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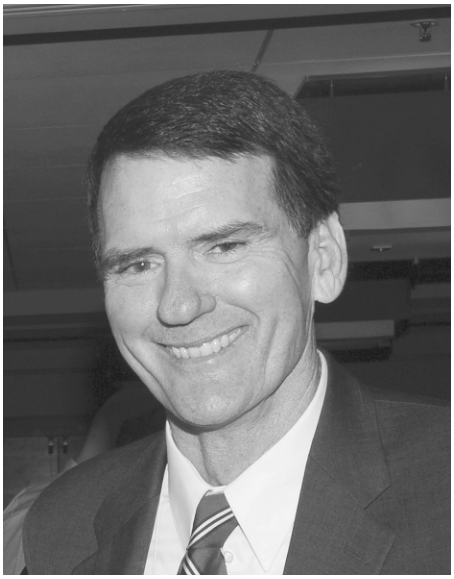
Tribute To Judge John McCarthy Roll

Hon. David R. Cole (Ret.)*



On January 8, 2011, the life of Judge John M. Roll was tragically cut short. In violent and senseless fashion, John was taken away from his family, his many friends, and the Tucson community that he loved and that he called home for more than 55 years.

Judge Roll was born in Pittsburgh, Pennsylvania, on February 8, 1947. His family moved to Tucson in 1954. After graduating from Salpointe Catholic High School in 1965, John attended the University of Arizona, where he obtained his undergraduate and law degrees. He was admitted to the State Bar of Arizona in 1972.

After a short stint as a law clerk/bailiff in the Pima County Superior Court, Judge Roll became an assistant city prosecutor in Tucson. In 1973, he was hired by then-Pima County Attorney Dennis DeConcini as a county prosecutor. During his first three years as a deputy county attorney, Judge Roll tried more than 70 jury trials. In 1980, he left the county attorney's office and became an

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* The author, who served as a Deputy Pima County Attorney with Judge Roll from 1976 to 1979, is currently Arizona Solicitor General. He served as a judge of the Arizona Superior Court (Maricopa County) from 1989 to 2007 and taught at the Phoenix School of Law from 2007 to 2011.

Assistant United States Attorney. He spent the next seven years in that office, handling general criminal matters, drug cases, and civil appeals.

In 1987, Judge Roll was appointed to Division Two of the Arizona Court of Appeals. In November 1991, President George H. W. Bush appointed Judge Roll to the United States District Court, District of Arizona. He became Chief Judge for the District in April 2006.

In addition to being an excellent trial lawyer, and later, a highly-respected trial judge, Judge Roll had a talent for scholarly research and writing. During his tenure on the Arizona Court of Appeals, he earned a Master of Laws degree from the University of Virginia. He had two law review articles published: "The 115 Year-Old Ninth Circuit – Why a Split is Necessary and Inevitable"[1] and "Merit Selection: The Arizona Experience."[2]

The Honorable Alex Kozinski, Chief Judge of the United States Court of Appeals, Ninth Circuit, made these observations upon hearing of Judge Roll's passing:

> The entire federal judiciary mourns the loss of Judge Roll. He was a respected jurist, a strong and able leader of his court, a dedicated family man, and a kind, caring and courteous human being. . . . I can say that I never saw Judge Roll without a smile on his face, or without a kind and generous comment about others on his lips. I will miss him very much, as will we all.[3]

Eileen Aroon[4]

Youth will in time decay, Eileen Aroon.
Beauty must fade away, Eileen Aroon.
Castles are sacked in war,
Chieftains are scattered far.
Truth is a fixéd star, Eileen Aroon.

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[1] *See generally* John M. Roll, *The 115 Year-Old Ninth Circuit—Why a Split is Necessary and Inevitable*, 7 WYO. L. REV. 109 (2007).

[2] *See generally* John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837 (1990).

[3] Letter from Alex Kozinski, Chief Judge of the U.S. Court of Appeals for the Ninth Circuit, to Ninth Circuit Family (Jan. 10, 2011) (on file with author).

[4] The song Eileen Aroon is an old Irish song that has been rendered in many versions throughout the years. *Some Notes on the History of "Eileen Aroon"*, JUST ANOTHER TUNE (Oct. 7, 2007), http://www.justanothertune.com/html/eileenaroon.html. The author chose this verse because he regards Judge Roll as having been a "chieftain" of the legal profession who lived his life based on several "fixéd stars" –his deep and abiding religious faith; his love for his wife and family; and his enduring search for justice. In return, Judge Roll has become a "fixéd star" for the rest of us as we try to chart a steady course through the chaos and uncertainty of our existence.

THE ARIZONA MEDICAL MARIJUANA ACT: A POT HOLE FOR EMPLOYERS?

Michael D. Moberly* & Charitie L. Hartsig**

I. INTRODUCTION

The medical, legal, and political debate over the therapeutic use of marijuana is not a new phenomenon.[1] Not surprisingly, the decades-old debate cen-

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[1] *See* People v. Bianco, 113 Cal. Rptr. 2d 392, 398 (Ct. App. 2001) ("While the majority of California voters undoubtedly believe that marijuana has legitimate medical uses, there remains a vigorous debate on this point."); Dominica Minore Bassett, Note, Comment & Legislative Review, *Medical Use and Prescription for Schedule I Drugs in Arizona: Is the Battle Moot?*, 30 ARIZ. ST. L.J. 441, 448 (1998) ("The drive to legalize marijuana use for medical purposes has

ters on the question of whether the potential medical benefits from the use of marijuana outweigh the known risks of the drug.[2] Courts have been hesitant to weigh in on the substance of the debate,[3] instead leaving that task to voters and elected lawmakers.[4]

Despite persistent public resistance to the broad legalization of marijuana for personal recreational use,[5] laws seemingly recognizing the potential medical benefits of marijuana were enacted by various states throughout the twenti-

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been ongoing. [The National Organization for Reform of Marijuana Laws] has sought to change the federal government's control over marijuana since the early 1970s.").

[2] *See* State v. Jones, No. 1 CA-CR 09-0944, 2011 WL 3300366, at *3 (Ariz. Ct. App. Aug. 2, 2011) ("We recognize that the fears of marijuana's possible adverse effects on health and society are subject to serious question, and there is still an ongoing debate about the benefits and health risks of marijuana use and whether it should be decriminalized."); Seeley v. Washington, 940 P.2d 604, 616-18 (Wash. 1997) (highlighting opposing medical opinions regarding the medical benefits of marijuana, including the opinion of a Harvard Medical School specialist on psychoactive drugs that "marijuana is one of the safest drugs available" and the opinion of a medical oncology specialist that "there is no therapeutic use for marijuana" and that "the hazards associated with smoking marijuana . . . include lung disease, cardiac dysfunction, brain damage, genetic damage, immune disorders and psychomotor impairment."); Allison J. Bergstrom, *Medical Use of Marijuana: A Look at Federal & State Responses to California'*[sic] *Compassionate Use Act*, 2 DEPAUL J. HEALTH CARE L. 155, 155 (1997) ("Conflict centers on whether marijuana does, in fact, provide a unique form of pain relief not found from other available drugs.").

[3] *See, e.g.*, Cole v. Laird, 468 F.2d 829, 833 n.5 (5th Cir. 1972) ("We do not as Judges undertake to enter the contemporary controversy as to the nature of marijuana or its medico-sociological classification."); United States v. 325 Skyline Circle, 534 F. Supp. 2d 1163, 1168 n.10 (S.D. Cal. 2008) ("This Court finds it inappropriate to debate the effects, positive or negative, of marijuana smoking here. Therefore, this Court does not consider the effects, harmful or not, of marijuana smoking . . . .").

[4] Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 836 (2004); *see Seeley*, 940 P.2d at 623 ("The debate over the proper classification of marijuana belongs in the political arena."); *see also* Butler v. Douglas County, Civil No. 07-6241-HO, 2010 WL 3220199, at *4 n.4 (D. Or. Aug. 10, 2010) ("The debate over the necessity to legalize marijuana for medical use and whether the federal government should decline to prosecute in such cases, is a political issue that plays no role in this court's decision.").

[5] *See, e.g.*, People v. Urziceanu, 33 Cal. Rptr. 3d 859, 873 (Ct. App. 2005) ("[T]he people of this state . . . [have] declined to decriminalize marijuana on a wholesale basis."); State v. Dixson, 740 P.2d 1224, 1239 (Or. Ct. App. 1987) (Van Hoomissen, J., dissenting) (noting that a 1986 ballot measure in Oregon which "would have legalized private possession and growing of marijuana for personal use . . . was soundly defeated at the polls"), *rev'd on other grounds*, 766 P.2d 1015 (Or. 1988); O'Hear, *supra* note 4, at 836 ("[D]espite success in getting onto state ballots, liberalizing initiatives for nonmedical marijuana use have been repeatedly and decisively defeated."). *But see* Ekow N. Yankah, *A Paradox in Overcriminalization*, 14 NEW CRIM. L. REV. 1, 7 (2011) ("One might argue that the restricted use of marijuana for medical purposes does little to evidence a coherent trend toward decriminalization were it not for two obvious features. The first is that the link between personal marijuana consumption and medical need in many of these jurisdictions is becoming increasingly illusionary. . . . Secondly, the proliferation of permissive medical marijuana regimes has occurred in concert with an explicit decriminalization of marijuana use or recession of criminal penalties on the state and local levels.").

eth century.[6] However, most of these laws were purely symbolic in nature,[7] in many cases because they authorized the medical use of marijuana only if prescribed by a doctor,[8] and prescribing marijuana is prohibited by federal law.[9]

California rekindled the medical marijuana debate when it enacted the California Compassionate Use Act ("CUA") by voter referendum in 1996,[10] making California the first state in the modern era to effectively decriminalize the medical use of marijuana.[11] The marijuana legalization movement gained con-

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[6] *See, e.g.*, Murphy v. Commonwealth, 521 S.E.2d 301, 302 (Va. Ct. App. 1999) ("The first statute criminalizing the possession of marijuana in Virginia was enacted in 1936. Notwithstanding its enactment . . . the General Assembly permitted doctors to use the drug for medicinal purposes.") (citation omitted). *See* Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 211 n.1 (Cal. 2008) (Kennard, J., concurring in part and dissenting in part) ("State and federal laws permitting marijuana use for medical purposes have existed at various times and in various forms . . . for many decades.").

[7] *See* Troy E. Grandel, *One Toke over the Line: The Proliferation of State Medical Marijuana Laws*, 9 U. N.H. L. REV. 135, 140-49 (2010) ("In 1993, California passed a bipartisan medical marijuana bill, but the bill was purely symbolic in that it failed to provide patients with protection from arrest.") (citation omitted) (internal quotation marks omitted) (brackets omitted); Sara L. Imhof & Brian Kaskie, *Promoting a "Good Death": Determinants of Pain-Management Policies in the United States*, 33 J. HEALTH POL. POL'Y & L. 907, 920 (2008) ("While several states have passed laws since 1978 that were favorable to medicinal marijuana use, early policies were largely symbolic.").

[8] *See, e.g.*, Pearson v. McCaffrey, 139 F. Supp. 2d 113, 116 n.1 (D.D.C. 2001) (noting that "Virginia, Connecticut, Vermont, and New Hampshire have authorized doctors to prescribe marijuana"); *see also* Daniel Abrahamson, Speeches, *The Criminalization of Medicinal Marijuana*, 11 HASTINGS WOMEN'S L.J. 75, 86 (2000) ("Between 1970 and the mid-1980's, thirty-five states in this country passed laws permitting physicians to prescribe marijuana to patients. Most of those laws lay dormant on the books."); Michelle Patton, *The Legalization of Marijuana: A Dead-End or the High Road to Fiscal Solvency?*, 15 BERKELEY J. CRIM. L. 163, 166 n.31 (2010) ("Prior to 1996, a number of states passed laws permitting doctors to prescribe marijuana. . . . These laws were ineffective because it was illegal under federal law for doctors to prescribe marijuana and the laws did not provide for a method in which the patients could fill the prescriptions.").

[9] *See, e.g.*, State v. Padua, 869 A.2d 192, 205 n.23 (Conn. 2005) ("[Connecticut] General Statutes § 21a-253 permits the possession of marijuana pursuant to a prescription by a licensed physician . . . . This statute was enacted, however, to permit the medical use of marijuana consistent with federal law. Because the federal government has not permitted such use, no prescriptions have ever been issued under this statute.") (citation omitted). *See Pearson*, 139 F. Supp. 2d at 121 (noting that "the prescription . . . of medicinal marijuana . . . is still a violation of federal law"); United States v. Friel, 699 F. Supp. 2d 328, 330 (D. Me. 2010) (noting that it is "illegal to prescribe marijuana under federal law").

[10] CAL. HEALTH & SAFETY CODE § 11362.5 (West, Westlaw through 2011 legislation).

[11] *See Ross*, 174 P.3d at 211 (Kennard, J., concurring in part and dissenting in part) (observing that "the Compassionate Use Act was the first law of its kind in the nation"); Ari Lieberman & Aaron Solomon, Notes, *A Cruel Choice: Patients Forced to Decide Between Medical Marijuana and Employment*, 26 HOFSTRA LAB. & EMP. L.J. 619, 620 (2009) ("California was the first state to recognize a medical marijuana law with the enactment of the [Compassionate Use Act] in 1996.").

siderable momentum as a result of this enactment,[12] and several other states soon followed California's lead in providing legal protection for medical marijuana users.[13]

Arizona recently joined this trend.[14] In the November 2010 General Election, Arizona voters passed by a narrow margin Proposition 203,[15] now the Arizona Medical Marijuana Act ("AMMA"),[16] making Arizona the 15th state, in addition to the District of Columbia, to decriminalize the medical use of marijuana.[17] As has been the case in other states enacting such legislation,[18] this development poses significant managerial and legal problems for employers.[19]

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[12] *See* Raich v. Gonzales, 500 F.3d 850, 869 (9th Cir. 2007) (asserting that "changes in state law reveal a clear trend towards the protection of medical marijuana use"); County of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 470 (Ct. App. 2008) (observing that "the use of marijuana for medical purposes has found growing acceptance among the states"); Deborah Garner, Note, *Up in Smoke: The Medicinal Marijuana Debate*, 75 N.D. L. REV. 555, 555 (1999) ("The current trend in the marijuana controversy, as seen in recent legislative enactments in both California and Arizona, is legalization of marijuana for medical uses.").

[13] *See* Conant v. Walters, 309 F.3d 629, 643 (9th Cir. 2002) (Kozinski, J., concurring) (identifying seven states that, by late 2002, had "followed California in enacting medical marijuana laws by voter initiative," and another state that had "done so by legislative enactment"); Imhof & Kaskie, *supra* note 7, at 920-21 ("Starting with California's policy adoption in 1996, some states began to adopt more substantial medical marijuana policies with strengthened patient and clinician safeguards.").

[14] The authors' previous analysis of the employment implications of this development appears in the July/August 2011 issue of Arizona Attorney magazine. The authors are grateful to the editors of that publication for permission to explore the topic in more detail here. They also wish to thank Suzy Walker for her assistance in the preparation of both articles.

[15] *Proposition 203*, ARIZ. SECRETARY OF ST., http://www.azsos.gov/election/2010/info/pubpamphlet/english/Prop203.htm (last visited March 4, 2012).

[16] ARIZ. REV. STAT. ANN. §§ 36-2801 to 36-2819 (Westlaw through 2012 Legis. Sess.).

[17] *See* State Bar of Ariz., Ethics Op. 11-01 (2011) ("Arizona [is] the 16th jurisdiction (15 states and the District of Columbia) to adopt a medical-marijuana law."); Allison M. Busby, Comment, *Seeking a Second Opinion: How to Cure Maryland's Medical Marijuana Law*, 40 U. BALT. L. REV. 139, 148-49 (2010) (identifying Arizona as one of "fifteen states that currently protect individuals suffering from chronic or debilitating medical conditions against marijuana prosecution," and noting that the "District of Columbia's medical marijuana law [also] came into effect in 2010 . . . ."). In early 2011, Delaware became the 17th jurisdiction to legalize the medical use of marijuana. *See* 78 Del. Laws 23 (2011); *cf. Delaware: Medical Marijuana Nears Legalization*, N.Y. TIMES, May 11, 2011, at A18 (noting that on May 11, 2011, the Delaware Senate approved a bill (Senate Bill 17) "allow[ing] people 18 and older with certain serious or debilitating conditions that could be alleviated by marijuana to possess up to six ounces of the drug."). Given the obvious trend, other states are likely to follow suit.

[18] *See* Lieberman & Solomon, *supra* note 11.

[19] *See* Jahna Berry, *Arizona Medical Marijuana Law Likely to Test Workplace Regulations*, ARIZ. REPUBLIC, Dec. 1, 2010, at A9 (predicting "widespread uncertainty among employers" concerning the AMMA's requirements, and noting that "[m]any states with existing medical-marijuana laws are still struggling with many of the same issues").

This article begins with a historical discussion of the nation's movement to criminalize marijuana in the United States,[20] which was led by the states,[21] and reached a pinnacle with Congress's enactment of the Controlled Substances Act of 1970.[22] The article then discusses the criminalization of marijuana in Arizona.[23] Next, the article discusses state medical marijuana laws generally,[24] and the provisions of the AMMA specifically.[25] The article then explores potential problems the AMMA poses for Arizona employers and attempts to offer guidance to employers seeking to comply with the AMMA's requirements.[26] The article ultimately concludes with a discussion of the federal government's reaction to the AMMA and other states' medical marijuana laws and the uncertainty that reaction has caused among employers, medical marijuana users, law makers, and law enforcement agencies.[27]

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[20] *See infra* Part II.

[21] *See infra* Part II.B.

[22] *See infra* Part II.C.

[23] *See infra* Part III.

[24] *See infra* Part IV.

[25] *See infra* Part V.

[26] *See infra* Part VI. Despite the widespread attention state medical marijuana laws have received from employer organizations and legal commentators, the courts of "[o]nly a few states that allow the medical use of marijuana have considered the question of how the laws will affect employment, specifically a private employer's ability to terminate or refuse to hire employees for their use of medical marijuana." Lieberman & Solomon, *supra* note 11, at 624.

[27] *See infra* Part VII.

II. The Criminalization of Marijuana in the United States

A. Marijuana: A Cash Crop in the Nation's Early Years

For much of the nation's history, marijuana was not regulated.[28] Thus, the possession,[29] cultivation,[30] sale,[31] and use of marijuana were entirely lawful until the first part of the twentieth century.[32] In fact, the federal Harrison Narcotic Act of 1914,[33] which was the nation's first primary drug control law and required those authorized to manufacture or handle certain drugs to register

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[28] *See* K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 Wake Forest L. Rev. 221, 275 (2005) ("The first record of marijuana in the colonial United States dates back to 1611 when Jamestown settlers brought the plant to Virginia for use in hemp production. Many used marijuana as legal tender in the Americas from 1631 until the early 1800s, and until the late 1930s it reigned as one of the country's top cash crops. . . . At the time the Bill of Rights was ratified, no laws restricted marijuana or its ingestion."); *cf.* Bergstrom, *supra* note 2, at 158 ("Marijuana has not always been illegal in the United States. Marijuana and the hemp plant from which it is derived, have been used for purposes such as an analgesic and as a source of paper and textiles."); Matthew Segal, *Overdue Process: Why Denial of Physician-Prescribed Marijuana to Terminally Ill Patients Violates the United States Constitution*, 22 Seattle U. L. Rev. 235, 239 (1998) ("[W]hen America passed its first major drug laws of the twentieth century, marijuana was not among the items taxed or regulated.").

[29] *See* Ric Simmons, *Why 2007 Is Not Like 1984: A Broader Perspective on Technology's Effect on Privacy and Fourth Amendment Jurisprudence*, 97 J. Crim. L. & Criminology 531, 545 n.56 (2007) ("[P]ossession of marijuana was legal in this country until the first states began to outlaw it in the second decade of the twentieth century.").

[30] *See* Rudolph J. Gerber, Legalizing Marijuana: Drug Policy Reform and Prohibition Politics 2 (2004) (observing that "America's first law on marijuana, dating from 1619 in Virginia, *required* farmers to grow hemp" because its "stalks were useful for sails, riggings, and caulking, products the colonists badly needed") (emphasis added); Tara Christine Brady, Comment, *The Argument for the Legalization of Industrial Hemp*, 13 San Joaquin Agric. L. Rev. 85, 85 (2003) ("The Founding Fathers grew hemp and it was an integral crop in the economic structure of the colonial United States."); Seaton Thedinger, Notes & Comments, *Prohibition in the United States: International and U.S. Regulation and Control of Industrial Hemp*, 17 Colo. J. Int'l Envtl. L. & Pol'y 419, 425 (2006) ("Beginning in 1774, mandatory hemp cultivation laws were passed by the colonial governments in preparation for war with Britain.").

[31] *See* Seeley v. State, 940 P.2d 604, 614 n.10 (Wash. 1997) (Sanders, J., dissenting) ("In nineteenth century America[,] marijuana . . . was generally available in drug stores. . . .") (citation omitted); Gerber, *supra* note 30, at 2 ("A century ago when pharmacies legally sold marijuana in small packages as a cure for migraines, rheumatism, and insomnia, hemp products were widely available.").

[32] *See* Raich v. Gonzales, 500 F.3d 850, 864-65 (9th Cir. 2007) ("[M]arijuana has a long history of use—medically and otherwise—in this country. Marijuana was not regulated under federal law until . . . 1937 . . . ."); Paul D. Carrington, *Justice on Appeal in Criminal Cases: A Twentieth-Century Perspective*, 93 Marq. L. Rev. 459, 475 n.91 (2009) (noting that "marijuana [was] not made illegal until the early twentieth century . . . ."); *cf.* Randy E. Barnett, *Scrutiny Land*, 106 Mich. L. Rev. 1479, 1490 (2008) (observing that "marijuana was . . . widely used as a medication for most of our history").

[33] Pub. L. No. 63-223, 38 Stat. 785 (1914) (repealed 1970).

with the Internal Revenue Service, pay a tax, and maintain records of their sales and purchases,[34] did not encompass marijuana.[35]

B. The States' Shift Toward Regulation of Marijuana

States, rather than the federal government,[36] generally led the way in the regulation of marijuana.[37] California and Utah were the first states to move to criminalize the drug.[38] In 1907, even before California outlawed marijuana, California's legislature classified the drug as a poison.[39] Among other things, the 1907 law made it unlawful for any person to sell marijuana without labeling

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[34] *See* Gonzales v. Raich, 545 U.S. 1, 10 (2005) ("[T]he primary drug control law, before being repealed by the passage of the [Controlled Substances Act], was the Harrison Narcotics Act of 1914, 38 Stat. 785 (repealed 1970). The Harrison Act sought to exert control over the possession and sale of narcotics, specifically cocaine and opiates, by requiring producers, distributors, and purchasers to register with the Federal Government, by assessing taxes against parties so registered, and by regulating the issuance of prescriptions.").

[35] *See* DuVivier, *supra* note 28, at 276 n.315 ("The first federal regulation of drugs, the Harrison Act of 1914, addressed the importation of opium for medicinal purposes and the interstate trade of cocaine, morphine, and heroin; it did not mention marijuana."). The Harrison Act eventually was repealed by the Controlled Substances Act of 1970. *See* United States v. Green, 511 F.2d 1062, 1068 (7th Cir. 1975); Thomas v. United States, 650 A.2d 183, 187 (D.C. 1994).

[36] *See Gonzales*, 545 U.S. at 11 ("Marijuana itself was not significantly regulated by the Federal Government until 1937 when accounts of marijuana's addictive qualities and physiological effects, paired with dissatisfaction with enforcement efforts at state and local levels, prompted Congress to pass the Marihuana Tax Act, 50 Stat. 551 (repealed 1970)."); Richard J. Bonnie & Charles L. Whitebread II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1010 (1970) ("Until the inclusion of marijuana in the Uniform Narcotic Drug Act in 1932 and the passage of the Marihuana Tax Act in 1937, there was no 'national' public policy regarding the drug.").

[37] *See* O'Hear, *supra* note 4, at 796 ("[T]he federal government did not develop an interest in marijuana regulation until *after* earlier efforts at the state and local level.") (emphasis added). Some localities prohibited the use or possession of marijuana even before the criminalization of the drug at the state level. For example, in "1914 the New York City Sanitary Laws included cannabis in a prohibited drug list." Bonnie & Whitebread, *supra* note 36, at 1010; *see also* EL PASO, TEX., PENAL CODE § 53 (1917) *in* CHARTER AND PENAL CODE OF THE CITY OF EL PASO, 1917 (Julian Richardson, codifier).

[38] *See* Daniel J. Pfeifer, *Smoking Gun*: The Moral and Legal Struggle for Medical Marijuana, 27 TOURO L. REV. 339, 362 (2011) ("Since marijuana was considered a valuable medication, marijuana was not subject to federal or state regulation until California and Utah first prohibited its possession or sale in 1915."); *cf.* DuVivier, *supra* note 28, at 276 ("California and Utah passed state laws outlawing marijuana in 1915, and Colorado followed suit in 1917.").

[39] California Poison Law, 1907 Cal. Stat. 124; *Ex parte* Hallawell, 99 P. 490, 491 (Cal. 1909) (noting that the California Poison Law "regulat[ed] the sale of poisons in the state of California, and provid[ed] a penalty for the violation thereof") (quoting 1907 Cal. Stat. 124); Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REFORM 707, 758 n.317 (1998) ("California first regulated marijuana in 1907. The state legislature classified the drug as a 'poison.'").

the package in which marijuana was contained "poison."[40] Nevertheless, possession of the drug remained lawful in California until 1915, when the state's legislature passed a law making it illegal to possess marijuana without a prescription.[41]

Utah also passed a law in 1915 broadly prohibiting the sale and possession of marijuana, but, like its California counterpart, allowing for the medical use of the drug with a prescription.[42] Other states soon followed suit,[43] and by 1931 more than twenty states had enacted similar legislation.[44] According to two authoritative authors on the subject of marijuana regulation, there were three primary reasons for the states' initial regulation of marijuana: racial prejudice;[45] an assumption that marijuana would be used as a substitute for narcotics and alcohol;[46] and publicity surrounding the 1925 Geneva Convention's attention to marijuana.[47]

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[40] California Poison Law, 1907 Cal. Stat. 124.

[41] Poison Regulation Act, 1915 Cal. Stat. 1066; *see also* Vitiello, *supra* note 39, at 758 n.317 ("Possession of marijuana remained legal [in California] until 1915, at which point state law mandated that the drug could be possessed legally only with the prescription of a physician."); Michael A. Town, Comment, *The California Marijuana Possession Statute: An Infringement on the Right of Privacy or Other Peripheral Constitutional Rights?*, 19 HASTINGS L.J. 758, 759 (1968) ("Possession of marijuana was lawful until 1915 when possession unless prescribed by a physician was prohibited.").

[42] *See* Poison Regulation Act, 1915 Utah Laws 74; Bonnie & Whitebread, *supra* note 36, at 1012 n.14 (observing that the 1915 Utah statute "forbade sale and possession of the named drugs, and provided for medical use under a system of prescriptions and order blanks").

[43] *See* DuVivier, *supra* note 28, at 276 n.317 (observing that from about 1914 to 1931, many states, "including seventeen west of the Mississippi, passed laws that prohibited the use of marijuana for nonmedicinal purposes").

[44] *See* Bonnie & Whitebread, *supra* note 36, at 1010-11 (observing that by 1931, twenty-one states had restricted the sale of marijuana, "one state had prohibited its use for any purpose, and four states had outlawed its cultivation").

[45] *Id.* at 1012 ("It was thought [after the turn of the century] . . . that use of marijuana west of the Mississippi was limited primarily to the Mexican segment of the population. . . . Whether motivated by outright prejudice or simple discriminatory disinterest, the result was the same in each legislature—little if any public attention, no debate, pointed references to the drug's Mexican origins, and sometimes vociferous allusion to the criminal conduct inevitably generated when Mexicans ate 'the killer weed.'"); *cf.* United States v. Bannister, 786 F. Supp. 2d 617, 646 (E.D.N.Y. 2011) ("[A] series of drug prohibitions in American history [were] prompted in part by fears of and distaste for distinct ethnic or racial minority groups. . . . 'Chicanos in the Southwest were believed to be incited to violence by smoking marijuana . . . .'") (quoting DAVID MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL 244-45 (1973)).

[46] *See* Bonnie & Whitebread, *supra* note 36, at 1019 (observing that the argument for New York's criminalization of marijuana in 1927 was that the drug "must be prohibited to keep addicts from switching to it as a substitute for the drugs which had become much more difficult to obtain after the enactment of the Harrison Act, and for alcohol after Prohibition").

[47] *See id.* In particular, the Geneva Convention called upon participating countries "to enact laws ensuring the effective control of the production, distribution, and export of opium, cocaine,

In 1932, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Narcotic Drug Act.[48] The purpose of the uniform act was to curtail illegal drug traffic and to regulate the sale and distribution of narcotic drugs.[49] The uniform act did not include marijuana as a controlled substance.[50] However, a footnote to the act suggested certain statutory language in the event a state decided to regulate marijuana.[51] Specifically, states that wished to regulate the sale and possession of marijuana were instructed to add "cannabis" to the definition of "narcotic drugs."[52] Eventually, most states adopted the uniform law in some form.[53]

C. The Federal Government Joins the Marijuana Criminalization Movement

The federal government's first regulation of marijuana occurred in 1937 when Congress passed the Marihuana Tax Act.[54] The regulation was in the form of a tax due to "constitutional limits still enforced against federal lawmak-

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marihuana, and any other drugs which the World Health Organization finds susceptible to abuse." *Narcotics Regulation*, 62 YALE L.J. 751, 761 n.60 (1953).

[48] *See, e.g.*, State v. Wortham, 160 P.2d 352, 355 (Ariz. 1945) (observing that "the Uniform Narcotic Drug Act [was] formulated and recommended by the National Conference of Commissioners on Uniform State Laws in October, 1932") (quoting People v. Gennaro, 261 A.D. 533, 536-37 (N.Y. App. Div. 1941)); Doswell v. State, 455 A.2d 995, 997 n.2 (Md. Ct. Spec. App. 1983) ("The Uniform Narcotic Drug Act was originally approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association in 1932."); State v. Hansen, 627 N.W.2d 195, 211 (Wis. 2001) (observing that the "National Conference of Commissioners on Uniform State Laws adopted the Uniform Narcotic Drug Act" in 1932).

[49] State v. Lee, 382 P.2d 491, 494 (Wash. 1963); *see* Baldwin v. Commonwealth, 125 S.E.2d 858, 861 (Va. 1962).

[50] People v. Van Alstyne, 121 Cal. Rptr. 363, 372 (Ct. App. 1975); *see* Bonnie & Whitebread, *supra* note 36, at 1033.

[51] *Van Alstyne*, 121 Cal. Rptr. at 372.

[52] Bonnie & Whitebread, *supra* note 36, at 1033.

[53] *See* People v. McCarty, 427 N.E.2d 147, 152 (Ill. 1981) ("[T]he Uniform Narcotic Drug Act . . . has been adopted by the great majority of State legislatures."); F. LEE BAILEY & KENNETH J. FISHMAN, HANDLING NARCOTIC AND DRUG CASES § 34 (1972) ("The Uniform Narcotic Drug Act, with various modifications, has been incorporated into the law of every state except Pennsylvania and California.").

[54] 26 U.S.C. § 4741 (1964), *repealed by* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, tit. III, § 1101(b)(3)(A), 84 Stat. 1292; *see* DuVivier, *supra* note 28, at 277 ("The first federal attempt to legislate marijuana use occurred in 1937 with the Marijuana Tax Act."); Christine A. Kolosov, Comment, *Evaluating the Public Interest: Regulation of Industrial Hemp Under the Controlled Substances Act*, 57 UCLA L. REV. 237, 245 (2009) ("In 1937, Congress passed the Marihuana Tax Act (MTA), the first federal law enacted to discourage Cannabis sativa L. production for marijuana.").

ing power."[55] Although the Marihuana Tax Act did not expressly outlaw the drug,[56] it was essentially intended to prohibit the use and possession of marijuana.[57] The act was described as having been "so burdensome both financially and procedurally that it virtually eliminated any legal medicinal, industrial, or recreational use of marijuana."[58] The act ultimately was held to be unconstitutional in 1969 by the Supreme Court because it violated the Fifth Amendment's guarantee against self-incrimination.[59]

In response to the Supreme Court's invalidation of the Marihuana Tax Act, Congress passed the Controlled Substances Act of 1970,[60] "placing marijuana in [S]chedule I and directly criminalizing any use of it."[61] In classifying marijuana as a Schedule I drug, Congress found that marijuana has "a high potential

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[55] Seeley v. State, 940 P.2d 604, 614 n.10 (Wash. 1997) (Sanders, J., dissenting); *see also* Waters v. Farr, 291 S.W.3d 873, 883 (Tenn. 2009) (observing that "most domestic drug regulations prior to 1970 generally came in the guise of revenue laws" and that the "leading statute in this area was the Harrison Narcotics Act of 1914," followed by the Marihuana Tax Act of 1937, "which '[l]ike the Harrison Act . . . did not outlaw the possession or sale of marijuana outright' but imposed similar registration and reporting requirements for individuals who produced, imported, distributed, sold, or dealt marijuana and 'required the payment of annual taxes in addition to transfer taxes whenever the drug changed hands' ") (quoting Gonzales v. Raich, 545 U.S. 1, 10-11 (2005)).

[56] *See* Leary v. United States, 395 U.S. 6, 21 (1969) (observing that the Marijuana Tax Act was intended to impose a very high tax on certain transfers of marijuana, but not to entirely prohibit those transfers); Kasey C. Phillips, *Drug War Madness: A Call for Consistency Amidst the Conflict*, 13 CHAP. L. REV. 645, 654 (2010) ("While the Marihuana Tax Act did not actually prohibit marijuana, it imposed a tax on distributors.").

[57] *See Leary*, 395 U.S. at 21 (observing that the tax's purpose was "not only to raise revenue from the marihuana traffic, but also to discourage the . . . widespread undesirable use of marihuana by smokers and drug addicts") (quoting Hearings on H.R. 6385 Before the H. Comm. on Ways and Means, 75th Cong. 9 (1937)); United States v. Truelove, 527 F.2d 980, 983 (4th Cir. 1975) ("[T]he Marihuana Tax Act of 1937, as amended, controlled all domestic transactions of marihuana. This law, ostensibly a revenue measure, was enacted 'to discourage the widespread use of the drug' and 'through [a] transfer tax to prevent the drug from coming into the hands of those who will put it to illicit uses.' ") (quoting *Leary*, 395 U.S. at 23); State v. Wortham, 160 P.2d 352, 354-55 (Ariz. 1945) (concluding that although the Marihuana Tax Act of 1937 was a "revenue tax act[ ]," it complimented Arizona state law "in the control and abolition of the traffic in narcotics"); DuVivier, *supra* note 28, at 277 (observing that the Marijuana Tax Act "did not criminalize marijuana, but attempted to curb its use through a prohibitive tax").

[58] *Seeley*, 940 P.2d at 614 n.10 (Sanders, J., dissenting).

[59] *See Leary*, 395 U.S. at 37.

[60] 21 U.S.C. §§ 801-904 (2000); *see* Gipson v. Kasey, 129 P.3d 957, 962-63 (Ariz. Ct. App. 2006) ("[I]n 1970, Congress enacted the Controlled Substances Act . . . which provides a comprehensive federal scheme for regulation and control of certain drugs and other substances."), *vacated in part*, 150 P.3d 228 (Ariz. 2007).

[61] *Seeley*, 940 P.2d at 614 n.10 (Sanders, J., dissenting); *cf.* State v. Hardesty, 214 P.3d 1004, 1008 (Ariz. 2009) (noting that "the federal Controlled Substances Act broadly prohibits possession of schedule one substances").

for abuse"[62] and "no currently accepted medical use in treatment in the United States,"[63] and that "[t]here is a lack of accepted safety for use of the drug . . . under medical supervision."[64] Marijuana currently remains a Schedule I drug.[65] Accordingly, under federal law, marijuana cannot be used for any purpose.[66]

III. The Criminalization of Marijuana in Arizona

Following the national pattern,[67] the private use and possession of marijuana were not crimes in Arizona during the territorial era or the early years of statehood.[68] In fact, marijuana use was lawful as a matter of Arizona state law until 1931, when the Arizona Legislature enacted the Arizona Narcotic Control Act.[69] This act for the first time made the possession or sale of marijuana

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[62] 21 U.S.C. § 812(b)(1)(A) (West, Westlaw through 2012 legislation); *see also* Knoll Pharm. Co. v. Sherman, 57 F. Supp. 2d 615, 618 (N.D. Ill. 1999) ("Schedule I controlled substances . . . are unsafe drugs with a high potential for abuse . . . .").

[63] 21 U.S.C. § 812(b)(1)(B); *see also* United States v. Friel, 699 F. Supp. 2d 328, 330 (D. Me. 2010) (noting that "federal law does not recognize any medical use for a Schedule I controlled substance like marijuana").

[64] 21 U.S.C. § 812(b)(1)(C); *see* Pearson v. McCaffrey, 139 F. Supp. 2d 113, 119 (D.D.C. 2001) ("Schedule I drugs have . . . no currently accepted medical value in the United States, and a lack of accepted safety for use under medical supervision. . . . Marijuana is a Schedule I controlled substance.") (citations omitted); *see also* United States v. Rush, 738 F.2d 497, 512 (1st Cir. 1984) ("Every federal court that has considered the matter, so far as we are aware, has accepted the congressional determination that marijuana in fact poses a real threat to individual health and social welfare . . . .").

[65] 21 U.S.C. § 812(c). As recently as July 8, 2011, the Drug Enforcement Administration ("DEA") rejected a petition filed in 2002 by medical marijuana supporters that sought to have marijuana removed from the Schedule I category of the Controlled Substances Act and reclassified as a Schedule III, IV, or V drug. In reaching its decision, the DEA noted the Department of Health and Human Services' recent conclusion that marijuana continues to meet all of the criteria for a Schedule I drug and should remain in Schedule I. Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 76 Fed. Reg. 40,552 (July 8, 2011).

[66] *See* Raich v. Gonzalez, 500 F.3d 850, 865 (9th Cir. 2007) ("Congress placed marijuana on Schedule I of the Controlled Substances Act, taking it outside of the realm of all uses, including medical, under federal law."); *cf.* Conant v. Walters, 309 F.3d 629, 634 (9th Cir. 2002) (noting that "a doctor who actually prescribes or dispenses marijuana violates federal law."). *But see* People v. Tilehkooh, 7 Cal. Rptr. 3d 226, 235 n.11 (Ct. App. 2003) ("Marijuana is a controlled substance under the federal law. However, the mere use of marijuana is not a federal offense.").

[67] *See supra* notes 28-29 and accompanying text.

[68] *See* Stoudamire v. Simon, 141 P.3d 776, 778 (Ariz. Ct. App. 2006) (observing that "[n]either possession of marijuana nor possession of drug paraphernalia was a crime at the time of statehood").

[69] *See id.* (citing 1931 Ariz. Sess. Laws ch. 36 § 3). By 1931, other states had already begun to criminalize private marijuana use. *See supra* notes 43-44 and accompanying text. Indeed, by the end of 1931, more than half the states had "passed laws that prohibited the use of marijuana for nonmedicinal purposes, and by 1933, nearly every western state had passed anti-marijuana legislation." DuVivier, *supra* note 28, at 276 n.317.

illegal in Arizona[70] and, by necessary implication, also criminalized any private use of the drug.[71]

The Arizona Legislature revised its anti-drug statutes four years later when it adopted the Arizona Uniform Narcotics Act of 1935,[72] which prohibited the private possession or sale of any narcotic drug[73] including marijuana.[74] The 1935 Arizona act was premised on the Uniform Narcotic Drug Act of 1932.[75] Arizona statutory law on the subject then remained relatively static for the next several decades[76] until the Arizona Legislature, following the lead of several

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[70] *See Stoudamire*, 141 P.3d at 778. The act made the possession or sale of marijuana punishable "by a fine of not less than fifty nor more than one thousand dollars, or by imprisonment for not less than sixty days nor more than five years, or both." 1931 Ariz. Sess. Laws ch. 36 § 3.

[71] *See* Borsari v. Fed. Aviation Admin., 699 F.2d 106, 111 (2d Cir. 1983) (observing that those who use illicit substances "must, in the nature of the act, . . . have possessed illicit substances"); United States v. Stacy, No. 09cr3695 BTM, 2010 WL 4117276, at *6 (S.D. Cal. Oct. 18, 2010) ("Clearly, the lawfulness of use is tied to the lawfulness of possession. One cannot use a drug without possessing it in some form. Thus, common sense dictates that if it is illegal to possess a certain drug . . . it is also unlawful . . . to be a user of that drug."); Washburn v. Columbia Forest Prods., Inc., 134 P.3d 161, 167 (Or. 2006) (Kistler, J., concurring) (noting that a person "cannot use marijuana without possessing it").

[72] *See* State v. Marcus, 450 P.2d 689, 690 (Ariz. 1969); State v. Wortham, 160 P.2d 352, 353 (Ariz. 1945).

[73] *See* State v. Cheramie, 189 P.3d 374, 376 (Ariz. 2008) (en banc) ("In 1935, the legislature passed the Arizona Uniform Narcotics Act of 1935. . . . The 1935 Act made it 'unlawful for any person to manufacture, possess, have under his control, [or] sell . . . any narcotic drug . . . .'") (quoting 1935 Ariz. Sess. Laws ch. 26 § 3).

[74] The 1935 act specifically defined "narcotic drugs" to include marijuana. 1935 Ariz. Sess. Laws ch. 26 § 2(n), (o). The classification of marijuana as a narcotic drug has been retained in more recent Arizona anti-drug legislation. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3401(4), (20)(w) (West, Westlaw through 2012 Legis. Sess.). The classification has been upheld by the Arizona appellate courts despite "decisions from other jurisdictions which hold that the classification of marijuana as a narcotic drug is unreasonable, arbitrary and capricious." Sexstone v. State, 622 P.2d 13, 14 (Ariz. Ct. App. 1979) (following State v. Wadsworth, 505 P.2d 230 (Ariz. 1973) and State v. Yanich, 516 P.2d 308 (Ariz. 1973) (en banc)); *see also* State v. Chudy, 492 P.2d 402, 404 (Ariz. 1972) (en banc) (noting that the "provisions of . . . the Uniform Narcotic Drug Act[ ] restrict[ ] the possessing and having control of narcotic drugs [ ]including marijuana") (quoting ARIZ. REV. STAT. ANN. § 36-1012, *repealed by* 1979 Ariz. Sess. Laws 328).

[75] *See* State v. Jacobson, 490 P.2d 433, 435 (Ariz. Ct. App. 1971) (observing that Arizona adopted the Uniform Narcotics Drug Act of 1932). *See generally supra* note 72 and accompanying text.

[76] Arizona's prohibition of marijuana and other drugs mirrored the law in most other states during this period. *See* Leary v. United States, 395 U.S. 6, 16 n.15 (1969) ("[Forty-eight] states and the District of Columbia had on their books in some form essentially the provisions of the Uniform Narcotic Drug Act. Section 2 of that Act states: 'It shall be unlawful for any person to . . . possess . . . any narcotic drug, except as authorized in this Act.' Section 1 (14) defines 'narcotic drugs' to include marihuana ('cannabis').") (citation omitted).

other states,[77] replaced the Uniform Narcotics Act with the Arizona Uniform Controlled Substances Act in 1979.[78]

The Arizona Uniform Controlled Substances Act[79] is a variation of a model state law originally drafted by the Bureau of Narcotics and Dangerous Drugs[80] (now the Drug Enforcement Administration),[81] the agency charged with primary responsibility for waging the federal government's widely-publicized war on drugs,[82] and an entity notoriously hostile to any efforts to legalize the private use of marijuana.[83] The model state act in turn was patterned after

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[77] *See* State v. Morrow, 535 S.W.2d 539, 541 (Mo. Ct. App. 1976) ("[T]he Uniform Controlled Substances Act . . . [was] adopted by our Legislature in 1971 to supplant the predecessor Uniform Narcotic Drug Act."); Egan v. Sheriff, Clark Cnty., 503 P.2d 16, 19 n.2 (Nev. 1972) ("The [Nevada] Uniform Controlled Substances Act . . . supplanted the Uniform Narcotic Drug Act, effective January 1, 1972."); Moore v. State, 545 S.W.2d 140, 142 (Tex. Crim. App. 1976) ("The Uniform Narcotic Act was repealed in 1973 with the enactment of the Controlled Substances Act."); State v. Matson, 587 P.2d 540, 542-43 (Wash. Ct. App. 1978) ("The Uniform Narcotic Drug Act has . . . been repealed and replaced with the Uniform Controlled Substances Act . . . .").

[78] *See* State v. Superior Court (*Birdsall*), 627 P.2d 686, 687-88 (Ariz. 1981); State v. Dungan, 718 P.2d 1010, 1013 (Ariz. Ct. App. 1985). Although initially enacted in 1979, the effective date of the Arizona Uniform Controlled Substances Act was delayed by subsequent legislative amendments until September 1, 1981. *See id.*

[79] ARIZ. REV. STAT. ANN. §§ 36-2501 to 36-2553 (2009) (West, Westlaw through 2012 Legis. Sess.).

[80] *See* People v. Van Alstyne, 121 Cal. Rptr. 363, 373 (Ct. App. 1975) ("In 1970, . . . the federal Bureau of Narcotics and Dangerous Drugs (BNDD) drafted model state laws and submitted them to the National Conference of Commissioners on Uniform State Laws, which revised and adopted the proposed draft as the Uniform Controlled Substances Act of 1970."); State v. Vail, 274 N.W.2d 127, 131 (Minn. 1979) ("In 1970, the Federal Bureau of Narcotics and Dangerous Drugs drafted legislation approved by the National Conference of Commissioners on Uniform State Laws as the Uniform Controlled Substances Act."); *see also supra* notes 60-66 and accompanying text.

[81] *See* United States v. Falcone, 364 F. Supp. 877, 880 (D.N.J. 1973) (noting that "what was formerly the Bureau of Narcotics and Dangerous Drugs . . . is now the Drug Enforcement Administration"), *aff'd*, 500 F.2d 1401 (3d Cir. 1974); People v. Behnke, 353 N.E.2d 684, 688 n.1 (Ill. App. Ct. 1976) ("The Federal Bureau of Narcotics and Dangerous Drugs has been replaced by the Drug Enforcement Administration . . . .").

[82] *See* Gooding v. United States, 416 U.S. 430, 448-49 (1974) (noting that the Bureau of Narcotics and Dangerous Drugs was "the federal agency set up to enforce the [federal drug] laws"); Babineaux v. State, 803 S.W.2d 301, 301 (Tex. Crim. App. 1990) (Teague, J., dissenting) ("The present day 'War on Drugs,' as it relates to the controlled substance marihuana, actually commenced in the 1930's, through the efforts of H.J. Anslinger of the then Federal Bureau of Narcotics, now the Drug Enforcement Administration.").

[83] *See supra* note 65 and accompanying text; Susan David Dwyer, Note, *The Hemp Controversy: Can Industrial Hemp Save Kentucky*?, 86 KY. L.J. 1143, 1157 n.109 (1998) (noting that the early twentieth century public campaign against the private use of marijuana "was supported by the Federal Bureau of Narcotics," which may have "turned to marijuana eradication to justify its own existence once opiate use began to decline"). Indeed, one commentator has observed that

the federal Controlled Substances Act[84] and ultimately was adopted by most states[85] including Arizona.[86]

Like its federal counterpart,[87] the Uniform Controlled Substances Act classified marijuana as a Schedule I controlled substance.[88] As a result of this classification, marijuana is considered to be a dangerous drug with no safe or acceptable medical use,[89] and lawful possession of the drug was limited to a select group of individuals licensed to manufacture, dispense, or use it strictly for scientific research purposes.[90]

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the "drug war is essentially a war against marijuana." John Sperling, *Forward* to RUDOLPH J. GERBER, LEGALIZING MARIJUANA: DRUG POLICY REFORM AND PROHIBITION POLITICS x (2004).

[84] *See, e.g.*, Boultinghouse v. Hall, 583 F. Supp. 2d 1145, 1155 (C.D. Cal. 2008) (noting that "California's version of the Uniform Controlled Substances Act . . . is modeled on the federal Controlled Substances Act"); *see also* State v. Moody, 393 So. 2d 1212, 1214 (La. 1981) (noting that the federal act "provided a model for the Uniform Controlled Substances Act").

[85] *See* State v. Brown, 745 P.2d 1101, 1112 (Idaho Ct. App. 1987) ("Within months of the adoption by Congress of the federal Act, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Controlled Substances Act. The Uniform Act . . . has been adopted by most states . . . ."); Town Tobacconist v. Kimmelman, 462 A.2d 573, 580 (N.J. 1983) (noting that "the Uniform Controlled Substance Act . . . has been enacted in most states . . . .").

[86] *See, e.g., Civil Forfeiture*, 3 CRIM. PRAC. MANUAL § 107:64 (2011) (noting "Arizona retains some provisions of the Uniform Controlled Substances Act, but not its forfeiture provisions"); *cf.* State v. Burrow, 514 S.W.2d 585, 590 (Mo. 1974) (referring to "the Arizona version of the Uniform Controlled Substances Act").

[87] *See* Grinspoon v. Drug Enforcement Admin., 828 F.2d 881, 887 (1st Cir. 1987) ("The Uniform CSA, like its federal counterpart, creates five schedules of controlled substances and, indeed, was modeled on the federal CSA.").

[88] ARIZ. REV. STAT. ANN. § 36-2512(A)(3)(o) (West, Westlaw through 2012 Legis. Sess.); *see also* State v. Vail, 274 N.W.2d 127, 135 (Minn. 1979) ("[T]he 1970 Uniform Controlled Substances Act . . . listed marijuana in Schedule I because little was known about its long-term effects."); Seeley v. State, 940 P.2d 604, 611 (Wash. 1997) ("The Uniform Controlled Substances Act has been adopted in some form by all 50 states, all of which place marijuana on schedule I.").

[89] *See* State v. Balzer, 954 P.2d 931, 939 (Wash. Ct. App. 1998) ("Similar to the federal statute, the Uniform Act classifies controlled substances based upon their therapeutic value, potential for abuse, and safety. A substance is listed in Schedule I if it has . . . . no currently accepted medical use in treatment in the United States, and . . . no accepted safety for use in treatment under medical supervision.") (citations omitted); *cf.* State v. Hardesty, 204 P.3d 407, 414 (Ariz. Ct. App. 2008) ("A.R.S. § 13-3405 uniformly bans the knowing use and possession of marijuana. By imposing a total ban, the legislature has deemed that the use and possession of marijuana always pose a risk to public health and welfare."), *vacated*, 214 P.3d 1004 (Ariz. 2009).

[90] *See* State v. Cramer, 851 P.2d 147, 149 (Ariz. Ct. App. 1992); *cf.* United States v. Friel, 699 F. Supp. 2d 328, 330 n.1 (D. Me. 2010) ("Because it is a Schedule I drug, the . . . possession of marijuana is a criminal offense. The single exception available is the use of the drug as part of a government-approved research project."); *Seeley*, 940 P.2d at 607 ("Controlled substances listed in schedule I under federal law may not be prescribed or dispensed anywhere in the United States unless a specific registration to do so is obtained to use the substance for research purposes.").

The Arizona Legislature briefly recognized an exception to the broad statutory prohibition of private marijuana use beginning in 1980[91] known as the Arizona Controlled Substances Therapeutic Research Act.[92] This act permitted cancer and glaucoma patients who were not responding to conventional treatment to use marijuana under the direct supervision and control of a licensed medical practitioner.[93] However, this limited medical use exception expired through legislative inaction in 1985,[94] prompting the Arizona Court of Appeals to observe that private marijuana use "previously allowed for therapeutic purposes, was . . . outlawed without exception" in Arizona.[95] This situation mirrored similar contemporaneous developments in other states.[96]

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[91] *See* 1980 Ariz. Sess. Laws ch. 122 § 3.

[92] §§ 36-2601 to 36-2606, *repealed by* 1979 Ariz. Sess. Laws 328.

[93] *See* 1980 Ariz. Sess. Laws ch. 122 § 3. Similar laws were enacted by several other states. *See, e.g.*, McIntosh v. State, 443 So. 2d 1275, 1282 (Ala. Crim. App. 1983) (Alabama), *rev'd on other grounds*, 443 So. 2d 1283 (Ala. 1983); State v. Hanson, 468 N.W.2d 77, 78 (Minn. Ct. App. 1991) (Minnesota); State v. Diana, 604 P.2d 1312, 1316-17 (Wash. Ct. App. 1979) (Washington). On the federal level, "demand for medical marijuana by patients and physicians throughout the United States persuaded the Food and Drug Administration ('FDA') in 1976 to approve the medicinal use of marijuana on a restricted basis." Miklos Pongratz, Note, *Constitutional Law—Medical Marijuana and the Medical Necessity Defense in the Aftermath of* United States v. Oakland Cannabis Buyers' Cooperative, 25 W. NEW ENG. L. REV. 147, 155 (2003). The FDA implemented the "Individual Treatment Investigational New Drug Program (or Compassionate Use IND Program) ['IND Program'], under which physicians could obtain special authority to administer marijuana to patients." *Id.* At its peak, the IND program enrolled as many as seventy-eight patients nationwide, but "was closed to all new applicants in 1992, in an effort to prevent it from being overrun with AIDS patients requesting access to medical marijuana supplies." *Id.* at 155-56; *see also* Kuromiya v. United States, 78 F. Supp. 2d 367, 368-70 (E.D. Pa. 1999) ("The . . . FDA . . . does provide a mechanism known as the treatment IND by which drugs that are under clinical investigation may be distributed to patients for whom no alternative drug or therapy is available. However, the compassionate use program did not comply with the requirements of a treatment IND. Rather, the marijuana program may more appropriately be described as a 'single patient IND,' in which the drug was simply distributed to certain individuals. . . . At the time the program stopped accepting new applicants in March 1992, there were thirteen participants . . . .").

[94] *See Cramer*, 851 P.2d at 149; *cf.* Nicole Dogwill, Comment, *The Burning Question: How Will the United States Deal with the Medical-Marijuana Debate?*, 1998 DETROIT C.L. MICH. ST. U. L. REV. 247, 274 (1998) ("[M]ost state therapeutic research programs were physically disbanded in the late 1980's, amidst the massive hyperbole surrounding the United States' war against drugs.").

[95] *Cramer*, 851 P.2d at 149. For a well-reasoned criticism of this type of blanket prohibition of the drug, see Rudolph J. Gerber, Essay, *On Dispensing Justice*, 43 ARIZ. L. REV. 135, 151-54 (2001).

[96] *See, e.g.*, State v. Ownbey, 996 P.2d 510, 512 n.3 (Or. Ct. App. 2000) ("In 1979, the Oregon legislature enacted ORS 475.505 *et seq*. allowing physicians to prescribe marijuana to patients undergoing chemotherapy and for the treatment of glaucoma. The legislature repealed ORS 475.505 *et seq.* in 1987."); Seeley v. State, 940 P.2d 604, 607 (Wash. 1997) ("The State of Washington obtained federal approval to use marijuana for research purposes and the Legislature

IV. State Efforts to Decriminalize Marijuana for Medical Use

The marijuana regulation landscape began to change dramatically in 1996 with the voter-initiated enactment of medical marijuana reform legislation in Arizona and California.[97] Voters in both states passed these initiatives following several unsuccessful legislative and voter-initiated efforts to legalize or decriminalize the use of marijuana in other states,[98] including Hawaii,[99] Oregon,[100] Washington,[101] and California.[102]

The Arizona initiative, known as Proposition 200[103] (and, subsequent to its enactment, as the Drug Medicalization, Prevention and Control Act of 1996),[104] was in some respects the more ambitious of the two state medical marijuana initiatives passed in 1996.[105] In particular, Proposition 200 pur-

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passed the Controlled Substances Therapeutic Research Act (Research Act) in 1979. . . . [T]he Legislature stopped funding the program in 1980.").

[97] *See* Conant v. Walters, 309 F.3d 629, 632 (9th Cir. 2002) (discussing the "1996 . . . initiatives passed in both Arizona and California decriminalizing the use of marijuana for limited medical purposes"); Pearson v. McCaffrey, 139 F. Supp. 2d 113, 116 n.1 (D.D.C. 2001) ("Arizona and California voters approved medical marijuana laws in 1996."); Grandel, *supra* note 7, at 139 ("Marijuana policy began to change . . . in the 1990s. . . . The 1990s, however, brought about a direct democracy movement, with the people becoming involved at a grassroots level.").

[98] *See, e.g.*, Commonwealth v. Hutchins, 575 N.E.2d 741, 743 (Mass. 1991) ("The Massachusetts Legislature has considered a bill providing for the use of marihuana in therapeutic research on more than one occasion, but no such statute has been enacted in the Commonwealth."); *cf.* Hart v. Sec'y of State, 715 A.2d 165, 166 (Me. 1998) (discussing a rejected 1997 Maine "direct initiative petition entitled 'An Act to Permit the Medical Use of Marijuana'"). For a discussion of other failed attempts to legalize the medical use of marijuana, see Albert DiChiara & John F. Galliher, *Dissonance and Contradictions in the Origins of Marihuana Decriminalization*, 28 Law & Soc'y Rev. 41, 62-65 (1994).

[99] *See* State v. Bachman, 595 P.2d 287, 288 n.1 (Haw. 1979) ("We note that the legislature, in its 1979 session, has again rejected proposals to decriminalize possession of marijuana.").

[100] *See Ownbey*, 996 P.2d at 512 n.3 ("The Oregon legislature . . . considered legalizing marijuana for medical use in 1993 and 1997, but did not do so.").

[101] *See* State v. Smith, 610 P.2d 869, 878 (Wash. 1980) ("Historically, Washington's citizens who supported liberal marijuana laws have consistently failed to gain broad-based citizen support for marijuana legalization or decriminalization initiatives.").

[102] *See, e.g.*, Laura M. Rojas, Comment, *California's Compassionate Use Act and the Federal Government's Medical Marijuana Policy: Can California Physicians Recommend Marijuana to Their Patients Without Subjecting Themselves to Sanctions?*, 30 McGeorge L. Rev. 1373, 1381 (1999) ("In 1972, Proposition 19, a California initiative designed to decriminalize marijuana was defeated by a statewide margin of two to one.").

[103] *See* 1997 Ariz. Sess. Laws 2895-2904.

[104] *See* State v. Reinhardt, 92 P.3d 901, 902 (Ariz. Ct. App. 2004); O'Brien v. Escher, 65 P.3d 107, 109 (Ariz. Ct. App. 2003); Baker v. Superior Court (*Gerst*), 947 P.2d 910, 911 (Ariz. Ct. App. 1997).

[105] *See* J. Ryan Conboy, *Smoke Screen: America's Drug Policy and Medical Marijuana*, 55 Food & Drug L.J. 601, 608 n.67 (2000) (noting that Arizona's Proposition 200 was "[b]roader than the California law"); Dogwill, *supra* note 94, at 274 (noting that Proposition 200 "distinc-

ported to authorize Arizona physicians, under certain specified conditions, to prescribe not only marijuana,[106] but over 100 other Schedule I drugs including heroin and LSD, to seriously or terminally ill patients.[107]

However well-intentioned it may have been,[108] the Arizona Drug Medicalization, Prevention, and Control Act had virtually no practical impact on the medicinal use of marijuana in Arizona.[109] The purely symbolic nature of the act stems primarily from the fact that it purports to authorize physicians to prescribe marijuana to a seriously ill patient "if documented scientific research concluded that the drug would provide medical benefits for treatment of the patient's disease or condition and if a second physician concurred in writing."[110] Finding even one physician willing to prescribe marijuana is

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tively surpassed the legislation passed in California"); Garner, *supra* note 12, at 581. (observing that the Arizona initiative was "broader than California's Proposition").

[106] *See* ARIZ. REV. STAT. ANN. § 13-3412.01(A) (West, Westlaw through 2012 Legis. Sess.).

[107] *See* Ariz. Legis. Council v. Howe, 965 P.2d 770, 772-73 (Ariz. 1998); Bassett, *supra* note 1, at 441-42; Abbie Crites-Leoni, *Medicinal Use of Marijuana*, 19 J. LEGAL MED. 273, 273-74, 294 (1998); Dogwill, *supra* note 94, at 269 n.166.

[108] *See* 1997 Ariz. Legis. Sess. 2895, 2897 ("The people of the State of Arizona declare their purposes to be . . . to permit doctors to prescribe Schedule I controlled substances to treat a disease, or to relieve the pain and suffering of seriously ill and terminally ill patients."); Dogwill, *supra* note 94, at 269 ("The purpose of the Act was to give physicians the tools necessary to relieve patients' pain and suffering.").

[109] *See* Andrew J. Boyd, *Medical Marijuana and Personal Autonomy*, 37 J. MARSHALL L. REV. 1253, 1272 (2004) ("Arizona's legalization of medical marijuana is . . . illusory."); Eric E. Sterling, *Drug Policy: A Smorgasbord of Conundrums Spiced by Emotions Around Children and Violence*, 31 VAL. U. L. REV. 597, 638 (1997) ("[U]ntil the federal controls on Schedule I drugs . . . are modified or struck down as applied, the Arizona proposition . . . is likely to have little effect.").

[110] *Ariz. Legis. Council*, 965 P.2d at 772; *see also* O'Hear, *supra* note 4, at 830 ("In order to provide a prescription, a doctor was required to document a scientific basis for the drug's therapeutic value and to obtain a written second opinion from another doctor."); Cathryn L. Blaine, Note, *Supreme Court "Just Says No" to Medical Marijuana: A Look at* United States v. Oakland Cannabis Buyers' Cooperative*,* 39 HOUS. L. REV. 1195, 1214 (2002) ("Arizona law allows physicians to prescribe marijuana to patients only after they receive a second physician's written concurring opinion.").

extremely difficult,[111] and persuading a pharmacy to dispense marijuana presumably would be impossible even if the drug was prescribed.[112]

In addition, the documented scientific evidence concerning the medical benefits of marijuana is at best inconclusive,[113] due largely to the fact that the use of marijuana and other Schedule I drugs was unlawful for any purpose during most of the quarter century immediately preceding Proposition 200's

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[111] *See, e.g.*, Conant v. Walters, 309 F.3d 629, 634 (9th Cir. 2002) (noting that "a doctor who actually prescribes or dispenses marijuana violates federal law"); State v. Cole, 874 P.2d 878, 881 (Wash. Ct. App. 1994) ("[The defendant] sought a prescription for marijuana from his doctors . . . . The doctors refused because marijuana is a Schedule I drug which cannot be prescribed."), *impliedly overruled on other grounds by* Seeley v. State, 940 P.2d 604 (Wash. 1997); *see also* Boyd, *supra* note 109, at 1260 n.53 ("Arizona doctors have refused to write prescriptions for marijuana, fearing prosecution under federal law."); Blaine, *supra* note 110, at 1214 ("[F]ew Arizona physicians are willing to prescribe marijuana to their patients because the Arizona law is in direct conflict with the federal [Controlled Substances Act], which would likely subject the physicians to criminal liability.") (footnotes omitted). *See generally* Christina E. Coleman, Note, *The Future of the Federalism Revolution:* Gonzales v. Raich *and the Legacy of the Rehnquist Court*, 37 LOY. U. CHI. L.J. 803, 828 n.151 (2006) ("[B]ecause the text of Arizona's law allows prescription of marijuana, it is arguably not effective until such time as a physician can legally prescribe marijuana, i.e., until the federal government reclassifies the drug.").

[112] *See* United States v. Kerr, 778 F.2d 690, 698 n.7 (11th Cir. 1985) (Hoffman, J., dissenting) ("Schedule I drugs . . . cannot be sold in a pharmacy."); Warren v. State, 288 So. 2d 817, 825 (Ala. Crim. App. 1973) ("Marihuana is not . . . normally prescribed by physicians and sold over-the-counter by pharmacists."), *rev'd on other grounds*, 288 So. 2d 826 (Ala. 1973); *Seeley*, 940 P.2d at 607 ("Marijuana cannot be legally prescribed, nor can a prescription for marijuana be filled by a pharmacist . . . unless a federal registration is granted."); Sterling, *supra* note 109, at 638 ("[N]one of the Schedule I substances are available at a pharmacy, thus there is no lawful way that a prescription can be filled. Proposition 200 does not, on its face, permit a physician to 'dispense' a Schedule I controlled substance.").

[113] *See Conant*, 309 F.3d at 643 (Kozinski, J., concurring) ("The evidence supporting the medical use of marijuana does not prove that it is, in fact, beneficial. . . . [T]here is a genuine difference of expert opinion on the subject, with significant scientific and anecdotal evidence supporting both points of view."); Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 15 F.3d 1131, 1137 (D.C. Cir. 1994) (noting "the testimony of numerous experts that marijuana's medicinal value has never been proven in sound scientific studies"); Crites-Leoni, *supra* note 107, at 279 ("One problem with the argument for marijuana's viability as medicine is that scientific studies are limited and contradictory. . . . [S]tudies concerning the effects of marijuana on terminally and seriously ill patients are not conclusive.").

enactment[114] (and continues to be unlawful as a matter of federal law today).[115] As one court has noted, "a litany of legal, administrative, and practical obstacles . . . hinder researchers seeking to conduct experiments with Schedule I drugs," including "difficulty in obtaining volunteers for clinical studies and, for academic researchers, difficulty in securing approval from institutional review boards."[116]

The fact that the Arizona initiative authorized physicians to prescribe drugs generally deemed to be more addictive and thus more dangerous than marijuana, such as LSD and heroin,[117] also may have contributed to the act's inef-

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[114] *See* Raich v. Gonzales, 500 F.3d 850, 865 (9th Cir. 2007) ("[N]o state permitted medical marijuana usage until . . . 1996. Thus, from 1970 to 1996, the possession or use of marijuana—medically or otherwise—was proscribed under state and federal law."); *In re* Jones, 110 Cal. Rptr. 765, 767-68 (Ct. App. 1974) ("Various studies and reports have attempted to analyze the [effects of marijuana] but with little success. One of the difficulties encountered was the fact that as the use of marijuana was illegal there was no standardization of pharmacological potency and the amount of [the] drug . . . actually consumed by a user was not known."); *cf.* Peter J. Cohen, Symposium, *Medical Marijuana: The Conflict Between Scientific Evidence and Political Ideology*, 2009 UTAH L. REV. 35, 56 (2009) (noting that "marijuana has not been used in a medical context for a sufficiently long period to allow the collection of scientific observations and data").

[115] *See* Pearson v. McCaffrey, 139 F. Supp. 2d 113, 121 (D.D.C. 2001) ("Even though state law may allow for the prescription or recommendation of medicinal marijuana within its borders, to do so is still a violation of federal law under the [Controlled Substances Act]."); Washburn v. Columbia Forest Prods., Inc., 134 P.3d 161, 167 (Or. 2006) (Kistler, J., concurring) ("The federal Controlled Substances Act prohibits possessing, manufacturing, dispensing, and distributing marijuana. That prohibition applies even when a person possesses, manufactures, dispenses, or distributes marijuana for a medical use.") (citations omitted).

[116] Grinspoon v. Drug Enforcement Admin., 828 F.2d 881, 896 (1st Cir. 1987); *see also* Eric Blumenson & Eva Nilsen, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform*, 17 VA. J. SOC. POL'Y & L. 43, 72 n.117 (2009) ("[M]arijuana research has . . . been hindered by marijuana's inclusion in Schedule I, as well as by a complicated federal approval process, and limited availability of research-grade marijuana."); Alistair E. Newbern, Comment, *Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use After* United States v. Lopez, 88 CALIF. L. REV. 1575, 1585 (2000) ("Classification as a Schedule I drug . . . limits the availability of a drug for research to determine possible medical uses.") (footnote omitted).

[117] *See* Dogwill, *supra* note 94, at 273-74 ("Arizona's legislation . . . validated any prescription of a Schedule I substance as long as the correct protocol was followed. . . . [N]ot only could marijuana be prescribed, much harsher narcotics such as LSD and heroin could be prescribed in Arizona as well."); *cf.* United States v. Kuch, 288 F. Supp. 439, 448 (D.D.C. 1968) ("There is . . . a clear and compelling interest in the regulation of the transfer and possession of LSD. The drug is more harmful than marihuana . . . .") (footnote omitted); State v. Wadsworth, 505 P.2d 230, 233 (Ariz. 1973) (acknowledging that "dangerous drugs such as 'L.S.D.' . . . are more harmful to the user than marijuana").

fectiveness[118] (although the Arizona act is not entirely unique in this regard).[119] Indeed, some observers have suggested that because Proposition 200 was widely promoted as a medical marijuana reform law[120] (and is still typically viewed in this fashion),[121] many Arizonans who supported the proposition may not have realized that it also purported to legalize the prescription and use of other more controversial Schedule I controlled substances.[122]

In contrast to Proposition 200, the contemporaneous California initiative, known as Proposition 215[123] proved to be extremely influential,[124] in part because it was considerably narrower than its Arizona counterpart.[125] Specifi-

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[118] *See* Ariz. Legis. Council v. Howe, 965 P.2d 770, 776 (Ariz. 1998) (observing that drugs such as heroin "unquestionably evoke serious concerns in the minds of most people, even if used for medicinal purposes . . . ."); Crites-Leoni, *supra* note 107, at 294 ("Broadly legalizing prescription of [all Schedule I] drugs is potentially reckless, because it permits physicians to prescribe substances that traditionally have been recognized as having a high incidence of abuse.").

[119] *See, e.g.*, State v. Tate, 477 A.2d 462, 468 (N.J. Super. Ct. Law Div. 1984) ("The New Jersey Legislature has also recognized that marijuana (as well as other Schedule I controlled dangerous substances) may have medicinal value."), *aff'd*, 486 A.2d 1281 (N.J. Super. Ct. App. Div. 1985), *rev'd on other grounds*, 505 A.2d 941 (N.J. 1986).

[120] *See* Crites-Leoni, *supra* note 107, at 294 (noting that "the media claimed Proposition 200 was intended to legalize marijuana"); *cf.* Jeffrey Allan Kilmark, Note & Comment, *Government Knows Best? An Analysis of the Governor's Power to Veto and the Legislature's Power to Repeal or Amend Voter-Enacted Initiative and Referendum Petitions in Arizona*, 30 ARIZ. ST. L.J. 829, 829 (1998) (describing Proposition 200 as "the so-called medical-marijuana initiative").

[121] *See supra* note 97 and accompanying text.

[122] *See* Bassett, *supra* note 1, at 442 (discussing an attempt by the Arizona Legislature to amend Proposition 200 "[a]mid concern that . . . some voters were unaware that the measure extended beyond marijuana to all Schedule I drugs").

[123] *See* People v. Mower, 49 P.3d 1067, 1070 (Cal. 2002) ("At the General Election held on November 5, 1996, the electors approved an initiative statute designated on the ballot as Proposition 215 and entitled Medical Use of Marijuana. In pertinent part, the measure added section 11362.5 [of the California Health and Safety Code], the Compassionate Use Act of 1996.").

[124] *See, e.g.*, Conant v. Walters, 309 F.3d 629, 641 (9th Cir. 2002) (Kozinski, J., concurring) ("Following passage of the California initiative, the White House Office of National Drug Control Policy commissioned the National Institute of Medicine of the National Academy of Sciences (IOM) to review the scientific evidence of the therapeutic application of cannabis."); *cf.* Yankah, *supra* note 5, at 6 ("Since the passage of California's Compassionate Use Act, at least sixteen other states have passed similar bills to allow the personal use of marijuana with a doctor's recommendation."). For a prior academic discussion of the California proposition's impact, see Bergstrom, *supra* note 2.

[125] *See* Alex Kreit & Aaron Marcus, *Raich, Health Care, and the Commerce Clause*, 31 WM. MITCHELL L. REV. 957, 962-63 (2005) (noting that "modern state law medical marijuana reform efforts began with the passage of . . . California's Compassionate Use Act, and a similar ballot initiative in Arizona," but the California act has been the principal focus of "most of the medical marijuana-related publicity and legal activity, in part because of the structure of California's law").

cally, Proposition 215—now the CUA—[126] created a limited exemption from California state laws prohibiting the use and cultivation of marijuana[127] by permitting patients and their primary caregivers[128] to cultivate and possess marijuana for medical use upon a physician's recommendation or approval.[129]

While Arizona's Proposition 200 ostensibly allows physicians to prescribe more than 100 Schedule I drugs, including heroin and LSD,[130] the CUA only decriminalizes the medical use of marijuana.[131] In addition, while Arizona's Proposition 200 allows physicians to prescribe a Schedule I drug only if documented scientific research indicates the drug would provide medical benefits to the patient and if a second physician provides a written concurrence,[132] the

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126 *See* Gonzales v. Raich, 545 U.S. 1, 5 (2005) ("In 1996, California voters passed Proposition 215, now codified as the Compassionate Use Act of 1996."); People v. Hochanadel, 98 Cal. Rptr. 3d 347, 354 (Ct. App. 2009) ("The CUA was approved by California voters as Proposition 215 in 1996 . . . .").

127 *See Mower*, 49 P.3d at 1075 (observing that the CUA "renders possession and cultivation of marijuana noncriminal—that is to say, it renders possession and cultivation of the marijuana noncriminal for a qualified patient or primary caregiver"); *cf.* Cnty. of Los Angeles v. Hill, 121 Cal. Rptr. 3d 722, 728 (Ct. App. 2011) ("The possession, dispensing, cultivation, or transportation of marijuana is ordinarily a crime under California law.").

128 The CUA defines a primary caregiver as "the individual designated by [the patient] who has consistently assumed responsibility for the housing, health, or safety of [the patient]." CAL. HEALTH & SAFETY CODE § 11362.5(e) (West, Westlaw through 2012 legislation).

129 *See* CAL. HEALTH & SAFETY CODE § 11362.5(d) (West, Westlaw through 2012 legislation); Cnty. of Santa Cruz v. Ashcroft, 314 F. Supp. 2d 1000, 1003 (N.D. Cal. 2004). The stated purpose of the CUA is to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate" in the treatment of "cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief," to "ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction," and to "encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." CAL. HEALTH & SAFETY CODE § 11362.5(b)(1); *see also* People v. Spark, 16 Cal. Rptr. 3d 840, 844-45 (Ct. App. 2004) (discussing the enumerated purposes of the CUA).

130 *See supra* note 117 and accompanying text.

131 *See* CAL. HEALTH & SAFETY CODE § 11362.5(d); O'Hear, *supra* note 4, at 830 ("California's Proposition 215 applies only to marijuana, not to all Schedule I substances . . . ."); Marcia Tiersky, Comment, *Medical Marijuana: Putting the Power Where It Belongs*, 93 NW. U. L. REV. 547, 573 (1999) ("Opponents claim that the standards set out in Proposition 200 allow all Schedule I drugs for anyone who can obtain a doctor's recommendation, [sic] and that this standard is too low. . . . Proposition 215, by contrast, only allows for marijuana use.").

132 *See supra* note 110 and accompanying text.

CUA allows physicians to "recommend" rather than prescribe marijuana,[133] and no second opinion or supporting scientific evidence is required.[134]

Indeed, the drafters of the CUA apparently authorized doctors to "recommend" a patient's use of marijuana rather than to prescribe the drug precisely because, as a Schedule I controlled substance, marijuana cannot lawfully be prescribed.[135] As another commentator previously observed, "[b]y requiring a doctor's recommendation, but not a prescription, the [Compassionate Use Act] avoided the federal prohibition against writing prescriptions for marijuana which had rendered similar initiatives ineffective."[136]

V. THE AMMA: ARIZONA'S SECOND BITE AT THE MEDICAL MARIJUANA APPLE

In an apparent attempt to correct some of the problems with Arizona's 1996 act,[137] the drafters of the AMMA followed to some extent the pattern of

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[133] *See* People v. Chakos, 69 Cal. Rptr. 3d 667, 674 (Ct. App. 2008) ("[T]he Compassionate Use Act . . . allow[s] lawful possession under state law pursuant to a physician's 'recommendation,' as distinct from a formal 'prescription[ ]' . . . ."); Ross v. RagingWire Telecomms., Inc., 33 Cal. Rptr. 3d 803, 811 (Ct. App. 2005) ("Unlike prescription drugs that are dispensed under regulated circumstances, the Compassionate Use Act requires only a physician's oral recommendation . . . ."), *aff'd*, 174 P.3d 200 (Cal. 2008); Crites-Leoni, *supra* note 107, at 289 (noting that under the CUA, "a physician need only recommend use to a patient, making it easier for patients to obtain marijuana").

[134] *See* Taylor W. French, Notes, *Free Trade and Illegal Drugs: Will* NAFTA Transform the United States into the Netherlands?, 38 VAND. J. TRANSNAT'L L. 501, 508 (2005) (asserting that "the 'second opinion' feature indicates hesitation to open the door to the medicalization of drugs"). Arizona's Proposition 200 was relatively unique in this regard. As one commentator noted, most state medical marijuana laws are "quite permissive, and require minimal scientific data to demonstrate that marijuana might be effective in treating every condition for which it may be recommended by a willing physician." Peter J. Cohen, *Medical Marijuana 2010: It's Time to Fix the Regulatory Vacuum*, 38 J.L. MED. & ETHICS 654, 658 (2010) (emphasis omitted).

[135] *See Chakos*, 69 Cal. Rptr. 3d at 673 n.7; People v. Wilson, 148 Cal. Rptr. 47, 52 (Ct. App. 1978) ("[T]here are no situations in which marijuana, like certain other controlled substances, can be prescribed by physicians."); State v. Adler, 118 P.3d 652, 658 (Haw. 2005).

[136] Patton, *supra* note 8, at 166 n.32. A federal court in California has observed that even as a matter of federal law, "there are lawful and legitimate responses to a medical marijuana recommendation. The patient, armed with the doctor's recommendation, may urge the federal government to change the law." Denney v. Drug Enforcement Admin., 508 F. Supp. 2d 815, 828 (E.D. Cal. 2007). "Alternately, the patient may lawfully procure marijuana with the recommendation by enrolling in a federally-approved experimental marijuana therapy program or traveling to a country where marijuana is legal." *Id*. at 828 n.1.

[137] *See* Howard Fischer, Poll: 52% of Likely Voters Support Medical Marijuana, ARIZ. DAILY SUN, Oct. 14, 2010, at A2 ("Arizonans approved a similar measure in 1996 but found it thwarted by legislative action. They re-approved it in 1998 . . . . But the law never was used because both versions required a prescription by a doctor. . . . Proposition 203 gets around that by instead requiring only a 'recommendation,' a tactic now used in laws in more than a dozen other states."); Jon Johnson, *Medical Marijuana Proposition Passes*, E. ARIZ. COURIER, Nov. 17, 2010, at A1

California's CUA.[138] Like the CUA and the medical marijuana laws in other states,[139] the AMMA only authorizes the medical use of marijuana and not other Schedule I controlled substances.[140] Also similar to the CUA,[141] the AMMA does not require a physician's prescription.[142] The AMMA instead provides that a qualifying patient[143] with a "written certification issued by a physician" may obtain a medical marijuana registry identification card.[144] Patients with valid medical marijuana registry cards may receive up to 2.5 ounces of marijuana every two weeks from dispensaries, or, under some circumstances, to cultivate up to twelve marijuana plants for their own personal medical use.[145]

("Arizona also passed a proposition in 1996 (by a vote of 65 percent to 35 percent) to allow patients to use medical marijuana, but it . . . stated doctors could prescribe the drug. The United States Drug Administration threatened to punish doctors who wrote prescriptions for marijuana. The 2010 proposition only requires a doctor's recommendation for a patient to obtain a medical marijuana registry card.").

138 *See* Niki D'Andrea, *Smoke and Furors*, PHOENIX NEW TIMES, Oct. 21, 2010, at 12 ("Arizona voters passed one of the first medical marijuana measures in the country, way back in 1996. It was called Proposition 200, and it . . . permitted doctors to 'prescribe' marijuana. . . . [T]his year's Proposition 203 is the most detailed medical marijuana measure Arizona [has] ever seen, and it's more evolved than similar laws passed in other states. . . . [It] bear[s] some resemblance to California's Proposition 215 (passed by voters in 1996) . . . .").

139 *See*, *e.g.*, State v. Hanson, 157 P.3d 438, 442 (Wash. Ct. App. 2007) (noting that the Washington State Medical Use of Marijuana Act merely authorizes the medical use of marijuana and "does not cover the entire scope of schedule I controlled substance designations"); *see also supra* note 131 and accompanying text.

140 ARIZ. REV. STAT. ANN. § 36-2811(B) (West, Westlaw through 2012 Legis. Sess.).

141 CAL. HEALTH & SAFETY CODE § 11362.5(c) (West, Westlaw through 2012 legislation).

142 ARIZ. REV. STAT. ANN. § 36-2804.02(A) (West, Westlaw through 2012 Legis. Sess.).

143 The act defines a qualifying patient as a person who "has been diagnosed by a physician as having a debilitating medical condition," such as cancer, glaucoma, human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, crohn's disease, and agitation of alzheimer's disease. *Id.* § 36-2801(3)(a), (13).

144 *Id.* § 36-2804.02(A). Other state medical marijuana laws contain similar provisions. *See, e.g.*, United States v. Barnard, 770 F. Supp. 2d 366, 369 (D. Me. 2011) ("[T]he Maine Medical Use of Marijuana Act requires that a registrant provide a written certification from a physician justifying the patient's use . . . ."); Rollins v. Ulmer, 15 P.3d 749, 753 (Alaska 2001) ("The Alaska statute does not . . . require that patients have a prescription. As long as a patient submits a letter from a physician certifying that the patient may benefit from marijuana, the decision to use marijuana as a medical treatment is left entirely to the individual."); Burns v. State, 246 P.3d 283, 286 (Wyo. 2011) ("Colorado law simply allows for a physician to certify that a patient might benefit from the use of marijuana as a medical treatment. . . . Clearly, therefore, the physician is not prescribing . . . marijuana . . . .").

145 ARIZ. REV. STAT. ANN. §§ 36-2801(1)(a), 36-2811(B).

VI. The AMMA's Maze for Arizona Employers

A. Discrimination in Employment Prohibited

In most states that have legalized the medical use of marijuana, state criminal penalties for the use, possession, and cultivation of marijuana are removed for patients with a recommendation or referral from their physicians.[146] However, most state medical marijuana laws, including the CUA,[147] do not directly address the employment issues implicated by the use of marijuana for medical purposes.[148] Courts in several of these states have concluded that the protection afforded to medical marijuana users under these statutes is limited to the decriminalization of medical marijuana use, possession, or sale.[149] These courts generally uphold the right of employers to terminate or otherwise discipline employees whose use of marijuana for medical purposes violates drug-free workplace policies.[150]

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146 *See* Raich v. Gonzales, 500 F.3d 850, 865 (9th Cir. 2007) (noting that in the decade following enactment of California's medical marijuana act, "ten states other than California . . . passed laws decriminalizing in varying degrees the use, possession, manufacture, and distribution of marijuana for the seriously ill."); Qualified Patients Ass'n v. City of Anaheim, 115 Cal. Rptr. 3d 89, 101 n.2 (Ct. App. 2010) ("California is not alone, nor an outlier among the states in decriminalizing medical marijuana; at least 12 states have done so despite the continuing federal ban . . . .").

147 *See* Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 203 (Cal. 2008) ("Nothing in the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and duties of employers and employees.").

148 *See, e.g.*, Casias v. Wal-Mart Stores, Inc., 764 F. Supp. 2d 914, 922 (W.D. Mich. 2011) (noting that the Michigan Medical Marijuana Act "says nothing about private employment rights"); Johnson v. Columbia Falls Aluminum Co., No. DA 08-0358, 2009 WL 865308, at *2 (Mont. Mar. 31, 2009) (noting that the Montana Medical Marijuana Act "does not provide an employee with an express or implied private right of action against an employer"); Linda Obele, *Arizona Going to Pot: Firms Grapple with Legal Ramifications of Medical Marijuana*, Phoenix Bus. J., Jan. 14, 2011, at 14 (noting that a Colorado state constitutional provision protecting medical marijuana users from criminal prosecution "says nothing about employers having to accommodate workers who are using marijuana for medical conditions").

149 *E.g.*, *Casias*, 764 F. Supp. 2d at 922 (noting that the Michigan act "provides a potential defense to criminal prosecution"); *Johnson*, 2009 WL 865308, at *2 (noting that the Montana Medical Marijuana Act "is essentially a 'decriminalization' statute"); Freightliner, LLC v. Teamsters Local 305, 336 F. Supp. 2d 1118, 1127 (D. Or. 2004) ("On its face, the [Oregon Medical] Marijuana Act only aims to protect Oregon citizens holding valid marijuana prescriptions from criminal prosecution . . . ."); Roe v. TeleTech Customer Care Mgmt. (Colo.), LLC, 216 P.3d 1055, 1061 (Wash. Ct. App. 2009) (holding that the Washington State Medical Use of Marijuana Act "provides qualifying medical users only a defense to criminal prosecution"), *aff'd*, 257 P.3d 586 (Wash. 2011).

150 *See* Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518, 524 n.7 (Or. 2010) (en banc) ("Both the California and Washington courts have held that, in enacting their states' medical marijuana laws, the voters did not intend to affect an employer's ability to take adverse employment actions based on the use of medical marijuana. . . . We reach the same

In contrast to the medical marijuana laws of these other states,[151] the AMMA specifically prohibits employers from discriminating against individuals in hiring, promotion, or other terms and conditions of employment based on their status as registered medical marijuana cardholders.[152] Arizona employers also may not terminate, otherwise discipline, or refuse to hire a registered medical marijuana cardholder for testing positive for the use of marijuana[153] unless the individual testing positive used, possessed, or was impaired by the drug on the employer's premises or during working hours.[154]

B. The Interplay Between the AMMA and the Federal Drug-Free Workplace Act

The AMMA's anti-discrimination provisions are subject to a statutory exception permitting employers to base employment decisions upon an employee's status as a medical marijuana cardholder, or upon a cardholder's positive test for marijuana, if the employer's "failure to do so would cause [it] to lose a monetary or licensing related benefit under federal law or regulations."[155] Most observers have interpreted this exception to be an implicit reference to the federal Drug-Free Workplace Act of 1988,[156] which "imposes a drug-free workplace requirement on federal contractors and federal grant recip-

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conclusion, although our analysis differs because Oregon has chosen to write its laws differently.") (citations omitted).

151 Apart from Arizona (and Delaware more recently), Rhode Island is "the only state that specifically protects the jobs of employees who use medical marijuana." Lieberman & Solomon, *supra* note 11, at 624. To date, "no other medical marijuana statute has been held to regulate private employment." *Casias,* 764 F. Supp. 2d at 925 n.8.

152 ARIZ. REV. STAT. ANN. § 36-2813(B)(1) (2010) (West, Westlaw through 2012 Legis. Sess.).

153 *Id.* § 36-2813(B)(2). This aspect of the Act represents a significant change in Arizona employment law. *See* Weller v. Ariz. Dep't Econ. Sec., 860 P.2d 487, 490 (Ariz. Ct. App. 1993) ("[A]n employer who terminates an at-will employee for failing a drug test ordinarily incurs no civil liability."). The change also distinguishes Arizona law from the law of other states. *See, e.g.*, Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 203 (Cal. 2008) ("Under California law, an employer may require preemployment drug tests and take illegal drug use into consideration in making employment decisions.").

154 ARIZ. REV. STAT. ANN. § 36-2813(B)(2).

155 *Id.* § 36-2813(B).

156 41 U.S.C. §§ 8101-06 (2000). Several states have enacted their own drug-free workplace statutes designed "to maximize productivity and reduce the costs associated with substance abuse by employees." Oleszko v. State Comp. Ins. Fund, 243 F.3d 1154, 1159 n.7 (9th Cir. 2001). These state statutes typically require employers providing "property or services to any state agency" to certify that they will maintain drug-free work environments. *Ross*, 174 P.3d at 213 (discussing California's Drug-Free Workplace Act).

ients"[157] and requires employers to make a good faith effort to comply with this requirement "in order to remain eligible for federal funds."[158]

However, this exception for recipients of federal benefits may not be particularly helpful to employers attempting to comply with the AMMA.[159] Although the Drug-Free Workplace Act requires employers to notify their employees of the federal act's requirements,[160] and also arguably requires employers to condition an individual's employment on compliance with those requirements,[161] the act's objectives have repeatedly been interpreted to be primarily educational and rehabilitative in nature.[162]

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[157] Parker v. Atlanta Gas Light Co., 818 F. Supp. 345, 347 (S.D. Ga. 1993); *see also Ross*, 174 P.3d at 213 (Kennard, J., concurring in part and dissenting in part) ("Under federal law, federal grant recipients are subject to a . . . drug-free workplace requirement.") (citing 41 U.S.C. § 8103 (2000)); Univ. of Haw. Prof'l Assembly v. Tomasu, 900 P.2d 161, 163 (Haw. 1995) ("The [Drug-free Workplace Act] requires employers who are the recipients of federal grants or contracts to maintain drug-free workplaces by establishing policies on drug awareness and implementing them in the workforce.").

[158] *Parker*, 818 F. Supp. at 347; *see also Univ. of Haw. Prof'l Assembly*, 900 P.2d at 163 ("The [Drug-free Workplace Act] . . . provides that continued payments on contracts with the federal government, or continued funding to the grantee, is contingent upon compliance with the Act.").

[159] *See* Carolyn Ladd, *Medical Marijuana and the Workplace*, 29 ASS'N OF CORP. COUNS. 58, 62 (April 2011) ("It is not entirely clear when an [Arizona] employer is subject to lose a monetary or licensing-related benefit under federal law or regulations."); *cf.* Washburn v. Columbia Forest Prods., Inc., 104 P.3d 609, 615 (Or. Ct. App. 2005) ("The Federal Drug-Free Workplace Act prohibits only certain actions and then prohibits them only if they are 'unlawful.' Under Oregon law, [the] medical use of marijuana is not unlawful."), *rev'd on other grounds*, 134 P.3d 161 (Or. 2006).

[160] *See Washburn*, 104 P.3d at 615 ("The Federal Drug-Free Workplace Act imposes certain requirements on federal contractors and grant recipients. Contractors or grant recipients must . . . notify their employees that they must comply with the requirements.").

[161] *See* Collings v. Longview Fibre Co., 63 F.3d 828, 830 n.1 (9th Cir. 1995) (noting that the federal act requires employers to notify their employees that the unlawful use or possession of controlled substances is prohibited in the workplace, and to warn employees that "they must abide by those terms 'as a condition of employment' ") (quoting 41 U.S.C. § 8102(a)(1) (2000)); Gulf Coast Indus. Workers Union v. Exxon Co., 991 F.2d 244, 250 (5th Cir. 1993) ("The Drug-Free Workplace Act . . . requires private employers with federal contracts to (1) publish a statement notifying their workers that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the workplace, [and] (2) notify employees that their continued employment hinges on compliance with the policies outlined in this statement . . . . A company's failure to comply with the Act subjects the company's federal contract to possible termination.") (citing 41 U.S.C. § 8102(a)(1)(A)-(D) (2000)).

[162] *See* Oleszko v. State Comp. Ins. Fund, 243 F.3d 1154, 1159 n.7 (9th Cir. 2001) ("The Drug-free Workplace Act . . . requires federal contractors and federal grant recipients to establish drug-free awareness programs which inform employees about the availability of [employee assistance programs].") (citing 41 U.S.C. §§ 8102(a)(1)(B)(iii), 8103(a)(1)(B)(iii) (2000)); Figueroa v. Fajardo, 1 F. Supp. 2d 117, 123 (D.P.R. 1998) ("This particular statute aims at reducing the use of drugs by employees of federal contractors or federal grant recipients by conditioning the flow of funds [on] the establishment of drug awareness programs as well as rehabilitation assistance for the employees."); Cullen v. E.H. Friedrich Co., 910 F. Supp. 815, 821 (D. Mass. 1995) ("[T]he

For example, the act does not require that employers test their employees or applicants for illegal drug use.[163] Nor does the act dictate the action an employer must take if an individual tests positive for illegal drugs.[164] Even more fundamentally, the Drug-Free Workplace Act expressly prohibits the unlawful use or possession of drugs only *in the workplace*.[165] The same is true of most state drug statutes patterned after the federal act.[166] The fact that these "drug-free workplace laws are not concerned with employees' possession or use of drugs like marijuana away from the jobsite" strongly suggests that "nothing in those laws would prevent an employer that knowingly accepted an

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Federal Drug-Free Workplace Act . . . is intended to encourage employers to educate employees about the dangers of drugs.").

163 *See* Mares v. Conagra Poultry Co., 773 F. Supp. 248, 254-55 (D. Colo. 1991) ("Nowhere in [the] law does it require entities to engage in drug testing of employees."), *aff'd*, 971 F.2d 492 (10th Cir. 1992); H. Michael Bagley, et al., Survey, *Workers' Compensation*, 49 MERCER L. REV. 383, 385 n.14 (1997) ("The main thrust of the federal act is awareness and education rather than actual testing."); Ladd, *supra* note 159, at 62 ("The [Drug-Free Workplace] Act requires that an employer provide training and report any drug related convictions of its employees to the government, but does not require drug testing."); Jeffrey J. Olsen, *A Comprehensive Review of Private Sector Drug Testing Law*, 8 HOFSTRA LAB. L.J. 223, 226 (1991) ("The Drug-Free Workplace Act . . . does not require drug testing."); *cf.* Santiago v. Greyhound Lines, Inc., 956 F. Supp. 144, 152 (N.D.N.Y. 1997) ("Although the Act does not mandate drug screening, it is fair to say it encourages it.") (citations omitted).

164 *See* Atl. Pipe Corp. v. Laborers Int'l Union, No. CV074015994S, 2008 WL 1970965, at *9 (Conn. Super. Ct. 2008) ("The act simply does not provide for, mandate or condone automatic termination of an employee as a result of the possession of marijuana at work."); Univ. of Haw. Prof'l Assembly v. Tomasu, 900 P.2d 161, 169 (Haw. 1995) ("[W]hen an employee violates the [employer's] drug enforcement policy, the employee must be duly sanctioned or must participate in a drug abuse assistance or rehabilitation program. The [Act] does not describe the exact procedure for these actions, leaving these details to the individual employers to fashion and implement."); Deanne J. Mouser, *Combating Employee Drug Use Under a Narrow Public Policy Exception*, 12 INDUS. REL. L.J. 184, 190-91 (1990) ("[T]he Drug-free Workplace Act does not require that employers fire employees who use drug—the Act requires only a good faith effort to maintain a drug-free workplace. . . . A good faith effort may consist of drug testing and a rehabilitation program.").

165 *See* 41 U.S.C. §§ 8102(a)(1)(A), 8103(a)(1)(A) (2000); *cf. Figueroa*, 1 F. Supp. 2d at 123 ("It is evident from the statute . . . that its application is circumscribed to work-related problems caused by drug use.") (emphasis omitted). This aspect of the Drug-Free Workplace Act has been criticized. *See, e.g.*, Olsen, *supra* note 163, at 227 ("[T]he [Act] does not expressly prohibit reporting to work 'under the influence' . . . . Thus, an employee may 'beat the system' under the Drug-free Workplace Act by 'getting high' prior to work or during lunch breaks.").

166 *See* Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 213 (Cal. 2008) (Kennard, J., concurring in part and dissenting in part) ("Both the state and federal drug-free workplace laws are concerned only with conduct *at the jobsite* . . . .").

employee's use of marijuana as a medical treatment at the employee's home from obtaining drug-free workplace certification."[167]

This interpretation of the Drug-Free Workplace Act is illustrated by the analysis in *Washburn v. Columbia Forest Products, Inc.*,[168] a case arising under the Oregon Medical Marijuana Act ("OMMA").[169] The plaintiff in *Washburn* was authorized to use marijuana for medical purposes.[170] The plaintiff's employer terminated his employment after he tested positive for marijuana in a series of tests administered in accordance with the employer's workplace drug policy.[171] The plaintiff brought suit against the employer, arguing that "the OMMA does not allow employers to discriminate against medical marijuana users who do not use marijuana at work and are not impaired by marijuana while at work."[172]

The trial court awarded summary judgment to the employer.[173] On appeal, the employer argued that its actions were required by the Drug-Free Workplace Act.[174] The Oregon Court of Appeals rejected the employer's argument[175] and held that the trial court erred in granting the employer's motion for summary judgment.[176] The appellate court reasoned that because the plaintiff "did not take any actions that the Act prohibits in the workplace" he could not "be said to have violated (or caused [the employer] to violate) the Federal Drug-Free Workplace Act."[177]

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[167] *Id.*; *cf.* Ladd, *supra* note 159, at 62 (asking rhetorically whether "a federal contractor or grantee [can] comply with the Drug-free Workplace . . . Act even if it allows an employee who tests positive for medical marijuana to continue working").

[168] *Washburn*, 104 P.3d 609 (Or. Ct. App. 2005), *rev'd on other grounds*, 134 P.3d 161 (Or. 2006).

[169] OR. REV. STAT. §§ 475.300-.346 (2009).

[170] *Washburn*, 104 P.3d at 610-11.

[171] *Id.* at 611.

[172] *Id.* The parties agreed that the urinalysis tests administered by the employer "did not, and indeed could not, reveal whether plaintiff was under the influence of marijuana at the time of the test, but only that plaintiff had used marijuana sometime in the previous two to three weeks." *Id.*

[173] The trial court adopted the employer's contention that employers are not required to accommodate the needs of medical marijuana users, including those who merely test positive for use of the drug with no compelling evidence that they were actually impaired. *See id.*

[174] *See id.* at 614-15.

[175] *See id.* at 615 ("[A]nalysis of the Federal Drug-Free Workplace Act does not lead to the result that defendant suggests.").

[176] *See id.* at 614.

[177] *Id.* at 615. Although the Supreme Court of Oregon subsequently reversed the Court of Appeals' decision, it did so on other grounds, holding that summary judgment was appropriate because the "employer had no statutory duty to accommodate the plaintiff's physical limitation in the manner sought by [the] plaintiff." Washburn v. Columbia Forest Prods., Inc., 134 P.3d 161, 166 (Or. 2006). The Oregon Court of Appeals' analysis of the interplay between the OMMA and the federal Drug-Free Workplace Act was not addressed by the Supreme Court of Oregon, and thus presumably continues to be a correct statement of Oregon law on this subject. *See Washburn*,

The AMMA reflects a similar focus by permitting employers to discipline their employees, including registered medical marijuana cardholders, for ingesting marijuana in the workplace, or for working while under the influence of marijuana.[178] Although the AMMA does not specifically authorize employers to discipline cardholders solely for *possessing* marijuana in the workplace,[179] any uncertainty over this issue may have been resolved by the Arizona Legislature's subsequent enactment of a statute insulating employers from liability for taking disciplinary action (including termination of employment) against an employee "based on the employer's good faith belief that [the] employee used or possessed any drug while on the employer's premises or during the hours of employment."[180] However, neither the Drug-Free Workplace Act nor the AMMA appears to authorize the disciplining of a medical marijuana user solely for possessing or ingesting marijuana outside the workplace during nonworking hours.[181]

C. Compliance with the AMMA in the Face of Federal Regulations

As the preceding discussion suggests, the employment provisions of the AMMA may present significant problems for employers.[182] Considerable empirical evidence shows that the use of marijuana, whether for medical purposes or otherwise, may impair the user's cognitive functions and ability to

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134 P.3d at 164; Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 186 P.3d 300, 306 (Or. Ct. App. 2008) (noting that the Supreme Court in *Washburn* "did not address any of the . . . issues that [the Court of Appeals] had decided concerning the application of the OMMA or the federal Drug-Free Workplace Act"), *rev'd on other grounds*, 230 P.3d 518 (Or. 2010).

178 ARIZ. REV. STAT. ANN. § 36-2814(A)(3), (A)(B) (West, Westlaw through 2012 Legis. Sess.); *cf.* Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC, 257 P.3d 586, 593 (Wash. 2011) ("[A]n employer only has a duty to accommodate an employee's off-site medical marijuana use if the employee's use would not affect job safety or performance.").

179 *See* County of Butte v. Superior Court, 96 Cal. Rptr. 3d 421, 429 (Ct. App. 2009) (noting that a state medical marijuana law "has no effect on . . . searches and seizures under federal law"). *Cf.* Ross v. RagingWire Telecomms., Inc., 33 Cal. Rptr. 3d 803, 811 (Ct. App. 2005) ("[I]t could be asserted that . . . the employer cannot discriminate against medicinal marijuana users by refusing to allow them to bring their medication to work . . . . If so, this would mean the employer would be compelled to tolerate on its premises the presence of a drug that is illegal under federal law—which, under circumstances not entirely speculative, could result in the employer's workplace being subject to a search conducted by federal authorities pursuing an employee's violation of federal criminal laws."), *aff'd*, 174 P.3d 200 (Cal. 2008).

180 ARIZ. REV. STAT. ANN. § 23-493.06(A)(5).

181 *See* Weller v. Ariz. Dep't Econ. Sec., 860 P.2d 487, 493 (Ariz. Ct. App. 1993) ("[A] positive test result revealing that marijuana of unknown quantity inhaled or ingested at an unknown prior time may reflect only off-duty activity and may be entirely unrelated to work.").

182 *See Roe*, 257 P.3d at 599 (Chambers, J., dissenting) ("[T]he employer may well have an overriding reason not to permit an employee to medicate with marijuana.").

perform complex tasks requiring attention and mental coordination,[183] and that the impairment may persist well after the drug was ingested.[184] Employers are understandably concerned about the loss of productivity that may attend an employee's use of marijuana,[185] as well as the liability to which they may be subject if third parties are injured by the actions of an employee working while under the influence of the drug.[186]

In addition, Arizona employers must comply with Occupational Safety and Health Act ("OSHA")[187] and other federal standards governing workplace safety.[188] In this regard, the U.S. Department of Transportation ("DOT") has

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[183] *See* State v. Lucero, 85 P.3d 1059, 1063 (Ariz. Ct. App. 2004) (citing evidence that tetrahydrocannabinol (THC), the principal psychoactive chemical component of marijuana, "affects judgment, the ability to think, and the ability to solve problems," and "can make the ability to perform multiple tasks, such as those performed while driving, difficult."); *see also* Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 214 (Cal. 2008) (Kennard, J., concurring in part and dissenting in part) ("Considered strictly in terms of its physical effects relevant to employee productivity and safety, and not its legal status, marijuana . . . may affect cognitive functioning and have a potential for abuse.").

[184] *See Lucero*, 85 P.3d at 1063 ("Even when THC is no longer detectable in the blood, it remains for a time in the nervous system and continues to affect the user. . . . Adverse effects endure as long as twenty-four hours after consumption."); *see also* Fowler v. New York City Dep't of Sanitation, 704 F. Supp. 1264, 1275 (S.D.N.Y. 1989) ("[D]rugs affect individuals long after ingestion. Serious skill impairment has been measured 24 hours after smoking a single marijuana cigarette.") (citing Jerome A. Yesavage et al., *Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report*, 142 AM. J. PSYCHIATRY 1325, 1325-29 (1985) ("[T]he use of marijuana continues to influence a patient for some time after ingestion.")); Yesavage et al., *supra* note 184.

[185] *See* Loder v. City of Glendale, 927 P.2d 1200, 1222-23 (Cal. 1997) (acknowledging "the well documented problems that are associated with the abuse of drugs and alcohol by employees—increased absenteeism, diminished productivity, greater health costs, increased safety problems and potential liability to third parties, and more frequent turnover"); Dolan v. Svitak, 527 N.W.2d 621, 626 (Neb. 1995) (suggesting that drug-free workplace policies further "the employer's interest in job safety, absenteeism, productivity, morale, and health costs.").

[186] *See* Thomas H. Barnard & Martin S. List, *Defense Perspectives on Individual Employment Rights*, 67 NEB. L. REV. 193, 202 (1988) ("[E]mployers have become more acutely concerned with the direct and indirect costs of drug use in, or affecting, the workplace. Additional costs can occur through liability to third parties for injuries caused by employees under the influence of drugs, whether directly or on the theory of negligent hiring.") (footnotes omitted). *See also Weller*, 860 P.2d at 495 ("[E]mployers have a legitimate interest in prohibiting employees from working while they are physically or mentally impaired by drugs. Impaired workers are not only a menace to the vitality of our economy but also to the safety of the community and other workers.").

[187] 29 U.S.C. §§ 651-78 (2000).

[188] *See Weller*, 860 P.2d at 494 (noting that an employer "may insist that its employees obey all health and safety laws relating to the workplace"). *See also* Wendland v. AdobeAir, Inc., 221 P.3d 390, 393 (Ariz. Ct. App. 2009) ("OSHA was adopted to reduce the number of occupational safety and health hazards in the workplace and to protect employees from dangerous work conditions. It imposes certain duties on employers to provide a safe working environment for employees.") (citation omitted).

taken the position that state medical marijuana laws do not supersede federal drug testing requirements applicable in the trucking, railroad, airline, and transit system industries;[189] an employee's use of marijuana for medical purposes does not excuse an employer from addressing the employee's positive test for use of that drug as specified in the DOT's regulations.[190]

The DOT's position on this issue poses a potential dilemma for Arizona employers because under the AMMA an employee's positive test for marijuana use, standing alone, is not sufficient to establish that the employee was operating, navigating, or in physical control of a motor vehicle, aircraft, or motorboat while under the influence of marijuana.[191] Under the AMMA, a positive test for marijuana provides no basis for disciplining an employee who is a medical marijuana cardholder unless the employee also used or possessed marijuana in the workplace,[192] or the marijuana was present in the employee's system in a sufficient amount to cause impairment.[193]

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[189] *See* OFFICE OF THE SEC'Y OF TRANSP., DEP'T OF TRANSP., OFFICE OF DRUG AND ALCOHOL POLICY AND COMPLIANCE NOTICE (Oct. 22, 2009), [hereinafter COMPLIANCE NOTICE], *available at* http://www.fmcsa.dot.gov/documents/Medical-Marijuana-Notice.pdf; *cf.* Assenberg v. Anacortes Hous. Auth., No. C05-1836RSL, 2006 WL 1515603, at *4 (W.D. Wash. May 25, 2006) (noting that the U.S. Department of Housing and Urban Development "has interpreted its regulations to preempt state medical marijuana use laws"), *aff'd*, 268 F. App'x 643 (9th Cir. 2008).

[190] *See* COMPLIANCE NOTICE, *supra* note 189; *cf.* People v. Feezel, 783 N.W.2d 67, 90 (Mich. 2010) (Young, J., concurring in part and dissenting in part) ("[L]egalization of the use of marijuana for a limited medical purpose cannot be equated with an intent to allow its lawful consumption in conjunction with driving.").

[191] *See* ARIZ. REV. STAT. ANN. § 36-2802(D) (West, Westlaw through 2012 Legis. Sess.) ("This [Act] . . . does not . . . prevent the imposition of . . . penalties for . . . operating, navigating or being in actual physical control of any motor vehicle, aircraft or motorboat while under the influence of marijuana, except that a registered [medical marijuana cardholder] shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment."). *But cf.* State v. Phillips, 873 P.2d 706, 710 (Ariz. Ct. App. 1994) ("[T]here is no level of illicit drug use which can be acceptably combined with driving a vehicle; the established potential for lethal consequences is too great.").

[192] *See* ARIZ. REV. STAT. ANN. § 36-2813(B)(2).

[193] *See id.* § 36-2814(A), (B); *cf. Weller*, 860 P.2d at 493 ("Absent any physical effects, we fail to see a substantial connection between a positive drug test and work"). A recent amendment to Arizona's statute regarding drug testing of employees provides some protection to employers who take action against an employee based on the employer's good faith belief that the "employee used or possessed any drug while on the employer's premises or during the hours of employment." ARIZ. REV. STAT. ANN. § 23-493.06(A)(5). Whether this protection extends to an employer who takes action against an employee solely because the employee possessed medical marijuana at work is an unanswered question. *See infra* note 203 and accompanying text.

The DOT's regulations do not actually compel a different result.[194] Although the regulations do not prohibit an employer from terminating an employee who tests positive for marijuana,[195] they also do not compel the employer to terminate or otherwise discipline such an employee.[196] Instead, the regulations merely require an employer to prohibit an employee who tests positive for marijuana use from performing safety-sensitive functions until the employee passes a subsequent drug test and completes the education and treatment requirements of a comprehensive return-to-duty process prescribed by the DOT,[197] which must include compliance with a "written follow-up testing plan."[198]

D. Recent Arizona Legislation Impacting the AMMA

A recently enacted Arizona statute purports to immunize employers from liability for taking action to prevent an individual from working in a "safety sensitive position"[199] based on the employer's good faith belief that the indi-

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[194] *See* Bhd. of Maint. of Way Emps. v. Chicago & N.W. Transp. Co., 514 N.W.2d 90, 94 (Iowa 1994) (concluding that state law "employee rights legislation in conflict with federal employee drug testing policy" is preempted by federal law).

[195] *See* Burton v. Southwood Door Co., 305 F. Supp. 2d 629, 632 n.2 (S.D. Miss. 2003) (noting that "there is nothing in the . . . regulations to preclude termination of an employee for a positive drug test"); *cf.* Golden Eagle Distribs., Inc. v. Ariz. Dep't Econ. Sec., 885 P.2d 1130, 1132 (Ariz. Ct. App. 1994) ("[F]ailing a federally mandated drug test may justify an employer in terminating an employee . . . .").

[196] *See* United Food & Commercial Workers Int'l Union, Local 588 v. Foster Poultry Farms, 74 F.3d 169, 174 (9th Cir. 1996) ("The DOT regulations only prohibit employees who test positive for drug use from operating commercial motor vehicles; the DOT regulations do not require that such employees be automatically discharged."); Hill v. Eagle Motor Lines, 645 S.E.2d 424, 428 n.2 (S.C. 2007) ("Although the federal government requires a person seeking to drive a commercial vehicle to pass a drug test and a road test before *driving* a commercial vehicle, there is no obligation on an employer to perform these tests before *hiring* a truck driver employee.").

[197] *See* E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57, 64 (2000) ("The DOT regulations specifically state that a driver who has tested positive for drugs cannot return to a safety-sensitive position until . . . the driver has followed any rehabilitation program prescribed . . . and . . . passed a return-to-duty drug test . . . .") (citations omitted); BNSF Ry. Co. v. U.S. Dep't Transp., 566 F.3d 200, 202 (D.C. Cir. 2009) ("Under Department of Transportation regulations, employees in the aviation, rail, motor carrier, mass transit, maritime and pipeline industries who either fail or refuse to take a drug test must successfully complete a drug treatment program and pass a series of urine tests as a condition of performing any safety-sensitive duties.").

[198] 49 C.F.R. § 40.307(a) (2012). However, the DOT's regulations state that an employer is "not required to return an employee to safety-sensitive duties" simply because the employee has completed the return-to-duty process. *Id.* § 40.305(b) (2012). The applicable regulation characterizes this issue as "a personnel decision that [the employer has] the discretion to make, subject to collective bargaining agreements or other legal requirements." *Id.*

[199] The statute defines "safety-sensitive positions" broadly to include any job the employer in good faith believes could affect the safety or health of the employee or others, including the

vidual is engaged in the current use of any drug that could cause an impairment or lessen the individual's ability to perform the duties of the job.[200] However, the statute does not specifically refer to the employment rights of medical marijuana cardholders,[201] but instead applies to employees generally.[202] Therefore, whether Arizona employers may take action, including termination, against registered medical marijuana users working in safety-sensitive positions who test positive for marijuana solely on the basis of the positive drug test is currently an open question.[203]

The problems these statutory and regulatory ambiguities pose for Arizona employers are compounded by the fact that the AMMA fails to define the term "impairment,"[204] which is the standard that triggers an employer's authority to discipline a medical marijuana cardholder who tests positive for marijuana but cannot be shown to have used or possessed the drug in the workplace or during working hours.[205] Urinalysis, the type of drug test most commonly used by employers, is notoriously ineffective in determining whether a marijuana user is impaired.[206] There is no generally accepted external standard for determin-

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operation of equipment, machinery, or power tools, or the performance of duties in or on the commercial premises of a customer, supplier, or vendor. ARIZ. REV. STAT. ANN. § 23-493(9)(a), (c).

200 *Id.* § 23-493(6)(a), (7).

201 *See* Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC, 257 P.3d 586, 593 (Wash. 2011) ("One would expect any statute creating employment protections for authorized medical marijuana users might include exceptions for certain occupations . . . .").

202 ARIZ. REV. STAT. ANN. § 23-493(4).

203 The Arizona Legislature's ability to modify the AMMA is limited. *See* ARIZ. CONST. art. 4, pt. 1, § 1(6)(C) ("The legislature shall not have the power to amend an initiative measure approved by a majority of the votes cast thereon, or to amend a referendum measure decided by a majority of the votes cast thereon, unless the amending legislation furthers the purposes of such measure . . . ."); *cf.* Pijanowski v. Yuma Cnty., 43 P.3d 208, 211 (Ariz. Ct. App. 2002) ("[M]odification-by-implication is disfavored by courts when construing statutes, and we will not find such an intent unless the interplay between the statutes under consideration compels us to find the legislature must have intended the later statute to impliedly repeal the earlier one. . . .").

204 *See* ARIZ. REV. STAT. ANN. § 36-2801 (West, Westlaw through 2012 Legis. Sess.). The omission is not unique. *See, e.g.*, People v. Percz, 420 N.Y.S.2d 477, 477 (Suffolk Cnty. Dist. Ct. 1979) (noting that a New York statute prohibiting persons from driving while impaired by the use of drugs "contain[ed] no definition of the term 'impaired' "); *cf.* State v. Worster, 611 A.2d 979, 980 (Me. 1992) (discussing a Maine statute that "does not give a definition of being 'under the influence' of drugs").

205 *See* ARIZ. REV. STAT. ANN. § 36-2814; *cf. Roe*, 257 P.3d at 593 ("One would expect any statute creating employment protections for authorized medical marijuana users might include . . . permissible levels of impairment on the job.").

206 *See* State v. Hammonds, 968 P.2d 601, 603 (Ariz. Ct. App. 1998) ("It is only when [a] drug is in the bloodstream that it is capable of impairment . . . and this impairment lasts only so long as the drug is in the bloodstream. . . . A urine test, while indicative of what has been in the bloodstream in the past, says nothing conclusive about what is presently in the bloodstream."); *cf.* Burka v. New York City Transit Auth., 739 F. Supp. 814, 821 (S.D.N.Y. 1990) ("[U]rinalysis is

ing whether a marijuana user is impaired,[207] unlike in the case of alcohol use, where an employer could presumably rely by analogy on state statutes defining "impairment" for purposes of operating a motor vehicle,[208] or perhaps on the DOT's even more stringent definition of the term.[209]

A statute enacted by the Arizona Legislature in response to the AMMA attempted to clarify the matter by defining "impairment" as being under the influence of marijuana to the extent that the employee's job performance abilities are "decreas[ed] or lessen[ed]."[210] The statute also describes various "symptoms" an employer can consider in attempting to determine whether an individual is impaired, including perceived changes in the individual's speech, walking, standing, coordination, demeanor, physical appearance, and odor.[211]

Not surprisingly, the symptoms the Arizona Legislature identified as being indicative of marijuana impairment are the same as those that may suggest

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not necessarily determinative of impairment from marijuana while on-duty . . . ."); Nat'l Fed'n of Fed. Emps. v. Carlucci, 680 F. Supp. 416, 428-29 (D.D.C. 1988) ("[U]rinalysis drug testing . . . is not capable of determining whether a person is impaired or intoxicated by drugs. . . . Only a blood test can show a correlation between the effects of drugs and their concentrations in bodily fluids. As the testing technology now stands, [urinalysis] tests for only one substance can show impairment; that substance is alcohol.").

207 *See* State v. Phillips, 873 P.2d 706, 710 (Ariz. Ct. App. 1994) ("[U]nlike the blood alcohol concentration test used to measure alcohol impairment, there is no useful indicator of impairment from . . . drugs because they are fundamentally different from alcohol."); Shepler v. State, 758 N.E.2d 966, 970 (Ind. Ct. App. 2001) ("[T]here is no accepted toxicological agreement as to the amount of marijuana . . . necessary to cause impairment.").

208 *See, e.g.*, ARIZ. REV. STAT. ANN. § 28-1381(A)(2) ("It is unlawful for a person to drive or be in actual physical control of a vehicle in this state . . . [i]f the person has an alcohol concentration of 0.08 or more within two hours of driving or being in actual physical control of the vehicle and the alcohol concentration results from alcohol consumed either before or while driving or being in actual physical control of the vehicle.").

209 *See* 49 C.F.R. § 40.23(c) (2010) ("[A]n employer who receives an alcohol test result of 0.04 or higher . . . must immediately remove the employee involved from performing safety-sensitive functions.").

210 ARIZ. REV. STAT. ANN. § 23-493(7) (West, Westlaw through 2012 Legis. Sess.); *cf.* Wiehe v. Kissick Constr. Co., 232 P.3d 866, 874-75 (Kan. Ct. App. 2010) ("Impairment is defined as '[t]he fact or state of being damaged, weakened, or diminished.' . . . Thus, when a person is impaired, it follows logically that the person's mental and physical faculties are damaged or diminished.") (quoting BLACK'S LAW DICTIONARY 819 (9th ed. 2009)).

211 ARIZ. REV. STAT. ANN. § 23-493(7); *see* Abbe M. Goncharsky & Alexandra G. Gormley, *Guess Who's Coming to Work?: Employers Prepare for the Arizona Medical Marijuana Program*, ATT'Y AT LAW MAGAZINE, June 2011, at 14 ("This new law defines 'impairment' by listing examples of symptoms 'that may decrease or lessen the employee's performance of the duties or tasks of the employee's job position,' including physical dexterity, appearance, odor, and negligence or carelessness in operating equipment."); *cf.* State v. Anonymous (1976-3), 355 A.2d 729, 736 n.34 (Conn. Super. Ct. 1976) (noting that "a significantly stronger dose [of marijuana] impairs coordination and reaction time"); People v. Kaminski, 573 N.Y.S.2d 394, 395 (J. Ct. 1991) (noting that "the traditional signs of impairment" include "slow speech, blood shot eyes as well as the odor of marijuana").

alcohol impairment.[212] While there is some logic to this linkage[213] (and to the legislature's focus on observable symptoms of impairment),[214] the statutory enumeration of those symptoms may be of limited benefit to employers attempting to comply with the AMMA, because "drug use is far harder for lay people to detect than . . . alcohol use."[215] Indeed, the guidance the legislature has attempted to provide is likely to be of virtually no use to employers in the hiring process[216] because employers in that situation typically have "not had [an] opportunity to observe the applicant over a period of time."[217]

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[212] The statute defines impairment for purposes of both drug and alcohol use. ARIZ. REV. STAT. ANN. § 23-493(7) (" 'Impairment' means symptoms that a prospective employee or employee while working may be under the influence of drugs or alcohol that may decrease or lessen the employee's performance of the duties or tasks of the employee's job position . . . ."); *see also* Weller v. Ariz. Dep't Econ. Sec., 860 P.2d 487, 495 (Ariz. Ct. App. 1993) (stating that "[h]and-eye coordination tests which focus on on-the-job [alcohol] impairment" are also "effective in detecting marijuana's deleterious effects") (citing A.G. GOODMAN & L.S. GILMAN, THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 550-51 (8th ed. 1990)).

[213] *See* People v. Smith, 193 Cal. Rptr. 825, 827 (Ct. App. 1983) (observing that the "use of alcohol produces many effects similar to the effects produced by marijuana"); State v. Worster, 611 A.2d 979, 981 (Me. 1992) (noting "the similar effects and symptoms of both alcohol and marijuana").

[214] *See* Glide Lumber Prods. Co. v. Emp't Div., 741 P.2d 907, 911 (Or. Ct. App. 1987) ("If an employe [sic] is actively intoxicated or residually impaired while at work, direct observation by supervisors and co-workers would appear to be a better means of ascertaining that fact than drug testing . . . . In any event, observation cannot be a worse means, because [a] urine test can show nothing about on-the-job effects."); *cf.* Burka v. New York City Transit Auth., 739 F. Supp. 814, 821 (S.D.N.Y. 1990) ("There may be means more effective than urinalysis [testing] with which to . . . prevent on-duty impairment . . . ."); Harmon v. Thornburgh, 878 F.2d 484, 489 (D.C. Cir. 1989) (suggesting that employee drug impairment in traditional office environments "is, presumably, more easily detected by means other than urine testing").

[215] Fowler v. New York City Dep't of Sanitation, 704 F. Supp. 1264, 1275 (S.D.N.Y. 1989); *cf.* Nat'l Air Traffic Controllers Ass'n v. Burnley, 700 F. Supp. 1043, 1046 (N.D. Cal. 1988) ("[I]t is very difficult for any employer, even with supervisors trained in identifying drug-related problems, to detect drug problems without a comprehensive drug testing program."); New Jersey v. Bealor, 872 A.2d 1081, 1085 (N.J. Super. Ct. App. Div. 2005) ("Marijuana intoxication . . . is not a matter of common knowledge such that an inference of intoxication may be drawn solely from a lay witness's testimony respecting [an individual's] behavior."), *rev'd on other grounds*, 902 A.2d 226 (N.J. 2006). *See generally* Bhd. of Maint. of Way Emps., Lodge 16 v. Burlington N. R.R. Co., 802 F.2d 1016, 1020 (8th Cir. 1986) ("[T]he use or abuse of marijuana and other illegal drugs frequently does not produce an externally obvious state of impairment. . . . [T]oo often the user's faculties are impaired . . . without any outward sign of his impairment that could lead a supervisor or other person to intervene.").

[216] *See Burka*, 739 F. Supp. at 821 ("[S]upervisors could *in certain instances* screen employees and thus be able to prevent an impaired worker from causing an injury . . . .") (emphasis added).

[217] Loder v. City of Glendale, 927 P.2d 1200, 1223 (Cal. 1997); *see also* Willner v. Thornburgh, 928 F.2d 1185, 1193 (D.C. Cir. 1991) ("[A]t the pre-employment stage . . . the applicant is an outsider. . . . [T]he applicant is a person the . . . prospective employer[ ] has had no opportunity to observe in the setting of the workplace.").

VII. The Federal Reaction to the AMMA and Other Recent State Medical Marijuana Laws

As discussed earlier,[218] even the use of marijuana for medical purposes remains unlawful under federal law[219] (and, for that matter, under the law of most other states),[220] despite repeated efforts by various interested parties to have the medical use of marijuana legalized on a national basis.[221] However, in late 2009, the Obama Justice Department ("Justice Department") announced, in what has come to be known as the Ogden Memorandum, that as an exercise of prosecutorial discretion, the department's resources should not be focused on prosecuting medical marijuana users and caregivers who provide those individuals with marijuana in states where the medical use and sale of marijuana is lawful as a matter of state law.[222] Notably, the Ogden Memorandum was par-

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[218] *See supra* note 115 and accompanying text.

[219] *See* United States v. Hicks, 722 F. Supp. 2d 829, 833 (E.D. Mich. 2010) ("[T]he possession of marijuana remains illegal under federal law, even if it is possessed for medicinal purposes in accordance with state law."); Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 204 (Cal. 2008) ("No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical users.") (citations omitted); D. Douglas Metcalf, *Federal Supremacy and Arizona's Medical Marijuana Act*, 47 Ariz. Att'y 22, 23 (2011) ("Arizona's new Medical Marijuana Act, which legalizes the distribution and use of marijuana for medical use in certain situations, has no bearing on whether such activities remain illegal under federal law.").

[220] *See, e.g.*, State v. Koehn, 637 N.W.2d 723, 728 (S.D. 2001) ("South Dakota grants no authority, by statue or precedent, for medicinal use of marijuana."); Burns v. State, 246 P.3d 283, 286 (Wyo. 2011) (noting that the "possession of marijuana, even for medical purposes, remains illegal" in Wyoming). *See generally* United States v. Mich. Dep't of Cmty. Health, No. 1:10-mc-109, 2011 WL 2412602, at *3 (W.D. Mich. June 9, 2011) ("Most of the states have not [decriminalized] the medical use of marijuana and neither has federal law.").

[221] *See* United States v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086, 1105 (N.D. Cal. 1998) ("[M]edical marijuana advocates have been unsuccessful in convincing the federal government decision makers that marijuana should be . . . made available to seriously ill patients upon a physician's recommendation."); People v. Bianco, 113 Cal. Rptr. 2d 392, 397 (Ct. App. 2001) ("Congress has not seen fit to change the law despite a growing movement in several states that supports the medical use of marijuana."); Vijay Sekhon, Comment, *Highly Uncertain Times: An Analysis of the Executive Branch's Decision to Not Investigate or Prosecute Individuals in Compliance with State Medical Marijuana Laws*, 37 Hastings Const. L.Q. 553, 557 (2010) (noting that "Congress has repeatedly considered but failed to pass legislation that would permit the possession, cultivation and use of marijuana by individuals in compliance with state medical marijuana laws").

[222] *See* United States v. Friel, 699 F. Supp. 2d 328, 330 (D. Me. 2010) (discussing Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep't of Justice, to Selected U.S. Attorneys (Oct. 19, 2009), *available at* http://www.justice.gov/opa/documents/medical-marijuana.pdf) [hereinafter Ogden Memorandum]; *cf.* Cnty. of Santa Cruz v. Ashcroft, 279 F. Supp. 2d 1192, 1200 (N.D. Cal. 2003) ("There is a robust and ongoing debate as to whether the public interest in fact is served by the [federal Drug Enforcement Administration's] use of its limited resources to target for raids and potential prosecution seriously ill and dying patients . . . who use and possess

ticularly vague as to whether the Justice Department intends to allocate its resources to prosecuting distributors of medical marijuana in states with medical marijuana laws.[223]

The Justice Department's announcement did not abrogate its authority to enforce the provisions of the Controlled Substances Act prohibiting the use and sale of marijuana as a matter of federal law.[224] Thus, despite the Justice Department's apparent intent to accommodate state medical marijuana laws, the law on the subject remains in a troubling state of uncertainty;[225] persons using or dispensing marijuana for medical purposes in accordance with state law nevertheless could be prosecuted—and certainly at least investigated[226]—for violating federal prohibitions on the use or distribution of marijuana for any purpose.[227]

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marijuana only for medicinal purposes."), *modified on reconsideration*, 314 F. Supp. 2d 1000 (N.D. Cal. 2004).

223 *See* Ogden Memorandum, *supra* note 222, at 2 ("[P]rosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department.").

224 *See Hicks*, 722 F. Supp. 2d at 833 ("The Department of Justice's discretionary decision to direct its resources elsewhere does not mean that the federal government now lacks the power to prosecute those who possess marijuana."); Cnty. of Butte v. Superior Court, 96 Cal. Rptr. 3d 421, 434 (Ct. App. 2009) (Morrison, J., dissenting) ("[I]t is only in benign forbearance that medical marijuana users are protected."), *cert. denied*, 130 S. Ct. 1522 (2010); *cf.* Metcalf, *supra* note 219, at 24 ("*Gonzales v. Raich* forecloses any serious argument that a person who is complying with Arizona's Medical Marijuana Act cannot be prosecuted for violating the CSA.").

225 *See Mich. Dep't of Cmty. Health*, 2011 WL 2412602, at *14 ("[U]sers or providers of marijuana under [state medical marijuana laws] and their supporters should be concerned that . . . this Administration or the next may simply pull the plug and prosecute anyone using or distributing marijuana, which it unquestionably may do under existing federal law."); Sekhon, *supra* note 221, at 561-62 ("The imprimatur of the Executive Branch . . . provides individuals with a false sense of security in relying upon compliance with state medical marijuana laws given the possibility of a change to [the] enforcement policy by the Executive Branch during or after the expiration of the term of President Obama.").

226 *See Mich. Dep't of Cmty. Health*, 2011 WL 2412602, at *14 ("[E]ven if the Attorney General of the United States has adopted a policy of not prosecuting persons who are *bona fide* medical marijuana users and providers as far as [state law] is concerned, it certainly falls within the scope of the DEA's responsibility, and authority, to determine, among other things, whether those claiming the benefits of [a] medical marijuana statute are doing so legitimately and should enjoy the Attorney General's largess."); *Cnty. of Butte*, 96 Cal. Rptr. 3d at 425 ("[M]edical marijuana laws do not prohibit police from investigating possible violations of the law.").

227 *See* United States v. Pendleton, 636 F.3d 78, 85 (3d Cir. 2011) ("Medicinal marijuana users . . . could be using marijuana legally under state law, but still be vulnerable to federal prosecution."); Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518, 529 (Or. 2010) (en banc) ("[S]tate law does not prevent the federal government from enforcing its marijuana laws against medical marijuana users . . . if the federal government chooses to do so."); *cf. Mich. Dep't of Cmty. Health*, 2011 WL 2412602, at *7 ("The use of marijuana continues to be a federal felony and reasonable persons would expect the DEA to continue to investigate those who use or traffic in marijuana."); Metcalf, *supra* note 219, at 23 ("It seems counterintuitive that . . . a person

In this regard, a federal magistrate judge recently cautioned that "[o]nly the truly naive or the disingenuous would try to argue that [medical marijuana laws] will not be abused by others seeking a cover for illicitly using or distributing marijuana."[228] Consistent with this concern, the then-United States Attorney for the District of Arizona, Dennis Burke, advised the Director of the Arizona Department of Health Services in May 2011 that federal prosecutors in Arizona would "vigorously prosecute individuals and organizations that participate in unlawful manufacturing, distribution and marketing activity involving marijuana, even if such activities are permitted under state law."[229]

In a subsequent memorandum directed to all United States Attorneys, Deputy Attorney General James M. Cole indicated that Mr. Burke's letter, and similar and generally contemporaneous announcements made by several of Mr. Burke's counterparts in other states,[230] were "entirely consistent" with the enforcement policy previously articulated in the Ogden Memorandum.[231] Mr. Cole went on to state that persons "cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law," and that the Ogden Memo-

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complying with state law could still be prosecuted and imprisoned by the federal government. But that is the case with medical marijuana.").

[228] *Mich. Dep't of Comty. Health*, 2011 WL 2412602, at *14; *see, e.g.*, State v. Smith, 262 P.3d 72, 73 (Wash. Ct. App. 2011) (describing an individual "who had a medical marijuana license to grow marijuana for personal medicinal use, [but] had also engaged in the illegal sale of marijuana to friends and acquaintances"). *See* United States v. Stacy, 696 F. Supp. 2d 1141, 1149 (S.D. Cal. 2010) ("Federal prosecuting authorities are free to investigate or prosecute individuals if, in their judgment, there is reason to believe that state law is being invoked to mask the illegal production or distribution of marijuana.").

[229] Letter from Dennis K. Burke, U.S. Attorney, Dist. of Ariz., to Will Humble, Dir., Ariz. Dep't of Health Servs. (May 2, 2011) [hereinafter Burke letter], *available at* www.justice.gov/usao/az/reports/USAO_Medical_Marijuana_May_2011_Letter.pdf; *see also* Mary K. Reinhart, *Feds Likely to Prosecute Arizona Medical-Pot Industry*, ARIZ. REPUBLIC, May 3, 2011, at A10 ("Burke's letter clarifies that federal authorities, despite their reluctance to prosecute sick people, will not look the other way when it comes to marijuana cultivation and distribution.").

[230] *See, e.g.*, *In re* McGinnis, No. 11-60010-fra13, 2011 WL 2358672, at *2 n.3 (Bankr. D. Or. June 9, 2011) ("On June 3, 2011, the United States Attorney for Oregon and 33 of Oregon's 36 District Attorneys released a 'Notice to Owners, Operators and Landlords of Oregon Marijuana Dispensaries' stating that 'The sale of marijuana for any purpose—including as medicine—violates both Federal and Oregon law and will not be tolerated,' and that property used by anyone to cultivate marijuana for sale may be subject to forfeiture."); Mary K. Reinhart & Craig Anderson, *Federal Pressure Stirs Legal Confusion*, ARIZ. REPUBLIC, Apr. 21, 2011, at A1 ("Although the Justice Department said in 2009 that it would not prosecute sick people using medical marijuana, U.S. attorneys in California and Washington state have told officials there that they do intend to enforce federal laws that prohibit manufacture and distribution of the drug.").

[231] Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to U.S. Attorneys (June 29, 2011), *available at* http://www.azdhs.gov/prop203/documents/resources/guidance_regarding_medical_marijuana.pdf.

randum "was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law."[232]

These developments prompted Arizona's Attorney General, Tom Horne, to commence a federal declaratory judgment action on behalf of the State of Arizona seeking to clarify the implications of the conflict between state and federal law concerning the medical use of marijuana,[233] and to determine the extent to which compliance with the AMMA "shields state employees, patients, dispensary owners and others from federal prosecution."[234] The commencement of this litigation in turn prompted the Director of the Arizona Department of Health Services to suspend the licensing of medical marijuana dispensaries under the AMMA.[235] One local observer subsequently cautioned that until this conflict is resolved,[236] "if a person is using or dispensing medical marijuana in

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[232] *Id.*; *cf.* Metcalf, *supra* note 219, at 24 ("Does the Ogden Memorandum consider a person who dispenses medical marijuana in a state-licensed dispensary facility to be . . . within the exemption [from federal prosecution]? . . . The absence of any mention of dispensaries [in the Ogden Memorandum] suggests that the federal government did not intend to give dispensaries 'a pass.'").

[233] Copies of letters issued by other U.S. Attorneys who have taken positions consistent with Mr. Burke's letter were discussed in, and attached as exhibits to, the State's Complaint for Declaratory Judgment. Complaint for Declaratory Judgment, State of Arizona v. United States, No. 2:11-cv-01072-SRB (D. Ariz. May 27, 2011).

[234] Mary K. Reinhart, *Medical-Pot Dispensary Applications to Be Denied*, ARIZ. REPUBLIC, June 1, 2011, at B2; *see also* Metcalf, *supra* note 219, at 28 ("[T]he uncertainty of whether state employees who are tasked with implementing the Arizona Medical Marijuana Act are at risk of federal prosecution . . . caused the State of Arizona to file a declaratory judgment action against the U.S. Justice Department in federal court.").

[235] *See* Mary K. Reinhart, *Lawsuit Stalls Medical-Pot Dispensaries*, ARIZ. REPUBLIC, May 28, 2011, at B1 ("Arizona's health director put medical-marijuana dispensaries on hold just days before he was to begin accepting applications, citing the lawsuit filed by the state in federal court . . . to determine whether the new law conflicts with federal drug statutes."). In early January 2012, the federal district court dismissed the State's declaratory judgment action without prejudice on the ground that the dispute alleged in the State's Complaint was not ripe for adjudication. *See* Order, at 8, 10, State of Arizona v. United States, No. CV 11-1072-PHX-SRB (D. Ariz. Jan. 4, 2012). The State subsequently elected not to amend its Complaint or appeal or otherwise challenge the court's ruling, and the Department of Health Services is now expected to begin accepting dispensary applications in approximately September 2012, and to start issuing dispensary licenses in November 2012. *See* Mary K. Reinhart, *Governor OKs Licensing Tied to Medical Pot*, ARIZ. REPUBLIC, January 14, 2012, at A1, A11.

[236] Many observers believe the conflict can be resolved only by federal legislative or administrative action that effectively reclassifies marijuana as something other than a Schedule I controlled substance. *See, e.g.*, Kathleen T. McCarthy, Commentary, *Conversations About Medical Marijuana Between Physicians and Their Patients*, 25 J. LEGAL MED. 333, 348 (2004) ("[I]f state drug policies conflict with federal standards, this issue must be addressed. One of the ways this conflict could be avoided is to list marijuana on a different schedule under the Controlled Substances Act."); *cf.* United States v. Middleton, 690 F.2d 820, 823 (11th Cir. 1982) (noting that "a reclassification of marijuana is a matter for legislative or administrative, not judicial, judgment").

[a] way that undermines federal enforcement of the [Controlled Substances Act], that person could become a target of prosecution even if he or she is in clear and unambiguous compliance with Arizona law."[237]

Despite these developments, the threat of federal prosecution faced by those dispensing medical marijuana seems unlikely to deter individual medical marijuana users (who may be authorized by the state to cultivate their own marijuana plants)[238] from exercising their rights under the AMMA.[239] Indeed, within nine months of the AMMA's enactment (and barely four months after the Arizona Department of Health Services began accepting applications),[240]

Recent developments suggest that such reclassification is unlikely to occur anytime soon. *See, e.g.*, *supra* note 65. *See also* Cnty. of Santa Cruz v. Ashcroft, 279 F. Supp. 2d 1192, 1203 (N.D. Cal. 2003) ("[T]here have been several attempts to reschedule marijuana; all were unsuccessful . . . ."), *modified on reconsideration*, 314 F. Supp. 2d 1000 (N.D. Cal. 2004); Erik R. Neusch, Comment, *Medical Marijuana's Fate in the Aftermath of the Supreme Court's New Commerce Clause Jurisprudence*, 72 U. COLO. L. REV. 201, 211 (2001) ("The most logical solution to the problem, rescheduling marijuana from a Schedule I category to a Schedule II category, is not politically viable. . . . Efforts to reclassify marijuana at both the administrative and legislative levels have repeatedly failed.").

237 Metcalf, *supra* note 219, at 24; *see also* Neusch, *supra* note 236, at 211 ("Because of marijuana's status as a Schedule I drug, physicians who recommend, and patients who use, marijuana in accordance with state law can be held criminally liable under federal law.").

238 *See* ARIZ. REV. STAT. ANN. §§ 36-2804.02(A)(3)(f), 36-2804.04(A)(7), 36-2812(A)(4) (West, Westlaw through 2012 Legis. Sess.) (ARIZ. REV. STAT. ANN. § 36-2812, *repealed by* 2010 Prop. 203 (an Initiative Measure), § 5 (effective Apr. 14, 2011)); Mary K. Reinhart, *Arizona to Sue over Medical-Pot Law*, ARIZ. REPUBLIC, May 27, 2011, at B1 ("Both patients and caregivers are authorized to grow 12 plants per patient if the patients live more than 25 miles from a dispensary. Since there are not yet any licensed dispensary licenses [sic], caregivers and patients are allowed to grow their own.").

239 *See* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1479 (2009) ("Given the federal government's limited enforcement resources and its comparatively weak influence over personal preferences, moral obligations, and social norms, many citizens are not dissuaded from using marijuana by the existence of the federal ban."). *See also* Cnty. of Butte v. Superior Court, 96 Cal. Rptr. 3d 421, 430 (Ct. App. 2009) (Morrison, J., dissenting) ("Because of the perceived minor nature of marijuana as compared to other drugs and other crimes generally, federal law enforcement agencies rarely investigate or seek prosecution for people who simply possess marijuana."); Metcalf, *supra*, note 219, at 28 ("Truly seriously ill individuals who use marijuana to ameliorate their medical symptoms would not be the focus [of] federal prosecution whether the Department of Justice issued its medical marijuana policy or not.").

240 The Department of Health Services did not begin accepting applications for medical marijuana certifications until April 14, 2011—some five months after the AMMA was approved by Arizona voters. *See* Michelle Ye Hee Lee & William Hermann, *Final Medical-Pot Plan Unveiled*, ARIZ. REPUBLIC, March 29, 2011, at B1 ("Arizona's medical marijuana program officially begins April 14, [2011] when the department will begin accepting patient applications."); Ginger Rough, *Medical-Pot Clarification Sought*, ARIZ. REPUBLIC, May 25, 2011 ("Proposition 203, which legalized medical-marijuana use for people with certain debilitating conditions, was approved by voters in November and took effect April 14.").

an estimated 10,000 Arizonans had been certified to use medical marijuana,[241] and the overwhelming majority of those persons were authorized to grow their own marijuana plants.[242] These numbers are even larger now,[243] and because those who grow marijuana for their own personal medical use fall within the protection of the AMMA's anti-discrimination provisions,[244] the compliance problems faced by Arizona employers do not appear to be ameliorated (or, conversely, significantly exacerbated) by the conflict between state and federal law that vexes others impacted by the AMMA.[245]

VIII. CONCLUSION

Some observers expected the Arizona Department of Health Services to address the employment problems posed by the AMMA when it issued the implementing regulations it was directed to promulgate under the terms of the

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[241] *See* Mary K. Reinhart, *Medical-Pot Probe Flags 8 Doctors*, ARIZ. REPUBLIC, Aug. 20, 2011, at A1 (noting "the 10,000 Arizonans certified to use medical marijuana"); Editorial, *ADHS Exposing Shady Doctors*, ARIZ. REPUBLIC, Aug. 24, 2011, at B4 (discussing "the 10,000 certifications allowing people to legally use marijuana as medicine").

[242] *See* Reinhart, *supra* note 241, at A7 ("About 80 percent of those issued state ID cards to use medical marijuana also are authorized to grow it.").

[243] By the latter part of October 2011—approximately six months after the Department of Health Services began accepting applications—the number of Arizonans certified to use medical marijuana had grown to "more than 13,000," and "nearly 11,000" of those persons were authorized to grow their own plants. Mary K. Reinhart, *Two Different Views on the Future of Medical Marijuana in Arizona*, ARIZ. REPUBLIC, Oct. 23, 2011, at B3. By the end of 2011, these numbers had swelled to nearly 18,000 and 15,000, respectively. *See* Mary K. Reinhart, *Arizona's Medical Marijuana Suit Tossed*, ARIZ. REPUBLIC, Jan. 5, 2012, at A4.

[244] *Compare* ARIZ. REV. STAT. ANN. § 36-2804.04(A)(7) (West, Westlaw through 2012 Legis. Sess.) ("Registry identification cards for qualifying patients and designated caregivers shall contain . . . a clear indication of whether the cardholder has been authorized to cultivate marijuana plants for the qualifying patient's medical use.") *with id.* § 36-2813(B)(1) ("[A]n employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon . . . [t]he person's status as a cardholder."). *But see* Washburn v. Columbia Forest Prods., Inc., 134 P.3d 161, 166 (Or. 2006) (Kistler, J. concurring) ("Federal law preempts state . . . law to the extent it requires employers to accommodate medical marijuana users.").

[245] *See* United States v. Lynch, No. CR 07-0689-GW, 2010 WL 1848209, at *23 (C.D. Cal. Apr. 29, 2010) ("[C]ertain states . . . allow the prescribing [sic] of marijuana for medical purposes and the Federal Government [has] the option of prosecuting persons who seek to act under the States' imprimatur. Individuals [dispensing medical marijuana] are caught in the middle of the shifting positions of governmental authorities."). *Cf.* Metcalf *supra* note 219, at 28 ("[L]andlords or lenders who facilitate the distribution of medical marijuana could find themselves at serious risk of federal prosecution and incarceration or seizure of their property even if they never touch or see the medical marijuana. . . . Unfortunately, there is simply no way . . . that anyone can become involved in dispensing medical marijuana without risking federal prosecution."). .

AMMA.[246] Unfortunately, the regulations are silent as to any of the troubling employment aspects of the act.[247] Until the Arizona courts or the state legislature provide further guidance as to the meaning and impact of the AMMA, employers will be operating in a troubling state of uncertainty concerning their legal rights and obligations and those of their employees who are medical marijuana card holders.[248]

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[246] *See, e.g.*, Berry, *supra* note 19, at A1 (suggesting that the DHS regulations might provide much needed guidance for employers "scrambling to review their drug-testing policies and scrutinize employee rules to comply with the new law"); John Alan Doran, *Arizona Legislature Passes Law Protecting Employers from Medical Marijuana Claims; Governor Expected to Sign Bill into Law*, NAT'L LAW REV. 1 (May 1, 2011), *available at* http://www.natlawreview.com/printpdf/4792 ("Prop. 203 provided virtually no guidance to Arizona employers with respect to compliance. It was with great anticipation, then, that Arizona employers awaited promulgation and publication of interpretive rules that would guide employers through the medical marijuana smokescreen.").

[247] *See* ARIZ. ADMIN. CODE §§ R9-17-101 to R9-17-323 (2011); Doran, *supra* note 246, at 1 ("Unfortunately, when the Arizona Department of Health Services published its rules governing medical marijuana on March 28, 2011, it failed to so much as mention employer responsibilities in the new rules."). The Department's failure to address the employment implications of the AMMA may reflect the fact that it was given only 120 days to draft and issue its implementing regulations. *See* ARIZ. REV. STAT. ANN. § 36-2803(A) (West, Westlaw through 2012 Legis. Sess.); *cf.* People v. Redden, 799 N.W.2d 184, 223 (Mich. Ct. App. 2010) (O'Connell, P.J., concurring) (observing that "120 days to draft the administrative rules" guiding the application of the Michigan Medical Marijuana Act "was a totally unreasonable time limit for such a task."), *appeal withdrawn*, 798 N.W.2d 513 (Mich. 2011).

[248] *See* Berry, *supra* note 19, at A1 ("Zero tolerance of drug use is the workplace norm in Arizona, but the medical-marijuana law . . . will cloud what had been a clear-cut issue for workers and employers."); Doran, *supra* note 246, at 1 ("Arizona employers remain[ ] very much in the dark with respect to Prop. 203's employer mandates."); Obele, *supra* note 148, at 13 ("[T]he law opens all sorts of questions for employers, whose zero-tolerance drug-use policies likely will be challenged."); *cf. Redden*, 799 N.W.2d at 203-04 (O'Connell, P.J., concurring) ("[T]he confusing nature of the [Michigan Medical Marijuana Act], and its susceptibility to multiple interpretations, creates an untoward risk for Michiganders. . . . Until our Supreme Court and the Legislature clarify and define the scope of the [Act], it is important to proceed cautiously when seeking to take advantage of the protections in it.").

Stock Stories, Cultural Norms, and the Shape of Justice for Native Americans Involved in Interparental Child Custody Disputes in State Court Proceedings

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PROLOGUE

Imagine two tales. The stories are told at separate times, in separate places, and for different reasons. Consider the story behind the stories—i.e., how do the storytellers envision the concepts of fairness, justice, and personal responsibility?

In the first story, the all-wise king sat on a throne above a multitude of cowering supplicants.[1] Among the petitioners were two women, would-be mothers, each claiming parenthood of a single child.[2] Unable to determine which woman was the baby's true mother, the king called for a sword; he then ordered that the baby be sliced into equal parts and divided between the two women.[3] The baby's true mother threw herself at the king's feet, desperately pleading for her child to be spared, even if the false mother received custody of the child.[4] Realizing that the woman begging for mercy on the child was the true mother, the king immediately halted the execution and gave the mother her baby.[5] The king's decision became known throughout the land, and all the people stood in awe of the king because the wisdom of God informed his decisions.[6]

The second story tells the tale of a beautiful young woman who lived alone in the mountains.[7] She had many suitors, but she chose not to marry.[8] One day, as she lay sleeping, a drop of rain fell on her stomach and she became pregnant with twins.[9] All the young woman's suitors, hoping to marry her, claimed the babies as their own.[10] When the twins began to crawl, the woman called her suitors together and told them to form a circle around the two babies.[11] If the twins crawled up to any man, then he would be the father and she would marry him.[12] However, the babies climbed upon no one, and the woman never married.[13]

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[1] *See* 1 *Kings* 2:12.

[2] *Id.* at 3:16-22.

[3] *Id.* at 3:24-25.

[4] *Id.* at 3:26.

[5] *Id.* at 3:27.

[6] *Id.* at 3:28.

[7] COMALK-HAWK-KIH, AW-AW-TAM INDIAN NIGHTS: THE MYTHS AND LEGENDS OF THE PIMAS 171 (William John Lloyd trans. 2008).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* This story continues with the twins' search for their father, and its conclusion has several variants, depending on the source. *See id.* at 174 (comparing variants of the same story collected by United States military personnel assigned to Arizona territory).

Consider the forms of justice that must be common in the cultures that produced these stories. If, as in the first story, resolution is properly imposed on litigants by a wiser, more powerful, and possibly divinely-inspired being, a member of that community is unlikely to accept judgment by a culture that regards justice as a discernable event in which independent, self-determinative sources make their own life choices. Likewise, if a person believes that justice is related to individual choice with its inevitable link to life consequences, a unilateral resolution imposed by a higher authority—one not part of that person's community or its daily life—is unlikely to resonate as an act of justice with that individual.[14]

In the American judicial system, an act of justice is fundamentally, inextricably linked to the concept of notice and the opportunity to be heard.[15] Litigants are, essentially, storytellers.[16] Each party comes to the table with a different version of the same story, i.e., a version that she believes will entitle her to a favorable judgment.[17] A disappointed litigant sometimes fails to realize that the final judgment results not from her story alone, but from the judge's reinterpretation and narration of the events giving rise to the case.[18] Although the judge's rendering of the story determines the ultimate remedy as between the parties, it also has the unique power to shape the story itself.[19] Judges select facts for their narratives after the conclusion of the events giving rise to the litigation, and expressly for the purpose of "'situat[ing] the case doctrinally.'"[20] From a litigant storyteller's point of view, however, justice is done only when the litigant's original story dominates the judicial narrative and drives the end result.

When the judge and the litigants start with different concepts of justice, as in the stories told above, the judge's final narrative may—accidentally or intentionally—divest the litigants' stories of important cultural nuance.[21] The loss of these subtle distinctions may implicitly devalue the storytellers' culture and suggest doubts about whether the judge has reached a fair result.

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[14] *See* Ada Pecos Melton, *Indigeneous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 133 (1995).

[15] U.S. CONST. amend.XIV, § 1.

[16] *See* Christine Metteer Lorillard, *Retelling the Stories of Indian Families: Judicial Narratives that Determine the Placement of Indian Children Under the Indian Child Welfare Act*, 8 WHITTIER J. CHILD & FAM. ADVOC. 191, 192 (2009).

[17] *See id.*

[18] *See id.* at 193.

[19] *See id.* at 193, 195.

[20] *Id.* at 195.

[21] *See id.*

I. INTRODUCTION

In an American courtroom, a litigant relies on the evidence and his words—strung together in story form—to convince the judge (or jury) of the merits of the case. The litigants compete, within strict parameters, to tell the stronger and more resonant story. Because stories almost always begin with a shift in "the way things generally are,"[22] stories of change essentially form the foundation for much litigation, especially in family courts.[23] The stories presented by litigants in family court are not only emotionally compelling, but they also incorporate themes common to daily life: family conflicts, spousal relationships, parental responsibilities, financial difficulties, and child-rearing concerns. Therefore, this Article uses the competing stories offered by two Native American litigants in a bitterly contested child custody case[24] to suggest ways to enhance the authority of judicial narrative when the judge's cultural norms differ from those of the litigants.

Initially, this Article argues that a key characteristic of a successful litigant's narrative is the story's ability to evoke immediate recognition in the judge. Under most circumstances, this immediate recognition, or familiarity, has an emotional rather than logical quality.[25] Scholars refer to this quality of unconscious familiarity as a "stock story."[26] Even though a litigant's stock story has great emotional or psychological pull, the ultimate storyteller is the court, whose duty it is to digest these stock stories and return them to the parties as a judicial narrative.[27] American jurisprudence demands that the court set aside its story biases to administer justice.[28]

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[22] *See* Christine Metteer Lorillard, *Stories That Make the Law Free: Literature as a Bridge Between the Law and the Culture in Which It Must Exist*, 12 TEX. WESLEYAN L. REV. 251, 254 (2005) (citing JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE 6 (2002)).

[23] Generally, litigants do not end up in family court without an external impetus–a story–that creates the impulse for change in the original family structure. Some of the more familiar stories in family court litigation are the ones that are the most sensational–those involving infidelity, violence, drug use, and aberrant behaviors.

[24] *See* Duwyenie v. Moran, 207 P.3d 754 (Ariz. Ct. App. 2009); Rosebud Sioux Tribe v. Duwyenie, No. CV 09-1660-PHX-MHM, 2010 WL 2534193 (D. Ariz. June 18, 2010).

[25] *See* Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV.1, 3 (1984).

[26] *See id.*

[27] *See* Lorillard, *supra* note 16, at 192-93.

[28] The image of Justice as a blind-folded woman holding a set of scales derives from antiquity. *Legal Symbols of the Anglo-American Legal Tradition*, 11 THE GUIDE TO AMERICAN LAW: EVERYONE'S LEGAL ENCYCLOPEDIA 685, 687, Appendix D (1985). For instance, the ancient Egyptians worshipped the goddess Ma'at, who was often depicted with an ostrich feather in her hair to symbolize truth and justice. *Id.* Ma'at (from which the term "magistrate" is derived) assisted Osiris in the judgment of the dead by weighing their hearts. *Id.* The deceased's heart was weighed against the feather, and if the soul was "lighter than a feather," the deceased was pure–entitling him to journey to Áaru, an eternal paradise. WENDY CHRISTENSEN, GREAT EMPIRES OF THE PAST: EMPIRE OF ANCIENT EGYPT 74 (rev. ed. 2009).

Next, this Article examines whether and to what extent it is possible for a fact finder to eliminate story biases from her judicial narrative despite the thorny influence of culture, particularly indigenous culture, on the courtroom drama. In law, as in any story, the narrator's perspective influences the selection of facts, the weight accorded to the selected facts, and the order in which the story is told.[29] Consequently, the judicial narrator does not simply "tell a story"; instead, she purposefully culls specific facts from the parties' narratives in order to support her ultimate decision.[30] This Article further argues that when a court is faced with a decision involving unfamiliar cultural norms, it is not unusual for a judicial narrator to ignore the cultural aspects of the case, opting instead for a strict application of the Rule-of-Law model.[31] As a result, cultural narratives familiar to and resonant with Native American litigants can become distorted in ways that make them indistinguishable from courtroom narratives produced by the dominant culture.[32] If the cultural portion of the judge's narrative is absent, a Native American litigant may not recognize the legitimacy of the decision even if it is based on the Rule of Law.[33] Much as a Solomonic story may not resonate with an individual who believes the twin babies should choose their own father, a judicial narrative lacking a cultural component may be so unfamiliar to a Native American litigant that he may reject the judge's story. In other words, since the judge's narrative does not accurately reflect "his" story, a Native American litigant may also resist the judge's proposed remedy because the narrative's version of justice does not apply to him.

Finally, this Article suggests a stewardship model as a way to resolve competing family court narratives when disparate cultures are involved. In family court cases, especially where the custody of a Native American child is at issue, the judge's application of the Rule-of-Law model may adhere to precedent, but leads to a rigid and sterile decision,[34] devoid of the cultural nuance that many Native American litigants value. On the other hand, by resisting the lure of a decision based on the Rule of Law and instead implementing a model of stewardship, the judicial narrator may engage a Native American litigant's sense of justice simply by acknowledging the richness of Native cultural and familial relations.[35] This Article concludes by suggesting that given two equally valid,

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[29] *See* Lorillard, *supra* note 16, at 193.

[30] *Id.* at 193-94.

[31] *See* Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 633 (2002).

[32] *E.g.,* Duwyenie v. Moran, 207 P.3d 754 (Ariz. Ct. App. 2009).

[33] *See* Lorillard, *supra* note 16, at 195.

[34] *See* Atwood, *supra* note 31.

[35] *See* Kevin Noble Maillard, *Rethinking Children as Property: The Transitive Family*, 32 CARDOZO L. REV. 225, 226-29 (2010).

competing narratives, thoughtful legal practitioners might soften the application of the Rule-of-Law model by negotiating fiduciary concessions from the custodial parent. For example, a fiduciary concession might take the form of an agreement between the parties to allow the child to take part in seasonal ceremonies important to the non-custodial parent's tribe. Such concessions, embedded into the judicial narrative, might raise the cultural profile of the opinion and legitimize the narrative in the eyes of a cultural minority.

II. Swapping a Story for a Remedy: In the Courtroom, Litigants Exchange Narratives in Competition for Their Desired Legal Outcome

Think of a story as the currency of basic human interaction.[36] Swapping stories allows people to acknowledge other members of a community and interact with them in socially meaningful ways.[37] Often, the purpose in exchanging stories with another is not simply to recall an experience, but to assert and confirm a certain perception of the world based on a shared meaning.[38] Under normal circumstances, the stories build on each other and form an "interpretive network," or common way of understanding the world that shapes both social expectations and personal responses.[39] Eventually certain stories, or "stock stories," permeate a culture so thoroughly that the teller of a stock story need only supply his audience with a few discrete facts because those facts are automatically imbued with "assumed" background information.[40] For instance, when two individuals are faced with a difficult choice, one person might say to the other, "Why don't we split the baby?"[41] When both parties share a common American Judeo-Christian upbringing, the aphorism is clear, though multilayered: it means that there is no good solution, that only divinely-inspired wisdom can save the day, and that compromise on both sides will resolve the conflict. Therefore, as long as the parties share an understanding of the same

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[36] *See* Lorillard, *supra* note 22.

[37] *See id.*

[38] *See id.* ("The goal of telling stories is to 'uncover what is universal, what is accessible to others in a way that allows them to walk around in our shoes.'").

[39] *See* Lopez, *supra* note 25, at 5-6.

[40] *See id.* at 3. According to Professor Lopez, "stock stories" are non-verbal (or pre-verbal) knowledge structures that "help us interpret the everyday world with limited information and help us make choices about asserting our own needs and responding to other people." *Id.* Alternatively called "scripts," "schemas," "frames," and "nuclear scenes," *id.* at 3 n.1, stock stories are universally recognized values that allow us to "carry out the routine activities of life without constantly having to analyze or question what we are doing[,]" *id.* at 3.

[41] *Cf.* 1 *Kings*, *supra* note 3.

basic story, there is no need to retell the entire tale. Instead, the tale is understood instantaneously after reference to only a few key facts.[42]

A litigant whose story can be instantly grasped—either emotionally or intellectually—by the judge has an undeniable advantage in the courtroom.[43] Litigants tell competing stories to the judge to persuade her of the legitimacy of each litigant's version of events.[44] If the judge can be persuaded of the merits of a litigant's story, the judge will elevate that story by incorporating all or part of it into her judicial narrative.[45] Although legal processes and rules of evidence limit the nature and quantity of facts considered by the judge, the litigants' individual stories have the power to influence "'real effects in the material world . . . [and] shape the course and direction of the law.'"[46] The judge, of course, reacts not to the actual event that gave rise to the story, but to the storyteller's version of that event.[47] Hearsay or other rules may prohibit the judge from considering some parts of the story,[48] so a litigant must carefully consider how the courtroom rituals could alter the telling of his story.[49] As a result, successful litigants seek to influence the judicial narrative through a ritualized, or ceremonial, exchange of "story" for "remedy."[50]

A. Familiar Stock Stories Tend to Favorably Influence the Judicial Narrative

No matter how many stories are told in the courtroom, the law has the last word. From an advocate's perspective, an important key to victory is whether, and to what extent, his client's story will resonate with the judge.[51] In other

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[42] *See* ROGER C. SCHANK, TELL ME A STORY: NARRATIVE AND INTELLIGENCE 37-40 (1995). Schank suggests that all stories are simply shorthand for a longer, more detailed story, often a familiar one. *Id.* at 39. Schank offers the following example from the Woody Allen movie, *Manhattan*:

YALE: She's gorgeous.

ISAAC: She's seventeen. I'm forty-two, and she's seventeen.

"More needn't be said here because the point has been made without saying more. We all know stories or can imagine stories involving the complexities of a relationship between a forty-two-year- old man and a seventeen-year-old girl. . . . The reference here is to a story we all know which then serves as the basis for the story we are about to hear." *Id.* at 40.

[43] *See* Lorillard, *supra* note 16, at 195 ("[T]he choice of which story to privilege is most often determined by the story that comes closest to the experience of the judge.").

[44] *See* Lorillard, *supra* note 22, at 255.

[45] *See id.*

[46] *See id.* (quoting Lenora Ledwon, *The Poetics of Evidence: Some Applications from Law & Literature*, 21 QUINNIPIAC L. REV. 1145, 1148 (2003)).

[47] *See* Lorillard, *supra* note 16, at 195.

[48] *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT R. 2.9(C) (2007).

[49] *See* Lorillard, *supra* note 22, at 255.

[50] *See* Lopez, *supra* note 25, at 27.

[51] *See* Lorillard, *supra* note 22, at 256.

words, the advocate must present the client's story in a way that strikes a familiar or intimate note with the judge and impels her to favorable action.[52] The advocate does not simply repeat the client's story *ad infinitum*, but rather *represents* the client's story—i.e., the advocate shows the client to the world not as he is, but as he wants to be understood.[53] This is the art of persuasion.

Persuasion of this sort is generally successful because, as a rule, people tend to gauge complex matters like frequency, probability, and causality[54] on the basis of superficially generated facts and easily digestible information—i.e., sound bites.[55] Because of the need to process vast amounts of information quickly and efficiently, people tend to accept common stock stories without independently assessing them.[56] This does not mean that most people mindlessly accept all stock stories as true.[57] Instead, it means that most people tend to make broad comparisons between competing stock stories: their cognitive judgments are relational, rather than objective.[58] When a listener can identify a stock story sufficiently similar to his own, he makes a "likeness judgment."[59] Therefore, the facts of the story exist not independently of, but in relation to, a stock story that the listener already knows.[60] Because the number of variables required to make a single judicial decision would be overwhelming without a narrative structure to rely upon,[61] the story that is familiar to the judge almost always wins.[62]

B. Familiar Judicial Narratives Tend to Enhance a Litigant's Perception of Justice

In the American legal system, judicial storytelling is an exercise of power.[63] Ultimately, the judge selects one of the litigants' stock stories as the primary basis for the judge's narrative.[64] The judge's choice to elevate one story over another has profound implications for the litigants and for the ulti-

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[52] *See* Lopez, *supra* note 25, at 3.

[53] *Id.* at 11.

[54] *Id.* at 15.

[55] *Id.*

[56] *Id.* at 16.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 20.

[60] *See id.* "We think we find the world; instead we make it ourselves. Stock structures create their own image; they search for themselves in the world and, finding something sufficiently like them, tell Man that they are what he sees and what the world is." *Id.* at 19.

[61] *Id.* at 27.

[62] *See id.* at 43-44.

[63] *See* Lorillard, *supra* note 22, at 255.

[64] *See id.*

mate trajectories of their personal family histories.[65] Simultaneously however, the judge must consider whether, and to what extent, her narrative will be accepted—not only by the parties to the litigation—but also by the general public, the legal community, and of course, the appellate courts. Therefore, in constructing a narrative, the judge must use special care to develop a "coherent plot"[66] that will be familiar to many people in many roles, all of whom bring their diverse life experience to the table when interpreting a stock story. If the judge successfully identifies and incorporates certain stock structures into her narrative, others will recognize the story as one familiar to their own experience.[67] When the judicial narrative is familiar enough, others will agree on its worth as an act of justice simply because of its repetitive themes.[68] Such is the power of stare decisis.

Consequently, the successful advocate must shape his story with two goals in mind. Not only must the story identify the client's preferred remedy,[69] but because his success depends on whether the court can easily make a likeness judgment, the advocate must also[70] ensure that his client's story sits squarely in the stream of precedent.[71]

At a structural level, the advocate's quest for an ultimate remedy drives the story toward a familiar plot. Likewise, the judge's quest to protect the integrity of her narrative, and prevent the decision from being overturned, drives the judicial narrative toward the familiar as well.[72] Because the forces shaping the stories tend to emphasize the familiar or conventional, over the unusual or uncommon,[73] public perception of justice is likely to be similarly constrained. The ceremonial exchange of the story for the remedy will be perceived as "right" when the audience can also make a likeness judgment.[74] People sense, at some unspoken level, that the adopted version of "what happened often leads directly, if not inexorably, to what ought to be."[75] Shared norms, therefore, are a key factor in establishing the public's perception of justice.[76]

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65 *See* Lorillard, *supra* note 16, at 196.
66 *See id.* at 194.
67 *See* Lorillard, *supra* note 22, at 256.
68 *See id.*
69 *See* Lopez, *supra* note 25, at 10.
70 *Id.* at 16-18.
71 *See id.* at 43-44.
72 *See id.* at 44-45.
73 *See id.*
74 *Id.* at 41.
75 *Id.*
76 *See id.* at 44-45.

III. Sticks, Stones, and Broken Bones: How Language and Culture Tend to Distort the Telling of Unfamiliar Stock Stories

When a litigant's stock story is not conventionally familiar to the judge, it becomes increasingly difficult for the judge to recognize that she is substituting a likeness judgment for the litigant's story.[77] Given the pressures of litigation and the unceasing flow of cases, the judge, by necessity, seeks out story patterns that make sense precisely because they readily match her existing repertoire of stock stories and those patterns "will then, not coincidentally, be given a familiar meaning."[78] The problem, of course, arises when words or stories that are familiar to the judge mean something wholly different to the litigants.

A. Language, Meaning, and the Judge's Dilemma

While stock stories might help a listener understand another's intimate circumstance and decide how to react,[79] stock stories also create a risk that two parties will accidentally "talk past each other."[80] Jean-Francois Lyotard, a postmodern philosopher, coined the term "differends" to refer to the ways in which citizens of different cultures use the same words to describe similar concepts, while the cultural narratives and language cues that are distinct to each culture prevent the parties from connecting at deeper levels of shared meaning.[81] When the stock stories of the judge and the litigants diverge, differends can arise in the way that the narratives use basic words like "family" or "parenting." Although parenting is a universally recognized concept, it is enormously difficult to casually communicate specific ideas about parenting because the term has as many meanings as there are cultures and subcultures.

The center of a stock story told in a state court proceeding, for example, will likely define parenting as an exclusive, rights-based status.[82] Early English common law, from which traditional American jurisprudence is derived, viewed children as chattels and vested fathers with an "absolute right to ownership and control" over their offspring.[83] Although society has moved away from the property model, modern family court jurisprudence often

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[77] *See id.*

[78] *See id.* at 44.

[79] *See id.* at 3.

[80] *See* Atwood, *supra* note 31, at 598.

[81] *See id.*

[82] *See* Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 Neb. L. Rev. 577, 634 (2000).

[83] *Id.* at 624-25.

remains locked into stories that begin with the assumption that vesting primary custody with one parent is in the best interests of the child.[84]

In contrast, the tribal court is more, though not entirely, likely to define parenting as a shared responsibility.[85] If the tribal court chooses to define parenting as a shared responsibility, then it is also likely to incorporate a broader definition of the word "shared."[86] For the tribal court, "shared responsibility" may not only be a matter of splitting parenting duties between mother and father, but also of spreading that responsibility among members of the extended family, both old and young, who take turns caring for the child.[87] Many tribes perceive child rearing as the collective responsibility of an elaborate kinship system.[88] Therefore, the opinion of the collective can, and sometimes does, take priority over decisions made by a biological parent.[89]

Consequently, courtroom conversations between cultures about family-related or parenting issues tend to be characterized by differends: the same words, with subtly different meanings, can result in no real communication at all. Yet all these cultures and subcultures come together in the courtroom with a shared expectation of fairness, justice, and resolution that is anticipated to be both legally correct and emotionally satisfying. Once the parties determine that they are unable to accept each other's stock stories, they look to the courts to write the ending to their own, often cautionary, tale. Our courtrooms, however, are simply gathering places for ritualized conflict resolution, devoid of magic or sentiment. The risk, of course, is that the parties will neither recognize the judge's stock story nor acknowledge it as a form of justice.

B. Impact of Custom and Tradition on the Judicial Narrative

Because the choice of forum can strongly influence the narrative structure, child custody litigants fight hard to lay groundwork for the acceptance of the story that they want to dominate the judicial narrative. Tribal member litigants, particularly those raised in or around a reservation community, understand that their stock stories are wholly unfamiliar to judges in the dominant culture.

"Although judges have the duty to understand minority perceptions, . . . the prevailing conception of justice may deprive an individual of a 'voice that can be heard on terms which the system will understand.'"[90] The unrelenting pressure of the judicial economy forces judges to find the most efficient way to

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[84] *Id.* at 626.
[85] *Id.* at 640.
[86] *See id.* at 640-41.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] Lorillard, *supra* note 16, at 195.

process an unfamiliar stock story.[91] Well-meaning judges sometimes unknowingly substitute their own superficial likeness judgments for unfamiliar stock stories, rather than processing the unfamiliar stories with careful thought and reflection.[92] Even if the judge does incorporate an unfamiliar stock story into her narrative, important cultural nuance may disappear, simply because the judge does not have the vocabulary to capture those concepts. As a result, the need for a coherent judicial narrative can deprive a culturally unfamiliar stock story of its individuality.[93] The dichotomy between a Western concept of justice and a Native concept of justice becomes especially pronounced when the judge re-tells a story involving Native custom and tradition.[94]

Many tribal court judges, for instance, rely not only on written precedent to make their decisions, but also on unwritten—though deeply rooted—forms of custom and tradition.[95] Fundamental cultural values underlie these forms of custom and tradition; values pass from generation to generation through example and the oral histories of tribal elders.[96] Tribal statutes often allow evidence of tribal custom or practice to be considered by the tribal courts and given appropriate weight.[97] Because law and culture are inextricably intertwined in a Native community, tribal court jurisprudence celebrates the inclusion of a cultural overlay in its decision-making processes.[98] Thus, the judicial narrative in a tribal court tends to serve a dual purpose, i.e., meting out justice while also "discern[ing] and extend[ing] the tribe's cultural character."[99]

In state court litigation, on the other hand, the cultural component is decidedly restrained, and the role of custom is virtually non-existent.[100] When state courts do acknowledge the role of custom and tradition in a child custody dispute, it often means that the litigants' stories are distorted in such a way as to fit the state court's idea of an appropriately familiar stock story. For Native Americans, unfortunately, this sometimes means that their stories are vastly skewed when they appear in the judicial narrative. Not surprisingly, tribal

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91 *See* Lopez, *supra* note 25, at 43-44.

92 *See id.*

93 *See* Lorillard, *supra* note 16, at 195.

94 *See* Melton, *supra* note 14.

95 *Id.* at 130.

96 *Id.* at 126.

97 *See, e.g.,* San Carlos Child & Family Protection Code, tit. 8, § 106(C) ("Because of the vital interest of the Tribe in its children and those children who may become members of the Tribe, the statutes, regulations, public policies, CUSTOMS AND COMMON LAW of the tribe shall control in any proceeding involving a child who is a member of the Tribe. . . .") (emphasis supplied).

98 Atwood, *supra* note 82, at 599; *see also* Frank Pommersheim, *Tribal Court Jurisprudence: A Snapshot from the Field*, 21 VT. L. REV. 7, 27 (1996) (likening the process to "stitching the cultural past into the judicial present . . . .").

99 *See* Atwood, *supra* note 82, at 599.

100 *See* Melton, *supra* note 14, at 126.

member litigants often embrace the cultural underpinnings of tribal court jurisprudence precisely because their own stock stories are often undervalued, sometimes distorted, and occasionally wholly ignored by courts of the dominant culture.[101]

The adversarial nature of the American justice paradigm assumes a number of stock structures that "conflict with the communal nature of most tribes."[102] Therefore, gaining more than a superficial understanding of a tribal member's stock story requires a depth and breadth of cross-cultural understanding that often is beyond the scope of the judge's daily docket. On occasion, conflicts raised in family court by a tribal member's stock story provide fertile ground for differends in terms of language and culture.

C. An Example of Cultural Conflict and a Clash of Stock Stories

A dispute between two devoted parents over the custody of a well-loved child can, and sometimes does, become a battle of mythic proportions. Indeed, a bitter dissolution proceeding, during which each parent vies for the undivided affection, presence, or custody of the child (or children), is the classic setup for the "somebody-done-somebody-wrong"[103] narrative. A child custody dispute can be difficult enough when the judge and the parents are part of the same majority culture.[104] However, when the mother, the father, and the judge are all from different cultures, an inter-parental child custody dispute can take on additional layers of misunderstanding and urgency.

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[101] *Cf.* Atwood, *supra* note 82, at 599 (indicating that tribal courts typically identify the cultural basis of their decisions).

[102] *See* Melton, *supra* note 14. Although such statements carry a risk of overbroad or inaccurate characterizations of Native culture, Native American scholarship tends to concede that tribal communities share certain features setting them apart from Western culture. *See also* Atwood, *supra* note 82, at 605 ("Certain fundamental cultural values seem to be shared by many North American tribes, including, for example, an emphasis on cohesion and harmony within family units and within the larger community, a belief in the interconnection of people and the natural world, a recognition of the need for balance between people and the natural world, and an acknowledgement of spiritual forces.").

[103] LARRY BUTLER & CHIPS MOMAN, (HEY, WON'T YOU PLAY) ANOTHER SOMEBODY DONE SOMEBODY WRONG SONG (1975).

[104] *See* Sanford L. Braver, et al., *The Consequences of Divorce for Parents*, *in* HANDBOOK OF DIVORCE AND RELATIONSHIP DISSOLUTION 329-30 (Mark A. Fine & John H. Harvey eds., 2006). Divorcing couples with children commonly tend to experience high levels of conflict immediately after the divorce and for approximately three years thereafter. *Id.* Although most couples disengage from protracted conflict after the initial three-year period, at least twenty-five percent of couples experience high levels of conflict more or less indefinitely. *Id.*

1. The Backstory

By 2006, Antanelle Duwyenie and Chris Moran had lived together in the City of Globe, Arizona for several years.[105] Duwyenie was a member of the San Carlos Apache Tribe,[106] whose reservation is located approximately five miles east of Globe. Moran, on the other hand, was a member of the Sicangu Oyate Lakota, or the Rosebud Sioux Tribe, whose reservation is located in south-central South Dakota,[107] along the Nebraska border. Their two-year-old son, known as "C.J." in court documents, was born in 2004.[108] After several years together, the relationship broke down and the couple verbally agreed—without benefit of a court order—to split physical custody of C.J. on an alternating weekly basis.[109] When Duwyenie allowed Moran to take C.J. for the first week under their new arrangement, Moran and his mother took the toddler and fled Arizona for South Dakota in order to petition the Rosebud Sioux Tribal Court for sole custody of C.J.[110] Litigation ensued.

Initially, the custody battle between Moran and Duwyenie was a fight for jurisdiction between the Rosebud Sioux Tribal Court and the San Carlos Apache Tribal Court.[111] As both parties were tribal members, it seemed that a tribal court was the more logical, and less expensive, place for the parties to resolve their dispute.

However, Moran evidently felt dubious about presenting his case in the San Carlos Apache Tribal Court, even though he worked as a police officer for the San Carlos Apache Tribe and his father was the lead officer for the Bureau of Indian Affairs' Criminal Investigation Unit at the San Carlos Agency.[112] It seems that Moran was afraid that the San Carlos Apache Tribal Court would favor a child custody suit by Duwyenie, a member of the San Carlos Apache Tribe. Based on this self-asserted and probably baseless supposition, Moran took C.J. and fled Arizona—apparently for what he hoped would be a more welcoming environment for his stock story.

Over the course of the next twelve months, Duwyenie endured the abrupt loss and prolonged absence of her only child.[113] Due to the sheer physical distance between the parties and the financial burden associated with the trip,

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105 Duwyenie v. Moran, 207 P.3d 754, 755 (Ariz. Ct. App. 2009).

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

112 Moran v. Duwyenie, No. CIV 06-368 (Rosebud Sioux Tribal Ct. Oct. 11, 2006).

113 *See Duwyenie*, 207 P.3d at 755-56 (discussing that between September 2006 and February 2007, Duwyenie had approximately 10 days of visitation with CJ).

Duwyenie was unable to travel to South Dakota except for required court hearings.[114] Even when Duwyenie was in South Dakota, Moran repeatedly sought and obtained orders from the Rosebud Sioux Tribal Court that strictly limited Duwyenie's interaction with her son.[115] Finally, during a rare visit with the child in Arizona, Duwyenie forced resolution of the matter by filing for temporary custody orders in Gila County Superior Court, instead of returning the baby to his father in compliance with the Rosebud Tribal Court's order.[116] Using the state court forum deprived both Duwyenie and Moran of the chance to explore, in the relative safety of a courtroom setting, how and to what extent their son might benefit from learning the customs and traditions of their respective tribes. The Arizona state appellate opinion itself is curiously sterile, even though the Apache and Sioux traditions are rich and vibrant with ceremony.

2. Shaping the Next Chapters

Although this case, like many others, concerned who should maintain physical care, custody, and control of an only child, it also engaged the complexities of making likeness judgments between different cultures. Underlying the custodial questions in the case were deeper and thornier issues about the psychological impact of an abrupt change in the child's primary caregiver,[117] the emotional repercussions of the child's identity as an Indian person,[118] and the cultural implications of the child's tribal affiliation.[119] Predictably, the stories told on behalf of the parties only grazed the surface of these subjects, emphasizing instead the larger American cultural theme of "somebody-done-somebody-wrong."[120]

Moran alleged that Duwyenie was a neglectful parent and a promiscuous woman.[121] Duwyenie emphasized that Moran, a uniformed police officer, took

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114 *Id.*

115 *Id.*

116 The use of the state court forum was not Moran's choice, as he contested the jurisdiction of the Gila County Superior Court throughout the proceedings before ultimately stipulating to a custody and child support agreement. *Id.* at 756-59. Considering that the Rosebud Sioux Tribe subsequently filed a companion case in District Court and lost, it is unlikely that the Superior Court's decision has gained any legitimacy in Moran's eyes. *See* Rosebud Sioux Tribe v. Duwyenie, No. CV 09-1660-PHX-MHM, 2010 WL 2534193 (D. Ariz. June 18, 2010).

117 *See* Atwood, *supra* note 31, at 593-95 (referring to judicial narratives regarding a Native child's attachment to a primary caregiver as "the continuity principle").

118 *Id.* (referring to judicial narratives regarding a child's Native American heritage as "the identity question").

119 *See id.*

120 *See* BULTER & MOMAN, *supra* note 103.

121 Complaint for Paternity, Custody and Child Support, Moran v. Duwyenie, No. CIV 06-368 (Rosebud Sioux Tribal Ct. Sept. 6, 2006).

C.J. from her under false pretenses and fled the state.[122] Over the next four years, these stories—ostensibly for the purpose of gaining custody of the child—essentially became vehicles to present questions of continuity, identity, and culture to the fact finders in various jurisdictions. It consequently fell to the court system to choose between these wildly varying accounts of what had happened.[123]

By ultimately choosing to elevate Duwyenie's story over Moran's, the Gila County Superior Court simultaneously—and by default—made choices regarding the continuity of C.J.'s care, his identity as a Native American person, and his cultural affiliation. The judicial narrative format, however, was ill-equipped to address these issues—the trial court orders and the appellate opinion omit any mention of continuity, identity, or culture—despite their overriding importance to Duwyenie, Moran, and their respective tribes.[124]

3. Whose Story Is It, Anyway?

A story is successful when it elicits the outcome desired by the litigant-storyteller.[125] In a judicial context, this usually means that the litigant storyteller and her audience—the judge or the jury—must agree on certain shared norms before "justice" can be rendered.[126] Part of the storyteller's task is negotiating the terms of the parties' shared norms.[127] When the storyteller successfully negotiates the norms of the litigation, the parties tend to accept the verdict. On the other hand, when the parties refuse to agree on the norms of the litigation, the stories change dramatically as they pass from storyteller to audience, and the losing party always claims that the verdict was unjust—i.e., that its side of the story was not accepted as the norm, and therefore, not elevated by the fact finder as proof of a winning argument.[128]

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[122] Special Appearance Answer, Moran v. Duwyenie, No. CIV 06-368 (Rosebud Sioux Tribal Ct. Oct. 11, 2006).

[123] *See* Lorillard, *supra* note 22, at 255. Moreover, as a result of Moran's decision to appeal the lower court's judgment, Duwyenie's version of the story has been memorialized for all time in the law's literature–a published opinion.

[124] Moran's perceived need for a legal forum that would accept and validate his stock story (the fallen woman and the helpless child) over and above the literal truth (inevitable end of a young relationship) was so great that it impelled him to abscond with C.J. to a jurisdiction more than one thousand miles away. In so doing, Moran unintentionally gave Duwyenie a very powerful narrative (police officer goes rogue, abducts child), which is the story that ultimately prevailed in the state court system, possibly because it echoes the "somebody-done-somebody-wrong" theme in an emotionally wrenching and familiar way.

[125] Lopez, *supra* note 25, at 14.

[126] *See id.* at 16.

[127] *See id.* at 28.

[128] *See* Lorillard, *supra* note 22, at 255 (explaining that each storyteller will tell his version of the events, and the judge as the listener must decide which stories "are to be privileged.").

Though Moran stipulated to the entry of judgment in the Gila County Superior Court, he continued to object to the judicial narrative,[129] at least partially because of a fundamental disagreement over how the court defined the norms for the case. Tribes and tribal members "tend to view the regulation of family relations as lying at the core of tribal sovereignty."[130] Accordingly, Moran's position was that the Gila County Superior Court's exercise of jurisdiction in this matter impermissibly intruded upon his tribe's right to regulate the relationship between him and his son.

This disagreement eventually became the basis for a federal complaint.[131] Essentially, the complaint alleged that the Gila County Superior Court "impermissibly trenched [sic] upon the sovereignty of the Rosebud Sioux Tribe" by exercising jurisdiction over the child custody case involving C.J.[132] One of the fundamental structures underlying Moran's stock story involved the absolute authority of a tribal nation to govern the affairs of its people.[133] Because Moran's stock story differed radically from the stock structures assumed by the state court in its jurisprudence, he was unable to make an easy "likeness judgment."[134] The Gila County Superior Court's story was so unfamiliar to Moran that he was unable to accept either the judicial narrative or the legal outcome associated with it. Ultimately, the Rosebud Sioux Tribe agreed, took up the cause, and filed a complaint in federal court challenging the Gila County Superior Court's right to exercise jurisdiction over C.J.[135]

Unless the court's stock story is conventionally familiar to the litigants, it can have the unintended effect of increasing negative tension in the litigation.[136] Because the state court's narrative focused only on the Rule of Law, without reference to the sovereignty of the Rosebud Sioux Tribe or the child's tribal affiliation, the narrative maintained its legal integrity but lost Moran and the Rosebud Sioux Tribe—key members of its audience.[137]

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[129] Duwyenie v. Moran, 207 P.3d 754, 759 (Ariz. Ct. App. 2009).

[130] Atwood, *supra* note 82, at 582; *see also id.* at 586-87 (explaining how dispute resolution is linked to tribal identity).

[131] Complaint with Technical Correction, Rosebud Sioux Tribe v. Duwyenie, No. 2:09-cv-01660-MHM (D. Ariz. 2009).

[132] *Id.* at 3.

[133] *See id.* at 1-2.

[134] *See* Lopez, *supra* note 25, at 43-44.

[135] *See generally* Rosebud Sioux Tribe v. Duwyenie, No. CV 09-1660-PHX-MHM, 2010 WL 2534193 (D. Ariz. June 18, 2010).

[136] Lopez, *supra* note 25, at 43-44.

[137] Moran's refusal to acknowledge the Superior Court's decision as lawful has had consequences for his son. For instance, Moran and his family have refused all personal contact with C.J. since the Superior Court's order. Moran has also failed to voluntarily cooperate with the Superior Court's order for monthly child support payments. Telephone Interview with Antanelle Duwyenie (Sept. 3, 2011).

IV. On the Mend: Three Ways of Approaching a Solution

A primary concern for any court is whether its narrative is likely to be recognized as legitimate by all parties, including the losing side. When the parties recognize the judicial narrative as legitimate, they essentially acknowledge the narrative's ability to define their reality. The judicial narrative can be characterized as "reality" not only because specific legal consequences flow from the judge's version of the events, but also because the story is fixed in the stream of precedent due to the judge's elevated status as a storyteller.[138] In cases such as *Duwyenie*, where the losing party declines to recognize a court's decision as lawful, the court's only choice—if it wants to protect the integrity of its narrative—is to rely on the Rule of Law.[139]

Generally, the Rule-of-Law model requires that decisions made by those in authority—judges or those in executive offices—conform to previously articulated rules without the slightest deviation.[140] As a corollary, the Rule-of-Law model also means, strictly speaking, that substantive justice—fairness—must be "sacrificed in favor of the consistent application of the legal principle."[141]

Balanced against the harsh landscape of the Rule-of-Law model is the so-called Ethic of Care.[142] The Ethic of Care gained ground with the legal community in the 1990s with its "call to context."[143] At the heart of this call was a plea for more individualized justice.[144] For proponents of the Ethic of Care, the ultimate goal of the court system is to do justice; according to these proponents, this means "judges must hear the various competing stories before them, and engage in an empathy that goes beyond their personal experience in prioritizing these stories under existing law, or in creating new law."[145] In other

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138 *See* Lorillard, *supra* note 16, at 196 (referring to Professor Carol Weisbroad's observation that "judicial narratives are a 'particularly intense form of storytelling that involves the shaping of personal history and private life.'").

139 *See* Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 Mich. L. Rev. 2099, 2102, 2122 (1989) ("Where consensus ends, lines are drawn; and those outside the line—legal losers—always will feel unheard and wounded.").

140 *Id.* at 2103. The author acknowledges that the Rule-of-Law model has long been the subject of an ongoing and wide-ranging jurisprudential debate across a multitude of disciplines. Because of the complexity inherent in the "Rule of Law," the phrase can legitimately mean different things to different people. For the purposes of this article, however, the narrow definition identified above provides a sufficient, though by no means comprehensive, foundation for the discussion.

141 *Id.*

142 *Id.* at 2106.

143 *Id.*

144 *See id.; see also* Lorillard, *supra* note 22, at 257 (explaining that a collective focus of the law prompted a counter focus to the "Rule-of-Law" model in which there was a "call to context," arguing for more individualized justice).

145 Lorillard, *supra* note 22, at 257.

words, the Ethic of Care encourages judges to listen to litigants' stories with something akin to compassion or empathy, and then to incorporate those feelings of compassion or empathy into their final decisions.[146]

The Rule of Law and the Ethic of Care each represent far ends of a continuum. Marginalized voices will always clamor for the Ethic of Care,[147] especially in relation to stock stories involving unfamiliar issues like cultural identity. On the other hand, a call for empathy in judicial decision making inevitably leads to greater discretionary authority on the part of the judge.[148] Such discretionary authority, which is often both standardless and non-reviewable, contradicts the values of American jurisprudence.[149] A third model, stewardship, emphasizes the value of interpersonal relationships[150] and suggests a way to break free of a continuum that leads to all-or-nothing results in the judicial narrative.

A. The Rule-of-Law Model Elevates Certainty Over Cultural Enfranchisement in the State Court's Judicial Narrative

By far the most widely accepted Rule-of-Law model in the context of interparental child custody disputes is the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). Forty-nine states have adopted some form of the UCCJEA,[151] and the comments to Section 104 of the UCCJEA suggest that tribes can adopt its provisions as enabling legislation by replacing references to "this State" with references to "this Tribe."[152]

Arizona's version of the UCCJEA vests its state courts with the authority to exercise initial jurisdiction over a child custody dispute if Arizona is the child's "home state" at the commencement of the proceeding, provided that the child is absent from the State of Arizona and a parent continues to live there.[153] "Home state" jurisdiction is generally defined as the state where the child has

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146 *See id.*

147 *See* Massaro, *supra* note 139, at 2116 ("[L]aw often privileges the stories of the powerful and drowns out the voices of the weak and marginal.").

148 *See id.* at 2116-17.

149 *Id.* at 2117.

150 *See* Maillard, *supra* note 35, at 226.

151 *Legislative Fact Sheet – Child Custody Jurisdiction and Enforcement Act*, NAT'L CONF. OF COMMISSIONERS ON UNIFORM ST. LAWS, http://www.nccusl.org (last visited February 19, 2012). The State of Massachusetts has introduced a bill proposing adoption of the UCCJEA, but has not yet enacted it. *UCCJEA Adoptions*, NAT'L CONF. OF COMMISSIONERS ON UNIFORM ST. LAWS, http://www.uniformlaws.org/Shared/docs/UCCJEAadoptions.pdf (last visited February 19, 2012).

152 UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 104 (1997).

153 ARIZ. REV. STAT. ANN. § 25-1031 (Westlaw through 2011 legislation). Other grounds for home state jurisdiction include significant contacts and substantial evidence regarding the child. *Id.*

lived with a custodial parent for the past six consecutive months, including any periods of absence from the state.[154] Once Arizona exercises initial jurisdiction over a child custody matter, it retains exclusive continuing jurisdiction until the parties no longer have significant connection with Arizona and substantial evidence regarding the child is no longer available in the state, or the parties no longer reside in Arizona.[155] The only circumstance that allows a court to modify a child custody order issued by another jurisdiction is when that jurisdiction has exercised its authority "substantially in conformity" with the UCCJEA.[156] Similarly, child custody decisions made by tribal jurisdictions will be recognized and enforced in Arizona as long as the "substantial conformity" requirement has been met.[157] Arizona's UCCJEA further provides for discretionary communication and cooperation between courts.[158]

These provisions of the UCCJEA protected Duwyenie when she made the decision to file for temporary custody orders in the Gila County Superior Court despite the terms of the visitation order issued by the Rosebud Sioux Tribal Court. Not surprisingly, Duwyenie's decision led to accusations by Moran and the Rosebud Sioux Tribe that she had acted in bad faith by keeping the child and seeking protection from the state court.[159]

In his arguments to the Superior Court, Moran emphasized that the Rosebud Sioux Tribal Court was the first court to exercise jurisdiction over the case.[160] Fundamentally underpinning Moran's stock story was the assumption that any impingement on Moran's first-in-time exercise of jurisdiction was a threat to tribal sovereignty.[161] Another stock structure of Moran's story involved his assertion that the Rosebud Sioux Tribe should have the exclusive right to preside over legal questions involving the welfare of its tribal members, including him and his son.[162] Ultimately, Moran found himself in a legal

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154 *Id.* § 25-1002(7).

155 *Id.* § 25-1032.

156 *Id.* § 25-1036.

157 *Id.* § 25-1004.

158 *Id.* §§ 25-1010, 1012.

159 Duwyenie v. Moran, 207 P.3d 754, 758 (Ariz. 2009).

160 *Id.* at 757.

161 *See id.*

162 Even after the original Rosebud tribal court judge dismissed Moran's complaint based on Moran's failure to disclose his flight from Arizona, Moran v. Duwyenie, CIV 06-368, Memorandum Decision at 2 (Rosebud Sioux Tribal Ct. Feb. 27, 2007), Moran continued to press his version of the story, striking two different judges and securing a Tribal Council resolution declaring that only Rosebud tribal courts could exercise jurisdiction over Rosebud tribal members:

> THEREFORE BE IT RESOLVED that there is hereby established by the Rosebud Sioux Tribal Council a rule of Rosebud Sioux Tribal law that if one parent and/or the children that are part of a child custody dispute are enrolled members of the Rosebud Sioux Tribe in a civil action filed in the Rosebud Sioux Tribal Court, the Rosebud

morass because his argument conflated the legal issue of jurisdiction with cultural issues related to his son's tribal affiliation and identity.[163]

Questions related to the continuity of C.J.'s care, his identity as a Native person, and his ultimate tribal affiliation, were simultaneously short-term developmental and long-term cultural issues that were crucial to both C.J.'s personhood and the ultimate sustainability of tribal nations. Although both Duwyenie and Moran likely had much to say about these issues, the superior court's application of the Rule of Law effectively annulled any discussion about the continuity principle, the identity question, or the cultural issues involved in the case, and it virtually assured that the opinion would not be reversed.

By applying the UCCJEA, the state courts successfully avoided muddying the waters with an unfamiliar stock story related to the child's cultural heritage. The Arizona Court of Appeals affirmed the lower court on the issue of "home state" jurisdiction[164] and rejected Moran's sovereignty argument on the basis that a first-in-time filing must be in a jurisdiction having substantial conformity with the UCCJEA.[165] The Court of Appeals also engaged in a close reading of the statutory language to distinguish Moran's claim that Duwyenie's "unjustifiable conduct" required the Arizona courts to decline jurisdiction in favor of the Rosebud Sioux Tribal Court.[166] Thus, under the Rule-of-Law model, the Gila County Superior Court's decision to award physical custody of C.J. to his mother, Antanelle Duwyenie, seems not only logical, but also inevitable. Under the provisions of the UCCJEA, Arizona was unquestionably the child's home state, and Moran, the only bad actor.

B. In State Court Proceedings, Application of the Ethic-of-Care Model Promotes Cultural Enfranchisement at the Expense of Precedent

Viewed from the Rule-of-Law perspective, the inevitability of the court's decision in *Duwyenie* is shockingly evident, even self-proving. In litigation, however, the end of the story is hardly ever obvious.[167] In *Duwyenie*, the state court resorted to the Rule of Law to resolve the parties' dispute, but what if the

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> Sioux Tribe shall have the sole authority and jurisdiction to hear and decide that dispute[.]

Rosebud Sioux Tribe Res. No. 2006-327 (2006) (enacted).

163 *Duwyenie*, 207 P.3d at 756-60.

164 *Id.* at 756-57.

165 *Id.* at 757.

166 *Id.* at 758.

167 *See* Lorillard, *supra* note 16, at 193.

situation had been different? If the parties could have agreed on a tribal court forum, would the outcome have changed? Would the tribal courts have been better suited to address the underlying issues of continuity, identity, and culture? Would the judge's likeness judgments have more closely resembled the stock stories of the litigants? By applying the Rule of Law, the state court avoided any consideration of whether, and to what extent, the inculcation of Apache or Sioux customs and traditions could have benefitted the child. But because the social structure of the San Carlos Apache Tribe differs markedly from that of the Rosebud Sioux Tribe,[168] it may have been instructive for the state court to delve into those nuanced differences—even if only to incorporate certain elements of the parties' stock stories and to make the final outcome more palatable to the losing party.

State courts, however, seem to have a more difficult time when wrestling with the identity principle.[169] An Indian identity, and the importance of it, is something that is not familiar to many state court judges; in the adversarial world of family court litigation, "identity" tends to become an "either-or" concept.[170] On the other hand, a tribal court is more likely to view its role in "fostering the child's sense of tribal identity" as an appropriate part of its jurisprudence.[171] Minority communities tend to define themselves via their differences, and a minority culture's jurisprudence is likely to do so as well.[172] For instance, while a state court might balk at applying a law such as the Indian Child Welfare Act ("ICWA") to a child of Indian heritage who has no ties to the reservation,[173] the tribal court might specifically talk about the role of the clan in the child's upbringing and talk about how to "enforce the childrens' [sic] rights [as tribal members], and only incidentally provide for the rights of the parents, where they are in harmony with those of the children."[174]

In *Goldtooth*, for example, the Window Rock District Court analyzed competing custody claims between a Navajo father and a Hopi mother.[175] In

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[168] The San Carlos Apache Tribe is matrilineal, while the Rosebud Sioux Tribe is patrilineal. Sherry L. Hamby, *The Importance of Community in a Feminist Analysis of Domestic Violence among Native Americans in* DOMESTIC VIOLENCE AT THE MARGINS 183 (Natalie J. Sokoloff & Christina Pratt eds., 2005); *see* BEATRICE MEDICINE, LEARNING TO BE AN ANTHROPOLOGIST & REMAINING "NATIVE" 144 (Sue-Ellen Jacobs ed., 2001). Aside from the differences in ceremonies, custom, and kinship structures, this difference presents a genuine question of what types of cultural influences might best shape a child of tender years.

[169] *See* Atwood, *supra* note 31, at 593.

[170] *See id.*

[171] *See* Atwood, *supra* note 82, at 647-48.

[172] *See id.* at 578.

[173] *See* Atwood, *supra* note 31, at 635.

[174] *See* Atwood, *supra* note 82, at 611 (quoting Goldtooth v. Goldtooth, 3 Navajo Rptr. 223, 227 (Window Rock D. Ct. 1982)).

[175] Goldtooth v. Goldtooth, 3 Navajo Rptr. 223, ¶ 9 (Window Rock D. Ct. 1982).

reviewing the home study submitted in support of the father's custody claim, the court particularly noted the father's fluency in the Navajo language and his ability to provide his children with an appropriate cultural foundation.[176] Mindful of the historical trauma and personal and family tragedies related to the Navajo-Hopi Joint Land Use Area, the court struggled with the appropriateness of awarding joint custody where one parent was Navajo and the other parent was Hopi.[177] As part of an extended discussion of tribal court precedent for its decision, the court stated as follows:

> [I]n Navajo culture and tradition, children are not just the children of the parents but they are children of the clan. In particular children are consider[ed] members of the mother's clan. While that fact could be used as an element of preference in a child custody case, the court[ ] wants to point out that the primary consideration is the child's strong relationship to members of an extended family. Because of these strong ties, children frequently live with various members of the family without injury. This is the condition throughout Indian Country (as Indian reservations as a whole are called). Therefore the court looks to that tradition and holds that it must consider the children[']s[ ] place in the entire extended family in order to make a judgment based upon Navajo traditional law. . . . This family is in an excellent position to be maintained in harmony, notwithstanding the sorrow of divorce, and I hold that the best interests of these children require an award of joint custody to their parents.[178]

Although the *Goldtooth* court's emphasis on Native tradition and custom is not unusual for a tribal court opinion, it would be extraordinary for a state court to integrate the cultural component into its decision in the same way that *Goldtooth* did. A stock story offered by a Native American litigant in this context would probably be so unfamiliar to a state court that any decision based

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176 *Id.* ¶ 12.

177 *Id.* ¶ 35. Although there are distinct differences between the Navajo and the Hopi tribes, the likeness judgments made by a tribal court with respect to these parties' stock stories are likely to be more similar than the likeness judgments made by a superior court in the same situation, simply because a tribal court judge is more likely to have a repertoire of stock structures comparable to those of the Native American parents. For a brief summary of the very complicated land dispute issues and a description of the brutal realities of daily life for Native Americans who live in the Joint Use Area, see William F. Rawson, *110-Year-Old Navajo-Hopi Land Dispute Haunts Tribal Relations*, L.A. TIMES (October 17, 1993), http://articles.latimes.com/1993-10-17/news/mn-46610_1_hopi-land.

178 *Goldtooth,* 3 Navajo Rptr. at ¶¶ 28, 34.

on such an unusual stock story would render the opinion virtually useless as precedent. Yet, for some Native Americans, the state court's reluctance to incorporate such unfamiliar stock stories may trigger a certain level of discontent or unease with respect to the court's final order.

For instance, although the parents in *Duwyenie* both agreed that their son was Indian, they could not agree whether he should be enrolled in the San Carlos Apache Tribe or the Rosebud Sioux Tribe.[179] Although this was a matter of overriding long-term importance to parents and child alike, the unfamiliar nature of this conflict arguably allowed the Gila County Superior Court to avoid the question by emphasizing the Rule of Law over and above the Ethic of Care.

Professor Barbara Ann Atwood has identified certain state court trends when the subject of Native ethnicity is involved. Specifically, when a state court identifies a child as "Indian" for purposes of ICWA, then the tribal often prevails in the litigation. On the other hand, when a state court identifies a child as mixed race for purposes of ICWA, then the tribe's request for relief is likely to be only partially granted, if at all.[180] Viewed from the outsider's perspective, a tribe seeking to advance the story of the child's "Indianness" may appear to be objectifying the child, perhaps treating the child like a number or statistic—i.e., the child is just one more notch in the tribe's population count.[181] On the other hand, a tribe advancing such an argument would say that the child's identity reveals the tribe's perspective on that child as an individual who is valued in his own right.[182] So, being identified as a tribal member results in the inculcation of a particular feeling of permanent belonging, and not simply as a number or a statistic, but as a valuable, individual addition to a larger population—i.e., a population vibrant with a shared appreciation, and

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[179] Moran v. Duwyenie, CIV 06-368, Memorandum Decision at 1 (Rosebud Sioux Tribal Court February 27, 2007).

[180] *See* Atwood, *supra* note 31, at 629-30 (quoting *In re* Bridget R., 49 Cal. Rptr. 2d 507 (Ct. App. 1996) ("[A]ny application of ICWA which is triggered by an Indian child's genetic heritage, without substantial, social, cultural, or political affiliations between the child's family and a tribal community, is an application based . . . predominately[ ] upon race and is subject to strict scrutiny under the equal protection clause.")).

[181] *See id.* at 634 n.199 (discussing the holding in *In re* Morgan, No. 02A01-9608-CH-00206, 1997 WL 716880 (Tenn. Ct. App. Nov. 19, 1997), that the Tohono O'odham Tribe was not allowed to intervene in an ICWA case because the mother did not live on the reservation and had no contact with her tribe for fifteen years). *Contra* 25 U.S.C. §1911(c) (1978) (providing a mandatory right of intervention for any tribe wishing to participate in a state court proceeding involving foster care placement or termination of parental rights to an Indian child).

[182] *See* Atwood, *supra* note 82, at 609 (citing Alonzo v. Martine, 18 Indian L. Rptr. 6129 (Navajo 1991) ("Navajos do not view children as property or possessions, but value them as individuals in a community.")).

largely unspoken understanding, of what it means to live a communal life.[183] Yet the American legal system is not geared to allow tribes to tell their stories of what it means to be an Indian family.[184] To do so would require the judicial narrative to incorporate the Ethic of Care and result in an opinion that could be reversed and may not even constitute precedent. Consequently, tribal members in state court may feel as though their stock stories have never been fully elucidated, at least not in a way that they recognize.

C. Using the Stewardship Model to Reconcile the Rule of Law and the Ethic of Care in State Court Proceedings Involving Native American Child Custody Disputes

While the Rule of Law tends to eviscerate the cultural issues involved in litigation between tribal members, a decision based on the Ethic-of-Care model will necessarily incorporate an unconventional stock story. As a result, a decision based on Ethic of Care may not be recognized as valid precedent in the legal community. In other words, the opinion will be distinguishable based on its unusual facts. Therefore, the Rule-of-Law model seems to present itself as the only viable option in child custody cases where tensions run high and cause otherwise rational people to do irrational things in the name of parenting. Yet the application of the Rule of Law remains unsatisfactory in cases that demand recognition of each party's culture.

One alternative might be the application of a stewardship model, originally propounded to resolve the parental rights of an unmarried man whose biological progeny presumptively belongs to the mother's husband.[185] Building on existing theories of others, Professor Maillard offers a "stewardship vision" that applies property concepts—simultaneous interests of borrowing and possession—to parental rights.[186] According to Maillard, "the classic ownership model dispossesses indigenous groups of objects, ideas, and land that originated within Indian communities. In response to this appropriation, stewardship replaces the classic bundle of rights—'use, representation, access, and production'—with a 'web of interests' that displaces discrete ownership with shared considerations."[187] Although Maillard makes the argument in the context of the biological father and the presumption of paternity for the marital

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[183] Lorillard, *supra* note 16, at 221-22 (quoting a Native grandmother's rejection of the state court's narrow definition of Indian heritage that required embracing "tribal politics . . . Indian charities . . . subscribing to tribal newspapers, and participating in Indian . . . events. . . . It's not how many activities you go to . . . it's something [that] you feel.").

[184] *See id.*

[185] *See* Maillard, *supra* note 35, at 259.

[186] *Id.*

[187] *Id.* at 259-60.

father,[188] his reasoning logically flows to inter-parental child custody disputes as well. As a result, it is possible to view the custodial parent of an Indian child as a fiduciary who owes duties to the non-custodial parent and to the non-custodial parent's tribe.[189]

If the debate is recast in terms of stewardship, the rhetoric between the parties can move from all-or-nothing arguments over the child's tribal identity to a more productive discussion of the appropriate allocation of rights and responsibilities within the complex web of interests connecting the child to his parents and their respective tribes.[190] As the story shifts from the emotional intricacies of tribal membership (and the landmines of a physical custody dispute) to established fiduciary duties—loyalty, care, and good faith—the warring parties are, ironically, forced to focus on the best interests of the child.[191] As one court stated during a particularly brutal intra-family custody battle, "[t]he fact that all the people seeking custody of [the child] are members of an Indian tribe does not suggest that each of the proposed custodians is equally capable of raising [the child] to respect the unique social and cultural environment of Indian life."[192] When the courts engage in a detailed examination of the parties' proffered stock stories, instead of making quick likeness judgments, the child's long-term and short-term interests are better protected. Forcing the courts to assert flat and conclusory statements about the Rule of Law and Indian children tends to legitimize false arguments over the child's tribal identity, while minimizing the validity of the "nuanced webs"[193] of family and kinship structures historically present in tribal communities.

While thoughtful practitioners will no doubt identify many creative ways to implement a stewardship model, state courts may want to afford greater consideration to the process by which their ultimate decisions are made. In instances where culture and tribal identity raise strong feelings in the parents, state courts may want to stay proceedings to refer the parties to a talking circle, a peacemaking court, or another culturally-based dispute resolution process. The referral's purpose would be to discuss sensitive issues related to Native custom and tradition in the presence of a neutral individual, who would be acceptable to both sides and knowledgeable about families and child-rearing practices common to the Native communities to which the parents belonged.[194] Any conces-

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188 *Id.* at 227.

189 *See id.* at 260-61.

190 *See id.*

191 *See id.*

192 *In re Custody of A.K.H.*, 502 N.W.2d 790, 795 (Minn. Ct. App. 1993).

193 Maillard, *supra* note 35, at 228.

194 *See, e.g.*, Comment D.4, BIA Guidelines for State Courts, Indian Child Custody Proceedings, 44 Fed. Reg. 67,584-67,595 (November 26, 1979) (defining Qualified Expert Witnesses as tribal members with knowledge of tribal customs pertaining to family organization and child-

sions arising out of the traditional dispute resolution process could be reduced to writing and appended to the judge's final order. For example, if the Gila County Superior Court had the opportunity to initiate a peacemaking-type process during the *Duwyenie* case, the parties could have negotiated an arrangement to teach their son about the non-custodial parent's custom and traditions. If the non-custodial parent had turned out to be Duwyenie, for instance, she might have argued for and obtained a concession that her son be placed with her during the summer season, when Apache Sunrise Dances are traditionally held. Likewise, Moran might have argued for and obtained a concession that C.J. be permitted to participate in the Sun Dance ceremonies of the Sicangu Oyate Lakota. Although the lengthy intricacies of such delicate negotiations might impede on the state court's desire for a quick and effective resolution of the matter, the state court's willingness to acknowledge the parties' specific concerns via a traditional dispute resolution process could successfully elevate the cultural profile of the judicial narrative. In turn, other judges could potentially make a likeness judgment based on the decision, which in its turn, might mean that the opinion could retain an appropriate level of precedential authority.

Therefore, under a stewardship model, the legal rights of the parents—and their tribes—become secondary to the daily duties of every attentive parent.[195] From a fiduciary perspective, the duty of parental care requires the custodial parent to respect the interests of others, including the child, his non-custodial parent, and any tribe that claims an interest in the child.[196] Even if this so-called fiduciary duty fails to act in the interests of these other parties, the model has value because it acknowledges the outside influences on the child's life and creates a "dynamic of responsibility"[197] on the part of the custodial parent who is, essentially, raising a child for the tribe. Because it remains consistent with a worldview that embraces a communal form of justice, application of a stewardship model to the fiduciary duties and obligations owed to an Indian child creates an "equitable . . . accommodation"[198] for every tribe that claims an interest in the Indian child's identity. By embracing a stewardship model in disputes over Indian children, state courts can "champion[ ] parental duties"[199] over all-or-nothing claims of tribal identity. Decisions made this way, rather than deci-

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rearing practices, experts with substantial experience in the delivery of services to Indians, or professional persons with substantial experience in his or her specialty).

195 *See* Maillard, *supra* note 35, at 261.

196 *Id.*

197 *Id.* at 262.

198 *Id.*

199 *Id.*

sions made strictly on the basis of competing claims to the child's Indian heritage, are more likely to be consistent with indigenous values.

V. Conclusion

For many tribal members, fundamentally fair and legitimate acts of justice come not from a single individual with divine wisdom, but from a group consensus—forged over time and through open discussion—about what is right and what is wrong.[200] When the judge's cultural norms differ from those of the litigants, there is an increased risk that the judicial narrative will distort the litigants' stock stories. Because of misunderstood language cues or the judge's being seduced by the false comfort of easy likeness judgments, even the most well-meaning and objective judge is unlikely to fully extricate her decisions from her own story biases.

Occasionally, a judge will revert to the strict application of the Rule-of-Law model in an attempt to minimize the impact of her own story biases vis-à-vis unconventional stock stories. However, instead of eliminating story biases, the application of the Rule of Law only emphasizes the vast divide between the litigants' stories and the judicial narrative. On the other hand, while the application of the Ethic-of-Care model may acknowledge the validity of unconventional stock stories, such as those told by Native Americans, it may not meet the needs of the American justice system for predictable, authoritative standards.

The key is to raise the cultural profile of a judicial opinion to give it legitimacy among persons who may feel that their stock stories are otherwise devalued or ignored. In a situation involving an inter-parental child custody dispute where issues of continuity, identity, and culture are intertwined, a thoughtful practitioner should seek written concessions based on stewardship in the context of a traditional dispute resolution process such as a talking circle, and a thoughtful judge should incorporate these concessions into the final narrative. A child custody order based on a stewardship model acknowledges and incorporates the nuanced webs of tribal kinship structures and family relations, even as it remains firmly rooted in the familiar legal concept of fiduciary duty.

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[200] *See* Melton, *supra* note 14, at 126 ("The indigenous justice system is based on a holistic philosophy . . . a circle of justice that connects everyone involved with a problem or conflict on a continuum, with everyone focused on the same center. The center of the circle represents the underlying issues that need to be resolved to attain peace and harmony for the individuals and the community. The continuum represents the entire process, from disclosure of problems, to discussion and resolution, to making amends and restoring relationships. The methods used are based on concepts of restorative and reparative justice and the principles of healing and living in harmony with all beings and with nature.").

A court's effort to raise the cultural profile of the judicial narrative—especially where unconventional stock stories are in play and parental relationships are broken beyond repair—leads to better results for the children in terms of cultural identity. It further leads to better results for the judicial narrative in terms of longevity, durability, and integrity. Using the judicial narrative to bridge the gap between cultures, even in a small way, offers the possibility of justice to each person who has ever had a story to tell.

TEACHING PROFESSIONAL SKILLS AND VALUES: AN ALUMNI ASSESSMENT

Hon. Stephen Gerst (Ret.)* & Maria L. Bahr**

I. INTRODUCTION

The purpose of this article is to report on Phoenix School of Law's attempt to address the following question: will recent innovations in law school curricula make a significant difference in graduates' readiness to practice law?[1]

The General Practice Skills ("G.P.S.") course at Phoenix School of Law, first offered in the fall semester of 2007, is designed to teach law students the professional skills and values that are deemed essential to the practice of law. Known as the "G.P.S." course, it is a direct response to the calls for change in traditional legal education.[2] This article will describe the efforts made by

* Professor and Program Director of General Practice Skills at the Phoenix School of Law; retired Maricopa County Superior Court Judge. The authors express their gratitude for helpful comments made to earlier drafts of this article by Gerry Hess, Sophie Sparrow, Jennifer Spreng, and Hon. Michael Yarnell (Ret.). We also express our gratitude to the *Phoenix Law Review* for their efforts in reviewing and preparing this article for publication.

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[1] Stephen Gerst & Gerald Hess, *Professional Skills and Values in Legal Education: The GPS Model*, 43 VAL. U. L. REV. 513, 546-47 (2009) ("Will recent innovations in law school curricula make a significant difference in the readiness of graduates to practice law? Law schools will not know the answer to that question unless they assess the effects of their reform efforts. Surveys or interviews of former students, after their first year or two of practicing law, is one way of assessing the success of curricular innovations. The survey could ask graduates to evaluate the role that skills and values courses played in their transition to practice. Former students could rank the degree to which the skills and values taught in law school have helped in their present area of practice.").

[2] *See id.* at 515. Over the last three decades, critics have argued that legal education does not do enough to prepare graduates for professional practice. *See id.* at 515, 518. They have urged

Phoenix School of Law to assess and evaluate the effectiveness of its G.P.S. course to determine whether it is achieving its goal of helping students become "practice ready."

The first part of this article is an overview of the G.P.S. course.[3] The second part contains the results of the initial survey of alumni, all of whom completed the G.P.S. course as a requirement of graduation. The third part contains an analysis of the survey results. This part also discusses the questions that the present survey leaves unanswered. This article is more than just a report on the survey results of a skills and values course; its intent is to share information and lessons we have learned from our first experience in surveying alumni. We hope that this information and our suggestions will be of assistance to others who are also seeking meaningful evidence on whether recent innovations in law school curricula make a significant difference in the readiness of graduates to practice law.

II. Overview of the General Practice Skills Course

Phoenix School of Law began with an inaugural class of twenty-eight students in 2005.[4] Its three-fold mission is to provide an educational experience that is 1) student-centered, 2) a bridge to practice readiness, and 3) committed to serving the underserved communities.[5]

In 2005, Phoenix School of Law mailed over 10,000 letters inviting Arizona Bar Association members to complete a survey.[6] The purpose of the survey was to ask Arizona lawyers to assess areas of essential knowledge, skills and values to the practice of law in Arizona. The survey results were substantially similar to the knowledge, skills, and values identified by the *MacCrate Report* in 1992,[7] which was critical of law schools generally for failing to adequately prepare students for the practice of law. Informed by these studies, the

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law schools to devote significant effort and resources to teach students a broad range of professional skills and values. *See id.* at 515-16. Defenders of traditional legal education point out its success in teaching doctrine, theory, and analytical skills; they argue that other professional skills and values are best learned in practice after graduation from law school. *See id*. at 546. In response to the calls for change, Phoenix School of Law has attempted to address the gaps between legal education and the professional practice. *See id.* at 523.

[3] *See id*. at 526-40 (detailing the history and description of the General Practice Skills course at Phoenix School of Law).

[4] Total enrollment in the spring semester of 2012 is expected to exceed 1000 students.

[5] *About Phoenixlaw*, Phoenix Sch. of L., http://www.phoenixlaw.edu/about (last visited February 22, 2012).

[6] Gerst & Hess, *supra* note 1, at 523 n.69. For a full copy of the Arizona Bench and Bar Survey, see *id.* at 548-51, and for a full outline on the results, see *id.* at 524-25.

[7] *See generally* Section on Legal Educ. & Admissions to the Bar, Am. Bar Ass'n, Legal Education and Professional Development ("MacCrate Report") (1992) (Robert MacCrate chaired the task force at the time of this report).

G.P.S. course was specifically designed to be a capstone course to help fulfill the mission pillar of "a bridge to practice readiness." Later studies and reports, such as the *Carnegie Study*[8] and *Best Practices for Legal Education*,[9] confirmed the course design was consistent with the learning objectives of the G.P.S. course.

By the end of the course each student will have done the following: 1) practiced many of the skills that will be used in the practice of law;[10] 2) experienced how lawyers solve legal problems; 3) become knowledgeable and sensitive to the professional values deemed important by the bench and bar;[11] 4) demonstrated a commitment to high ethical standards of behavior and professionalism in dealing with clients, opposing counsel, courts, and the community; and 5) acquired a realistic basis to make decisions about different areas of the law as a career.[12]

To achieve these objectives, the G.P.S. course is designed as a single semester, required, six credit, pass/fail course which meets twice each week for a three hour period. Most of the skill exercises are practiced collaboratively in student "law firms." A distinguishing feature of the course design is to invite practicing lawyers to serve as "lawyer-faculty" to guide students in learning and practicing the skills and values identified in the course design.

Each G.P.S. class section is limited to no more than thirty students. The course is divided into seven learning modules representing different areas of law practice.[13] A different two lawyer-faculty team provides instruction and feedback on the skills and values exercises for each module.[14] The G.P.S.

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[8] See William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law*, *in* PREPARATION FOR THE PROFESSIONS, at 15-17 (The Carnegie Found. for the Advancement of Teaching, Vol. No. 2, 2007).

[9] *See* ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 7-10 (2007).

[10] Gerst & Hess, *supra* note 1, at 527-28. Thirteen professional skills have been identified and adopted into the course design. These include the following: 1) working cooperatively as a team; 2) listening; 3) written communication; 4) oral communication; 5) counseling; 6) recognizing and resolving ethical dilemmas; 7) mediation; 8) pretrial discovery; 9) advocacy; 10) drafting legal documents; 11) interviewing and questioning; 12) negotiation; and 13) factual investigation. *Id.* at 528.

[11] *Id.* at 527-28. Six professional values have been identified and incorporated into the course design: 1) acting honestly and with integrity; 2) showing reliability and a willingness to accept responsibility; 3) striving to provide competent, high quality legal work for each client; 4) treating clients, lawyers, judges, and staff with respect; 5) demonstrating creativity and innovation; and 6) showing tolerance, patience, and empathy. *Id.* at 529-30.

[12] *Id.* at 527-28.

[13] *Id.* at 528. This includes six, two-week modules of twelve hours of classroom instruction and one, one-week module of six hours of classroom instruction. *Id.* at 534 n. 94.

[14] *See id.* at 530. The emphasis on professional values and the skills of recognizing and resolving ethical issues are included in the course design for all modules. *Id*. at 529. The most powerful teaching of values and professionalism, however, is the modeling of behaviors by the

course begins with a module on Law Office Management,[15] followed by modules in Family Law Practice,[16] Representing a Creditor or Debtor,[17] Creating and Selling Small Business Enterprises,[18] Wills and Estates Practice,[19] Criminal Law Practice,[20] and Personal Injury Practice.[21] These practice areas and Law Office Management were selected because of the number of Phoenix School of Law graduates who are expected to join small firms or become solo practitioners.[22]

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lawyer-faculty teams observed by the students throughout each module. *Id*. at 536-37. The other identified skills are practiced in several modules but are not necessarily included in all modules. *See id.* at 529.

[15] *See id.* at 533. In the Law Practice Management module, students form the law firms they work in for the semester, draft business plans and fee agreements, reconcile and manage trust fund accounts, use time-capturing software for record keeping, and practice different billing methods. *Id.*

[16] *See id.* In the Family Law module, students interview and counsel clients in a hypothetical family law matter. *Id.* at 533-34. Students represent their clients in a dissolution of marriage legal action between the parties. *Id.* This requires the drafting and preparation of all required documents related to dissolution of a marriage involving children. *Id.* Students also negotiate a settlement agreement and participate in court hearings on motions they have drafted on behalf of their clients. *Id.*

[17] *Id.* at 535. In the Creditor/Debtor module, students spend the first week learning and practicing the various means of assisting clients on the collecting of a debt or money judgment. *Id.* Students practice the skills of drafting, fact investigation, discovery, advocacy and negotiation. *Id.* at 529. In the second week of the module, students practice the skills involved in representing a debtor client in a bankruptcy matter. *Id.* at 535. Students prepare the bankruptcy schedules and necessary documentation. *Id.* Students are also involved in the drafting of motions and court hearings related to bankruptcy proceedings. *Id.*

[18] *Id.* at 534. In the Small Business Enterprise module, students represent clients in the legal formation, purchase or sale of a small business enterprise. *Id*. The skills practiced include interviewing and counseling, drafting of documents for the formation of a company, and purchasing or selling the assets or other ownership interest in a business entity. *Id.* Students are involved in interviewing and counseling, negotiation, drafting, and statutory analysis. *Id.*

[19] *Id.* at 534-35. In the Estate Planning module, students draft a client's will, advance directives, and a durable power of attorney. *Id.* Students also prepare and draft the appropriate documents necessary to a probate of a client's estate. *Id.* Skills practiced include interviewing and counseling, legal analysis, and drafting of documents. *Id.* at 529.

[20] *Id.* at 535. In the Criminal Law module, students process a criminal case while representing either the prosecution or the defense. *Id.* Students practice the skills of interviewing, counseling, fact investigation, discovery, drafting legal instruments, negotiation, court hearings, and interviewing and counseling. *Id.* at 529.

[21] *Id.* at 536. In the Personal Injury module, students represent a plaintiff or defendant in a civil action for damages arising out of an automobile accident. *Id.* Students practice the skills of interviewing, counseling, fact investigation, oral advocacy, drafting of pleadings and motions, negotiation, and advocating before a court and jury. *Id.* at 529.

[22] *See infra* Part IV.

III. THE ALUMNI SURVEY

Before the present survey, the G.P.S. course was assessed primarily through student evaluations, the oversight of faculty, and the observations of others. Student evaluations were conducted anonymously after each module in the first few semester offerings of the course. Thereafter, student evaluations were conducted at the end of the semester to enable students to compare course modules and lawyer-faculty over an entire semester.

In February 2009, an American Bar Association site team visited Phoenix School of Law as part of the accreditation process. Its report included the following comments:

> [T]he course appears to be an appropriate vehicle to introduce students to drafting, advocacy and other skills transferable to a variety of practice settings. In addition, based upon a team member's review of the course materials and interview with the supervising faculty member, the course appears to be well-organized and delivered by adjunct faculty who are both well-supervised and vetted for practice and teaching effectiveness.[23]

In July of 2009, the ABA Section on Professionalism recognized Phoenix School of Law by awarding it the E. Smythe Gambrell Professionalism Award for the development and design of the General Practice Skills course. In the letter informing Phoenix School of Law of its having been selected as one of three winners of the award for 2009, the Standing Committee on Professionalism wrote, "The Committee was particularly impressed with the fundamental integration of professionalism into basic legal education."[24]

Despite the praise of professional organizations and positive feedback from students, it still remained to be determined whether the G.P.S. course was of significant value in helping students achieve practice readiness in the legal community. The measurement of that value had to abide until the graduation of a sufficient number of students entering the practice of law.

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[23] SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, REPORT ON PHOENIX SCHOOL OF LAW (2009).

[24] Letter from Melvin F. Wright, Standing Comm. on Professionalism Chair, Am. Bar Ass'n, to Stephen Gerst, Associate Professor & Dir. of the Gen. Practice Skills Program, Phx. Sch. of Law (June 4, 2009) (on file with authors). The award is given annually by the American Bar Association Standing Committee on Professionalism. *See id.* The presentation of the award was made at the ABA Annual Meeting in Chicago, Illinois on July 31, 2009. *Id.*

On February 16, 2011, Phoenix School of Law administered a survey of alumni electronically through "SurveyMonkey."[25] As of that date, there were 162 alumni of Phoenix School of Law, of whom the school maintained a list of 158 alumni electronic addresses available for use in the survey.[26] The survey was sent to all 158 alumni and each anonymous response was tracked. It requested the alumni to rate the learning and practice of each skill and value taught using a scale of 1 through 5, with 5 being the highest.[27] Forty-two alumni responded to the survey—a response rate of 27%. The survey consisted of four parts plus an invitation for responders to add their comments. The survey questions, with responses, are reproduced below:

SurveyMonkey, February 16, 2011

A. Question: What kind of legal experience have you had since graduation? (Pick as many choices as apply.)

	Response Percent	**Response Count**
Solo Practitioner	22.0%	9
Small Firm (less than 10)	24.4%	10
Medium-sized Firm (10-50)	4.9%	2
Large Firm (more than 50)	2.4%	1
Public Sector/Agency	22.0%	9
Other (please specify)	**29.3%**	**12**

[25] A copy of the questionnaire and responses are on file with Stephen Gerst. For a general understanding of this online survey, see SURVEYMONKEY, http://www.surveymonkey.com (last visited Feb. 23, 2012).

[26] Graduates are not placed on the alumni list until one week after the next bar examination following their graduation. Although there were thirty-seven students who graduated on January 14, 2011, they were not eligible for the *alumni list* because their earliest opportunity to take a bar examination in Arizona would not occur until February 2011. The students who were included in the survey pool all had an opportunity to take a bar examination as of July 2010. Of the total number of students who graduated from Phoenix School of Law as of February 15, 2011, 155 had taken a bar exam. One hundred thirty-six students had passed either the Arizona bar exam or an out-of-state bar exam. Records of the Registrar and Academic Records Department of Phoenix School of Law (2011) (on file with Phoenix School of Law).

[27] Although the survey was mailed electronically to the 158 alumni on the Phoenix School of Law alumni e-mail address list, it is not known how many of the alumni actually received the survey. In the future, efforts will be made to verify current e-mail addresses and obtain evidence of actual delivery of survey questionnaires. The net effect of this is that the response percentage can be characterized as a minimum percentage of only those who received the survey.

B. Question: How well did the G.P.S. course achieve its goal of helping you become practice ready? (On a scale of 1-5, with 5 being the highest.)

	Response Percent	Response Count
1	2.4%	1
2	11.9%	5
3	31.0%	13
4	**40.5%**	**17**
5	14.3%	6

C. Question: Would you recommend continuing the G.P.S. course as a requirement of graduation?

	Response Percent	Response Count
Yes	**85.7%**	**36**
No	14.3%	6

D. Question: Please rank how well the G.P.S. course increased your level of confidence in the following skills. (On a scale of 1-5, with 5 being the highest.)

	1	2	3	4	5	Response Count
Interviewing and Questioning Clients and Witnesses	4.8% (2)	9.5% (4)	19.0% (8)	**45.2% (19)**	21.4% (9)	42
Negotiation of Settlements and Agreements	7.1% (3)	14.3% (6)	26.2% (11)	**40.5% (17)**	11.9% (5)	42
Pretrial Discovery and Factual Investigation (depositions and judgment debtor exams)	4.9% (2)	**34.1% (14)**	26.8% (11)	24.4% (10)	9.8% (4)	41

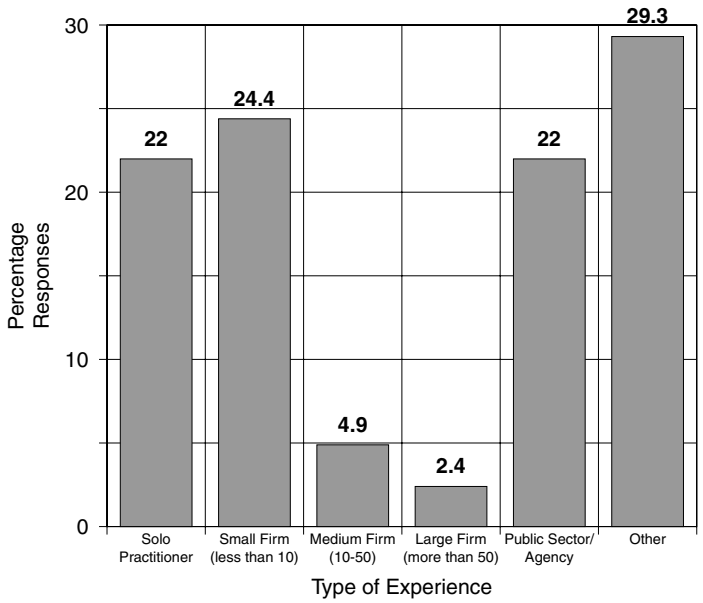
Drafting Legal Documents (letters, pleadings, motions, petitions)	7.1% (3)	16.7% (7)	21.4% (9)	**35.7% (15)**	19.0% (8)	42
Advocacy - Oral Argument, Voir Dire, Hearings	2.4% (1)	22.0% (9)	26.8% (11)	**34.1% (14)**	14.6% (6)	41
Law Office Management and Organization (planning, time billing, trust accounts)	2.4% (1)	16.7% (7)	23.8% (10)	**33.3% (14)**	23.8% (10)	42
Recognizing and Resolving Ethical and Professionalism Issues	4.8% (2)	4.8% (2)	23.8% (10)	**42.9% (18)**	23.8% (10)	42
Working Cooperatively as Part of a Team (law firms)	7.3% (3)	7.3% (3)	12.2% (5)	**36.6% (15)**	**36.6% (15)**	41
Legal Analysis and Reasoning	9.5% (4)	9.5% (4)	**31.0% (13)**	23.8% (10)	26.2% (11)	42
Listening	12.2% (5)	7.3% (3)	17.1% (7)	**34.1% (14)**	29.3% (12)	41

IV. Survey Results

The survey results[28] show that of the responding Phoenix School of Law alumni, graduates are primarily practicing in solo practice (22%), small firms (24.4%), or in public sector/agency employment (22%). The rest (29.3%) listed themselves as "Other" and described their experience since graduation as corporate, in-house counsel, Law/Compliance, Teaching Paralegals, Law Clerk, LLM Student, Bar Prep, Non-legal employment and Unemployed. This is illustrated in the graph below:

[28] *See supra* notes 25-27 and accompanying text.

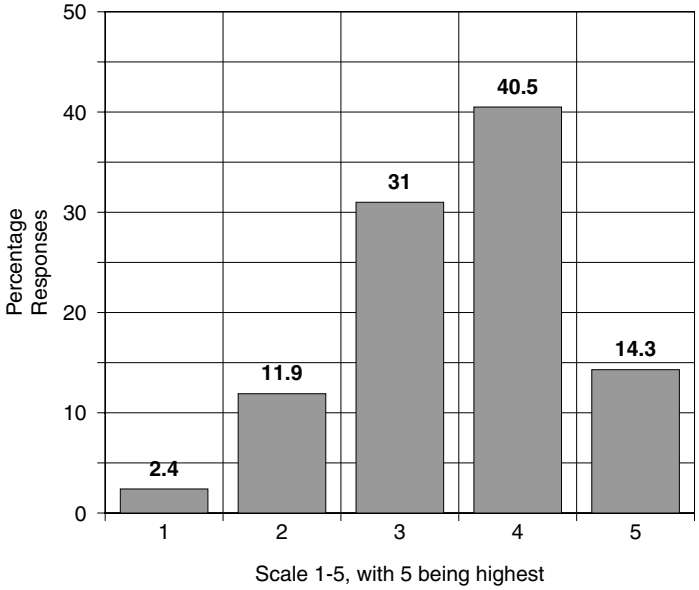
WHAT KIND OF LEGAL EXPERIENCE HAVE YOU HAD SINCE GRADUATION?



GPS Survey 2011

To the question of "How well did the G.P.S. course achieve its goal of helping you become practice ready?" 85.8% of the responders answered with a 3 or higher rating, as is shown in the graph below.

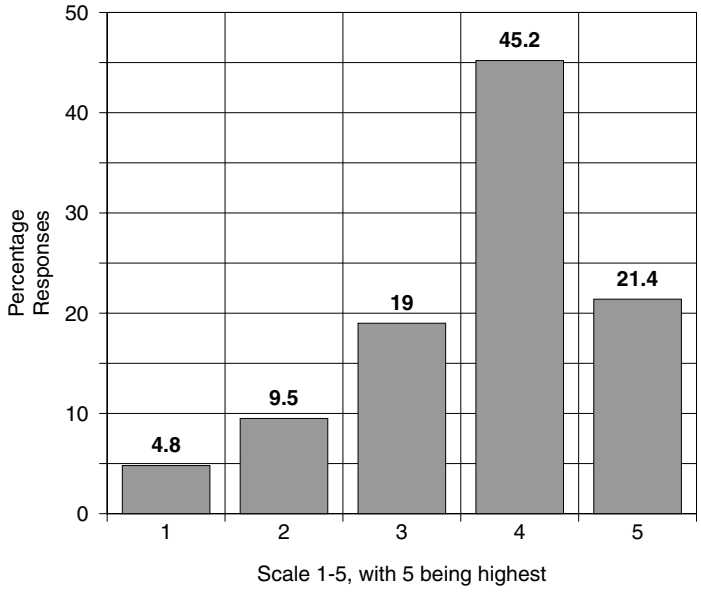
How Well Did the GPS Course Achieve Its Goal of Helping You Become Practice Ready?



Responders were asked to rank how well the G.P.S. course increased their level of confidence in a list of ten skills. The following list breaks out individual skills with the corresponding percentage of alumni that ranked their level of increased confidence in that particular skill with a 3 or higher ranking as a result of the G.P.S. course:

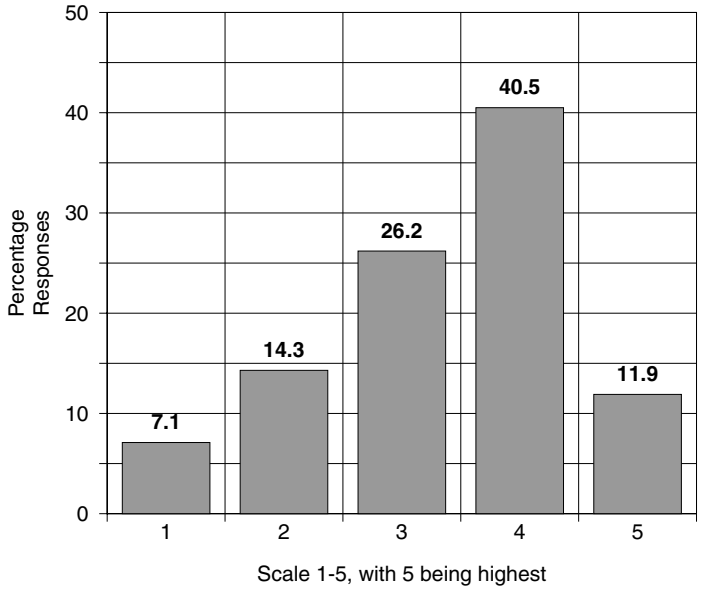
A. Interviewing and Questioning of Clients and Witnesses (85.6% answered with a 3 or higher rating)

How Well Did GPS Course Increase Your Level of Confidence in Interviewing and Questioning Clients and Witnesses?



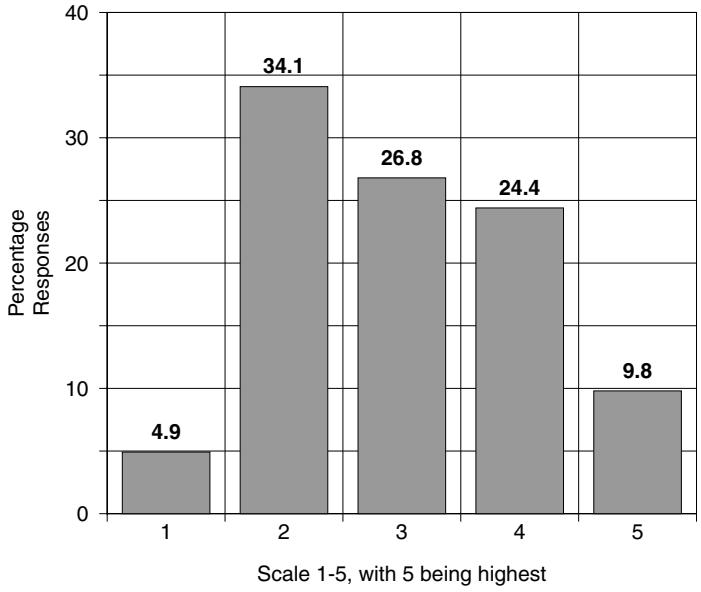
B. Negotiating Settlements and Agreements (78.6% answered with a 3 or higher rating)

How Well Did GPS Course Increase Your Level of Confidence in Negotiating Settlements and Agreements?



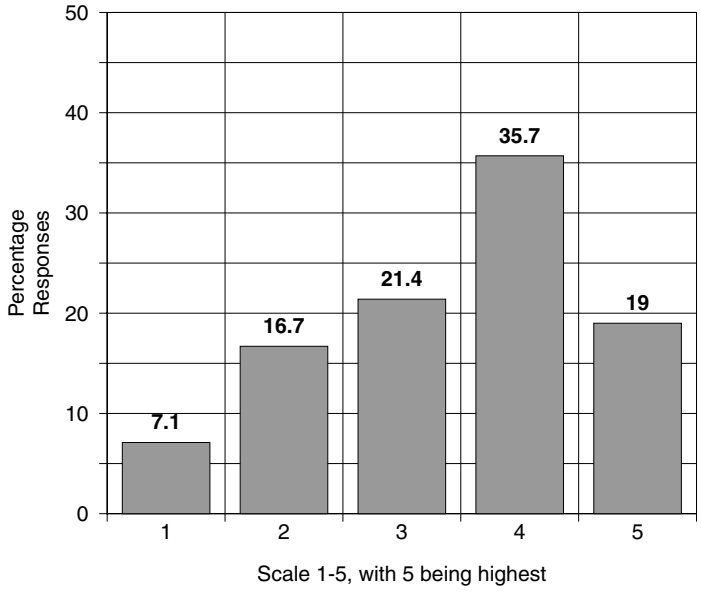
C. Pretrial Discovery and Factual Investigation (61% answered with a 3 or higher rating)

How Well Did GPS Course Increase Your Level of Confidence in Pretrial Discovery and Factual Investigation?



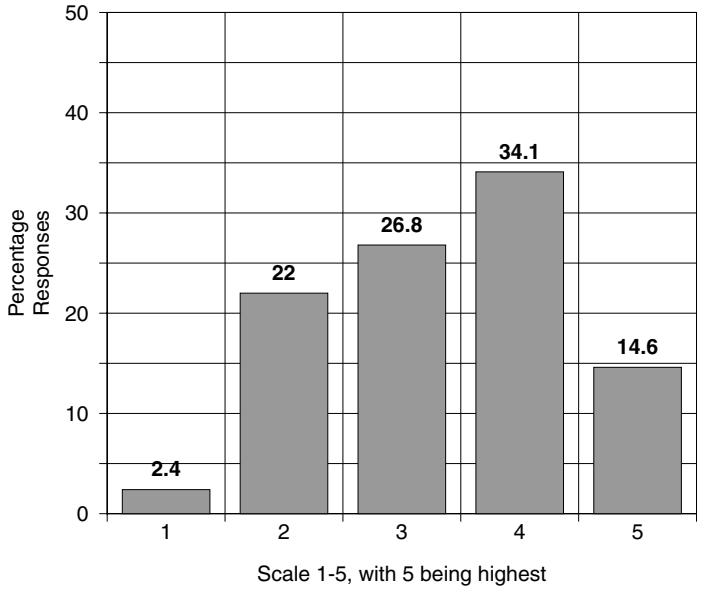
D. Drafting Legal Documents (76.1% answered with a 3 or higher rating)

How Well Did GPS Course Increase Your Level of Confidence in Drafting Legal Documents?



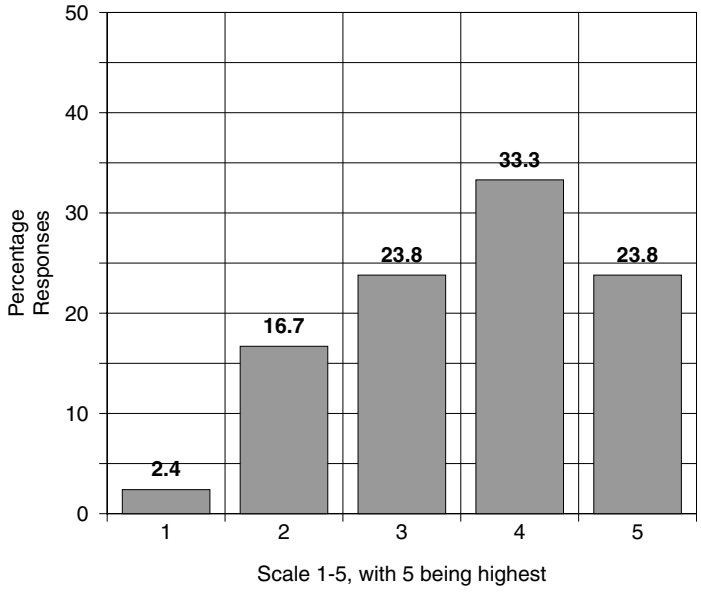
E. Advocacy (75.5% answered with a 3 or higher rating)

How Well Did GPS Course Increase Your Level of Confidence in Advocacy?



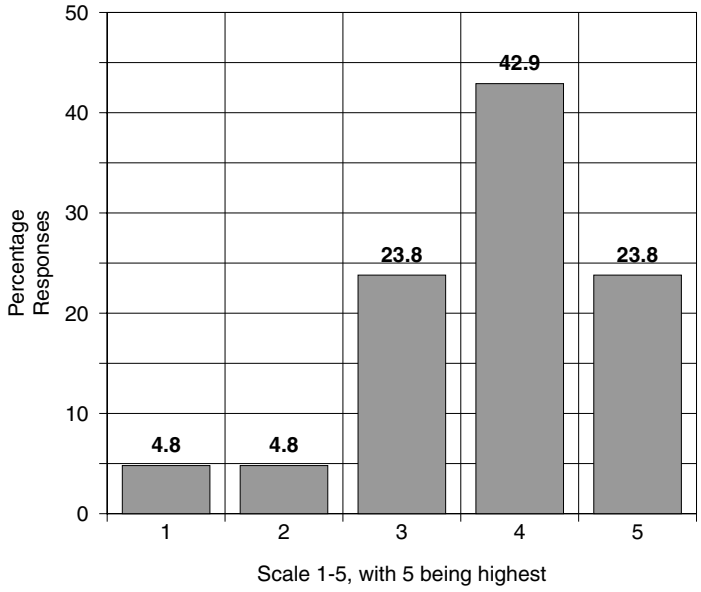
F. Law Office Management and Organization (80.9% answered with a 3 or higher rating)

How Well Did GPS Course Increase Your Level of Confidence in Law Office Management?



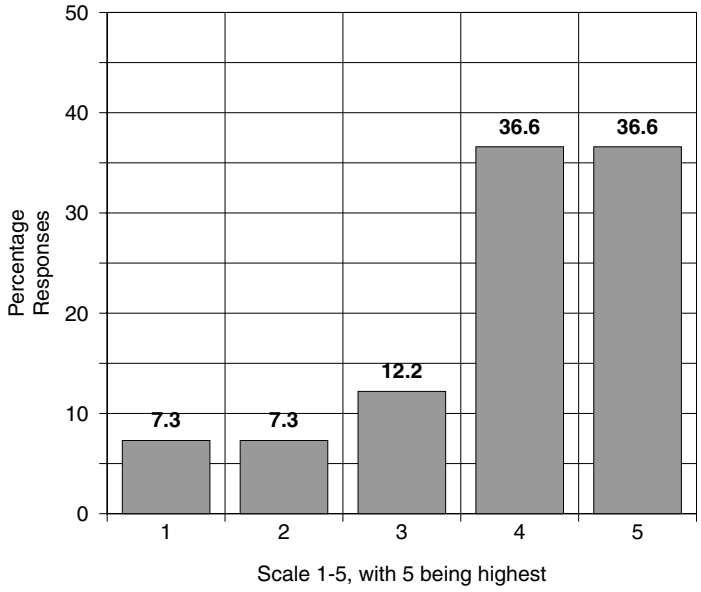
G. Recognizing and Resolving Ethical and Professional Issues (90.5% answered with a 3 or higher rating)

How Well Did GPS Course Increase Your Level of Confidence in Recognizing and Resolving Ethical Issues?



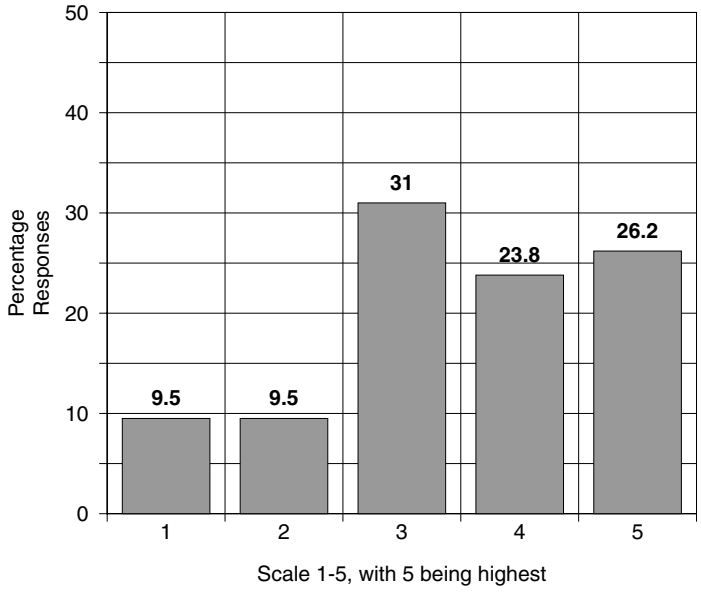
H. Working Cooperatively as Part of a Team (85.4% answered with a 3 or higher rating)

How Well Did GPS Course Increase Your Level of Confidence in Working Cooperatively as Part of a Team?

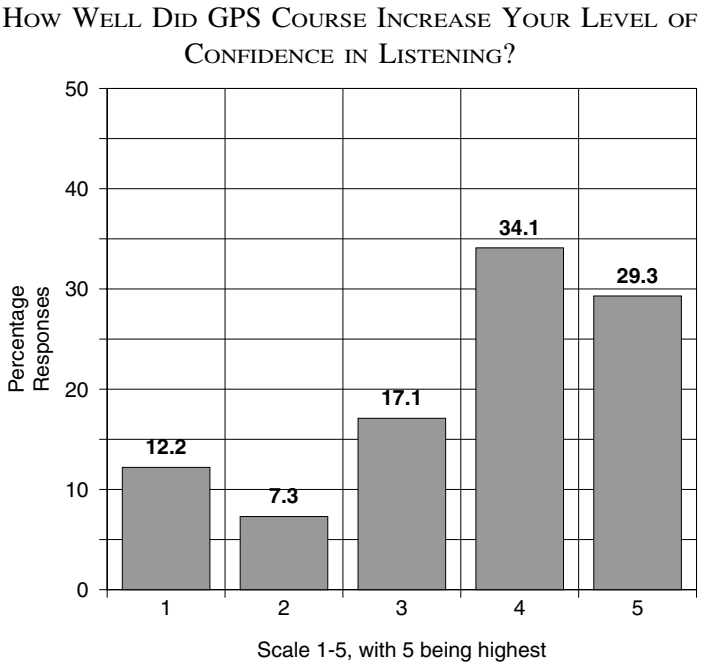


I. Legal Analysis and Reasoning (81% answered with a 3 or higher rating)

How Well Did GPS Course Increase Your Level of Confidence in Legal Analysis and Reasoning?

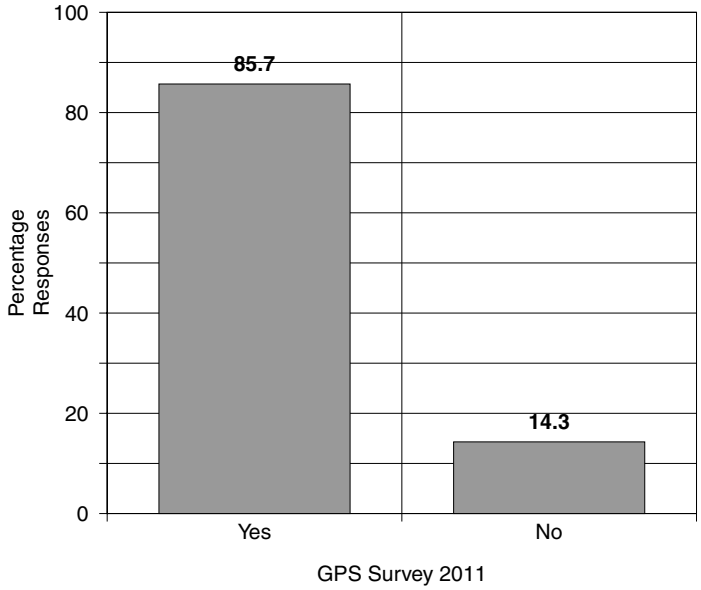


J. Listening (80.5% answered with a 3 or higher rating)



To the question of "Would you recommend continuing the G.P.S. course as a requirement of graduation?" 85.7% of the responders answered "Yes" as shown in the graph below.

WOULD YOU RECOMMEND CONTINUING THE G.P.S. COURSE AS A REQUIREMENT OF GRADUATION?



V. ALUMNI COMMENTS

Alumni comments[29] in the survey reflect the differences among alumni in rating the value of the course to their early practice experience. Some alumni found the course valuable in ways not specifically described as a course design goal. Some found the course was of value in building a sense of confidence in their ability to enter the legal profession. Others found the course valuable in making career choices as they were exposed to different career areas of legal practice. The following selected and excerpted comments are organized to illustrate these differences among alumni.

A. Comments on the value of building a sense of confidence:

> By the end of the course [,] I felt a new level of confidence & felt as though I had a professional tool kit sufficient to get me started in the practice of law.
>
> . . . .

[29] *See supra* notes 25-27 and accompanying text.

> GPS was a wonderful class and gave me an edge over non-PSL graduates who had done very little in the way of practical experience prior to graduating from law school.
>
> . . . .
>
> Working with students of another law school this year has shown me how much more I am prepared for the 'real legal world' than many of them. I believe a big part of this is PSL, specifically the GPS program. . . .

B. Comments on the value of being exposed to different practice areas:

> The variety of practice areas helps students who are not sure of their legal future get real life experience in those areas.
>
> . . . .
>
> Meeting active attorneys in the community and learning about the practice of law in several different areas. It helped me figure out which areas I was interested in.
>
> . . . .
>
> The thing I remember the most is meeting and talking to actual practicing attorneys. That simply has to continue and looking back through school—especially as a working student—you just don't get that exposure in the night program.
>
> . . . .
>
> I loved the overview it provided. It really opened my eyes to some legal fields I had never considered.

C. Comments on preferences for skills learned:

> [T]he law office management is invaluable . . . I think it is invaluable to someone who needs to know how an office is run.
>
> . . . .
>
> I think that since I am focusing in estate planning . . . the items that were taught that relate to my scope of the law was definitely beneficial to me being a solo practitioner.

D. Suggestions for changes or improvements:

> I'd suggest PSL consider developing several practice area specific electives using the GPS model.
>
> . . . .
>
> I would add in a section on document management, especially electronic document management.
>
> . . . .
>
> More time spent on practice exercises, less time spent on lectures.
>
> . . . .
>
> Some of the sections were a bit repetitive and I felt like we did the same kind of motion multiple times.
>
> . . . .
>
> Sometimes the written assignments were not clear and there was not enough time to do most of them.
>
> . . . .
>
> [I]nstead of focusing so much on different areas of the law, focus on different skills and spend more time on those skills.
>
> . . . .
>
> I think the course is useful however I did not feel it dove deep enough into any of the practice areas we were exposed to simply because of the time restraints in the subject matter.

E. Positive Comments:

> The GPS course brought everything together for me. I started to feel like a lawyer the first day of class—a new & slightly overwhelmed lawyer, but a lawyer nonetheless.
>
> . . . .
>
> I found the GPS program to be tremendouosly (sic) helpful preparation.
>
> . . . .
>
> This was a very valuable course to take.
>
> . . . .

> It was great to experience application, rather than just theory, while still in school. Thank you!
>
> . . . .
>
> GPS was a highlight of my legal education.
>
> . . . .
>
> I believe the GPS course is very valuable as a capstone to practice-ready, practical, hands-on, legal education.

VI. Survey Analysis

The survey results[30] show that most alumni consider the G.P.S. course to have been of substantial value to their early law practice experience. In response to the question "How well did the G.P.S. course achieve its goal of helping you become practice ready?" 85.8% of the alumni surveyed answered the question with a rating of 3 or higher. In fact, most of the alumni responded with a 4 or 5 rating to this question. An almost identical percentage of alumni surveyed, 85.7%, answered, "Yes," to the question of whether the G.P.S. course should be retained as a requirement of graduation. When alumni were asked to rank the value of teaching particular skills to the achievement of practice readiness, however, the overall percentage ratings were not as high. The average rating given to the learning of particular skills was 80% as compared to the rating of 85.8% given to the overall course. This may be explained by some alumni finding the course of value in preparing them for practice in ways that are not specific to the teaching of particular skills. This was reflected in comments about feeling increased confidence and exposure to different practice areas that helped some students make career choices.

The skills which rated the highest among alumni surveyed were as follows: Listening (80.5%), Law Office Management (80.9%), Legal Analysis (81%), Working Cooperatively (85.4%), Interviewing and Questioning (85.6%), and Resolving Ethical and Professional Issues (90.5%). Although higher ratings given to some skills learning may be gratifying, the results raise questions with respect to *why* such skills learning were rated higher than others in the course.

Of particular interest are the alumni ratings for the learning of the skill of Legal Analysis. Legal Analysis is not one of the listed skills in the G.P.S. course design, yet a large percentage of the alumni surveyed rated it higher than many of the skills the course was designed to teach. Is it possible that this suggests the skill of legal analysis, which the Carnegie Study[31] concedes law

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[30] *See supra* notes 25-27 and accompanying text.

[31] Sullivan et al., *supra* note 8.

schools traditionally teach quite well, is learnable from practicing other skills? Is this just one of those "unexpected outcomes" that suggests that learning legal analysis is enhanced from practicing other skills? If so, such conclusion might be an argument for orienting other courses to a "practice ready" learning style.

The highest rating for the learning of skills and values was in Recognizing and Resolving Ethical and Professional Issues. A professional responsibility course is already a required course in the curriculum. One would not think that the teaching of such skills would top the list of skills learned and valued for practice readiness after a course in the subject matter was already taken. Does this mean that "hands on" courses are simply better or such effective supplements to other professional responsibility courses that the subject should be taught in that manner?

Of equal interest to the authors were the differences among alumni in the ratings given to the learning of the specific skills the course was designed to teach. An example is the learning of the skills of Factual Investigation, which received the lowest rating with 61% of the alumni surveyed rating its value with a 3 or higher. Skill exercises involving factual investigation included instruction and practice in conducting a judgment debtors' examination, and the taking of depositions.[32] Perhaps some of the alumni who rated the value of teaching this skill believed they received sufficient instruction in other courses or that they did not receive sufficient instruction or practice in the G.P.S. course. It might be that some alumni have not yet had occasion to use the skills of deposition taking or other factual investigation in their practices.

Other skills that received a less than 80% rating of 3 or higher from alumni were Negotiating (78.6%), Drafting (76.1%), and Advocacy (75.5%). Is it because other courses in the curricula have already adequately taught the skills involved in drafting, advocacy and negotiation? Is it due to the nature of their practice experience? Is it an issue of selection and training of lawyer-faculty or course design?

Not yet mentioned in this discussion is what the survey tells us about the learning of skills and values related to practice readiness that are not identified in the studies of competencies deemed essential to lawyers in the practice of law. The learning of skills related to law office management, although not an "identified skill," may arguably be the most important skills taught in the G.P.S. course. Phoenix School of Law only offers a course in law office man-

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[32] *See* Gerst & Hess, *supra* note 1, at 535-36. In the Personal Injury module, court-reporter students participated in the deposition practice exercises by administering oaths to witnesses, using their stenography machines, and assuring that the *record* was not affected by student lawyers *talking over each other*, *talking too fast*, or otherwise being asked to say things, *off the record* without a stipulation to do so from the other parties.

agement in a summer session.[33] Its importance, especially to students who enter practice as sole practitioners or who form small law firms, cannot be overestimated. The only chance many students will have to obtain any law school instruction on this subject may be in the G.P.S. course.

One of the lessons learned from this survey is the importance of including questions asking for specific comments or explanations for the rating of each skill taught and practiced in addition to comments on the overall value of the course.[34] It would also be helpful to ask alumni to provide their work history, how long they have been in active practice, and their present employment status. With this information an analysis based on the length of time in law practice, and the different types of law practice, could be conducted. Such information would also help differentiate how the skills ratings of solo practitioners compare to the skills ratings of alumni employed by government agencies or law firms. Future surveys will include these additional questions in the hope that such information will provide answers to these questions.[35]

The present survey provides useful information and identifies areas of course design and course delivery where improvements can be made. One area identified by alumni is that we must assure that repetitive practice of a particular skill shows a progression from basic learning of a skill to increased practice of a skill at a greater complexity as the course progresses. In interviewing a client, for instance, the challenge is to ensure that the skill practice does not just cover the basic initial interviewing skills. The comprehensive curriculum design may need to be reviewed to ensure that students start with a basic initial interview in early classes and then progress to more complex interviewing and counseling skills in later classes.

The survey reinforces the need of some lawyer-faculty to receive additional and continuous training to refrain from "lecturing," or attempting to teach substantive law, except as it is necessary for the students to understand the context

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[33] As of this writing, the course has only been offered in two summer sessions. In the summer of 2010, there were twenty students enrolled and in summer of 2011, there were seventeen students. Records of the Registrar and Academic Records Department of Phoenix School of Law (2011) (on file with authors).

[34] Of concern to the authors in conducting this first survey was that alumni might be unwilling to answer a survey that took more than a few minutes of their time. In hindsight, this is now of less concern given the lost opportunity of gathering useful information.

[35] It is recognized that a survey assessment, usually referred to as an *indirect assessment*, assesses students' subjective experiences of their learning. In contrast, *direct assessment* would be observations from clients, other lawyers, judges, and those who have a chance to interact with graduates. *Direct* assessment is more valid but very difficult to obtain. *See What Is Assessment?*, U. CONNECTICUT., http://assessment.uconn.edu/what/index.html (last visited February 23, 2012). While it might be possible in the future to survey attorneys in law firms about the difference between a Phoenix School of Law graduate, who has taken the GPS course and another graduate who has not, it would be difficult to obtain such data at this time.

of the practice skills. The primary function of the lawyer-faculty is to provide instruction in the skill exercises and to provide informative feedback to the students' practice of the skill exercises.

Serious consideration is being given to the suggestion from one alumni comment that a G.P.S. module be offered focusing on the skills of using technology for things such as "electronic document management." The use of technology in the legal profession could also be incorporated into a module that not only teaches skills useful in practice, but addresses the ethical and professional issues that accompany the use of technology.

VII. Conclusion

The continued success of the G.P.S. course will determine not only its future at Phoenix School of Law, but will also have an effect on the establishment and maintenance of law practice skills and values courses at other schools. With feedback from alumni, input from the practicing legal community, and the creative efforts of law school faculty the needs of the legal community can be addressed in a manner that addresses the criticisms of past law school teaching. Students are placing their trust in their chosen law schools to prepare them to be ready to join the legal community and to be of immediate value and service in whatever capacity they choose to express their skills as lawyers.

Reporting Roulette: Complaining or Even Sitting on a Board Just Might Get You Sued

(aka The Immunity Laws in Arizona Are in a Terrible State of Disarray)

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** J.D., Phoenix School of Law, May 2011; assisted in writing this article as an extern at Jaburg & Wilk, P.C.

I. Introduction

The law of quasi-judicial immunity in Arizona is in a terrible state of disarray. It is difficult, if not impossible, to determine just what type of immunity applies to Arizona administrative proceedings. If one makes a complaint to certain Arizona boards or agencies, there can be no liability, regardless of what is reported or why. For other Arizona agencies, a complaint can result in a defamation lawsuit against—or potential liability for—the complainant, the witnesses, or even the sitting members of that board. The current state of Arizona law makes it difficult to determine whether statements made to a particular agency are subject to an absolute immunity—preventing any lawsuit—or a qualified privilege—allowing lawsuits for bad faith or reckless disregard for the truth.

It is difficult to ascertain which statements are fully protected and which are not. Arizona law is full of contradictions that often do not make sense. For example, someone complaining to the Arizona Medical Board could be liable if her complaint was not filed in good faith. Yet anyone can complain to the State Bar of Arizona and avoid liability, even if his complaint is a blatant lie or intentional fabrication.

This dichotomy arises for a number of reasons. On one hand, Arizona has a line of cases making it clear that statements related to court proceedings—whether made by a witness, a lawyer, or a party—are absolutely immune from liability in any type of case.[1] Similarly, absolute immunity is applied to statements made to the State Bar.[2] In addition, there are many cases where such absolute immunity is applied to statements made during arbitration, to any city council, and to the police during the reporting of a crime.[3]

On the other hand, there are many Arizona cases in which only a qualified privilege applies. These cases involve statements made to the following: the Federal Aviation Administration ("FAA"); the Liquor Board; a zoning control board; and, most recently, the Arizona Medical Board.[4] It is difficult to understand why someone can report a lawyer to the Arizona State Bar without fear of legal repercussion, but cannot report a physician to the Arizona Medical Board without risking a defamation or other lawsuit.

The overview part of this Article reviews the various immunities and their application to the administrative process. It looks at the immunities offered to three categories of persons who may be involved in the administrative process:

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[1] *See infra* Part II.A-C.

[2] *See infra* text accompanying note 29.

[3] *See infra* Part II.E.

[4] *See infra* Part III.B.

(1) complainants, (2) witnesses in administrative proceedings, and (3) board members who hear proceedings.

The later part discusses conflicting court decisions in the administrative arena with regard to absolute immunity and its application to quasi-judicial proceedings. This Article also reviews the move away from absolute privilege and toward qualified privilege, and the impact this move may have on officials and professionals, e.g., board members who may be subject to suits against them for their judicial functions. Furthermore, it discusses the blurring line between absolute and qualified immunity. This Article concludes with a few humble suggestions in response to the *Tri-City* case where the court found that legislature-imposed "good faith" standards of immunity are "abrogated" whenever absolute immunity might have otherwise applied.[5]

II. IMMUNITIES: AN OVERVIEW

A. Absolute Immunity Explained

The availability of an absolute privilege has been somewhat restricted. It applies only when the public interest is so vital and apparent that complete freedom of expression is mandated.[6] The rationale supporting absolute privilege in the law of defamation has been explained as follows:

> [The privilege is based chiefly upon a] recognition that certain persons, because of their special position or status, should be as free as possible from fear that their actions in that position might have an adverse effect upon their own personal interest[s]. To accomplish this, it is necessary for them to be protected not only from civil liability but also from the danger of even an unsuccessful civil action. To this end, it is necessary that the propriety of their conduct not be inquired into indirectly by either court or jury in civil proceedings brought against them for misconduct in their position. Therefore, the privilege, or immunity, is absolute and the protection that it affords is complete. It is not conditioned upon the honest and reasonable belief that the defamatory matter is true or upon the absence of ill will on the part of the actor.[7]

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[5] Advanced Cardiac Specialists, Chartered v. Tri-City Cardiology Consultants, P.C., 214 P.3d 1024, 1028 (Ariz. Ct. App. 2009).

[6] Sobol v. Alarcon, 131 P.3d 487, 490 (Ariz. Ct. App. 2006); *see also* Lewis v. Swenson, 617 P.2d 69, 72 (Ariz. Ct. App. 1980).

[7] *Id.* at 490.

Absolute immunity is so all-encompassing that even the potential for retaliatory litigation or an inquiry into motive is prohibited. Here, the law recognizes that conduct, which would otherwise be actionable, escapes liability because an interest is of sufficient importance to society that it is entitled to protection, even if it is accompanied with uncompensated harm.[8] Socially important interests promoted by absolute privilege commonly include the following: judicial proceedings; legislative activities; certain high-level executive functions; and sometimes, crime reports.[9]

B. Qualified Immunity Explained

Absolute immunity is contrasted by qualified immunity, meaning the immunity is not absolute, but can be overcome. The United States Supreme Court calls qualified immunity "the norm" for executive officials.[10] Qualified immunity balances the need to absolutely protect the candor of certain persons in special positions against the "assumption that all individuals, whatever their position in the government, are subject to [ ] law."[11]

Qualified immunity is also called the "good faith" immunity.[12] It applies to discretionary acts within the scope of official duties.[13] However, in the event that the immunity is challenged, there will be a subjective inquiry into malice—whether acts were performed with intentional malice—and an objective inquiry into the reasonableness of the official action.[14] In other words, a person can defeat immunity in a suit against a complainant if the complainant "*knew or reasonably should have known* that the action he took within his sphere of . . . responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause deprivation of constitutional rights or other injury . . . ."[15]

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[8] Green Acres Trust v. London, 688 P.2d 617, 620 (Ariz. 1984) (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 114 p. 777-81 (1971)).

[9] Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982); Sanchez v. Coxon, 854 P.2d 126, 128 (Ariz. 1993); *id.* at 621; Ledvina v. Cerasani, 146 P.3d 70, 75 (Ariz. Ct. App. 2006); Johnson v. McDonald, 3 P.3d 1075, 1078 (Ariz. Ct. App. 1999); Lewis v. Swenson, 617 P.2d at 73.

[10] *Harlow*, 457 U.S. at 809 (1982) (stating that while absolute privilege has been extended to legislators in the legislative function, to judges in the judicial function, and to certain officials of the executive branch, qualified immunity is the general norm for other executive officials in general).

[11] Butz v. Economou, 438 U.S. 478, 506 (1978).

[12] *Harlow*, 457 U.S. 800 at 815.

[13] Scheuer v. Rhodes, 416 U.S. 232, 247 (1974), *abrogated by Harlow*, 475 U.S. 800.

[14] *See* Mason v. Arizona, 260 F. Supp. 2d 807, 819 (D. Ariz. 2003).

[15] *Harlow*, 457 U.S. at 815-16 (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)).

C. *Judicial Proceedings are Absolutely Privileged*

An absolute judicial privilege protects judges, parties, lawyers, witnesses, and jurors.[16] The purpose of providing these participants in the judicial process with absolute immunity from any liability is to promote complete, unrestrained exposure of all information needed to fully litigate claims before a tribunal.[17]

Absolute immunity requires that the acts raising privilege must have some relationship to those proceedings.[18] Although there must be some connection to the proceeding, the content of the communication need not be "strictly relevant"; it only needs to have "some reference to the subject matter of the proposed or pending litigation."[19] If there is a judicial proceeding, the immunity applies to virtually all persons involved in, and all aspects of, those proceedings.

1. Judges

Historically, the common law provides judges with an absolute privilege for all acts performed within the judicial function.[20] In addition, this is not limited to duly appointed judges, but applies to all officials performing a judicial function.[21] The rationale in defamation law supporting absolute privilege for judges is as follows:

> The public interest in securing the utmost freedom to those who preside over judicial proceedings or who otherwise perform a judicial function is so important as to preclude inquiry in a civil action into the motive or purpose of such an officer. Abuse of his official position by a judicial officer may subject him to impeachment, recall or removal, but it will not subject him to a civil action for defamation.[22]

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16 Johnson v. McDonald, 3 P.3d 1075, 1078 (Ariz. Ct. App. 1999); *see also* Lewis v. Swenson, 617 P.2d 69, 73 (Ariz. Ct. App. 1980) ("A witness called to testify at trial is also privileged, in our opinion, to answer the questions asked without fear of civil liability in damages to the litigants for any mistrial which may result from the answer, whether it is responsive to the question or not, and regardless of the witness' motives in answering.'").

17 Green Acres Trust v. London, 688 P.2d 617, 621 (Ariz. 1984).

18 *Id.*

19 *Id*. (quoting RESTATEMENT (SECOND) OF TORTS, § 588 cmt. c (1977)).

20 John v. Gibson, 270 F.2d 36, 39 (9th Cir. 1959).

21 RESTATEMENT (SECOND) OF TORTS § 895D (1979).

22 RESTATEMENT (FIRST) OF TORTS, § 585 cmt. a (1938).

2. Judicial Proceedings

Arizona courts have upheld the absolute privilege in various judicial settings.[23] These settings include, for example: statements in a complaint filed with the Commission on Judicial Qualifications;[24] statements filed while seeking to compel withdrawal of counsel and related complaints filed with the State Bar of Arizona;[25] statements in affidavits while moving for a new trial;[26] text in a *lis pendens* for a slander of title action;[27] and statements in engineering reports and recommendations to a board of directors used in the decision whether to file suit.[28] As a consequence of the policies underpinning absolute immunity, application of the privilege, once granted, is frequently extended to claims other than defamation when they arise from the same common factual root or set of circumstances.[29] "If the policy, which in defamation actions affords an absolute privilege or immunity to statements made in judicial and quasi-judicial proceedings, is really to mean anything then we must not permit its circumvention by affording an almost equally unrestricted action under a different label."[30]

3. Witnesses and Parties

All witness testimony, by person or affidavit, is protected by absolute privilege due to the significant role that witnesses play in exposing key information in the judicial process.[31] The rationale is as follows:

> The final judgment of the tribunal must be based upon the facts as shown by [the witnesses'] testimony, and it is necessary therefore that a full disclosure not be hampered by fear of private suits for defamation. The compulsory attendance of all witnesses in judicial proceedings makes the protection thus accorded the more necessary. The witness is subject to the control of the trial judge in the exercise of the privilege. For

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[23] *See* Bailey v. Superior Court, 636 P.2d 144, 146 (Ariz. Ct. App. 1981).

[24] *Id.*

[25] Drummond v. Stahl, 618 P.2d 616, 619 (Ariz. Ct. App. 1980).

[26] Todd v. Cox, 512 P.2d 1234, 1236 (Ariz. Ct. App. 1973).

[27] Stewart v. Fahey, 481 P.2d 519, 521 (Ariz. Ct. App. 1971).

[28] W. Techs., Inc. v. Sverdrup & Parcel, Inc., 739 P.2d 1318, 1322 (Ariz. Ct. App. 1986).

[29] *Id.* at 1323.

[30] *Id.* (citing Lone v. Brown, 489 A.2d 1192, 1197 (N.J. Super. Ct. App. Div. 1985) (absolute immunity from defamation prevented claims of fraudulent and negligent misrepresentation, as well as intentional interference with prospective contractual relations).

[31] *Todd*, 512 P.2d at 1235.

> abuse of it, he may be subject to criminal prosecution for perjury and to punishment for contempt.[32]

Uniquely, testimony need not be relevant or material to qualify for the privilege.[33] Additionally, it does not matter if the relevant statements were made voluntarily or declared inadmissible; the testimony still will be protected as long as it has some reference to the proceeding.[34]

Like witnesses, parties to litigation are given the same protection over their exchanges of information during the judicial process. The reason "parties . . . [are] granted an absolute privilege . . . [is] because of the overriding public interest that persons should speak freely and fearlessly in litigation, 'uninfluenced by the possibility of being brought to account in an action for defamation.'"[35] In addition, any party's statements to his attorney are protected by the attorney-client privilege.

4. Attorneys

Due to the tasks inherent in representing others before the court, broad application of the immunity privilege is particularly necessary for attorneys. "An attorney must seek discovery of evidence, interrogate potential witnesses, and often resort to ingenious methods to obtain evidence; thus, he must not be hobbled by the fear of reprisal by actions for defamation."[36] Absent this privilege, the potential to sue attorneys for defamation in connection with performing their job would hinder free discharge of the attorney duty owed to the client.[37] Justice demands that attorneys be free from such threat. Any other rule would have a chilling effect on vigorous prosecution of litigation.

D. Legislative Immunity is Absolute

Both the state and federal government constitutionally mandate absolute immunity protection of statements made by legislators during formal legislative meetings.[38] The supporting policy is similar to that for absolute judicial immunity granted when applied to attorneys; without it, the legislature could be

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[32] RESTATEMENT (SECOND) OF TORTS, § 588 cmt. a (1977).

[33] *Id.* § 588 cmt. c (1977).

[34] *Id.*

[35] Steward v. Fahey, 481 P.2d 519, 520-21 (Ariz. Ct. App. 1971) (quoting Laun v. Union Elec. Co., 166 S.W.2d 1065, 1068 (Mo. 1942)).

[36] Johnson v. McDonald, 3 P.3d 1075, 1079 (Ariz. Ct. App. 1999) (quoting Russell v. Clark, 620 S.W.2d 865, 868 (Tex. Civ. App. 1981)).

[37] Green Acres Trust v. London, 688 P.2d 617, 621 (Ariz. 1984).

[38] Sanchez v. Coxon, 854 P.2d 126, 128 (Ariz. 1993) (citing U.S. CONST. art. I, § 6, cl. 1; ARIZ. CONST. art. IV, pt. 2, § 7) (applying legislative immunity to city and town council members for speech during formal council meeting).

improperly constrained from performing its function. The privilege keeps discussion and debate open. Even when arguments are heated, the privilege supports candor and eliminates judicial inquiry into the motives for statements made by legislators.[39]

It has been argued that legislative immunity encourages qualified and otherwise willing individuals to serve in government. Absent this immunity, "only the foolish or irresponsible would serve."[40] "If executive officials are denied immunity, they may elevate personal interest above official duty. Public servants would be obligated to spend their time in court justifying their past actions, instead of performing their official duties."[41] Consequently, the policy favors immunity, as explained by Judge Learned Hand:

> There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance, it has been thought in the end better to leave unredressed wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.[42]

In judicial immunity, the specific content of statements does not provide the basis for the privilege. Instead, "[i]t is the occasion of the speech, not the content, that provides the privilege."[43] An absolute legislative privilege applies to legislators when "performing a legislative function although the defamatory matter has no relation to a legitimate object of legislative concern."[44] The privilege applies not only to legislators, but also to lesser legislative bodies, e.g., town councils.[45] Any other rule would frustrate the purposes for which the immunity is given.[46]

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[39] *Id.* at 129-30.

[40] *Id.* at 130 (quoting Noble v. Ternyik, 539 P.2d 658 (1993)) (stating, "[A] substantial number of capable people would be reluctant to serve if their statements, made in the course of their legislative duties, were . . . privileged only if the finder of fact found the statements were not made maliciously.").

[41] Chamberlain v. Mathis, 729 P.2d 905, 908-09 (Ariz. 1986).

[42] *Sanchez*, 854 P.2d at 129 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied,* 339 U.S. 949 (1950)).

[43] *Id.* at 130.

[44] *Id.* (emphasis omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 590 cmt. a (1977)).

[45] Green Acres Trust v. London, 688 P.2d 617, 621, 626 (Ariz. 1984).

[46] *Id*.

E. Reports of Crime may be Absolutely Immune

The public policy that supports absolute immunity for reports of crimes seems particularly strong in Arizona. According to the decision of the Court of Appeals of Arizona in *Ledvina v Cerasani*, absolute immunity assures the "utmost freedom of communication between citizens and public authorities" in investigating and preventing crime, apprehending criminals, and remedying wrongdoing.[47] Quoting another court, the Court in *Ledvina* reasoned as follows:

> The law does not, and should not, allow recovery in tort by all persons accused of crimes and not convicted. There is no guarantee in our society that only guilty persons will be accused and arrested . . . . [A] person wrongfully accused of a crime must bear that risk, lest those who suspect wrongful activity be intimidated from speaking about it to the proper authorities for fear of becoming embroiled themselves in the hazards of interminable litigation.[48]

Although other jurisdictions offer only qualified immunity to those involved in reporting crimes, the Court in *Ledvina* balanced the competing public policy concerns to offer greater protection via absolute immunity to victims, witnesses, and those who report wrongdoing.[49] To help reach this desired result, that Court of Appeals decision has stretched judicial immunity. Formal complaints to a prosecuting authority and informal statements to those investigating a suspected crime—e.g., the police—are now viewed as initial steps in a judicial proceeding.[50]

To further support this position, the Court in *Ledvina* looked to the Victims' Bill of Rights, which was adopted by Arizona in 1990 and amended the State Constitution.[51] The Victims' Bill of Rights intends that crime victims "be free from intimidation, harassment, or abuse throughout the criminal justice

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[47] Ledvina v. Cerasani, 146 P.3d 70, 75 (Ariz. Ct. App. 2006) (quoting Imig v. Ferrar, 138 Cal. Rptr. 540, 543 (Ct. App. 1977)).

[48] *Id.* at 75 (quoting McGranahan v. Dahar, 408 A.2d 121, 128 (N.H. 1979)).

[49] *Id.* ("The policy underlying the privilege is to assure utmost freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing.") (quoting Imig, 138 Cal. Rptr. at 543)). "In order for such investigation to be effective, 'there must be an open channel of communication by which citizens can call . . . attention to suspected wrongdoing. That channel would quickly close if its use subjected the user to a risk of liability for libel. A qualified privilege is inadequate under the circumstances. . . .'" *Id.* (quoting King v. Borges, 104 Cal Rptr. 414, 418 (Cal. Ct. App. 1972)).

[50] *Id*. (holding a report to police of slashed tires was absolutely privileged).

[51] ARIZ. CONST. art. II, § 2.1.

process."[52] Accordingly, collateral litigation of defamation claims would vitiate a victim's rights and stated public policy, and it would occur absent absolute immunity for reporting crimes.[53]

There is no certainty about crime-reporting immunity. An earlier Arizona case provided a different result regarding statements made by a detective while interrogating a shoplifting suspect and, thereafter, filing a police report.[54] In 1974, the Court of Appeals of Arizona held that the detective's statements were entitled only to a qualified privilege due to "the nature of [the detective's] office and/or the interest of the public to be informed on the subject of the communication."[55]

In *Selby v. Savard*, the Arizona appellate court found conduct to be conditionally privileged when allegations of criminal conduct were "of the most serious nature."[56] In this case, Savard, who owned a resort, accused Selby, who was a junior officer in the liquor enforcement division of the Arizona Department of Public Safety ("DPS"), of being involved in "many illegal activities."[57] Savard made the accusations to the Director of DPS.[58] The court held the statements to be defamatory because Savard knew the accusations were either probably false or made with reckless disregard for their truth.[59] The court reasoned that absent "good faith" reporting, there was no qualified privilege protecting defamatory statements about "public officials."[60] Savard was held liable for defamation despite having made his accusations to "law enforcement."[61]

The end result is that reports of a crime may or may not be protected by an absolute privilege. Uncertainty still exists under current Arizona law about crime-reporting immunity.

F. Immunities are not Favored

Behind all of this is a backdrop of judicial abhorrence to any form of immunity. The Arizona courts have made clear that they do not favor immunities and will not easily grant any absolute immunity. In Arizona, the trend started with *Grimm v. Arizona Bd. of Pardons and Paroles* where the Court

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[52] *Ledvina,* 146 P.3d. at 75 (quoting ARIZ. CONST. art. II, § 2.1).

[53] *Id.* (holding report to police of crime (slashed tires) was absolutely privileged).

[54] *See generally* S.H. Kress & Co. v. Self, 526 P.2d 754 (Ariz. Ct. App. 1974).

[55] *Id.* at 756.

[56] Selby v. Savard, 655 P.2d 342, 344 (Ariz. 1982).

[57] *Id.*

[58] *Id.*

[59] *Id.* at 346.

[60] *Id.*

[61] *Id.* It should also be noted that *Selby* was adjudicated in 1982, well before enactment of the Victims' Bill of Rights in 1990.

abolished absolute immunity for public officials.[62] *Ryan v. State* and *Kenyon v. Hammer* continued the trend.[63] In *Sanchez v. Coxon*, the court found that a town council member was entitled to absolute immunity; however, it hesitated and warned about extending immunities further: "We do not favor immunity from common law liability. Lack of responsibility can breed lack of care."[64]

III. The Conundrum: Quasi-Judicial Immunity

As noted, an absolute judicial privilege protects all those participating in a true judicial proceeding, including judges, parties, lawyers, witnesses, and jurors.[65] The courts have extended absolute immunity to some quasi-judicial proceedings. They also have held that absolute immunity protects participants—including complainants and witnesses—in proceedings before the State Bar,[66] the Commission on Judicial Qualifications,[67] and the Arizona Board of Document Preparers.[68] Yet, complaints to other boards are entitled only to qualified immunity, for example, when the complaint is to the FAA,[69] the Liquor Board,[70] or to a zoning board of adjustment.[71]

The courts seem to base the analysis on just how "judicial" the administrative proceeding might be. If the administrative proceeding is like a court proceeding—such as one before the Arizona Office of Administrative Hearings—it is likely that the proceeding will involve an absolute immunity. If the proceeding is one where there are no judicial trappings, then the proceeding may be subject to a qualified immunity or to none at all.[72]

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[62] *See generally* Grimm v. Ariz. Bd. of Pardons & Paroles, 564 P.2d 1227 (Ariz. 1977).

[63] *See generally* Ryan v. State, 656 P.2d 597 (Ariz. 1982), *superseded by statute*, Ariz. Rev. Stat. Ann. §§ 12-820, 12-826 (Westlaw through 2011 Legis. Sess.); *see also* Kenyon v. Hammer, 688 P.2d 961, 976 (Ariz. 1984) (stating that "[s]pecial privileges and immunities are not favored by Arizona law.").

[64] Sanchez v. Coxon, 854 P.2d 126, 130-31 (Ariz. 1993) (citations omitted).

[65] Johnson v. McDonald, 3 P.3d 1075, 1078 (Ariz. Ct. App. 1999); *see also* Lewis v. Swenson, 617 P.2d 69, 73 (Ariz. Ct. App. 1980) ("A witness called to testify at trial is also privileged, in our opinion, to answer the questions asked without fear of civil liability in damages to the litigants for any mistrial which may result from the answer, whether it is responsive to the question or not, and regardless of the witness' motives in answering.").

[66] *See infra* Part III.F.

[67] Bailey v. Superior Court, 636 P.2d 144, 145-46 (Ariz. Ct. App. 1981).

[68] Sobol v. Marsh, 130 P.3d 1000, 1002-03 (Ariz. Ct. App. 2006) (recognizing absolute privilege for complaints to Board governing legal document preparers).

[69] Lewis v. Oliver, 873 P.2d 668, 670 (Ariz. Ct. App. 1993).

[70] Melton v. Slonsky, 504 P.2d 1288, 1290-91 (Ariz. Ct. App. 1973).

[71] Burns v. Davis, 993 P.2d 1119, 1126-27 (Ariz. Ct. App. 1999); *see also* Carroll v. Robinson, 874 P.2d 1010, 1014 (Ariz. Ct. App. 1994) (qualified privilege applicable in proceeding to revoke license of childcare provider suspected of sexual misconduct).

[72] Grimm v. Ariz. Bd. of Pardons & Paroles, 564 P.2d 1227, 1233 (Ariz. 1977); *see also Burns*, 993 P.2d at 1126-27.

Application of absolute immunity can be justified by countervailing safeguards built into the judicial process. In judicial proceedings, opposing counsel may object to improper or irrelevant questions, and witnesses may be cross-examined.[73] Witnesses offer testimony under oath and by subpoena. Witnesses who answer untruthfully may be subject to charges of perjury, or even contempt if they are intentionally not responsive.[74] The proceedings are adversarial, pursuant to due process, and have well-established rules. In addition, counsel represents the parties. Furthermore, there is opportunity for appeal. All these trappings provide some degree of fairness for the person who is the subject of the complaint; however, the same may not be true during a quasi-judicial proceeding.

A. Quasi-Judicial Proceedings must be Truly Judicial

With conflicting court decisions about immunity in the administrative arena, some framework must be used to determine if a proceeding is sufficiently judicial to apply the absolute immunity applicable to judicial proceedings. The Court of Appeals of Arizona, in *Burns v. Davis*, addressed this issue head on. The court based its determination on "whether the proceeding was sufficiently judicial to merit the heightened protection of an absolute privilege."[75] To that end, the *Burns* court looked at the following factors:[76] (1) is a judicial officer or tribunal involved, one who "exercises judicial functions"; (2) can the board "require compulsory attendance of all witnesses"; (3) is the person required to take an oath; (4) does the person speaking face "the risk of perjury or contempt for untrue statements"; (5) is there the opportunity for "trial-like advocacy [with the board] taking on the role of a court"; (6) does the proceeding allow for "cross-examination of the witnesses"; and (7) is there any form of judicial review?

After balancing these factors, the *Burns* court found there were insufficient judicial trappings in the proceedings before the Sedona Zoning Board of Adjustment; therefore, the court applied only a qualified privilege.[77] Although this Article focuses on Arizona law, other courts have applied a similar analysis.[78]

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[73] Lewis v. Swenson, 617 P.2d 69, 73 (Ariz. Ct. App. 1980).

[74] *Id.*

[75] *Burns*, 993 P.2d at 1126 (citing RESTATEMENT (SECOND) OF TORTS, § 558, com. a).

[76] *Id.* at 1126-27 (citing RESTATEMENT (SECOND) OF TORTS, § 588 (1977)).

[77] *Id.* at 1127.

[78] *See* Rockwood Bank v. Gaia, 170 F.3d 833, 838 (8th Cir. 1999) (privilege based on "such traditional judicial powers as the conducting of hearings at which witnesses may be summoned and examined, documents subpoenaed, and judgments handed down . . . .") (quoting Wright v. Over-The-Road & City Transfer Drivers, 945 S.W.2d 481, 491 (Mo. Ct. App. 1997); Kelley v. Bonney, 606 A.2d 693, 703-04 (Conn. 1992) (Grievances to state board of education are abso-

In short, an agency and its adjudicative proceedings should have the attributes of a court if it seeks to obtain an absolute immunity. Administrative agencies seeking to extend immunity protections could benefit from evaluating these factors and determining whether the agency's procedures could be expanded to increase the chance of obtaining absolute immunity.

B. Public Officials are not Automatically Immune

Those sitting on a board, or representing a board, may not automatically be immune from a lawsuit. At common law, a long line of precedent for public official immunity derived originally from the English maxim, "the King can do no wrong."[79] The underlying premise of public official or governmental immunity is that "it cannot be tortious conduct for [the] government to [properly] govern [its representatives]."[80] This privilege does not derive from the judicial or the legislative functions; rather, it is grounded in public policy.[81]

Today's policy reasons for official immunity involve the need to encourage competent people to serve in public office and to act responsibly—but independently—in their official capacity. The law should permit public officials to perform official duties without fear of spending time in court to justify their actions.[82] Typically, courts recognize immunity where officials set public policy or perform acts, which inherently require judgment or discretion, similar to the legislative function.[83]

The scope of the privilege gets more complicated in light of competing interests at the administrative level.[84] Courts must weigh a public official's need for protection while performing his duties against an individual's entitlement to a remedy for the public official's wrongdoings.[85] While there may be no reliable criteria for judging independent decisions at the policy-making level, most non-policy administrative and operational functions of government can be readily measured against the need to assign responsibility for unre-

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lutely privileged; the agency must possess most or all of the following powers: (1) to exercise discretion; (2) find facts; (3) make binding orders and judgments; (4) affect personal or property rights of individuals; (5) examine witnesses and hear litigation of issues; and (6) enforce decisions or enforce penalties.).

[79] Grimm v. Ariz. Bd. of Pardons & Paroles, 564 P.2d 1227, 1231 (Ariz. 1977).

[80] Ryan v. State, 656 P.2d 597, 600 (Ariz. 1982) (quoting Commercial Carrier Corp. v. Indian River Co., 371 So.2d 1010 (Fla. 1979), *superseded by statute,* ARIZ. REV. STAT. ANN. §§ 12-820, 12-826 (Westlaw through 2011 Legis. Sess.); *see also* Chamberlain v. Mathis, 729 P.2d 905, 908 (Ariz. 1986). ("The rationale for granting executive government officials immunity for conduct within the scope of their employment is that the government must be allowed to govern.").

[81] *Chamberlain*, 729 P.2d at 912.

[82] *Id*. at 908-09.

[83] *Id*. at 909.

[84] *Id.* at 909-10.

[85] *Id.*

strained conduct. "While society may want and need courageous, independent policy decisions among high level government officials, there seems to be no benefit and, indeed, great potential harm in allowing unbridled discretion without fear of being held to account for their actions for every single public official who exercises discretion."[86] Thus, the immunity given to most government officials is qualified.

The trend against absolute immunities started with *Grimm v. Arizona Board of Pardons and Paroles,* where the Supreme Court of Arizona abolished absolute immunity in favor of qualified immunity for public officials (here, a parole board improvidently released a prisoner).[87] While still mired in a task-oriented analysis that considered "policy level" versus "administrative level" tasks of public officials to determine immunity, the *Grimm* court determined that absolute immunity "in other than true judicial proceedings is not required, and, indeed, is improper."[88] Since *Grimm*, courts have given qualified immunity to police officers,[89] city and town council members,[90] the Director of the Arizona State Health Department,[91] a county sheriff whose report implicated a county jail inmate in an assault on another prisoner,[92] and state officials who directed the firing of a childcare facility director who had been accused of child molestation.[93]

Chamberlain v. Mathis, in which the Arizona Supreme Court reaffirmed the general rule announced in *Grimm*, presents a good example of public official qualified immunity.[94] *Chamberlain* also provides a more reflective analysis.[95] Here, five internal audit employees at the Arizona Health Care Cost Containment System (AHCCCS) brought a defamation action against the Director of the Arizona Department of Health Services (Mathis) for referring to

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[86] Grimm v. Ariz. Bd. of Pardons & Paroles, 564 P.2d 1227, 1233 (Ariz. 1977). Official immunity is not analyzed in the context of a judicial setting, but in the context of the administrative setting. The discretion of an administrative official is not that of a judge. By training and tradition, the trust placed in the judgment of a judge is not the same as that of an administrative officer. *Id.* at 1231.

[87] *Id.* at 1228-29.

[88] *Id.* at 1233 (citation omitted) (stating "[D]emocracy by its very definition implies responsibility. In this day of increasing power wielded by governmental officials, absolute immunity for nonjudicial, nonlegislative officials is outmoded and even dangerous.").

[89] Ryan v. State, 656 P.2d 597, 598-600 (Ariz. 1982) *superseded by statute*, ARIZ. REV. STAT. ANN. §§ 12-820, 12-826 (Westlaw through 2011 Legis. Sess.).

[90] Sanchez v. Coxon, 854 P.2d 126, 129 (Ariz. 1993).

[91] Chamberlain v. Mathis, 729 P.2d 905, 907, 914 (Ariz. 1986).

[92] Carlson v. Pima Cnty, 687 P.2d 1242, 1243-44, 1247 (Ariz. 1984) ("There is no absolute privilege in Arizona for public officers and employees of the state and its political subdivisions.") (quoting Portonova v. Wilkinson, 627 P.2d 232, 234 (Ariz. 1981)).

[93] Carroll v. Robinson, 874 P.2d 1010, 1012-13, 1018 (Ariz. Ct. App. 1994).

[94] *See generally Chamberlain*, 729 P.2d 905.

[95] *Id.*

them as incompetent, unqualified, and uninformed.[96] Attaching absolute immunity to the Director, the trial court dismissed the case, but the appeals court reversed.[97] In remanding the action, the Arizona Supreme Court weighed the need to deter public officials from acting with improper conduct or motive against the need to compensate legitimate victims of defamation.[98] The Court held that public officials have a qualified privilege whereby they are protected "from liability for acts within the scope of their public duties unless the official knew or should have known that he was acting in violation of established law or acted in reckless disregard of whether his activities would deprive another person of [his] rights."[99] Essentially, the Court recognized that if public officials do not act in good faith while performing their official duties, they are appropriately at risk.[100] The court reasoned, in part, that requiring plaintiffs to objectively prove bad faith or malice minimizes the negative aspects of lawsuits against public officials.[101]

C. Witnesses and Complainants may not be Absolutely Immune Either: Public Interest Immunity

Closely related to the "public official privilege" is the "public interest privilege" recognized at common law. The public interest privilege "involves communications made to those who may be expected to take official action of some kind for the protection of some interest of the public."[102] Although the public interest privilege has overtones of judicial privilege, the policy reasons for granting the public interest privilege are much weaker. The public interest privilege considers the need for uninfluenced speech in litigation, but declines to extend uninfluenced speech to proceedings before administrative bodies "where a volunteer informer may '[vent] his malice under the guise of protecting the public.' "[103]

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[96] *Id.* at 907.

[97] *Id*. at 908.

[98] *Id.* at 909.

[99] *Id.* at 912. (citations omitted).

[100] *Id.* at 909.

[101] *Id.* at 913.

[102] Lewis v. Oliver, 873 P.2d 668, 673 (Ariz. Ct. App. 1993), *cert. denied*, 513 U.S. 929 (1994); s*ee also* RESTATEMENT (SECOND) OF TORTS, § 598 (1977) ("An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that (a) there is information that affects a sufficiently important public interest, and (b) the public interest requires the communication of the defamatory matter to a public officer or a private citizen who is authorized or privileged to take action if the defamatory matter is true.").

[103] Melton v. Slonsky, 504 P.2d 1288, 1290-91 (Ariz. Ct. App. 1973) (quoting Meyer v. Parr, 37 N.E.2d 637, 641 (Ohio Ct. App. 1941).

Both policies are served by extending a defeasible privilege to statements before an administrative board.[104] Limiting the privilege neither precludes open discussion nor automatically deprives individuals of a remedy for wrongdoing.[105] The right of individuals to freely express their views upon the subject under consideration at hearings is protected.[106] At the same time, such hearings are not to become a possible forum for "unfettered character assassination."[107]

Courts have applied a qualified public interest privilege in numerous governmental agency settings. These settings include statements made to the FAA, the National Transportation Safety Board,[108] the Board of Adjustment,[109] and the Department of Health Services.[110]

D. Statutory "Abrogation" of the Absolute Immunity: Tri-City

The Court of Appeals of Arizona muddied the waters of the privilege debate when it decided *Advanced Cardiac Specialists, Chartered v. Tri-City Cardiology Consultants, P.C.*[111] In *Tri-City*, the court concluded that Arizona Revised Statute § 32-1451(A) abrogated the common law absolute privilege that might otherwise apply to a complaint letter written to the Arizona Medical Board; the court found that a qualified privilege applied.[112]

The *Tri-City* court started its analysis with the perhaps overbroad statement that "[a]t common law, there is an absolute privilege for reports involving professional misconduct in quasi-judicial proceedings,"[113] thereby implying an absolute immunity applied to reports made to the Medical Board.[114] The court considered the following language from Arizona Revised Statute § 32-1451(A): "[a]ny person or entity that reports or provides information to the [Medical] board in good faith is not subject to an action for civil dam-

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104 *See id.* at 1291.

105 *Id.*

106 *Id.*

107 *Id.* (holding that statements to the Arizona State Liquor Board were qualifiedly privileged).

108 Lewis v. Oliver, 873 P.2d 668, 669-670 (Ariz. Ct. App. 1993).

109 Burns v. Davis, 993 P.2d 1119, 1127 (Ariz. Ct. App. 1999).

110 *See generally* Carroll v. Robinson, 874 P.2d 1010 (Ariz. Ct. App. 1994) (allowing DHS employees to exercise their discretion in good faith, without fearing civil liability, to protect the welfare of children in day care centers).

111 *See generally* Advanced Cardiac Specialists, Chartered v. Tri-City Cardiology Consultants, P.C., 214 P.3d 1024 (Ariz. Ct. App. 2009).

112 *Id.* at 1026.

113 *Id.* at 1027.

114 *See supra* Part III.A-C (the dicta that at common law there was an absolute immunity for reports to the medical board is questionable).

ages. . . ."[115] The court determined that the "[l]egislature amended [Ariz. Rev. Stat.] § 32-1451(A) to abrogate the common law absolute privilege in the context of reports involving medical malfeasance."[116]

In other words, the court found that when the legislature imposed a "good faith" standard of immunity, the legislature "abrogated" whatever absolute immunity might have otherwise applied.[117] The court's ruling is highly significant because the legislature has routinely provided a good faith standard in order to protect those who sit on various boards as well as those who provide information to a board.

One might argue the court created an immunity that did not really exist, and then struck it down through a statute that was not clearly intended to do so.[118] Regardless of any criticism, the concept of legislative abrogation must now be considered a significant factor in determining whether an absolute or qualified immunity applies, and if so, the scope of the immunity.[119] As a consequence of *Tri-City*, Arizona agencies should review their reporting and other immunity statutes to look for language that may abrogate absolute immunity. Assuming absolute immunity is desired, relevant agencies may need to seek statutory revision.

E. Application of the "Good Faith" Standard

The legislatively-enacted "good faith" standard still presents a formidable protection to those covered by the standard.[120] The *Tri-City* court dismissed the lawsuit on the basis of the good faith standard.[121] The *Tri-City* court imposed the same standard first adopted in *New York Times Co. v. Sullivan*,[122] and stated, "[a]n abuse through 'actual malice' occurs when the defendant makes a statement knowing its falsity or actually entertaining doubts about its truth."[123] The court explained the "good faith" standard meant there is only a qualified privilege; therefore, to overcome qualified privilege, the "good faith" standard is required.[124] The court applied the same standard constitutionally required, and stated, "[t]hough the qualified privilege at issue in this case is

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115 *Tri-City*, 214 P.3d at 1028 (citing ARIZ. REV. STAT. ANN. § 32-1451(A) (Westlaw through 2011 Legis. Sess.) (emphasis removed)).

116 *Id.* at 1027.

117 *Id.* at 1027-28.

118 *See id.*

119 *See id.*

120 *Id.*

121 *Id.* at 1027-29.

122 *See generally* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

123 *Tri-City*, 214 P.3d at 1029.

124 *Id.* at 1028-29.

rooted not in the First Amendment but in state law, the same standard governs both privileges."[125]

In *Tri-City*, the requirement of proving good faith serves to prevent malicious attacks on character and reputation, particularly when other safeguards are not available.[126] In numerous and varied situations, the standard can be applied uniformly and in equal measure, and it has already been the subject of countless judicial interpretations and applications. The good faith standard for liability in qualified immunity situations can be useful.

F. The Result: A Hodgepodge of Immunities

When *Tri-City* is applied, Arizona agencies face a hodgepodge of immunities.[127] If a particular agency has statutory protection for good faith actions, this would mean only a qualified immunity applies.[128] If, on the other hand, an agency's statute is silent or provides an unqualified immunity, then actions involving that agency are absolutely protected and absolutely immune.[129] The application and the outcome are a matter of statutory construction.

The attached chart demonstrates the *Tri-City* findings and shows the consequences of the *Tri-City* analysis.[130] The chart examines all professions requiring licenses under Title 32 of the Arizona Revised Statutes dealing with "Professions and Occupations."[131] The chart examines whether there is an absolute or qualified privilege for three categories of persons involved in the administrative process: (1) those who complain to a particular board (complainants); (2) those who later provide information to that board (witnesses); and (3) those who sit on the board (members).[132] The results seem inconsistent, contradictory, and unjustified.

Thus, it appears that a complaint made to the boards that license accountants, physical therapists, architects, engineers, and some others referenced in the chart are all absolutely privileged.[133] Complaints to such boards, at least under *Tri-City*, can never be the basis for a lawsuit, even if the complainant lied or acted maliciously and intentionally.[134] On the other hand, complaints to

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[125] *Id.* at 1029.

[126] *Id.* at 1028.

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

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

[129] *See infra* Appendix I: Immunity Status of Licensed Professions and Occupations in Arizona [hereinafter Appendix I].

[130] *See infra* Appendix I.

[131] *See generally* ARIZ. REV. STAT. ANN. § 32 (Westlaw through 2011 Legis. Sess.); *See infra* Appendix I.

[132] *See infra* Appendix I.

[133] *See infra* Appendix I.

[134] *See infra* Appendix I.

most boards, such as the Arizona State Board of Nursing or the Arizona Medical Board, seem to be protected only by a qualified privilege.[135] Why someone can complain to the State Bar or the Certified Public Accountant Board with immunity, but the same person could risk a lawsuit for telling the Medical Board or Nursing Board about an unsafe practitioner, is very difficult to understand.

The results are equally inconsistent for the immunity applied to those who sit as board members.[136] Those who sit on the Board of Barbers, Board of Cosmetology, and other select boards are absolutely immune. However, those who sit as members on most boards are protected only by a qualified immunity.[137]

In all, Title 32 of the Arizona Revised Statutes includes forty-two categories of regulated professions.[138] Those who complain in sixteen of the forty-two categories can expect to have an absolute immunity protecting their complaint.[139] Complainants to the remaining twenty-six agencies could face litigation if they act with malice.[140] Similarly, there are eleven professional categories where those in charge have not had their absolute immunity abrogated because the statute is silent about their protection.[141] Members of the remaining thirty-one boards could face litigation if they act with malice.[142]

IV. Some Humble Suggestions

The analysis of immunity under the common law, as developed by individual cases, is sometimes confusing and contradictory.[143] This is due in large measure to an inappropriate extension of the absolute judicial privilege applied to reports involving misconduct—of officials and professionals—that is treated as though it were heard in a "quasi-judicial" proceeding. The court considers factors to determine whether a proceeding is "sufficiently judicial to merit the

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[135] *See infra* Appendix I.

[136] *See infra* Appendix I.

[137] *See infra* Appendix I.

[138] *See generally* Ariz. Rev. Stat. Ann. § 32 (Westlaw through 2011 Legis. Sess.); *See infra* Appendix I.

[139] *See infra* Appendix I.

[140] *See infra* Appendix I.

[141] *See infra* Appendix I.

[142] *See infra* Appendix I.

[143] *See* Sobol v. Alarcon, 131 P.3d 487, 490 (Ariz. Ct. App. 2006) ("We can conceive of no reason why a person who reports allegedly unethical conduct by a lawyer should be protected by absolute immunity while a person who reports allegedly unethical conduct by a certified legal document preparer should be subjected to the risk of civil liability.").

heightened protection of an absolute privilege."[144] It is easy to understand why such a standard could be interpreted and applied in conflicting ways.

In *Tri-City*, the Court of Appeals of Arizona recognized that the common law absolute privilege when attached to reports of professional misconduct was "fully abrogated in favor of a qualified privilege for those acting 'in good faith.'"[145] Nevertheless, the standard of good faith would seem to mean there could no longer be any form of quasi-judicial absolute immunity, even if the agency has all the trappings of a court.

In other words, under the *Tri-City* analysis, board members can face litigation for judicial functions, such as sitting in judgment of a licensee in a formal hearing, since the statute provides only "good faith" immunity.[146] It is in this context that two suggestions are offered.

A. Apply the Quasi-Judicial Immunity to True Quasi-Judicial Proceedings

As noted, most boards only have a qualified immunity protecting its members, complainants, and witnesses.[147] This is true even if a statute says the board or witnesses are complainants. This seems unfortunate if the board is carrying out a true judicial function.

The first suggestion is that courts should apply the tests used in *Burns v. Davis.*[148] If the proceeding is a true judicial function, then absolute immunity should apply, even if the applicable statute only protects good faith actions. Courts should decline to adopt *Tri-City's* reasoning as to true quasi-judicial functions.[149]

B. Fix the Statutes for Consistency

The statutes need fixing. First, the use of the term "good faith" is a fiction because courts routinely apply a conditional privilege when the statute includes the term.[150] In *Tri-City*, the court directly equated the two standards.[151] Thus,

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[144] Burns v. Davis, 993 P.2d 1119, 1126-27 (Ariz. Ct. App. 1999) (reversing the trial court's grant of absolute privilege and applying qualified privilege to statements before a Sedona Board of Adjustment meeting as "[not] sufficiently judicial in character to merit the heightened protection of absolute privilege").

[145] Advanced Cardiac Specialists, Chartered v. Tri-City Cardiology Consultants, P.C., 214 P.3d 1024, 1028 (Ariz. Ct. App. 2009).

[146] *See id.*

[147] *See supra* Part III.F.

[148] Burns, 993 P.2d at 1126-27.

[149] *Tri-City*, 214 P.3d at 1027-28.

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

[151] *Tri-*City, 214 P.3d at 1027-28.

the good faith condition should be abandoned for an honest term like "conditional immunity." Alternatively, the language used in the Nursing Board statutes—immunity for acting "without malice and in the reasonable belief that the member's action is warranted by law"[152]—should be used.

Second, the statutes need consistency. It makes no sense that some statutes are silent about immunity, while others provide for good faith protection or a qualified immunity using some related term.[153] It also does not make sense to not mention immunity regarding some boards. A wholesale statutory change should be adopted that carefully and consistently defines the applicable immunity. Those regulated, and those regulating, need to know specifically what level of protection applies to their actions and to complaints against them. The statutes, as written, do not provide this information.

Rejecting *Tri-City* and clarifying the statutes provides consistent results and clear expectations of immunity. The current patchwork scheme is untenable and potentially exposes participants in the quasi-judicial process to liability. Common sense, rapid resolution through statutory refinement, and judicial cure will restore the process to efficacy.

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[152] ARIZ. REV. STAT. ANN. § 32-1602(E) (Westlaw through 2011 Legis. Sess.).
[153] *See infra* Appendix I.

APPENDIX I.
IMMUNITY STATUS OF LICENSED PROFESSIONS AND OCCUPATIONS IN ARIZONA

Profession	**Civil Liability Standard for Complainant**[154]	**Civil Liability Standard for Witness**[155]	**Civil Liability Standard for Board Member**	**Source(s) – Arizona Revised Statutes**
Architect, Assayer, Engineer, Geologist, Home Inspector, Landscape Architect, Surveyor	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	Board members are immune from civil liability "with respect to acts done and actions taken in good faith within the scope of their authority."	§ 32-110
Barber	A person who "provides the information in good faith is not subject to liability for civil damages."	A person who "provides the information in good faith is not subject to liability for civil damages."	The statute is silent: absolute privilege applies?	§ 32-354(A)
Cosmetologist	A person who "provides the information in good faith is not subject to liability for civil damages."	A person who "provides the information in good faith is not subject to liability for civil damages."	The statute is silent: absolute privilege applies?	§ 32-573(A)
Certified Public Accountant	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	There is no civil liability or cause of action against board members "for any act done or proceeding undertaken or performed in good faith."	§ 32-704

154 This chart lists all of the statutes dealing with professions and occupations from Title 32 of the Arizona Revised Statutes. ARIZ. REV. STAT. ANN. § 32. Many boards have separate liability for licensees who provide information in bad faith, omit, or report misleading information. A few examples include the following: Certified Public Accountants may not "[k]nowingly make a false or misleading statement [t]o the board[,]" *id.* § 32-741 (A)(14)(a) (West, Westlaw current through second regular session of 2012 Legis. Sess.); Dentist/Dental Hygienist who fails to report professional incompetence or falsely report are subject to disciplinary action, *id.* § 32-1263(D); Physical Therapists are to not provide "misleading, deceptive, untrue or fraudulent representations" or fail "to report to the board any direct knowledge of an unprofessional, incompetent or illegal act" or else they will face disciplinary action, *id.* § 32-2044; and Mammographic Technologists are required to "report any suspected violations of § 32-2821 to the board[,]" *id.* § 32-2841(G).

155 Witnesses for various professions may be subpoenaed—in which case, they are then protected by judicial privilege. Examples include the following: the Medical Board "on its own initiative or on application of any person involved in the investigation may issue subpoenas to require the attendance and testimony of witnesses[,]" *id.* § 32-1451.01(B)(1); and The Board of Psychologists and "its authorized agents may issue subpoenas to compel the attendance and testimony of witnesses[,]" *id.* § 32-2091.10(B).

Podiatrist	Any "person that reports or provides information to the board in good faith" is not subject to civil liability.	Any "person that reports or provides information to the board in good faith" is not subject to civil liability.	Board members are personally immune from suit "with respect to all acts done and actions taken in good faith" within the scope of their authority.	§ 32-852.01(A) § 32-802(I)
Chiropractor	"Any person who reports or provides information to the board in good faith is not subject to civil damages."	"Any person who reports or provides information to the board in good faith is not subject to civil damages."	Board members are personally immune from civil liability with respect to "all actions he takes in good faith" within his or her authority.	§ 32-924(B) § 32-901(F)
Collection Agent	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	§ 32-1001
Contractor/Builder	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	§ 32-1101
Dentist/Dental Hygienist	"Any person who in good faith makes a report . . . to the board or to any person or committee acting on behalf of the board is not subject to civil liability . . . as a result of the report."	"Any person who in good faith makes a report . . . to the board or to any person or committee acting on behalf of the board is not subject to civil liability . . . as a result of the report."	Board members are immune from civil liability "with respect to all acts done and actions taken in good faith and within the scope of their authority."	§ 32-1263.02(F) § 32-1207(C)
Denturist	"Any person who in good faith . . . report[s] . . . to the board . . . is not subject to liability for civil damages."	"Any person reporting . . . in good faith shall not be subject to civil liability."	Board members are immune from civil liability "with respect to all acts done and actions taken in good faith and within the scope of their authority."	§ 32-1263.02(I) § 32-1295(A) cites to § 32-1207
Funeral Director/ Embalmer	"Any person who reports or provides information to the board in good faith is not subject to an action for civil damages."	"Any person who reports or provides information to the board in good faith is not subject to an action for civil damages."	Board members are immune from personal liability "with respect to acts done and actions taken in good faith and in furtherance" of their duties.	§ 32-1311(A) & (B)

Doctor of Medicine	"Any person or entity that reports or provides information to the board in good faith is not subject to an action for civil damages."	"Any person or entity that reports or provides information to the board in good faith is not subject to an action for civil damages."	"Members of the board are personally immune from suit with respect to all acts done and actions taken in good faith and in furtherance" of their duties.	§ 32-1451(A) § 32-1402(F)[156]
Doctor of Naturopathic	"Any person or entity that reports or provides information to the board in good faith is not subject to an action for civil damages."	"Any person or entity that reports or provides information to the board in good faith is not subject to an action for civil damages."	Board members are immune from civil liability for "any act done or proceeding undertaken or performed in good faith and in furtherance" of their duties.	§ 32-1551(A) § 32-1502(C)
Nurse	Any person who "reports or provides information to the board in good faith is not subject to civil liability."	Any person who "reports or provides information to the board in good faith is not subject to civil liability."	Board members acting "within the scope of board duties, without malice and in the reasonable belief that the member's action is warranted by law is not subject to civil liability."	§ 32-1664(D) § 32-1602(E)
Dispensing Optician	"Any person who in good faith makes a report . . . is not subject to liability for civil damages."	"Any person who in good faith makes a report . . . is not subject to liability for civil damages."	The board is immune from civil liability "for any act . . . perform[ed] in good faith and in furtherance" of their duties.	§ 32-1691.01(I) § 32-1672(F)
Optometrist	Any person "who reports or provides information to the board in good faith is not subject to civil damages."	Any person "who reports or provides information to the board in good faith is not subject to civil damages."	Board members are "immune from suit with respect to all acts done and actions taken in good faith and in furtherance" of their duties.	§ 32-1744(A) § 32-1703(C)
Osteopath	"Any person who reports or provides information to the board in good faith is not subject to civil damages" or civil liability.	"Any person who reports or provides information to the board in good faith is not subject to civil damages" or civil liability.	Board members, and related positions, "are immune from civil liability for any act they do in good faith" within their duties.	§ 32-1855(A) § 32-1802(D)

156 *Id.* § 32-1402(F), *held unconstitutional on other grounds as recognized in* Tucson Woman's Clinic v. Eden, 379 F.3d 531, 550 (9th Cir. 2004).

Pharmacist	"Any person or entity that reports or provides information to the board in good faith is not subject to an action for civil damages."	"Any person or entity that reports or provides information to the board in good faith is not subject to an action for civil damages."	Board members "are personally exempt from suit with respect to all acts done and actions taken in good faith and in furtherance" of their duties.	§ 32-1927(D) § 32-1902(F)
Pharmacy Technician	"Any person or entity that reports or provides information to the board in good faith is not subject to an action for civil damages."	"Any person or entity that reports or provides information to the board in good faith is not subject to an action for civil damages."	Board members "are personally exempt from suit with respect to all acts done and actions taken in good faith and in furtherance" of their duties.	§ 32-1927.01(D) § 32-1902(F)
Physical Therapist	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	"A board member who acts within the scope of board duties, without malice and in the reasonable belief that the person's action is warranted by law is immune from civil liability."	§ 32-2002(E)
Psychologist	"A person who reports or provides information to the board in good faith is not subject to an action for civil damages."	"A person who reports or provides information to the board in good faith is not subject to an action for civil damages."	All board members are "personally immune from suit with respect to all acts done and actions taken in good faith" and in furtherance of their duties.	§ 32-2081(C) § 32-2062(F)
Behavior Analyst	"A person who reports or provides information to the board in good faith is not subject to an action for civil damages."	"A person who reports or provides information to the board in good faith is not subject to an action for civil damages."	All board members are "personally immune from suit with respect to all acts done and actions taken in good faith" and in furtherance of their duties.	§ 32-2091.09(A) § 32-2062(F)
Real Estate Broker/Salesperson, Cemetery Broker	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	§ 32-2101
Veterinarian	"A person who reports information to the board in good faith pursuant to this section is immune from civil liability."	"A person who reports information to the board in good faith pursuant to this section is immune from civil liability."	Board members are immune from civil liability "with respect to acts done and actions taken in good faith within the scope of their authority."	§ 32-2240(B) § 32-2208
Structural Pest Control	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	§ 32-2301

Professional Driving School Trainer	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	§ 32-2351
Private Investigator	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	Board members "are personally immune from suit with respect to all acts done and actions taken in good faith and in furtherance" of their duties.	§ 32-2404
Physician Assistant	Any person "that reports or provides information to the board in good faith is not subject to an action for civil damages."	Any person "that reports or provides information to the board in good faith is not subject to an action for civil damages."	"Board employees . . . are immune from civil liability for good faith actions they take" to execute their duties.	§ 32-2551(A) § 32-2504(D)
Security Guard	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	§ 32-2601
Radiologic Technologist	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	Board members are "personally immune from suit for all actions taken in good faith in furtherance" of their duties.	§ 32-2802 § 32-2802(J)
Mammographic Technologist	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	Board members are "personally immune from suit for all actions taken in good faith in furtherance" of their duties.	§ 32-2802(J)
Homeopathic Physician	"Any person who reports or provides information to the board in good faith is not subject to an action for civil damages."	"Any person who reports or provides information to the board in good faith is not subject to an action for civil damages."	"Board members and board employees are immune from civil liability for any good faith action they take to implement" their duties.	§ 32-2934(A) § 32-2902(F)
Private Postsecondary Educator	"A person who reports or provides information to the board in good faith is not subject to an action for civil damages."	"A person who reports or provides information to the board in good faith is not subject to an action for civil damages."	Board members are immune from civil liability "with respect to acts done and actions taken in good faith without wanton disregard of their statutory duties."	§ 32-3052(C) § 32-3002(E)
Health Professional	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	§ 32-3201

Behavioral Health Professional (Social Worker, Professional Counselor, Marriage/Family Therapist, Substance Abuse Counselor)	"Any person or entity that reports or provides information to the board in good faith is not subject to an action for civil damages."	"Any person or entity that reports or provides information to the board in good faith is not subject to an action for civil damages."	Board member "are personally immune from suit with respect to all acts done and actions taken in good faith and in furtherance" of their duties.	§ 32-3281(A) § 32-3252(G)
Occupational Therapist	"A person who provides information to the board in good faith" will not be subject to civil damages.	"A person who provides information to the board in good faith" will not be subject to civil damages.	The statute is silent: absolute privilege applies?	§ 32-3442(C)
Respiratory Therapist	"[A]ny other person that reports or provides information to the board in good faith is not subject to an action for civil damages."	"[A]ny other person that reports or provides information to the board in good faith is not subject to an action for civil damages."	Board members are "personally immune from suit with respect to all acts done and actions taken in good faith and in furtherance" of their duties.	§ 32-3553(B) § 32-3504(E)
Appraiser	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	§ 32-3601
Acupuncturist	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	Board members are "not subject to civil liability for any act done or proceeding undertaken or performed in good faith and in furtherance" of their duties.	§ 32-3902(I)
Certified Reporter	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	The statute is silent: absolute privilege applies?	§ 32-4041
Athletic Trainer	Any person who provides information in "good faith" is "immune from civil liability."	Any person who provides information in "good faith" is "immune from civil liability."	"A board member who acts within the scope of board duties, without malice and in the reasonable belief that the person's action is warranted by law is not subject to civil liability."	§ 32-4158(B) § 32-4102(E)
Massage Therapist	"Any person or entity that reports or provides information to the board in good faith is not subject to an action for civil damages" and is "immune for civil liability."	"Any person or entity that reports or provides information to the board in good faith is not subject to an action for civil damages" and is "immune for civil liability."	"A board member who acts within the scope of board duties, without malice and in the reasonable belief that the member's action is warranted by law is not subject to civil liability."	§ 32-4254(A) § 32-4256(B) § 32-4202(E)

Reefer Sadness: How Patients will Suffer if Arizona Refuses to Implement Its Own Medical Marijuana Law

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FOREWORD

Subsequent to the submission of this piece for publication, the State of Arizona and the United States District Court for the District of Arizona both took significant action toward full implementation of the Arizona Medical Marijuana Act ("AMMA"). On January 4, 2012, the United States District Court for the District of Arizona dismissed without prejudice Arizona's declaratory judgment action seeking a ruling as to the legality of the AAMA and whether State employees who distribute medical marijuana are subject to federal prosecution.[1] Judge Susan Bolton ruled that the State may file an amended complaint requesting relief if it could overcome two fatal issues: (1) the failure of federal prosecutors to threaten to prosecute State or municipal employees for implementing the new law—a central basis for the State's lawsuit; and (2) the inability of the State to demonstrate that it would experience any harm absent a court ruling.[2] Judge Bolton wrote, "Plaintiffs do not challenge any specific action taken by any Defendant. Plaintiffs also do not describe any actions by State employees that were in violation of the [Controlled Substances Act] or any threat of prosecution for any reason by federal officials. These issues, as presented, are not appropriate for judicial review."[3]

On January 13, 2012, Arizona Governor Jan Brewer announced that the State would not re-file the federal lawsuit and directed the Arizona Department of Health Services to begin the process of licensing medical marijuana dispensaries, pending future rulings in State court.[4]

On January 20, 2012, Maricopa County Superior Court Judge Richard Gama, ruled that the State must allow operation of medical marijuana dispensaries.[5] Judge Gama invalidated the Arizona Department of Health Service's

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[1] Order at 10, Arizona v. United States, No. CV-11-02072-PHX-SRB (D. Ariz. 2012).

[2] As a result, the court found that the State failed to satisfy the constitutional and prudential component for ripeness and dismissed the case. *See id.* at 6-7.

[3] *Id.* at 9. For all intents and purposes, the State was seeking an advisory ruling from the district court, and the district court properly sidestepped the State's procedural faux pas. *Id.*

[4] Press Release, Jan Brewer, Governor of Ariz., Directing Implementation of the Arizona Medical Marijuana Act §§ 36-208 to 36-2819 (Jan. 13, 2012), http://azgovernor.gov/dms/upload/PR_011312_MarijuanaStatement.pdf.

[5] Yvonne Wingett Sanchez, *Judge Gives Medical Pot Ok*, USA TODAY (Jan. 20, 2012, 4:21 AM), http://www.usatoday.com/USCP/PNI/NEWS/2012-01-20-PNI0120met-politics-potART_ST_U.htm.

restrictions on who may operate dispensaries based on their place of residence or financial history, finding that the State exceeded its statutory authority.[6]

On January 24, 2012, Arizona state officials announced that they would not appeal the superior court's ruling.[7] Arizona Department of Health Services ("ADHS") Director Will Humble announced that his goal to begin accepting dispensary applications in April 2012 and to potentially award the maximum 125 dispensary licenses by mid-June 2012.[8] Humble expects fully operational dispensaries to open their doors to qualified patients in July or August 2012.[9]

In the aftermath, Governor Brewer acknowledged that, "[i]t is well-known that I did not support passage of Proposition 203, and I remain concerned about potential abuses of the law . . . . Know this: I won't hesitate to halt State involvement in the AMMA if I receive indication that State employees face [federal] prosecution due to their duties in administering this law."[10] While Arizona seems headed toward full implementation of the State's voter-approved medical marijuana law, at least some barriers and uncertainty will remain until dispensaries actually open their doors and qualified patients gain practical access to medical marijuana without State impediment. Such uncertainty may even chill pharmacists' willingness to dispense. As news continues to break, the patient community of Arizona waits for long anticipated access to medical marijuana to be realized.

I. INTRODUCTION

No state would benefit more from a prescription for medical marijuana than the great State of Arizona—put plainly, it is high time for Arizona state officials to chill out. The State's latest response to Arizona voters' decision to legalize medical marijuana, for the third time in the past two decades, could backfire in an explosion of irony: it might encourage hundreds of thousands of Arizona citizens to grow marijuana in their homes, sanctioned by state law.

In November 2010, Arizona voters approved Proposition 203, which legalized medical marijuana use in Arizona for people with certain debilitating conditions such as cancer, glaucoma, HIV, Lou Gehrig's disease, Crohn's disease, Alzheimer's disease, and others that cause severe and chronic pain or nausea. Marijuana is of great medical benefit to a vast number of people with a range of

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[6] *Id.* In addition, the Court struck down regulations that required applicants seeking to become medical marijuana patients to be Arizona residents for three years; have no history of personal or corporate bankruptcy; and have no "government debts," including parking tickets.

[7] *Id.*

[8] Will Humble, *Dispensaries in AZ This Summer?*, ARIZ. DEPARTMENT OF HEALTH SERVICES DIRECTOR'S BLOG (Jan. 25, 2012), http://directorsblog.health.azdhs.gov/?p=2175.

[9] *Id.*

[10] *See* Press Release, Jan Brewer, *supra* note 4.

medical conditions, including extreme nausea and loss of appetite caused by chemotherapy, chronic pain, severe migraines, seizures, and glaucoma.[11] A January 2010 ABC News/Washington Post poll found that more than eight in ten Americans (81%) supported efforts to make marijuana legal for medical use.[12]

The AMMA took effect in April 2011.[13] Arizona is one of sixteen states that has legalized marijuana for medical purposes.[14] Patients rejoiced. The many in need would be able to rely on safe and legal access to the only effective treatment option for their pain and suffering through conventional distribution by dispensaries regulated by the State.

On May 27, 2011—in an unprecedented move—Arizona Attorney General, Tom Horne, on behalf of Governor Jan Brewer and the State of Arizona, challenged the State's own medical marijuana law in federal court.[15] The suit against the United States Justice Department and other defendants asked a federal judge to render a declaratory judgment regarding whether strict compliance with the Arizona law provides a "safe harbor" from federal prosecution of state employees or whether federal law pre-empts the Arizona measure.[16] Arizona officials maintain that the innocent intent of the lawsuit is solely to seek guidance as to whether Arizona may legally implement the law. Skeptical observers claim that the lawsuit is a political move by state officials who vehemently opposed the AMMA and now seek to undermine the will of the voters.[17]

Regardless of what a state or federal court may one day rule as to the propriety of federal prosecution of state employees implementing the law, Arizona officials still have a choice: to implement or not to implement—how and to what extent.[18] Many other articles address the doctrinal tension between

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[11] *See infra* Part III.

[12] Gary Langer, *High Support for Medical Marijuana*, ABC NEWS (Jan. 18, 2010), http://abcnews.go.com/PollingUnit/Politics/medical-marijuana-abc-news-poll-analysis/story?id=9586503.

[13] *See id.*

[14] *See id.*

[15] *See id.*

[16] *See id.* The author finds this stance quite odd and interesting at the very least. The State argued vociferously that it had the right to pass and enforce SB 1070 based on state's rights principles. *See* Brief for Petitioner, Arizona v. United States, 132 S. Ct. 845 (2011) (No. 11-182). Now, in contrast, the State argued that federal law was pre-empting state law with a marijuana issue.

[17] *See* Langer, *supra* note 12.

[18] In theory, state executive officials are bound by federal law and cannot enforce state law that is preempted by federal law. U.S. CONST. art. *VI, cl. 2;* Gonzales v. Raich, 545 U.S. 1 (2005). In practice, however, state officials often persist in applying their own state laws regardless of contrary federal court judgments. *See* Langer, *supra* note 12. For example, the United States Supreme Court in *Raich*, held that federal law preempted California's medical marijuana law. *Gonzales*, 545 U.S. at 1. However, post-*Raich*, California continued to enforce its own law. *See*

state medical marijuana legalization and federal drug laws.[19] This article will instead explore the real life ramifications for Arizona citizens if the State of Arizona refuses to implement the AMMA. Failure to implement the law in its entirety could result in no operational medical marijuana dispensaries in Arizona, no state-issued medical marijuana identification cards for patients, and no tax revenue generated from sales. Instead, certain "safety valve" provisions in the law will allow all current and future patients with a doctor's recommendation to legally grow their own marijuana in their homes.

Although the "safety valve" provisions will ensure that patient possession of medical marijuana will remain legal under state law, State refusal to implement the law will create grave difficulty for seriously ill patients who need access to medical marijuana—patients who now have *legal* access will lack *practical* access. The State's failure to implement will also create serious confusion and difficulty for state law enforcement. Absent a universal online database of legal users, police will have virtually no way of determining whether an individual's possession of marijuana is legal. Absent clear and unequivocal State support of its own law, inconsistency of enforcement is certain to permeate law enforcement agencies. If Arizona refuses to implement the AMMA, politicians who claim to be *protecting* individuals will actually create a counterproductive environment, denying patients' access to the medical mari-

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Langer, *supra* note 12. All other states with medical marijuana laws also continued to enforce their own law post-*Raich*. *See id.* Further, several new states passed medical marijuana laws after *Raich*. ALASKA STAT. § 11.71.090 (LEXIS through 2011 legislation); ARIZ. REV. STAT. ANN. §§ 36-2801 to -2819 (Westlaw through 2011 legislation); CAL. HEALTH & SAFETY CODE § 11362.5, 11362.7-.83 (West, Westlaw through Ch. 4 of 2012 Reg. Sess.); COLO. CONST. ART. XVIII, § 14 (LEXIS through 2011 legislation); DEL. CODE ANN. tit. 16, §§ 4901-4926 (LEXIS through 78 Del. Laws, Ch. 213); HAW. REV. STAT. §§ 329-121 to -128 (LexisNexis, LEXIS through 2011 legislation); ME. REV. STAT. tit. 22, §§ 2421-2430-B (2011), *available at* http://www.mainelegislature.org/legis/statutes/22/title22ch558-Csec0.html; MICH. COMP. LAWS §§ 333.26421-.26430 (West, Westlaw through P.A.2012, No. 4, of the 2012 Reg. Ses.); MONT. CODE ANN. §§ 50-46-301 to -344 (2011), *available at* http://data.opi.mt.gov/bills/mca_toc/50_46_3.htm; NEV. REV. STAT. § 453A.010-.400 (2011), *available at* http://www.leg.state.nv.us/NRS/NRS-453A.html; N.J. STAT. ANN. § 24:6I (West, Westlaw through 2011 legislation); N.M. STAT. ANN. § 26-2B-1 (West, Westlaw through 2011 legislation); ORE. REV. STAT. §§ 475.300-.346 (2011), *available at* http://www.leg.state.or.us/ors/475.html; R.I. GEN. LAWS. §§ 21-28.6-1 to -12 (LEXIS through Jan. 2011 Legis. Sess.); VT. STAT. ANN. tit. 18, §§ 4472-4474(L) (LEXIS through 2011 Legis. Sess.); WASH. REV. CODE § 69.51A.005-.903 (2011), *available at* http://apps.leg.wa.gov/rcw/default.aspx?cite=69.51A

[19] Ilya Somin, Gonzales v. Raich*: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J. L. & PUB. POL'Y 507, 539 (2006); *see Gonzales*, 545 U.S. at 1; K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 286-93 (2005); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009); Marcia Tiersky, Comment, *Medical Marijuana: Putting the Power Where It Belongs*, 93 NW. U. L. REV. 547, 551 (1999).

juana that they need. Many patients may go so far as to start growing marijuana in their own homes without meaningful State supervision or resort to illegal and unregulated street drugs that could cause them harm.

Part II of this article explores the development of medical marijuana policy in the United States throughout the Twentieth and Twenty-First centuries. Part III will provide evidence of medical marijuana efficacy and explain patient need for safe and legal access. Part IV will describe the passage of Proposition 203 and explore provisions of the AMMA. This Part will also flesh out the main points of the State's federal complaint for declaratory judgment as to the validity of the law. Part V will take an in-depth look at the "safety valve" provision within the Arizona law that among other things, allows patients to grow their own marijuana absent operational dispensaries. Part VI will critically analyze the ramifications of the State forcing patients to "grow their own" medical marijuana. The article concludes that the State of Arizona should abide by the will of Arizona voters and fully implement the AMMA so that all qualified patients have safe, legal, and practical access to the medicine they require.

II. Development of Medical Marijuana Policy in the United States

A. Federal Policy

Marijuana, also known as cannabis, has a long history of therapeutic use. As far back as five thousand years ago in China, marijuana was recommended as a medicinal agent to treat constipation, rheumatic pains, and female disorders.[20] Marijuana possession, use, and trafficking were legal in the United States until 1937;[21] many individuals freely used marijuana for a number of medicinal purposes until the early 1940s.[22] In fact, between 1840 and 1900, medical journals published more than one hundred articles describing the therapeutic uses of marijuana.[23] Even then, physicians recognized marijuana's abil-

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[20] Sec'y of Health, Educ., & Welfare, Marijuana and Health: Fifth Annual Report 118-119 (1975).

[21] Max Beau, Medical Marijuana Changing Times II 71 (2011). *See* Harold E. Doweiko, Concepts of Chemical Dependency 122 (8th ed. 2012); Elisa H. Nelan, *Medical Marijuana: Research Priority, Hoax or Civil Right?*, Treatment Issues, Jan. 1997, *available at* http://www.aegis.com/pubs/gmhc/1997/GM110101.html.

[22] *See generally* Tod Mikuriya, *Therapeutic Potential and Medical Uses of Marijuana*, 14 J. Psychoactive Drugs 239 (1982).

[23] *See* Eric E. Sterling, *Drug Policy: A Smorgasbord of Conundrums Spiced By Emotions Around Children and Violence*, 31 Val. U. L. Rev. 597, 622 (1997).

ity to treat such medical conditions as menstrual cramps, chronic rheumatism, asthma, gastric ulcer, morphine addiction, and migraines.[24]

The federal government's medical marijuana policy shift began with the passage of the Marihuana Tax Act in 1937. The Marihuana Tax Act made possession of marijuana illegal throughout the United States but excluded possession for medical and industrial uses.[25] Some historians believe that legislators, who voted for the law, which excised a hefty tax on medical marijuana and a severe punishment of five years imprisonment for non-payment, made a terrible mistake—but not a policy mistake as one might think.[26] It seems legislators did not realize that "marijuana" and "cannabis" were one and the same.[27] They believed instead that marijuana was "a narcotic of some kind," totally separate from cannabis, a substance with which they were comfortable.[28] Leave it to Congress to bungle over five thousand years of experience with medical marijuana.[29] So began the sharp decline of accessibility to medical marijuana in America.[30]

The dawn of the 1960's—earth-shattering news this is not—ushered in an age of increased marijuana use among young people, resulting in President Nixon's request that Congress enact strict legislation to combat drug use.[31] In 1970, Congress responded by passing the Controlled Substances Act ("CSA"), which banned the possession, cultivation, and distribution of marijuana in the United States.[32] The CSA set out five schedules for drugs, establishing varying degrees of an individual's allowable control over each.[33]

Today, marijuana is a Schedule I drug, the most restrictive of the categories.[34] This category is reserved for drugs that have "a high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use of the drug . . . under medical supervi-

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[24] *See* LESTER GRINSPOON & JAMES B. BAKALAR, MARIHUANA THE FORBIDDEN MEDICINE 1 (rev. ed. 1997).

[25] *See* Nelan, *supra* note 21.

[26] *See* DAVID R. FORD, MARIJUANA: NOT GUILTY AS CHARGED 62-64 (1997).

[27] *See id.*

[28] *See id.* at 64.

[29] *See* LESTER GRINSPOON & JAMES B. BAKALAR, MARIHUANA THE FORBIDDEN MEDICINE 3 (rev. ed. 1997).

[30] *See* Nelan, *supra* note 21.

[31] Richard Nixon, Thirty-seventh President of the U.S., Special Message to the Congress on Control of Narcotics and Dangerous Drugs (July 14, 1969), *available at* http://www.presidency.ucsb.edu/ws/?pid=2126.

[32] 21 U.S.C. §§ 841, 844 (2006).

[33] *Id.* § 812.

[34] *Id.* § 812(b)(1).

sion."[35] Marijuana shares this designation with heroin, LSD, and PCP.[36] The law classifies *cocaine* as Schedule II, a less restrictive category.[37] These drugs are defined as having "a high potential for abuse," "a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions," and potential for "abuse of the drug [that] may lead to severe psychological or physical dependence."[38]

A few states have rescheduled marijuana under state law as a Schedule II, but there is virtually no practical significance of this action since federal schedules supersede state schedules and the federal scheduling does not permit marijuana prescriptions.[39] Even the American Medical Association recently became an outspoken advocate of rescheduling marijuana to a Schedule II drug for the purposes of allowing unfettered clinical trials of cannabinoids.[40] Interestingly, despite its federal Schedule I status, marijuana use in America has actually increased and, likewise, so has the number of health-care professionals and their patients who believe in the plant's medicinal efficacy.[41]

A 1972 report of the National Commission on Marijuana and Drug Abuse ("Shafer Report") recommended decriminalization of simple possession of marijuana, by advising President Nixon as follows:[42]

> [T]he criminal law is too harsh a tool to apply to personal possession even in the effort to discourage use. It implies an overwhelming indictment of the behavior, which we believe is

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[35] *See id.*

[36] *Id.* § 812(c)(a).

[37] *See Cocaine*, U.S. DRUG ENFORCEMENT ADMIN., http://www.justice.gov/dea/concern/cocaine.html (last updated Mar. 2010).

[38] § 812(b)(2).

[39] MARIJUANA POL'Y PROJECT, KEY ASPECTS OF STATE AND D.C. MEDICAL MARIJUANA LAWS 16 (2011), http://www.mpp.org/assets/pdfs/library/State-by-State-Laws-Report-2011.pdf. Alaska, Iowa, Montana, Tennessee and the District of Columbia have all rescheduled marijuana as a Schedule II drug. *Id.*

[40] COUNCIL ON SCI. & PUB. HEALTH, AM. MED. ASS'N., *Use of Cannabis for Medicinal Purposes*, *in* REPORTS OF THE COUNCIL ON SCIENCE AND PUBLIC HEALTH 189, 190 (2009), *http://www.ama-assn.org/resources/doc/hod/i-09-csaph-reports.pdf (*"AMA urges that marijuana's status as a federal Schedule I controlled substance be reviewed with the goal of facilitating the conduct of clinical research and development of cannabinoid-based medicines, and alternate delivery methods. This should not be viewed as an endorsement of state-based medical cannabis programs, the legalization of marijuana, or that scientific evidence on the therapeutic use of cannabis meets the current standards for a prescription drug product.").

[41] MARK EDDY, CONG. RESEARCH SERV., RL33211, MEDICAL MARIJUANA: REVIEW AND ANALYSIS OF FEDERAL AND STATE POLICIES 2 (2010), http://www.fas.org/sgp/crs/misc/RL33211.pdf.

[42] NAT'L COMM'N ON MARIJUANA & DRUG ABUSE, REPORT NO. 1, MARIJUANA, A SIGNAL OF MISUNDERSTANDING (1972), *available at* http://www.druglibrary.org/schaffer/Library/studies/nc/ncmenu.htm.

> not appropriate. The actual and potential harm of use of the drug is not great enough to justify intrusion by the criminal law into private behavior, a step which our society takes only with the greatest reluctance.[43]

The Nixon Administration refused to implement any of the Shafer Report's recommendations.[44] In fact, prior to the release of the findings, Nixon held a meeting with the commission Chair, Governor Raymond Shafer, intending to tell the Commission what to conclude and prevent the publication of the actual findings:

> You're enough of a pro to know that for you to come out with something that would run counter to what the Congress feels and what the country feels, and what we're planning to do, would make your commission just look bad as hell . . . the thing to do now is to alert the country to the problem and . . . take a strong line.[45]

In 1988, after more than ten years of litigation by the National Organization for the Reform of Marijuana Laws ("NORML"), in an attempt to force Congress to reschedule marijuana as a Schedule II drug, Administrative Law Judge Francis Young concluded as follows:

> [T]he overwhelming preponderance of evidence in [the] record establish[es] that marijuana has a currently accepted medical use in treatment in the United States for nausea and vomiting resulting from chemotherapy treatments in some cancer patients. To conclude otherwise, on this record, would be unreasonable, arbitrary and capricious.[46]

Judge Young recommended rescheduling marijuana to Schedule II on the basis that marijuana serves a medicinal purpose.[47] However, the federal government had no interest in heeding the conclusions of the learned judge, medical experts, researchers, doctors, or the public outcry.[48] The Administrator of the Drug Enforcement Agency ("DEA") flatly discarded the Judge's findings

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[43] *Id.*

[44] *See* Gene Weingarten, *Just What Was he Smoking?*, WASH. POST, Mar. 21, 2002, at C1, http://www.commondreams.org/headlines02/0321-07.htm.

[45] *Id.*

[46] Marijuana Rescheduling Petition, Docket No. 86-22, at 34 (Sept. 6, 1988), *http://iowamedicalmarijuana.org/pdfs/young.pdf.*

[47] *Id.* at 67.

[48] *See generally* Marijuana Rescheduling Petition, 54 Fed. Reg. 53,767 (Drug Enforcement Admin. 1989) (final admin. order denying petition).

and denied the petition for the rescheduling of marijuana to a Schedule II, thus shutting the door to a federal exception for legal *medical* marijuana.[49]

Subsequent legislative and administrative attempts to reschedule marijuana at the federal level have failed.[50] Following suit, courts have also refused to carve out exceptions to the CSA, even for seriously ill patients who have a dire need for the drug.[51] Meanwhile, qualified patients bore the brunt of political expediency with no safe or legal way in which to obtain medical marijuana.

B. The States Take Medical Marijuana into Their Own Hands

The states to the rescue! Beginning with California in 1996, fifteen additional states and the District of Columbia have now legalized medical marijuana under state law:[52] Oregon, Washington, Alaska, Maine, Colorado, Hawaii, Montana, Nevada, Vermont, Rhode Island, New Mexico, Michigan, New Jersey, and, of course, Arizona.[53] Typically, states have passed regulations to help curb abuses by doctors, patients, caregivers, and other potential wrongdoers. For example, most states require physicians to conduct a bona fide medical examination before recommending marijuana to a patient and that such recommendations be in writing.[54] The Arizona law provides for an online database, which law enforcement and dispensary agents can utilize to ensure medical marijuana cards are not issued to individuals with a history of illegal drug abuse.[55] Of course, if Arizona refuses to implement the law, the adoption of this provision will be in vain.

Many jurisdictions have adopted laws permitting patients access to marijuana for medicinal purposes via storefront dispensaries, a place where medicine is dispensed. The states permitting dispensary distribution are as follows: Colorado, Delaware, Maine, New Jersey, New Mexico, Vermont, and

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[49] *See id.*

[50] *See* Mikos, *supra* note 19, at 1434-35.

[51] United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001) (concluding that the CSA "leave[s] no doubt that the [medical necessity] defense is unavailable" under the statute, given Congress's necessary determination that "marijuana has no medical benefits worthy of an exception").

[52] *See* sources cited *supra* note 18.

[53] *See* Nixon, *supra* note 31.

[54] *E.g.*, ALASKA STAT. § 17.37.010(c) (LEXIS through 2011 legislation); WASH. REV. CODE § 69.51A.010 (2011), *available at* http://apps.leg.wa.gov/rcw/default.aspx?cite=69.51A. All states require written recommendations except California, which permits oral recommendations. *See* CAL. HEALTH & SAFETY CODE § 11362.5(d) (West, Westlaw through Ch. 4 of 2012 Reg. Sess.).

[55] *See* ARIZ. REV. STAT. ANN. § 36-2807 (Westlaw through 2011 legislation).

Washington D.C.[56] Arizona and Rhode Island both permit dispensaries in their current law, but that provision is currently on hold.[57] Michigan does not specifically provide for dispensaries under state law, but cities have passed local ordinances that sanction dispensaries.[58] Montana law does not explicitly allow dispensaries either, but the law authorizes caregivers to assist an unlimited number of patients, resulting in storefront operations.[59] California permits collectives and cooperatives.[60] California has no state licensing, but some localities do issue licenses and regulations.[61] Of those states permitting dispensaries, Arizona, California, Colorado, Maine, Michigan, Montana, New Mexico, Rhode Island, and Vermont also allow patients and caregivers to cultivate medical marijuana at home, although specific restrictions vary.[62] That leaves the following states that only allow home cultivation of medical marijuana, also known as "grow your own" ("GYO"): Alaska, Hawaii, Nevada, and Oregon.[63]

The relationship between the CSA and state medical marijuana laws is constitutionally complex because both federal and state law regulates marijuana use, possession, and trafficking; states may, of course, except medicinal use from their marijuana proscriptions:

> The CSA is not preempted by state medical marijuana laws, under federal law, *nor are state medical marijuana laws preempted by the CSA*. States can statutorily create a medical use exception for botanical cannabis and its derivatives under their own, state level controlled substance laws. At the same time, federal agents can investigate, arrest, and prosecute medical marijuana patients, caregivers, and providers in accordance with the federal Controlled Substances Act, even in those states where medical marijuana programs operate in accordance with state law.[64]

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[56] MARIJUANA POL'Y PROJECT, KEY ASPECTS OF STATE AND D.C. MEDICAL MARIJUANA LAWS, http://www.mpp.org/assets/pdfs/library/Medical-Marijuana-Grid.pdf (last updated Feb. 28, 2012).

[57] *Id.*; *see infra* Parts IV-V (discussing Arizona's decision to prevent dispensaries from operating in the state).

[58] MARIJUANA POL'Y PROJECT, *supra* note 56.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] MARK EDDY, CONG. RESEARCH SERV., RL33211, MEDICAL MARIJUANA: REVIEW AND ANALYSIS OF FEDERAL AND STATE POLICIES 2 (2010), http://www.fas.org/sgp/crs/misc/RL33211.pdf (emphasis added).

In reality, the vast majority of arrests in the United States for marijuana possession are by local law enforcement, not the DEA.[65] Therefore, patients and caregivers in states that permit medical marijuana almost always go unprosecuted because their own states' marijuana prohibition laws do not apply to these patients, and federal law is rarely enforced.[66]

C. The Federal Government Reacts

Still, the federal government did not take kindly to states taking medical marijuana regulation into their own hands.[67] After California's passage of Proposition 200, the federal government threatened to prosecute medical marijuana suppliers vigorously, revoke the prescription writing authority of physicians who recommended marijuana to patients, and deny various federal benefits to patients who used marijuana pursuant to California law.[68] These threats, however, were mostly bark and no bite.

In contrast, the DEA under George W. Bush let the dogs loose on medical marijuana operations, conducting nearly two hundred raids on dispensaries in California alone.[69] In July 2007, the DEA's Los Angeles Field Division Office levied a new attack strategy against medical marijuana dispensaries in the city by sending letters threatening building owners with up to twenty years in federal prison for violating the so-called "crack house statute" of 1986.[70] This statute made it a federal offense to "knowingly and intentionally rent, lease, or make available for use, with or without compensation, [a] building, room, or enclosure for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance."[71] A scathing *Los Angeles Times* editorial called the DEA threats against landlords a "deplorable new bullying tactic."[72]

In 2005, the U.S. Supreme Court took a hiatus from their usual states' rights narrative in *Gonzales v. Raich*.[73] The Court affirmed the federal government's broad power to regulate interstate commerce when it held that Congress

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[65] *See id*.

[66] *Id.*

[67] *See* 21 U.S.C. § 812(b)(2) (2006).

[68] Administrative Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (Feb. 11, 1997).

[69] MARIJUANA POL'Y PROJECT, STATE-BY-STATE REPORT ON MEDICAL MARIJUANA LAWS (2008), http://docs.mpp.org/pdfs/download-materials/SBSR_NOV2008_1.pdf.

[70] MARK EDDY, CONG. RESEARCH SERV., RL33211, MEDICAL MARIJUANA: REVIEW AND ANALYSIS OF FEDERAL AND STATE POLICIES 2 (2010), http://www.fas.org/sgp/crs/misc/RL33211.pdf.

[71] *See id.*

[72] Op-Ed., *The DEA's Rent Control*, L.A. TIMES, July 19, 2007, http://articles.latimes.com/2007/jul/19/opinion/ed-forfeiture19.

[73] *See generally* Gonzalez v. Raich, 545 U.S. 1, 3, 28-30 (2005).

could regulate even the non-commercial, intra-state cultivation and consumption of marijuana occurring in California.[74] *Raich* did not invalidate state medical marijuana laws, but it gave the DEA license to enforce the CSA against medical marijuana patients and caregivers in states with medical marijuana laws.[75] Notably, the majority opinion included this footnote, "We acknowledge that evidence proffered by respondents in this case regarding the effective medical uses for marijuana, if found credible after trial, would cast serious doubt on the accuracy of the findings that support listing marijuana on Schedule I."[76] The Court emphasized that Congress has the power to reschedule marijuana under the CSA to a Schedule II drug.[77] Despite the legal outcome of the case, the majority opinion stated that resolution to the medical marijuana issue should be achieved through "the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress."[78]

It took a so-called 'big government liberal' in the Oval Office to finally *limit* federal discretionary power and put an end to the war on state medical marijuana programs. Heeding the directive of President Obama, in March of 2009, Attorney General Eric Holder, Jr., followed President Barack Obama's March 2009 directive and ended federal raids on medical marijuana dispensaries.[79] The new Obama Administration formalized the policy in a Justice Department memorandum to United States Attorneys known as the Ogden Memorandum.[80] While the Ogden memorandum affirmed that the "Department of Justice is committed to the enforcement of the Controlled Substances Act in all States," the memo also stated that the Justice Department is "committed to making efficient and rational use of its limited investigative and prosecutorial resources . . . on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[81] The memorandum goes on to express the Department's intent to recommit their prosecution efforts on significant illegal drug traffickers, "prosecution of com-

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[74] *See id.*

[75] *See id.*

[76] *Id.* at 27 n.37.

[77] *See id.* at 13-14, 32-33.

[78] *Id.*

[79] David Johnston & Neil A. Lewis, *Obama Administration to Stop Raids on Medical Marijuana Dispensers*, N.Y. TIMES, Mar. 19, 2009, at A20, *available at* http://www.nytimes.com/2009/03/19/us/19holder.html.

[80] Memorandum from David Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, On Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana to Selected U.S. Attorneys, U.S. Dep't of Justice (Oct. 19, 2009), http://www.justice.gov/opa/documents/medical-marijuana.pdf.

[81] *Id.*

mercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department."[82]

Two bills recently reintroduced in Congress could affect the direction of federal medical marijuana laws. First, the Medical Marijuana Patient Protection Act, introduced by Representative Barney Frank in 2009, would (1) allow the medical use of marijuana in states that permit such use with a doctor's recommendation; (2) move marijuana from Schedule I to Schedule II of the CSA; and (3) exempt authorized patients and medical marijuana providers who are acting in accordance with state laws from federal prosecution.[83]

Second, the Truth in Trials Act, introduced by Representative Sam Farr in 2009, would: (1) make it permissible for medical marijuana users and providers who are tried in federal court to reveal to juries that their marijuana activity was medically related and legal under state law; (2) amend the CSA to allow an affirmative defense for persons who provide or use marijuana in accordance with state medical marijuana laws; and (3) limit the authority of federal agents to seize marijuana authorized for medical use under state law and would provide for the retention and return of seized plants pending resolution of a case involving medical marijuana.[84]

The recent shift in tone of federal policy suggests that the biggest threat to medical marijuana access may no longer be the federal government, but rather the states themselves that legalized it in the first place. At least this appears true in Arizona, where patients who had great hope of access to safe and legal medical marijuana, now wait with bated breath for the relief they need.

III. Patients Need Access to Medical Marijuana

A. Evidence of Efficacy in Medical Marijuana Patients

The case for medical marijuana efficacy for a class of patients who suffer from painful chronic, degenerative, and terminal conditions is strong; it is simply irresponsible to deny that marijuana likely provides unique and effective relief for these patients.[85] Marijuana is medically effective for a wide range of ailments including symptoms caused by chemotherapy-induced nausea caused by cancer treatment, AIDS wasting syndrome, glaucoma, epilepsy, and multi-

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[82] *Id.*

[83] Medical Marijuana Patient Protection Act, H.R. 2835, 111th Cong. (2009).

[84] Truth in Trials Act, H.R. 3939, 111th Cong. (2009).

[85] Brief for the Leukemia & Lymphoma Society, et al. as Amici Curiae Supporting Respondents at 4, Gonzales v. Raich, 545 U.S. 1 (2005) (No. 03-1454) (stating that "it cannot seriously be contested that there exists a small but significant class of individuals who suffer from painful chronic, degenerative, and terminal conditions, for whom marijuana provides uniquely effective relief"); s*ee* H.R. 2835; Tiersky, *supra* note 19; Memorandum from David Ogden, *supra* note 80.

ple sclerosis.[86] For example, chemotherapy is notorious for causing severe bouts of nausea and vomiting.[87] Marijuana decreases nausea in a matter of minutes for many patients undergoing chemotherapy.[88] Marijuana is also effective to mitigate pain caused by a variety of sources, including types of chronic pain such as neuropathic pain for which other prescribed medications prove far less effective.[89] Medical marijuana also produces improvements in patients who suffer from depression and insomnia.[90] Patients almost unanimously agree that marijuana is the most benign drug they encountered in their treatment.[91] Patients suffering from Alzheimer's disease also responded remarkably to the appetite-stimulating effects of marijuana,[92] and disturbed behavior among the patients decreased.[93]

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[86] *See Access to Therapeutic Marijuana/Cannabis*, 86 AM. J. PUB. HEALTH 441, 441-42 (1996), *available at* http://druglibrary.net/olsen/MEDICAL/apha.html. Opponents argue that a range of ailments for which marijuana has been considered, such as epilepsy and immune diseases, turn up inconclusive evidence of efficacy, mainly due to the limited number of randomized clinical trials of marijuana for these uses. Since 2010, there have been fewer than twenty such clinical trials involving a limited number of patients. *See* Anna Wilde Matthews, *Is Marijuana a Medicine?*, WALL ST. J., Jan. 18, 2010, http://online.wsj.com/article/SB10001424052748703626604575011223512854284.html.

[87] *See Chemotherapy Nausea and Vomiting: Prevention is Best Defense*, MAYO CLINIC (May 21, 2011), http://www.mayoclinic.com/health/cancer/CA00030.

[88] Ross Bonander, *The Health Benefits and Risks of Marijuana*, FOX NEWS (Oct. 19, 2010), http://www.foxnews.com/health/2010/10/19/benefits-marijuana.

[89] *See generally* Tiersky, *supra* note 19. According to Dr. Igor Grant, the Director of the Center for Medicinal Cannabis Research and Vice chair of the Department of Psychiatry at the University of California, San Diego School of Medicine:

> [W]e've completed several studies on a condition called neuropathic pain. Now neuropathic pain affects some people who have AIDS, diabetes[, cancer,] and some other conditions, and it's characterized by a burning, painful, very unpleasant hypersensitivity in the feet particularly, feet and legs, sometimes hands and arms. And it is a condition that's difficult to treat. It doesn't respond as well to traditional pain medicines such as ibuprofen, which is Advil, or even opioid medicines, morphine-type medicines. There are some treatments but not everybody responds to them and it's the case that based on, certainly, animal research, there was evidence that cannabinoids might be helpful and so we've completed now several studies of people with AIDS neuropathy and some other conditions and it does appear that marijuana is helpful in reducing this kind of pain.

These Days (now Midday Edition), *Health Effects of Marijuana* (KPBS television broadcast Sept. 27, 2010), *available at* http://www.kpbs.org/news/2010/sep/27/how-does-smoking-marijuana-affect-your-health.

[90] *See* Tiersky, *supra* note 19, at n.77; *Access to Therapeutic Marijuana/Cannabis*, *supra* note 86 at 441-42.

[91] *See* Tiersky, *supra* note 19.

[92] *Medical Uses*, CANNABINOID MEDICINES, http://www.cannabis-med.org/index.php?tpl=page&id=21&lng=en#Alz (last visited Feb. 21, 2012).

[93] *Id.*

A 2010 Congressional report explains marijuana efficacy from a biological standpoint:

> The recent discovery of cannabinoid receptors in the human brain and immune system provides a biological explanation for the claimed effectiveness of marijuana in relieving multiple disease symptoms. The human body produces its own cannabis-like compounds, called endocannabinoids that react with the body's cannabinoid receptors. Like the better-known opiate receptors, the cannabinoid receptors in the brain stem and spinal cord play a role in pain control. Cannabinoid receptors, which are abundant in various parts of the human brain, also play a role in controlling the vomiting reflex, appetite, emotional responses, motor skills, and memory formation. It is the presence of these natural, endogenous cannabinoids in the human nervous and immune systems that provides the basis for the therapeutic value of marijuana and that holds the key, some scientists believe, to many promising drugs of the future.[94]

The more credible concerns that medical marijuana use is harmful to one's health are still without merit. Opponents claim that medical marijuana may provide patients with short-term relief, but it increases long-term health risks, including lung cancer.[95] However, "[t]he largest study of its kind unexpectedly concluded that smoking marijuana, even regularly and heavily, does not lead to lung cancer."[96] According to the study's lead researcher: "We hypothesized that there would be a positive association between marijuana use and lung cancer, and that the association would be more positive with heavier use . . . . What we found instead was no association at all, and even a suggestion of some

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[94] MARK EDDY, CONG. RESEARCH SERV., RL33211, MEDICAL MARIJUANA: REVIEW AND ANALYSIS OF FEDERAL AND STATE POLICIES 2 (2010), http://www.fas.org/sgp/crs/misc/RL33211.pdf. For a summary of the growing body of research on endocannabinoids, see Roger A. Nicoll & Bradley N. Alger, *The Brain's Own Marijuana*, SCI. AM., Dec. 2004, at 70-75 and Jean Marx, *Drugs Inspired by a Drug*, 311 SCI. 322, 322-25 (2006).

[95] *See* Marc Kaufman, *Study Finds No Cancer-Marijuana Connection*, WASH. POST, May 26, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/05/25/AR2006052501729.html.

[96] *Id*; *see also* Donald P. Tashkin et al., *Marijuana Use and the Risk of Lung and Upper Aerodigestive Tract Cancers*, 15 CANCER EPIDEMIOLOGY BIOMARKERS & PREVENTION 1829 (2006). Donald Tashkin, a pulmonologist at The David Geffen School of Medicine at UCLA, has studied the effects of marijuana for thirty years, and was the lead researcher in the study. The study was funded by the National Institute of Health's National Institute on Drug Abuse. *Id.*

protective effect."[97] There were also no links found between marijuana use and emphysema.[98] According to the leading authorities in the area, the International Agency for Research on Cancer (IARC) and the U.S. National Toxicology Program (NTP), THC, the active drug found in marijuana, is *not* a carcinogen.[99] In fact, THC may kill aging cells and keep them from becoming cancerous.[100]

Concern over marijuana's impact on respiratory health is easily remedied when patients use a delivery system called a vaporizer.[101] The vaporizer heats the plant so that active ingredients boil off into a fine mist, but the plant itself never ignites.[102] The mist contains no tars or noxious gases, making respiratory complications a thing of the past.[103]

As for the addictiveness of marijuana, the Shafer Report concluded that "physical dependence has *not* been demonstrated in men or animals," but that "very heavy users" could potentially exhibit a strong psychological dependence.[104] While debate continues over marijuana's addictiveness, recent studies confirm what many doctors, psychologists, and psychiatrists have maintained for many years: marijuana is not generally addictive.[105] Still, some maintain that marijuana dependency is a significant risk and concern.[106] An unbiased review of the most relevant scientific research on the subject found that 9 percent of recreational marijuana users become addicted to the substance, compared with 32 percent of tobacco users, 23 percent of heroin users, 17 percent of cocaine users, and 15 percent of alcohol users.[107] And, unlike the others, no one has ever died from a marijuana overdose.[108]

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97 Tashkin, *supra* note 96 at 1829. Notably, in a study conducted a decade earlier at UCLA, Dr. Tushkin concluded that frequent marijuana use can cause airway injury, acute and chronic bronchitis, lung inflammation and impaired pulmonary defense against infection." *See* Donald P. Tashkin, *Effects of Smoked Marijuana on the Lung and Its Immune Defenses: Implications for Medicinal Use in HIV-Infected Patients*, 1 J. OF CANNABIS THERAPEUTICS, 87, 87 (2001).

98 *See* Tashkin, *supra* note 96 at 1829.

99 Bonander, *supra* note 88.

100 *See* Kaufman, *supra* note 95.

101 *See id.*

102 *See id.*

103 *See id.*

104 *See* NAT'L COMM'N ON MARIJUANA & DRUG ABUSE, *supra* note 42.

105 *See* LESLIE L. IVERSEN, THE SCIENCE OF MARIJUANA 105-14 (2nd ed. 2008); Jann Gumbiner, *Is Marijuana Addictive?*, PSYCHOL. TODAY BLOG (Dec. 5, 2010), http://www.psychologytoday.com/blog/the-teenage-mind/201012/is-marijuana-addictive.

106 *See generally* CANNABIS DEPENDENCE: ITS NATURE, CONSEQUENCES, AND TREATMENT (Roger A. Roffman, et al. eds., 2006).

107 *See id.*

108 Marijuana Rescheduling Petition, 54 Fed. Reg. 53,767, 53,783 (Dec. 29, 1989) (final admin. order denying petition).

B. The Patient Perspective

Those who have fought alongside a brother, a mother, a grandfather, or close loved one understand that in a fight for life, it is vital to employ every means available to help provide hope for survival. Short of this hope, the goal can only be to provide comfort. While modern medicine continues to make strides in increasing the likelihood that cancer patients achieve successful outcomes, the inescapable statistics show the gargantuan tidal wave of cancer battles is never-ending in every corner of this country.[109] The statistics, however, fail to provide insight as to the personal toll of this disease on its victims.[110]

The numbers will never shed light on the gruesome and horrific day-to-day routine that a cancer patient endures—the brutality of chemotherapy, radiation, and surgery; and the incessant vomiting, nausea, pain, and loss of appetite that inevitably results.[111] No statistics paint a full picture of the "wasting syndrome" and chronic pain suffered as a result of HIV/AIDS. Statistics will not demonstrate the spasticity and pain endured by those with multiple sclerosis. Nor will they capture the impending blindness that faces many glaucoma patients. No statistic will allow a glimpse into the life of a maimed United States war veteran who faces chronic pain from his injuries. Imagine a substance known to have the power to alleviate suffering and, in some cases, improve survival, but it is not accessible in an hour of great need. The following two stories—one of a young woman at the beginning of her adult life, and the other of an elderly man at the end of his life—illustrate two important points. First, a patient's need for the medical use of marijuana is universal; diseases that inflict those who may benefit from marijuana do not discriminate based on age or gender, or any other factor. Second, the relief marijuana can bring to certain patients is real and the circumstances under which many patients turn to marijuana face are desperate. While these individual stories alone may not provide a basis for policy change, it is essential to understand the urgency with which countless patients in similar circumstances depend on safe and legal access to medical marijuana.

Heather Torgerson, 29, was an adamant opponent of legalized medical marijuana.[112] She even wrote a college paper against the use of medical mari-

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[109] *See* Rebecca Siegel et al., *Cancer Statistics, 2011: The Impact of Eliminating Socioeconomic and Racial Disparities on Premature Cancer Deaths*, 61 CA: A CANCER J. FOR CLINICIANS 212, 212-13 (2011), http://onlinelibrary.wiley.com/doi/10.3322/caac.20121/pdf.

[110] *See, e.g.*, Alia Beard Rau, *Medical-Marijuana Issue Nears Ballot*, ARIZ. REPUBLIC , Apr. 15, 2010, http://www.azcentral.com/arizonarepublic/local/articles/2010/04/15/20100415potpetitions0415.html.

[111] *See, e.g.*, *id.*

[112] *See id*.

juana for seriously ill patients.[113] Years later in 2007, her grim brain cancer diagnosis required aggressive chemotherapy and radiation treatment that rendered her unable to ingest food and caused severe vomiting episodes.[114] Her doctors predicted she would have approximately six months to live.[115] Heather's symptoms became so debilitating, and her weight loss so rapid, that she faced the imminent threat of doctors stopping her cancer treatment.[116] When all conventional antiemetic prescription drugs failed, she turned to medical marijuana, illegal at the time, for help.[117] Heather's appetite returned within five minutes of her first marijuana treatment.[118] She said of medical marijuana, "I owe my life to it. . . . If I hadn't had medical marijuana during my treatments, I would not be sitting here today. I'd be in a grave."[119] Heather chaired the Arizona Medical Marijuana Policy Project, which organized the effort to pass Proposition 203.[120]

Roger Chalmers admitted that it is hard to believe one person could have so many ailments during a lifetime in which marijuana was the only effective medicine.[121] Yet, Roger never used marijuana to "get high." In April of 2011, Roger lay on his deathbed in his mountainside home in rural Montana. His "skin [was] ashen, his beard white, his face slack." Kidney cancer had ravaged his body as it spread throughout his back, hip, and bones, inflicting mind-numbing pain.[122] Though his death sentence was certain, he wished, like so many others in his position, to live out his final days with relative comfort.[123] "The marijuana is by all means the only good thing that has come along to help me out," he says. "It puts the lights out at night for me where this other drug [Dilaudid]—we're still struggling with it. Marijuana helped me get my appetite back."[124]

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113 *See id.*

114 *See id.*

115 *See id.*

116 *See* David Rookhuyzen, *Two Valley Women's Opposing Views on Medical Marijuana*, ABC15.COM (Sept. 21, 2010), http://www.abc15.com/dpp/news/state/2-valley-women%E2%80%99s-opposing-views-on-medical-marijuana.

117 *See id.*

118 *See id.*

119 Andrew Myers, *Pledge to Vote for Medical Marijuana*, MARIJUANA POL'Y PROJECT, http://www.mpp.org/states/arizona/alerts/pledge-to-vote-for-medical.html (last visited Feb. 21, 2012).

120 *See* Rookhuyzen, *supra* note 116.

121 *See* Joe Nickell, *Cancer Patient's Message: Medical Marijuana Really Does Help*, MISSOULIAN (Apr. 9, 2011, 11:00 PM), http://missoulian.com/news/local/article_a59794f6-6329-11e0-b9ca-001cc4c03286.html.

122 *Id.*

123 *See id.*

124 *Id.* The author interprets "it puts out the lights for me" as meaning that the marijuana helps to relieve Roger's pain to the extent where he can sleep through the night, as opposed to dilaudid, which did not relieve his pain to the extent where he could be comfortable enough to sleep. *Id.*

Many years earlier, Roger served in the United States Air Force as a weapons control officer in Korea during the Vietnam War. During his service, he experienced intense pain in his eyes and began having serious issues with his eyesight. He was diagnosed with glaucoma, a disease that can eventually lead to blindness. His base doctor quietly recommended that Roger try marijuana to relieve the pressure in his eyes. After other prescribed treatments failed, he tried medical marijuana and felt immediate relief, "The marijuana has saved my sight, without a doubt . . . I wouldn't have as much sight as I do now."[125]

Medical marijuana gave Roger hope during his life and was the only aid that gave him comfort in the months, weeks, and days before his death.[126] Marijuana made the end of life process bearable.[127] On May 27, 2011, the *same day* the State of Arizona filed its federal lawsuit against its own medical marijuana law, Roger Chalmers died in his home.[128]

Rick Rosio, a caregiver in Montana who provides medical marijuana at no cost to qualified hospice clients, explains the fear within the hospice community that medical marijuana laws could be threatened at the state level:

> Our mission is to help people like Roger who are suffering and who get some benefit from cannabis. You don't play politics with dying people. But at the same time, this issue is also about helping people who have lots of life ahead of them, who can benefit and become more productive . . . . The thought that this man might become a criminal again . . . . It's a terrible thought.[129]

IV. Arizona Voters Legalize and the State Makes It a Federal Case

A. History of Arizona Proposition 203

Arizona Proposition 203, a ballot initiative to legalize medical marijuana, passed on November 2, 2010, with 50.1% of the vote.[130] It won by only 4341

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[125] *Id.*

[126] *See* Joe Nickell, *Western Montana Lives: Roger Chalmers Campaigned for Environment, Neighbors*, Missoulian (Aug. 8, 2011, 6:45 AM), http://missoulian.com/lifestyles/hometowns/article_6a7d44d4-c1c9-11e0-8745-001cc4c03286.html.

[127] *See id.*

[128] *See id*.

[129] *Id.*

[130] *Arizona Voters Approve Medical Marijuana Measure*, CNN (Nov. 14, 2010), http://articles.cnn.com/2010-11-14/politics/arizona.medical.marijuana_1_medical-marijuana-marijuana-regulation-marijuana-policy-project?_s=PM:POLITICS.

votes out of more than 1.67 million votes counted.[131] ADHS completed the rules and guidelines for the AMMA on March 28, 2011 and began accepting applications for patient and caregiver identification cards on April 14, 2011.[132] ADHS Director, Will Humble, stated, "It has been our mission since the initiative passed to make this the best medical marijuana program in the country . . . . Our goal from the outset was to set the stage for a medical marijuana program, as opposed to a recreational one."[133]

This was not the first time Arizona voters passed a medical marijuana initiative. In 1996, Arizona and California voters passed the nation's first medical marijuana laws. The Arizona law passed overwhelmingly in 1996 and again in 1998, yet state lawmakers refused to enact the law because it provided that doctors "prescribe" medical marijuana, and the federal government threatened to punish doctors who "prescribed" the drug.[134] Instead, states that have enacted medical marijuana laws since 1996, including Arizona, have provided that doctors issue a "certification," basically a written statement, which attests that the patient is qualified to use marijuana as therapy.[135]

The Arizona Medical Marijuana Policy Project, which was largely funded by the Marijuana Policy Project in Washington, D.C., supported Proposition 203.[136] Proponents of the measure maintained throughout the campaign that if passed, the law would allow terminally and seriously ill patients who find relief from marijuana to use it with their doctors' approval.[137] Additionally, support-

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131 *Arizona Voters Approve Medical Marijuana Measure*, CBS NEWS (Nov. 13, 2010, 9:45 PM), http://www.cbsnews.com/stories/2010/11/13/national/main7052327.shtml. On Election Day, the measure was down by 7,200 votes, but the gap narrowed in the following ten days as every vote was counted. *See id.* The law, dubbed the Arizona Medical Marijuana Act, went into effect when the election results were certified on December 14, 2010. *See* ARIZ. REV. STAT. ANN. §§ 36-2801 to -2819 (Westlaw through 2011 legislation).

132 *See* Press Release, Ariz. Dep't of Health Servs., ADHS Establishes Rules for Medical Marijuana Program (Mar. 28, 2011), http://azdhs.gov/diro/pio/news/2011/110328_FinalMedMarijuanaRules.pdf.

133 *Arizona's Take on Medicinal Marijuana*, ADVANCE FOR NURSES (April 15, 2011), http://nursing.advanceweb.com/Regional-Articles/Regional-Guide/Arizonas-Take-on-Medicinal—Marijuana.aspx.

134 *See* Jon Johnson, *Medical Marijuana Proposition Passes*, E. ARIZ. COURIER (Nov. 17, 2010, 12:00 AM), http://www.eacourier.com/news/medical-marijuana-proposition-passes/article_50e59d61-ee97-5343-9647-8a1aaa3b759b.html; Michelle Ye Hee Lee, *Prop. 203: Legalization of Medical Marijuana*, ARIZ. REPUBLIC (Sept. 26, 2010, 12:00 AM), http://www.azcentral.com/news/election/azelections/articles/2010/09/26/20100926arizona-medical-marijuana-prop-203.html.

135 *See* ARIZ. REV. STAT. ANN. § 36-2801(18) (Westlaw through 2011 legislation); MARIJUANA POL'Y PROJECT, *supra* note 39 at 8.

136 Lee, *supra* note 134.

137 *About the Initiative*, ARIZ. MED. MARIJUANA POL'Y PROJECT, http://stoparrestingpatients.org/home/about-initiative (last visited Feb. 21, 2012).

ers argued it was vital to protect these seriously ill patients from arrest and prosecution for simply taking their doctor's recommended medicine.[138]

Keep AZ Drug Free, led by Carolyn Short, led the movement against Proposition 203, with the support of a glittering array of high-profile public figures and the maximum of rhetoric.[139] Numerous Arizona politicians, including Governor Brewer, Senators John McCain and Jon Kyl, Maricopa County Sheriff Joe Arpaio, and Attorney General Horne publically opposed the measure.[140] Opponents argued that the measure was an attempt to legalize marijuana with a façade of patient care.[141] In a press conference two weeks before the election, Governor Brewer warned that Proposition 203 was a backdoor legalization of the drug and, if passed, dispensaries would overrun communities and result in increased crime.[142] Governor Brewer stated, "I ask my fellow Arizonans not to be bullied into believing this is about compassion for sick people."[143] The Governor has also stated that "[m]odern medicine [and] modern science can develop drugs that are just as strong and pain-relieving" as marijuana.[144]

While other opponents acknowledged that marijuana could provide medical relief for patients, they insisted that before marijuana can be accessible to patients, it must first be FDA approved for safety and efficacy and subject to the same federal oversight and regulation as other legal prescription medication.[145] Furthermore, they argued that if Proposition 203 passed, it would cause increased illegal drug use across Arizona.[146] Opponents often argued that the measure contained the same loopholes that would allow people without debilitating diseases to gain access to marijuana, citing the instances of people faking pains to obtain marijuana "legally" in California.[147]

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138 *See id.*

139 *See AZ Republic Editorial Board Views on Prop 203*, KEEP ARIZ. DRUG FREE (Sept. 26, 2010), http://keepazdrugfree.com/index/2010/09/26/az-republic-editorial-board-views-on-prop-203; *see also* David W. Freeman, *Prop 203 Passes: Medical Marijuana to be Legal in Arizona*, CBS NEWS (Nov. 16, 2010, 10:32AM), http://www.cbsnews.com/8301-504763_162-20022928-10391704.html.

140 *See* Johnston & Lewis, *supra* note 79; Lee, *supra* note 134.

141 Johnston & Lewis, *supra* note 79; *see* Casey Newton, *Jan Brewer Speaks Out Against Medical Marijuana*, ARIZ. REPUBLIC (Oct. 20, 2010, 4:46 PM), http://www.azcentral.com/news/election/azelections/articles/2010/10/20/20101020jan-brewer-speaks-out-against-marijuana.html.

142 *See* Newton, *supra* note 141.

143 *Id.*

144 Rau, *supra* note 110. Governor Brewer's argument is hypocritical to say the least, considering the overwhelming consensus among the medical community as to the extreme dangers of prescription drug pain relievers. *See* Christina Ruffini, *America's Fastest-Growing Drug Problem: Prescription Drug Abuse* (April 19, 2011, 11:52 AM), http://www.cbsnews.com/8301-503544_162-20055292-503544.html.

145 *See* Memorandum from David Ogden, *supra* note 80.

146 *See id*.

147 *See id.*

The Joint Legislative Budget Committee for the Arizona Legislature and Morrison Institute for Public Policy at Arizona State University disagree with the Proposition 203 opponents' concerns.[148] Their analysis of the law supported the argument that Proposition 203 was written in a much more detailed manner and provided far greater regulation as compared to current California law.[149] The AMMA and its supplementary ADHS rules provide for one of the most stringent medical marijuana laws in the country, regulating the production, sale, and use of medical marijuana.[150]

B. Summary of the Arizona Medical Marijuana Act

The key provision of protection in the AMMA provides that registered patients and caregivers abiding by the Act are "not subject to arrest, prosecution or penalty in any manner, or denial of any right or privilege, including any civil penalty or disciplinary action" for doing so.[151] To that end, the ADHS vigorously defends the legitimacy and stringency contained in the provisions of the AMMA. It points out the differences between the AMMA and other medical marijuana laws in the United States, as well as touting the ADHS rules as a "comprehensive rule package."[152]

First, the AMMA details guidelines for patient and caregiver access. Under the AMMA a qualified patient with a registry identification card may possess 2.5 ounces of processed marijuana.[153] Registered caregivers may possess up to 2.5 ounces for each patient they assist.[154] The ADHS administers and oversees the registry identification card program and issues all identification cards to patients.[155] To qualify for an identification card, a patient must

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[148] *See* KRISTIN BORNS & BILL HART, UNDERSTANDING ARIZONA'S PROPOSITIONS: PROP 203 (2010), *available at http://morrisoninstitute.asu.edu/publications-reports/2010-proposition-203-medical-marijuana/at_download/file.*

[149] *See id.*

[150] *See* Amanda Lee Myers, *Arizona Medical Marijuana Dispensaries Face Tougher Regulations than in Colorado,* HUFFINGTON POST (May 21, 2011, 11:00 AM), http://www.huffingtonpost.com/2011/05/21/arizona-medical-marijuana_n_865082.html; *see also* Amanda Lee Meyers, *Would-be Pot Shops Face Stringent Rules in Arizona*, ARIZ. CAPITOL TIMES (May 23, 2011, 7:14 AM), http://azcapitoltimes.com/news/2011/05/23/would-be-pot-shops-face-stringent-rules-in-arizona/.

[151] *See* ARIZ. REV. STAT. ANN. § 36-2811 (Westlaw through 2011 legislation).

[152] *See* ARIZ. DEP'T OF HEALTH SERVS., ARIZONA MEDICAL MARIJUANA: THE CLINICAL PERSPECTIVE, (2011), http://www.azdhs.gov/medicalmarijuana/documents/ArizonaMedicalMarijuana_Clinical_110228.pdf; Meyers, *supra* note 150 (quoting Tom Salow, an Arizona Department of Health Services manager who was in charge of writing the rules for dispensaries).

[153] *See* § 36-2816.

[154] *See id.* § 36-2801.

[155] *See* Letter from Will Humble, Director, Ariz. Dep't of Human Servs., to Arizona Law Enforcement Agencies (June 6, 2011), http://www.azdhs.gov/medicalmarijuana/documents/

obtain a "certification" from a physician with whom the patient has a bona fide relationship, stating that the patient has a qualifying condition and is "likely to receive therapeutic or palliative benefit" from the medical use of marijuana.[156] Conditions qualifying patients to engage in medical use of marijuana under the AMMA include cancer, HIV/AIDS, hepatitis C, amyotrophic lateral sclerosis, Crohn's disease, glaucoma, agitation related to Alzheimer's disease, and conditions causing one or more of the following: severe and chronic pain, cachexia or wasting, severe nausea, seizures, or persistent muscle spasms.[157] ADHS can approve additional medical conditions.[158]

If a qualifying patient's home is located more than twenty-five miles from the nearest nonprofit medical marijuana dispensary, the patient or designated caregiver may cultivate up to twelve marijuana plants in an enclosed, locked facility.[159] A caregiver may supply medical marijuana for up to five patients at a time,[160] must be at least twenty-one years old, and must not have been convicted of an excluded felony offense.[161]

The AMMA prohibits landlords, employers, and schools from discriminating based on a person's status as a caregiver or patient, unless they would otherwise lose a federal monetary or licensing benefit.[162] The law provides that an employer cannot penalize staff for testing positive for marijuana, unless they ingest marijuana at work or are impaired at work.[163]

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enforcement/ID-card-announcement.pdf (informing Arizona law enforcement agencies of the new medical marijuana identification cards).

156 § 36-2801(18).

157 *See id.*

158 *Id.* § 36-2801.01.

159 *See id.* § 36-2804.02(A)(3)(f) (stating that an application for a medical marijuana identification card must include "a designation as to who will be allowed to cultivate marijuana plants for the qualifying patient's medical use if a registered nonprofit medical marijuana dispensary is not operating within twenty-five miles of the qualifying patient's home"); *id.* § 36-2801 ("With respect to a qualifying patient . . . if the qualifying patient's registry identification card states that the qualifying patient is authorized to cultivate marijuana, twelve marijuana plants contained in an enclosed, locked facility except that the plants are not required to be in an enclosed, locked facility if the plants are being transported because the qualifying patient is moving. . . . With respect to a designated caregiver . . . [i]f the designated caregiver's registry identification card provides that the designated caregiver is authorized to cultivate marijuana, twelve marijuana plants contained in an enclosed, locked facility except that the plants are not required to be in an enclosed, locked facility if the plants are being transported because the designated caregiver is moving.").

160 § 36-2801(5)(d); *Frequently Asked Questions: Designated Caregivers*, ARIZ. DEP'T OF HEALTH SERV., http://www.azdhs.gov/medicalmarijuana/documents/faqs/Designated_Caregivers_FAQs.pdf (last visited March 1, 2012).

161 *Frequently Asked Questions: Designated Caregivers, supra* note 160.

162 § 36-2813(A)-(B).

163 *Id.* § 36-2814.

Unfortunately, in April 2011, Governor Brewer signed a bill that undermines these employment protections.[164] The bill allows employers to depend on reports of impairment by an employee's colleague who is "believed to be reliable" and also permits employers to take an adverse employment action if an employee uses medical marijuana or certain prescription medication and works a "safety-sensitive" role.[165]

The law addresses certain protections for child custody and visitation rights, as well as protections for residents of nursing homes and other assisted living facilities.[166] The State must also honor a visiting patient's out-of-state registry identification card for up to thirty days. However, a visiting patient's out-of-state registry identification card is not valid for obtaining marijuana within Arizona.

Second, in order to prevent physician and patient abuse, the AMMA includes strict requirements and expectations of physicians who provide patients with certifications.[167] A doctor who writes a patient certification agrees to assume responsibility for providing management and routine care of the patient's debilitating condition after conducting a full assessment of the patient's medical history.[168] Before issuing a certification, a doctor has a duty to review a patient's medical history from the previous twelve months, establish and maintain a medical record for each qualified patient, explain to the patient the risks and benefits of medical marijuana use, and confirm that the patient is not flagged on the Arizona Board of Pharmacy Controlled Substances Prescription Monitoring Program database.[169] A doctor may issue a certification only if, in the doctor's professional opinion, the patient is likely to receive

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164 *See* Alia Beard Rau & Jim Walsh, *Brewer Vetoes 29 Bills, Signs 357 into Law*, ARIZ. REPUBLIC (Apr. 29, 2011, 8:50 PM), http://www.azcentral.com/news/election/azelections/articles/2011/04/29/20110429arizona-bills-brewer-24-vetoes.html.

165 "Safety-sensitive" role is an extremely broad category that may extend to any role designated by an employer. *See* ARIZ. REV. STAT. ANN. §23-493(2), (6)-(9); Jahna Berry, *New Law Can Shield Firms in Marijuana Lawsuits*, ARIZ. REPUBLIC (May 2, 2011, 6:30 PM), http://www.azcentral.com/arizonarepublic/business/articles/2011/05/02/20110502medical-marijuana-lawsuits-law.html#ixzz1X7mNnt6l; *id*.

166 § 36-2805.

167 *See* ARIZ. DEP'T OF HEALTH SERVS., *supra* note 152, at 8.

168 *See id*.

169 *Id.* at 8-9. The Arizona Board of Pharmacy Controlled Substances Prescription Monitoring Program database is a "computerized central database tracking system to track the prescribing, dispensing and consumption of Schedule II, III, and IV controlled substances in Arizona . . . Pharmacies and medical practitioners who dispense controlled substances listed in Schedule II, III, and IV to a patient, [are required] to report prescription information to the Board of Pharmacy on a weekly basis. [The database] assists law enforcement in identifying illegal activity related to the prescribing, dispensing and consumption of Schedule II, III, and IV controlled substances [and] [p]rovides information to patients, medical practitioners, and pharmacists to help avoid the inappropriate use of Schedule II, III, and IV controlled substances[.]" *See About CSPMP*, ARIZ. ST.

therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's debilitating medical condition.[170]

Third, the AMMA and ADHS rules provide rigorous standards for State-regulated storefront nonprofit dispensaries. A dispensary is a "not-for-profit entity that acquires, possesses, cultivates, manufactures, delivers, transfers, transports, supplies, sells or dispenses marijuana or related supplies and educational materials to cardholders."[171] Dispensaries may cultivate their own marijuana at the dispensary site or in an "enclosed, locked" cultivation location that must be registered with the ADHS.[172] A dispensary, under the AMMA, may sell medical marijuana to another dispensary but cannot purchase marijuana from anyone other than another dispensary.[173] Dispensaries can dispense no more than 2.5 ounces of marijuana to a patient every fourteen days.[174] The total number of dispensaries cannot exceed one for every ten pharmacies, which amounts to about 125 dispensaries in the entire State of Arizona, compared to about 800 dispensaries in the State of Colorado[175] and nearly 1000 dispensaries in the City of Los Angeles alone.[176]

The ADHS may conduct criminal background checks of all dispensary employees before issuing a registration card.[177] The law requires that dispensaries appoint a medical director who must provide annual training to employees that includes guidelines for providing information, education, and support to patients.[178] The law also mandates that dispensaries keep a logbook to track the use and effects of specific medical marijuana strains and products for reporting purposes.[179]

BOARD OF PHARMACY, http://www.azpharmacy.gov/CS-Rx_Monitoring/aboutpmp.asp (last visited Mar. 21, 2012).

170 ARIZ. DEP'T OF HEALTH SERVS., *supra* note 152, at 10.

171 ARIZ. REV. STAT. ANN. § 36-2801(11). Dispensaries may cultivate their own marijuana at the dispensary site or in an "enclosed, locked" cultivation location that must be registered with the ADHS. *See* ARIZ. DEP'T OF HEALTH SERVS., *supra* note 152, at 34.

172 *See* MED. MARIJUANA DISPENSARY, http://www.medicalmarijuanadispensary.net/ (last visited Mar. 21, 2012).

173 *See* ARIZ. REV. STAT. ANN. § 36-2806 (Westlaw through 2011 legislation).

174 *See id.* § 36-2806.02.

175 *See* Myers, *supra* note 150 (noting 800 dispensaries in Colorado).

176 *See id.*; Michel Martin, *In California, Marijuana Dispensaries Outnumber Starbucks* (Nat'l Pub. Radio Oct. 15, 2009), http://www.npr.org/templates/story/story.php?storyId=113822156.

177 *See* Medical Marijuana Program, 17 Ariz. Admin. Reg. 732, 768 (May 6, 2011), http://www.azsos.gov/public_services/Register/2011/18/exempt.pdf; *Frequently Asked Questions: Dispensaries*, ARIZ. DEP'T OF HEALTH SERV., http://www.azdhs.gov/medicalmarijuana/documents/faqs/Dispensaries_FAQs.pdf (last visited Mar. 1, 2012).

178 Medical Marijuana Program, 17 Ariz. Admin. Reg. at 770.

179 *Id.*

All dispensaries must develop, document, and implement comprehensive policies and procedures regarding inventory control.[180] The inventory documentation is so highly regulated that "[e]ach day's beginning inventory, acquisitions, harvests, sales, disbursements, disposal of unusable medical marijuana, and ending inventory" must be meticulously documented.[181] In addition, all marijuana must be tracked by a batch number that specifies whether the batch originated from marijuana seeds or cuttings; states the origin, strain, and number of seeds or cuttings planted; and lists any chemical additives used in cultivation.[182] The rules even mandate detailed guidelines of requisite security systems that must be installed at every dispensary.[183]

The ADHS was scheduled to begin accepting competitive dispensary applications on June 1, 2011.[184] Just days before the ADHS opened the application process, on May 24, 2011, the State filed a lawsuit in federal court, asking for a declaratory judgment regarding whether state employees will be subjected to prosecution, while abiding by the provisions of the AMMA.[185] Just one day before ADHS was set to begin accepting dispensary applications, Governor Brewer halted the permit process by issuing an Executive Order that prevented the operation of dispensaries pending the result of the federal lawsuit.[186] And when "application day" came on June 1, 2012, ADHS Director Will Humble refused to accept any applications from the first prospective operators.[187] While the State of Arizona has refused to implement the AMMA's dispensary provisions, they have continued to accept and process applications for registry identification cards by patients and caregivers.[188] That leaves patients without access to dispensaries to obtain medical marijuana.

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[180] *Id.* at 771-72.

[181] *Id.* at 771.

[182] *Id.* at 772.

[183] *Id.* at 773-74.

[184] *See* J. Craig Anderson, *Arizona Medical-Marijuana Dispensaries Face Property Hurdles*, ARIZ. REPUBLIC (Apr. 13, 2011, 12:00 AM), http://www.azcentral.com/business/articles/2011/04/13/20110413arizona-marijuana-dispensaries-property-hurdles.html#ixzz1X7w2bmoL.

[185] *See* Linda Kor, *Marijuana Dispensaries Are on Hold Pending Outcome of Federal Lawsuit*, ARIZ. J., June 3, 2011, http://www.azjournal.com/2011/06/03/marijuana-dispensaries-are-on-hold-pending-outcome-of-federal-lawsuit.

[186] *See* Mary K. Reinhart, *Arizona to Sue Over Medical-Marijuana Law*, ARIZ. REPUBLIC (May 27, 2011, 12:00 AM), http://www.azcentral.com/news/election/azelections/articles/2011/05/27/20110527arizona-medical-marijuana-federal-lawsuit.html; Ray Stern, *Governor Jan Brewer Says Feds' New Letter on Medical Pot Proves She Took "Proper Course of Action" in Derailing Dispensary Program*, PHX. TIMES (July 1, 2011, 4:41 PM), http://blogs.phoenixnewtimes.com/valleyfever/2011/07/governor_jan_brewer_says_clari.php.

[187] *See* Paul Davenport, *AZ Turns Away Application for Marijuana Dispensary*, ARIZ. CAP. TIMES (June 1, 2011, 10:17 AM), http://azcapitoltimes.com/news/2011/06/01/az-turns-away-application-for-marijuana-dispensary.

[188] *See id.*

C. Arizona's Federal Case Against the AMMA

On May 27, 2011, Attorney General Horne, at Governor Brewer's direction, filed a motion for declaratory judgment in the United States District Court for the District of Arizona, questioning the validity of the AMMA.[189] The suit was filed on behalf of the State of Arizona, Governor Jan Brewer, ADHS Director Will Humble, and Director of the Arizona Department of Public Safety Robert C. Halliday against the United States Department of Justice, United States Attorney General Eric Holder Jr., United States Attorney of the District of Arizona Dennis Burke, the Arizona Association of Dispensary Professionals Inc., Serenity Arizona, Inc., the Arizona Medical Marijuana Association, several doctors, and medical marijuana patients.[190] Both civilian defendants[191] and the United States Government[192] filed separate motions to dismiss for lack of subject matter jurisdiction and failure to state a claim.

The State alleged that an April 2011 letter sent by United States Attorneys in Washington State to Washington's Governor Gregoire warning that, "state employees who conducted activities mandated by the Washington legislative proposals would not be immune from liability under the CSA."[193] This letter prompted concerns that state employees in Arizona might be at risk of federal prosecution for carrying out provisions of the AMMA.[194] The State further argued that it was compelled to file suit on May 2, 2011, when Dennis Burke, the United States Attorney for the District of Arizona, issued a letter ("Burke Letter") addressed to ADHS Director Humble, regarding the State's implementation of the AMMA, advising that the growing, distribution, and possession of marijuana are "violation[s] of Federal law regardless of State laws that purport to legalize such activities."[195] The letter further provided that the federal government will continue to "vigorously prosecute" individuals and organizations that participate in unlawful manufacturing, distributing, and marketing activi-

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189 Howard Fischer, *Medical Marijuana Supporters: Suit Tailored to Kill Law*, E. VALLEY TRIB. (May 27, 2011, 5:17 PM), http://www.eastvalleytribune.com/arizona/article_98c73702-88bf-11e0-b54a-001cc4c002e0.html.

190 Complaint for Declaratory Judgment, Arizona v. United States, No. CV-11-02072-PHX-SRB (D. Ariz. 2011).

191 Defendant's Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim with Memorandum of Points and Authorities, Arizona v. United States, No. CV-11-02072-PHX-SRB (D. Ariz. 2011).

192 Federal Defendant's Motion to Dismiss and Memorandum of Law in Support Thereof, Arizona v. United States, No. CV-11-02072-PHX-SRB (D. Ariz. 2011).

193 Letter from Jenny A. Durkam & Michael C. Ormsby, U.S. Attorneys, U.S. Dep't of Justice, to Hon. Christine Gregoire, Wash. State Governor (April 14, 2011) (on file with author).

194 Complaint for Declaratory Judgment, *supra* note 190, at 5, Exhibit A.

195 *See id*. at 5-6, Exhibit B.

ties involving marijuana, even if such activities are in "compliance with Arizona laws."[196]

Defendants argued that the case must be dismissed because the controversy is not yet ripe for adjudication, citing numerous Supreme Court holdings in which the validity of criminal laws are unripe when prosecution is speculative.[197] Defendants made the point that "federal prosecutors in *other* judicial districts have implied the possibility of prosecution of *another state's* officials under a proposed regulatory regime *different* from Arizona's," and threats of enforcement against another cannot stand in place of threats against plaintiffs themselves.[198]

In addition, Defendants argued that "conspicuously absent" from the Burke Letter—a letter written in response to an ADHS request for clarification of the "state employee" liability issue—was any mention of state employees within the categories of persons and organizations listed as subject to federal prosecution under the CSA.[199] In fact, Mr. Burke subsequently confirmed that the omission was intentional before the State filed the suit.[200] Burke stated publically, "It's fair to read into my letter what I included and what I didn't. And if I didn't include state employees, I think that's telling in itself."[201] The same day the Arizona case was filed, Mr. Burke was quoted in the *Arizona Republic* as saying, "We have no intention of targeting or going after people *who are implementing* or who are in compliance with state law."[202] This is consistent with subsequent Department of Justice guidance about state medical marijuana laws, which has made no mention of the possibility that state officials could or would be prosecuted.[203] Burke has stated, "You would think that a letter back from Attorney General Horne, as opposed to 'I'm going to file a lawsuit and have a press conference,' might have been a better course of action."[204] Burke maintains that there seems to be elements of political grandstanding involved with

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196 *See id*.

197 Defendant's Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim with Memorandum of Points and Authorities, *supra* note 191, at 9; Federal Defendant's Motion to Dismiss and Memorandum of Law in Support Thereof, Arizona v. United States, *supra* note 192.

198 Defendant's Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim with Memorandum of Points and Authorities, *supra* note 191, at 10.

199 *See id.*

200 Howard Fischer, *Federal Prosecutor: Brewer, Horne Twisting Medical Marijuana Memo*, E. VALLEY TRIB. (May 26, 2011, 4:19 PM), http://www.eastvalleytribune.com/arizona/politics/article_62e3877a-87ee-11e0-95eb-001cc4c03286.html.

201 *Id.*

202 Reinhart, *supra* note 186 (emphasis added).

203 *See* Memorandum from James Cole, Deputy Att'y Gen., on Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), http://www.aclu.org/files/drugpolicy/june_2011_guidance_regarding_medical_mariju.pdf.

204 Fischer, *supra* note 200.

the decision to file suit, because nothing changed in federal law between the time Arizona voters approved the medical marijuana law in November and the day the suit was filed.[205]

Political grandstanding may actually be a gross understatement. An emailed letter from Carolyn Short, who led the opposition to Proposition 203, to ADHS Director Will Humble dated February 16, 2011, contradicts the claim by Arizona officials that the lawsuit was filed as a result of Burke's letter.[206] In the smoking gun letter, Short refers to her January 2011 meeting with Attorney General Horne that occurred *five months before the release of the Burke Letter*. During this meeting, Horne suggested that he could file a declaratory judgment action to determine whether State employees who implemented the AMMA were at risk of federal prosecution.[207] Short's letter stated,

> *On January 10, 2011, [former Arizona U.S. Attorney] Paul Charlton and I met with Attorney General Horne to discuss our conclusion that implementation of Prop 203 would subject you and other ADHS employees to federal prosecution for violating the Controlled Substances Act ("CSA"). Attorney General Horne suggested that he could file a declaratory judgment action, asking a court to determine whether the implementation of Arizona's law would subject you and other ADHS employees to the risk of federal prosecution under the CSA.*[208]

Attorney General Horne confirmed that he entertained a meeting with Short in January.[209]

The State maintained in the federal lawsuit that a "deliberate and ominous shift in tone of the more recent U.S. Attorneys' Letters, including [the Burke Letter], has had a negative and palpable effect and created uncertainty as to the application of federal law to state medical marijuana programs, and in particular, the AMMA."[210] Therefore, the State desired for the Court to resolve this uncertainty by declaring whether the AMMA complies with federal law and should be implemented in accordance with its terms, or conversely, whether the AMMA is preempted by the CSA and therefore void.[211]

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205 *See id.*

206 *See* Ray Stern, *Tom Horne, Arizona Attorney General, Worked with Anti-Prop-203 Leader Carolyn Short on Federal Lawsuit Idea*, PHX. NEW TIMES BLOGS (June 8, 2011, 8:38 PM), http://blogs.phoenixnewtimes.com/valleyfever/2011/06/tom_horne_arizona_attorney_gen.php.

207 *See id*.

208 *Id.*

209 *See id.*

210 Complaint For Declaratory Judgment, *supra* note 190, at 29.

211 *See id.*

Defendants in the lawsuit maintained that "[t]he possibility that Arizona State employees might be prosecuted for fulfilling their duties under the AMMA is purely speculative and not sufficiently concrete to generate a 'case or controversy.' Therefore this action should be dismissed as unripe."[212] Furthermore, defendants argued that *neither* of the State's requested declarations—either a "safe harbor" declaration stating that citizens or state employees complying with the AMMA are immune from federal prosecution, or federal preemption declaration stating that the AMMA is preempted by the CSA and federal law—would be legally correct and thus the complaint should be dismissed for failure to state a claim upon which relief can be granted.[213]

Regardless of the federal court's decision, the State of Arizona will ultimately have a choice to make: abide by the will of the voters and provisions of the AMMA and fully implement the AMMA, including the implementation and regulation of medical marijuana dispensaries, or refuse to implement parts of the law or the law in its entirety. Some are wary that the State may refuse to implement the law regardless of the result in federal court.[214] If so, the patients of Arizona had better start reading up on the joys of horticulture to take advantage of the AMMA's "safety valve" provisions.

V. The Safety Valve Provisions

A. Purpose of the Safety Valve Provisions

The prescient drafters of Proposition 203 crafted certain "safety valve" provisions into the proposed law in order to protect Arizona patients in the event that State officials refused to implement the law once passed.[215] It was feasible

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[212] Defendant's Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim with Memorandum of Points and Authorities, *supra* note 191, at 11.

[213] *See id.* at 17.

[214] *See* E.D. Kain, *Department of Justice Tells AZ Governor Jan Brewer to Dismiss Medical Marijuana Lawsuit*, Forbes (Aug. 4, 2011, 3:58 PM), http://www.forbes.com/sites/erikkain/2011/08/04/department-of-justice-tells-az-governor-jan-brewer-to-dismiss-medical-marijuana-lawsuit.

[215] *See, e.g.,* Ariz. Rev. Stat. Ann. §§ 36-2818, 36-2804.02 (Westlaw through 2011 legislation). According to Andrew Myers, campaign manager and primary drafter of Ariz. Proposition 203, ("we had in our minds that it [was] very feasible that we could have an administration that would be reticent to actually implement."). Telephone Interview with Andrew Myers, Campaign Manager & Drafter of Ariz. Proposition 203 (August 19, 2011) (on file with author). Mr. Myers was hired to be the campaign manager for Proposition 203 in January 2009. He was involved as part of the six member team that drafted the initiative language in January/February 2009. In April 2009, Mr. Myers headed up the petition collection effort for Proposition 203 and submitted the requisite paperwork the following April. From then on Mr. Myers was the chief spokesperson for the campaign for Proposition 203 throughout the proposition campaign as well as the chief spokesperson for the Arizona Medical Marijuana Policy Project Supporting Proposition 203. During the campaign Mr. Myers co-founded and served as the co-executive director of the Arizona Medical Marijuana Association, which was formed to be a patient advocacy and trade organiza-

that state officials may refuse to implement the AMMA, making it essential that there be a "clear path forward" for patient access to medical marijuana and continued legal protection for qualified patients, regardless of the State's action or inaction.[216] If ADHS fails to implement or activate the rules of the AMMA, this triggers the right of any Arizona citizen to commence a mandamus action in superior court to compel ADHS to perform the actions mandated under the AMMA.[217] Furthermore, the AMMA has provided an unprecedentedly strong mechanism whereby patients or others injured as a result of Arizona's potential failure to implement, would *still* have legal access to medical marijuana, even if potential plaintiffs were unable to compel the State to implement the actions mandated in the AMMA through the courts.[218]

Certain "safety-valve" provisions also kick into effect automatically in the event that the State fails to perform the actions mandated in the AMMA.[219] Two ways that Arizona may refuse to implement the AMMA include the failure to (1) process applications of prospective patients, caregivers, and dispensary agents and issue identification cards to eligible applicants;[220] and (2) process applications and certify the requisite number of prospective medical marijuana dispensaries.[221]

B. State's Failure to Issue Identification Cards Triggers the Safety Valve

The State may fail to issue patient medical marijuana applications in two ways.[222] The first way the State could fail is "[i]f the [ADHS] *fails to issue a registry identification card* within forty-five days of the submission of a valid application or renewal*, the registry identification card shall be deemed issued*,

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tion, after the election. He remained in that official capacity until April 2011, when he left the organization and moved on to new projects.

216 *See* Telephone Interview with Andrew Myers, *supra* note 215.

217 *See* § 36-2818(A) (2011) ("If the department fails to adopt regulations to implement this chapter within one hundred twenty days of the effective date of this chapter, any citizen may commence a mandamus action in superior court to compel the department to perform the actions mandated under this chapter.").

218 *See id.* §§ 36-2804.02, 36-2818(B)-(C).

219 *See id.*

220 *See id.* §§ 36-2804.01-05 (§ 36-2804.01 mandates registration of nonprofit medical marijuana dispensary agents; § 36-2804.02 mandates registration of qualifying patients and designated caregivers; § 36-2804.03 mandates the issuance of registry identification cards; §§ 36-2804.04-.05 provide the guidelines for acceptance or denial of registry identification cards).

221 *See id.* §§ 36-2804 (mandating the registration and certification of nonprofit medical marijuana dispensaries), 36-2806 (describing the requirements of registered nonprofit medical marijuana dispensaries).

222 *See id.* §§ 36-2804.02, 36-2818(B).

and a copy of the registry identification card application or renewal is deemed a valid registry identification card."[223]

This scenario anticipates that ADHS has complied with the AMMA's requirement of accepting applications, yet fails to meet the temporal requirements of accepting or denying the patient's application for an identification card.[224] Essentially, if ADHS fails to issue or deny an application for an identification card within forty-five days of the application's submission, the application itself becomes a valid identification card.[225]

The second way the State may fail in this regard is as follows:

> "[i]f at any time after the one hundred forty days following the effective date of this chapter the department is not accepting applications or has not promulgated rules allowing qualifying patients to submit applications, a *notarized statement by a qualifying patient containing the information required in an application* . . . together with a written certification issued by a physician within the ninety days immediately preceding the notarized statement, *shall be deemed a valid registry identification card.*[226]

This scenario anticipates that the ADHS *fails to implement* the AMMA by refusing to accept all applications for identification cards.[227] Essentially, if Arizona refuses to issue identification cards to qualified patients and/or caregivers, this provision ensures that the State's failure will not foreclose the ability for patients to have documentation that demonstrates their possession of marijuana is legal under state law.[228] In practice, a doctor may make a medical marijuana recommendation for a patient exactly as he would have in a state compliant situation and simply place a notary in his office for convenience.[229] In this case, rather than the State issuing the patient an identification card, the patient need only have his or her doctor's recommendation notarized and the

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223 *Id.* § 36-2818(B).

224 *See id.*

225 *See id.*

226 *See id.* §§ 36-2804.02, 36-2818(B).

227 *See id.*

228 *See* Telephone Interview with Andrew Myers, *supra* note 215 (explaining that if the state were to stop issuing identification cards, "that really doesn't impact the patients either, because at that point all the doctor needs to do is have a notary in his office, they go to get the recommendation exactly as they did before, but instead of sending the paperwork to the State of Arizona, they just get this notarized stamp on their recommendation and that will serve as a card for them.").

229 *See id.*

notarized document in itself serves as a valid medical marijuana identification card.[230]

C. State's Failure to Implement Dispensaries Triggers the Safety Valve

If a qualifying patient's home is located more than twenty-five miles from the nearest nonprofit medical marijuana dispensary, the patient or designated caregiver may cultivate up to twelve marijuana plants in an enclosed, locked facility.[231] This provision is primarily intended to ensure that rural patients without reasonably convenient access to a medical marijuana dispensary would still have access to medical marijuana.[232] However, the drafters of the law also foresaw a situation in which no dispensaries would be operational and under this scenario, every medical marijuana patient would have the legal right under the AMMA to cultivate their own medical marijuana or have a caregiver cultivate it for them.[233] Therefore, if the State refuses to implement the law by failing to register and certify dispensaries, there will be no operational dispensaries in Arizona to provide patients access to medical marijuana. As a result, *every patient would have the ability to grow their own medical marijuana*, or have a caregiver do it for them.[234]

When reading the second and third safety-valve provisions in tandem, a breathtaking fact becomes apparent. If the State of Arizona fails to implement the AMMA, either by refusing to issue identification cards to qualified patients or refusing to allow dispensaries to operate in the state, its actions would cause the AMMA's "dispensary model" to automatically shift to a virtually unregulated "grow your own" ("GYO") model. Patients would receive valid notarized

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230 *See id.*

231 *See* § 36-2804.02(A)(3)(f) (2011) (stating that an application for a medical marijuana identification card must include a "designation as to who will be allowed to cultivate marijuana plants for the qualifying patient's medical use if a registered nonprofit medical marijuana dispensary is not operating within twenty-five miles of the qualifying patient's home."); § 36-2801 ("With respect to a qualifying patient . . . if the qualifying patient's registry identification card states that the qualifying patient is authorized to cultivate marijuana, twelve marijuana plants contained in an enclosed, locked facility except that the plants are not required to be in an enclosed, locked facility if the plants are being transported because the qualifying patient is moving. . . . With respect to a designated caregiver . . . [i]f the designated caregiver's registry identification card provides that the designated caregiver is authorized to cultivate marijuana, twelve marijuana plants contained in an enclosed, locked facility except that the plants are not required to be in an enclosed, locked facility if the plants are being transported because the designated caregiver is moving.").

232 *See* Telephone Interview with Andrew Myers, *supra* note 215 (explaining that the grow your own provision is "going to be an important provision for rural patients no matter what.").

233 *See* § 36-2801; Telephone Interview with Andrew Myers, *supra* note 215 ("It's just if there's no dispensary operational, which obviously there can't be any dispensary if there's no rules promulgated, every patient would have the ability to cultivate their own, or have a caregiver do so for them.").

234 *See* §§ 36-2801, 36-2804.01-05; Telephone Interview with Andrew Myers, *supra* note 215.

identification cards directly from their doctors with authority under state law to grow their own marijuana in their homes or have a caregiver grow it for them.[235]

D. Certain Safety Valves Have Already Been Triggered

As of the writing of this article, the State had taken a "middle road" approach to thwarting the AMMA.[236] Since the State of Arizona filed their complaint, patient identification cards have been diligently issued through the State. They have refused, however, to register medical marijuana dispensaries or allow already registered dispensaries to operate.[237] In its online FAQ sheet for the Arizona Medical Marijuana Program, ADHS states, "Since no dispensaries will be operating when the first qualifying patients obtain a registry identification card, all qualifying patients will be approved to cultivate if they request approval to cultivate."[238] This means that at this very moment in Arizona, thousands of patients with state-issued identification cards may grow their own marijuana in their homes or allow a caregiver to do it for them.[239] And that is exactly what is happening across the state.[240]

Cory Miller is a retired Army Lieutenant who was injured by an Improvised Explosive Device while traveling in a convoy in Afghanistan.[241] Two of

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[235] *See* §§ 36-2801, 36-2804.01-05; Telephone Interview with Andrew Myers, *supra* note 215.

[236] *See* Telephone Interview with Andrew Myers, *supra* note 215 ("[T]hey've taken kind of a middle road right now. . . . they're issuing identification cards, but they are not moving forward with the dispensary portion of things. So basically they've decided that they don't want to have these commercial businesses that are operating, and so that they're opting for the grow your own choice right now. And so what happens presently is that patients go to a physician, they acquire their recommendation, they apply to the State. The State is very diligently issuing cards. That part of health services hasn't slowed down. And then they're in a situation where they can either cultivate up to twelve plants on their own, or they can designate a caregiver to cultivate those twelve plants for them.").

[237] *Id.*

[238] *Frequently Asked Questions: Qualifying Patients*, ARIZ. DEP'T OF HEALTH SERV., http://www.azdhs.gov/medicalmarijuana/documents/faqs/Qualifying_Patients_FAQs.pdf (last visited March 2, 2012).

[239] *Id.*; *see* Howard Fischer, *Medical Pot Cards to Trigger Early Grow-Your-Own*, ARIZ. DAILY SUN (Mar. 29, 2011, 5:00 AM), http://azdailysun.com/news/local/state-and-regional/med-pot-cards-to-trigger-early-grow-your-own/article_d782c19f-bc7a-59ba-b07b-d9d4ed4f4afc.html?mode=story.

[240] *See* Sonu Wasu, *Medical Marijuana Patients Start Growing Their Own*, TUCSON NEWS NOW (May 17, 2011, 11:03 PM), http://www.tucsonnewsnow.com/story/14666178/medical ("As Arizona's medical marijuana laws go into effect, dispensaries are still waiting for word as to when they can open their doors, but some people are not waiting for them. Applicants who have already received medical marijuana cards and the green light to cultivate pot for personal use, have already started cultivating the plant at home.").

[241] *See id.*

his fellow soldiers were killed in the attack.[242] As a result of his injuries, Miller suffers from carpal tunnel throughout his veins, severe pain in his foot, as well as pain from titanium screws placed in his body.[243] Before obtaining his prescription for medical marijuana, Miller took six pain pills a day, including Vicodin and Percocet, but the prescription medication made him tired and unable to function.[244] Medical marijuana has proved a much better way to control his pain so that he may live his everyday life without the heavy side effects of other prescription drugs.[245] Miller currently has six marijuana plants growing in a hydroponics set up, behind a curtained closet in his home, because he desperately needs it to control his pain and cannot obtain it in a more convenient or legal manner.[246]

VI. RAMIFICATIONS OF THE STATE FORCING PATIENTS TO "GROW THEIR OWN" MEDICAL MARIJUANA

If the State continues to deny dispensaries the ability to operate, patients may continue to grow their own marijuana legally under Arizona state law. However, this decentralized, disorganized system will cause counterproductive and potentially grave ramifications for all citizens of Arizona.[247] First, patients who have *legal* access to medical marijuana will lack *practical* access.[248] Second, Arizona will have relinquished virtually all regulation and control over medical marijuana use, cultivation, and sales in Arizona. This will inevitably result in difficulties for law enforcement, a lack of oversight to prevent doctor and patient abuses, and voluntary abandonment of potential tax revenues.[249]

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242 *See id.*

243 *See id.*

244 *See id.*

245 *See id.*

246 *See id.*

247 *Id.*; ARIZ. REV. STAT. ANN. §§ 36-2801, 36-2804.01-05 (2011); Telephone Interview with Andrew Myers, *supra* note 215.

248 *See* Telephone Interview with Andrew Myers, *supra* note 215 ("For a very seriously-ill patient, you know, this can be obviously far more difficult than having just them or caregiver go to the dispensary that's a mile down the road and be able to acquire the medication that they need.").

249 Press Release, Tom Horne, Ariz. Att'y Gen., Horne to Recommend Taxation of Medical Marijuana (Jan. 26, 2011), *available at* http://www.azag.gov/press_releases/jan/2011/HORNE%20TO%20RECOMMEND%20TAXATION%20OF%20MEDICAL%20MARIJUANA.html ("'[T]he sale of the substance can be taxed by the State, and we [The Attorney General's Office] are recommending to the Department of Revenue that it tax the sales accordingly. We are informed by the Department of Revenue that they will take this advice, and tax the sales.' The taxes are estimated to yield revenues to the State of Arizona in the approximate amount of $40 million per year."); *see infra* Part VI.B.

Finally, the GYO model could create greater opportunity for wrongdoers to engage in illegal activity.[250]

A. Patients Will Lack Practical Access to Medical Marijuana

Arizona's continued failure to implement the AMMA will have a disturbing effect on the patients who require medical marijuana most, but do not have practical access to the medication that they need.[251] In fact, if the medical marijuana program in Arizona remains a GYO model—a result wholly compelled by the inaction of state officials—seriously ill patients will find it "far more difficult" to obtain medical marijuana for their well-being.[252] In a traditional dispensary model, patients or caregivers can simply "go to the dispensary that's a mile down the road and be able to acquire the medication that they need."[253] The GYO model puts a heavy onus on the patient to provide marijuana for themselves or somehow network among private channels to find a caregiver who will provide it for them.[254] This conundrum begs the question: what good is a medical marijuana law, if patients have no practical access to the medicine it seeks to provide? If Arizona fails to implement dispensaries, patients will have three options regarding how they will gain access to medical marijuana: they may grow their own, find a caregiver who will grow it for them, or resort to the criminal market.[255]

Alaska's medical marijuana law, void of dispensary access, demonstrates the effect that such a law can have on a community of patients, absent an effective mechanism for patient access.[256] The section chief for Alaska's Bureau of Vital Statistics, responsible for providing Alaska residents with medical marijuana application and identification cards admits that "([t]he law) doesn't really

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250 *See* Telephone Interview with Andrew Myers, *supra* note 215.

251 *See id.*; *Talking Points: Medical Cannabis Collective Dispensary Bans*, AMS. FOR SAFE ACCESS, http://www.safeaccessnow.org/downloads/dispensary.ban.talking.points.pdf (last visited Feb. 26, 2012).

252 *See* Telephone Interview with Andrew Myers, *supra* note 215; *Talking Points: Medical Cannabis Collective Dispensary Bans*, *supra* note 251.

253 *See* Telephone Interview with Andrew Myers, *supra* note 215; *Talking Points: Medical Cannabis Collective Dispensary Bans*, *supra* note 251.

254 *See* Telephone Interview with Andrew Myers, *supra* note 215; *Talking Points: Medical Cannabis Collective Dispensary Bans*, *supra* note 251.

255 *See* Telephone Interview with Lisa Hauser, Attorney for Governor Jan Brewer (Aug. 31, 2011) ([P]atients . . . will be going to either caregivers which is contemplated by the law, or to the criminal market, or growing their own.); *Arizona Medical Marijuana Program: FAQs—Qualifying Patients*, Ariz. Department of Health Services, http://www.azdhs.gov/medicalmarijuana/faqs/patients.htm#Q26 (last updated Jan. 26, 2012);

256 ALASKA STAT. § 11.71.090 (LEXIS through 2011 legislation).

address how you're supposed to get [marijuana]."[257] As a result of the negative stigma that the law itself perpetuates, the President of the Alaska State Medical Association has stated that she cannot think of a "single doctor in the state who recommends marijuana to patients."[258] In fact, as of 2011, there are only three hundred and seventy-nine patients on the medical marijuana registry throughout the entire State of Alaska.[259]

The expectation that a newly diagnosed patient, or one who needs access quickly, will realistically grow his or her own medical marijuana is simply absurd.[260] Imagine a scenario where a recently diagnosed cancer patient begins chemotherapy, suffers severe side effects, and thus obtains a doctor recommendation for medical marijuana. She now may legally use marijuana, but first must locate and then plant marijuana seeds and wait for the plant to grow, while she continues to suffer the symptoms of her disease.

Earlier this year in Washington State, patients faced the threat of losing access to dispensaries and patient advocates argued that the result would be devastating to patients currently using medical marijuana.[261] "We've got cancer patients who have chemo next week, they want their next medicine, they're coming to me crying not knowing what to do. I don't know what to tell them."[262] While supporters of dispensary moratoriums in other states argue that such action is necessary to comply with federal law, ADHS director William Humble, still could not answer how patients in Arizona could potentially obtain the seeds without violating state and federal law.[263] How then will patients legally obtain medical marijuana in Arizona, if not through a dispensary?

The answer lies in the ability for *caregivers* to grow marijuana for patients. Under the AMMA, similarly to most other medical marijuana states, a regis-

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257 Jeff Richardson, *Medical Marijuana: Why It's Not a Big Issue for Alaska*, FAIRBANKS DAILY NEWS-MINER (May 22, 2011), http://www.newsminer.com/view/full_story/13365991/article-Medical-marijuana—Why-it-s-not-a-big-issue-for-Alaska?.

258 *See id.*

259 *See id*.

260 *See* Telephone Interview with Andrew Myers, *supra* note 215 ("In the [cancer patient] case, obviously it can be more difficult if you don't have dispensaries.").

261 Kirsten Joyce, *Medical Marijuana Patients, Dispensaries in Shoreline State Their Case to Council*, Q13FOX NEWS (June 6, 2011, 10:26 PM), http://www.q13fox.com/news/kcpq-20110606-medical-marijuana-shoreline,0,3810643.story.

262 *Id.* ("Laura Stevens, who runs Green Hope, a medical marijuana dispensary in Shoreline. Most of her customers suffer from cancer, AIDS and Crohn's disease.").

263 Fischer, *supra* note 239; s*ee* Thom Jensen, *Feds Say They Won't Allow Sale of Pot Anywhere in State*, KATU (June 9, 2011, 11:48 PM), http://www.katu.com/news/local/123602414.html.

tered caregiver may grow marijuana and provide marijuana for a patient.[264] Under Arizona law, a caregiver may supply medical marijuana for up to five patients at a time.[265] A caregiver may grow up to twelve plants for each patient for whom he or she is providing medical marijuana.[266] Simple math demonstrates that a caregiver who obtains an identification card may grow up to sixty marijuana plants if he or she provides the medicine to five patients at a time.[267] This ability for caregivers to provide medical marijuana to patients is the alternative to forcing seriously ill patients, who in some cases cannot even leave their bed, to grow their own medicine.[268]

Compensation and character regulations will probably have an additional dampening effect on the numbers of qualified patients who have practical access to the drug. While sometimes a caregiver will be the actual person "caring" for a patient, the reality is that most often, caregivers are simply the people providing medical marijuana for the patient.[269] However, under the AMMA, a caregiver may only receive financial reimbursement for actual costs incurred in assisting a patient's use of medical marijuana. A caregiver may "not be paid any fee or compensation for his service as a caregiver."[270] In addition, ADHS has the authority to do background checks on all caregivers to ensure clean records, and therefore minimize potential abuse.[271] These well-intentioned regulations will likely have a chilling effect upon would-be caregivers.

There are significant issues that arise when patients must rely on caregivers to supply them with medicine, rather than a trusted, regulated, transparent commercial dispensary. Legitimate concerns of less than adequate patient access, quality control, lack of therapeutic guidance from professionals, and the prospect of patients resorting to the criminal market, abound.[272]

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264 ARIZ. REV. STAT. ANN. § 36-2801(5) (Westlaw through 2011 legislation); *Frequently Asked Questions: Cultivation*, ARIZ. DEP'T OF HEALTH SERV., http://www.azdhs.gov/medicalmarijuana/documents/faqs/Cultivation_FAQs.pdf (last visited Mar. 2, 2012).

265 § 36-2801(5)(d); *Frequently Asked Questions: Designated Caregivers*, *supra* note 160.

266 § 36-2801(b); *Frequently Asked Questions: Designated Caregivers*, *supra* note 160.

267 § 36-2801(b); *Frequently Asked Questions: Designated Caregivers*, *supra* note 160.

268 § 36-2801(5)(e).

269 *See* Telephone Interview with Andrew Myers, *supra* note 215.

270 *Id.*

271 *See* Natalie Rivers, *In-Depth Look at Medical Marijuana in Arizona*, AZFAMILY.COM (Feb. 9, 2011, 6:30 PM), http://www.azfamily.com/news/In-depth-look-at-medical-marijuana-in-Arizona-115593524.html (quoting the director of the ADHS as saying "[w]e're going to do background checks on the caregivers to make sure they're not felons . . . we have that authority").

272 *See* Telephone Interview with Andrew Myers, *supra* note 215; Telephone Interview with Lisa Hauser, *supra* note 255.

Caregivers are not nearly as easy to locate as dispensaries.[273] This is especially true in Arizona given that a caregiver is only allowed to support up to five patients at a time.[274] Such a limitation could result in a scarcity of caregivers to support patients who need access and cannot wait for a caregiver to become available.[275] Accordingly, it will be essential that physicians who provide patients with medical marijuana recommendations also be able to refer patients to support groups with access to caregivers who are able to provide medication to patients.[276]

Assuming physicians will have the requisite information to make useful recommendations could be wishful thinking. Many physicians may not be familiar with such networking channels and, as a result, patients could be left in a painful lurch, faced with extremely difficult access issues.[277] Older patients who are battling serious health problems will be likely the hardest hit because of the work entailed in seeking out an available caregiver.[278] Patients who live in less populated areas will also bear the brunt of this "patchwork" caregiver model.[279] Arizona citizens who should be focused on their health issues may find themselves re-focused on the potentially intimidating process of searching for a caregiver—a process that may cause a legal medical marijuana user to feel like he or she is seeking out a drug dealer.[280]

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273 *See* Telephone Interview with Andrew Myers, *supra* note 215 ("[The caregiver model] can be obviously far more difficult than having just them or a caregiver go to the dispensary that's a mile down the road and be able to acquire the medication that they need.").

274 ARIZ. REV. STAT. ANN. § 36-2801(b) (Westlaw current through 2012 Legis. Sess.); *Frequently Asked Questions: Designated Caregivers*, *supra* note 160.

275 *See* Telephone Interview with Andrew Myers, *supra* note 215 ("[T]hese caregivers are not easy to find as a dispensary would be, especially because the caregivers can only have five patients. So what's really going to be important in this situation is that patients are able to find patient support groups . . . but you know that's obviously again is going to be a patchwork. In some communities in the state you're probably going to have a community of physicians that are providing recommendations that would be able to refer patients very easily to patient support groups that have access to caregivers that will be able to provide medication to that patient. But for a patient that lives in a less populated area, or the physician that you haven't been given a recommendation from and just is not somebody who is very tied into that type of network, I mean you can be looking at very difficult access issues for that patient definitely . . . especially older patients who are dealing with very serious health problems.").

276 *See* Telephone Interview with Andrew Myers, *supra* note 215.

277 *See id.*

278 *See id.*

279 *See id.*

280 *See id.* ("[Patients] shouldn't have to end up having to make like five, six different phone calls trying to track [caregivers] down to get marijuana for them, and that's one thing that can very intimidating for patients . . . [especially] since there is a stigma that has been associated with marijuana use for a lot of years [patients will] basically feel like they're trying to find a drug dealer, instead of having a comfortable environment that they can step into that's operated out of a storefront and is very accessible.").

The misguided stigma associated with medical marijuana use is exacerbated by the State's refusal to implement accessible and transparent dispensaries.[281] In order for patients to feel as though they have *legal* access to medical marijuana, it is important that Arizona's medical marijuana program reflect that legality, or patients may be deterred from seeking out or using the drug.[282] Harvard Medical School Professor Emeritus, Dr. Lester Grinspoon, maintains that the most dangerous thing about marijuana is the stigma attached to it.[283]

While marijuana's stigma may deter some patients from utilizing it as medicine, concerns regarding quality control may deter even more patients from considering it as a viable option. Many qualified patients may struggle with a myriad of health issues, including a compromised immune system.[284] Therefore, quality control measures to ensure patient safety become important because marijuana is not a uniform, well-defined material. Different plant strains vary radically in their cannabinoid composition and in the contaminants—fungi, bacteria, pesticides, heavy metals and other substances—they contain. Products made without any proof of quality control may be ineffective or harmful."[285]

Dispensaries have a distinct advantage of having the ability to test its medicine for pesticides, cleanliness, microbiological contaminants and potency.[286] Through the guidance of "best practices" manuals, quality control testing laboratories, and training classes for employees, dispensaries are in a position to ensure the safest, highest quality medicine for patients.[287] Dispensaries can also be valuable resources to help patients understand the differences

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[281] *See generally* GRINSPOON & BAKALAR, *supra* note 24.

[282] *See id*.; Telephone Interview with Andrew Myers, *supra* note 215 ("[The patient will be deterred] if you have a situation where the State is refusing to implement the program . . . they are only stigmatizing it further. So I think that the best-case scenario for patients would be that the State implement this fully and openly. Dispensaries have become an accepted part of the community . . . they are commercial establishments that [patients] can walk into and be immediately welcomed and being taken care of like a medical patient, which they are.").

[283] *See generally* GRINSPOON & BAKALAR, *supra* note 24; *see also* Jennifer Joseph et al., *Marijuana from Mom: Mother Says Drug Helps Son Cope with Severe OCD*, ABC NEWS (July 23, 2010), http://abcnews.go.com/2020/MindMoodNews/marijuana-alternative-treatment-children-ocd-autism/story?id=11227283&page=1.

[284] *See Frequently Asked Questions: Qualifying Patients, supra* note 238.

[285] Henry I. Miller, Op-Ed, *Crackpot Legislation*, N.Y. TIMES (June 17, 2007), http://www.nytimes.com/2007/06/17/opinion/nyregionopinions/17CImiller.html.

[286] *See Santa Cruz Medical Marijuana Dispensary Sees Advantage of Clean Green Certification*, PRWEB (Aug. 31, 2011), http://www.prweb.com/pdfdownload/8758689.pdf; *see also* Jessica van Berkel, *Marijuana Dispensaries Could Help Sick Patients,* WORLD (July 27, 2010, 11:00 AM), http://theworldlink.com/news/local/article_2ffeb2a5-e73d-5f62-9f1b-07f8fbab1fee.html.

[287] Jonathan Martin, *With Few Rules, Pot Dispensaries Try Policing Themselves,* SEATTLE TIMES (Aug. 26, 2011, 9:02 PM), http://seattletimes.nwsource.com/html/localnews/2016027851_marijuana27.html.

between available marijuana strains and which are best suited to patients' conditions.[288] Additionally, dispensaries may serve to properly educate patients regarding the different ways to use medical marijuana and moderate dosage.[289]

This quality control concern was a driving force for the drafters' decision to require state regulated dispensaries within the AMMA.[290] The primary drafter of the AMMA maintains that without dispensaries, patients simply "don't know what they are getting."[291]

> They don't know what they're getting at this point—the quality of it and the potency of it, whether it's even the right sort of marijuana strain for their condition, and there *are* differences. [Dispensary operators] in other states . . . have developed the research and information that would at least enable them to advise a patient. [Otherwise] it is like you are a patient who needs penicillin [and the State's position regarding how to obtain it is] 'by the way, you can grow the mold on your bread in your refrigerator if you so choose' . . . not exactly quality control.[292]

Drafters maintain that the AMMA was written as a complete regulatory scheme in which dispensaries are closely monitored. Rules in the AMMA govern, for example, how to track the growth and supply of marijuana plants so as to account for every ounce.[293] This strict regulation increases the probability of sufficient quality control.

A law that falls short of the strict dispensary regulations also "opens the door to a misuse of the act . . . and arguably the approach [the State] has taken here could potentially push more patients towards the criminal market."[294] Under the AMMA, it is not legal for a medical marijuana patient to obtain their medicine through the criminal market.[295] Arizona's temporary, and possibly long term decision to ignore the AMMA's mandated dispensary program, flies in the face of the stated purpose of Proposition 203: "[To] permit qualifying

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288 *See* Telephone Interview with Lisa Hauser, *supra* note 255; *see also San Francisco Medical Marijuana Doctor Describes Methods of Medicinal Cannabis Use*, PRWEB (June 6, 2011), http://www.prweb.com/releases/marijuana-doctor/san-francisco/prweb8536705.htm.

289 *San Francisco Medical Marijuana Doctor Describes Methods of Medicinal Cannabis Use*, *supra* note 288; *see Santa Cruz Medical Marijuana Dispensary Sees Advantage of Clean Green Certification*, *supra* note 286.

290 *See* Telephone Interview with Lisa Hauser, *supra* note 255.

291 *See id.*

292 *Id.*

293 *See* Medical Marijuana Program, 17 Ariz. Admin. Reg. at 770-72.

294 *Id.*

295 *See Frequently Asked Questions: Qualifying Patients, supra* note 238.

patients or their caregivers to legally purchase their medicine from tightly regulated clinics, as they would any other medicine—so they need not purchase it from the criminal market."[296]

In states that permit marijuana use for medical purposes but do not provide for dispensaries, a dispensary alternative that still allows patients a realistic opportunity to obtain medical marijuana is a "co-op" or collective model.[297] While a dispensary generally involves the sale of medical marijuana, a collective or cooperative exists for the cultivation and sharing of medical marijuana among a group of individual qualified medical patients or caregivers.[298] The concept takes advantage of legal provisions permitting caregivers to provide medicine to qualified patients.[299] Pursuant to this model, patients join a group consisting of caregivers who have joined together to grow medical marijuana legally under state law (hence the term "co-op" or "collective"), and then provide marijuana to patients who become members because they lack other sources of the drug.[300]

> A collective should be an organization that merely facilitates the collaborative efforts of patient and caregiver members-including the allocation of costs and revenues. As such, a collective is not a statutory entity, but as a practical matter it might have to organize as some form of business to carry out its activities. The collective should not purchase marijuana from, or sell to, non-members; instead, it should only provide a means for facilitating or coordinating transactions among members.[301]

In a way, co-ops and collectives in these states become de facto dispensaries, wherein a neutral onlooker would not be able to distinguish whether the operation is in fact a state-regulated dispensary or privately owned co-op.[302] This system of patients and caregivers joining together within the letter of the law creates organized medical marijuana networks that are recognizable for

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296 *About the Initiative*, *supra* note 137.

297 *See* MARIJUANA POL'Y PROJECT, *supra* note 56. Washington, Oregon, California, and Nevada all adopt a co-op/collective model. *Id.*

298 *See Medical Marijuana Dispensaries: Frequently Asked Questions*, CITY OF SAN JOSE, *www.sanjoseca.gov/planning/zoning/docs/MedicalMarijuanaQ&A.pdf* (last visited Mar. 2, 2012).

299 *See* CAL. ATTORNEY GEN., GUIDELINES FOR THE SECURITY AND NON-DIVERSION OF MARIJUANA GROWN FOR MEDICAL USE app. C (2008), *available at* http://www.safeaccessnow.org/article.php?id=6389.

300 *See* Telephone Interview with Andrew Myers, *supra* note 215.

301 CAL. ATTORNEY GEN., *supra* note 299 (quoting language issued by the Attorney General of California in 2008).

302 *See id.*; MARIJUANA POL'Y PROJECT, *supra* note 56, at 1-7.

patients and give physicians a place to refer their patients to in lieu of dispensaries.[303]

Despite the fact that this potential system is a legal avenue (under state law) for caregivers to provide medical marijuana to patients, there remains a deep concern that it could create a double-edged sword for patients in Arizona by creating the appearance of criminality.

> [This is] a catch-22 situation[.] [In order] to provide the type of access to patients [they need], you want to have a high enough profile so that they can actually find you, but if patients can easily find you, law enforcement can easily find you too. All you can do is operate clearly under the guise of state law, make sure all of your documentation is in order and ultimately this becomes a political question. In many cases it comes down to [the actions of] sheriffs and county attorneys who are elected by voters. If you're in a county where the sheriff is going to be supported in his actions by carrying out . . . raids [on these establishments], they will probably [happen]. In a situation where voters are going to react very negatively to those types of actions—a place like Pima County—then you're in a different situation.[304]

The "patchwork" problem of Arizona refusing to implement dispensaries pervades more than patient access and quality control inconsistencies. It also gives rise to a patchwork environment in terms of how the AMMA is enforced, which ultimately affects patient access and quality of patients' lives.

B. Law Enforcement Confusion, Inconsistency, and Aggression

Arizona's refusal to implement the AMMA would impact law enforcement in three distinctly troubling ways. First, police would have great difficulty in actually enforcing AMMA law violations, absent state regulation and supervision of medical marijuana dispensaries. Second, inconsistency of enforcement throughout the state is inevitable, with certain municipalities likely to take a

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303 *See* Telephone Interview with Andrew Myers, *supra* note 215 ("[C]aregivers would band together into larger groups is what would naturally occur in a situation where dispensaries would not be implemented, because that's the way and that would be the best case scenario because that would be something that would raise the profile a little bit. They'd be able to make themselves available to additional patients and so you'd have these co-op type setups that would emerge. That would be—that's the second best scenario to dispensaries, because it's something that would be a little bit more recognizable for patients and more importantly for physicians, and it would give a place for physicians to refer their patients to in lieu of dispensaries.").

304 *Id.*

"hands off" approach, while others are likely to take an intrusive "heavy handed" approach. Finally, patient access to medical marijuana will be affected accordingly.

If Arizona were to regulate the operation of dispensaries, large actors would cultivate most marijuana used for medicinal purposes.[305] Therefore, law enforcement and state officials would have a relatively easy time keeping tabs on these actors, and the dispensary operations themselves, to ensure that at every level conduct conforms to State law.[306] By contrast, under a GYO model, medical marijuana would be grown by potentially tens of thousands of patients and caregivers in neighborhoods across the state—a far-flung scattering of small, unchecked marijuana cultivation locations.[307]

This dynamic will place an unreasonably heavy burden on law enforcement to determine what is a "legal grow" and what is "not a legal grow."[308] Then if Arizona ever ceases to issue identification cards, law enforcement will no longer have a mechanism to determine a legal grower from an illegal grower.[309] Essentially, the only way for police to determine whether an individual is protected under the AMMA is to execute a search warrant of the individual's home in order to discover whether the individual has an identification card or a notarized letter from a physician.[310]

The second issue flows from the first: the difficulty that law enforcement will face in an environment void of known producers of marijuana and of centralized locations for distribution to patients will lead to an inconsistency of enforcement of the AMMA across the State of Arizona.[311] Without clear state regulation signaling acceptance of the law, an air of skepticism and confusion will likely loom among law enforcement and the general public.

In June 2011, after receiving a tip that a medical marijuana patient had a small amount of medicine in his home, approximately twenty Gilbert, Arizona, police officers cut off the utilities and then stormed the home of Ross Taylor, who suffers from severe post-traumatic stress disorder, brandishing shields,

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305 *See id.*

306 *See id.*

307 *See id.* ("If you have a 'grow your own' model, marijuana [will] be grown in neighborhoods across the state—all over the place, and so it becomes very difficult for law enforcement to determine what is a legal grow and what is not a legal grow, especially if the state gets to the point where they stop issuing identification cards. Then law enforcement has no way to check.").

308 *Id.*

309 *See id.*

310 *See id.* ("[Law Enforcement will] have to go in and basically execute a search warrant to try and check on this marijuana grower that they found and had been reported on by neighbors, and when they get there they might find out that that patient has a notarized letter from a physician and then they have absolutely no way, they can't prosecute that patient.").

311 *See id.* (explaining that if Arizona does not implement the Arizona Medical Marijuana Act, "you'd have [enforcement] handled differently from municipality to municipality.").

masks, and shotguns; and yelling "search warrant!"[312] Ross, owner of Cannabis Patient Screening Centers, an Arizona company that refers patients to doctors for medical marijuana purposes, immediately produced his medical marijuana identification card,[313] but presumably in light of Arizona's pending declaratory judgment action, officers were unsure whether his identification card was even valid.[314] In Ross's home, police found two ounces of medical marijuana, within the AMMA's legal limits, and a very small amount of hashish (a concentrated form of marijuana). This amount of marijuana was within the legal limit under the AMMA.[315]

Ross told police that he did not grow the marijuana himself, but rather obtained it from another legal medical marijuana cardholder—an activity that police believed was illegal under the AMMA.[316] In fact, according to ADHS, obtaining medical marijuana through another qualified patient or caregiver is completely legal.[317] Ross was not arrested, but police seized his medical marijuana.[318]

Police maintain that the raid on Ross's home was intended to pursue those possessing marijuana for criminal purposes, taking advantage of the medical marijuana law.[319] Yet, prior to the raid, police did not even check the patient registry to verify whether Ross was indeed a legal identification card holder, nor did they seem fazed when Ross presented his card.[320] Police denied that Ross's home was raided because he owns Cannabis Screening Centers,[321] but others who would otherwise start distribution businesses may not be so sure. A resulting "chilling effect" would rob patients of even more potential access points.

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312 Marc Lacey, *Legal Marijuana in Arizona, but Not for the Sellers*, N.Y. TIMES, July 23, 2011, at A10, *available at* http://www.nytimes.com/2011/07/23/us/23pot.html?_r=1&scp=1&sq=In%20Arizona,%20you%20can%20buy%20marijuana,%20but%20not%20sell%20it&st=cse; Ray Stern, *Gilbert Police Storm Home, Seize Two Ounces of Marijuana from Card-Holding Medical Pot Patient. Really.*, PHX. NEW TIMES BLOGS (Jun. 16, 2011, 5:12 PM), http://blogs.phoenixnewtimes.com/valleyfever/2011/06/gilbert_police_storm_home_seiz.php). Gilbert, Arizona is a town located southeast of Phoenix, Arizona within the Phoenix metropolitan area; it is home to over 200,000 residents. GILBERT ARIZ. (March 22, 2012), http://www.gilbertaz.gov/.

313 Lacey, *supra* note 312; Stern, *supra* note 312.

314 Lacey, *supra* note 312; Stern, *supra* note 312.

315 Lacey, *supra* note 312; Stern, *supra* note 312.

316 Lacey, *supra* note 312; Stern, *supra* note 312.

317 *Frequently Asked Questions: Qualifying Patients, supra* note 238 ("*QP30: Where can I legally buy marijuana if I am a qualifying patient? Qualifying patients can obtain medical marijuana from a dispensary, the qualifying patient's designated caregiver,* ANOTHER QUALIFYING PATIENT, or, if authorized to cultivate, from home cultivation." (emphasis added)).

318 Lacey, *supra* note 312; Stern, *supra* note 312.

319 Lacey, *supra* note 312; Stern, *supra* note 312.

320 Lacey, *supra* note 312; Stern, *supra* note 312.

321 Lacey, *supra* note 312; Stern, *supra* note 312.

The Ross Taylor incident was not isolated. The same week, Gilbert police officers raided the Medical Marijuana Advocacy Group offices, where qualified patients meet to share medical marijuana—activity contemplated and fully legal under the AMMA and ADHS rules.[322] Officers placed the group's founder, an employee, and several customers in handcuffs before searching the area. Unsurprisingly, they did find several ounces of medical marijuana and live plants, all of which they seized.[323] The group's founder, a medical marijuana patient who suffers from massive back injuries and walks with a severe limp as a result of a motorcycle accident, was ultimately not arrested, nor was anyone else.[324]

The incidents in Gilbert illustrate the pitfalls of imprecise and sometimes counterintuitive regulation of marijuana used legally for medicinal purposes that even the most conscientious law enforcement personnel may struggle to avoid. First, significant confusion exists among law enforcement in Arizona regarding the status and legality of the AMMA. Second, state authorities have shown clear signs of resisting the AMMA—which one can hardly condemn given that their bosses immediately filed a lawsuit questioning its constitutionality upon passage. Finally, the existing political and law enforcement climate threatens practical patient access to legal medical marijuana in Arizona.

Although the caregiver supply model may insulate individual distributors from prosecution and few individuals may ever be arrested, law enforcement seizure of medical marijuana could cause dire consequences for patients. "The worst case scenario [is a] [s]ituation where hundreds or thousands of patients using a co-op, in the middle of treatment, lose access. Then you have patients who are either forced back completely into the criminal market or they lose access entirely. *Then we're back where we started*."[325]

VII. CONCLUSION

The State of Arizona should abide by the will of Arizona voters and fully implement the provisions of the AMMA. Full implementation is necessary if Arizona's patient community is to realize the intent and full effect of the law. A reliable system of safe and legal medical marijuana dispensaries is essential to realizing Arizona citizens' intent—so is a complete regime of regulation essential to full implementation of the AMMA. Law enforcement's fair, consistent, and even-handed enforcement of the AMMA is also vital to give

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[322] *See Frequently Asked Questions: Qualifying Patients, supra* note 238 ("Qualifying patients can obtain medical marijuana from a dispensary, the qualifying patient's designated caregiver, another qualifying patient, or, if authorized to cultivate, from home cultivation.").

[323] Stern, *supra* note 312.

[324] *See id.*

[325] Telephone Interview with Andrew Myers, *supra* note 215.

patients the confidence they deserve in the law, as well as ensuring that their access is never compromised. To that end, Arizona's public officials must end their highly contentious tactics to thwart full implementation. The State must demonstrate to the law enforcement community and people of Arizona acceptance of, and cooperation with, the intent of the AMMA.

While certain safety valve provisions may protect "patient access," as they allow for patients to grow their own medical marijuana in the absence of dispensaries, the "access" that patients will have to medical marijuana would be entirely counterproductive for the patients that the AMMA seeks to help and protect. Without dispensaries to provide patients with medical marijuana, patients will be forced to grow their own marijuana in their homes, find a caregiver to grow it for them, or resort to the criminal market. However, the expectation that patients grow their own marijuana is impractical; the caregiver model is spotty at best; and illegal acquisition is both extremely dangerous for patients and completely antithetical to achieving reasonable law enforcement goals, aside from bringing patients back to where they started prior to the passage of the AMMA. The "co-op" alternative, while practical and successful in some states that operate on a GYO model, may not be the viable option it seemed for Arizona in light of aggressive law enforcement action against the medical marijuana community in the months since the AMMA went into effect.

Young people and "pot heads" are not the intended beneficiaries of medical marijuana in Arizona, nor are they the actual beneficiaries. According to an ADHS Application Report, the majority of medical marijuana applications submitted to date by were from patients over the age of forty-one.[326] Legitimate patients who need practical access to medical marijuana cannot afford to be, in effect, denied access to the only effective treatment option available to them. Practical access is legal under the state law as written, safer for patients and the community, and essential to the course of treatment recommended by their doctor. Lest we forget, "[f]or certain persons, the medical use of marijuana can literally mean the difference between life and death."[327]

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[326] ARIZ. DEP'T OF HEALTH SERVS. APPLICATION MONTHLY REPORT: ARIZONA MEDICAL MARIJUANA PROGRAM (2011), http://www.azdhs.gov/medicalmarijuana/documents/reports/110927_Patient-Application-Report.pdf.

[327] Brief for the Leukemia & Lymphoma Society, et al. as Amici Curiae Supporting Respondents, *supra* note 85.

Share the Road: Why the Current Laws in Arizona Do Not Adequately Protect Cyclists, and a Call to Legislators to Change Those Laws

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I. Introduction

For some people, riding a bicycle is a distant memory. These people remember when they were a child riding to school or through the neighborhood park, and that is the last time they ever rode a bicycle. For others, riding a bicycle is an everyday part of life. These people ride bicycles for fitness, fun, competition, or commuting to work. Of course, the vast majority of bicyclists fall somewhere between these two extremes.[1]

Exact figures of how many people own bicycles in the United States are hard to determine, but one study in 1997 estimated that figure to be approximately 120 million.[2] Projected bicycle sales figures in the United States from

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[1] *See A Look at the Bicycle Industry's Vital Statistics*, Nat'l Bicycle Dealers Ass'n, http://nbda.com/articles/industry-overview-2009-pg34.htm (last visited Feb. 8, 2012). In 2006, the Bicycle Market Research Institute reported that 73% of adult bicyclists rode for recreation, 53% for fitness, 10% for commuting, 8% for racing, and 6% for sport. *Id*. (adding up to more than 100% because some ride in multiple ways).

[2] 71 Am. Jur. Trials 337, § 1.

1997 to 2009 were estimated at approximately 232 million.[3] These sales figures do not indicate how many new bikes replaced older bikes owned by the same person, but bicycle use statistics shed some light on how many bicycles are actively being used. An estimated 38.1 million Americans, ages seven or older (and several million more under age seven), used a bicycle six times or more in 2009.[4] These numbers are important because they illustrate the ever-increasing trend of bicycle ownership and use in the United States. This trend is important when looking at the unfortunate statistics related to bicycle use—specifically, statistics relating to injuries and fatalities from accidents involving bicyclists and motor vehicles.

The National Highway Traffic Safety Administration ("NHTSA") published a report in 2008 containing statistics on bicyclists involved in accidents with motor vehicles.[5] The report states that in 2008, 716 cyclists were killed and 52,000 injured in traffic-related crashes across the nation.[6] The Arizona Department of Transportation ("ADOT") reported that in 2009 there were 1,995 motor vehicle crashes involving cyclists in Arizona, of which twenty-five cyclists were killed and 1,643 were injured.[7] This begs the question: what is being done to reduce or eliminate motor vehicle accidents involving cyclists?

ADOT has attempted to address this problem in Arizona by focusing on five areas: (1) safety education training; (2) safe routes to school; (3) bicycle and pedestrian facility design training; (4) safety awareness; and (5) archived data.[8] While these are all good areas to focus on, there is one key component missing—the laws that govern cyclist-motor vehicle interaction. Current Arizona law regarding motor vehicle-bicycle accidents is grossly lacking.[9] The law in Arizona simply does not offer enough protection for cyclists, nor does the law do enough to deter and prevent irresponsible driving behavior of motor vehicle operators when they encounter a cyclist on the road.

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[3] *A Look at the Bicycle Industry's Vital Statistics*, *supra* note 1 (calculation done by adding sales figures from chart: Bicycle Manufacturers Association, and apparent market consumption based on U.S. Department of Commerce import statistics, and estimates of domestic market production by National Bicycle Dealers Association and Gluskin Townley Group, LLC).

[4] *Id.*

[5] NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS 2008 DATA: BICYCLISTS AND OTHER CYCLISTS (2008), *available at* www-nrd.nhtsa.dot.gov/pubs/811156.pdf.

[6] *Id.* at 1.

[7] INTERMODAL TRANSP. DIV., ARIZ. DEP'T OF TRANSP., 2009 MOTOR VEHICLE CRASH FACTS FOR THE STATE OF ARIZONA 51 (2010), *available at* http://www.azdot.gov/mvd/Statistics/crash/index.asp (follow "2009" hyperlink).

[8] ARIZ. DEP'T OF TRANSP., FY2010 BICYCLE AND PEDESTRIAN SAFETY AWARENESS CAMPAIGN 3 (2010), *available at* http://www.azbikeped.org/statewide-bicycle-pedestrian.html (follow the FY2010 Bicycle and Pedestrian Safety Awareness Campaign PDF hyperlink).

[9] *See infra* Part II (for a discussion of the applicable Arizona statute and sample cases that illustrate why the statute is so inadequate).

Part II of this article provides additional background information necessary to understand the scope of the problem Arizona cyclists face. This includes an expansion of information on the current state of the law as it relates to motor vehicle-cyclist interaction in Arizona, and a sample of accident cases in Arizona, including an interview with a recent accident victim. Part III addresses the problems that Arizona cyclists face by exploring both novel solutions through the use of law and the rationale behind these solutions. This part is subdivided into several areas of concentration. First, Part III(A)(1)-(2) explores the concepts of restorative justice and procedural justice and why these concepts are appropriate for dealing with bicycle-motor vehicle accidents. Second, Part III(B)(1) calls on legislators to amend the current laws to include criminal liability in many cases, and explains why this is appropriate. Part III(B)(2) contributes an in-depth discussion of victims' rights under Arizona's Constitution and how these rights can apply to victims of cyclist-motorist collisions. These two sub-parts also incorporate a restorative and procedural justice model that explains why the changes are needed and why they will work. Part III(C) looks to the current driving under the influence ("DUI") statutes in Arizona and how these can be used as a template for legislators when re-writing the current cycling laws. Part III(D) offers a proposed statute the author has created that Arizona legislators can use as a starting point to amending the current law. And finally, Part IV integrates these ideas into a comprehensive solution to the problems Arizona cyclists currently face.

II. BACKGROUND

Arizona Revised Statutes Annotated § 28-735(A) states, "[w]hen overtaking and passing a bicycle proceeding in the same direction, a person driving a motor vehicle shall exercise due care by leaving a safe distance between the motor vehicle and the bicycle of not less than three feet until the motor vehicle is safely past the overtaken bicycle."[10] The statute further states that if a motorist violates the statute and collides with a cyclist, the motorist is subject to a $500 civil penalty if the cyclist is injured, or a $1,000 civil penalty if the cyclist is killed.[11] Apparently, to add insult to injury, the statute eliminates any of these civil penalties if the cyclist is outside of a present and passable bike lane when hit by a motorist.[12]

The problem with this statute is twofold. First, the dollar amount of the civil penalties is so low that they hardly offer any deterrent effect at all. An injured cyclist can always bring a negligence lawsuit against the motorist that

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[10] ARIZ. REV. STAT. ANN. § 28-735(A) (Westlaw through 2011 Legis. Sess.).
[11] *Id.* § 28-735(B)(1)-(2).
[12] *Id.* § 28-735(C).

hit the cyclist, but the motorist's auto insurance policy will generally cover most damage awards.[13] The result is that a motorist who hits a cyclist is generally facing, at worst, a $1,000 fine and a possible increase in insurance premiums.[14] Second, the statute completely exculpates from civil penalties a motorist who hits a cyclist if the collision happens next to a passable bike lane and the cyclist is outside of the bike lane. This language is extremely disadvantageous to cyclists. The term *passable* is ambiguous, and the nature of an accident involving a motor vehicle and a cyclist (in the absence of eyewitnesses) can be problematic in determining whether a cyclist was in fact outside the bike lane.[15] This creates an incentive for negligent motorists to always claim a cyclist was outside the bike lane. The motorist can possibly avoid civil penalties, and more importantly, the motorist might avoid some—if not all—liability for the accident by claiming the cyclist holds contributory negligence for traveling outside the bike lane.[16] A closer look at some sample cases sheds further light on the inadequate operation of Arizona's bicycle laws.

Jerome Featherman was one month away from his eighty-fifth birthday.[17] He was traveling home on his bicycle, in a designated bike lane, when Dave Armstrong struck Jerome from behind with a car.[18] Jerome died of his injuries at a hospital in Tucson, Arizona.[19] Armstrong was only cited for traveling in a bike lane and for failing to give a cyclist three feet of space.[20] The end result after negligently killing another human being: Armstrong was ordered to pay

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[13] It is the author's opinion that the overwhelming majority of cases and articles regarding cyclists hit by motorists tend to center around the types of damage awards that can be pursued against the motorist, and the general practice of attorneys handling those cases appears to be to work within the motorist's insurance policy limits, especially when dealing with judgment-proof motorists.

[14] Note—this article does not explore the cases where a motorist intentionally hits a cyclist (which opens the door to serious felony charges and possible waiver of insurance).

[15] A motorist can easily claim a cyclist was outside of a bike lane and that the lane was passable because the scene of a motor vehicle-bicycle accident does not necessarily present enough evidence to precisely re-create the accident to determine whether the cyclist was in or out of the bike lane.

[16] This is not to say a motorist should not be able to claim contributory negligence in situations where a cyclist is not exercising ordinary due care, but rather that the cyclist being in or out of the bike lane should have no weight in the consideration of contributory negligence or civil penalty assessment. The motorist should still be required to abide by the statutory safe distance rule, *see* ARIZ. REV. STAT. ANN. § 28-735 (Westlaw through 2011 Legis. Sess.), when passing a cyclist, even if the cyclist is outside of a bike lane.

[17] Dan Shearer, *Cycling Death Leaves Brother Frustrated over Laws*, GREEN VALLEY NEWS (Sept. 15, 2009, 12:00 AM), http://www.gvnews.com/news/cycling-death-leaves-brother-frustrated-over-laws/article_0ab307d9-94fe-5748-bce1-cef2619ae5e6.html.

[18] *Id.*

[19] *Id.*

[20] *Id.*

$254 in fines to the Green Valley Justice Court.[21] Of course, Armstrong can face a wrongful death civil suit if Jerome's brother, Burt Featherman, decides to bring one. Sadly however, statements Burt Featherman made to the press demonstrate that even a wrongful death suit probably will not bring a sense of justice to Burt.[22]

On February 24, 2010, Cindie Holub was on a training ride on her bike[23] when a Waste Management garbage truck struck Cindie from behind.[24] Cindie was rushed to a hospital in Scottsdale, Arizona, where she died four days later.[25] The driver claimed that he saw Cindie and thought he left her enough room, but that he could not move over because there was a car next to him.[26] Witnesses claim there was no car next to the garbage truck, and that they clearly saw Cindie riding on the road.[27] The police cited the driver of the garbage truck (the customary *failure to leave three feet* citation), but again, the most the negligent driver faced was a $1,000 civil fine.[28] Cindie's husband brought a wrongful death civil suit against Waste Management,[29] but even if the suit is successful, another motorist guilty of negligently killing another human being will escape any criminal liability. This is yet another tragic example of how Arizona's bike laws fail to truly protect cyclists. Even though the majority of bicycle-motor vehicle accidents result in injury rather than death, the human toll is a constant.[30]

On October 5, 2009, John Sellinger, an Arizona resident, triathlete, and avid cyclist, was racing in the Soma Triathlon in Tempe, Arizona, when his life was drastically changed by yet another irresponsible motorist.[31] John was riding his bike on the bike leg of the racecourse—a closed road separated from parallel open traffic lanes by three layers of traffic cones—when a driver

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[21] Ofelia Madrid & Jane Larson, *Scottsdale Cyclist's Death Shows Problem with Law*, ARIZ. REPUBLIC (Apr. 22, 2010, 2:19 PM), http://www.azcentral.com/community/scottsdale/articles/2010/04/22/20100422scottsdale-bike0safety.html.

[22] Shearer, *supra* note 17. "As long as they're going to consider it a misdemeanor, I'm not interested in suing at this point," he said. "I'm not interested in money." "It's almost futile, because Arizona has no interest in protecting people in that situation." *Id.*

[23] Holub was training for an Ironman distance triathlon, which consists of a 2.4 mile swim, 112 mile bike, and 26.2 mile run. *Frequently Asked Questions*, IRONMAN, http://ironman.com/faq#axzz1mPyEj4pv (last visited Feb. 25, 2012).

[24] Madrid & Larson, *supra* note 21.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *See supra* notes 6-7 and accompanying text.

[31] Telephone interview with John Sellinger, accident victim (Oct. 18, 2010).

decided to make a u-turn.[32] The driver crossed through all three layers of traffic cones, onto the racecourse, and directly in front of John. John was traveling approximately thirty miles per hour and had no chance of stopping in time when he hit the side of the car.[33] John's attorney later showed John the police report and explained to John that the driver was cited for three traffic violations amounting to approximately $500 in fines, but that no criminal charges were filed.[34] The accident damaged John's body so badly that he was still undergoing surgeries over a year later.[35] John's doctors told him his pelvis was damaged to the point that he will likely need a complete hip replacement in five to ten years, and this will likely prohibit him from being able to continue competing in triathlons.[36] John was only thirty-three years old at the time of the accident.[37]

John's case is another example of how the laws in Arizona once again have failed cyclists. John understandably declined to discuss any further details about litigation as his civil case was still pending, but he did say that he was surprised to find out there was really no accountability for the driver.[38] John is a very forgiving person and stated that while he was angry at first, after reflection he does not necessarily think the driver should have been sentenced to any jail time.[39] However, John does wonder why the law does not, at the very least, require the suspension of the motorist's driver's license, or some other measure aimed at deterring drivers from driving irresponsibly around cyclists—especially cyclists competing in a closed course race.[40] When the statute was explained to John, he was silent for a few moments and then simply said, "That doesn't make much sense, you can really hurt or even kill someone, leaving their families to suffer, and you just get off the hook with a small fine after your insurance pays for everything else?"[41] This statement echoes what thousands of other bicycle accident victims and their families have had to face in Arizona—a complete lack of true justice.

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[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*

III. The Solution

A. *Restorative Justice and Procedural Justice*

It is no secret that changing a law can potentially be a long and drawn-out process. As such, Part III(A)(1)-(2) is dedicated to two concepts that lawyers and judges can use in the interim before actual changes to Arizona's cycling laws occur. However, it is important to note that these concepts come from criminal law; therefore, they are presented as templates for lawyers and judges to draw from while the cycling laws are still in the civil arena. These concepts are not meant to be an alternative solution to changing Arizona's cycling laws. Those laws still need to be changed, and the remainder of Part III is dedicated to that proposition.

1. Restorative Justice

Restorative justice is a concept "[i]n the criminal justice area that has been steadily growing since the mid-1980s."[42] Professor Susan Daicoff explains the concept of restorative justice in her new book, Comprehensive Law Practice: Law as a Healing Profession:[43]

> [Restorative justice] views crime as a "violation of people and of interpersonal relationships;" it is a tear in the fabric of society rather than an offense against the state. It puts the focus on the victim, wrongdoer, and society as the three main stakeholders in crime. It focuses on the harm done by crime to the victims and to the community, positing that criminal "violations create obligations" which must be put right. It seeks to restore the victims, the relationship between the criminal offender and his or her community, and overall harmony. It does this not through traditional criminal adjudication and sentencing but through dialogue, negotiation, problem solving for the future, and an emphasis on the offender's acceptance of accountability to his or her victims and to the community.[44]

Even though this is an excellent explanation of restorative justice, the last sentence can be slightly misleading to individuals unfamiliar with restorative justice. Professor Daicoff further explains, "[restorative justice] is not primarily focused on forgiveness or reconciliation, [nor is it necessarily] mediation."[45]

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[42] Susan Swaim Daicoff, Comprehensive Law Practice: Law as a Healing Profession 223 (2011).

[43] *Id.*

[44] *Id.* (quoting Howard Zehr, The Little Book of Restorative Justice 19 (2002)).

[45] *Id.* at 224 (paraphrasing Zehr, *supra* note 44, at 21 (2002)).

The restorative justice process can sometimes take place prior to any criminal sentencing but it can often involve post-sentencing victim-offender interaction.[46] "[Restorative justice] is seen in almost every jurisdiction in the United States, in many forms, such as: teen court, victim-offender mediation (VOM), reparative probation programs, and community parole boards."[47] Perhaps the best way to fully understand restorative justice is through a sample case that Professor Daicoff offers.[48]

Professor Daicoff recites the words of writer Barbara Stahura that detail the story of a victim-offender mediation case[49]:

> One evening in July, 1998, Terri Carlson and her husband were walking home along the side of the road from the annual community festival in Byron, Minnesota, when a four-wheel-drive pickup truck going about 55 [mph] swerved, hitting and killing Terri's husband and injuring Terri. The 25-year-old driver, Eric, was a deputy county sheriff, whose blood alcohol level was 50% over the minimum for drunk driving. Yet Terri felt badly for him. She herself had occasionally driven drunk. She said, "He was only 25. . . . just a baby. He had lost everything he'd committed to in his profession." When he received a 44-month sentence, despite her request to give him 10 years' probation and community outreach, she felt "further violated." She packed up her three children and moved to Oregon, but upon finding out about restorative justice, she and Eric began a process designed to reconcile and resolve what had happened. It took a year of preparation and individual meetings with the mediator before they were ready to meet together with the mediator. In that meeting, "they had a warm and honest talk, even laced with laughter, and reached an agreement." Terri promised to help Eric reintegrate himself back into the Byron community. They agreed to speak jointly to schools, community groups, and the city council about how to prevent what happened. And they agreed that Eric should speak to Terri's three children about the death of their father.[50]

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[46] *Id.*

[47] *Id.* at 229.

[48] *Id.* at 230.

[49] *Id.; see also* Barbara Stahura, *Trail 'Em, Nail 'Em, and Jail 'Em: Restorative Justice*, SPIRITUALITY & HEALTH, Spring 2001, at 43 (discussing Terri Carlson's story).

[50] DAICOFF, *supra* note 42, at 230 (quoting Stahura, *supra* note 49).

Professor Daicoff describes this story as a "vibrant and stirring example of restorative justice at work."[51] This story also offers a restorative justice model for attorneys to use when representing cyclists, or the families of deceased cyclists, that have been the victims of a careless motorist.

Attorneys can explain the restorative justice process to their client and inquire if the client has any interest. If the client is agreeable, the attorney can then contact the offender, ascertain their interest, and begin the restorative justice process. The end result is that the victim can have a potentially much needed meeting with the offender. The families of Jerome Featherman[52] and Cindie Holub[53] could meet with—and be heard by—the drivers that caused the death of the families' loved ones. John Sellinger[54] could have the opportunity to be heard by the woman, who caused his life-altering injuries. In these scenarios, the victims have the chance to say what they need to say, and explore agreements with their offenders that can lead to true healing, as happened in Terri Carlson's story.[55] The idea of the victim's need to be heard can be understood in greater detail by exploring procedural justice.

2. Procedural Justice

Procedural justice is a concept that considers the psychology behind litigants' views of the judicial process, and it attempts to provide the litigants with tools that promote a sense of fairness not tied to a case's outcome.[56] Essentially, procedural justice recognizes three factors that determine a litigant's sense of fairness surrounding a case. These factors do not include whether the litigant wins or loses his case or whether the judge rules a certain way on criminal liability.[57] These three factors are as follows: "1. being given an opportunity to speak and be heard; 2. being treated with dignity and respect by the judge and the other legal personnel; and 3. how trustworthy those in authority appeared and behaved."[58] Tom R. Tyler, the proponent of these three factors, stated, "Each of these three factors has more influence on judgments of procedural justice than do either evaluation of neutrality or evaluations of the favorableness of the outcome of the hearing."[59] Professor Daicoff expands this

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[51] *Id.*

[52] *See supra* Part II.

[53] *See supra* Part II.

[54] *See supra* Part II.

[55] DAICOFF, s*upra* note 42, at 230 (quoting Stahura, *supra* note 49).

[56] *See id.* at 113.

[57] *Id.*

[58] *Id.*

[59] *Id.* (quoting Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, *in* LAW IN A THERAPEUTIC KEY 12 (David B. Wexler & Bruce J. Winick eds., 1996)).

concept by stating that procedural justice "suggests that litigation in itself may not necessarily be what people want from the law; they want a voice, an opportunity to tell their story, to be treated with respect by authority figures, and to have the decision . . . explained to them."[60] Based on these insights, procedural justice clearly has the potential to help victims of cyclist-motorist collisions.

Procedural justice would allow the families of Jerome Featherman[61] and Cindie Holub[62] to be present in court and heard by the judge. These families would be able to tell their stories of how the loss of a loved one has affected them. A judge practicing procedural justice would treat the deceased loved one's family with respect and explain why he is making a particular ruling or decision in the case. Similarly, procedural justice would allow John Sellinger[63] to tell his story and give him the opportunity, at the very least, to have the judge explain why or why not the offender should have his license revoked.[64]

Procedural justice's concept of allowing victims to be heard in court is very similar to restorative justice's concept of providing a forum for the victims to be heard outside of court. Of course, for restorative justice to work, the victim and offender must agree to a meeting;[65] for procedural justice to work the victim and offender must be involved in a court proceeding that allows the victim to be heard.[66] Here is where Arizona Revised Statutes Annotated § 28-735 fails victims of cyclist-motorist collisions. The statute fails to place any criminal liability on the offender at all.[67] The statute's lack of criminal liability weakens, or even completely eliminates, a victim's ability to benefit from restorative justice or procedural justice because the two concepts are generally triggered by some form of criminal liability. The next subpart explores how an amended Arizona Revised Statutes Annotated § 28-735 can address this issue.

B. Amending Arizona Revised Statutes Annotated § 28-735: What the Law should be and Why

1. The Oregon Statute

Arizona legislators can and should look to Oregon for guidance on what changes should be made to the Arizona Revised Statutes § 28-735.[68] Oregon Revised Statutes § 811.060 (Vehicular assault of bicyclist or pedestrian; penal-

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60 *Id.*
61 *See supra* Part II.
62 *See supra* Part II.
63 *See supra* Part II.
64 *See* Telephone interview with John Sellinger, *supra* note 31.
65 *See* Daicoff *supra* note 42, at 225.
66 *Id.* at 113.
67 ARIZ. REV. STAT. ANN. § 28-735 (Westlaw through 2011 Legis. Sess.).
68 *See* OR. REV. STAT. § 811.060 (2011), *available at* http://www.leg.state.or.us/ors/811.html.

ties) attaches criminal liability to a motorist that injures a cyclist under certain defined circumstances.[69] The statute states as follows:

> (1) For the purposes of this section, "recklessly" has the meaning given that term in ORS 161.085.
>
> (2) A person commits the offense of vehicular assault of a bicyclist or pedestrian if:
>
> (a) The person recklessly operates a vehicle upon a highway in a manner that results in contact between the person's vehicle and a bicycle operated by a person, a person operating a bicycle or a pedestrian; and
>
> (b) The contact causes physical injury to the person operating a bicycle or the pedestrian.
>
> (3) The offense described in this section, vehicular assault of a bicyclist or pedestrian, is a Class A misdemeanor.[70]

A Class A misdemeanor in Oregon carries a fine of up to $6,250[71] and a prison term of up to one year.[72] Oregon defines recklessly as:

> [A] person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.[73]

Section 811.060 provides a much better model for Arizona to use than Arizona's current statute[74] because the Oregon statute attaches criminal liability to a motorist that hits a cyclist.[75] Criminal liability is critical because it triggers victims' rights under the Arizona Constitution.[76] Before exploring this trigger, it is necessary to look at another important element of the Oregon statute[77] that Arizona should not use.

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[69] *Id.*

[70] *Id.*

[71] OR. REV. STAT. § 161.635(1)(a) (2011), *available at* http://www.leg.state.or.us/ors/161.html.

[72] *Id.* § 161.615(1).

[73] *Id.* § 161.085(9).

[74] ARIZ. REV. STAT. ANN. § 28-735 (Westlaw through 2011 Legis. Sess.).

[75] OR. REV. STAT. § 811.060 (2011), *available at* http://www.leg.state.or.us/ors/811.html.

[76] ARIZ. CONST. art. II, § 2.1.

[77] § 811.060

Section 811.060's applicability is limited to only those motorists who act recklessly.[78] This limitation may be problematic as it requires proof that the motorist was "aware of and consciously disregard[ed] a substantial and unjustifiable risk."[79] Proof of a specific mental state in many cyclist-motorist collisions will most likely be difficult. For example, a motorist can easily say he never saw the cyclist in the road, rather than admit he saw the cyclist but consciously decided to turn in front of the cyclist, or otherwise disregarded a similar risk. This is why a criminal negligence standard is more appropriate for these types of collisions.

In fact, Arizona Revised Statutes Annotated § 13-105(10)(d) provides for this standard by defining criminal negligence as:

> [A] person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.[80]

This standard is much more appropriate for a statute attaching criminal liability to a cyclist-motorist collision. For example, if this standard is applied to the previous example (motorist states he never saw the cyclist), the motorist could still be held criminally negligent if the circumstances surrounding the collision indicate a reasonable person would have perceived the risk of hitting the cyclist.[81] The motorist's claim of not seeing the cyclist will not carry much weight because "motorists are chargeable with knowledge of objects on the highway that are in plain view; the motorist will be deemed to have seen what he could have seen, had he been a prudent and vigilant driver maintaining a proper lookout . . . ."[82] If adopted in Arizona, this standard would place the driver within the definition of criminal negligence.

It should be noted that the use of Oregon's statute as a model for Arizona does not necessarily mean that Arizona should require the same penalties, such as a $6,250 fine and a one year prison term.[83] Arizona legislators could make the penalties more or less severe. However, the critical piece of Oregon's statute that Arizona should keep is its creation of criminal liability for the motor-

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[78] *Id.*

[79] *Id.* § 161.085(9).

[80] ARIZ. REV. STAT. ANN. § 13-105(10)(d) (Westlaw through 2011 Legis. Sess.).

[81] *See id.*

[82] 11 AM. JUR. 3D *Proof of Facts* §3 (1991) (citing Hastings v. Soule, 100 A.2d 577 (Vt. 1953); 40 AM. JUR. 2D *Proof of Facts* 411).

[83] OR. REV. STAT. §§ 161.615(1), 161.635(1)(a) (2011), *available at* http://www.leg.state.or.us/ors/161.html.

ist.[84] This piece is necessary because it will trigger victims' rights under Arizona's Constitution.[85]

2. Arizona's Victims' Bill of Rights

Arizona's Victims' Bill of Rights begins with the statement, "[t]o preserve and protect victims' rights to justice and due process, a victim of crime has a right," and then enumerates the rights of Arizona crime victims.[86] A closer look at some of these rights reveals that many shadow procedural and restorative justice theories and processes.

The first enumerated right states that a crime victim has a right "[t]o be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process."[87] This right falls in line with the second factor of procedural justice that addresses a litigant's need to be "treated with dignity and respect by the judge and the other legal personnel."[88] The language of this enumerated right clearly follows the same language used in the procedural justice factor. Furthermore, the Supreme Court of Arizona has said trial courts must follow and apply the plain language of the Victims' Bill of Rights.[89] It follows that courts adhering to the plain language of the Victims' Bill of Rights are required to treat crime victims with, among other things, dignity and respect. This conclusion demonstrates that if Arizona's bicycle statute makes hitting a cyclist a crime, then the Victims' Bill of Rights would be triggered and the second factor of procedural justice would be available to the victim.

The next relevant enumerated right under Arizona's Victims' Bill of Rights is the right "[t]o be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present."[90] The right to request information and attend proceedings would be important to cyclists hit by motorists for two reasons. First, the cyclist or his family would receive notice, upon request, of all the critical proceedings that the motorist has a right to attend. Second, the cyclist or his family would have the right to attend all of those same critical proceedings. The majority of injured cyclists or the families of killed cyclists currently do not have such rights under Arizona's bicycle

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[84] *Id.* § 811.060.

[85] *See* ARIZ. CONST. art. II, § 2.1.

[86] *Id.*

[87] *Id.* § 2.1(A)(1).

[88] DAICOFF, *supra* note 42, at 113.

[89] Knapp v. Martone, 823 P.2d 685, 687 (Ariz. 1992).

[90] ARIZ. CONST. art. II, § 2.1(A)(3).

statute.[91] Arizona's current statute limits a motorist's liability to a civil fine,[92] leaving the victim or his family without any right to be present at a motorist's criminal court proceedings. This lack of presence highlights concerns that the third procedural justice factor addresses: a litigant's view of "how trustworthy those in authority appeared and behaved."[93] Certainly, the victim cannot feel the judge appeared and behaved in a trustworthy way if the victim cannot even be present when the judge is ruling on the motorist's case. The right to be present is closely tied to the next right enumerated in the Victims' Bill of Rights.

The fourth right crime victims in Arizona have is "[t]o be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing."[94] The right to be heard is probably the most important right to confer on a victim of a cyclist-motorist collision when considering procedural justice factors. The first, and possibly most important, procedural justice factor that litigants seek from the law is to be "given an opportunity to speak and be heard."[95] This opportunity is exactly what the fourth right under the Victims' Bill of Rights would give to the victim of a cyclist-motorist collision. Furthermore, combining the previously mentioned right to be present at critical proceedings[96] with the right to be heard[97] could potentially influence the outcome of these critical proceedings. For example, the victim would be able to stand up at any critical proceeding and tell his story to the judge. That story could include all the terrible things that the victim and/or his family had to endure. Victims' stories could potentially impact the judge's decision on whether to release the offender, whether to accept a negotiated plea, or what the appropriate sentencing should be. It should be noted that a victim's story and his right to be heard will not necessarily lead to increased fines and jail time for the offender. In John Sellinger's case, he did not think the person that hit him should have been sent to jail, but he did feel she should have had her driver's license taken away.[98] The triggering of the right to be heard would have given John the opportunity to stand before a judge and share these very sentiments. Again, the right to be heard is exactly what most victims are seeking: "They want a voice, an opportunity to tell their story."[99]

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[91] *See supra* Part III(B) (asserting that criminal liability needs to be included in a revised statute to trigger the Victims' Bill of Rights).

[92] ARIZ. REV. STAT. ANN. § 28-735 (Westlaw through 2011 Legis. Sess.).

[93] DAICOFF, *supra* note 42, at 113.

[94] ARIZ. CONST. art. II, § 2.1(A)(4).

[95] DAICOFF, *supra* note 42, at 113.

[96] ARIZ. CONST. art. II, § 2.1(A)(3).

[97] *Id.* § 2.1(A)(4).

[98] *See supra* text accompanying notes 39-40.

[99] DAICOFF, *supra* note 42, at 113.

The next right conferred upon crime victims in Arizona is "[t]o refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant."[100] The right to refuse a discovery request expands the second procedural justice factor of "being treated with dignity and respect by . . . legal personnel."[101] This expansion shields the victim from harassment by the offender or the offender's attorney. Shielding the victim from this type of harassment obviously promotes procedural justice's goal of treating the victim with dignity and respect. However, it is important to note that procedural justice seeks fairness for the defendant as well. At first glance, it would appear that the right to refuse a discovery request is not fair to defendants; by prohibiting the defendant from deposing the victim,[102] the defendant is potentially prevented from showing a cyclist was at fault for the collision. This would be an unfair result for a motorist who was not truly negligent. However, Arizona courts have determined that the Victims' Bill of Rights does not allow the victim to refuse to testify at the defendant's trial,[103] and when the victim's rights conflict with the defendant's constitutionally protected rights to due process and effective cross-examination, the defendant's rights must prevail.[104] The protection for both victim and defendant strikes a fair balance and falls within the scope of procedural justice because it protects innocent victims from harassment, yet also allows an innocent defendant the opportunity to expose in court a negligent cyclist.

The sixth right given to crime victims under the Victims' Bill of Rights is "[t]o confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition."[105] The right to confer with the prosecution promotes the procedural justice factor of "being given an opportunity to speak and be heard."[106] The more prominent procedural justice effect this right would have on a victim is promoting the idea that victims want to have decisions explained to them.[107] The victim utilizing this right to confer would have the opportunity to meet with the prosecutor; have the prosecutor listen to the victim's story; have the prosecutor explain to the victim what course of action will be pursued; and

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100 ARIZ. CONST. art. II, § 2.1(A)(5).

101 DAICOFF, *supra* note 42, at 113.

102 ARIZ. CONST. art. II, § 2.1(A)(5).

103 S.A. v. Superior Court, 831 P.2d 1297, 1299 (Ariz. Ct. App. 1992).

104 P.M. v. Gould, 136 P.3d 223, 227-28 (Ariz. Ct. App. 2006).

105 ARIZ. CONST. art. II, § 2.1(A)(6).

106 ARIZ. CONST. art. II, § 2.1(A)(4); DAICOFF *supra* note 42, at 113; *See supra* text accompanying notes 94-99 (essentially this right gives the victim the opportunity to tell his story and to be heard just like they would under enumerated right number four. The difference under enumerated right number six is that the victim is telling his story to the prosecutor rather than the judge.).

107 *See* DAICOFF, *supra* note 42, at 113.

most importantly, hear why the prosecutor is making that decision. One of the things litigants are really seeking from the law is not a particular course of action, but rather an explanation as to why a particular course of action is being pursued.[108] For example, the family of a killed cyclist may not be happy when told that a prosecutor is going to offer the criminally negligent motorist a plea agreement. However, families may receive some sense of justice if allowed to talk to the prosecutor about their dissatisfaction. Hearing prosecutors explain why they think the plea agreement is the best course to pursue, perhaps because they are not confident in getting a conviction, can potentially help families overcome any dissatisfaction.

The next right that crime victims have in Arizona is "[t]o receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury."[109] The right to prompt restitution addresses restorative justice concepts more so than procedural justice concepts. Specifically, one restorative justice concept is to restore the victim to where he was before the crime.[110] That is exactly what the right to prompt restitution would do for the victim of a cycling-motorist collision; it would restore the victim to where he was before the crime because once the motorist is convicted, the victim would be entitled to prompt restitution.[111] Arizona defines the restitution amount as "the full amount of the economic loss [suffered by the victim or the victim's immediate family if the victim is deceased] as determined by the court."[112] This broad definition could include anything from out-of-pocket medical expenses to lost wages to replacement of a destroyed bicycle. The key here is that the victim would acquire the right to restitution upon conviction of the motorist. The victim could potentially avoid filing a civil lawsuit altogether if the court awards him a proper amount of restitution. Of course, restitution may not always be the proper means of making the victim whole again. John Sellinger's case is a good example.[113] The injuries John received when hit by the motorist will likely accompany him long into the future.[114] A criminal court would likely encounter great difficulty determining the proper amount of restitution; therefore, John will probably be better served in a civil court that can determine what amount he should receive to cover his injuries and compensate him for the ordeal he will face for the rest of his life.

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[108] *See id.* at 113-14.

[109] ARIZ. CONST. art. II, § 2.1(A)(8).

[110] *See* DAICOFF, *supra* note 42, at 223-26.

[111] ARIZ. CONST. art. II, § 2.1(A)(8).

[112] ARIZ. REV. STAT. ANN. § 13-603(C) (Westlaw through 2011 Legis. Sess.).

[113] *See supra* text accompanying notes 34-36.

[114] *See supra* text accompanying notes 34-36.

The final right relevant to this article is quite possibly just as critical as the previously discussed right to be heard.[115] The final relevant right is "[t]o a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence."[116] As the bicyclist laws in Arizona currently stand, a cyclist or his family may face years of litigation in civil court before receiving any closure from the legal system.[117] If the laws are amended to include criminal liability, the victim's right to a speedy trial is triggered and the victim can potentially avoid the longer timelines associated with a civil trial.[118] This amendment is important for two reasons. First, faster criminal trials can lead to restitution for the victim,[119] thereby getting the victim potentially much needed money more rapidly than a civil trial would.[120] Second, the victim or his family can receive closure much sooner than through a civil trial. This is potentially critical for many victims or their families, as the healing process cannot truly begin until all legal processes are completed.

Understood together, all of these victims' rights provide an excellent framework for applying procedural justice principles and restorative justice principles to cases involving cyclists hit by motorists. However, the key to applying these rights is that Arizona law must attach criminal liability to the motorist to trigger victims' rights. Thus, Arizona Revised Statutes Annotated § 28-735 simply needs to be amended to include a framework for criminal liability in these cases.

C. Arizona's DUI Laws and How They Can Be Used as a Template

In addition to using the previously discussed Oregon statute, Arizona legislators can also look to Arizona's criminal code for guidance in amending the current cycling laws. Specifically, legislators should look to Arizona's DUI laws.[121] Arizona Revised Statutes Annotated § 28-1381 states in part:

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[115] ARIZ. CONST. art. II, § 2.1(A)(4).

[116] ARIZ. CONST. art. II, § 2.1(A)(10).

[117] John Sellinger's civil lawsuit had still not begun as of the date his interview, even though his accident occurred more than a year prior.

[118] *See* JUD. BRANCH ARIZ. MARICOPA CNTY., ANNUAL REPORT—FISCAL YEAR 2011 7 (2011), *available at* http://www.superiorcourt.maricopa.gov/MediaRelationsDepartment/docs/annualrep/FY2011AnnualRpt.pdf (reporting longer disposition period for civil cases in Maricopa County courts); *See U.S. District Court—Judicial Caseload Profile*, U.S. CTS., http://www.uscourts.gov/viewer.aspx?doc=/Uscourts/Statistics/FederalCourtManagementStatistics/2011/District FCMS Profiles September 2011.pdf&page=65 (last visited Feb. 25, 2012) (showing longer disposition period for civil cases in the Arizona U.S. District Court).

[119] ARIZ. CONST. art. II, § 2.1(A)(8).

[120] Victims of these types of collisions are likely in need of money to cover out-of-pocket medical expenses, lost wages, and other related expenses.

[121] *See* ARIZ. REV. STAT. ANN. § 28-1381 (Westlaw through 2011 Legis. Sess.).

> A. It is unlawful for a person to drive or be in actual physical control of a vehicle in this state under any of the following circumstances:
>
> 1. While under the influence of intoxicating liquor, any drug, a vapor releasing substance containing a toxic substance or any combination of liquor, drugs or vapor releasing substances if the person is impaired to the slightest degree.
>
> 2. If the person has an alcohol concentration of 0.08 or more within two hours of driving or being in actual physical control of the vehicle and the alcohol concentration results from alcohol consumed either before or while driving or being in actual physical control of the vehicle.
>
> . . . .
>
> 4. If the vehicle is a commercial motor vehicle that requires a person to obtain a commercial driver license as defined in § 28-3001 and the person has an alcohol concentration of 0.04 or more.[122]

When this statute is broken down and examined as separate sections, it becomes clear why the statute provides a good model to use for cycling laws. Key language in the statute's first section is "impaired to the slightest degree."[123] This phrase can translate to a cycling statute by using similar language. For example, replace the word *impaired* with the word *negligent*. The new wording could be used to hold a driver criminally liable for being *negligent to the slightest degree* when the driver's negligence results in contact with a cyclist. This change would eliminate any need to prove gross negligence over ordinary negligence,[124] and would provide an easy standard for juries to use. Just as a driver is criminally liable for driving while impaired to the slightest degree,[125] a driver would be criminally liable for hitting a cyclist when negligent to the slightest degree. Both of these standards make sense because the driver in each situation is controlling a potentially dangerous machine; therefore, the driver is held to a higher standard of care.[126]

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[122] *Id.* § 28-1381(A).

[123] *Id.* § 28-1381(A)(1).

[124] *See supra* Part III(B)(1) (discussing a change of wording from reckless to negligent, but implying gross negligence as the standard).

[125] § 28-1381(A)(1).

[126] A Westlaw search of information applicable to motorists returns hundreds of articles that repeatedly refer to a motorist having a high duty of care to be aware of what is in front of and surrounding them, so as to avoid hitting something. This standard is especially stressed with regard to pedestrians and cyclists.

Using the *negligent to the slightest degree* standard may appear harsh towards motorists at first glance, but it must be stressed that a motorist can still offer evidence of the cyclist's contributory negligence or even that the cyclist was completely at fault for the contact. For instance, in situations where a cyclist is hit and there is no designated bike lane, or where the cyclist is outside of a designated bike lane, the *negligent to the slightest degree* standard is a much more workable alternative than the current statute that holds harmless a motorist who hits someone outside of a bike lane.[127] Rather than allowing the motorist to claim the cyclist was outside of the designated bike lane, and placing fault with the cyclist, the motorist would have to show that he was not negligent in the slightest degree when he hit the cyclist. Of course, this scenario begs the question as to what should happen if the cyclist is inside of a designated bike lane when hit by a motorist. The next part of Arizona Revised Statutes Annotated § 28-1381 offers some guidance.[128]

The reason § 28-1381(A)(2) can be used as a model for cycling law is because of its nature as a *per se* rule.[129] When this subsection of the statute is applied to a DUI violation, if a motorist has blood alcohol content ("BAC") of 0.08 or higher while driving, the motorist is *per se* in violation of the statute. Put another way, as a matter of law, the motorist is liable for a DUI charge even if there is no other evidence of impairment.[130] This model can translate to a cycling law very easily.

A cycling statute could incorporate a provision that says if a motorist hits a cyclist while the cyclist is in a designated bike lane, then the motorist is *per se* reckless and in violation of the statute.[131] This provision would do two important things. First, it would eliminate the need for a cyclist, or his survivors, to prove the motorist was reckless. This makes sense when considering the motorist's heightened duty of care and the fact that he should never be driving inside a bike lane. This provision also correlates nicely to the Arizona Legislature's decision to make it a *per se* violation if a motorist's BAC is above a certain level. The reason the provision correlates nicely is because a person driving with a BAC above 0.08 can be said to be driving recklessly, just as a person driving in a bike lane can be said to be driving recklessly. Second, it could have huge deterrent potential, as motorists would be held criminally liable for hitting a cyclist in a bike lane rather than simply being exposed to a small civil fine. Of course, the statute should provide for mitigating circum-

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127 § 28-735.

128 § 28-1381.

129 *Per se* is defined as a matter of law. BLACK'S LAW DICTIONARY 1257 (9th ed. 2009).

130 § 28-1381; *see also id.*

131 *See supra* Part III(B)(1) for a discussion of why proving a driver was reckless can be problematic.

stances under this type of provision, such as entry into a bike lane due to an equipment malfunction, or forced entry by another vehicle.

Another subsection of § 28-1381 can also translate to a cycling statute.[132] Subsection (A)(4) deals specifically with commercial drivers.[133] It is important to note that this is a *per se* provision, just like subsection (A)(2), but subsection (A)(4) only requires a 0.04 BAC.[134] The difference in BAC limits is important to note because it may indicate that legislators thought there should be an even higher standard of care for commercial drivers.[135] This can, and should, translate to a cycling statute, holding commercial drivers *per se* reckless for hitting a cyclist regardless of whether the cyclist is in a designated bike lane. Just as commercial drivers have a higher duty of care than other drivers, as indicated by the lower BAC limit, they should have a higher duty of care when approaching a cyclist on the road.

Cindie Holub's story[136] is a perfect example of why holding commercial drivers to a higher standard of care makes sense. In her case, the Waste Management driver claimed he gave her enough room.[137] He obviously did not give her enough room, and he should have been more careful due to the fact he was driving a garbage truck, which is much larger than a normal vehicle.[138] A cycling statute that holds commercial drivers criminally liable for hitting a cyclist, regardless of where the cyclist is, will put those drivers on notice that they need to exercise extreme care when approaching a cyclist. This has great potential to deter commercial drivers from driving unsafely around cyclists.

Additionally, subsection (C) of Arizona Revised Statutes Annotated § 28-1381 is useful in constructing a solid cycling statute.[139] Subsection (C) states, "[a] person who is convicted of a violation of this section is guilty of a class 1 misdemeanor."[140] Arizona law provides sentencing guidelines for misdemeanors as follows:

> A. A sentence of imprisonment for a misdemeanor shall be for a definite term to be served other than a place within custody of the state department of corrections. The court shall fix the

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132 § 28-1381(A)(4).

133 *Id.*

134 *Id.*

135 This is indicated by the fact that the legislators decided to hold drivers with a standard drivers license accountable for a BAC over .08, but drivers with a commercial drivers license are accountable for a BAC over only half (.04) that of standard drivers.

136 *See* Madrid & Larson, *supra* note 21.

137 *Id.*

138 *Id.*

139 § 28-1381(C).

140 *Id.*

> term of imprisonment within the following maximum limitations:
> 1. For a class 1 misdemeanor, six months.
> 2. For a class 2 misdemeanor, four months.
> 3. For a class 3 misdemeanor, thirty days.[141]

Arizona law further provides fine amounts for misdemeanors as follows:

> A. A sentence to pay a fine for a class 1 misdemeanor shall be a sentence to pay an amount, fixed by the court, not more than two thousand five hundred dollars.
> B. A sentence to pay a fine for a class 2 misdemeanor shall be a sentence to pay an amount, fixed by the court, not more than seven hundred fifty dollars.
> C. A sentence to pay a fine for a class 3 misdemeanor shall be a sentence to pay an amount, fixed by the court, not more than five hundred dollars.[142]

Finally, the DUI statute calls for specific mandatory sentencing and fine amounts:

> I. A person who is convicted of a violation of this section:
> 1. Shall be sentenced to serve not less than ten consecutive days in jail and is not eligible for probation or suspension of execution of sentence unless the entire sentence is served.
> 2. Shall pay a fine of not less than two hundred fifty dollars.
> 3. May be ordered by a court to perform community restitution.
> 4. Shall pay an additional assessment of five hundred dollars to be deposited by the state treasurer in the prison construction and operations fund established by § 41-1651.
> 5. Shall pay an additional assessment of five hundred dollars to be deposited by the state treasurer in the public safety equipment fund established by § 41-1723.
> . . . .
> J. Notwithstanding subsection I, paragraph 1 of this section, at the time of sentencing the judge may suspend all but twenty-four consecutive hours of the sentence if the person completes a court ordered alcohol or other drug screening, education or treatment program. If the person fails to com-

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141 *Id.* § 13-707(A).
142 *Id.* § 13-802(A)-(C).

> plete the court ordered alcohol or other drug screening, education or treatment program and has not been placed on probation, the court shall issue an order to show cause to the defendant as to why the remaining jail sentence should not be served.[143]

These sentences, fines, and mandatory minimum amounts offer an outstanding framework that legislators can effectively apply to a new Arizona cycling law.

The first aspect of this framework that legislators can use is the maximum sentence requirement.[144] Arizona cycling laws could separate the offenses much like the DUI statute separates the offenses;[145] however, unlike the DUI statute, legislators could apply different misdemeanor levels to separate offenses. For example, the cycling statute could separate the *negligent to the slightest degree* offense and the *per se reckless* offense,[146] and it could charge the negligent offense as a class 3 misdemeanor and the *per se* offense as a class 1 misdemeanor. This allows a judge to sentence a *negligent to the slightest degree* motorist up to a maximum of thirty days in jail and the *per se reckless* driver up to a maximum of six months in jail.[147] Furthermore, the judge could also impose a fine of up to $500 on the *negligent to the slightest degree* driver and $2,500 on the *per se reckless* motorist.[148]

Along with sentencing and fine provisions, the mandatory minimum provisions in § 28-1381 provide another aspect of the framework legislators can use.[149] Legislators can copy this provision's structure, preventing judges from under-sentencing and under-fining statute violators.[150] For example, just like the DUI statute requires a minimum of ten days jail time, with nine suspendable,[151] legislators could set a mandatory minimum of ten days jail time for the class 1 violators, also with nine suspendable, and no minimum jail time for negligent violators. This accomplishes two things. First, this framework allows judges to exercise discretion based on the circumstances of the case. For example, if a negligent driver was momentarily distracted and clipped a

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143 *Id.* § 28-1381(I)-(J).

144 *Id.* § 13-707(A).

145 *Id.* § 28-1381 (DUI statute separates the impaired to the slightest degree from the *per se* violations).

146 *See supra* Part III(C) for a discussion of the proposed offenses of "negligent to the slightest degree" and "*per se* reckless."

147 § 13-707(A).

148 *Id.* § 13-802(A)-(C).

149 *Id.* § 28-1381.

150 Under-sentencing and under-fining are presented as terms to describe a situation where a judge is sentencing a guilty defendant in a manner that is below the minimum threshold the Legislature intended under the statute.

151 § 28-1381.

cyclist, but caused little to no injury, a judge could forego imposing jail time. However, if the driver approached the level of gross negligence, a judge could sentence the driver up to thirty days in jail. Second, allowing mandatory minimums provides for some exercise of control over the judge. For example, a driver who hits a cyclist in a designated bike lane could be forced to serve a minimum of twenty-four hours in jail and pay a minimum fine of a certain amount. This may effectively prevent a judge from circumventing the statute by not imposing any penalties in situations that legislators deemed deserving of a penalty.

Another noteworthy part of § 28-1381 is the provision for assessments in addition to fines.[152] The assessments paid under the DUI statute contribute to prison construction and public safety projects.[153] A cycling statute could utilize assessments as well. For example, the statute could include assessments similar to DUI assessments, and the statute could direct the assessments to a victim relief fund. Another idea would be to direct some of the assessment amounts to projects aimed at creating safer roads for cyclists, such as the ADOT programs mentioned in Part I of this article.[154] This serves two functions. First, it would help increase funding for these projects so that they have a higher chance of being effective. Second, it will help to deter irresponsible driving because imposing assessments and fines adds up, and these high amounts place the public on notice that such behavior will not be taken lightly.

Another aspect of § 28-1381 that deserves mentioning is the provision for suspension of jail time if an offender completes an out-of-court course.[155] This provision translates nicely into a cycling statute. Legislators could require that a mandatory jail sentence be suspended only if the driver completes an advanced driver safety course and perhaps even performs a certain amount of community service related to cycling, such as picking up trash along bike lane areas. This prevents drivers from continuing to drive irresponsibly; additionally, it has the potential to educate drivers about the true dangers that cyclists face on the road.

The last and most important aspect of this framework is that making these offenses misdemeanors triggers the Arizona Victims' Bill of Rights.[156] This Article has already discussed the importance of triggering these rights.[157] Referencing these rights again reinforces the importance of procedural jus-

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[152] *Id.*

[153] *Id.*

[154] *See* ARIZ. DEP'T OF TRANSP., *supra* note 8.

[155] § 28-1381.

[156] ARIZ. CONST. art. II, § 2.1.

[157] *See supra* Part III(B)(2).

tice[158] and illustrates how using Arizona's DUI laws as a framework for amending its cycling laws can achieve the goals of procedural justice.

D. The Proposed Statute

The following proposed statute incorporates a combination of concepts taken from Oregon's cyclist statute and Arizona's DUI statute. The author does not represent it as a complete and perfect model to adopt, but as a framework for legislators to start with and build upon.

Proposed Statute:

Arizona Revised Statutes Annotated § 28-735. Overtaking bicycles; criminal penalties.

A. When overtaking and passing a bicycle proceeding in the same direction, a person driving a motor vehicle shall exercise due care by leaving a safe distance between the motor vehicle and the bicycle of not less than three feet until the motor vehicle is safely past the overtaken bicycle.[159]

B. If a person is negligent to the slightest degree in violating subsection A, and the violation results in a collision with a bicycle outside of a designated bicycle lane, and the collision causes serious physical injury as defined in § 13-105 or death to another person, the violator is guilty of a class 3 misdemeanor.

1. The minimum penalty to be assessed is a five hundred dollar fine and ten days in jail.
2. The violator will be assessed five hundred dollars for the ADOT Bicycle and Pedestrian Safety Awareness Fund.
3. The judge may suspend the entire jail sentence if the violator completes an advanced driver safety course of instruction within sixty days of sentencing.

C. If a person violates subsection A, and the violation results in a collision with a bicycle inside of a designated bicycle lane, and the collision causes serious physical injury as defined in § 13-105 or death to another person, the violation is *per se* reckless, and the violator is guilty of a class 1 misdemeanor.

1. The minimum penalty to be assessed is a one thousand dollar fine and ten days in jail.
2. The violator will be assessed five hundred dollars for the ADOT Bicycle and Pedestrian Safety Awareness Fund.
3. The judge may suspend nine of the ten days of jail sentence if the violator completes an advanced driver safety course of instruction within sixty days of sentencing.

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158 *See supra* Part III(A)(2).

159 § 28-735.

D. If a person operating a vehicle under a commercial driver's license violates subsection A, and the violation results in a collision with a bicycle, regardless of whether the cyclist was inside or outside a designated bicycle lane, and the collision causes serious physical injury as defined in § 13-105 or death to another person, the violation is *per se* reckless, and the violator is guilty of a class 1 misdemeanor.

1. The minimum penalty to be assessed is a one thousand dollar fine and ten days in jail.
2. The violator will be assessed five hundred dollars for the ADOT Bicycle and Pedestrian Safety Awareness Fund.
3. The judge may suspend nine of the ten days of jail sentence if the violator completes an advanced driver safety course of instruction within sixty days of sentencing.

IV. Conclusion

The number of cyclists in Arizona injured or killed by collisions with motorists every year is alarming. Even more alarming is the fact that Arizona's laws do little to protect the victims of these collisions. While these victims still have the ability to sue the negligent motorist in civil court, the concepts of procedural justice and restorative justice have shown that many of these victims are interested in something other than money. They are interested in justice, and justice comes primarily from having the opportunity to be heard. The Arizona Victims' Bill of Rights can give cyclists and their families that justice, but they first must have access to those rights. This access can only come from the hands of Arizona legislators. Legislators must first amend Arizona's bicyclist laws and impose criminal liability on motorists that negligently or recklessly collide with cyclists. Criminal liability will trigger victims' rights for injured cyclists or the families of killed cyclists and it will finally give these victims the tools they need to seek true justice. Arizona legislators should look to Oregon's cycling statute, as well as to Arizona's DUI laws, as a framework for creating an effective Arizona cycling statute.

In the absence of access to a criminal court, attorneys may still find some sense of justice for a victim of a cyclist-motorist collision by using restorative justice. However, this requires agreement and cooperation from both the victim and the offender; therefore, in many cases the victim will never feel a true sense of justice because he will never be given what most victims want—the opportunity to be heard.

KEEPING THE DRAGON SLAYERS IN CHECK: REINING IN PROSECUTORIAL MISCONDUCT

Lorraine Morey*

"Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."
- Justice William O. Douglas[1]

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* J.D. 2011, Phoenix School of Law. Thank you to Professor Keith Swisher, Larry Hammond, and Colin Campbell for providing valuable insight and advice.

[1] Brady v. Maryland, 373 U.S. 83, 87 (1963).

I. INTRODUCTION

"Prosecutors are the most powerful actors in the American criminal justice system."[2] Further, "'[t]he prosecutor has more control over life, liberty and reputation than any other person in America.'"[3] Because a prosecutor wields such tremendous power, society requires "assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice."[4] Few would suggest that prosecutors specifically plan to convict an innocent person.[5] Rather, "prosecutorial misconduct stems from a 'win at all cost' mentality underlying the desire to further a career, or a firm belief in the defendant's guilt notwithstanding admissible evidence."[6] Pace University law professor and expert on prosecutorial misconduct Bennett Gershman asserts that there is no accountability and that "'[i]t's systemic now, and . . . the system is not able to control this type of behavior.'"[7]

"Appellate courts only overturn defendants' convictions for prosecutorial misconduct when the prosecutors' misdeeds are very serious and result in clear prejudice to the defendant."[8] Yet, in the rare instance the courts reverse these cases of misconduct, the judicial opinions do not name the offending prosecutor.[9] In fact, "many judges go to great lengths to redact the names of misbe-

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[2] Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1061 (2009).

[3] Scott Horton, *The Federal Prosecutor: A Calling Betrayed*, HARPER'S MAG., Sept. 2007, http://harpers.org/archive/2007/09/hbc-90001135 (quoting Robert H. Jackson, U.S. Attorney Gen., Address at the Department of Justice in Washington (Apr. 1, 1940)).

[4] Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 814 (1987).

[5] SECTION OF LITIGATION, AM. BAR ASS'N, CROSSING THE LINE: RESPONDING TO PROSECUTORIAL MISCONDUCT 1 (2008).

[6] *Id.*

[7] Brad Heath & Kevin McCoy, *Prosecutors' Conduct Can Tip Justice Scales*, USA TODAY (Sept. 22, 2010, 1:31PM), http://www.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform_N.htm.

[8] Gershowitz, *supra* note 2, at 1062.

[9] *Id.* at 1059; James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2126 (2000) ("[E]ven in the face of egregious behavior, orders announcing these reversals rarely single out anyone by name to bear the blame . . . ."); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 172-73 (2004) ("Indeed, few convictions are overturned by virtue of prosecutorial misconduct and, in the rare incidences of reversal, the appellate court opinions invariably neglect to identify the prosecutor by name as a matter of 'professional courtesy.'").

having prosecutors from trial transcripts quoted in judicial opinions" and, very often, the offending prosecutor is not disciplined for his misconduct.[10] In the absence of public embarrassment for prosecutors' misdeeds, there is little external pressure from the criminal justice system to prevent prosecutorial misconduct.[11]

The Office of Professional Responsibility ("OPR") was created to ensure that Department of Justice ("DOJ") attorneys continue to perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency.[12] The OPR reports directly to the United States Attorney General and investigates allegations of misconduct relating to the exercise of DOJ attorneys' authority to investigate, litigate, or provide legal advice.[13] The OPR traditionally has been lax in investigating complaints against government attorneys.[14] Prosecutors are well aware that professional discipline is lax and "the increasing incidence of prosecutorial misconduct suggests that it has become 'normative to the system.'"[15] "The courts focus on the impact of the misconduct upon the verdict, and professional disciplinary bodies appear unable or unwilling to grapple with ethical violations by prosecutors."[16]

Because discipline is inadequate and because there is a need for transparency in the naming of violating prosecutors, an Independent Prosecutorial Commission ("IPC") should be formed.[17] This Commission would not only regulate and discipline offending prosecutors, but would also publish the names of the accused prosecutors, the outcome of the investigation, and the discipline exacted.

Additionally, to reduce incidents of prosecutorial misconduct and to increase public confidence in the administration of justice, Congress should

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[10] Gershowitz, *supra* note 2.

[11] *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 68 (2005) ("Even when the appellate court reverses a conviction on grounds of prosecutorial misconduct, the prosecutor who engaged in the misconduct generally escapes any repercussions."); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for "Brady" Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987) ("[A]t present insufficient incentive exists for a prosecutor to refrain from *Brady*-type misconduct.").

[12] OFFICE OF PROF'L RESPONSIBILITY, DEP'T OF JUSTICE, ANNUAL REPORT 2009 1 (2009), *available at* http://www.justice.gov/opr/annualreport2009.pdf.

[13] *Id.*

[14] *See* United States v. Hasting, 461 U.S. 499, 522 (1983) (". . . futility of relying on the Department of Justice disciplinary proceedings").

[15] Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 454 (1992).

[16] *Id.*

[17] *See infra* Part IV.A.

revise the Hyde Amendment.[18] Further, the DOJ should adopt and abide by the American Bar Association Model Rules.[19]

This article focuses on all United States Attorneys (including Assistant United States Attorneys) within the DOJ. Part II discusses and illustrates different types of prosecutorial misconduct through various examples of violations and outcomes. Part III describes existing standards and remedies for prosecutorial misconduct, and their deficiencies. Part IV presents recommendations, including the proposal to create and structure an IPC. Part V offers the conclusion that the combination of these remedies will help not only to reduce the likelihood of wrongful convictions, but also will reduce the reversal of rightful convictions.

II. PROSECUTORIAL MISCONDUCT

Prosecutorial misconduct[20] "has been used to describe any 'behavior that deliberately seeks an unfair advantage over the accused or a third person, or otherwise seeks to prejudice these persons' rights.'"[21] Prosecutorial misconduct is not a remote incident by an immoral prosecutor.[22] Rather:

> [P]rosecutorial misconduct is largely the result of three institutional conditions: vague ethics rules that provide ambiguous guidance to prosecutors; vast discretionary authority with little or no transparency; and inadequate remedies for prosecutorial misconduct, which create perverse incentives for prosecutors to engage in, rather than refrain from, prosecutorial misconduct. These three conditions converge to create uncertain norms and a general lack of accountability for how prosecutors view and carry out their ethical and institutional obligations.[23]

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[18] *See infra* Part III.D.

[19] *See infra* Part IV.B.

[20] Black's Law Dictionary adequately defines "prosecutorial misconduct" as "[a] prosecutor's improper or illegal act (or failure to act), esp. involving an attempt to avoid required disclosure or to persuade the jury to wrongly convict a defendant . . . ." BLACK'S LAW DICTIONARY 1342 (9th ed. 2009).

[21] KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009 24 (2010), *available at* http://law.scu.edu/ncip/file/ProsecutorialMisconduct_BookEntire_online%20version.pdf (citing BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT (2d ed. 2007)).

[22] Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 400 (2006).

[23] *Id.*

A. Selected Case Studies

When examining a prosecutor's conduct, courts first determine whether the conduct, when viewed objectively, was improper; courts then determine whether the probable impact of the conduct prejudiced the verdict.[24] This standard has been used to review a broad array of misconduct allegations, including those in the following cases.[25]

1. Failure to Disclose Evidence

In July 2007, the U.S. Court of Appeals for the Ninth Circuit reversed defendant Rachel Jernigan's bank robbery conviction because the government deprived Jernigan of a fair trial by failing to disclose that a similar-looking woman, who the government had charged with other bank robberies, confessed to the robbery Jernigan had allegedly committed.[26]

After Jernigan was charged, arrested, and jailed in 2000 for robbing three Arizona banks, a woman whose description bore an "uncanny physical resemblance" to Jernigan robbed two more area banks.[27] Although the prosecution knew that a person matching Jernigan's description had robbed other nearby banks after Jernigan's arrest, the prosecution did not give this information to defense counsel before trial.[28]

At Jernigan's trial, the defense argued that the defendant had been misidentified.[29] "No physical evidence tied [her] to the robber[ies]."[30] However, the victimized bank teller from the first robbery identified Jernigan soon after the arrest.[31] Five or six months later, several other eyewitnesses also identified Jernigan as the bank robber.[32] Jernigan was convicted and sentenced to 168 months (14 years) in prison.[33] Although the government knew of the other suspect before Jernigan's trial, Jernigan did not hear about the other similar robberies until after her conviction and incarceration.[34]

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[24] United States v. Young, 470 U.S. 1, 11-12 (1985).

[25] *See infra* notes 26, 43, 53, 60, 66, and 76.

[26] United States v. Jernigan, 492 F.3d 1050, 1055, 1057 (9th Cir. 2007).

[27] *Id.* at 1051.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 1052.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 1051. The Circuit Court noted the getaway vehicle the defendant allegedly used was similar to one used by the other suspect; the banks were near each other; very few bank robbers are either female or Hispanic; and the demand notes passed to tellers had similar sloppy penmanship and used some of the same phraseology. *Id.* at 1055.

The Ninth Circuit, ruling en banc, concluded, "[t]he government has deprived Jernigan of a fair trial and placed a possibly innocent woman behind bars."[35] The Court ordered a new trial,[36] and the government subsequently filed a motion to dismiss the case.[37] In the motion, prosecutors said another woman confessed to the robbery.[38] The prosecutors stated that although they had interviewed the other woman, they did not believe her confession because elements did not fit with witnesses' accounts of the original crime.[39] Prosecutors moved for a dismissal because they believed "a jury would likely be confused" about the conflicting details.[40] The district court in 2008 ruled there would be no new trial and dismissed the charges against Jernigan.[41] The prosecutor was not named in the opinion, and there is no indication in the opinion whether any disciplinary action was taken against the prosecutor.[42]

2. Improper Attempt to Influence a Witness

In February 1999, the U.S. Court of Appeals for the Fourth Circuit vacated defendant Golding's conviction for illegally possessing a shotgun because the prosecutor prevented witness testimony, which would have been damaging to her case, by threatening Golding's wife with prosecution.[43] Further, in closing arguments, the prosecutor "abused her power" by using the wife's decision not to testify as "indicative of the falsity of the defendant's story."[44]

Defendant Golding was charged in a Virginia federal court with being a felon in possession of a shotgun.[45] Although Golding's wife was ready to testify that the shotgun belonged to her, the prosecutor threatened to prosecute Mrs. Golding for marijuana possession if she testified.[46] The prosecutor further exacerbated this misconduct by repeatedly referencing Mrs. Golding's failure to testify as proof of the falseness of Mr. Golding's story.[47] After the defense objection to this line of argument was overruled, the prosecutor, emboldened by the ruling, became even more expansive:

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35 *Id.* at 1057.

36 *Id.*

37 Government's Motion to Dismiss at 1, United States v. Jernigan, 492 F.3d 1050 (9th Cir. 2007) (CR-00-1010-PHX-FJM).

38 *Id.* at 2.

39 *Id.*

40 *Id.* at 3.

41 *Id*. at 1.

42 *See generally* Jernigan 492 F.3d. 1050.

43 United States v. Golding, 168 F.3d 700 (4th Cir. 1999).

44 *Id.* at 703.

45 *Id.* at 701.

46 *Id.* at 702.

47 *Id.*

> She didn't ever come up here and testify. . . . What wife in the world wouldn't just come right on in and tell you the truth, if that was the truth, to prevent her husband from going to prison? . . . [T]here is nothing wrong with her possessing a weapon and ammunition, and she is the one who possessed them, why didn't she just walk right up here and tell you?[48]

The Fourth Circuit found the idea that the prosecutor not knowing the reason for Mrs. Golding's absence as a witness was "at least highly improper."[49] The Court said, "the threat rose to the level of intimidation necessary to constitute an abuse of process."[50] The Court vacated the conviction and remanded the case for a new trial.[51] The prosecutor was not named in the opinion, and there is no indication in the opinion whether any disciplinary action was taken against the prosecutor for her intentional misconduct of improperly influencing a witness.[52]

3. Breaching a Plea Agreement

In September 2008, the U.S. District Court for the Northern District of Iowa reduced defendant Dicus's sentence because it determined his plea agreement was clearly violated.[53] Dicus, a convicted felon, was charged in Iowa after a March 2006 search of his home uncovered four gallon-sized bags of marijuana, cash from drug proceeds, ammunition, and miscellaneous drug paraphernalia.[54] He agreed to plead guilty to conspiracy to distribute marijuana and to being a felon in possession of ammunition, and the government agreed not to ask the court to enhance Dicus's prison term.[55] Later, at Dicus's sentencing hearing, the federal prosecutor asked the court to sentence Dicus as a career offender and extend the time Dicus would serve.[56] The district court judge found the request a "clear violation" of the plea agreement and sharply criticized the prosecution's behavior as "beyond blatant" and "egregious."[57] As a result of the government's serious prosecutorial misconduct, the judge sen-

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[48] *Id.* at 703.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 705.

[52] *See generally id.*

[53] United States v. Dicus, 579 F. Supp. 2d 1142 (N.D. Iowa 2008).

[54] *Id.* at 1144-45.

[55] *Id.* at 1145-46.

[56] *Id.* at 1147.

[57] *Id.* at 1149.

tenced Dicus to a prison term close to the minimum called for by sentencing guidelines.[58]

The prosecutor was not named in the opinion, and there is no indication in the opinion whether any disciplinary action was taken against the prosecutor for her intentional misconduct of breaching a plea agreement.[59]

4. Harassing, Displaying Bias Toward, or Having a Vendetta Against the Defendant or Defendant's Counsel

In July 2005, the U.S. Court of Appeals for the Eighth Circuit granted a new trial for defendant Holmes because it determined the prosecutor's improper comments during rebuttal closing argument constituted reversible prosecutorial misconduct.[60] Holmes was charged with possession of a firearm by a felon because police, responding to a report of a disturbance at an apartment, found Holmes in possession of an un-holstered revolver.[61] Holmes was convicted and sentenced to 250 months in prison.[62]

The Court found that various comments made during trial showed that the prosecutor "was accusing defense counsel of conspiring with the defendant to fabricate testimony."[63] In granting a new trial, the Court ruled "[t]hese types of statements are highly improper because they improperly encourage the jury to focus on the conduct and role of [defense counsel] rather than on the evidence of the [defendant's] guilt."[64] The prosecutor was not named in the opinion, and there is no indication in the opinion of whether any disciplinary action was taken against the prosecutor for his intentional misconduct.[65]

5. Improper Remarks

In February 2003, the U.S. Court of Appeals for the Eighth Circuit ordered a new trial for defendant Conrad, who was convicted of illegally possessing a

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[58] Order Nunc Pro Tunc at 38, United States v. Dicus, 579 F. Supp. 2d 1142 (N.D. Iowa 2008) (No. CR 07-32-MWB).

[59] *See generally Dicus*, 579 F. Supp. 2d at 1142-63.

[60] United States v. Holmes, 413 F.3d 770, 772 (8th Cir. 2005).

[61] *Id.* The record is unclear as to what role, if any, Mr. Holmes played in the events leading to the 911 call, reporting a disturbance at the apartment. *Id.*

[62] Criminal Docket at 11, United States v. Holmes, 413 F.3d 770 (8th Cir. 2005) (No. 4:03-cr-00163-FJG-1).

[63] *Holmes*, 413 F.3d at 775. The comments referred personally to defense counsel and the necessity for defense counsel to "get his stories straight." *Id.*

[64] *Id.* Holmes agreed to plead guilty in exchange for a shorter sentence of 120 months. *Id.*

[65] *See generally id.*

sawed-off shotgun.[66] Conrad appealed based on allegations of prosecutorial misconduct.[67]

In the original trial, the prosecutor made improper remarks during his opening statement, while eliciting testimony from a witness, and during his closing argument.[68] In his opening statement, the prosecutor indicated that an agent from the Bureau of Alcohol, Tobacco, and Firearms ("ATF") would testify why the shotgun was regulated.[69] The prosecutor not only attempted to obtain from the ATF agent testimony regarding the shot pattern of the weapon, but also repeatedly argued about the reasons sawed-off shotguns are banned and the particular danger of the weapon.[70] In closing arguments, the prosecutor again discussed the purpose of regulating the weapon.[71]

The Court ruled that the prosecutor knew that the rationale for the regulation had "absolutely no relevance to the issue at trial."[72] The Court held that "the tenor of the prosecution severely prejudiced the defendant," and "worked to deprive [Conrad] of a fair trial."[73] Accordingly, the Court granted Conrad a new trial.[74] The prosecutor was not named in the opinion, and there is no indication in the opinion whether any disciplinary action was taken against the prosecutor for his intentional misconduct.[75]

6. Improper Vouching

In January 2003, the U.S. Court of Appeals for the Sixth Circuit affirmed the conviction of defendant White because it determined statements made by prosecutors during closing arguments did not amount to reversible error.[76] In October 1994, police were called to investigate after an 18-wheeler collided with the corner of a motel.[77] With the help of a drug-sniffing dog, they discovered more than 1,000 pounds of marijuana hidden under several boxes of watermelons inside the truck.[78] White was the truck's owner.[79] White's son was identified on a bill of lading as the truck's driver, but the truck was actually

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66 United States v. Conrad, 320 F.3d 851, 853 (8th Cir. 2003).
67 *Id.*
68 *See id.* at 854.
69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.* at 853.
73 *Id.* at 856-57.
74 *Id.* at 858.
75 *See generally id.*
76 United States v. White, 58 F. App'x 610, 611 (6th Cir. 2003).
77 *Id.* at 612.
78 *Id.*
79 *Id.*

driven by Frank Arnold.[80] White was charged with conspiracy to distribute marijuana and possession with intent to distribute.[81]

During closing arguments, the prosecutor explicitly vouched for the credibility of the government's witnesses, "When I put a witness on the witness stand, then, generally, I'm vouching for that witness in the sense that I am believing that his testimony will be true."[82]

The jury found White guilty.[83] The district court denied White's motion for a new trial, and the Sixth Circuit affirmed.[84] The Court stated, "[a]lthough we ultimately agree that the prosecutor's statements during closing arguments were improper and even inexcusable, we hold that the prosecutor's behavior did not amount to reversible error."[85] The Court said its decision "should not be construed as suggesting that we condone the prosecutor's unprofessional behavior in this case."[86] The prosecutor was not named in the opinion, and there is no indication in the opinion whether any disciplinary action was taken against the prosecutor for his intentional misconduct.[87]

The most remarkable part of all the above selected case studies is that, while there were various outcomes to the cases, the opinions neither mentioned any names of the offending prosecutors, nor whether any disciplinary actions were taken against them.

III. Existing Standards and Remedies

As suggested above, "no government official in America has as much unreviewable power and discretion as the prosecutor."[88] While in theory the separation of powers should be a check on prosecutors, it is not.[89] "[J]udges who attempt to impose any meaningful standards have often been thwarted by an unresponsive hierarchy within DOJ, or by appellate courts that are constrained by a rising tide of precedent that has weakened judicial authority . . . ."[90]

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[80] *Id.*

[81] *Id.* at 611.

[82] *Id.* at 617.

[83] *Id.* at 611.

[84] *Id.*

[85] *Id.* at 617.

[86] *Id.* at 619.

[87] *See generally id.*

[88] Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. Pa. L. Rev. 959, 959 (2009).

[89] *See* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 993 (2006) ("[T]he government faces almost no institutional checks when it proceeds in criminal matters.").

[90] Elakan Abramowitz & Peter Scher, *The Hyde Amendment: Congress Creates a Toehold for Curbing Wrongful Prosecution*, The Champion, March 1998, www.nacdl.org/champion/articles/98mar04.htm.

The following are existing standards and remedies regarding prosecutorial misconduct.

A. Office of Professional Responsibility

The OPR was created in 1975 by the DOJ in response to the revelations of ethical abuses and misconduct by DOJ officials in the Watergate scandal.[91] The OPR reports directly to the Attorney General and to the Deputy Attorney General.[92]

The OPR has jurisdiction to investigate allegations of DOJ attorney misconduct "relat[ing] to the exercise of their authority to investigate, litigate or provide legal advice, as well as allegations of misconduct by law enforcement personnel when they are related to allegations of attorney misconduct."[93] The OPR receives complaints from diverse sources, such as prison inmates, judicial referrals, private parties, and DOJ employees.[94]

The OPR insists that only rarely do prosecutors deliberately violate the rules.[95] Attorney General Eric Holder asserts that the OPR is up to its task and "does a real good job."[96] Over the last decade, the OPR completed more than 750 investigations and discovered only 68 intentional violations.[97] The department did not identify the cases tarnished by intentional violations and "remove[d] from its public reports any details that could be used to identify the prosecutors involved."[98]

However, Michael Shaheen, a respected former head of the OPR, has asserted that the OPR has "become ineffective and should close up shop."[99] Further, he added, "[The OPR] is plagued by a history of delays and bureaucratic layers imposed on it . . . by the end of an investigation—two or three

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[91] *About the Office*, U.S. DEPARTMENT OF JUST., http://www.justice.gov/opr//about-opr.html (last updated March 3, 2010).

[92] *Id.*

[93] *Policies and Procedures*, U.S. DEPARTMENT OF JUST., http://www.justice.gov/opr/polandproc.htm (last updated Dec. 2010).

[94] OFFICE OF PROF'L RESPONSIBILITY, *supra* note 12, at 9.

[95] Heath & McCoy, *supra* note 7.

[96] Ryan J. Reilly, *DOJ's Oft-Criticized Watchdog Doing 'A Real Good Job' Says Holder*, TPM (Dec. 10, 2010, 12:51 PM), http://tpmmuckraker.talkingpointsmemo.com/2010/12/dojs_oft-criticized_watchdog_doing_a_real_good_job_says_holder.php. *Contra* Anna Stolley Persky, *A Cautionary Tale: The Ted Stevens Prosecution*, 33 ALASKA B. RAG 1, 21-22 (2009) (statement of Joseph E. diGenova) ("[The Office of Professional Responsibility] has become known as the Bermuda Triangle of complaints against prosecutors. They go in, and they never go out.").

[97] Heath & McCoy, *supra* note 7.

[98] *Id.*

[99] Ari Shapiro, *Ex-Chief Calls for Scrapping Justice Dept. Watchdog*, NPR (June 1, 2007), http://www.npr.org/templates/story/story.php?storyId=10634336 (quoting Michael Shaheen, founding director of the OPR).

years later—you find that they've labored and brought forth a squeak or a mouse."[100]

Recently, Attorney General Holder announced the creation of the Professional Misconduct Review Unit ("PMRU").[101] The PMRU will investigate allegations of "intentional or reckless" professional misconduct stemming from OPR findings,[102] and will "determine whether those findings are supported by evidence and the applicable law."[103] The PMRU not only will decide whether evidence and law back OPR discoveries, but also will "take over from OPR the responsibility for deciding whether the misconduct merits referral to the [offending] prosecutor's state bar association for discipline."[104]

While Attorney General Holder's efforts may be applauded by some for his attempt to segregate and accelerate the handling of serious misconduct cases, his efforts are seriously flawed for two reasons. First, federal judges have long complained that the OPR's "internal ethics process seemed rigged to sweep embarrassment under the rug."[105] The PMRU "doesn't appear to address those concerns, because it won't review cases where prosecutors [*were not*] found by OPR to have committed misconduct."[106] In essence, because the OPR will continue to determine the cases in which prosecutorial misconduct exists, the PMRU must rely on the flawed and ineffective system of the OPR to provide them with cases to investigate. Second, the newly appointed head of the PMRU, Kevin Ohlson, is a long-time trusted aide of Attorney General Holder.[107] Although this appointee may be highly regarded by Attorney General Holder, and may be well qualified, the relationship gives the strong appearance of cronyism. There is also the appearance that, to avoid embarrassment to the DOJ, he will automatically approve the findings of the OPR.

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[100] *Id.*

[101] Memorandum from Eric Holder, U.S. Attorney Gen. on Creation of the Prof'l Misconduct Review Unit to Marshall Jarret, Director, Executive Office for United States Attorneys (Jan. 14, 2011), *available at* http://www.justice.gov/opa/documents/pmru-creation.pdf.

[102] Andrew Ramonas, *Former Holder Chief of Staff to Lead New Misconduct Unit*, MAIN JUSTICE (Jan. 18, 2011, 9:24PM), www.mainjustice.com/2011/01/18/former-holder-chief-of-staff-to-lead-new-misconduct-unit/.

[103] Holder Memorandum, *supra* note 101.

[104] Ramonas, *supra* note 102.

[105] *Id.*

[106] *Id.* (emphasis added).

[107] *See id.* (PMRU Appointee, Kevin Ohlson, was Attorney General Holder's Chief of Staff and Counselor when Holder was Deputy Attorney General in the Clinton Administration, and also served as Holder's spokesman in the 1990s when Holder was the U.S. Attorney for the District of Columbia.).

B. Unwillingness of Judges to Name Offending Prosecutors

There are a variety of reasons why judges rarely identify prosecutors by name when reversing the prosecutors' cases for misconduct. The following are some of the reasons that demonstrate why trial and appellate judges fail to name offending prosecutors.

First, failing to identify prosecutors by name occurs because some "prosecutors appear daily in front of the same judge."[108] This explanation applies more strongly at the trial level rather than at the appellate level.[109] At the trial level, prosecutors are often assigned to a particular judge's courtroom for an extended time.[110] "A group of prosecutors may be assigned to one judge and appear in court on every matter that is assigned to that judge's courtroom."[111] After each case, "the judge and prosecutor remain to handle the next case," while the defense attorney leaves after he concludes his case.[112] "This constant contact between the same judge and prosecutor may lead the judge to consider that prosecutor 'her' prosecutor."[113] However, appellate judges typically do not have relationships with individual prosecutors.[114] Therefore, this rationale does not apply as easily to appellate courts.[115]

Second, and perhaps more compelling, is that appellate judges may decline to name prosecutors because of their desire to protect their own.[116] Because many appellate judges were once prosecutors themselves, "judges may be reluctant to stigmatize those with whom they identify."[117]

A third "explanation for courts' failure to name prosecutors is simple compassion . . . . Judges might actually believe that the misconduct is an isolated episode."[118] The danger is that the prosecutor's misconduct "is not an isolated incident and that the prosecutor had not been castigated in judicial opinions for prior misconduct because each judge mistakenly believed the prosecutor had

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[108] Roberta K. Flowers, *An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor*, 79 NEB. L. REV. 251, 269 (2000); *see also* Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 398 (2007) (explaining that prosecutors are "the ultimate repeat players since they litigate all criminal cases").

[109] *See* Flowers *supra* note 108.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.* In particular, judges and prosecutors are frequently in contact with one another and must depend on each and must rely on the "other's integrity, competency, and assistance." *Id.* (quoting Bennett L. Gershman, PROSECUTORIAL MISCONDUCT, 12-14 & n.71 (1996)).

[114] *See id.* at 253.

[115] *See id.*

[116] Gershowitz, *supra* note 2, at 1085.

[117] *Id.*

[118] *Id.* at 1086.

committed an aberrant mistake that did not justify dragging [his] name through the mud."[119]

Finally, "there is the possibility that lower court judges disagree with the rules they are enforcing."[120] "[W]hile judges may feel bound to follow precedents they do not like, they would be reluctant to excoriate prosecutors by name for disobeying rules with which they disagree."[121] Yet this explanation is not convincing "[b]ecause the harmless error test gives appellate courts [relatively] little room to reverse convictions, rarely does anything short of flagrant misconduct trigger reversal . . . . Thus . . . judges who find enough prejudice to reverse a conviction are likely to be offended by the prosecutor's clear violation of the rules."[122]

The more persuasive explanation for the failure of courts to name offending prosecutors is the combination of camaraderie between judges and prosecutors, desire by judges to protect their own, and the compassion of judges for prosecutors.[123] "While [the] reasons [for judicial failure to name prosecutors for their misconduct] have explanatory [value], they are not adequate reasons for declining to name prosecutors who have committed misconduct."[124]

C. Harmless Error Doctrine

If prosecutorial misconduct violates a defendant's constitutional right to a fair trial, a defendant's conviction might be overturned on appeal. However, reversals are limited because the Harmless Error Doctrine generally precludes relief when the court finds that the prosecutorial misconduct did not fundamentally prejudice the defendant.[125]

The Harmless Error Doctrine was originally developed as an appellate device to "prevent matters concerned with the mere etiquette of trials [or] with the formalities and minutiae of procedure from touching the merits of a verdict."[126] The test is whether it appears "beyond a reasonable doubt that the

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[119] Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM. L. 395, n.102 (2009).

[120] Gershowitz, *supra* note 2, at 1087.

[121] *Id.* at 1088.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *See* Rose v. Clark, 478 U.S. 570, 576 (1986) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)) (Stating that "[W]e have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (internal quotations omitted)).

[126] Bruno v. United States, 308 U.S. 287, 294 (1939).

error complained of did not contribute to the verdict obtained."[127] This doctrine limits the application of constitutional rights so that if error occurs, but the prosecution can prove beyond a reasonable doubt that the error did not affect the judgment, that error is excused.[128] Although the rule was never intended to deny a fair trial,[129] it authorizes appellate courts to affirm a conviction when the defendant's guilt is clear, even if he may have received an unfair trial.[130]

The rule, which "developed into the most powerful judicial weapon to preserve convictions," has been a "jurisprudential fiasco" because it alters prosecutorial behavior in the most insidious fashion.[131] This rule "tacitly informs prosecutors that they can weigh the commission of evidentiary or procedural violations not against a legal or ethical standard of appropriate conduct, but rather, against an increasingly accurate prediction that the appellate courts will ignore the misconduct when sufficient evidence exists to prove the defendant's guilt."[132]

D. Hyde Amendment

In 1998, Congress—without hearings or committee reports—enacted the Hyde Amendment, which permits acquitted defendants to recover legal fees upon a judicial finding that "the position of the United States was vexatious, frivolous, or in bad faith," unless such an award would be unjust.[133] Any

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127 Chapman v. California, 386 U.S. 18, 24 (1967).

128 *Id.*

129 *See* Bollenbach v. United States, 326 U.S. 607, 614 (1946) (stating that "[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.").

130 *See Clark*, 478 U.S. at 588-89 (Stevens, J. concurring).

131 Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 425 (1992).

132 *Id.* (citing Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 439-40 (1980)).

133 Pub. L. No. 105-119, Title VI, § 617, 111 Stat. 2519 (1997) (codified at 18 U.S.C. 3006A note (2000)). More fully, Section 617 provides:

> During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act, any award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be made pursuant to the procedures and limitations (but not the burden of proof) provided for an award under [the Equal Access to Justice Act] . . . Fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision.

awards under this Act come out of the budget of the particular offending federal agency, normally the United States Attorney's Office.[134]

"[T]he strong [legislative] support of the Amendment flow[ed] from the pervasive public and congressional hostility toward law enforcement organizations existing at the time of the Hyde Amendment's passage."[135] The combination of the failed prosecution of former Congressman Representative Joseph McDade,[136] "the tragedies of Waco[137] and Ruby Ridge,[138] [and] the accusations of FBI misconduct in the 'File-gate' imbroglio,[139] . . . coalesced to create a perception that every federal agency was out of control."[140] The legislature thus was "primed to take action, any action, to restrain federal law enforcement authority in light of the pervasive vilification of government agencies."[141] Consequently, "the alignment of conservatives and liberals, compounded by widespread hostility to federal law enforcement authorities, rendered impotent

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Id. at 55-56.

[134] *See id.*

[135] Lawrence Judson Welle, Note, *Power, Policy, and the Hyde Amendment: Ensuring Sound Judicial Interpretation of the Criminal Attorney's Fees Law*, 41 WM. & MARY L. REV. 333, 341 (1999).

[136] Carmine Capasso, Case Comment, United States v. Knott*, 256 F.3d 20 (1st Cir. 2001)*, 36 SUFFOLK U. L. REV. 907 n.19 (2003) (citing United States v. Gilbert, 198 F.3d 1293, 1299-1303 (11th Cir. 1999) (noting that the statute was originally a floor amendment to appropriations legislation). "After a lengthy investigation, McDade was tried and acquitted of federal bribery and racketeering charges." *Id.* at 1297. "Representative Hyde sponsored the Amendment and patterned the legislation after the Equal Access to Justice Act." *Id.* at 1299-1300. Some representatives criticized Rep. Hyde for offering the Amendment without the benefit of formal hearings. 143 CONG. REC. H7786-04 (daily ed. Sept. 24, 1997) (statement of Rep. Skaggs), at *H7791-92. Others criticized the Amendment for its potential "'chilling effect' on federal prosecutions." *Id.* (statement of Rep. Skaggs), at *H7792-93 (noting adverse impact of Amendment.).

[137] *See generally Waco: The Inside Story*, PBS, www.pbs.org/wgbh/pages/frontline/waco/ (last visited March 2, 2012) (An FBI raid on the Branch Davidian compound near Waco, Texas culminated in the death of nearly eighty members of the religious sect.).

[138] *See generally The Federal Raid on Ruby Ridge, Idaho*, U.S. SENATE (Sept. 6 - Oct. 19, 1995), http://law2.umkc.edu/faculty/projects/ftrials/weaver/weaversenate.html (On August 22, 1992, a standoff between federal marshals and Randy Weaver, a Ruby Ridge, Idaho white separatist who failed to appear in court on weapons charges, resulted in a shootout that left Weaver's unarmed wife and fourteen-year-old son dead.).

[139] *See* Joe Conason, "*Filegate" Judge: There's No There There—and Never Was*, SALON (Mar. 10, 2010, 12:11 PM), www.salon.com/news/opinion/joe_conason/2010/03/10/filegate; *see also FBI Files Fiasco*, CNN, http://www.cnn.com/ALLPOLITICS/1997/gen/resources/fbi.files/ (last visited Mar. 2, 2011) (In 1996, Congressional Republicans discovered the Clinton administration "improperly collected some 700 background FBI files of Republicans," including a former U.S. Secretary of State, and a former U.S. National Security Advisor.).

[140] Welle, *supra* note 135, at 341; *see also* Nancy Gibbs et al., *The FBI: Under the Microscope*, TIME, Apr. 1997 ("[W]ithout accountability, several things happen . . . Waco, Ruby Ridge, Filegate . . .").

[141] Welle, *supra* note 135.

any calls for a meaningful deliberation of the practical and legal pitfalls of implementing the Hyde Amendment."[142]

Opposition to the Hyde Amendment was fierce.[143] The Justice Department fought the Hyde Amendment from the day it was proposed.[144] Federal prosecutors consistently criticized the Hyde Amendment as being unduly burdensome and an unlawful interference with their discretion.[145] In fact, then Attorney General Janet Reno strongly urged President Clinton to oppose the passage of the Hyde Amendment.[146] Some members of Congress criticized the law for its potential "chilling effect,"[147] making prosecutors shy away from worthwhile, but difficult, cases.[148] But Representative Hyde asked his opponents, "[w]hat is the remedy, if not this [amendment], for somebody who has been unjustly, maliciously, improperly, abusively tried by the government, by the faceless bureaucrats who . . . get a U.S. Attorney looking for a notch on his gun?"[149]

Ultimately, Congress overwhelmingly approved the attorney fees measure without full consideration of its consequences.[150] The Hyde Amendment seemingly created "a much-needed vehicle for vindicated criminal defendants to argue that a prosecutor was abusive or that the government engaged in wrongful conduct."[151] A clear message was sent: "The power wielded by prosecutors is tremendous, and in some instances, prosecutors go too far in pursuing their targets; whether motivated by ambition, vindictiveness, misplaced enthusiasm, or a blinding political agenda."[152] Passage of the Hyde Amendment was hailed as a victory for defendant's rights and a timely response to the abusive acts of government officials.[153]

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142 *Id*. at 342 (For a discussion of the political atmosphere at the time the Hyde Amendment was approved.).

143 Kevin McCoy & Brad Heath, *Not Guilty, but Stuck with Big Bills, Damaged Career*, USA TODAY, at 1A, www.usatoday.com/printedition/news/20100928/1ahyde28_cv.htm (last visited Mar. 2, 2012).

144 *Id.*

145 *See* Abramowitz & Scher, *supra* note 90.

146 *See id.* at 24. Then Deputy Attorney General Eric Holder Jr., at an October press conference, opined on the Hyde Amendment as "drastic legislation" that could cost taxpayers a fortune in high-stakes payoffs warning that, if the Hyde Amendment became law, people such as the "three Johns" –Gotti, Hinckley, and DeLorean– "could wind up with big taxpayer checks." *Id.*

147 143 CONG. REC. H7786-04 (daily ed. Sept. 24, 1997) (statement of Rep. Rivers), at *H7793 (Others criticized the Amendment for its potential "chilling effect" on federal prosecutions.)

148 *Id.* (statement of Rep. Skaggs noting adverse impact of Amendment).

149 *Id.* (statement of Rep. Hyde).

150 *See* Abramowitz & Scher, *supra* note 90 (The House approved the Hyde Amendment by a bipartisan vote of 340-84).

151 *Id.*

152 *Id.*

153 *Id.*

Yet, the Hyde Amendment is inherently problematic. To receive an award under the Hyde Amendment, the defendant must qualify as a "prevailing party."[154] A defendant also must show that the prosecutor's decision to file charges was "vexatious, frivolous, or in bad faith."[155] Even if these standards are met, a court may deny attorney fees if it finds that "special circumstances make such an award unjust."[156] Thus, the Hyde Amendment does not permit defendants to recover fees merely when a jury or a judge finds in their favor.[157] If the prosecution can establish reasonable conduct, then a defendant may not recover fees.[158] Because the Hyde Amendment sets such a high standard and was drafted with such vague and ambiguous language, the Amendment is virtually no help to wronged individuals.

E. McDade Amendment

The McDade[159] Amendment[160] provides that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys of that State."[161] The McDade Amendment "represented the culmination of years of debate among the Department of Justice, the Congress, the courts, and the

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154 *See* United States v. Campbell, 134 F. Supp. 2d 1104, 1107 (C.D. Cal. 2001) (forbidding fee award under Hyde Amendment due to defendant's failure to satisfy prevailing party status). The *Campbell* court noted that the Hyde Amendment does not expressly define the phrase "prevailing party." *Id.* To determine whether a defendant is a "prevailing party," the *Campbell* court noted a court must look to the totality of the circumstances. *Id.*

155 *See* source cited *supra* note 133 (stating statutory language of Hyde Amendment).

156 United States v. Gilbert, 198 F.3d 1293, 1302 (11th Cir. 1999).

157 *Id.* at 1299 (finding defendant must show more than victory). In addition to winning the case, the defendant must also establish that there was prior prosecutorial misconduct, not merely prosecutorial mistake. *Id.* at 1304; *see also* United States v. Troisi, 13 F.Supp.2d 595, 597 (N.D. W. Va. 1998) (explaining that acquittal does not automatically entitle defendant to compensation).

158 *See* Troisi, 13 F. Supp 2d at 597 (noting that the court must determine whether the government acted reasonably in deciding to prosecute). The Troisi court concluded that prosecutions are not vexatious when there is sufficient disputed evidence to carry an issue to the jury. *Id.*

159 *See* United States v. McDade, No. 92-249, 1992 WL 151314, at *1 (E.D. Pa. June 19, 1992) (Congressman Joseph McDade was indicted on five counts, including "conspiracy, accepting an illegal gratuity by a public official, and RICO violations.); *see also* Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 213-14 (2000) (The charges were based on allegations that McDade had accepted campaign contributions in return for favorable treatment for government contractors.). McDade was ultimately acquitted and retained his seat in Congress. *Id.*

160 *See* Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080, 2080 (2000). (Congress buried the McDade Amendment within a 920 page appropriations act passed in October 1998.).

161 28 U.S.C. § 530B(a) (2006).

private bar about both which branch of government and which level of government—state or federal—should have the authority to determine the ethics rules governing federal prosecutors."[162]

Prior to the Amendment's enactment, federal prosecutors "were required to comply with the ethics rules of the jurisdiction in which they were licensed."[163] The McDade Amendment changed this by "requir[ing] prosecutorial compliance with the ethics rules of every jurisdiction in which an attorney 'engages in that attorney's duties,' rather than merely with the rules of the jurisdiction in which the attorney is licensed," and by "giv[ing] state ethics rules priority over federal policies without . . . permitting exceptions from compliance when federal policy interests so require."[164] The prosecution of federal crimes could be hampered "when state ethics rules conflict . . . with federal investigative and prosecutorial techniques."[165]

This Amendment has many problems, with "ambiguity being the primary issue—and is a burr in the side of the DOJ."[166] The Amendment "expressly holds federal prosecutors subject to the simultaneous application of state ethical regulations and the local rules adopted by federal courts."[167] Although these rules are often in alignment, federal courts have vigorously protected their authority to develop local rules to govern the conduct of the attorneys appearing before them. Federal law must be enforced consistently across jurisdictions,[168] and the McDade Amendment "fails to specify whether state or federal regulations control when they conflict."[169]

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162 Note, *supra* note 160 (citing United States v. Hammad, 846 F.2d 854, 857-58 (2d Cir. 1988) ("upholding federal courts' power to enforce professional responsibility standards against government attorneys") (citing *Ethical Standards for Federal Prosecutors Act of 1996: Hearing on H.R. 3386 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong. 2, 64-66 (1996) (statement of Rep. Carlos J. Moorhead, Chairman) ("rejecting DOJ's claim to exclusive authority to regulate the conduct of federal attorneys")).

163 *Id.* at 2080.

164 *Id.* at 2080-81.

165 *Id.*

166 Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 16 (2005).

167 Bradley T. Tennis, Note, *Uniform Ethical Regulation of Federal Prosecutors*, 120 YALE L.J. 144, 153 (2010) (citing 28 U.S.C. § 530B(a) (2006)).

168 Note, *supra* note 160, at 2097 (identifying an interest in national uniformity for the federal court system); *see also* McMorrow, *supra* note 166 at 11-13 (noting that federal courts are at least "supposedly uniform" and that "a scheme with no horizontal uniformity [is] anathema to the heart of federal court rule-makers").

169 Tennis, *supra* note 167, at 153.

IV. RECOMMENDATIONS

The proper response to prosecutorial misconduct is "anger and concern for the damage to our country that it brings. The proper reaction is to demand accountability."[170] To promote accountability and public confidence in the criminal justice system, the Executive Branch should implement various measures. The first measure is the establishment of an IPC to review and investigate the prosecutorial practices of DOJ attorneys and to deter misconduct. The second measure is for Congress to revise the Hyde Amendment and address its inherent problems.[171] Third, the DOJ should adopt and adhere to the American Bar Association Model Rules of Professional Conduct, with an emphasis on sections 3.8(g) and (h).[172]

A. Create an Independent Prosecutorial Commission

An IPC should be formed, by Executive Order, as a non-partisan, quasi-judicial regulatory agency of the United States government.[173] The IPC will be independent from the DOJ, will replace the OPR, and will report directly to the United States Attorney General[174] and to the U.S. Department of Justice Office of Inspector General ("OIG").[175]

Currently, the Attorney General has more direct control over internal investigations of prosecutors by the OPR because the OPR reports solely to the Attorney General.[176] In contrast, the OIG reports jointly to the Attorney General and to Congress.[177] "In theory and in fact, the AG controls the OIG far

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170 Horton, *supra* note 3.

171 *See infra* Part IV.C.

172 MODEL RULES OF PROF'L CONDUCT R. 3.8(g)-(h) (2008).

173 "An executive order is a specific power of the President and the executive branch as provided by the U.S. Constitution in Article II, Section 1. This power allows the President of the United States the authority to create laws or determine how existing laws should be carried out." Tricia Ellis-Christensen, *What is an Executive Order?* WISEGEEK, http://www.wisegeek.com/what-is-an-executive-order.htm (last visited March 2, 2012).

174 There should be no constitutional impediment to the creation of such a regulatory commission. The prosecutor is a member of the executive branch of the federal government. The President has the power to remove prosecutors. The IPC reports to the Attorney General and the DOJ OIG, who are a part of the executive branch.

175 *See* 5 U.S.C. app. § 3(a) (2006) (The OIG is a statutorily created independent entity within the DOJ that conducts and supervises audits, inspections, and investigations relating to the programs and operations of the DOJ.). The OIG has the authority to issue subpoenas to compel testimony or documents for investigations. *Id.* Currently, the OIG is prohibited from investigating the department's lawyers for misconduct related to their official duties. *Id.* § 8E(b)(3). Congress and the executive branch have limited oversight over the OIG. *Id.* § 5(a). The head of the OIG, the Inspector General, is selected by the president and confirmed by the Senate, and can be removed only by the president. *Id.* § 3(b).

176 *See* DOJ OFFICE OF PROF'L RESPONSIBILITY RULES, 28 C.F.R. § 0.39.

177 Reilly, *supra* note 96, at 2.

less than he controls the OPR."[178] The Inspector General has much more autonomy given his unlimited term, greater resources, and the fact that he reports to both Congress and the Attorney General.[179] Thus, it makes sense to require the IPC to report to both the Attorney General and the OIG.

The main mission of the IPC is to eradicate incidents of, and to promote public protection from, prosecutorial misconduct. The IPC will oversee the investigation and resolution of all allegations of prosecutorial misconduct of the U.S. Attorneys. To deter misconduct, the IPC will review complaints and conduct random reviews of prosecutorial decisions. The goal is not only to increase public trust in the federal court system, but also to prevent wrongful convictions secured by prosecutorial misconduct.

1. Composition of the IPC

The IPC will consist of nine commissioners appointed by the President of the United States and confirmed by the Senate for seven-year terms. To ensure that the IPC remains non-partisan, no more than four commissioners may belong to the same political party. At least two commissioners will be former prosecutors or retired judges, and at least two commissioners will be members of the public. The President will designate one of the commissioners as Chairman, the IPC's chief executive. The commissioners will have staggered terms, which will expire on October 1 of the expiring year.

The IPC will report directly to the United States Attorney General and to the OIG. The enforcement authority given by the Attorney General and the OIG will allow the IPC to bring ethical enforcement actions against federal attorneys found to have committed prosecutorial misconduct. A commissioner will serve solely at the discretion of the President.

2. Organization

The IPC's functional responsibilities should be organized into three divisions: the Office of Claims Administration, the Office of Investigations, and the Office of Administrative Law. An administrator appointed by, and reporting directly to, the Chairman of the IPC will head each division.

The Office of Claims Administration will receive and review all allegations of prosecutorial misconduct. It will perform an initial review and screening to determine if the claims appear to have merit. This process will help weed out frivolous claims, claims that are vague and unsupported by evidence, and claims of convicted individuals who feel their trials were unfair based solely on

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[178] *Id.* (statement of former DOJ Inspector General, Michael Bromwich).

[179] *See id.*

the fact of their conviction. If the claim is deemed to have merit, it will be forwarded to the Office of Investigations.

The Office of Investigations will perform an extensive inquiry into the allegations of the prosecutorial misconduct. This office may request additional information from the complainant or request a written response from the attorney against whom the allegation was made, and it will review other relevant materials, such as pleadings and transcripts. At the completion of the inquiry, a comprehensive report will be forwarded to the Office of Administrative Law.

The Office of Administrative Law will determine whether a hearing is warranted, or whether the case should be dismissed, based on the investigative findings. This department will be authorized to conduct hearings. Findings and recommendations, whether favorable[180] or unfavorable to the accused prosecutor, will be forwarded to the full commission of the IPC for final disposition. If the accused prosecutor does not agree with the findings and recommendations of the Office of Administrative Law, he will be given the opportunity to appeal the findings directly to the IPC commissioners.

The IPC will review the findings and recommendations from the Office of Administrative Law. Based on this report, the commissioners will decide what, if any, actions should be taken.

3. Duties and Responsibilities

The IPC duties and responsibilities will be similar to "[t]he Misconduct Review Board, originally proposed but ultimately excluded from the final version of the Citizens Protection Act [of 1998]."[181] The proposal defined ten specific acts of misconduct:

> (1) in the absence of probable cause seek the indictment of any person; (2) fail promptly to release information that would exonerate a person under indictment; (3) intentionally mislead a court as to the guilt of any person; (4) intentionally or knowingly misstate evidence; (5) intentionally or knowingly alter evidence; (6) attempt to influence or color a witness' testimony; (7) act to frustrate or impede a defendant's right to discovery; (8) offer to provide sexual activities to any government witness or potential witness; (9) leak or otherwise

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[180] *See* Office of Professional Responsibility, U.S. Department of Justice, Annual Report 2008 10, n.6, http://www.justice.gov/opr/annualreport2008.pdf (follow 2008 hyperlink under OPR Annual Reports) (The findings may determine the attorney made an excusable error. An excusable error is an error made "despite the exercise of reasonable care under the circumstances.").

[181] Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 463 (2001) (citing H.R. 3396, 105th Cong. § 201(a) (1998)).

> improperly disseminate information to any person during an investigation; [or] (10) engage in conduct that discredits the [DOJ].[182]

The IPC will have the ability to issue subpoenas to compel testimony or documents for investigations. The IPC will not only report its findings and conclusions in individual investigations, but it also will provide advice to the Attorney General and the OIG concerning the need for changes in policies and procedures that become evident during the course of its investigations.

4. Disciplinary Actions

The IPC will have the authority to "impose an appropriate penalty, including probation, demotion, dismissal, referral of ethical charges, loss of pension or other retirement benefits, suspension, or a referral to a grand jury for possible criminal prosecution."[183] Additionally, the IPC shall submit findings of ethical violations to the State Bar of the state in which the misconduct occurs.[184]

5. Public Records

The findings of the IPC, whether favorable or unfavorable, will become public record. The information will be available immediately upon electronic filing by the IPC on an online website to allow public access to the records.[185] Naming offending prosecutors likely will have a chilling effect on overzealous prosecutors who may knowingly cross the line and violate a defendant's constitutional rights.

6. Random Review of Cases

The IPC will review complaints brought to its attention by defendants, judges, and the public. Further, it "[will] conduct random reviews of routine prosecution decisions."[186] These random reviews will be conducted by the IPC reviewing a "selection of the closed files in a particular prosecution office and an examination of the file entries for each decision."[187] The IPC will "closely

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[182] *Id.* (citing H.R. 3396, 105th Cong. § 201(a) (1998)).

[183] *Id.* (citing H.R. 3396, 105th Cong. § 201(b) (1998)).

[184] *See generally infra* Part IV.E.

[185] The access will be modeled after the now existing online Public Access to Court Electronic Records (PACER) system, but will not require consumer registration. *See generally Public Acess to Court Electronic Records*, PACER, http://www.pacer.gov (last visited Feb. 27, 2012).

[186] Davis, *supra* note 181, at 463.

[187] *Id.*

examine charging and plea bargaining decisions and look for compliance with ABA's prosecution standards."[188]

This random review permits "affirmative investigations to discover bad practices, and its random nature is more likely to deter arbitrary prosecution decisions . . . [and] also serve the purpose of commending first-rate prosecution offices, thereby enhancing public confidence in offices that perform their responsibilities properly."[189]

B. The DOJ to Adopt American Bar Association Model Rules of Professional Conduct

> Prosecutors, as are all lawyers, are subject to some version of professional regulation in every state. Violations of these ethical rules could expose a prosecutor to discipline from the legal profession through state bar associations or disciplinary committees . . . [who] have the power to sanction prosecutors and impose sanctions as serious as disbarment.[190]

However, because there are likely variations between the American Bar Association ("ABA") Model Rules ("Model Rules") and the ethical rules adopted by each state, the DOJ should adopt the ABA Model Rules[191] in an effort to achieve uniform conduct in all offices of federal attorneys, and to allow the IPC to have a single set of rules to regulate.[192] In particular, the DOJ should observe ABA Rules 3.8(g) and (h).[193]

In February 2008, the ABA amended the Model Rules to include subsections (g) and (h) to Rule 3.8.[194] The subsections "impose new ethical duties on a prosecutor who learns of evidence that casts doubt on a conviction."[195] Specifically:

> [W]hen a prosecutor "knows of new, credible and material evidence creating a reasonable likelihood" that a convicted

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188 *Id.*; *see also infra* Part IV.B.

189 Davis, *supra* note 181, at 464.

190 Tracey L. Meares, *Rewards For Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives*, 64 FORDHAM L. REV. 851, 898 (1995).

191 It has been suggested that there should be a "uniform national codification of ethical rules specifically tailored to the demands of federal prosecutors." Tennis, *supra* note 167, at 148. However, because the ABA Model Rules already exist, there is no need to reinvent the wheel.

192 If any special rules are needed because of national security interests, these additional rules will be submitted to and approved by the IPC.

193 MODEL RULES OF PROF'L CONDUCT R. 3.8(g)-(h) (2008).

194 MODEL RULES OF PROF'L CONDUCT, Adopted by House of Delegates (Feb. 11, 2008).

195 *Id.*

> defendant is innocent of the crime, the prosecutor must 'promptly disclose' such evidence to the court. Furthermore, if the conviction [occurred] in the prosecutor's jurisdiction, the prosecutor must both inform the defendant and conduct further investigation. If the conviction was outside the prosecutor's jurisdiction, the prosecutor must notify the court or another appropriate authority . . . in the jurisdiction that obtained the conviction. [Furthermore,] if the information consists of "clear and convincing evidence" establishing that a convicted defendant in the prosecutor's jurisdiction did not commit the offense, the prosecutor must "seek to remedy the conviction."[196]

Despite the ABA's recommendation, only two states, Idaho and Delaware, have adopted the amendments to Rule 3.8 as is, and three states, Colorado, Tennessee, and Wisconsin, have adopted a modified version of the rule.[197] "Currently, due to the lack of an ethical requirement under most states' rules of professional conduct, prosecutors act out of their own benevolence rather than an ethical obligation when reopening questionably decided cases."[198]

The DOJ should observe Model Rules 3.8(g) and (h) for three principle reasons:[199]

> First, wrongful convictions occur under the current system, and 3.8(g) and (h) would provide recourse for wrongfully convicted defendants who wish to challenge their convictions with new evidence. Second, the proposed rules are consistent with the current codified duties of prosecutors. Finally, the amendments are necessary to maintain public confidence in the administration of justice.[200]

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196 Michele K. Mulhausen, Comment, *A Second Chance at Justice: Why States Should Adopt ABA Model Rules of Professional Conduct 3.8(g) and (h)*, 81 U. COLO. L. REV. 309, 311-12 (2010) (citing MODEL RULES OF PROF'L CONDUCT R. 3.8(g)-(h) (2008)).

197 *See* CPR POLICY IMPLEMENTATION COMM., AM. BAR ASS'N, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT (2010), www.americanbar.org/content/dam/aba/migrated/cpr/pic/3_8.authcheckdam.pdf. The Rules Committees in eleven jurisdictions are studying the amendments to the rule: Alaska, California, District of Columbia, Hawaii, Nebraska, New Hampshire, New York, North Dakota, Pennsylvania, Vermont, and Washington. *Id.* (New York put the rules in the comments, but only the New York State Bar Association, not the court, adopts the comments.).

198 Mulhausen, *supra* note 196, at 309.

199 *Id.* at 322.

200 *Id.*

C. Revise the Hyde Amendment

Congress should hold hearings and make policy findings to revise the Hyde Amendment. That "the application of attorney fees in the criminal law makes sense" is the basic premise of the Hyde Amendment.[201] "The need advanced in the floor debate by Representative Hyde was speculative and vague . . . [resulting in] an impossibly broad law that seemingly reached the entire universe of governmental misconduct."[202] Upon completion of the recommended hearings, Congress will better understand the problem and "will be in a better position to enact an efficient and balanced remedy."[203]

Next, because the statute is vague and ambiguous, "Congress should narrow the statute's application to those specific types of misconduct that it finds most warrant the attorneys' fees remedy, including, for example, the failure to disclose exculpatory evidence."[204] To give courts guidance in the application of the statute, Congress should define important terms such as "vexatious," "frivolous," "bad faith," and "prevailing party,"[205] and Congress should "expressly [adopt] an objective or subjective standard for triggering awards."[206]

V. Conclusion

Current remedies for prosecutorial misconduct are largely ineffective because of inadequate discipline of offending prosecutors, the lack of transparency in the naming of violating prosecutors, and the lack of uniform ethical rules. This Article argued that forming an IPC to regulate federal prosecutors will help reduce the incidents of prosecutorial misconduct by publicly disclosing the names of prosecutors charged with misconduct, the details of the misconduct, and the discipline imposed. The adoption of the ABA Model Rules will require all federal prosecutors to abide by one set of ethics rules and will achieve uniformity between prosecution offices. In addition, revising the Hyde Amendment will provide those harmed by prosecutorial misconduct a remedy to minimize the financial impact of the harm.

The implementation of the recommendations discussed in this Article will reduce the incidents of prosecutorial misconduct, but it also will restore the public's faith and confidence in the justice system. Individuals can then rest assured, should they ever be charged with a violation of law, that an overzeal-

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201 Welle, *supra* note 135, at n.233.

202 *Id*. at 379.

203 *Id*.

204 *Id.* at 380.

205 Pub. L. No. 105-119, Title VI, § 617, 111 Stat. 2519 (1997) (codified at 18 U.S.C. 3006A note (2000)).

206 Welle, *supra* note 135.

ous or unethical prosecutor will not violate their constitutional rights. As Justice George Sutherland so eloquently stated:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[207]

[207] Berger v. United States, 295 U.S. 78, 88 (1935).

UNNECESSARY ROUGHNESS: THE SINGLE ENTITY DEFENSE AND THE SUPREME COURT'S MISGUIDED ENCROACHMENT ON THE NFL'S CONSUMER BRAND IN *AMERICAN NEEDLE V. NFL*

Michael J. Rockwell*

I. INTRODUCTION

In January of 2010, just one month before the New Orleans Saints defeated the Indianapolis Colts in Super Bowl XLIV,[1] the National Football League ("NFL") faced its own decisive contest over 800 miles away from the Miami location of the championship game. Responding to the red challenge flag

* J.D. Candidate, Phoenix School of Law, May 2012. B.A., B.S., Arizona State University, May 2008.

[1] Greg Garber, *Saints Overcome Early Deficit, Stop Colts Late to Seal Victory*, ESPN (Feb. 7, 2010, 6:25 PM), http://scores.espn.go.com/nfl/recap?gameId=300207011.

thrown by American Needle after the Seventh Circuit dismissed an antitrust lawsuit filed against the NFL,[2] the nine officials of the Supreme Court of the United States emerged from the replay booth four months later and overturned the appellate court's ruling.[3] The Court's unanimous decision ostensibly nullified the NFL's victory by instructing the two opponents to replay the down in district court. The Court also removed a vital tactic from the NFL's antitrust playbook—the single entity defense.[4] In rejecting the NFL's invocation of this defense, which allows a parent corporation and its wholly owned subsidiary or subsidiaries to act cooperatively without contravening federal antitrust laws,[5] the Supreme Court's ruling prevented the NFL from granting one company an exclusive apparel license for all thirty-two of its independently owned franchises. In doing so, the Supreme Court dismissed the notion that the NFL possesses its own brand apart from the collection of the distinct and unaligned team trademark-licensing interests of "separate, profit-maximizing entities."[6]

However, the relevant characteristics relating to the business of the NFL demonstrate that the NFL possesses its own consumer brand—and the accompanying interests in that brand—that extends beyond the mere supervision of the interests of thirty-two separate, profit-maximizing entities. For example, the NFL collectively generated nearly $8 billion in revenue in 2009,[7] which it then dispersed to the teams through a revenue sharing program.[8] Additionally, the last seven broadcasts of the Super Bowl each garnered an average of 100 million television viewers.[9] This occurred despite each game featuring a different pair of opponents and only two teams—the Indianapolis Colts and the Pittsburgh Steelers—making more than one appearance.[10] The NFL's current television deals pay the league over $3.7 billion to provide its games over both free-to-air and cable airwaves—regardless of which teams appear in the prime

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[2] Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 744 (7th Cir. 2008), *rev'd*, 130 S. Ct. 2201 (2010).

[3] Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2217 (2010).

[4] *See id.*

[5] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767, 771 (1984).

[6] *Am. Needle, Inc*., 130 S. Ct. at 2213.

[7] Kurt Badenhausen, et al., *Recession Tackles NFL Team Values*, FORBES.COM (Sept. 2, 2009, 6:00 PM), http://www.forbes.com/2009/09/02/nfl-pro-football-business-sportsmoney-football-values-09-values.html.

[8] *See* Keith Wagstaff, *How Revenue Sharing Lead NFL to Dominate Pro Sports*, UTOPIANIST (Feb. 3, 2011), http://utopianist.com/2011/02/how-revenue-sharing-helped-the-nfl-dominate-pro-sports/.

[9] *See Super Bowl XLV Breaks Viewing Record, Averages 111 Million Viewers*, TV BY THE NUMBERS (Feb. 7, 2011), http://tvbythenumbers.zap2it.com/2011/02/07/super-bowl-xlv-poised-to-break-viewing-records-ties-1987-with-highest-overnight-ratings-ever/81684/. Though it averaged 111 million viewers, Super Bowl XLV reached 162.9 million people overall. *Id.*

[10] *History*, NFL, http://www.nfl.com/superbowl/history (last visited March 9, 2012).

broadcasting timeslots.[11] Over the last five years, NFL-licensed merchandise has generated a yearly average of nearly three billion dollars in revenue.[12] Accordingly, the NFL, though classified as a non-profit trade association for tax purposes,[13] holds a significant interest in preserving and promoting the integrity of its brand name and product.

While several analysts and legal scholars claim that the Court's holding in *American Needle, Inc. v. NFL*[14] ("*American Needle*") does not have broad implications,[15] the repudiation of decades of precedent in the sports industry indicates a significantly more sweeping decision. This article examines the current state of the single entity defense following *American Needle*, evaluating its effect in all industries where the single entity defense has arisen and whether subsequent application of the defense will be effective. Part II addresses the historical foundation for the single entity defense in American antitrust law and discusses the development and rationale for the single entity defense via its application in relevant industries, particularly the sports industry. Part II then interprets applications of the single entity defense by the Supreme Court and subordinate federal courts. Part III analyzes the Supreme Court's most recent and pertinent ruling on the single entity defense in *American Needle*, scrutinizing the Court's legal and economic justification for its adverse ruling and assessing the ruling's effect on prior precedent and future practices of the NFL and the rest of the sports industry. Part III then argues that the two single entity defense tests recognized in the past by the Supreme Court—the "economic unity" test and the "actual or potential competitors" test—remain valid, suggesting that the Court ruled against the NFL incorrectly because it misunderstood the NFL brand and the resulting product. Since this interest and those interests of the league's thirty-two subsidiaries in producing quality apparel or any other licensed merchandise are not mutually exclusive, Part III also presents a recommendation on how the district court should proceed as dictated by whether it has the fortitude to defy the Supreme Court's holding in *American Needle*. This article concludes that the single entity defense as employed by the NFL, despite ostensibly justifying violation of the nation's antitrust

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[11] *NFL Media Rights Deals For '07 Season*, SPORTS BUS. J. DAILY (Sept. 6, 2007), http://www.sportsbusinessdaily.com/article/114714.

[12] Darren Rovell, *Publication: MLB Will Beat NFL in Licensing Revenue in '10*, CNBC (Jun. 14, 2010), http://www.cnbc.com/id/37692194/Publication_MLB_Will_Beat_NFL_In_Licensing_Revenue_In_10 [*hereinafter* Rovell MLB].

[13] Duff Wilson, *N.F.L. Executives Hope to Keep Salaries Secret*, N.Y. TIMES, Aug. 12, 2008, at D10, *available at* http://www.nytimes.com/2008/08/12/sports/football/12nfltax.html?_r=1.

[14] See generally Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201 (2010).

[15] *See, e.g.*, Gregory J. Werden, *Initial Thoughts on the American Needle Decision*, 9 ANTITRUST SOURCE, August 2010, at *1.

laws, constitutes conduct that conforms to the letter and the spirit of the Sherman Act.

II. Historical Perspective on Antitrust Law and the Single Entity Defense

To appreciate why the Supreme Court elected to intervene, or perhaps meddle, in the NFL's efforts to control its brand in apparel manufacturing, the federal government's efforts to frustrate anticompetitive behavior needs to be traced to its source. The genesis of this crackdown, the Sherman Antitrust Act, reflects the motivation for this legislation and the conduct it sought to discourage. However, because *American Needle* addressed only a narrow aspect of antitrust law rather than the entire field,[16] this particular aspect of antitrust doctrine, known as the single entity defense, warrants review. So does the origin of single entity defense, *Copperweld v. Independence Tube*,[17] and the two tests devised to invoke the defense under the appropriate context: the "economic unity" test and the "actual or potential competitors" test. Finally, because *American Needle* involves the world of professional sports, where the economic realities of the industry require anticompetitive measures to attain competitive parity,[18] examination of the federal courts' application of antitrust law and the single entity defense calls into question whether the Supreme Court's involvement in *American Needle* was itself necessary.

A. Sherman Act

Enacted in 1890 by the fifty-first Congress in response to the proliferation of trusts and "combinations" of businesses with monopolistic attributes,[19] the Sherman Antitrust Act outlaws "every contract, combination . . . or conspiracy" that "[restrains] trade or [interstate] commerce."[20] Additionally, the Sherman Act extends its prohibition to any party "who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or [interstate] commerce."[21] Because Congress neglected to include definitions of the kinds of actions that constitute market restraints, federal courts recognized the legislation as one that "expected the courts to give shape to the statute's broad mandate by drawing on common-law

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[16] Am. Needle, Inc., 130 S. Ct. at 2208.

[17] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771-72 (1984).

[18] *See* Mark Yost, Tailgating, Sacks, and Salary Caps: How the NFL Became the Most Successful Sports League in History 54-55 (2006).

[19] Apex Hosiery Co. v Leader, 310 U.S. 469, 492-93 (1940).

[20] Sherman Antitrust Act, 15 U.S.C. § 1 (1890).

[21] § 2.

tradition."[22] Not bound by the formal limitations of contract law, the courts interpret the language of the Sherman Act through its legislative history and, specifically, the evil that Congress sought to abate: the destruction of free competition in business transactions, which generally "restrict[ed] production, raise[d] prices[,] or otherwise control[led] the market to the detriment of . . . consumers."[23]

As interpreted by the federal courts, section one of the Sherman Act only condemns concerted action, which itself demands a "duality of action," i.e., collusion or cooperation between two or more independent parties.[24] Conversely, violations under section two of the Sherman Act only arise when evaluating the conduct of a single firm which "is governed by § 2 alone and is unlawful only when it threatens actual monopolization."[25] Thus, as federal courts determined in the mid-twentieth century, the sanctions of the Sherman Act seemingly apply to corporate and market structures through which commonly owned or controlled entities could nevertheless conspire.[26] However, thirty years after it first rejected the notion that the single entity could not evade the prohibitions of the Sherman Act, the Supreme Court dismissed the "intraenterprise conspiracy doctrine" and reversed its position in *Copperweld v. Independence Tube*.[27]

B. Copperweld and the Single Entity Defense

In repudiating its earlier precedent, the Supreme Court answered in the negative the question of whether "a parent and its wholly owned subsidiary [were] capable of conspiring in violation of § 1 of the Sherman Act."[28]

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[22] Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) (*citing* 21 CONG. REC. 2456 (1890) (comments of Sen. Sherman)).

[23] *Apex Hosiery Co.*, 310 U.S. at 493.

[24] John C. Weisnart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 DUKE L.J. 1013, 1017-18 (1984) (citing E. GELLHORN, ANTITRUST LAW AND ECONOMICS 19-72 (1981); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 108 (1977)).

[25] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984).

[26] *See* United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947), *overruled by* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) (holding that a restraint on trade can derive equally from "a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent"); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951) (holding that common ownership or control does not "liberate [contracting corporations] from the impact of the antitrust laws"); United States v. Gen. Motors Corp., 121 F.2d 376, 410 (7th Cir. 1941) (holding that defendants, despite being separate entities, "even though as a matter of economics they may constitute a single integrated enterprise," can still restrain commerce of GM dealers).

[27] Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2211 (2010).

[28] *Copperweld Corp.*, 467 U.S. at 767.

Because concerted activity between two parties to pursue particular conduct in the market "inherently" entails "anticompetitive risk," the Sherman Act targets "two or more entities that previously pursued their own interests separately [that now] are combining to act as one for their common benefit."[29] However, a parent company and a wholly owned subsidiary naturally share a "unity of interest," as their "objectives are common, not disparate," and guided by one rather than two "separate corporate consciousnesses."[30] Thus, for purposes of a section one violation of the Sherman Act, the Supreme Court viewed a parent company and a wholly owned subsidiary as "that of a single enterprise."[31] The formation of this single entity turns on whether the parent and the subsidiary have either "a unity of purpose or a common design."[32] The structure of the relationship between the parent and the subsidiary has no effect on this determination; as long as the parent "may assert full control at any moment if the subsidiary" acts in opposition to the "ultimate interests" of both parent and subsidiary, the parent and its subsidiary may determine the appropriate level of formality.[33] In particular, *Copperweld* permitted incorporation that "may improve management, avoid special tax problems arising from multistate operations, or serve other legitimate interests" that "serve efficiency of control, economy of operations, and other factors" relating to the business climate.[34]

The antitrust legislation embodied in the Sherman Act discriminates only against a corporation that engages in conduct that "seriously threatens competition," meaning that it does not matter that the parent [corporation] "avail[s] itself of the privilege of doing business through separate corporations" because such an organization "is not laden with anticompetitive risk."[35] A prohibition on such organization not only defies the spirit of the Sherman Act, which is "comprehensible" and "coherent," but also bars "only multiparty conduct that poses the 'most obvious threats to competition.'"[36] Doing otherwise "serves

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[29] *Id.* at 768-69.

[30] *Id.* at 771.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 771-72 n.18.

[34] *Id.* at 772-73 (citing Phillip Areeda, Comment, *Intraenterprise Conspiracy in Decline*, 97 HARV. L. REV. 451, 453 (1983)).

[35] *Id.* at 772, n.19 (quoting Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 141 (1968), *overruled by Copperweld Corp*., 467 U.S. 752).

[36] Areeda, *supra* note 34, at 454 ("The most obvious threats to competition flow from (1) improper unilateral conduct by actual or would-be monopolists, or (2) unreasonable concerted behavior among several business units. [The Sherman] Act addresses the latter in section 1 and the former in section 2. Control of unilateral behavior is, therefore, confined by section 2 to situations of actual or threatened monopoly power." The author proceeds to differentiate unilateral and competitive decision-making, stating that "intraenterprise contacts, like 'pure' unilateral coordination within the very smallest firm, are natural and efficient. Such contacts are unlike

no valid antitrust goals but merely deprives consumers and producers of the benefits that the subsidiary form may yield."[37] To balance these concerns and assure consistent application of the single entity defense, two separate tests have emerged from *Copperweld* and its progeny: the "economic unity" test and the "actual or potential competitors" test.

1. Economic Unity Test

The economic unity test follows from *Copperweld*'s rationale that "there can be little doubt that the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor."[38] Commentators interpret this underlying principle by analyzing the control rights within the enterprise, looking specifically at the concentration of those rights in the parent corporation. The legitimacy of the parent corporation's appeal to single entity status decreases with "[e]vidence that control rights are fragmented and distributed across constituent entities."[39] The idea that economic unity equates to control rights manifests itself in the form of delegation from one party within a hierarchal corporate structure to the next.[40] Antitrust law recognizes economic unity in "top-down, one-way, hierarchal control," which represents the conventional corporate structure, where "parties higher up the hierarchy may delegate functions to parties lower on the hierarchy, parties lower down will not delegate functions to parties higher up, and parties lower down will not reserve control rights that the same party higher up could not abrogate."[41] However, antitrust law also recognizes corporate structures that deviate from the "purely top-down" hierarchy as a single entity, where two parties within the single entity can either delegate no management functions or some functions to each other while maintaining shared control over other functions.[42] Single entity status permits the delegation of management functions in whatever method the parties choose; it only bars "a single party within a single entity [from] actively manag[ing] mechanical affairs such as setting prices."[43]

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collaboration by unrelated firms, which is dangerous to competition and therefore forbidden unless redeemed by some precompetitive virtue").

37 *Copperweld*, 467 U.S. at 774.

38 *Id.* at 770.

39 Dean V. Williamson, Organization, Control and the Single Entity Defense in Antitrust 17 (January 2006) (unpublished discussion paper), *available at* http://www.justice.gov/atr/public/eag/221876.pdf. A modified version was later published in the *Journal of Competition Law & Economics*. *See generally* Dean v. Williamson, *Organization, Control, and the Single Entity Defense in Antitrust*, 5 J. COMPETITION L. & ECON. 723 (2009),

40 *Id.* at 17-18.

41 *Id.* at 18.

42 *Id.*

43 *Id.* at 17-18.

2. The Actual or Potential Competitors Test

Alternatively, in instances where it is unclear whether economic unity exists between corporations within a single entity, i.e., when the allocation of control rights is unclear, the "actual or potential customers" test asserts itself. The "actual or potential customers" test focuses on how parties within the single entity join "complementary assets, capabilities[,] or other complementary inputs together."[44] If the parties do not depend on the assets of the other(s) to produce a complete product, the parties would, through their independence in operation, constitute "actual or potential competitors."[45] Examples of two independent parties combining into single entities arise in franchising arrangements and patent arrangements. Under a franchising arrangement, the franchiser contributes the brand name and the franchisee contributes "complementary" inputs like labor. Under patent arrangements, the patent holder licenses his or her right to exploit the invention, and the licensee profits from selling products derived from the holder's patent.[46] The crux of the test lies in the level of interdependence the parties need to maintain the product that results from the arrangement. If a party can make the product without any input from the other party or parties in the market, the product does not require collaboration to exist.[47] Consequently, any covenant between two or more independent producers of the same product, when designed to increase efficiency by eliminating conflict, creates a conspiracy—a cartel—to restrain trade because the producers are "actually competing with each other."[48] However, where a product requires the coordination of complementary inputs from different parties just to exist, collusion "is as likely to result from an effort to compete as from an effort to stifle competition."[49] This is especially true where such coordina-

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[44] *Id.* at 19.

[45] *Id.*

[46] *Id.* The author also identifies several federal district court cases in which courts extended single entity status on the basis of complementarity, including: exclusive contracts (citing Calculators Haw., Inc. v. Brandt, Inc., 724 F.2d 1332 (9th Cir. 1983)); certification authorities (citing Jack Russell Terrier Network v. Am. Kennel Club, Inc., 407 F.3d 1027 (9th Cir. 2005)); media networks (citing Broad. Music Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979)); and professional sports leagues (citing S.F. Seals, Ltd. v. Nat'l Hockey League, 379 F. Supp. 966 (C.D. Cal. 1974)); for markets in which federal courts did not extended single entity status by these means, *contra* realtor associations (citing Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133 (9th Cir. 2003)); medical associations (citing Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332 (1982)); professional engineer association (citing Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978)); and joint operating agreement (citing Citizen Publ'g Co. v. United States, 394 U.S. 131 (1969)).

[47] *See* Williamson, *supra* note 39, at 20.

[48] *Id.*

[49] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984).

tion may be "necessary if a business enterprise is to compete" in other areas.[50] NFL football and the merchandise it engenders exemplify this contradiction.

C. Application in the Professional Sports Industry

Though competition is a critical attribute of the notion of sport, the staging of a sporting event demands coordination between competitors off the field before they can compete on the field. As early as 1922, the Supreme Court distinguished the act of a league holding a sporting event from conventional markets, maintaining that "the exhibition [of a baseball game], although made for money[,] would not be called trade of commerce in the commonly accepted use of those words."[51] A little more recently, a district court held that the teams comprising the National Hockey League ("NHL"), though competitors on the ice, do not compete "in the economic sense in the relevant market," as the teams are "all members of a single unit competing as such with other similar professional leagues."[52] Nevertheless, the bulk of single entity cases in the United States concern the structure of sports leagues.[53]

Of these examinations by federal courts throughout the last half of the twentieth century, the majority scrutinize the validity of a professional sports league's single entity invocation under the "actual or potential competitors" test.[54] Specifically, team owners and the leagues representing those owners stress the inherent complementarity of the events they stage, as the "teams themselves constitute complementary inputs to the production of 'games.'"[55] Additionally, the leagues rely on the same complementarity by contributing their own inputs that supplement the inputs provided by the teams.[56] For example, the Seventh Circuit[57] viewed the National Basketball Association ("NBA"), then composed of twenty-nine wholly independent entities, as the producer of "a single product," noting that "cooperation is essential (a league with one team would be like one hand clapping); and a league need not deprive the market of independent centers of decisionmaking."[58] The singularity of the product varies based on the market, as "[f]rom the perspective of fans and

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[50] *Id.*

[51] Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 209 (1922).

[52] Peter R. Morrison, *Shutting Down the Offense: Why the Supreme Court Should Designate the NFL a Single Entity for Antitrust Purposes*, 3 J. BUS. ENTREPRENEURSHIP & L. 97, 112 (quoting S.F. Seals, Ltd., 379 F. Supp. 966, 970 (C.D. Cal. 1974)).

[53] *See* Williamson, *supra* note 39, at 20.

[54] *Id.*

[55] *Id.* at 20-21.

[56] *See id.*

[57] Coincidentally, *American Needle* also was reviewed by the Seventh Circuit.

[58] Chi. Prof'l Sports Ltd. v. Nat'l Basketball Ass'n, 95 F.3d 593, 598-99 (7th Cir. 1996).

advertisers (who use sports telecasts to reach fans), 'NBA Basketball' is one product from a single source even though the Chicago Bulls and Seattle Supersonics are highly distinguishable."[59] The Supreme Court even recognized this same trait within the NFL, conceding that "the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival."[60]

This cooperation for the sake of economic viability implicates the role of network effects, illustrating the complementary nature of these components.[61] The "demand-side" network effects, relating to the rate and manner by which the product offered by a sports league is consumed, involve the "fact that the production of goods or services requires the input of more than one entity."[62] The licensing arrangement alluded to earlier entails that the licensee and the patent holder "collectively contribute complementary 'raw material' . . . without which each party would be 'inherently unable to compete fully effectively.'"[63] Accordingly, when the owners of teams field rosters to compete against other teams assembled for the same reason, they create a network in which consumers perceive value, entertainment or otherwise, and "may perceive greater value to having more, if not unboundedly more, teams in the network."[64] Conversely, the decisions by the single entity, and the subsidiaries within the single entity, also create "supply-side" network effects, which relate to the quality and quantity of the product supplied by the producers for consumption in the relevant market.[65] Such effects arise, for example, in the standards and restrictions enacted by the league for the "promotion of league-sanctioned competition," which contribute not to the constraint of actual or potential competition, but to the facilitation of commercializing all league-sanctioned products, i.e., the games themselves and the derivative goods like mer-

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[59] *Id.* at 599. Contemporaneous with the arguments of the case before the Seventh Circuit, the Chicago Bulls and the Seattle Supersonics were the two NBA teams representing the league in its championship series, the NBA Finals. Given the success of the two teams during the regular season, which included the Chicago Bulls setting a (still unbroken) NBA record for most wins (72 wins and 10 losses), the inputs provided by those two teams were of considerably higher quality than, say, the expansion Vancouver Grizzlies and Toronto Raptors (combined record for the 1995-1996 season: 36 wins and 128 losses). For more information on this historic NBA season, see *1995-96 NBA Season Summary*, BASKETBALL-REFERENCE.COM, http://www.basketball-reference.com/leagues/NBA_1996.html (last visited Feb. 28, 2012).

[60] Brown v. Pro Football, Inc., 518 U.S. 231, 248 (1996) (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101-102 (1984)).

[61] Williamson, *supra* note 39, at 21.

[62] *Id.*

[63] *Id.* (quoting Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 22-23 (1979)).

[64] *Id.*

[65] *See id.* at 21-22.

chandise.[66] Because the inputs contributed by the parties within the single entity involved are complementary, the single entity imposes vertical rather than horizontal restraints.[67] Only these horizontal restraints are prohibited by the Sherman Act because they constitute illegal agreements between actual competitors.[68]

Federal courts deciding whether professional sports leagues warrant single entity status consider the network effects of these leagues and what constitutes their relevant market, which consequently determines whether the teams within the league form actual or potential competitors.[69] Federal courts have rejected invocations of the single entity defense in cases involving one of the more important inputs in a professional sports league's production of games: the labor market for players and coaches.[70] For example, in a lawsuit filed by the NFL players' union, the Eighth Circuit invalidated an NFL sanction, called the Rozelle Rule, requiring a team to compensate another team when one lures away a player from the other through a process called free agency.[71] The service that each player provided (and which the modern NFL player continues to provide) represented a market in which the teams, in an effort to improve the quality of their individual inputs, competed not only with themselves but also with the demands of the players.[72] Consequently, the rule imposed "restraints on competition within the market for players' services," which "significantly

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[66] *See id.* at 22.

[67] *Id.*

[68] *See, e.g.*, Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730 (1988) ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints"); Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 348 (1982) ("Our decisions foreclose the argument that the agreements at issue escape *per se* condemnation because they are horizontal and fix maximum prices. *Kiefer-Stewart* and *Albrecht* place horizontal agreements to fix maximum prices on the same legal—even if not economic—footing as agreements to fix minimum or uniform prices").

[69] *See* Williamson, *supra* note 39, at 22.

[70] *Id.*; *see*, *e.g.*, Mackey v. Nat'l Football League, 543 F.2d 606, 610-11 (8th Cir. 1976); Smith v. Pro Football, Inc., 593 F.2d 1173, 1183 (D.C. Cir. 1978) (concluding that the NFL draft, through the prescribed rookie contract system, "as it existed in 1968 had a severely anticompetitive impact on the market for players' services, and that it went beyond the level of restraint reasonably necessary to accomplish whatever legitimate business purposes might be asserted for it").

[71] *Mackey*, 543 F.2d at 610-11. *Cf.* Clarett v. Nat'l Football League, 369 F.3d 124, 138 (2d Cir. 2004) ("the non-statutory exemption precludes antitrust claims against a professional sports league for unilaterally setting policy with respect to mandatory bargaining subjects. . . . the non-statutory labor exemption necessarily applied not only to protect such labor policies but also to prevent 'antitrust courts' from usurping the NLRB's responsibility for policing the collective bargaining process.") (citing Brown v. Pro Football, Inc., 518 U.S. 231, 240-42 (1986)).

[72] *See Mackey*, 543 F.2d at 620.

deter[red] clubs from negotiating with and signing free agents."[73] This reduced the likelihood that a club would sign a free agent, as a team does so "only where it is able to reach an agreement with the player's former team as to compensation, or where it is willing to risk the awarding of unknown compensation by the Commissioner."[74] In the absence of this result, competitive bidding would lead to higher salaries and increased movement in interstate commerce (e.g., from players shifting from Pennsylvania to Wisconsin). By contrast, the NFL argued that the rule promoted consistency and parity, both components of an accessible and quality product.[75]

The court concluded that the Rozelle Rule, though not a concerted refusal to deal through a group boycott as described by the district court, nevertheless violated the Sherman Act because the NFL's teams functioned as competitors "within the market for players' services," despite any concern for the general success of other teams to prevent them from going "out of business" in the professional sports market.[76] However, the single entity can overcome this labor market application of antitrust law, as demonstrated in *Fraser*, when the single entity forms because of a unity of interest, not through the absence of actual or potential competitors.[77] In the event that the professional sports league can establish a unity of interest, the single entity has no need to advance to the actual or potential competitors test, "[s]ince economic unity trumps considerations of complementarity."[78] Through *American Needle*, the Supreme Court offered to make the call when a Buffalo-based hat manufacturer challenged the NFL's licensing empire. But was it the right call to make?

III. American Needle v. NFL—The Supreme Court Decision

A. The NFL's Scoring Drive—Factual and Procedural History

In 1983, following the spectacular rise in popularity of the Washington Redskins' offensive line, a group collectively known as the Hogs, the NFL sought and lost an injunction to prevent unlicensed vendors—including the Hogs themselves—from selling merchandise bearing the name and image of the Hogs.[79] Despite forming NFL Properties in 1963,[80] it was not until several

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[73] *Id.* at 619-20.

[74] *See id* at 618-619.

[75] *Id.* at 621.

[76] *See id.* at 618-619.

[77] *See Fraser v. Major League Soccer*, L.L.C., 284 F.3d 47, 57 (1st Cir. 2002).

[78] Williamson, *supra* note 39, 24.

[79] *See* Yost, *supra* note 18, at 121.

[80] Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 737 (7th Cir. 2008), *rev'd*, 130 S. Ct. 2201 (2010) (The Seventh Circuit summarized *NFL Properties* in the following way: "With [intellectual property collectively known as the NFL Brand] promotional effort in mind, in 1963

years after the Hogs held the line that the NFL began merchandizing its products more vigilantly and restructured its apparel lines.[81] To execute this philosophy, the NFL decided at the turn of the century to abandon its practice of giving "out the team rights to licensees, [where] each one of those teams [then] work[ed] with that licensee on uniforms" and general apparel.[82] Subsequently, NFL Properties decided to consolidate the individual licenses of all thirty-two teams into a single license, for exclusive assignment to one licensee.[83] Reebok, an international athletic apparel company, purchased this ten-year license for $250 million; NFL Properties accepted Reebok's offer because Reebok served as one of the "very few companies that have the internal structure to handle all [thirty-two] teams."[84] This agreement between NFL Properties and Reebok quickly "streamlined the entire NFL apparel merchandizing operation and created more uniformity among the teams," and made the product of the NFL and its constituent teams easier and more efficient to maintain.[85]

This exclusive arrangement between the NFL and Reebok, though beneficial for those two parties, ejected several of the previously licensed manufacturers of apparel for individual NFL teams. One of the companies affected by this contract was American Needle, Incorporated, a manufacturer of trademarked Major League Baseball and NFL caps.[86] With its license to manufacture caps subsumed by Reebok's exclusive license, American Needle filed suit against NFL Properties and the New Orleans Saints, the team for whom American Needle manufactured caps bearing the Saints' trademarks. American Needle claimed that the exclusive license, by restricting or even eliminating the number of competitors in the market for apparel manufacturing, formed an "illegal conspiracy in restraint of trade [that] violat[ed] Section I of the Sherman Act."[87] The district court granted partial summary judgment for the NFL, holding that the unilateral decision by the NFL, through NFL Properties, qualified as the act of a single entity because "delegated decision-making does not deprive the marketplace of independent centers of decision-making."[88] The

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the NFL teams formed NFL Properties: a separate corporate entity charged with (1) developing, licensing, and marketing the intellectual property the teams owned, such as their logos, trademarks, and other indicia; and (2) 'conduct[ing] and engag[ing] in advertising campaigns and promotional ventures on behalf of the NFL and [its] member [teams].' ").

[81] YOST, *supra* note 18, at 128.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *See id.*

[86] *History*, AMERICAN NEEDLE, http://shop.americanneedle.com/pages/history (last visited Feb. 28, 2012).

[87] *See* Am. Needle, Inc. v. New Orleans La. Saints, 496 F. Supp. 2d 941, 942 (N.D. Ill. 2007).

[88] *Id.* at 943.

delegation of control rights that the NFL's wholly-owned subsidiaries pursued served their collective interests in the "protection and marketing of its own logos and trademarks in *a nationwide market* [that] would [if not observed vigilantly] cause each to be at a competitive disadvantage [compared] *with other leagues* with integrated marketing."[89]

In response to American Needle's appeal of this ruling, the Seventh Circuit reviewed the district court's conferral of single entity status upon the actions of the NFL, its member teams, and NFL properties as they "pertain to the teams' agreement to license their intellectual property collectively via NFL Properties."[90] The Seventh Circuit embraced the ruling of the district court, holding that, even though several teams may hold conflicting interests relating to how NFL Properties uses its respective intellectual properties, *Copperweld* indicates that "[e]ven a single firm contains many competing interests."[91] Still, as a single entity, the NFL teams defer management of these and other interests to the "only one source of economic power control[ling] the promotion of NFL football" against "other forms of entertainment for an audience of finite (if extremely large) size, [where] the loss of audience members to alternative forms of entertainment necessarily impacts the individual teams' success."[92] Accordingly, because "nothing in [section one of the Sherman Act] prohibits the NFL teams from cooperating so the league can compete against other entertainment providers," and because the Sherman Act promotes this kind of cooperation to "foster competition between that organization [the NFL] and its competitors," the Seventh Circuit affirmed the district court's holding.[93]

B. The Supreme Court Overturns the NFL's Play

As the decisive arbiters in this dispute, the nine Justices of the United States Supreme Court arrived at a decision that, though well received by the appellant hat manufacturer, ultimately misread the organization of the NFL and its constituent teams to the detriment of the league, the thirty-two wholly owned subsidiaries, and the millions of people who consume the NFL brand. This departure from years of federal court application of the Sherman Act to professional sports leagues rooted itself in the same *Copperweld* decision that these same leagues invoked in asserting single entity status. However, in interpreting *Copperweld*'s association of Sherman antitrust violations to deprivations of independent, market-driven decision-makers, the *American Needle* Court held that the crux of the single entity's Sherman Act conformity lies

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[89] *Id.* (emphasis added).
[90] Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 742 (7th Cir. 2008).
[91] *Id.* at 743.
[92] *Id.*
[93] *Id.* at 744.

within "substance, not form."[94] In other words, as clarified by Justice Stevens in the opinion of the Court, the relevant test ignores the label or appearance that the alleged single entity assigns to its corporate structure.[95] Instead, for a violation of federal antitrust prohibitions to occur, the single entity forms a "'contract, combination, . . . or conspiracy' amongst 'separate economic actors pursuing separate economic interests,'" which then removes the independent centers of decision-making from the marketplace.[96] As long as the corporation seeking single entity status restricts or otherwise eliminates competition that would exist but for the anticompetitive agreement, "the entities are capable of conspiring under [section one of the Sherman Act]," and the claim of single entity status sought by the parent corporation and its subsidiaries cannot earn validation by the courts.[97]

In shifting the focus of the single entity analysis to what it deemed "the single aggregation of economic power characteristic of independent action," the Court determined that NFL Properties, as the medium through which the thirty-two teams consolidated individual intellectual property interests, functioned as an instrumentality of the teams that constrained natural competition.[98] Though it acknowledged the cooperation required between the teams to stage an NFL game,[99] the decision by the Supreme Court in *American Needle* declared that the teams comprising the NFL competed with each other considerably to attract fans, generate high gate receipts, and contract with coaching and player personnel.[100] This competition extends to the intellectual property market, as the distinct names, colors, logos, and even history of individual teams possess varying amounts of value at any given time.[101] As sellers of these separate and valuable interests, the thirty-two NFL teams could compete with each other to

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[94] *See* Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2211, 2214 (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769, 773 (1984).

[95] *Id.* at 2211-12.

[96] *Id.* at 2212-2213 (quoting *Copperweld Corp.*, 467 U.S. at 769).

[97] *See id.* at 2212, 2214-15.

[98] *Id.* at 2212, 2215.

[99] *Id.* at 2214 (quoting Brown v. Pro Football, Inc., 518 U.S. 231, 248 (1996)).

[100] *Id.* at 2212-13.

[101] *See id.* at 2207, 2213; for an illustration of how apparel sales for each NFL team vary each year for various reasons, including team performance during the fiscal year, *compare* Darren Rovell, *Saints are NFL's Top Sellers*, CNBC (April 14, 2010, 10:30 AM), http://www.cnbc.com/id/30111451/Saints_Are_NFL_s_Top_Sellers [hereinafter Rovell NFL] (the top ten selling NFL teams for 2009-2010: Super Bowl Champion New Orleans Saints; Pittsburgh Steelers; Dallas Cowboys; Minnesota Vikings; Super Bowl Runner-Up Indianapolis Colts; New York Giants; New England Patriots; Chicago Bears; Philadelphia Eagles; Denver Broncos) *with* Larry Weisman, *Silver and Black Still Tops in NFL Merchandise Sales*, USA TODAY (July 21, 2004, 5:03 PM), http://www.usatoday.com/sports/football/nfl/2004-07-21-merchandising-sales_x.htm (the top five selling NFL teams for 2003-2004: Oakland Raiders; Super Bowl Champions New England Patriots; Green Bay Packers; Dallas Cowboys; and Philadelphia Eagles).

license their respective trademarks to similarly competing apparel manufacturers.[102] Consequently, the Court reasoned that licensing these distinct team trademarks, due to the differences that exist in their individual values, corresponds with conflicting rather than common interests; the decision "to license their separately owned trademarks collectively" is a choice that " 'depriv[es] the marketplace of independent centers of decisionmaking.' "[103] Despite the common interest of maintaining the NFL brand (which then extends to the thirty-two team owners' brand maintenance), the Court concluded that the assignment of these interests for management by NFL Properties ultimately succeeds in contracting, combining, or conspiring to restrain trade.[104] In rejecting the NFL's single entity defense, the Court determined that thirty-two NFL teams did not hold a unity of interest and were actual or potential competitors no matter how they labeled themselves.

C. Monday-Morning Quarterback[105]*—Did the Supreme Court Make the Right Call?*

As television analysts, newspaper beat writers, and fans observing from home know,[106] a critical feature of watching and digesting sports lies in the ability to question whether those responsible with impartially supervising the outcome of a game did so correctly. Given the nearly three billion dollars that NFL licensing generates every year,[107] the decision by the Supreme Court in *American Needle* warrants the same treatment. It too raises the question of whether the nine impartial justices, in a unanimous ruling, arrived at the correct holding. In making this assessment, one must look at the Court's holding in relation to the case law that preceded it. Specifically, did the Court overrule the single entity defense, thereby precluding its use by industries other than profes-

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102 *See Am. Needle, Inc.*, 130 S. Ct. at 2213.

103 *Id.* (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769-70 (1984)).

104 *See id.*

105 Monday-Morning Quarterback, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/monday%20morning%20quarterback (last visited Feb. 28, 2012). The phrase "Monday-morning quarterback" refers to someone who, armed with the benefit of hindsight and seeing how poorly a decision unfolded in its execution, second guesses the decision ("one who second guesses," originating "from a fan's usually critical rehashing of the weekend football game strategy").

106 *See* Paula Pasche, *LIONS: Ref Doesn't Have a Good Explanation of Ndamukong Suh Penalty*, OAKLAND PRESS (Dec. 6, 2010), http://www.theoaklandpress.com/articles/2010/12/06/sports/doc4cfc3716313f1677505864.txt?viewmode=fullstory; Gregg Rosenthal, *League Admits to Two Touchdown Errors in Sunday Night Game*, NBC SPORTS (Oct. 25, 2010, 5:44 PM), http://profootballtalk.nbcsports.com/2010/10/25/league-admits-to-two-touchdown-errors-in-sunday-night-game/; *Pereira: Officials wrong on Suggs' Penalty*, BALTIMORE SUN BLOG (Sep. 20, 2010) (on file with author).

107 Rovell MLB, *supra* note 12.

sional sports leagues? Alternatively, like the officials in an October 2010 Minnesota Vikings and Green Bay Packers game,[108] did the Supreme Court misapply the law to the facts and simply make the wrong call? Nevertheless, while the Supreme Court Justices must exercise detachment and objectivity in resolving disputes that reach the Court, the role of the Monday-Morning quarterback does not demand such a high standard. Instead, the Monday morning quarterback must only evaluate why the Court, despite its consensus, botched the call to the detriment of the NFL and its constituent teams.

Criticism of the Supreme Court's decision in *American Needle* is not tantamount to criticism of NFL referees, which one could characterize generously as vitriolic condemnations for incompetence.[109] The Supreme Court's own effectiveness and credibility as an institution stems from its insulation from political processes, as the Court detachedly hands down rulings as dictated by relevant constitutional, statutory, or case law without concerns for any one side.[110] Still, a few occasions exist where the Court essentially admitted to erroneous calls by its predecessors because of a mistaken understanding of the conditions or principles that underlay the misguided decision.[111] Likewise, the *American Needle* judgment arose from a misunderstanding by the Court of the circumstances that surround and define the NFL's organization.

1. The Intellectual Property Interests of Each Team, Like the Games Themselves, are Complementary Inputs Indicative of Interdependence Rather than Independence

As the statistics on annual team apparel sales demonstrate, not all hats and replica jerseys, despite manufacture by the same supplier and identical con-

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[108] Rosenthal, *supra* note 106.

[109] *See*, *e.g.*, Judy Battista, *In N.F.L., Wrong Calls and Wrong Assumption*, N.Y. TIMES, Nov. 2, 2008, at SP3, available at http://www.nytimes.com/2008/11/02/sports/football/02refs.html ("We have criticism from the days of officiating Pop Warner when parents yell at you from the sidelines"); John Harris, *NFL Officials Squander Credibility*, PITTSBURGH TRIB.-REV. (Oct. 13, 2008), http://www.pittsburghlive.com/x/pittsburghtrib/sports/steelers/s_593013.html.

[110] *See Lyle Denniston on the Supreme Court's Detachment from Politics*, C-SPAN, http://supremecourt.c-span.org/Video/Historians/SC_HIST_LyleD_02.aspx (last visited Feb. 28, 2012).

[111] *E.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495-96 (1954) (*overturning* the separate but equal doctrine from Plessy v. Ferguson, 163 U.S. 537 (1896)); Lawrence v. Texas, 539 U.S. 558, 560 (2003) (*overturning* Bowers v. Hardwick, 478 U.S. 186 (1986), which had upheld the constitutionality of anti-sodomy laws that criminalized private conduct between homosexual adults, because "[Bowers] was not correct when it was decided, is not correct today, and is hereby overruled").

sumer costs,[112] hold the same value.[113] Merchandise sales for teams with the more rabid fan bases (Dallas Cowboys, Pittsburgh Steelers, etc.) consistently generate revenue within the top ten of all thirty-two teams, but annual fluctuations in those top ten rankings signify that even the value of those intellectual property interests are not as independent as the Supreme Court determined.[114] With fixed prices set for official team merchandise, some factor must account for these yearly changes in the volume of sales for different teams when the only difference between one hat and the next is its color(s) and the team logo that appears on it. Rudimentary economic theory—the law of demand—dictates that, absent an adjustment in the price of a good, changes in the demand for a particular good, as motivated by personal tastes and the economic environment, must explain differences in consumer consumption.[115] The team apparel derived from a team's intellectual property interest in its logo(s) and colors rarely, if ever, lose inherent value. For example, the Dallas Cowboys' iconic blue and silver star logo, recognized internationally as a symbol of the team, has remained constant since 1964—one year after NFL Properties formed to promote this symbol and those of the other NFL teams.[116] Neverthe-

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[112] *See* NFL SHOP, http://www.nflshop.com/home/index.jsp (last visited Feb. 28, 2012). As a search of the NFL's official merchandise will display, regardless of the team and/or player appearing on the item, an adult replica jersey costs $80, *Jerseys*, NFL SHOP, http://www.nflshop.com/category/index.jsp?categoryId=2237409&clickid=topnav_jerseys (last visited Feb. 28, 2012), a sideline knit hat costs $20, and a pro shape flat brim hat costs $25, *Hats*, NFL SHOP, http://www.nflshop.com/category/index.jsp?categoryId=2237410 (last visited Feb. 28, 2012).

[113] Rovell NFL, *supra* note 101.

[114] *See id.; see also Cowboys Rank as Top-Selling NFL Team; Favre Leads in Jersey Sales*, SPORTS BUS. J. DAILY (Jan. 8 2009), http://www.sportsbusinessdaily.com/Daily/Issues/2009/01/Issue-76/Sponsorships-Advertising-Marketing/Cowboys-Rank-As-Top-Selling-NFL-Team-Favre-Leads-In-Jersey-Sales.aspx. Between the two seasons that spanned the 2008 and 2009 seasons, seven teams fell within the top 10, but the top selling team for the 2009 season—the Super Bowl winning New Orleans Saints—did not crack that list the previous year. For clarification, the top ten selling teams for the period covering the 2008 NFL season were: Dallas Cowboys; New York Giants; (Super Bowl Champion) Pittsburgh Steelers; New York Jets; Chicago Bears; New England Patriots; Washington Redskins; Philadelphia Eagles; Green Bay Packers; and the Indianapolis Colts. *But see 2008 NFL Standings, Team & Offensive Statistics*, PRO-FOOTBALL-REFERENCE.COM, http://www.pro-football-reference.com/years/2008 (last visited Feb. 28, 2012). Success on the field does not always breed success on the sales racks, as evident by the absence of the Super Bowl runner-up, the Arizona Cardinals, who, arguably, may never be fashionable no matter how well the team performs in the NFL regular season and/or playoffs.

[115] MICHAEL B. ORMISTON, UNDERSTANDING MICROECONOMICS: PARTIAL EQUILIBRIUM ANALYSIS 59 (2005) ("*Demand* tells us how much of a particular product buyers will purchase given their tastes and the *economic environment*") (emphases preserved).

[116] The Dallas Cowboys Cheerleaders, arguably as identifiable with the team as the star logo, have not changed much either. *History*, DALL. COWBOYS CHEERLEADERS, http://www.dallascowboyscheerleaders.com/history.cfm (last visited Feb. 28, 2012). Nonetheless, the Dallas Cowboys Cheerleaders, as a wholly owned subsidiary of Dallas Cowboys Football Club, Inc. holds its own intellectual property interests in its trademark colors and uniform, which it vigorously and suc-

less, for the teams whose logos and colors do not hold the same instant identification, the value of those characteristics likely derives from one source: a team's success on the football field.

In the two years that included the 2008 and 2009 NFL regular seasons, the Washington Redskins garnered the seventh highest total team merchandise sales after winning eight of sixteen games in the 2008 season, but did not appear in the top ten the following year when the team registered a 4-12 record.[117] Conversely, during that same period the New Orleans Saints failed to reach the top ten in merchandise sales, despite holding the same 8-8 record as the Redskins in 2008. The Saints then generated the highest team apparel sales the following year after going 13-3 and winning the Super Bowl.[118] Did the Saints' trademarks become more valuable because of a national fascination with the fleur-de-lis,[119] the city of New Orleans, or a trend to wear clothing featuring the Saints' official colors of metallic gold, black, and white?[120] Alternatively, did the Redskins' trademarks lose value because burgundy and yellow-gold[121] turned passé? The simplest answer is probably the correct one: the Saints were good, and the Redskins were bad.[122]

This explanation raises another question: why were the Saints suddenly considered good, and the Redskins suddenly considered bad? Like the staging of the games themselves, the value of a team's intellectual property holds interdependent qualities. The appeal of one team's licensed apparel depends on

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cessful defended in the 1970s against the distributors of *Debbie Does Dallas*. Dall. Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 203 (1979) ("However, we do not agree that all of [the] characteristics of plaintiff's uniform serve only a functional purpose or that, because an item is in part incidentally functional, it is necessarily precluded from being designated as a trademark.").

117 Rovell NFL, *supra* note 101; *Cowboys Rank as Top-Selling NFL Team*, *supra* note 114; *2008 NFL Standings, Team & Offensive Statistics, supra* note 114.

118 Rovell NFL, *supra* note 101.

119 The fleur-de-lis, which translates from French as "flower of the lilly" and serves as a symbol of "perfection, light, and life," has traditionally represented French Royalty and, by extension, the lands this dominion reached (e.g., New Orleans). The New Orleans Saints adopted the emblem in 1967. *History of the Fleur De Lis*, FLEURDELISFASHIONS.COM, http://www.fleurdelisfashions.com/history-of-the-fleur-de-lis.html (last visited Feb. 28, 2012).

120 CONST. AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE art. XIX, § 19.9(A).

121 *Id.* These two colors comprise the Washington Redskins' official club colors.

122 Though this statement may have described the current state of the NFL in 2009, the irony of this declaration emerges vis-à-vis the respective histories of the franchises, particularly the Saints. Before the New Orleans Saints' championship run in 2009, the organization was the epitome of a bad team, making the postseason only six times since 1975. *New Orleans Saints Franchise Encyclopedia*, PRO-FOOTBALL-REFERENCE.COM, http://www.pro-football-reference.com/teams/nor/ (last visited Feb. 28, 2012). The Redskins have fared much better, making the playoffs twelve times and garnering three Super Bowl championships over the same time span. *Washington Redskins Franchise Encyclopedia*, PRO-FOOTBALL-REFERENCE.COM, http://www.pro-football-reference.com/teams/was/ (last visited Feb. 28, 2012).

how consumers, at that given time, compare one team with another. One fan's affinity for the Green Bay Packers means little without a point of comparison; wearing an official (replica) home Aaron Rodgers jersey is tantamount to wearing a green shirt emblazoned with the number twelve below the letters R-O-D-G-E-R-S. However, when that same fan displays the jersey to a crowd of people adorned in the yellow and black logo and colors of the Pittsburgh Steelers, the real value of the Green Bay Packers team logo and colors emerges: an announcement that the team fan X supports is superior to the team fan Y supports, or any other team in the NFL.[123] In this sense, as Justice Stevens notes in *American Needle*, the requirement for NFL teams to cooperate to produce a game does not mean "that concerted activity in marketing intellectual property is necessary to produce football."[124] Rather, as the Seventh Circuit described, the object of the league and its constituent teams involves the production of "NFL football" as a source of entertainment against "other forms of entertainment for an audience of finite (if extremely large) size."[125]

Part of the attraction of NFL football as a source of entertainment flows from the ability of the league to market its product collectively, so that it sells a single organization rather than thirty-two profit maximizing entities that begrudgingly unite to throw around the pigskin for a third of the year. Without their association with the NFL, a team like the Arizona Cardinals is only a collection of men who, with few exceptions, played amateur football in the National Collegiate Athletic Association and now play football professionally in red and white uniforms. From 1960 through 1988, the Cardinals were headquartered in Missouri and played in the NFL as the St. Louis Cardinals.[126] At the same time, an organization called the St. Louis Cardinals played baseball games as part of Major League Baseball.[127] In pursuit of the St. Louis residents looking to take in a ballgame, how did the St. Louis Cardinals football team distinguish itself from the St. Louis Cardinals baseball team—a very different form of entertainment? *The association with the NFL created that dis-*

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[123] The author presumes (based on similar personal experiences) some variation of this encounter occurred around the country following the Green Bay Packers defeat of the Pittsburgh Steelers in Super Bowl XLV on February 6, 2011. For more information on Super Bowl XLV and Green Bay quarterback Aaron Rodgers's receipt of the game's Most Valuable Player honors, *see Final*, ESPN NFL (Feb. 6, 2011, 6:29 PM), http://scores.espn.go.com/nfl/recap?gameId=310206009.

[124] Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2214 n. 7 (2010).

[125] Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 743 (7th Cir. 2008), *rev'd*, 130 S. Ct. 2201(2010).

[126] *History*, ARIZ. CARDINALS, http://www.azcardinals.com/history/franchise.html (last visited Feb. 28, 2012); *Arizona Cardinals Franchise Encyclopedia*, PRO-FOOTBALL-REFERENCE.COM, http://www.pro-football-reference.com/teams/crd/ (last visited Feb. 28, 2012).

[127] *St. Louis Cardinals Team History & Encyclopedia*, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/teams/STL/ (last visited Feb. 28, 2012).

tinction. The identities of teams by logos and colors do not make the NFL; the NFL forges those logos and colors into identifiable trademarks.

When the NFL sought to expand in the late 1990s, a resulting new franchise—the Houston Texans—was not a previously established organization that the constituent teams decided to integrate into the league.[128] Instead, the owner of the Houston franchise bid $700 million to establish a team to begin play in 2002 "with no past, no players, no name, no logo, [and] no fan clubs."[129] This bid by Robert McNair represented his inclusion into a single organization, where any interests in the intellectual property of his soon-to-be-developed team would derive from those of the single entity rather than "actual or potential competitors"; his franchise was not a competitor until the NFL (and its constituent teams) made it one.[130] Unlike other industries, such as the incorporated consortium of mattress manufacturers licensing the "Sealy" trademark,[131] the thirty-two NFL teams cannot exist and still produce the same product outside of the licensing power granted by their association.[132] Consequently, whereas the Sealy entity imposed horizontal restraints like price-fixing through their licenses and thus functioned as an "instrumentality of the individual manufacturers,"[133] NFL Properties' use of intellectual property through bundling into packages for apparel and media application only imposes vertical restraints. By creating and packaging trademarks as part of the NFL product,[134] the agreement to vest a single organization—NFL Properties—with the

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[128] Richard Sandomir, *Pro Football; N.F.L. Goes Back to Houston for $700 Million*, N.Y. TIMES (Oct. 7, 1999), http://query.nytimes.com/gst/fullpage.html?res=9C06E7DE1231F934A35753C1A96F958260.

[129] *Id.*

[130] *See* Am. Needle, Inc. v. Nat'l Football League, 130 S.Ct. 2201, 2212 (2010).

[131] *Id.* at 2209 (citing U.S. v. Sealy, Inc., 388 U.S. 350, 352-53 (1967)).

[132] Otherwise, the resulting product would be the United Football League ("UFL"), a six team professional football league that formed in 2009 and continues to stage games in NFL-neglected markets, or, worse, the Xtreme Football League ("XFL"), a ten team professional football league that lasted for one season in 2001. *See About the UFL,* UFL, http://www.ufl-football.com/about-us (last visited March 9, 2011); REMEMBER THE XFL, http://rememberthexfl.8m.com/ (last visited Feb. 28, 2012). This author eagerly awaits the litigation that is bound to arise from the exploitation (or lack of exploitation) of the Las Vegas Locomotives' logo and colors.

[133] *Am. Needle Inc.*, 130 U.S. at 2210 (quoting *Sealy Inc.*, 388 U.S. at 356).

[134] NFL Films, the award-winning division of NFL Properties responsible for video documentations of the NFL, considers copyrighted footage of the NFL available for licensing as: "(1) all footage of NFL game action, including footage of ancillary activities inside the stadium (e.g., cheerleaders, pre-game activities, crowd, sidelines, etc.) from the period three hours prior to kick-off of an NFL game to one hour after the NFL game has ended, and (2) NFL controlled events (i.e., Combine, NFL Draft, etc.) . . . regardless of the source of such footage (this includes, but is not limited to, television coverage of games/events, footage shot on NFL sidelines with proper credentials, and NFL Films' coverage)." *NFL Footage Request*, NFL FILMS, http://www.nflfilms.com/FootageRequest/Default.aspx (last visited Feb. 28, 2012).

power of distribution is a vertical restraint that the Sherman Act permits.[135] As stated in *Copperweld*, the Sherman Act targets "two or more entities that previously pursued their own interests separately [that now] are combining to act as one for their common benefit."[136] Individual teams depend too greatly on each respective team's affiliation with the league that creates those interests to ever fully pursue their intellectual property interests separately. Therefore, the NFL's intellectual property distribution system does not violate the spirit of the Sherman Act, as it fails to create the kinds of anticompetitive risks that combinations by independent producers generally pose.

2. The Management of Each Team's Intellectual Property Signifies Economic Unity Between the Thirty-Two Teams as Represented by NFL Properties

As the Supreme Court established decades before *American Needle* appeared on the docket, the NFL cannot receive single entity status in transactions relating to the labor market, i.e., player and coach contracts.[137] However, the characteristic that distinguishes the market for contracting players from the market for selling merchandise of a silver and black pirate[138] is the quality that defines the economic unity of interest between a parent corporation and a wholly owned subsidiary. Control and the absence of it through fragmentation indicates the strength of the single entity defense; the greater the fragmentation and distribution across constituent entities of control of an input or inputs, the less control the single entity has (and therefore the weaker the single entity status).[139] When a player signs a contract to play for a particular team, the player does not play for the parent corporation (NFL), but for the individual team (e.g., the Arizona Cardinals).[140] Having competed with the other teams in the league for the right to do so, that team (the wholly owned subsidiary) exercises control over the player rather than the league (the parent corporation).[141] The parent corporation exercises some control over the same player by levying

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[135] *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730 (1988) ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints").

[136] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768-69 (1984).

[137] Mackey v. Nat'l Football League, 543 F.2d 606, 610-11 (8th Cir. 1976); Smith v. Pro Football, Inc., 593 F.2d 1173, 1183 (D.C. Cir. 1978).

[138] The logo and colors of the Oakland Raiders franchise.

[139] *See* Williamson, *supra* note 39, at 19.

[140] *E.g.*, *Brett Favre Signs with Minnesota Vikings*, ESPN NFL (August 19, 2009, 1:46 PM), http://sports.espn.go.com/nfl/news/story?id=4406963.

[141] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984).

fines for violating NFL rules,[142] but the fragmentation of control across constituent entities still exists.

Alternatively, when teams decide to delegate control of intellectual property exploitation to a single entity, like NFL Properties, they do so because of their unity of interest in the efficient management of assets. Congress endorsed this unity of interest in 1961 through the passage of the Sports Broadcasting Act, which, under the NFL's lobbying efforts, allowed the four major professional sports leagues to "come together . . . for the purpose of selling national TV rights."[143] Consistent with the Court's opinion in *American Needle*, a popular team like the Dallas Cowboys should be able to acquire more suitors and more lucrative bids for the rights to broadcast its respective games than a less popular team like the Carolina Panthers. Nonetheless, while a rational actor like the Dallas Cowboys ownership seemingly wants to maximize profit, it cannot earn any revenue if it has no teams (or an inconsequential amount) with which to compete.

To ensure the availability and viability of competition, sports leagues like the NFL "need a certain level of competitive balance to thrive."[144] Consequently, because the unity of interest stems from the league's need to sustain all of its constituent teams, the NFL institutes measures designed not to constrain competition but rather to promote it by giving fans at the start of each season "hope and faith that their team has a chance to make it in the postseason."[145] One such measure is revenue sharing. This, in addition to maintaining competitive balance by redistributing the money generated from television deals and ticket sales, also ensures financial stability, keeping members of the league from "teeter[ing] on the brink of bankruptcy."[146] Another source of revenue sharing derives from sales of NFL licensed merchandise, which the NFL distributes equally to its constituent teams no matter how well an individual team's merchandise fared for the given year.[147] Thus, by pooling and sharing the revenue generated by sales of team licensed apparel, the NFL and its constituent teams engage in an act indicative of "that of a single enterprise," where

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142 Jay Glazer, *Favre Fined $50K in Sterger Mess*, FOX SPORTS (Dec. 29, 2010 7:50 PM), http://msn.foxsports.com/nfl/story/brett-favre-faces-fine-in-jenn-sterger-scandal-122910.

143 Andrew Zimbalist, *Organizational Models of Professional Team Sports*, *in* HANDBOOK ON THE ECONOMICS OF SPORT 443 (Wladimir Andreff & Stefan Szymañski eds., 2006).

144 *Id.* at 444.

145 *Id.*

146 *Id.* at 443-44.

147 *See* Jake I. Fisher, The NFL's Current Business Model and the Potential 2011 Lockout 5 (May 4, 2010) (unpublished discussion paper), *available at* http://harvardsportsanalysis.files.wordpress.com/2009/09/the-nfl-business-model-and-potential-lockout.pdf.

"a unity of purpose or a common design" exists in maintaining and sustaining all the members of the league.[148]

Though each team may seek diametrically opposed goals on the football field, the owners of each team, and the league with which their teams associate, ultimately share one interest: maintaining a strong league so that individually each owner can continue to profit from his or her ownership. As expressed in *Copperweld*, a parent corporation and its wholly owned subsidiaries may seek any formulation that "serve[s] efficiency of control, economy of operations, and other factors," as long as it does not engage in conduct that bears substantial anticompetitive risk.[149] Consequently, by conferring the ability to delegate management functions in any legal manner, the availability of single entity status as a bar to antitrust suits only prohibits "a single party within a single entity [from] . . . actively manag[ing] mechanical affairs such as setting prices,"[150] as price setting is the essence of anticompetitive conduct. For instance, the NFL's exclusive and collective license with the developers of the popular Madden Football video game series[151] demonstrates that centralized management provides "essential efficiency and certainty" without engaging in anticompetitive conduct like price fixing.[152] This pro-competitive result arises from the creation of a competitive bidding process so that "a licensee can negotiate and contract with one entity rather than many, thereby lowering transaction costs and allowing the licensee to pass those savings along to consumers."[153] The process also allows a supplier (or buyer in the case of procuring the NFL license) "to negotiate with a joint venture just as with any other counterparty,

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148 Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984).

149 *Id.*

150 Williamson, *supra* note 39, at 19-20.

151 Darren Rovell, *All Madden, All the Time*, ESPN (Dec. 14, 2004, 12:08 PM) http://sports.espn.go.com/espn/sportsbusiness/news/story?id=1945691. In 2004, Electronic Arts ("EA"), the video game developer responsible for the *Madden NFL* football franchise, received an exclusive license akin to the one the NFL gave to Reebok for use in five iterations of the franchise, from both the NFL and the NFL Players' Association. In addition to the exclusive license's ability to separate its product in a "robust and diverse marketplace" by incorporating and simulating the NFL experience, the license, which would force competitors in the football video game market to rely on generic teams and player names, granted EA access to "NFL resources, including video, audio[,] and music scores from NFL Films." *Id.* The NFL awarded exclusive licenses to companies in other industries, including VISA, Gatorade, and PepsiCo (which includes its Pepsi, Frito-Lay, and Tropicana Products). In 2011, EA and the NFL extended its exclusive license agreement until 2013 to continue using NFL team colors, logos, and stadiums; however, the license for use of players likenesses was not included as part of the deal. Peter Rubin & Branden J. Peters, *"Madden" Keeps Exclusive NFL License, Loses Soul*, COMPLEX (Feb. 15, 2011, 5:02 PM), http://www.complex.com/video-games/2011/02/madden-keeps-exclusive-nfl-license-loses-soul.

152 Amicus Curiae Brief Supporting the NFL Respondents at 14, Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201 (2010) (No. 08-661).

153 *Id.* at 5.

without fear that the resulting license will lead to an antitrust suit."[154] Thus, selling the intellectual property rights of all thirty-two NFL teams under one license merely represents the united interests of both the league and its constituent teams to profit from something to which they all contribute, even if the contribution of one's input does not individually sell as well as another's input at the NFL Team Shop. It fosters, rather than restricts, competition by ensuring that each team associated with the league remains a viable form of entertainment, competing against other sports leagues and forms of leisure. Ultimately, though revenue sharing may reduce an individual owner's financial incentive to win,[155] it does not reduce the collective will to compete against those other forms of entertainment for the hearts and wallets of consumers, as manifested by an Aaron Rodgers jersey or an Oakland Raiders hoodie. Therefore, the delegation of intellectual property interests to centralized management permits the constituent teams of the NFL to promote an economic unity of interest while committing pro-competitive behavior.

IV. Conclusion

Even if one accepts the arguments in favor of the NFL's single entity status and agrees that the Supreme Court arrived at a legally and factually incorrect decision, the NFL and its constituent teams are not without recourse. Guided by Rule of Reason analysis, the federal courts rarely find antitrust defendants in violation of the Sherman Act, as the "inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition."[156] At the very least, the agreement between the thirty-two NFL teams to grant an exclusive license of their respective intellectual property interests to Reebok[157] does not suppress competition. A franchise's interest in fielding a successful team affects how well licensed team

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[154] *Id.* The Amicus Curiae Brief relies on the Supreme Court's holding in *Broadcast Music Inc. v. Columbia Broadcast System, Inc.*, 441 U.S. 1, 21-22 (1979), to stress the immense value that generates from a collective license over a license that may only incorporate some of the available team licenses ("Licensing through a single vehicle thus was precompetitive because the blanket license was 'truly greater than the sum of its parts; *it [was], to some extent, a different product*'") (emphasis preserved). Amicus Curiae Brief Supporting the NFL Respondents at 11.

[155] Zimbalist, *supra* note 143.

[156] Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978) (citing Bd. of Trade of Chi. v. United States, 246 U.S. 231, 243 (1918)).

[157] Darren Rovell, *Nike Will Have Exclusive NFL Apparel Rights*, CNBC (Oct. 12, 2010, 12:26 PM), http://www.cnbc.com/id/39632866/Nike_Will_Have_Exclusive_NFL_Apparel_Rights. Starting in April 2012, the exclusive team apparel license will lie in the able sewing machines of Nike, following the company's purchase of that license for five years in October of 2010. The arrangement with Nike gives the NFL access to its innovative uniform designs, such as its Pro Combat uniforms, which "are lightweight with a fitted, superhero look." However, unless subsequently rejected by the district court reviewing the American Needle case on remand, the NFL and

apparel sells, which will always foster competition. Nevertheless, because of the interdependence of each team in contributing inputs to both the production of NFL games specifically and the cultivation of the NFL game in general, a viable argument exists for another sports league to challenge the Supreme Court's rejection of the single entity defense for the NFL. Still, as long as the Rule of Reason analysis remains available, professional sports leagues do not have a great deal of incentive, other than saving litigation costs, to throw the red flag against the Supreme Court for its holding in *American Needle*.

Nike deal does not cover headwear, which will instead be manufactured by New Era Cap Co. and the '47 Brand from Twins Enterprise, Inc.