The statute specifically allows for a person who is an adult to create advance directives.[88] Each document must be signed before a witness or notary, who is not related by blood, marriage, or adoption to the adult executing the documents.[89] The statute contains limitations against civil or criminal liability for the patient's physician or surrogate for decisions made on the patient's behalf according to the stated wishes in his advance directives.[90] There is a presumption that decisions are made in good faith, which is defined in the statute as actions taken according to the physician's or surrogate's reasonable belief of the patient's wishes or in the patient's best interest.[91] Article 7 provides for the creation of a public, state-administered electronic database to

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[79] *Id.* at 18.
[80] Gasner, *supra* note 38, at 16.
[81] KROHM & SUMMERS, *supra* note 14, at 136.
[82] 1992 Ariz. Legis. Serv. Ch. 193 (WEST).
[83] AZ ST T. 36, Ch. 32, Art. 7, Refs & Annos.
[84] ARIZ. REV. STAT. ANN. §§ 36-3261 – 3262 (1992).
[85] ARIZ. REV. STAT. ANN. §§ 36-3223 – 3224 (1992).
[86] ARIZ. REV. STAT. ANN. § 36-3231 (1992).
[87] *Id.*
[88] ARIZ. REV. STAT. ANN. § 36-3221 (1992).
[89] *Id.*
[90] ARIZ. REV. STAT. ANN. § 36-3203, §36-3205 (1992).
[91] *Id.*

house living wills, healthcare powers of attorney, and mental healthcare powers of attorney.[92] The registry is to be maintained by the secretary of state, who "may accept gifts, grants, donations, bequests and other forms of voluntary contributions to support, promote and maintain the registry."[93]

An Arizona citizen is not required to register their directives with the state registry and failure to do so does not affect the validity of the documents.[94] Should a person wish to register, they will receive a printed record of the registered documents, as well as a unique and confidential file number and password.[95] Documents stored in the registry are accessible, to the patient and to their healthcare providers, only by entering the confidential file number and password, located on a wallet card mailed to the registrant, on the registry website.[96] The statute, however, does not require a physician to determine if a patient has registered any directives with the state registry.[97] Providing the file number and password to the physician is the only way a physician will know there are directives in the state registry and how to access them.[98]

VI. National Registry

The U.S. Living Will Registry is a private organization founded in 1996 to store healthcare directives and retrieve them for caregivers and families in any state.[99] Once a document is registered, the registry mails a wallet card with the registration number and date the information was last updated.[100] Additionally, the registry sends stickers to be placed on the registrant's driver license and insurance card, indicating that there are advance directives on file at the registry.[101] Registrants are contacted annually as a reminder to update contact information for themselves or family members, and to confirm that the documents in the registry are still accurate regarding their wishes.[102] When a document is needed, the healthcare facility can retrieve it from the registry website using the registration number from the wallet card.[103] If this number is unavailable,

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92 Ariz. Rev. Stat. Ann. § 36-3292 (2004).

93 Ariz. Rev. Stat. Ann. § 36-3291 (2004).

94 Ariz. Rev. Stat. Ann. § 36-3293 (2004).

95 Ariz. Rev. Stat. Ann. § 36-3294 (2004).

96 Ariz. Rev. Stat. Ann. §§ 36-3294 – 3295 (2004).

97 Ariz. Rev. Stat. Ann. § 36-3296 (2004).

98 *Arizona Advance Directive Registry*, Arizona Secretary of State, *available at* http://www.azsos.gov/adv_dir/Default.htm, (last visited March 14, 2014).

99 U.S. Living Will Registry, *available at* http://www.uslivingwillregistry.com/default.asp, (last visited March 14, 2014).

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.*

however, or if the physician is uncertain that a directive is on file, they can call the registry, provide verifying information about the healthcare facility and supply the patient's personal information, such as name, birth date, and social security number.[104] If there is a directive on file, registry personnel will manually send it to the physician.[105]

VII. Barriers to Adoption of Advance Directives

Despite both national and state legislation regarding the right to execute advance directives and the legal protections for those healthcare professionals who act according to them, the majority of adults have not adopted living wills and healthcare powers of attorney.[106] While most people respond positively to a discussion regarding advance directives and wish their physician would bring up the topic,[107] there are many reasons that people do not take action.

A. Lack of Awareness

A primary reason that people do not draft advance directives is that they are simply unaware that they exist as an option until a medical situation arises. A common way for people to learn about advance directives is when they check into a healthcare facility. The Patient Self-Determination Act requires that medical facilities supply information regarding advance directives to all patients upon admission.[108] The materials generally include forms to be completed on the spot, although this is not required, and submitted to the facility for storage and retrieval should they become relevant during the patient's stay. The statute includes no provision for a follow-up conversation, so the opportunity is lost if the patient does not sign right away.

Experts agree that the most opportune time for a discussion about one's end-of-life care takes place when they are not in the midst of a health crisis,[109] yet this is precisely the time that the national and state laws require this conversation to occur.[110] Patients who address advance directives when they are already ill have lost the chance to make meaningful decisions because, once they are admitted, standard hospital procedures involved in attending to patients take over and it is harder for patients to have input about their care.[111] Additionally, approximately forty percent of hospitalized patients have a dimin-

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104 U.S. Living Will Registry, *supra* note 99.
105 *Id.*
106 Nachman, *supra* note 7, at 299.
107 Krohm & Summers, *supra* note 14, at 48.
108 Patient Self Determination Act, *supra* note 66.
109 Krohm & Summers, *supra* note 14, at 48.
110 *Id.*
111 Channick, *supra* note 65, at 632.

ished level of decision making capacity.[112] Discussing advance directives with a patient who is critically ill, in pain, and perhaps only partly lucid, could result in a patient signing legal documents when they temporarily lack the capacity to do so. More likely, however, is that a patient simply will ignore the paperwork.

B. Lack of Presence of Family or Friends

A further problem with distributing advance directive paperwork at hospital admission is that a patient may not feel comfortable or capable of making such important decisions without the presence of family and friends. Determining the provisions in a living will or healthcare power of attorney is typically not a one-step process because the issues are emotionally challenging and legally complex.[113] Considering the views of loved ones is critical to the process of determining how one would choose to spend their last days and how they wish to approach death. Spiritual or religious patients might wish to consult with clergy regarding the views held by their faith about end-of-life care.[114] Ideally, communication with families and friends about end-of-life care would begin early, before the onset of any life-threatening illness or diminishment of capacity.[115] Asking or expecting a patient to rush through this process during in-patient registration, without the assistance of the people that comprise their personal support system, is simply not effective nor truly fair.

C. Misconceptions about Advance Directives

Finally, many patients have misunderstandings about advance directives. Those who are aware often think that living wills are only for the elderly or those with chronic or terminal health conditions. This notion is far from the truth. The cases of Karen Quinlan, Nancy Cruzan, and Terri Schiavo prove how important it is for everyone to make their wishes known, regardless of age. Each of these young women suffered an unforeseeable and tragic health crisis, and the absence of executed advance directives opened the door for her medical treatment to be the subject of litigation. Without definitive proof of a patient's desires, there is no way to predict how a court will rule. It is important to note, however, that there is no case involving a disputed living will where the living will has been invalidated.[116] The trend has been to enforce a living will over

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[112] Kevin B. O'Reilly, *Defective Directives? Struggling with End-of-Life Care,* AM. MED. NEWS (Jan. 5, 2009), http://www.amednews.com/article/20090105/profession/301059970/4/, (last visited March 14, 2014).

[113] KROHM & SUMMERS, *supra* note 14, at 57.

[114] *Id.* at 120.

[115] Ash & Arons, *supra* note 1, at 327.

[116] Silburn, *supra* note 3, at 58.

the objections of the family, the physician, and the surrogate.[117] There is wide consensus regarding the importance of advance directives for young people as it is critical, at any age, to make one's wishes known in a legally binding document.[118]

Many people misunderstand the purpose of a directive. Rather than granting permission for the family or physician to "pull the plug," a living will outlines the conditions under which a patient's life would be extended and what medical interventions would be desired.[119] It may specify the level of pain medication and other comfort measures that would be provided.[120] On the other hand, it may be the patient's wish to limit their physician from doing everything possible to extend his life. He can specify at what point he no longer wants certain treatments, recognizing that some may provide no medical benefit yet will increase the emotional and financial toll on his family.[121] In a living will, the patient can clearly communicate his choices.

Another misconception is that a living will or healthcare power of attorney is permanent. This is not true. While a patient is alive and competent, these documents are fully amendable and revocable.[122] In fact, a living will should be reviewed often and amended as needed, to account for changes in the patient's health and their views on end-of-life care.[123] According to the American Medical Association, twenty-nine percent of people will change their mind regarding the type of life-sustaining treatment they want to receive after signing a living will.[124]

A power of attorney should be reviewed periodically as well, since family situations change. A valid and enforceable healthcare power of attorney may name an individual as proxy that the patient no longer desires to be in that position, such as an ex-spouse. It may also name a deceased individual. In that case, a state's surrogacy statutes will prevail, and a patient will have no choice in the matter. But, surrogacy statutes are defaults, and are ineffective if a competent person has affirmatively named a proxy that differs from the statutory hierarchy.[125] If a patient desires that a friend or domestic partner act as their proxy, naming them in a directive may be the only means to ensure this, since non-relatives are generally excluded from surrogacy statutes, or are placed low

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117 Nachman, *supra* note 7, at 312.

118 Silburn, *supra* note 3, at 61; KROHM & SUMMERS, *supra* note 14, at 147.

119 Silburn, *supra* note 3, at 50.

120 *Id.*

121 *Id.*

122 *Id.* at 151.

123 *Id.*

124 O'Reilly, *supra* note 112.

125 KROHM & SUMMERS, *supra* note 14, at 136.

on the statutory priority.[126] Additionally, a living will can be used to disqualify a surrogate, even if that person is within the statutory hierarchy.[127] Finally, the directives should be reviewed frequently to ensure the contact information for those named as proxies is accurate. The power of attorney will be of no use if the proxies named cannot be located when needed.

Patients often believe that they have no need for directives because their family knows the type of care they would choose for themselves. This approach may be successful if families have had meaningful conversation about how they want to spend their last days. Most patients, however, hope for a medical miracle rather than fully face the issue of their death.[128] According to the Supreme Court's ruling in *Cruzan*, a state may enforce a standard of clear and convincing evidence regarding the patient's wishes, and it is not bound to accept the word of close relatives as meeting that standard.[129] In the absence of clear and convincing evidence, the state may decide if a patient has exercised his right to refuse treatment, giving no weight to the beliefs of the family.[130] Additionally, in trying to advocate for what their loved one may have wanted, a proxy is likely to project her own values and beliefs, perhaps unknowingly.[131] A proxy's actual decision is often not in agreement with what the patient would have wanted.[132] While a patient may choose to allow his family to make decisions on his behalf, there is no guarantee that the result will be as he hoped. Also, there is no guarantee that a court will accept the proxy's assertion.

These barriers to greater adoption of advance directives are possible to overcome. In general, increased education at multiple points within one's life should suffice to dispel the misperceptions and the overall lack of awareness or understanding regarding the function and utility of living wills and healthcare powers of attorney.

VIII. Barriers to Compliance with Advance Directives

A. Directives Not Available When Needed

In the instances where a patient does have valid advance directives, they are often not followed. A primary reason is that healthcare professionals do not have access to the documents. It may defy logic, but nearly sixty percent of people who execute advance directives do not give a copy to their physician or

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126 *Id.* at 70.

127 12 Darren T. Case, Brent W. Nelson & T.J. Ryan, Physician's Directives: Creation of Living Will, Ariz. Prac., Estate Planning and Probate Handbook § 2:8 (2013).

128 60 Minutes, *supra* note 5.

129 Silburn, *supra* note 3, at 58.

130 *Id.*

131 Shepherd, *supra* note 43, at 332.

132 Krohm & Summers, *supra* note 14, at 71.

their family members.[133] Often, a directive will not be sent to the hospital from a nursing home, or a relative simply may forget to bring it to the hospital or alert the staff that the patient has a directive.[134] Physicians and nurses are generally supportive of advance directives, especially for patients whose conditions are unlikely to improve regardless of the care provided.[135] If more directives were available when needed, there would likely be greater compliance with patients' wishes.

B. Instructions in Directives are Vague

Directives whose meanings are vague or hard to understand will not always be followed. Although states have provided sample living will and healthcare power of attorney forms within their statutes, the wording is very legalistic and may be incomprehensible to patients with no legal training. Additionally, there is no required format for a valid directive. Language that differs from that in the sample is acceptable, as long as the statutory requirements for a living will are met.[136] As a result, people desiring to execute documents might create their own form or have one drafted for them, particularized to their personal needs. Numerous entities – hospitals, doctors, medical associations, lawyers, religious organizations - have designed forms for individual use, as well, creating inconsistency and ambiguity for the physicians who need to interpret their meaning.[137] While an individual may have a clear understanding of what "no chance for survival" means to them, it is possible that those same words hold different meaning for a physician.[138] Additionally, nearly two-thirds of living wills do not cover the clinical realities faced by the patients who are relying on their use to guide their physician in determining a course of action.[139] Directives will achieve more predictable outcomes when the terminology is effective for all parties and there is clear meaning about the patient's wishes.

C. Physicians May Not Adhere to Instructions in Advance Directives

Despite the presence of a valid directive, a physician may choose to disregard it for one of several reasons. Some may fear that if they follow a directive that results in an adverse outcome or the death of a patient, they will expose

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133 O'Reilly, *supra* note 112.

134 KROHM & SUMMERS, *supra* note 14, at 107.

135 *Id.* at 95.

136 CASE, NELSON & RYAN, *supra* note 127.

137 Nachman, *supra* note 7, at 293-94.

138 O'Reilly, *supra* note 113.

139 *Id.*

themselves to a lawsuit from the family.[140] This is more perception than reality, however. Arizona statutes address this issue directly, granting immunity from civil and criminal liability for both physicians and surrogates who act in good faith reliance on an advance directive.[141] Additionally, physicians are not subject to professional discipline for following the patient's wishes expressed in a directive.[142]

Adhering to their own personal beliefs and values is also a common reason that a physician would choose to disregard a directive. Arizona statutes will not hold a physician liable for failing to follow a directive if the instructions violate a physician's conscience, but he must promptly withdraw after finding another physician to take over the patient's care.[143] Some physicians may object to a patient's desire to forego care even if the physician believes it could be beneficial. They may believe it is their duty as healers to do no harm to the patient and to utilize every available treatment to keep their patient alive as long as possible.[144] On the contrary, others may object to a patient's insistence on treatment, despite the futility of it. Professional ethics do not require that a physician provide treatment that will have no effect, especially if the instructions in the directive are contrary to the accepted medical standards in such a situation.[145]

IX. Proposed Changes to Arizona Statutes

Several revisions to the current Arizona statutes related to advance directives and the healthcare directives registry will greatly increase the adoption of advance directives by citizens of this state, improve the level of compliance by physicians, and enhance the effectiveness of the registry. This part will list the proposed changes and provide rationale for each suggestion.

The proposed statutory changes include: (1) the creation of a professional committee to draft several versions of each type of advance directive, to serve as the exclusive directives permitted in the state; (2) the permissibility of a living will executed by a minor; (3) the establishment of a government sponsored counseling program for those individuals desiring personal education or assistance in making choices for their advance directives; (4) the distribution of educational materials and sample directives through the Arizona Department of Transportation, Motor Vehicle Division; (5) operational revisions and a simpli-

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[140] Vicki Joiner Bowers, *Advance Directives: Peace of Mind or False Security?,* 26 Stetson L. Rev. 677, 700-01 (1996).

[141] Ariz. Rev. Stat. Ann. § 36-3203, § 36-3205 (1992).

[142] Ariz. Rev. Stat. Ann. § 36-3205 (1992).

[143] *Id.*

[144] Krohm & Summers, *supra* note 14, at 95.

[145] *Id.* at 105.

fied process for physicians to access directives from the Arizona Advance Directive Registry; and (6) a process to fund these proposals in full, by adding a surcharge to Motor Vehicle Division fees.

A. Standardized Forms

In the Arizona living will statute, there is a complete sample form that provides general statements about various medical treatment options with check boxes to indicate an individual's choice; the statute allows him to customize this form or use any other form that he chooses.[146] As one can imagine, there must be an endless number of different forms currently in use in the state, with perhaps no two formats exactly the same. A physician might have to make assumptions about the patient's meaning of the term "heroic measures" or "comfort care," rather than having concrete information about steps to be taken in a specific situation.[147] Doctors are tasked with interpreting a directive in the way the patient intended which may not be easy, or even possible, to do.

Rather than offer one template in the statute, Arizona should create and make available several templates, each providing the pertinent and necessary medical information, but in different styles of communication, to appeal to individual comfort levels. These few templates, however, would be the only legally accepted formats in Arizona, to allow for some measure of uniformity upon which physicians can depend. At one end of the spectrum, one format could consist of a checklist of options regarding the type of treatment a patient would want administered based on their situation. This is how most statutory samples are constructed. At the other end of the spectrum, the document could use common lay language to describe the possible treatment options for different medical situations and to describe the quality of life factors that an individual would choose at the end of his life.

Numerous formats for living wills have been proposed as a way to make the forms more effective. One such format is known as POLST – Physician Orders for Life-Sustaining Treatment. The purpose of this format is to translate a patient's end-of-life treatment wishes into actual medical orders that a healthcare provider must follow.[148] The POLST document is drafted cooperatively by the patient and his physician, using appropriate medical terminology, rather than legal terminology that may be difficult for a physician to understand, especially in emergency situations.[149] The Five Wishes format has gained much support as a document that uses everyday language to communicate end-of-life

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146 ARIZ. REV. STAT. ANN. § 36-3262 (1992).

147 Thomas J. Murphy, *Drafting Living Wills After Schiavo*, MAR ARIZ. ATT'Y 36, 37 (2006).

148 Keith E. Sonderling, *POLST: A Cure for the Common Advance Directive - It's Just What the Doctor Ordered*, 33 NOVA L. REV. 451, 456 (2009).

149 *Id.* at 472-73.

choices.[150] The attraction of this format is that the language is readily understandable with no needed legal or medical explanations.[151] The drafter, however, would need to ensure that a Five Wishes document did not contain legally ambiguous language so that it could withstand a legal challenge.[152]

Another possible format is what one author describes as "less dogmatic, less demanding, less legalistic . . . something more folksy, a letter sharing your thoughts."[153] This format would allow the patient to address unconventional topics for a living will, such as his desire for a more peaceful death process by dying at home, rather than in a hospital, and that his family should not feel guilty for not employing all possible means for extending his life.[154] It can describe the conditions of life that the patient would find acceptable, and those under which he would be unwilling to continue living. Additionally, a letter like this could communicate a patient's desire that his family not exhaust all their financial resources in attempts to prolong his life.[155] The document would use the patient's own words to help his loved ones make an informed decision about what level of care, or withholding of care, he would choose if he were able.[156]

The sanctioned use of living will formats such as these may seem counter to the proposed concept of standardizing the forms in Arizona. After all, no two individuals will create a personal letter to their family with the exact same factors for their family to consider. But clearly, a one-size-fits-all format is too limiting. The forms must fit statutory requirements, but the facts indicate that patients are more willing to execute a directive written in more common and understandable language.[157] Critics may not see the need for approved, standardized formats, and they may not believe that it is even possible to achieve given the personal nature of a document like a living will. However, the benefits of permitting just a few standard forms – some using technical legal or medical terminology, others allowing for more personalization by using the individual's own words – will outweigh the downsides as this will provide

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150 Ray J. Koenig III & MacKenzie Hyde, *Be Careful What You Wish for: Analyzing the "Five Wishes" Advance Directive*, 97 ILL. B.J. 242 (2009). The document outlines "(1) the person you want to make health care decisions for you when you cannot make them for yourself, (2) the kind of medical treatment you want or do not want, (3) how comfortable you want to be, (4) how you want people to treat you, and (5) what you want your loved ones to know."

151 Ruth F. Maron, *Who Has A Will to Live? Why State Requirements for Advance Directives Should Be Uniform(Ly Revised)*, 24 REGENT U. L. REV. 169, 195 (2012).

152 Koenig & Hyde, *supra* note 150, at 243.

153 Kenney Hegland, *Suggestions, Not Demands Rethinking Living Wills*, OCT. ARIZ. ATT'Y 14, 15 (October 2004).

154 *Id.* at 15-16.

155 Murphy, *supra* note 147, at 38.

156 Hegland, *supra* note 153, at 14-17 generally.

157 Nachman, *supra* note 7, at 331.

some measure of consistency and clarity to aid physicians in quickly understanding a patient's wishes.

Arizona should authorize the formation of a committee of experts to create several template forms for the various directives. Each template must be legally sound and provide clear and convincing evidence of the patient's wishes so that it can withstand the scrutiny of threatened litigation by a family member or physician that does not wish to comply with its provisions. With complex issues of law, medicine, ethics, and religion to be considered, the committee should include physicians and healthcare workers, psychologists, medical ethicists, attorneys, and clergy.[158] This will not only ensure that the created documents address a myriad of critical issues, but also may lead to greater adoption of advance directives by Arizonans who can be sure that the directives will suit their needs.[159] Additionally, the state legislature will be assured that all interests were represented as the new documents were drafted.[160]

B. Early Introduction of Concept and Documents

The tragic cases of Karen Quinlan, Nancy Cruzan, and Terri Schiavo stand as prime examples of why young adults should execute living wills. Their cases might never have gone to litigation had each woman completed a living will with her end-of-life wishes clearly specified. However, relatively few young people do this.[161] National and Arizona statistics regarding accident injuries and deaths among young people illustrate the importance of being prepared for an unexpected injury where one might be rendered unable to advocate on his own behalf.

According to Census Bureau reports for 2009, there were 5,505,000 traffic crashes.[162] Of these, 33,030 (0.6%) involved fatalities and 1,519,380 (27.6%) involved non-fatal injuries.[163] The accident statistics specific to young people are alarming. Nationally, people aged 24 and younger account for 13.2% of all licensed drivers.[164] Disproportionately, drivers in this age group account for 21.2% of vehicle accidents resulting in a fatality and 27.2% of all accidents.[165]

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158 Maron, *supra* note 151, at 197.

159 *Id.*

160 *Id.*

161 Channick, *supra* note 65, at 628.

162 *The 2012 Statistical Abstract*, *Table 1112*, UNITED STATES CENSUS BUREAU, *available at* http://www.census.gov/compendia/statab/cats/transportation/motor_vehicle_accidents_and_fatalities.html (last visited March 14, 2014). A "crash" is defined as a police-reported event that produces injury and/or property damage involving a vehicle in transport and occurs on a trafficway or while the vehicle is in motion after running off the trafficway.

163 *Id.* The remaining 3,958,095 crashes (71.9%) involved only property damage.

164 *Id.* at Table 1114.

165 *Id.*

Unintentional injuries are reported by the Centers for Disease Control. Falls, assaults, overexertion, motor vehicle accidents, poisoning/overdose, and fire injuries are among the top twenty types of unintentional injuries for people aged 24 and younger.[166] In 2012, there were 12,222,386 unintentional injuries nationwide in this age group within the top twenty reasons.[167]

Injury and hospitalization information for Arizona comes from the Arizona Department of Health Services. Unintentional injury was the fourth leading cause of death, accounting for 2804 (5.8%) deaths, in Arizona in 2012.[168] For the three-year period 2005-2007, there were an average of 1,100 unintentional deaths from motor vehicle accidents per year, 7,500 inpatient hospitalizations due to injuries sustained in motor vehicle accidents, and 50,400 motor vehicle accident victims admitted to emergency rooms.[169] Adolescents and young adults aged 15-24 had the second highest mortality rates from motor vehicle accidents each year in this same period.[170]

While this information fails to report the number of accident victims who were unable to make their own healthcare decisions, it does point to the importance of being prepared for this possibility in the event of an unintentional injury. While only adults are legally permitted to execute advance directives, it is important for minors to participate in their own healthcare decision-making because of the possibility of critical injury from unforeseen circumstances, as the statistics show.[171] For young people afflicted with an illness or chronic condition, it is equally important because they are already aware that their health problems might render them unable to participate in decisions regarding their care at some point. Communication among families should begin early, with discussion of individual desires and needs.[172] Some of the more flexible living will options may provide an easier way for young people to think about their values and overall goals for their healthcare and their ability to shape it themselves.[173]

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166 *Leading Causes of Nonfatal Injury Reports, 2012,* CENTERS FOR DISEASE CONTROL AND PREVENTION, *available at* http://webappa.cdc.gov/sasweb/ncipc/nfilead2001.html, (last visited March 14, 2014).

167 *Id.*

168 *Leading Causes of Death*, ARIZONA DEPARTMENT OF HEALTH SERVICES, *available at* http://www.azdhs.gov/plan/report/ahs/ahs2012/pdf/text2b.pdf, (last visited March 14, 2014).

169 Christopher K. Mrela & Clare Torres, *Injuries and Deaths of Arizona Residents in Motor Vehicle Accidents*, ARIZONA DEPARTMENT OF HEALTH SERVICES 59, *available at* http://www.azdhs.gov/plan/report/mva/mva07/index.htm, (last visited March 14, 2014).

170 *Id.* at 8.

171 KROHM & SUMMERS, *supra* note 14, at 144.

172 Perry, *supra* note 2, at 424.

173 Maron, *supra* note 151, at 190.

Courts will respect the wishes of a minor if it is determined that she has the requisite degree of maturity to make decisions regarding her own healthcare.[174] In *In re E.G.*,[175] the Illinois Supreme Court reasoned that being younger than the age of majority "is not an impenetrable barrier that magically precludes a minor from possessing and exercising certain rights normally associated with adulthood."[176] The court remanded for the trial judge to determine if there was clear and convincing evidence that the minor could appreciate the consequences of her actions and that she could exercise the judgment of adult.[177] If so, the court held that she had the right to consent to or refuse medical treatment.[178] The Maine Supreme Court held similarly in *In re Swan*[179] that clear and convincing evidence of a minor child's desire to not receive continued medical treatment in the event he was in a persistent vegetative state should be adhered to and respected.[180] Perhaps the American Bar Association's three-part test for competence, cited herein, could provide the test for a minor's competence.[181]

Arizona should formalize this doctrine and permit minors to execute a living will, as clear and convincing evidence of their end-of-life wishes. It would be logical to require a parent or guardian to witness the signing of the document along with an unrelated third party. Legalizing this process would encourage serious discussion among families at a time when they are not facing an acute medical situation. It would force attention on the grim statistics regarding the disproportionate number of auto accidents and fatalities among persons under age twenty-five and would be an impetus for them to memorialize their wishes in an advance directive. Critics will argue that children are incapable of making such important life-or-death decisions, and that they lack the ability to see all sides of the issue objectively. The courts, however, have developed a standard by which to evaluate a child's capacity[182] and determine if this is the case or not.

C. Public Education and Counseling

Advance directives are complicated documents, both legally and emotionally. Many people may not feel confident in their ability to execute the docu-

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[174] Bowers, *supra* note 140, at 709.
[175] In re E.G., 549 N.E.2d 322 (Ill. 1989).
[176] *Id.* at 325.
[177] *Id.* at 327-28.
[178] *Id.*
[179] In re Swan, 569 A.2d 1202 (Me. 1990).
[180] *Id.* at 1205-06.
[181] *See* text accompanying note *supra* 17,; KROHM & SUMMERS, *supra* note 14, at 34.
[182] *See supra* text accompanying notes 175-180.

ments without support[183] and may believe that their end-of-life choices are limited to only the circumstances or treatments that would hasten their death.[184] To encourage greater adoption, the state should provide counseling to help patients make informed decisions.[185] The Arizona Attorney General's office has already created a patient education packet, a twenty-four page document describing the purpose for advance directives and explaining the state registry.[186] A document like this, however, is likely to be intimidating to even the most educated citizens. For those not versed in legal terminology, it would be easier to ignore the issues entirely than to tackle on their own.

The state should fund the establishment of a free counseling program to assist individuals in formulating their personal choices and completing the various documents. This program should be staffed by medical personnel who can explain the multiple contingencies that directives are intended to cover. Attorneys and clergy should be available, as well, for citizens desiring to understand the issues from a legal, religious, or philosophical standpoint.

D. Distribution of Materials through Motor Vehicle Division

The Arizona Department of Transportation operates forty-five (45) Motor Vehicle Division ("MVD") locations throughout the state.[187] These offices provide a full slate of services related to driving and operating a vehicle in the state.[188] Additionally, the MVD website handles organ donation declarations and the voter registration process.[189] Many of these services can be accessed online through the MVD's authorized service website[190] or at any of the one hundred fifty (150) authorized third party provider locations around the

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183 *See supra* text accompanying notes 113-115.

184 *See supra* text accompanying notes 119-121.

185 KROHM & SUMMERS, *supra* note 14, at 101.

186 *Life Care Planning*, ARIZONA ATTORNEY GENERAL TOM HORNE, available at https://www.azag.gov/seniors/life-care-planning, (last visited March 14, 2014). These documents appear to be very comprehensive concerning the issues that need to be decided as well as the process for completing healthcare powers of attorney, mental healthcare powers of attorney, living wills, organ donation, funeral arrangements and pre-hospital medical care directives.

187 ARIZONA DEPARTMENT OF TRANSPORTATION, *available at* http://www.azdot.gov/, (last visited March 14, 2014).

188 *Id.* At an Arizona MVD location, a resident can obtain a new, renewed or reinstated driver license for a personal vehicle, motorcycle or commercial vehicle, as well as vehicle title, registration, renewal registration and license plates. Non-drivers can obtain identification cards.

189 *Id.*

190 SERVICE ARIZONA, ARIZONA DEPARTMENT OF TRANSPORTATION, *available at* http://servicearizona.com/, (last visited March 14, 2014).

state.[191] Arizona residents of all ages interact with the MVD on a regular basis for these services.

The Patient Self-Determination Act[192] requires that advance directive documentation be distributed upon a patient's admission to a healthcare facility,[193] but many agree that this is an inappropriate and ineffective time to introduce legal documents that have life-or-death implications.[194] The documents should be distributed at a time and place where an individual is not facing a medical situation of any kind; state-operated MVD offices should be this place. The current MVD infrastructure should be adjusted to support the hard-copy distribution of an Advance Directives packet to everyone that applies for an instructional or driver license or an identification card. While printed material may be seen as a wasteful use of public funds, getting something directly into people's hands is a critical step for awareness. The information should certainly be accessible online, however, the need for greater public awareness demands that the state proactively distribute the packets, rather than relying on each person's individual initiative to find the information online. For those who would argue that the DMV is an inappropriate place to deal with information not related to driver services, it should be noted that the organ donation process is currently facilitated through the DMV, as is voter registration.[195]

In Arizona, teens can apply for an instruction permit at age fifteen and a half and a driver license at age sixteen.[196] National and state statistics show that young drivers disproportionately get into vehicle accidents, both fatal and non-fatal.[197] It follows that Arizona has an interest in educating their young drivers about vehicle safety and the possible health consequences of dangerous driving. For teens, this material will be a valuable and effective way to start conversations within families who might otherwise never discuss the topic.[198]

E. Revisions to Registry Operations

Several revisions to the statutes in Article 7 would enhance the effectiveness of Arizona's registry and ensure that directives would be more accessible to physicians when needed. First, the registry should establish a process of continuous communication with the individuals who have filed directives. Cur-

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[191] Arizona Motor Vehicle Division, Driver License Authorized Providers, *available at* http://www.azdot.gov/apps/thirdpartyreportsviewpdf?lngReportImageID=23, (last visited March 14, 2014).

[192] Patient Self Determination Act, *supra* note 66.

[193] *Id.*

[194] Maron, *supra* note 151, at 192.

[195] Arizona Department of Transportation, *supra* at note 187.

[196] *Id.*

[197] *See* text accompanying *supra* notes 162-170.

[198] O'Reilly, *supra* note 112.

rently, once a directive is filed in the registry, the only activity that will take place is a request by the registrant to retrieve it, transfer it to a registry in a different jurisdiction, or delete it.[199] However, over time, an individual's values, beliefs and end-of-life choices might change. Accuracy may become an issue as the length of time between the original execution of a directive and the possible need to apply its provisions increases.[200] Even if an individual's choices remain consistent, medical advances may render a document out-of-date, simply because it did not contemplate the possibilities for current treatment.[201] Directives should be reviewed, modified, and re-executed on a regular basis to ensure that they truly reflect the individual's wishes based on the most current information available.[202] The Arizona registry would provide a valuable service by sending electronic notices, perhaps annually, to remind registrants to review their documents, to access the website to confirm that the documents on file are still accurate, or to revoke and re-register newly executed documents.[203]

Additionally, the state should allow for designation that directives are filed with the Arizona Advance Directives Registry on an individual's driver license. Currently, a license application includes a checkbox for those who have made an organ donation commitment.[204] Emergency personnel are accustomed to looking on a driver license for this designation. It would be logical to add a checkbox for the Advance Directives Registry on a driver license or identification card application and to print the designation on the license as well. This would significantly enhance awareness and effectiveness of the registry and might make a physician aware of the existence of directives even if the patient could not communicate that fact himself.

Finally, the registry should adopt new procedures for physicians to access their patients' directives. According to the statute, a physician can access documents by typing the patient's registry file number and password on the website portal.[205] Sixty percent (60%) of people with valid advance directives do not give copies to their doctors or their families.[206] It would be unreasonable to think that someone who does not share their actual directives with their physician or family would share their registry file number and password. Without this, however, a physician is unable to access the documents. This process

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199 ARIZ. REV. STAT. ANN. §§ 36-3294 – 3295 (2004).

200 Jeffreys, *supra* note 71, at 19.

201 Stolle, *supra* note 8, at 96.

202 *Id.*

203 This reminder service is provided by the U.S. LIVING WILL REGISTRY, *supra* note 99.

204 ARIZONA DEPARTMENT OF TRANSPORTATION, *supra* at note 187.

205 ARIZ. REV. STAT. ANN. § § 36-3295 (2004).

206 O'Reilly, *supra* note 112.

stands as a barrier to achieving the registry's purpose and should be changed. Perhaps the U.S. Living Will Registry process would make sense for Arizona.[207]

These represent only three suggestions, although important ones, that could be implemented to make the Arizona registry more robust. A survey of other existing state registries will undoubtedly reveal additional operational processes that could further improve its productivity. The state should establish a fact-finding committee to seek out information from other registries and to determine best practices that could be adopted here.

F. MVD Surcharge to Fund Proposals

The recommendations above are not, unfortunately, entirely free of cost. It may be possible to establish volunteer committees to research and draft new versions of the various advance directives recognized in Arizona statutes and research best operational practices of other state registries. Since these committees would exist for a single and finite purpose, once it is accomplished the committee can disband. It would be worth the effort to identify appropriate individuals for these committees and request their service on a non-compensated basis.

Incremental expense would be required to print hard copies of the informational packet and approved template versions for distribution through MVD offices. Additionally, launching a counseling program and staffing multiple locations throughout the state would be incremental budget items, as would allocating funds to update and maintain a more robust registry.

The principles of preventive law can be used to help justify this increase in state budget. Preventive law focuses on the positive results that can be achieved by advanced legal planning.[208] The concept is that an attorney and client work together in determining the client's long term goals so that future conflict in minimized.[209] In the area of end-of-life planning, determining one's legal options and preferences for their own healthcare can be emotionally empowering, lifting the psychological burdens imposed by the lack of control that many people face when they are ill.[210]

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[207] *See* U.S. LIVING WILL REGISTRY, *supra* notes 104-106.

[208] Dennis P. Stolle, David B. Wexler, Bruce J. Winick & Edward A. Dauer, *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HEALING PROFESSION 6 (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds., Carolina Academic Press, 2000).

[209] *Id.*

[210] Stolle, *supra* note 8, at 84.

The preventive law doctrine also recognizes that there can be significant negative emotional and financial implications to litigation and that planning for a contingency before it has occurred will minimize the chances of a poor outcome.[211] Preventive law supports the creation of advance directives because the legally binding instructions will remove doubt about the patient's choices, alleviating problems that would have arisen due to uncertainty about the patient's wishes. By funding the counseling and registry programs, Arizona would be providing valuable assistance in helping its citizens take the personal responsibility and initiative in making choices about their future healthcare.

From a legal perspective, the existence of an advance directive would be advantageous should a situation advance to litigation. It is evident that judges do not relish the position of deciding issues of life and death for incapacitated patients, as expressed in *Schiavo*:

> . . . in the end, this case is not about the aspirations that loving parents have for their children. It is about Theresa Schiavo's right to make her own decision, independent of her parents and independent of her husband. In circumstances such as these, when families cannot agree, the law has opened the doors of the circuit courts to permit trial judges to serve as surrogates or proxies to make decisions about life-prolonging procedures. It is the trial judge's duty not to make the decision that the judge would make for himself or herself or for a loved one. Instead, the trial judge must make a decision that the clear and convincing evidence shows the ward would have made for herself. It is a thankless task, and one to be undertaken with care, objectivity, and a cautious legal standard designed to promote the value of life.[212]

Similarly, expressing relief that the patient in the case is conscious and lucid, the judge in *Tune* states that "the Court is fortunately not called upon to address the difficult issues presented when the patient is comatose or otherwise incompetent, and a 'substituted judgment' must be made."[213]

In the *Cruzan* case, the Justices found that only clear and convincing evidence of Nancy's choice to refuse medical treatment would allow for the artifi-

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[211] Susan Daicoff, *The Role of Therapeutic Jurisprudence with the Comprehensive Law Movement*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HEALING PROFESSION 474 (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds., Carolina Academic Press, 2000).

[212] In re Guardianship of Schiavo, *supra* note 48 at 818.

[213] Tune, *supra* note 18 at 1454.

cial feeding and hydration to be removed.[214] A fully executed living will might have provided this clear and convincing evidence. The state should encourage a patient to express his own desires in a written medical directive by providing funding for uniform documents and information, providing access to counseling, and supporting the operations of an enhanced registry.

It is possible that the voluntary contributions to the registry fund will support the recommended changes; if not, the state should initiate a dedicated revenue-generation program. This program could be self-funding, by adding a surcharge to existing MVD license and identification card fees. Since it is the people using the MVD for their driver and vehicle services that would be receiving the advance directives packet, there is logic in proposing that they be the ones to pay for it. While an exact figure cannot be determined until the costs for the packet production, counseling program, registry upgrades, and management are known, the revised statute could mandate an upper limit on this surcharge. Any cost in excess of the donated funds to the registry and this MVD surcharge could be funded by the state's general treasury. This would guarantee that those people who complete and register advance directives, to minimize their risk for later legal conflict, could be certain of the registry's security. If it is to house critical documents for people in the final stages of their life, there should be no fear that the registry will cease operations due to a lack of funds.

X. Conclusion

Benjamin Franklin told us something we already know: it is certain that everyone will die. But how we die can be somewhat controlled by the creation of a living will and healthcare power of attorney. These documents will ensure that our own wishes are honored even if we are incapacitated and unable to personally communicate with our loved ones. However, not even twenty-five percent of adults have living wills,[215] with the result that many people do not spend their last days as they wish. The laws are in place, recognizing that advance directives are legally binding and releasing the physicians and surrogates who rely on them from liability. Nevertheless, the statutes do not go far enough to provide awareness of directives nor to encourage their use.

In Arizona, the changes proposed above would significantly improve this situation. Citizens of Arizona, both adults and minors, deserve to know that if they execute one of the approved directives and place them on file with the state registry, the documents will be available and accessible when needed. If a family member or physician cannot access a directive, there is no purpose to

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214 Cruzan, *supra* note 36 at 286-87.

215 *See* text accompanying *supra* note 7.

even having created it. We will be back to dying in ways that we do not want because no one can find the document that tells them what we do want. If there must be a death, at least it should be a good death. Revising the Arizona statutes can assure this.

A Law Without Special Needs: Arizona's Attempt to Drug Test Unemployment Recipients

Eric L. Williams*

I. Introduction

Arizona H.B. 2030, which adds A.R.S. § 23-797, requires initial applicants seeking unemployment compensation to submit to a drug screening questionnaire.[1] Depending on the results from the questionnaire, the applicant may have to submit a drug test as a condition to receiving unemployment benefits.[2] Requiring those applicants to submit to mandatory drug tests is likely a violation of the Fourth Amendment,[3] and therefore unconstitutional based upon the right to be free from suspicionless drug testing.[4]

This comment will address the exceptional circumstances the Court has authorized state governments to surpass the warrant and probable cause requirement under the Fourth Amendment when enforcing government-mandated drug test programs. Part I will discuss the significance of H.B. 2030 and its relation to similar state legislation that has been either introduced or enacted. Part II will outline when the Court allows government agencies to drug test citizens in order to preserve certain privacy interests within the Fourth Amendment. It will also provide the analysis courts have applied to determine whether government-mandated drug testing programs fall outside the scope of the protection from suspicionless searches granted under the Fourth Amendment. Lastly, Part II will apply past and present court decisions to H.B. 2030; showing that the government interest likely does not meet the special needs exception under the Amendment. Finally, Part III will conclude that H.B. 2030 likely cannot be enforced because Arizona law makers likely cannot prove that

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[1] H.B. 2030, 51st Leg., 2nd Reg. Sess. (Az. 2014).

[2] *Id.*

[3] U.S. Const. amend. IV ("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.").

[4] *See* Marchwinski v. Howard, 113 F.Supp.2d 1134, 1140, 1144 (E.D.Mich 2000) aff'd on reh'g, 60 F. App'x 601 (6th Cir. 2003); Lebron v. Sec'y, Fla. Dep't of Children & Families, 710 F.3d 1202, 1214 (11th Cir. 2013).

the interests fit within the two categories courts have determined are special needs.

II. ENACTING H.B. 2030

On January 10, 2014, Arizona House members Phil Lovas,Livingtston and Arizona Senator Burges introduced H.B. 2030.[5] The Bill has not received a hearing;[6] therefore the reasoning behind the Bill is unknown. Nonetheless, because H.B. 2030 closely aligns with a similar provision introduced by the state Senate in 2012,[7] and it is comparable to statutes that have been proposed in other states,[8] the rationale for the proposal can likely be found by looking to those legislations.

For instance, in 2012, Arizona state Senator Steve Smith indicated the need for individuals to be sober while searching for jobs.[9] During a hearing, Senator Smith also stressed that the demand for illegal drugs would decrease if welfare recipients are drug tested during their employment search.[10] Members of the Texas state Senate echoed Senator Smith's comments roughly one year later when Texas Senate Bill 21 was introduced.[11] In support of S.B. 21, Senator Williams maintained that when unemployment recipients use drugs, their families are also negatively affected.[12] Additionally, he pointed to the correlation between drug use and the increase in crime rates.[13] Furthermore, Senator Williams alluded to the current substance abuse problem within the nation and suggested that unemployed citizens would continue to abuse illegal drugs while receiving benefits, provided by the state and employers.[14]

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[5] *Unemployment Benefits; Drug Test: Hearing on H.B.2030 Before the H. Comm. on Reform and Human Services*, 51st Leg., 2nd Reg. Sess. (Ariz. 2014).

[6] Email response from Phil Lovas, Ariz. H. Rep. (Nov. 8, 2014, 17:41 PST) (on file with author) (explaining "decision to hold" the bill.).

[7] *Unemployment Benefits; Drug Test: Hearing on S.B. 1495 Before the S. Appropriations Comm.*, 50th Leg., 2nd Reg. Sess. (Ariz. 2012) (proposing that "all" welfare recipients submit to random and continuous drug testing as a condition of keeping benefits).

[8] *Drug Testing for Welfare Recipients and Public Assistance: History and Overview*, NAT'L. CONFERENCE OF STATE LEGISLATURES (March 20, 2015, 1:50 MST), http://www.ncsl.org/research/human-services/drug-testing-and-public-assistance.aspx. (listing states that have enacted drug mandated laws for unemployment and welfare benefits within the last three years).

[9] Appropriations Comm. Hearing, *supra* note 6.

[10] *Id.*

[11] *Relating to Drug Screening or Testing as a Condition of Unemployment Compensation Benefits by Certain Individuals: Hearing on* S.B 21 Before the S. Comm. on Econ. Dev., 83rd Leg. (Tx. 2012) (Senator Williams introducing legislation to drug test unemployment applicants), http://tlcsenate.granicus.com/MediaPlayer.php?view_id=9&clip_id=797.

[12] *Id.*

[13] *Id.* (stating that "drug use is responsible for a lot of crime.").

[14] *Id.*

The support from Senator Smith and Williams can likely be attributed to identical arguments from Florida Governor Rick Scott. When H.B. 353 was signed into law,[15] Governor Scott expressed his support for drug testing welfare recipients by pointing to research that proved "people on welfare abuse drugs at a 'much higher rate' than those not on welfare."[16]

Based upon legislation promulgated by Florida, Arizona, and Texas, the overarching premise for drug testing unemployment or welfare applicants seems to be that prospective employees should be ready to work while they receive unemployment benefits. Accordingly, the only means to ensure worker availability is to drug test those individuals. Therefore, the fervor surrounding the interest in worker availability and drug-free employee prospects should be measured against the backdrop of the Fourth Amendment and the Special Needs Doctrine, in order to determine whether the governmental interest justifies a mandate that unemployment applicants submit to drug testing as a condition of receiving benefits.

III. The Fourth Amendment and the Special Needs Requirement

The Fourth Amendment is designed to protect "people" from unreasonable searches and seizures conducted by the government.[17] Without a valid warrant, searches conducted by the government or its agents are unreasonable per se, unless the search falls into the one of the many exceptions to the warrant requirement.[18] Therefore, once a court concludes that a search has in fact occurred, it must analyze the reasonableness of that search. Outside of the probable cause standard traditionally required for searches conducted without a warrant, reasonable suspicion has allowed governments to search people in "exceptional circumstances."[19]

The Court has recognized in many instances that mandatory drug testing by the government, or its agents, is a type of search, and therefore within the purview of the Fourth Amendment's reasonableness requirement.[20] Drug testing

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[15] *See* Fla. Stat. § 414.0652 (2011).

[16] *See* Frank G. Barile, Note and Comment, *Learning from Lebron: The Suspicionless Drug Testing of TANF Applicants*, 26 J. Civ. Rts. & Econ. Dev. 789, 806 (2012) (citing *Governor Defends Welfare Drug Tests*, CNN.com (June 5, 2011), http://www.cnn.com/video/?/video/bestof tv/2011/06/05/exp.nr.fl.gov.welfare.drug.tests.cnn. (last visited December 3, 2014)).

[17] *See* Katz v. United States, 389 U.S. 347, 351 (1967).

[18] Katz v. United States, 389 U.S. 347, 356 (1967). *See also* Illinois v. Lafayette, 462 U.S. 640, 648 (1983); United States v. Mendenhall, 446 U.S. 544, 553-55 (1980); United States v. Biswell, 406 U.S. 311, 317 (1972); Terry v. Ohio, 392 U.S. 1, 30-31 (1968).

[19] *See* New Jersey v. T.L.O., 469 U.S. 325 (1985) (addressing the balancing of governmental and private interests in the context of administrative searches).

[20] *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 617 (considering railroad employees and safety standards); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656,

programs can be accommodated however, when the government demonstrates that the program qualifies as a special need "beyond the normal need for law enforcement,"[21] and that special need is substantial.[22] On this point, there are only two areas the Court has recognized the special need for drug testing: risk to public safety employees engaged in inherently dangerous jobs, and the protection of children in the public school system.[23] Only then, will a court begin an inquiry into whether the governmental interests outweigh the individual privacy concerns.[24] As of today, only two circuit courts have visited the special needs doctrine in the context of drug testing welfare recipients.[25] In both instances, the courts were not convinced that special needs called for the circumvention of the Fourth Amendment's warrant requirement.

A. Special Needs Applied to Welfare Recipients

In the most recent decision on drug testing welfare applicants without suspicion, the district court granted a preliminary injunction on Florida's drug testing program aimed at Temporary Assistance for Needy Families (TANF) applicants.[26] After a single father applied for, and was eligible to receive, temporary assistance through the TANF program, he was subsequently denied benefits after he refused to submit to a drug test as a condition of receiving benefits. During trial, in addition to lack luster study results, Florida offered four special needs that justified drug testing TANF applicants: (1) ensuring TANF funds were used for their directed purpose; (2) protecting children of recipients from of drug use; (3) ensuring that recipients remain suitable for employment; and (4) ensuring that the state did not attribute to the "public health risk" and crime associated with the "drug epidemic."[27]

On appeal, the Eleventh Circuit, acknowledged that drug use "might be" detrimental to TANF program objectives.[28] Nonetheless, the court stated that there was no evidence that suggested a relationship between TANF recipients'

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665 (1989) (considering U.S. Customs employees and their handling of firearms); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (considering public school athletics); Chandler v. Miller, 520 U.S. 305, 313 (1997) (considering public office candidates).

[21] T.L.O., 469 U.S. at 351.

[22] Chandler, 520 U.S. at 318.

[23] *Id* at 315-17.

[24] *See* T.L.O., 469 U.S. at 351 (Blackmun, J. concurring) (explaining that without exceptional circumstances for drug testing, a balancing of governmental interests cannot take place.).

[25] *See supra* note 4.

[26] Lebron v. Wilkins, 820 F. Supp. 2d 1273, 1275 (M.D. Fla. 2011) (holding that plaintiffs would likely succeed on the merits of their Fourth Amendment claim).

[27] *Id.* at 1286.

[28] *Id.* at 1211.

financial instability and drug use.[29] Thus, the panel refused to move beyond the precedent that calls for substantial special needs when drug testing citizens: "the specific risk to public to public safety employees engaged in inherently dangerous jobs and the protection of children entrusted to the public school system's care and tutelage."[30] The court further added that while a pattern of drug use might not be sufficient in all cases to validate a drug testing program, "such evidence could 'clarify' and 'substantiate' the dangers presented by such drug use and whether those dangers were pertinent to the government's asserted special need for drug testing."[31] Consequently, the court held that the lower court did not abuse its discretion in holding that the plaintiffs would likely succeed on the merits of their claim.[32]

B. Special Needs Applied to H.B. 2030 and Unemployment Recipients

Just as courts have rejected arguments that drug testing TANF recipients would prepare citizens to become more marketable employee prospects, a would likely reject virtually identical reasoning in the context of drug testing unemployment applicants. For instance, to suggest that the demand for drugs would significantly decrease if unemployment applicants are drug tested during their job search,[33] without concrete data, is nothing more than "hypothetical."[34] Even if Arizona law makers introduced data that showed a decline in drug use, as a result of drug testing unemployment applicants, a court is still likely to find that this type of evidence would not qualify as a substantial special need, because there is nothing "special or immediate" about Arizona's interest in guaranteeing that unemployment benefit recipients are no longer abusing drugs.[35] Similar to the findings in *Lebron*, the single characteristic available and shared between those that would be subjected to Arizona's mandatory drug testing is that they are unemployed.[36] Therefore, without specific facts to support a special need, drug testing unemployment applicants would most likely be seen as a violation of the Fourth Amendment.

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[29] *Id.*

[30] *Id.* at 1207.

[31] Lebron, 710 F.3d at 1212 (quoting *Chandler*, 520 U.S. at 319).

[32] *Id.* at 1206 ("[W]e do not resolve the merits of the constitutional claim, but instead address whether the district court abused its discretion in concluding that Lebron is substantially likely to succeed in establishing that Florida's drug testing regime for TANF applicants violates his Fourth Amendment rights.").

[33] Appropriations Committee Hearing, *supra* note 5.

[34] *See supra* note 31.

[35] *Id.*

[36] *Id.*

Likewise, lawmakers have not provided evidence that the crime rate would decrease if unemployment applicants are drug tested.[37] Besides, even if crime were considered in the context of drug use, Arizona already maintains a well-organized statutory and judicial system codified in Chapter 13 of the Arizona Statutes.[38] Protecting the families of unemployment applicants can also be handled by well-established statutes that govern Arizona's obligation to shield children from abuse or neglect.[39] Therefore, H.B. 2030 is superfluous because drug related crime and family safety is already addressed by normal law enforcement mechanisms and child safety laws. To that end, the justifications likely to support H.B. 2030 do not qualify as a special need. Therefore, drug testing unemployment applicants through H.B. 2030 cannot be enforced without a warrant or suspicion, as required under the Fourth Amendment.

IV. CONCLUSION

H.B. 2030, which mandates that unemployment applicants submit to drug test as a condition to receive benefits likely subverts the Fourth Amendment warrant or suspicion requirement, because the interest in ensuring that unemployment applicants are drug free, or protecting families from drug abuse, do not qualify as special needs exception. Thus, H.B. 2030 is most likely unconstitutional and cannot be forced on unemployment applicants.

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[37] *See supra* note 11.
[38] *See* ARIZ. STAT. REV. ANN. §§ 13-101 - 13-5002.
[39] *See* ARIZ. STAT. REV. ANN. §§ 8-101 – 8-1195.