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A letter from the Executive Managing Editor of *Accord*:

Welcome to *Accord*, *Arizona Summit Law Review's* legal journal for practitioners. *Accord* is now in its third volume and continues to grow, building on the success of the last two volumes. Unlike our print journal published under *Arizona Summit Law Review*, *Accord* is designed from the ground up to be an electronic journal that is published throughout the year. Instead of running as a traditional print journal with several issues, *Accord* publishes its content as it is completed—similar to that of a reporter for court opinions. In this respect, *Accord* has the advantage of publishing articles and other legal content immediately for the legal community to use right away.

Volume III of *Accord* represents an expansion of the journal's direction. In the past volumes, *Accord* focused on articles that were applicable to the practice of law. Volume III continues that mission and is adding additional content in the form of case notes and an increased number of comments.

The new case notes will primarily be written by attorneys and editors at *Arizona Summit Law Review* on decisions published by courts within the Ninth Circuit. The case notes will provide attorneys with a quick, easy-to-read breakdown of the relevant issues and holdings of the court, as well as a detailed analysis of the opinion.

Volume III is also publishing articles and comments on current, on-going issues and cases in an effort to spark dialogue and debate issues that are currently being litigated or are at the forefront of the legal community. As a result, we encourage reader submissions, for publication, in support of, or in contra to the author's remarks.

Thank you for your support of *Accord* and of *Arizona Summit Law Review*.

Sincerely,

Jason Forcier
Executive Managing Editor of *Accord*

REACHING THE END OF OUR ROPE? AN APPRAISAL OF THE
MOVEMENT TO LEGALIZE INDUSTRIAL HEMP

Michael D. Moberly*
Charitie L. Hartsig**

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I. BACKGROUND

Hemp, known scientifically as *cannabis sativa*,¹ is an herbaceous plant² related to the mulberry tree.³ It is the natural source not only for the recreational (and sometimes medicinal)⁴ psychoactive street drug⁵ popularly known

¹ See *United States v. Moore*, 446 F.2d 448, 450 (3d Cir. 1971); *State v. Navaro*, 26 P.2d 955, 956 (Utah 1933). The “L.” occasionally appearing at the end of the term “*cannabis sativa*” refers to “the classification system through which plants have been identified and distinguished.” *United States v. King*, 485 F.2d 353, 361 (10th Cir. 1973). Inclusion of the letter “does not qualify the identification of ‘*cannabis sativa*’ in any way.” *Id.*; see also *N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 6 (1st Cir. 2000) (citations omitted) (“[S]trictly speaking, ‘*cannabis*’ is the genus and ‘*sativa*’ is the species, and the ‘L.’ in the statute simply refers to [Swiss botanist Carl] Linnaeus’ system of botanical classification.”).

² See *United States v. Kayser*, 322 F. Supp. 52, 53 n.1 (S.D. Ga. 1970); *Simpson v. State*, 176 So. 515, 516 (Fla. 1937). Hemp is also a dioecious plant, meaning individual plants are usually (although not invariably) either male or female. See *Simpson*, 176 So. at 516; Susan David Dwyer, Note, *The Hemp Controversy: Can Industrial Hemp Save Kentucky?*, 86 KY. L.J. 1143, 1146-47 (1998). Female hemp plants are preferred for their production of marijuana. See *United States v. Robinson*, 35 F.3d 442, 447 (9th Cir. 1994); *United States v. Proyect*, 989 F.2d 84, 87 (2d Cir. 1993). Conversely, male plants have “the most commercial utility for the production of [industrial] hemp.” *Dickerson v. State*, 414 So. 2d 998, 1004 (Ala. Crim. App. 1982).

³ See Lucien J. Dhooge, *The North American Free Trade Agreement and Hemp: America’s War on Drugs Gets Nipped in the Bud*, 21 WIS. INT’L L.J. 65, 81 (2003); Tara Christine Brady, Comment, *The Argument for the Legalization of Industrial Hemp*, 13 SAN JOAQUIN AGRIC. L. REV. 85, 86 (2003); Robin Lash, Comment, *Industrial Hemp: The Crop for the Seventh Generation*, 27 AM. INDIAN L. REV. 313, 316 (2003).

⁴ Historical references to the medical use of hemp “date back nearly 5,000 years.” Michael Anthony Lawrence, *Reviving a Natural Right: The Freedom of Autonomy*, 42 WILLAMETTE L. REV. 123, 156 n.110 (2006) (quoting The National Organization for the Reform of Marijuana Laws, at <http://www.norml.com> (citing numerous sources) (last visited Apr. 20, 2005)); see also Martin D. Carcieri, *Gonzales v. Raich: Congressional Tyranny and Irrelevance in the War on Drugs*, 9 U. PA. J. CONST. L. 1131, 1134 n.25 (2007) (“Records dating to 2800 B.C. show that man has found three broad uses for the cannabis plant—*medicinal*, *industrial* (commerce in hemp) and *recreational* . . .”). Nevertheless, there is a vigorous public debate in this country over the physical and psychological effects of the drug produced from the hemp plant “and whether it [has] any medicinal value . . .” *United States v. White Plume*, 447 F.3d 1067, 1075 (8th Cir. 2006). For the authors’ consideration of a discrete aspect of this debate, see Michael D. Moberly & Charitie L. Hartsig, *The Arizona Medical Marijuana Act: A Pot Hole for Employers?*, 5 PHX. L. REV. 415 (2012).

⁵ Street drugs are “drugs not prescribed by treating physicians.” *Speer v. United States*, 512 F. Supp. 670, 672 (N.D. Tex. 1981), *aff’d*, 675 F.2d 100 (5th Cir. 1982); *cf.* *Hall v. Cnty. of Nemaha*, 509 F. Supp. 2d 821, 826 (D. Neb. 2007) (describing street drugs as “illegal drugs”). Marijuana falls within this category. See *United States v. Friel*, 699 F. Supp. 2d 328, 330 (D. Me. 2010) (noting that it is “illegal to prescribe marijuana under federal law”). Accordingly, “like any street drug, marijuana is not subject to any governmental standard which would insure the potency or purity of any given quantity of marijuana.” *United States v. Bindley*, 157 F.3d 1235, 1243 (10th Cir. 1998); see also *State v. Anonymous*, 355 A.2d 729, 733 n.17 (Conn. Super. Ct. 1976) (citations omitted) (internal quotation mark omitted) (“Drug preparations from the hemp plant

as marijuana,⁶ but also for many non-psychoactive food, oil, and industrial fiber products.⁷ One of the world's oldest known plants,⁸ hemp has been a valuable agricultural commodity in various cultures throughout recorded history.⁹

Much of the international community now prohibits the production of hemp for use as a drug.¹⁰ However, hemp intended for other uses¹¹—com-

vary widely in quality and potency, depending on the climate, soil, cultivation and method of preparation.”).

⁶ See *Monson v. DEA*, 522 F. Supp. 2d 1188, 1191 (D.N.D. 2007), *aff'd*, 589 F.3d 952 (8th Cir. 2009); *rso for Reform of Marijuana Laws v. Bell*, 488 F. Supp. 123, 128 (D.D.C. 1980). “The term ‘marijuana’ technically does not refer to the plant but instead to the drug that is derived from the plant *cannabis sativa*.” *United States v. Osburn*, 955 F.2d 1500, 1503 n.2 (11th Cir. 1992). Nevertheless, “[i]n legal discourse, the term is variously used, sometimes to refer . . . to the drug, and sometimes to the plant from which the drug is derived, so the reader must be alert to context.” *N.H. Hemp Council*, 203 F.3d at 3 n.1; *see also State v. Jackson*, 239 A.2d 215, 217 (Del. Super. Ct. 1968) (noting that “marijuana is a term sometimes applied to the hemp plant and products thereof which have no harmful or narcotic qualities”).

⁷ See *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1042 (6th Cir. 2001) (“Hemp . . . is a plant from which both marijuana and a valuable fiber can be harvested.”); *N.H. Hemp Council*, 203 F.3d at 3 (“[B]oth the drug commonly known as marijuana and various industrial products (e.g., rope) derive from different portions of the plant popularly called the hemp plant and designated *Cannabis sativa* in the Linnaean system of botanical classification.”).

⁸ See *United States v. Adams*, 293 F. Supp. 776, 779 (S.D.N.Y. 1968) (observing that *cannabis sativa* is “one of the oldest known plants”); *Simpson v. State*, 176 So. 515, 516 (Fla. 1937) (“The history of the plant *C sativa* or hemp is very old.”); Thomas A. Duppong, Note, *Industrial Hemp: How the Classification of Industrial Hemp as Marijuana Under the Controlled Substances Act Has Caused the Dream of Growing Industrial Hemp in North Dakota to Go Up in Smoke*, 85 N.D. L. REV. 403, 404 (2009) (“Hemp was one of the first plants cultivated by man.”).

⁹ See *Adams*, 293 F. Supp. at 779 (“Marihuana (*cannabis sativa*) . . . has been used through the ages for fibre, for oil, and for its narcotic principles.”); Duppong, *supra* note 8, at 409 (“Industrial hemp produces a variety of products which have been used by nearly every culture for thousands of years.”); Lash, *supra* note 3, at 314 (“Hemp has been of vital importance to civilization for centuries.”); Christen D. Shepherd, Comment, *Lethal Concentration of Power: How the D.E.A. Acts Improperly to Prohibit the Growth of Industrial Hemp*, 68 UMKC L. REV. 239, 242-43 (1999) (footnote omitted) (“Industrial hemp is one of the oldest known renewable resources in the world. Numerous civilizations cultivated industrial hemp for thousands of years.”).

¹⁰ See *Rayon Y Celanese Peruana, S.A. v. M/V PHGH*, 471 F. Supp. 1363, 1368 (S.D. Ala. 1979) (observing that marijuana is “prohibited or regulated by the laws of the United States and of most other nations”). The United States and a number of other countries are parties to an international treaty known as the 1961 Single Convention on Narcotic Drugs, and have thereby committed to “efforts to eradicate . . . illegal traffic in the drug.” *United States v. Kuch*, 288 F. Supp. 439, 446-47 (D.D.C. 1968); *see also Cnty. of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 470 n.3 (Cal. Ct. App. 2008) (citation omitted) (“[T]he United States is a party to a treaty, the Single Convention on Narcotic Drugs, March 30, 1961, which includes prohibitions on marijuana.”).

¹¹ See generally Kristin J. Balding, Comment, *It is a “War on Drugs” And It Is Time to Reload Our Weapons: An Interpretation of 21 U.S.C. § 841*, 43 ST. LOUIS U. L.J. 1449, 1463

monly referred to as “industrial hemp”¹²—continues to be legally grown for commercial uses¹³ in many parts of the world.¹⁴ Nevertheless, for most of the past half century, it has been essentially illegal for anyone to grow hemp for any purpose in the United States.¹⁵

Although a number of states prohibit industrial hemp cultivation,¹⁶ the principal obstacle to hemp cultivation in this country arises from federal drug

(1999) (“Throughout history, hemp was grown primarily for industrial uses, although the narcotic strains were apparently used as a popular ingredient in many medical products.”).

¹² The term “industrial hemp” is used to distinguish hemp grown for non-drug related commercial uses from hemp grown for use as a hallucinogen. See Brady, *supra* note 3, at 86 (“It is important to use the full term ‘industrial hemp’ . . . because of the confusion with the term ‘hemp’, which commonly refers to marijuana and the issue of the legalization of marijuana.”). In particular, “industrial hemp” refers to cannabis sativa plants “primarily grown as an agricultural crop (such as seeds and fiber, and byproducts such as oil, seed cake, hurds) and . . . low in THC (delta-9 tetrahydrocannabinol, marijuana’s primary psychoactive chemical).” RENÉE JOHNSON, CONG. RESEARCH SERV., RL 32725, HEMP AS AN AGRICULTURAL COMMODITY 1 (2013); see also Shepherd, *supra* note 9, at 240 (footnote omitted) (“‘Industrial hemp’ commonly refers to low-THC producing plants . . . that are more desirable for their manufacturing potential and legitimate business uses than for their intoxicating effects.”).

¹³ Although the Single Convention on Narcotic Drugs prohibits the cultivation of hemp for use as a drug, see JOHNSON, *supra* note 12, at 14, the treaty does not prohibit the plant’s cultivation “exclusively for industrial purposes (fibre and seed) or horticultural purposes.” Nat’l Org. for Reform of Marijuana Laws v. Ingersoll, 497 F.2d 654, 658 n.9 (D.C. Cir. 1974); see also Marty Bergoffen & Roger Lee Clark, *Hemp as an Alternative to Wood Fiber in Oregon*, 11 J. ENVTL. L. & LITIG. 119, 130 (1996) (noting that “the Single Convention . . . explicitly exempts industrial hemp production from regulation”); Dwyer, *supra* note 2, at 1164 (“[T]he treaty explicitly exempts industrial hemp from coverage, saving the global hemp industry from demise.”).

¹⁴ See JOHNSON, *supra* note 12, at 1 (“[M]ore than 30 nations [currently] grow industrial hemp as an agricultural commodity which is sold on the world market.”); cf. Bergoffen & Clark, *supra* note 13, at 123 (footnote omitted) (“Despite the plethora of antagonistic attention garnered by marijuana, hemp has survived as a valuable cash crop in many regions of the world. . . . [F]ormer communist states such as Hungary, Poland, and Ukraine have grown hemp for fiber for years, despite criminalization for other uses.”).

¹⁵ See *Hemp Indus. Ass’n v. DEA*, 333 F.3d 1082, 1085 n.2 (9th Cir. 2003) (“The industrial hemp plant . . . may not be grown in the United States.”); *State v. Wright*, 588 N.W.2d 166, 169 n.2 (Minn. Ct. App. 1988) (“Industrial hemp and intoxicating marijuana are two distinct varieties of the cannabis sativa plant. Both are currently illegal to grow in the United States”); Bergoffen & Clark, *supra* note 13, at 120 (“[T]he current legal regime in the United States prohibits production of hemp for any purpose.”); Thomas Richard Poole, Note, *Silly Rabbit, Farm Subsidies Don’t Help America*, 31 WM. & MARY ENVTL. L. & POL’Y REV. 183, 198 (2006) (“Currently industrial hemp is illegal to grow in the United States”).

¹⁶ See, e.g., *N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 4 (1st Cir. 2000) (noting that “New Hampshire law forbade production of cannabis sativa for industrial use”); Bergoffen & Clark, *supra* note 13, at 134 (“[I]n . . . Oregon domestic hemp production is illegal.”); see also Duppong, *supra* note 8, at 406 n.34 (“[T]hirty-three states passed laws, between 1914 and 1933, limiting the cultivation of the hemp plant”).

control legislation,¹⁷ in particular: the Controlled Substances Act of 1970 (“CSA”).¹⁸ The CSA established five schedules of controlled substances¹⁹ and made it illegal to, among other things, manufacture any scheduled substance²⁰ “except as authorized by the CSA.”²¹ Congress classified marijuana as a Schedule I controlled substance,²² thereby placing it among “the most dangerous of illegal drugs”²³ and prohibiting its manufacture (or more precisely, its

¹⁷ As discussed in more detail in Part V, some states have enacted legislation purporting to authorize the cultivation of industrial hemp within their borders. *See, e.g.,* *Monson v. DEA*, 522 F. Supp. 2d 1188, 1191 (D.N.D. 2007) (“In 1999, the State of North Dakota enacted a law authorizing the cultivation of industrial hemp”), *aff’d*, 589 F.3d 952 (8th Cir. 2009). However, other states may have been deterred from doing so by a perception that any “pro-hemp” state legislation would be preempted by contrary federal law. *Shepherd*, *supra* note 9, at 247.

¹⁸ 21 U.S.C. §§ 801-904 (2006). The CSA has been described as “a national effort by Congress to aid in correcting and controlling use of narcotics and other similar deleterious substances.” *United States v. Thomas*, 294 A.2d 164, 165 n.1 (D.C. 1972); *see also* *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077, 1080 (D. Or. 2002) (“The CSA provides a comprehensive federal scheme for regulation and control of certain drugs and other substances.”), *aff’d*, 368 F.3d 1118 (9th Cir. 2004), *aff’d sub nom.,* *Gonzales v. Oregon*, 546 U.S. 243 (2006). The CSA thus “may displace state statutes that purport to make lawful that which federal law makes unlawful.” *Boultinghouse v. Hall*, 583 F. Supp. 2d 1145, 1158 (C.D. Cal. 2008).

¹⁹ 21 U.S.C. § 812(b) & (c); *see also* *United States v. Suquet*, 551 F. Supp. 1194, 1196 (N.D. Ill. 1982) (citation omitted) (“The Act criminalizes various forms of conduct involving ‘controlled substances.’ Controlled substances are subdivided into five schedules, each pertaining to a different category of drug.”).

²⁰ *See* *United States v. Klein*, 850 F.2d 404, 405 (8th Cir. 1988) (discussing 21 U.S.C. § 841(a)(1)); *United States v. Jefferson*, 175 F. Supp. 2d 1123, 1130 (N.D. Ind. 2001) (citing 21 U.S.C. §§ 841, 844).

²¹ *United States v. White Plume*, 447 F.3d 1067, 1070 (8th Cir. 2006); *see also* *United States v. Martinez*, 599 F. Supp. 2d 784, 806 (W.D. Tex. 2009) (“Congress . . . made it unlawful to manufacture . . . any controlled substance (including marijuana) except as permitted in the CSA.”).

²² 21 U.S.C. § 812(c) (2006); *see also* *Gonzales v. Raich*, 545 U.S. 1, 14 (2005); *Jefferson*, 175 F. Supp. 2d at 1130.

²³ *State Farm Fire & Cas. Co. v. Baer*, 745 F. Supp. 595, 597 (N.D. Cal. 1990), *aff’d*, 956 F.2d 275 (9th Cir. 1992); *see also* *United States v. Madera*, 521 F. Supp. 2d 149, 155 n.4 (D. Conn. 2007) (“Schedule I substances are the most dangerous, while Schedule V substances have a relatively low potential for abuse.”). Although beyond the scope of this article, the classification of marijuana as a Schedule I controlled substance is itself a controversial and frequently debated issue. *See* *United States v. Miroyan*, 577 F.2d 489, 495 (9th Cir. 1978) (discussing the “familiar argument . . . that [the CSA] unreasonably and irrationally categorize[s] marijuana as a Schedule I controlled substance”). For a discussion of the issue, see Annaliese Smith, Comment, *Marijuana as a Schedule I Substance: Political Ploy or Accepted Science?*, 40 SANTA CLARA L. REV. 1137 (2000).

cultivation)²⁴ without express authorization from the federal Drug Enforcement Administration (“DEA”).²⁵

Although Congress’s primary objective in placing marijuana in Schedule I was to curb the production, distribution, and use of the cannabis plant as an illegal drug,²⁶ the CSA defines marijuana broadly enough to encompass all hemp plants regardless of their intended use.²⁷ Thus, like hemp grown for use as a drug,²⁸ hemp intended solely for use in food or industrial products is clas-

²⁴ See *United States v. Bernitt*, 392 F.3d 873, 879 (7th Cir. 2004) (“The definition of manufacturing includes the ‘production’ of a substance. 21 U.S.C. § 802(15). Production is in turn defined as ‘planting, cultivation, growing, or harvesting of a controlled substance.’ 21 U.S.C. § 802(22).”); *United States v. Wood*, 57 F.3d 913, 919 (10th Cir. 1995) (“[T]he term manufacture includes the term production, see 21 U.S.C. § 802(15), and the term production, in turn, includes cultivation and harvesting, see *id.* § 802(22).”).

²⁵ See *White Plume*, 447 F.3d at 1074 (“[T]he CSA prohibits the cultivation of marijuana without a DEA registration”); *Monson v. DEA*, 522 F. Supp. 2d 1188, 1192 (D.N.D. 2007) (“Under the CSA, any person who seeks to manufacture . . . a Schedule I controlled substance must apply for and obtain a certificate of registration from the Drug Enforcement Agency [sic]”), *aff’d*, 589 F.3d 952 (8th Cir. 2009).

²⁶ See *United States v. Walton*, 514 F.2d 201, 202 (D.C. Cir. 1975) (“[T]he ‘hallucinogenic’ or euphoric effects produced by [tetrahydrocannabinol] led to the Congressional ban on . . . marijuana.”). See generally *Ringo v. Lombardi*, 706 F. Supp. 2d 952, 961 (W.D. Mo. 2010) (citation omitted) (“The general purpose of the CSA is to deal with drug abuse in a comprehensive fashion.”); *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077, 1080 (D. Or. 2002) (“Congress’ overarching concern in enacting the CSA was the problem of drug abuse and illegal trafficking in drugs.”), *aff’d*, 368 F.3d 1118 (9th Cir. 2004), *aff’d sub nom.* *Rai v. Oregon*, 546 U.S. 243 (2006); *United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086, 1097 (N.D. Cal. 1998) (“[W]hen Congress passed the Controlled Substances Act it was primarily concerned with traditional for-profit drug trafficking”).

²⁷ See *Monson v. DEA*, 589 F.3d 952, 963 (8th Cir. 2009); see also N.H. Hemp Council, Inc. v. Marshall, 203 F.3d at 1, 7 (1st Cir. 2000) (noting that the CSA’s prohibition on the cultivation of marijuana “embraces production of cannabis sativa plants regardless of use”); John Dwight Ingram, *Medical Use of Marijuana*, 33 OKLA. CITY U. L. REV. 589, 593 (2009) (footnote omitted) (“Marijuana was placed in Schedule I. As a result, it is illegal for anyone to produce . . . marijuana for any reason.”); Christine A. Kolosov, Comment, *Evaluating the Public Interest: Regulation of Industrial Hemp Under the Controlled Substances Act*, 57 UCLA L. REV. 237, 246 (2009) (footnote omitted) (“[H]emp, as a species of *Cannabis sativa* L., is a Schedule I controlled substance.”).

²⁸ See *United States v. Roberts*, 978 F.2d 17, 18 n.1 (1st Cir. 1992) (“[The CSA] criminalizes, *inter alia*, the ‘manufacture’ of a ‘controlled substance.’ . . . [G]rowing marijuana falls squarely within this proscription.”); *United States v. Northrop*, 972 F. Supp. 183, 184 (W.D.N.Y. 1997) (“The statute specifically prohibits the manufacture of marijuana”); *United States v. Premises & Real Prop. at 250 Kreag Rd.*, 739 F. Supp. 120, 124 (W.D.N.Y. 1990) (“It is . . . well established that the proscription of the ‘manufacture’ of controlled substances contained in § 841 [of the CSA] criminalizes the growing of marijuana.”); cf. *United States v. Patton*, 451 F.3d 615, 627 (10th Cir. 2006) (referring to the “comprehensive ban on marijuana under the Controlled Substances Act”).

sified as a Schedule I controlled substance subject to the CSA's most severe restrictions on cultivation and production.²⁹ As one commentator explained:

The CSA classifies marijuana in the first category of schedules, placing it among the most harmful and dangerous drugs. . . . Another key classification made by the CSA regarding marijuana is its broad definition of the drug. . . . This effectively placed the entire use of the hemp plant, whether for drug use or as industrial hemp, squarely under the control of the CSA.³⁰

The DEA has consistently refused to authorize the cultivation of hemp³¹ (or marijuana),³² which it clearly has the authority to do notwithstanding the plant's classification as a Schedule I controlled substance.³³ As a result, no

²⁹ See *White Plume*, 447 F.3d at 1072 (“[T]he CSA . . . criminalized the growing of marijuana whether it was intended for industrial-use or drug-use.”); *Hemp Indus. Ass’n v. DEA*, 333 F.3d 1082, 1085 n.2 (9th Cir. 2003) (“The industrial hemp plant itself, which falls under the [CSA’s] definition of marijuana, may not be grown in the United States.”); *Monson*, 522 F. Supp. 2d at 1199 (“[T]he Controlled Substances Act designates the *Cannabis sativa* L. plant, including that grown exclusively for industrial purposes, as a Schedule I controlled substance.”); Lash, *supra* note 3, at 322 (“Under [the CSA], both hemp, and its cousin marijuana, were included as Schedule I substances, illegal to produce.”).

³⁰ Duppong, *supra* note 8, at 417-18 (footnotes omitted); see also Lash, *supra* note 3, at 323 (“The placement of hemp under Schedule I narcotics enables federal prohibition of its cultivation for any means”); Shepherd, *supra* note 9, at 256 (“Schedule I lists industrial hemp alongside . . . marijuana. Such placement prohibits its . . . cultivation for any purpose.”); Seaton Thedinger, Note, *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, 420 (2006) (“In present day America, hemp is treated as if it were identical to marijuana, and its production is outlawed by the Drug Enforcement Administration”).

³¹ See Brady, *supra* note 3, at 90 (“The DEA has only granted one industrial hemp permit in the last forty years.”); Dwyer, *supra* note 2, at 1168 (“Potential growers can seek permits to grow industrial hemp from the DEA, but permits have been very few in number, limited almost entirely to research plots.”); Lash, *supra* note 3, at 323 (“[I]n almost every instance the DEA refuses to grant permits for industrial hemp research or production.”).

³² See *Phillips v. City of Oakland*, No. C 07-3885 CW, 2007 WL 4374280, at *3 (N.D. Cal. Dec. 14, 2007) (“The Court takes judicial notice of the fact that the United States government does not issue licenses to individuals who wish to grow and sell marijuana, for medical purposes or otherwise.”); cf. *United States v. Osburn*, 955 F.2d 1500, 1502 (11th Cir. 1992) (discussing a DEA license issued for a research program that “was the only one in the United States in which marijuana was grown on a significant scale under a research grant from the government”).

³³ See *N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 5 (1st Cir. 2000) (citations omitted) (“The DEA . . . can license marijuana production”); Bergoffen & Clark, *supra* note 13, at 136 (citing 21 U.S.C. § 823(a) (“[T]he DEA may grant licenses to grow hemp pursuant to the [CSA].”). See generally *Conant v. McCaffrey*, No. C 97-00139 WHA, 2000 WL 1281174, at *2 n.1 (N.D. Cal. Sept. 7, 2000) (“Among its other powers, the DEA may grant, deny, or revoke registrations under the Controlled Substances Act.”), *aff’d sub nom.*, *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002).

individual or entity is presently authorized to legally grow hemp in the United States.³⁴ Ironically, it does not appear that Congress contemplated this *de facto* ban on domestic hemp cultivation when it enacted the CSA,³⁵ leaving the United States alone among the world's developed nations in prohibiting industrial hemp production.³⁶ Not surprisingly, this ban has frustrated members of the American agricultural community;³⁷ many of whom undoubtedly recognize that farmers could legally grow hemp throughout most of the nation's history,³⁸ and can still do so in many other parts of the world.³⁹ These individuals view the revitalization of the American hemp industry as a prudent economic strat-

³⁴ See JOHNSON, *supra* note 12, at 13 (“No active federal licenses allow U.S. commercial cultivation at this time.”); Shepherd, *supra* note 9, at 240 (footnote omitted) (“[I]ndustrial hemp cannot be legally grown in the United States because the D.E.A. refuses to grant farmers and entrepreneurs the required permit, . . . which would allow the licensee to ‘manufacture’ a ‘controlled substance.’ The D.E.A. has never granted these permits.”).

³⁵ See Kolosov, *supra* note 27, at 261 (“Because domestic hemp farmers planted their last crop in 1958, there was no one left to lobby Congress or to draw its attention to the industrial hemp issue when the CSA was enacted in 1970.”). In fact, Congress excluded from the CSA’s definition of marijuana the “stalk, fiber, sterilized seed, and oil of the industrial hemp plant, and their derivatives.” *Monson v. DEA*, 522 F. Supp. 2d 1188, 1191 (D.N.D. 2007) (discussing 21 U.S.C. § 802(16)), *aff’d*, 589 F.3d 952 (8th Cir. 2009). These exclusions “suggest that it was not the intent of Congress nor the object of the law to prohibit commercial uses of marijuana which are not of a drug-related nature.” Bergoffen & Clark, *supra* note 13, at 134.

³⁶ See Dhooge, *supra* note 3, at 84; Brady, *supra* note 3, at 85; Duppong, *supra* note 8, at 409, 432; Kolosov, *supra* note 27, at 256.

³⁷ See Shepherd, *supra* note 9, at 245 (footnote omitted) (“All of this . . . is much to the chagrin of many American farmers in search of a viable alternative crop which benefits the soil, provides a raw material in demand by various industries, and improves overall potential income.”); *cf.* Bergoffen & Clark, *supra* note 13, at 140 (“Farmers . . . in the United States are eager to grow hemp.”).

³⁸ See Lawrence, *supra* note 4, at 155 (“For close to 400 years—from the time of the first American hemp crop in 1611 near Jamestown, Virginia through the turn of the twentieth-century—marijuana (then known as hemp) was grown in America for its fiber content.”); 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, 1196 (2002) (“In the United States, the cultivation . . . of hemp for various resources can be traced back approximately four hundred years.”); Brady, *supra* note 3, at 85 (“Industrial hemp as a cash crop in the United States has a history as old as the United States itself.”); Kolosov, *supra* note 27, at 238 (“Industrial hemp was a critical agricultural product in America for over four centuries.”).

³⁹ See Dhooge, *supra* note 3, at 84 (footnote omitted) (“Industrial hemp is currently grown in thirty-two countries, and hemp varieties . . . have been legalized in Australia, Switzerland, Canada, France, Germany, Austria, and the United Kingdom. Other countries have always permitted the cultivation of industrial hemp without regulation, including Hungary, the Peoples’ Republic of China and Russia.”). Indeed, in some European countries “hemp production is subsidized, lowering costs of production.” Dwyer, *supra* note 2, at 1153; *see also* Bergoffen & Clark, *supra* note 13, at 123 (“The European Union has also been actively supporting hemp farming since 1971.”).

egy in today's increasingly competitive (and ecologically conscious)⁴⁰ agricultural environment.⁴¹

The situation has generated an intriguing grassroots movement to legalize (or more precisely, re-legalize)⁴² industrial hemp cultivation in the United States.⁴³ This article examines the status of this important, but controversial movement.⁴⁴ Expanding upon the background information provided in this part,⁴⁵ Part II of the article summarizes the history of hemp production, both globally and within the United States.⁴⁶ Part III discusses the impact of federal drug laws on the nation's production of industrial hemp, as well as courts' application of those laws as they relate to hemp's cultivation and production.⁴⁷ Part IV addresses the DEA's continued resistance to legalized industrial hemp production.⁴⁸ In Part V, the authors examine states' efforts to lead the industrial hemp legalization movement.⁴⁹ Part VI discusses Congress's inaction on

⁴⁰ See *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, No. 3:03cv091, 2008 WL 2987174, at *14 n.25 (S.D. Ohio July 30, 2008) (“[C]ontroversy surround[s] the banning of [hemp], because of the environmental benefit of using the industrial components of the hemp fibers as an alternative to the use of trees.”), *aff’d*, 624 F.3d 332 (6th Cir. 2010); Duppong, *supra* note 8, at 410 (footnotes omitted) (“One of the main reasons for the resurgence of the industrial hemp market is its marketability as a ‘green’ product Many industrial hemp products have found a niche among environmentally conscious consumers. . . . Consumers have given industrial hemp an ‘eco-friendly’ label because it is easily renewable and because the entire plant can be put to productive use.”).

⁴¹ See, e.g., *Monson v. DEA*, 522 F. Supp. 2d 1188, 1202 (D.N.D. 2007) (citation omitted) (“[I]ndustrial hemp may be a viable agricultural commodity There seems to be little dispute that the retail hemp market is significant, growing, and has real economic potential for North Dakota.”), *aff’d*, 589 F.3d 952 (8th Cir. 2009); Thomas J. Ballanco, Comment, *The Colorado Hemp Production Act of 1995: Farms and Forests Without Marijuana*, 66 U. COLO. L. REV. 1165, 1168 (1995) (“Industrial hemp’s economic potential interests many Colorado farmers who are eager to begin production.”); see also Kolosov, *supra* note 27, at 258 (“[H]emp cultivation could prove a boon to American farmers and rural economies.”); Duppong, *supra* note 8, at 425 (“Across America, farmers and business people have expressed excitement over the economic potential of industrial hemp.”).

⁴² See Ballanco, *supra* note 41, at 1165 (discussing “legislative action aimed at re-establishing a commercial hemp industry” in the United States).

⁴³ See *State v. Wright*, 588 N.W.2d 166, 169 n.2 (Minn. Ct. App. 1998) (discussing the “movement to legalize the growth of industrial hemp” (citing John Mintz, *Splendor in the Grass?*, WASH. POST, Jan. 5, 1997, at H1)); Lash, *supra* note 3, at 325 (“Many Americans are very interested in pursuing legalization of industrial hemp.”).

⁴⁴ See generally *Cockrel v. Shelby Cnty. Sch. Dist.*, 81 F. Supp. 2d 771, 776 (E.D. Ky. 2000) (“[T]he issue of industrial hemp is politically charged and of great concern to certain citizens.”), *rev’d and remanded*, 270 F.3d 1036 (6th Cir. 2001); Dwyer, *supra* note 2, at 1180 (“The public . . . has concerns over the legalization of industrial hemp.”).

⁴⁵ See *supra* notes 1-43 and accompanying text.

⁴⁶ See *infra* notes 53-94 and accompanying text.

⁴⁷ See *infra* notes 95-128 and accompanying text.

⁴⁸ See *infra* notes 129-146 and accompanying text.

⁴⁹ See *infra* notes 147-191 and accompanying text.

the matter.⁵⁰ Part VII highlights technological and economic challenges that industrial hemp supporters face.⁵¹ The authors ultimately conclude that the debate over legalized domestic production of industrial hemp should not be deterred by the application of the CSA—a law that was never intended to prohibit the commercial crop in the first place. Rather, market forces should resolve the controversy.⁵²

II. THE HISTORY OF HEMP PRODUCTION

A. *Industrial Hemp's Genesis*

The hemp plant is native to Central Asia,⁵³ where its first recorded cultivation as a commercial crop appears to have occurred in China several millennia ago.⁵⁴ From there, the plant migrated to the Middle East and other parts of Asia, and ultimately found its way to Western Europe,⁵⁵ where it was grown primarily as a food product and for making rope, paper, and other fiber products.⁵⁶

⁵⁰ See *infra* notes 192-204 and accompanying text.

⁵¹ See *infra* notes 205-228 and accompanying text.

⁵² See *infra* notes 229-242 and accompanying text.

⁵³ See *United States v. Honneus*, 508 F.2d 566, 575 n.8 (1st Cir. 1974) (noting that the botanist who gave hemp its scientific classification identified India as the plant's "country of origin"), *disapproved on other grounds by United States v. Christensen*, 732 F.2d 20, 23 n.5 (1st Cir. 1984); *United States v. Adams*, 293 F. Supp. 776, 779 (S.D.N.Y. 1968) (stating that hemp was "[o]riginally native to Central Asia"); *Simpson v. State*, 176 So. 515, 516 (Fla. 1937) ("[The hemp plant] seems to have originated in certain portions of temperate Asia, where it grew wild near the Caspian Sea in the region of the Lower Ural and Volga.").

⁵⁴ See *Simpson*, 176 So. at 516 ("At an early date in its history a Chinese Emperor, about the Twenty-Eighth Century B.C., advised his people to cultivate [hemp] for its fiber from which useful articles of commerce would be made."); Dhooge, *supra* note 3, at 83 ("Hemp is believed to have originated in China where its cultivation was first recorded."); Thedinger, *supra* note 30, at 424 ("Industrial hemp originated in China as early as 4500 B.C. and was predominately used for making rope, fishnets, and paper.").

⁵⁵ See *United States v. Kayser*, 322 F. Supp. 52, 53 n.1 (S.D. Ga. 1970) (noting that "*cannabis sativa* . . . is widely cultivated in Asia"); *Simpson*, 176 So. at 516 ("[Hemp's] cultivation then extended into Persia and India, but [it] is supposed not to have been cultivated in European countries until about the beginning of the Christian era."); Balding, *supra* note 11, at 1462 ("Although hemp most likely originated in the steppes of central Asia, its cultivation spread throughout Asia and India, and eventually, hemp reached Europe."); Dwyer, *supra* note 2, at 1156 ("Thought to have originated in central Asia, hemp's cultivation spread throughout Asia and India, eventually reaching Europe."); Thedinger, *supra* note 30, at 424 ("From China, hemp seed stock spread to Korea and Japan through trade in the third century B.C. . . . From Asia, hemp spread to Europe . . .").

⁵⁶ See *Simpson*, 176 So. at 516 ("In the middle ages hemp (*C sativa*) was cultivated in some Western European countries for the seed which were used for food."); Dhooge, *supra* note 3, at 83 ("As an agricultural staple in Europe by the sixteenth century, hemp was cultivated for fiber and its seed was cooked with barley and other grains for human consumption."); Thedinger, *supra*

Although introduced in North America not long after the Columbus expeditions⁵⁷ (and perhaps much earlier),⁵⁸ hemp did not become a particularly significant commercial crop in the New World until relatively late in the American colonial period,⁵⁹ when it was grown primarily for use in making rope,⁶⁰ canvas ship sails,⁶¹ and other fiber products.⁶² While its initial role in the American colonies may have been modest,⁶³ the hemp plant ultimately played an auspicious part in American colonial and revolutionary history.⁶⁴ Among other

note 30, at 424 (“Moorish Spain created the first Western paper mill in 1150 A.D. using hemp.”). During the Middle Ages, hemp also was grown in Europe “for various medical purposes, including treatment of burns, earaches, and ulcers.” Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REFORM 707, 749 n.241 (1998).

⁵⁷ See Lisa Scott, *The Pleasure Principle: A Critical Examination of Federal Scheduling of Controlled Substances*, 29 Sw. U. L. REV. 447, 478 (2000) (“It was planted as early as 1611, in Jamestown, Virginia, and American colonists primarily wore clothing that contained hemp fiber by 1630.”); Duppong, *supra* note 8, at 404 (“Industrial hemp was introduced to America sometime around 1545 and was cultivated as early as 1611 in the Jamestown colony.”); cf. Lash, *supra* note 3, at 315 (“Ships sailed by Christopher Columbus in 1492 were strung with sails made from hemp canvas . . .”).

⁵⁸ See Bergoffen & Clark, *supra* note 13, at 120-21 (footnotes omitted) (“In North America, hemp was widely used before European settlement, contrary to popular views. It is believed by some scholars that hemp came from Asia with the migration across the Bering Strait, over 10,000 years ago. John De Verrazano discovered it growing wild in Virginia in 1524.”); Lori Murphy, Note, *Enough Rope: Why United States v. White Plume Was Wrong on Hemp and Treaty Rights, and What It Could Cost the Federal Government*, 35 AM. INDIAN L. REV. 767, 783 (2011) (referring to “anthropological evidence of widespread pre-contact hemp cultivation by Native American peoples” suggesting that hemp has “a history that predates Europeans in North America”).

⁵⁹ See Thedinger, *supra* note 30, at 425 (“Beginning in 1774, mandatory hemp cultivation laws were passed by the colonial governments in preparation for war with Britain.”).

⁶⁰ See Morris B. Hoffman, Commentary, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1445 n.18 (2000) (observing that “hemp was an important colonial crop for cloth and rope”).

⁶¹ See Brady, *supra* note 3, at 87 (“Among . . . the important uses during this time was the use of industrial hemp for sailing ship sails and ropes.”). Indeed, hemp was used to make approximately “90% of all ships’ sails . . . until the 20th century.” Dwyer, *supra* note 2, at 1156 n.98.

⁶² See *United States v. Adams*, 293 F. Supp. 776, 779 (S.D.N.Y. 1968) (“[T]he plant was introduced here about the time of the American Revolution for the cultivation of hemp fibre . . .”); Deborah Garner, Note, *Up in Smoke: The Medical Marijuana Debate*, 75 N.D. L. REV. 555, 557 (1999) (“Colonists used the fiber of the plant to produce clothing, twine, rope, paper, blankets and canvas.”). There is, by contrast, “no evidence that marijuana was widely smoked in the colonies for recreation.” Hoffman, *supra* note 60, at 1445 n.18; see also Dwyer, *supra* note 2, at 1179 (noting that “hemp was grown in the United States for centuries without being smoked”).

⁶³ See Thedinger, *supra* note 30, at 425 (footnotes omitted) (“Originally, colonists preferred to cultivate tobacco due to its higher profit margins. . . . However, the colonists needed hemp fiber to make clothes and the British Empire needed the fiber for its ships. As a result, early colonial governments urged their colonists to produce hemp. . . . Eventually rope walks, where hemp was spun into rope and twine, began to appear in the early colonies.”).

⁶⁴ See Shepherd, *supra* note 9, at 243 (“Hemp played an important role in the establishment and founding of the American colonies and helped the colonies break their dependence on English

things, hemp provided the paper on which the Declaration of Independence and two early drafts of the American Constitution were written.⁶⁵ Several prominent Founding Fathers grew and promoted the plant,⁶⁶ including George Washington,⁶⁷ Thomas Jefferson,⁶⁸ and Benjamin Franklin.⁶⁹ Indeed, Washington's

exports."); Thedinger, *supra* note 30, at 425-26 ("During the Revolutionary War, hemp linens kept soldiers from freezing to death at Valley Forge, and America's strongest battleship—the U.S.S. Constitution—carried sixty tons of hempen rope and sail."). *See generally* Matthew R. Rheingans, Note, *Impact of the Tobacco Settlement on Kentucky: Is Industrial Hemp a Viable Alternative for the Commonwealth?*, 14 J. NAT. RESOURCES & ENVTL. L. 115, 133 (1998-99) ("Hemp cultivation has a storied history in America . . .").

⁶⁵ *See* Seeley v. State, 940 P.2d 604, 627 n.10 (Wash. 1997) (Sanders, J., dissenting) ("The original Declaration of Independence (July 4, 1776) was written on hemp as was Thomas Paine's *Common Sense*." (citing JACK HERER, *THE EMPEROR WEARS NO CLOTHES* 7 (1995))); Allison L. Bergstrom, *Medical Use of Marijuana: A Look at Federal & State Responses to California's Compassionate Use Act*, 2 DEPAUL J. HEALTH CARE L. 155, 158 (1997) ("[S]everal historical documents, including the Declaration of Independence, were written on hemp."); Brady, *supra* note 3, at 87 ("Industrial hemp paper was used to write the first two drafts of the U.S. Constitution, with the final draft being on animal skin."); Kolosov, *supra* note 27, at 238 ("The first drafts of the United States Constitution and the Declaration of Independence were both penned on hemp paper . . ."); Lash, *supra* note 3, at 315 ("The first drafts of the Declaration of Independence were written on hemp paper.").

⁶⁶ *See* Brady, *supra* note 3, at 85 ("The Founding Fathers grew hemp and it was an integral crop in the economic structure of the colonial United States."); Shepherd, *supra* note 9, at 239 (stating that hemp was "once grown in abundance by our Founding Fathers"); Thedinger, *supra* note 30, at 420 ("During colonial times, the founding fathers extolled the benefits of hemp.").

⁶⁷ *See* People v. Glaser, 48 Cal. Rptr. 427, 432 (Cal. Dist. Ct. App. 1965) ("[T]he cultivation of marijuana (cannabis sativa, hemp, or Indian hemp . . .) was practiced by George Washington and others prior to the adoption of the Constitution . . ."), *disapproved on other grounds* by People v. Barnum, 64 P.3d 788 (Cal. 2003); Michael Berkey, Note, *Mary Jane's New Dance: The Medical Marijuana Legal Tango*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 417, 420 (2011) (footnote omitted) ("[E]vidence suggests that George Washington cultivated hemp for the medical benefits of its resin, as well as to make rope."); Ronald Timothy Fletcher, Note, *The Medical Necessity Defense and De Minimis Protection for Patients Who Would Benefit from Using Marijuana for Medical Purposes: A Proposal to Establish Comprehensive Protection Under Federal Drug Laws*, 37 VAL. U. L. REV. 983, 987 n.32 (2003) (citation omitted) ("George Washington is known to have cultivated hemp at his Mount Vernon home for making rope. Furthermore, there is some indication that he used marijuana medicinally.").

⁶⁸ *See* Scott, *supra* note 57, at 478 ("Such venerable American figures as George Washington and Thomas Jefferson owned plantations that cultivated hemp."); Brady, *supra* note 3, at 87-88 ("Two of the strongest advocates for an industrial-hemp based economy were George Washington and Thomas Jefferson, with each cultivating the crop for its fiber content."). Jefferson purportedly "considered hemp so important that he even arranged to smuggle Chinese hemp seeds back to the United States because of their superior qualities." Bergoffen & Clark, *supra* note 13, at 121. Jefferson also invented a machine for the processing of hemp, *see* Edward C. Walterscheid, *Patents and the Jeffersonian Mythology*, 29 J. MARSHALL L. REV. 269, 312 n.197 (1995), and "was granted the first United States patent for a 'hemp break,' used to break down the fibrous stalks of hemp plants." Shepherd, *supra* note 9, at 239 n.3.

⁶⁹ *See* Seeley, 940 P.2d at 627 n.10 (Sanders, J., dissenting) ("George Washington and Thomas Jefferson grew it, and Benjamin Franklin used it in an early papermill."); J. Amy Dillard,

well-known instruction to his Mount Vernon gardener to “[m]ake the most of hemp seed and sow it everywhere” is often cited by those favoring the legalization of industrial hemp today.⁷⁰ In addition, the first American flag, which according to tradition was designed and sewn by Philadelphia seamstress Betsy Ross at Washington’s behest,⁷¹ may have been made of fabric derived from the hemp plant.⁷²

Hemp continued to be an important agricultural commodity in the states during the years following American Independence,⁷³ when it was grown for use primarily in the making of industrial products.⁷⁴ Indeed, some states offered bounties⁷⁵ or other incentives to encourage their citizens to grow

Big Brother Is Watching: The Reality Show You Didn’t Audition For, 63 OKLA. L. REV. 461, 494 n.202 (2011) (“Hemp was an agricultural crop at Mount Vernon, the home of George Washington, and on the farms of Thomas Jefferson and Benjamin Franklin.”); Brady, *supra* note 3, at 88 (“In 1791, Benjamin Franklin published what is thought to be the first ever article on industrial hemp to appear in an American magazine.”); Lash, *supra* note 3, at 315 (“Benjamin Franklin, founder of one of America’s first paper mills, used hemp in paper production.”).

⁷⁰ Lash, *supra* note 3, at 314; *see also* Ballanco, *supra* note 41, at 1165 (quoting a variation of the same instruction). *See generally* Shepherd, *supra* note 9, at 239 n.3 (“George Washington, Thomas Jefferson, Benjamin Franklin, James Madison and Alexander Hamilton were all known to extol the virtues of hemp.”).

⁷¹ *See* Joyce v. United States, 454 F.2d 971, 974 (D.C. Cir. 1971) (“George Washington . . . with Betsy Ross is generally credited with participating in the formulation of the design of the flag”); Adams v. Carrington Publ’g Co., 160 F. 986, 987 (D. Conn. 1908) (describing Ross as “the maker of the first American flag”); Commonwealth v. Bricker, 666 A.2d 257, 262 (Pa. 1995) (“[T]radition holds that a Pennsylvanian, Ms. Betsy Ross, designed the first flag.”). *But see* I. Bennett Capers, *Flags*, 48 How. L.J. 121, 145 n.101 (2004) (noting “the absence of any mention of [Ross] in connection with the flag in Congressional records, Washington’s diary, or any other Revolutionary documents”).

⁷² *See* Kal Raustiala, *Law, Liberalization & International Narcotics Trafficking*, 32 N.Y.U. J. INT’L L. & POL. 89, 139 n.248 (1999) (asserting that “the first American flag was made of hemp cloth”); Dwyer, *supra* note 2, at 1156 n.98 (“The original United States flag sewn by Betsy Ross is said to have been made of hemp fabric.”).

⁷³ *See* Balding, *supra* note 11, at 1462 (“In America, the importance of hemp continued through the founding of the United States.”); Duppong, *supra* note 8, at 405 (“The American hemp industry continued to grow throughout the beginning of the new republic”); Thedinger, *supra* note 30, at 426 (“[I]ndustrial hemp production and use was firmly established in the United States by the beginning of the nineteenth century.”).

⁷⁴ *See* JOHNSON, *supra* note 12, at 12 (“Hemp was widely grown in the United States from the colonial period into the mid-1800s; fine and coarse fabrics, twine, and paper from hemp were in common use.”); Kolosov, *supra* note 27, at 240 (“From the colonial period through the middle of the nineteenth century, hemp was widely grown in the United States for use in fabric, twine, and paper.”). The production of hemp for use as a drug did not become prevalent in the United States until early in the twentieth century. *See* Dillard, *supra* note 69, at 494; Duppong, *supra* note 8, at 405.

⁷⁵ The term “bounty” refers to “a reward for rendering a service that the offerer wants done.” *United States v. Dawson*, 425 F.3d 389, 393 (7th Cir. 2005); *see also* Hagan v. Black, 17 S.W.2d 908, 909 (Tenn. 1929) (citation omitted) (internal quotation marks omitted) (“A ‘bounty’ is . . . a

hemp.⁷⁶ By the middle of the nineteenth century, domestic production was so widespread that hemp was one of the nation's most important agricultural commodities.⁷⁷

B. The Downfall of Domestic Commercial Hemp

Hemp production in the United States gradually began to decline in the latter part of the nineteenth century,⁷⁸ largely as the result of technological advances that made the production of cotton and other competing crops more profitable.⁷⁹ Nevertheless, the domestic production of hemp did not cease entirely during the late nineteenth and early twentieth centuries.⁸⁰ In fact,

sum of money or other things given, generally by the government, to certain persons for some service they have done or are about to do the public. Bounty is the appropriate term where the action or services of many persons are desired, and each one who acts on the offer may entitle himself to the promised gratuity without prejudice from or to the claims of others.”)

⁷⁶ See, e.g., *Jewett v. City of New Haven*, 38 Conn. 368, 392 (1871) (Butler, C.J., dissenting) (“Bounties . . . have been given by general law within the present century to encourage the growth of . . . hemp, not only by exempting the land from taxation, but by a cash payment of \$10 per ton from the state treasury.”); see also *Thurlow v. Massachusetts (License Cases)*, 46 U.S. 504, 621 (1847) (Woodbury, J., concurring) (“[S]ome of the States have often bestowed bounties on the growth of hemp . . .”).

⁷⁷ See *United States v. Adams*, 293 F. Supp. 776, 779 (S.D.N.Y. 1968); Scott, *supra* note 57, at 478; see also *Bergoffen & Clark*, *supra* note 13, at 121 (“Hemp continued to be the [country’s] main fiber source throughout the 1800s.”); *Duppong*, *supra* note 8, at 405 (“The American hemp industry . . . reach[ed] its peak in the mid-1800s.”); cf. *Balding*, *supra* note 11, at 1462 (“Until the late-nineteenth century, many believed hemp was the world’s most cultivated crop . . .”).

⁷⁸ See *Theinger*, *supra* note 30, at 426 (“Beginning in the late nineteenth century, industrial hemp experienced a gradual decline in the United States.”).

⁷⁹ See *Dhooge*, *supra* note 3, at 83 (“In the United States, the hemp industry flourished in the mid-nineteenth century before being supplanted by increased production of cotton due to the invention of the cotton gin and increased imports of cheaper jute and abaca.”); *JOHNSON*, *supra* note 12, at 12 (“By the 1890s, labor-saving machinery for harvesting cotton made the latter more competitive as a source of fabric for clothing, and the demand for coarse natural fibers was met increasingly by imports.”); *Duppong*, *supra* note 8, at 405 (“By 1890 the labor intensive hemp industry had been effectively replaced by the development of new technology in the cotton industry.”); *Kolosov*, *supra* note 27, at 240-41 (“Production dropped by the 1890’s as technological advances made cotton a more competitive textile crop, and coarse fiber crops were increasingly imported.”); *Rheingans*, *supra* note 64, at 117 (footnote omitted) (“At the end of the Nineteenth Century, . . . technological breakthroughs were made with respect to competing crop production. . . . As a result of such technological advances, hemp production and usage declined throughout the world.”).

⁸⁰ See *JOHNSON*, *supra* note 12, at 12 (“In the early 1900s, hemp continued to be grown and researchers at [the U.S. Department of Agriculture] continued to publish information related to hemp production and also reported on hemp’s potential for use in textiles and in paper manufacturing.”); *Kolosov*, *supra* note 27, at 241 (footnote omitted) (“American farmers continued to grow hemp into the middle of the twentieth century, finding it a useful rotation crop because it acted as a natural herbicide – a [diverse], rapidly growing crop, it choked out weeds prior to the next planting of corn and other crops.”).

hemp experienced a brief resurgence during both world wars as a result of encouragement from the federal government,⁸¹ which, on both occasions, was experiencing critical shortages of fiber products necessary for its military operations.⁸²

Following World War II, American farmers once again turned their attention to the production of other more profitable crops.⁸³ Although the resulting post-war decline in hemp production was attributable primarily to economic factors,⁸⁴ the decline was also fueled by an aggressive public campaign to erad-

⁸¹ See *Ky. River Mills v. Jackson*, 206 F.2d 111, 113 (6th Cir. 1953) (discussing “purchases [of hemp] by the government during the war period”); *Coe v. Commonwealth*, 340 S.E.2d 820, 822 (Va. 1986) (quoting testimony to the effect that “in World War II, marijuana was grown for production of hemp” in the “area surrounding South Bend Indiana”); *Balding*, *supra* note 11, at 1465 (“Throughout the early twentieth century, the United States Department of Agriculture . . . supported hemp cultivation.”); *Brady*, *supra* note 3, at 90 (“At the request of the United States government, farmers planted 36,000 acres of industrial hemp seed in 1942. This was an increase of several thousand percent.”); *cf.* *United States v. City of Columbus*, 209 F.2d 857, 859 (6th Cir. 1954) (describing a storage company that “agreed to store government-owned hemp in its warehouse [in 1944] . . .”).

⁸² See, e.g., *Ballanco*, *supra* note 41, at 1171 (footnote omitted) (“[I]n the late 1930s, the United States Army and Navy, large consumers of hemp for rope and canvas, relied on imports from the Philippines to meet their needs. When the Philippines fell to the Japanese in early 1942, the United States was left without a source of hemp.”); *Duppong*, *supra* note 8, at 406 (“During World War II, . . . in response to a shortage of hemp for ropes used on ships, the federal government began to encourage the production of industrial hemp.”); *Thedinger*, *supra* note 30, at 426 (“During World War I, reduced imports from Russia and Italy led to a lack of supply of hemp, causing domestic farmers to take up the slack.”). See generally *Kolosov*, *supra* note 27, at 241 (“At the urging of the government, [hemp] production to supply fiber for military purposes was expanded enormously during World War I and again during World War II . . .”).

⁸³ See *Ballanco*, *supra* note 41, at 1171 (“After World War II ended, the commercial hemp industry began to decline”); *Brady*, *supra* note 3, at 90 (“[B]y the end of WW II, the government’s allowance of industrial hemp cultivation also ended”); *Dhooge*, *supra* note 3, at 83-84 (“During World War II, hemp enjoyed a brief renaissance in the United States . . . but it suffered a rapid decline after the resumption of imports and reimposition of restrictions at the end of hostilities.”); *Duppong*, *supra* note 8, at 406 (“The production of industrial hemp in America dramatically decreased after its resurgence in World War II.”); *Lash*, *supra* note 3, at 322 (“Following the war, . . . hemp production again declined as . . . farmers chose to produce crops without oppressive operating regulations.”).

⁸⁴ See *United States v. Adams*, 293 F. Supp. 776, 779 (S.D.N.Y. 1968) (“With changing economic conditions, . . . at least since as long ago as the end of World War II, the legitimate cultivation and use of the plant have ceased almost completely.”); *Commonwealth v. Harrelson*, 14 S.W.3d 541, 545 (Ky. 2000) (“[A]t one time hemp was a major cash crop in central Kentucky but . . . it failed economically for market reasons.”); *Dwyer*, *supra* note 2, at 1163 (“Competition from synthetic products . . . factored into the lack of successful hemp farming after World War II.”). Michael P. Rosenthal, *Dangerous Drug Legislation in the United States: Recommendations and Comments*, 45 TEX. L. REV. 1037, 1047 (1967) (“It has been reported . . . that since the end of World War II the competition of different foreign fibers and synthetics has largely destroyed the market for domestic hemp.”);

icate the use of marijuana and other recreational drugs.⁸⁵ While some observers have criticized the campaign's opposition to any form of hemp production,⁸⁶ there is no disputing that due in part to this opposition,⁸⁷ American farmers ceased producing industrial hemp altogether by the end of the 1950s.⁸⁸

This situation has not changed in the ensuing half century.⁸⁹ The United States still has no known commercial producers of industrial hemp,⁹⁰ however, hemp continues to be grown domestically, albeit illegally, for its use as a recreational and medicinal drug.⁹¹ As a result, all raw hemp used in food or indus-

⁸⁵ See Duppong, *supra* note 8, at 406 (footnote omitted) ("Another reason for the decline of the American hemp industry was due to the increased anti-drug sentiments The public perception linked the industrial uses of hemp with the intoxicating uses of marijuana"); Kolosov, *supra* note 27, at 239 ("[T]he campaign against marijuana . . . resulted in broad restrictions on all varieties of the plant."); Rheingans, *supra* note 64, at 117-18 (noting that the anti-drug movement "began in the 1930's and marked the beginning of hemp's decline and eventual disappearance in this country"). See generally Dwyer, *supra* note 2, at 1165 (noting that "hemp is as much a target of the war on drugs as marijuana").

⁸⁶ See, e.g., Dwyer, *supra* note 2, at 1157-58 ("Some protagonists of industrial hemp have portrayed . . . [the] battle against marijuana as including a conspiracy to undermine hemp production as well."); Ruth C. Stern & J. Herbie DiFonzo, *The End of the Red Queen's Race: Medical Marijuana in the New Century*, 27 QUINNIAC L. REV. 673, 762 (2009) ("[P]resenting [hemp] as a remarkably useful product invites speculation about the wisdom of the costly war against it."); cf. Shepherd, *supra* note 9, at 249 ("No one in the industrial hemp industry at the time realized that [the public] vilification of marijuana would eventually overshadow and kill the growth of the industrial hemp industry in this country.").

⁸⁷ See Dwyer, *supra* note 2, at 1162 (footnotes omitted) ("Industrial hemp was seen as an obstacle to the demonizing of marijuana and enforcement of drug laws. In time, hemp became labeled as a 'drug plant.' It has been speculated that this sort of hostility contributed to the decline in hemp cultivation.").

⁸⁸ See Ballanco, *supra* note 41, at 1172 ("[B]y 1958, there were no longer any commercial hemp producers in the United States."); Duppong, *supra* note 8, at 406 ("Production of industrial hemp in America virtually ended by 1958."); Kolosov, *supra* note 27, at 255 ("[T]he last hemp cultivators ceased production in the late 1950's").

⁸⁹ See Kolosov, *supra* note 27, at 253 ("[H]emp has been out of production in the United States for half a century"); Thedinger, *supra* note 30, at 420 ("[I]ndustrial hemp has been effectively banned in the United States for over sixty years."); cf. Dwyer, *supra* note 2, at 1152 ("[T]he United States hemp industry died out in the mid-twentieth century").

⁹⁰ See Dhooge, *supra* note 3, at 114 ("[T]here are currently no lawful U.S. cultivators of hemp"); JOHNSON, *supra* note 12, at 13 ("Currently, industrial hemp is not . . . commercially [produced] in the United States."); Kolosov, *supra* note 27, at 238 n.7 (stating that "the last commercial hemp crop was planted in 1957").

⁹¹ See, e.g., Nat'l Org. for Reform Marijuana Laws v. Mullen, 608 F. Supp. 945, 949 (N.D. Cal. 1985) (footnote omitted) (discussing the "thriving, and at times violent, marijuana cultivation industry" in California), *remanded for reconsideration on other grounds*, 796 F.2d 276 (9th Cir. 1986); N. Ga. C.O.P.S. v. Reagan, 587 F. Supp. 1506, 1507 (N.D. Ga. 1984) (discussing the "large increase in illegal marijuana cultivation in the National Forests"); *People v. Mayoff*, 729 P.2d 166, 169 (Cal. 1986) ("[I]n several rural northern California communities . . . widespread commercial marijuana farming has taken root."); *State v. Dixon*, 740 P.2d 1224, 1240 (Or. Ct.

trial products manufactured or sold in the United States must be imported from other countries.⁹² The lack of a commercial hemp crop in this country leaves those who can lawfully engage in the hemp trade (*e.g.*, manufacturers and sellers of food and textile products made from imported hemp)⁹³ at a competitive disadvantage to companies in countries where hemp production is lawful.⁹⁴

III. THE UPROOTING OF INDUSTRIAL HEMP

A. *The Impact of Federal Drug Laws on Industrial Hemp Production*

In retrospect, the death knell for American hemp production may have sounded with the enactment of the Marihuana Tax Act of 1937,⁹⁵ which required all hemp producers to register with the Treasury Department and pay

App. 1987) (Van Hoomissen, J., dissenting) (noting that “illegal marijuana is reportedly Oregon’s leading cash crop”), *rev’d on other grounds*, 766 P.2d 1015 (Or. 1988). See generally Robert L. Arrington Jr., Note, *Big Brother Meets Pandora: How U.S. v. Kyllo May Undermine the Basic Constitutional Concepts of Privacy Within the Home*, 45 How. L.J. 177, 179 (2001) (footnote omitted) (“The national market for illegal marijuana is extremely lucrative. The Drug Enforcement Agency [sic] estimates that 5,200 metric tons of domestically cultivated marijuana, with a value estimated between four and twenty-four billion dollars, enters the market annually.”).

⁹² See *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 355 (1984) (noting that hemp is “not grown in the United States and must be imported”); Dwyer, *supra* note 2, at 1151 (“Since hemp is not grown domestically, the one mill in the United States that produces [composite] boards [from hemp] must import its raw materials from overseas.”); Kolosov, *supra* note 27, at 247 (“[A]ll hemp products currently sold in the United States are either themselves imported or manufactured from imported hemp.”); Lash, *supra* note 3, at 325 (“[W]hile the United States bans the production of hemp, it imports the majority of Canada’s hemp crop.”); Thedinger, *supra* note 30, at 429 (“Currently, hemp clothing produced in the United States uses imported hemp yarn and fiber . . .”).

⁹³ See *Monson v. DEA*, 522 F. Supp. 2d 1188, 1191 (D.N.D. 2007) (“[A] statutory exclusion has allowed for the widespread use and trade of hemp stalk, fiber, and sterilized hemp seed and seed oil.” (discussing 21 U.S.C. § 802(16))), *aff’d*, 589 F.3d 952 (8th Cir. 2009); Dhooge, *supra* note 3, at 66 (“[I]ndustrial hemp products historically have been exempted from regulation.”); Kolosov, *supra* note 27, at 245 (“[I]mporters of hemp and hemp products are exempt from the CSA.”).

⁹⁴ See, *e.g.*, *Commonwealth v. Harrelson*, 14 S.W.3d 541, 545 (Ky. 2000) (“The defendant . . . owned a company in California that produced textile products in clothing derived from hemp. . . . He stated that . . . the hemp for their products had to be imported from Hungary and China and that the price of hemp would be lower if it could be grown domestically.”); see also Thedinger, *supra* note 30, at 429 (“Currently, hemp clothing produced in the United States uses imported hemp yarn and fiber and thus has high labor and technology costs.”).

⁹⁵ See Balding, *supra* note 11, at 1465 (“Despite the purported intention of the Act’s drafters, the Marihuana Tax Act contributed to the death of the hemp industry.”); Ballanco, *supra* note 41, at 1166 (“The once prosperous American hemp industry was dealt a fatal blow when it was made the inadvertent victim of the Marihuana Tax Act of 1937”); Thedinger, *supra* note 30, at 427 (“Since the Marihuana Tax Act of 1937 was enacted, hemp has been effectively banned in the United States.”).

an occupational tax.⁹⁶ The act was intended to curb illicit drug trafficking,⁹⁷ rather than industrial hemp production,⁹⁸ and hemp continued to be grown sporadically in the United States in the years immediately following its enactment.⁹⁹ However, the financial and administrative burdens imposed by the 1937 act unquestionably contributed to the decline in American hemp production.¹⁰⁰ While “[h]ope for the continuation of the hemp industry waxed and waned several times prior to its . . . eventual discontinua[nce],”¹⁰¹ any realistic hope of revitalizing the industry suffered a crippling blow when Congress repealed the Marihuana Tax Act and replaced it with the even more restrictive provisions of the CSA in 1970.¹⁰²

B. *The Federal Courts’ Application of the CSA to Industrial Hemp*

The First Circuit examined the CSA’s impact on hemp production in *New Hampshire Hemp Council, Inc. v. Marshall*.¹⁰³ The plaintiff, in this case, was a farmer and state legislator who co-sponsored a bill to legalize industrial hemp

⁹⁶ See *Castano v. United States*, 425 F.2d 1331, 1335 (5th Cir. 1970); *Rodriguez v. State*, 495 S.W.2d 952, 955 (Tex. Crim. App. 1973); JOHNSON, *supra* note 12, at 12.

⁹⁷ See *United States v. Walden*, 411 F.2d 1109, 1113 (4th Cir. 1969); *United States v. Kuch*, 288 F. Supp. 439, 447 (D.D.C. 1968).

⁹⁸ See *United States v. Sanchez*, 340 U.S. 42, 44 (1950) (discussing “the congressional purpose of restricting traffic in marihuana to accepted industrial and medicinal channels”); Kolosov, *supra* note 27, at 259 (“It is clear from the congressional record that the legislature never intended the [Marihuana Tax Act] to prohibit legitimate production of industrial hemp.”); Rheingans, *supra* note 64, at 119 (“[T]he 1937 Act was never intended to ban the production of industrial hemp . . .”).

⁹⁹ See, e.g., Duppong, *supra* note 8, at 412 (noting that “hemp was grown successfully in the southeastern portion of North Dakota in the 1940s . . .”); see also Lash, *supra* note 3, at 321 (“Although production of hemp was sparse in the late thirties and early forties, hemp was in fact produced in the United States.”); and Lash, *supra* note 3 at 351 (“Production of hemp following 1937[,] was legal and in the 1940s, encouraged by the federal government.”).

¹⁰⁰ See *Seeley v. State*, 940 P.2d 604, 627 n.10 (Wash. 1997) (Sanders, J., dissenting) (“[M]arijuana was repressed by the federal government in 1937 through a stamp tax so burdensome both financially and procedurally that it virtually eliminated any legal medicinal, industrial or recreational use of marijuana.”); Ballanco, *supra* note 41, at 1171 (“[T]he 1937 Act began to impede the domestic hemp industry in the late 1930s . . .”); Thedinger, *supra* note 30, at 427 (“Despite language in the Act that distinguished hemp from marijuana, hemp production plummeted under the burdensome regulations and increased liability.”).

¹⁰¹ Thedinger, *supra* note 30, at 426.

¹⁰² See *Kiczenski v. Gonzales*, 237 F. App’x 149, 151 (9th Cir. 2007) (discussing “the Controlled Substances Act’s limitation on hemp cultivation . . .”); Yonatan Even, *Appropriability and Property*, 58 AM. U. L. REV. 1417, 1470 n.166 (2009) (“The prohibition against cultivation of cannabis varieties, including hemp, can now be found in the Federal Controlled Substances Act.”); Dwyer, *supra* note 2, at 1164 (“The 1970 Act explicitly made all cultivation and sale of marijuana illegal, effectively outlawing industrial hemp . . . by removing registration procedures.”).

¹⁰³ *N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1 (1st Cir. 2000).

cultivation as a matter of New Hampshire state law.¹⁰⁴ When this effort failed,¹⁰⁵ due in part to opposition from the DEA,¹⁰⁶ the plaintiff brought suit against the agency alleging that he and others were being deterred from growing industrial hemp by the threat of federal criminal prosecution.¹⁰⁷ The plaintiff sought a declaration that the CSA did not criminalize “nonpsychoactive” hemp cultivation¹⁰⁸ and an injunction preventing the DEA from prosecuting anyone for growing industrial hemp.¹⁰⁹

The plaintiff argued that Congress’s primary concern in regulating hemp production was the plant’s psychoactive and hallucinogenic properties.¹¹⁰ Industrial hemp arguably does not raise this concern¹¹¹ because it contains rela-

¹⁰⁴ See *id.* at 3. The state law the plaintiff sought to modify was “designed, in specifying which drugs are controlled, to mirror the federal listings.” *Id.* at 4.

¹⁰⁵ See *id.* at 3 (“Although [the plaintiff’s] bill was . . . recommended for passage by [a] house committee, it was defeated on a relatively close vote (175 to 164) in the full house . . .”).

¹⁰⁶ See *id.* at 4 (noting that “the DEA urged its own reading of the federal statute on the New Hampshire legislature to defeat, as fruitless, [the plaintiff’s] effort to legalize ‘industrial hemp’ production under state law”). See generally Thedinger, *supra* note 30, at 437-38 (“The DEA’s suppression of hemp includes incidences of the agency’s involvement in state-level campaigns for the legalization of hemp. The DEA has stepped in and effectively used ‘scare tactics’ to discourage state legislatures from passing reasonable legislation.”).

¹⁰⁷ See *N.H. Hemp Council*, 203 F.3d at 3. The plaintiff was joined in the suit by the New Hampshire Hemp Council, “an organization supporting the legalization of hemp cultivation.” See also Kolosov, *supra* note 27, at 251. The plaintiff alleged that “he and the Hemp Council wanted to cultivate cannabis sativa plants to produce fiber and other industrial products but were deterred by the DEA’s position.” *N.H. Hemp Council*, 203 F.3d at 3; cf. Samuel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275, 1328 (2010) (footnote omitted) (“The indeterminacy of ‘marijuana’ in a federal drug statute might deter someone from producing industrial hemp . . .”).

¹⁰⁸ *N.H. Hemp Council*, 203 F.3d at 3-4; cf. *VoteHemp, Inc. v. DEA*, 237 F. Supp. 2d 55, 56-57 n.1 (D.D.C. 2002) (alterations in original omitted) (“According to plaintiff, industrial hemp ‘is a non-psychoactive variety of the cannabis sativa plant. Currently, it is illegal for U.S. farmers to grow Industrial Hemp because it is improperly classified as a ‘drug’ under the Controlled Substances Act.’”).

¹⁰⁹ See *N.H. Hemp Council*, 203 F.3d at 4.

¹¹⁰ See *id.* at 7 (“[The plaintiff] colorably argues that the [CSA] should . . . be read to protect production for industrial uses by . . . distin[guishing] between psychoactive and non-psychoactive strains of cannabis sativa.”); cf. *United States v. Sanapaw*, 366 F.3d 492, 495 (7th Cir. 2004) (“The legislative history of the Act indicates that the purpose of banning marijuana was to ban the euphoric effects produced by THC.”); *United States v. Walton*, 514 F.2d 201, 204 (D.C. Cir. 1975) (observing that “the clear purpose of the law is to proscribe the euphoric effect of THC”).

¹¹¹ See *People v. Vargas*, 111 Cal. Rptr. 745, 750 n.4 (Cal. Ct. App. 1974) (“[T]hough hemp rope is made from the fiber of the marijuana plant, . . . it obviously [is] not . . . in a form which can be used as a narcotic.”); *People v. Martinez*, 256 P.2d 1028, 1031 (Cal. Dist. Ct. App. 1953) (“[W]hile narcotics may be made from Indian hemp, the latter . . . is not a narcotic and may be used for making cloth, floor coverage and cordage.”); cf. Kolosov, *supra* note 27, at 264 (“Congress’s intention in enacting the CSA . . . was to regulate substances that create hazards for the public health and safety. Whereas hemp may technically fall within the definition of cannabis, it does not create these hazards.”).

tively little tetrahydrocannabinol (“THC”),¹¹² the psychoactive substance that produces marijuana’s euphoric effects.¹¹³

The court did not deny the essential accuracy of this proposition,¹¹⁴ but nevertheless rejected the plaintiff’s argument in favor of a literal reading of the CSA.¹¹⁵ The court noted that the Act’s definition of marijuana “does not distinguish among varieties of *cannabis sativa*”¹¹⁶ (on the basis of THC concentration levels),¹¹⁷ and the plaintiff did not dispute that industrial hemp is derived from the *cannabis sativa* plant.¹¹⁸

The court was also unmoved by the plaintiff’s argument that the CSA’s definition of marijuana was adopted from the Marihuana Tax Act of 1937,¹¹⁹

¹¹² See *Cockrell v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1042 (6th Cir. 2001) (“Unlike marijuana, the industrial hemp plant is only comprised of between 0.1 and 0.4 percent THC, an insufficient amount to have any narcotic effect.”); *N.H. Hemp Council*, 203 F.3d at 6 (“[P]lants produced for industrial products contain very little of the psychoactive substance THC.”); *Monson v. DEA*, 522 F. Supp. 2d 1188, 1191 (D.N.D. 2007) (“The industrial hemp plant . . . has been bred to a low concentration of . . . tetrahydrocannabinol or THC.”), *aff’d*, 589 F.3d 952 (8th Cir. 2009).

¹¹³ See *N.H. Hemp Council*, 203 F.3d at 3 (noting that “THC (a shorthand reference to tetrahydrocannabinol) [is] the ingredient that gives marijuana its psychoactive or euphoric properties”); *Monson*, 522 F. Supp. 2d at 1191 (“THC is the compound that causes the ‘high’ associated with the recreational use of the street drug marijuana.”); Ballanco, *supra* note 41, at 1166 (“THC is . . . found in the resin secreted by the plant, and it is this ingredient that gives marijuana its psychoactive properties.”); Brady, *supra* 3, at 86 (“THC is the compound that produces a narcotic effect which makes marijuana illegal.”).

¹¹⁴ See *N.H. Hemp Council*, 203 F.3d at 6 (“It may be that at some stage the plant destined for industrial products is useless to supply enough THC for psychoactive effects.”); *cf.* *United States v. White Plume*, 447 F.3d 1067, 1072 (8th Cir. 2006) (discussing the contention that “hemp is distinguished from marijuana because it contains virtually no THC, making it incapable of having a high potential for abuse”).

¹¹⁵ See *N.H. Hemp Council*, 203 F.3d at 6 (“[O]n a literal reading of the statute, the [hemp] plant . . . is within the statute’s ban. . . . [N]othing in [the plaintiff’s] complaint or arguments warrants a narrower reading, nor have somewhat similar arguments persuaded the several other circuits in which they have been advanced, in attempts to carve out various exceptions for *cannabis sativa* plants with low THC levels.”).

¹¹⁶ *Id.*; see also *Monson v. DEA*, 589 F.3d 952, 961 (8th Cir. 2009) (“The CSA . . . makes no distinction between *cannabis* grown for drug use and that grown for industrial use.”).

¹¹⁷ See *United States v. Sanapaw*, 366 F.3d 492, 495 (7th Cir. 2004) (“[I]n the Controlled Substance Act of 1970 . . . Congress defined marijuana to include ‘all parts of the plant *Cannabis sativa* L.,’ rather than ‘all species of marijuana containing tetrahydrocannabinol.’” (citing 21 U.S.C. § 802(16))); *Howard v. State*, 437 S.E.2d 420, 423 n.1 (Va. Ct. App. 1993) (noting that the CSA’s “definition of marijuana . . . makes no reference to THC content”).

¹¹⁸ See *N.H. Hemp Council*, 203 F.3d at 6 (“[The plaintiff]’s own complaint concedes that the industrial products at issue are produced from plants of the ‘species’ *cannabis sativa* [His] own expert admitted at the preliminary-relief hearing that the plant from which the industrial products are derived is *cannabis sativa*.”).

¹¹⁹ See *id.* at 7 (citations omitted) (“In 1970 Congress adopted the Controlled Substances Act, repealing the 1937 tax statute, but carrying forward its definition of marijuana into the present criminal ban on production”); *White Plume*, 447 F.3d at 1071 (“[T]he definition of ‘mari-

which purposely did not prohibit the cultivation of industrial hemp.¹²⁰ Although several commentators have advanced this argument,¹²¹ Congress's did not attempt to protect industrial hemp production using the 1937 Act's definition of marijuana,¹²² which (like its counterpart in the CSA)¹²³ "covered all cannabis sativa plants whether intended for industrial use or drug production."¹²⁴ Instead industrial hemp was protected by a complex registration and taxation scheme that "treat[ed] industrial-use and drug-use marijuana differently by taxing them at different rates, or not at all."¹²⁵ Because this aspect of

juana' in the modern CSA was carried forward from the Marihuana Tax Act of 1937 (Tax Act), which the CSA replaced . . .").

¹²⁰ See *N.H. Hemp Council*, 203 F.3d at 7 ("[I]n 1937 Congress . . . indicated in legislative history that production for industrial uses would be protected . . ."); Ballanco, *supra* note 41, at 1170 ("Before passage of the 1937 Act, proponents of marijuana regulation had assured Congress that [the act] would not interfere with the legitimate commercial hemp industry."); Dwyer, *supra* note 2, at 1160-61 ("Congress was extensively assured by witnesses from the Treasury Department and Federal Bureau of Narcotics that the Marihuana Tax Act would not affect hemp farmers.").

¹²¹ See, e.g., Lash, *supra* note 3, at 323-24 (footnote omitted) ("The definition of marijuana in the [CSA] is identical to that of the 1937 Act. Because the 1970 Act did not expand the definition of marijuana to include industrial hemp, and because it was the intent of Congress in 1937 to specifically exclude hemp, the result suggests that industrial hemp simply is not covered by the 1970 Act."); Shepherd, *supra* note 9, at 256 ("The definition of marijuana is identical in both Acts and there was no discussion during the passage of the CSA about modifying or expanding the definition to address industrial hemp. . . . These actions imply that industrial hemp is not covered by the Controlled Substances Act of 1970.").

¹²² See Ballanco, *supra* note 41, at 1167 (footnote omitted) ("THC was only identified as the active ingredient in marijuana in 1974, so classification based on psychoactive content was not possible when *Cannabis* was first regulated in the 1930s."). But see Dwyer, *supra* note 2, at 1165 ("[The] failure to distinguish between the two crops is inconsistent with congressional intent as seen in the legislative history to the Marihuana Tax Act, where the current definition . . . was first used.").

¹²³ See *supra* notes 116-117 and accompanying text.

¹²⁴ *N.H. Hemp Council*, 203 F.3d at 7; see also *United States v. Moore*, 330 F. Supp. 684, 686 (E.D. Pa. 1970) ("An examination of the legislative history of the Federal marihuana statutes reveals that Congress intended to include all varieties of marihuana or *Cannabis* within the statutory definition."), *aff'd*, 446 F.2d 448 (3d Cir. 1971); *Cassady v. Wheeler*, 224 N.W.2d 649, 653 (Iowa 1974) ("Hearing records, committee reports, and debate show Congress treated cannabis sativa as a synonym for marijuana or hemp and any other name by which the cannabis plant might be called in enacting the 1937 marijuana tax statute."); Brady, *supra* note 3, at 88 ("The [1937] Act did not differentiate the different types of *C. sativa*, nor did it even refer to levels of THC. It was this act that led to the current law today that also does not differentiate the different types of *C. sativa* or levels of THC.").

¹²⁵ *United States v. White Plume*, 447 F.3d 1067, 1071 (8th Cir. 2006). In particular, the 1937 act required that all persons producing, selling or using the hemp plant register with the Treasury Department, and subjected them to a modest annual occupational tax. See *Gonzales v. Raich*, 545 U.S. 1, 11 (2005); *N.H. Hemp Council*, 203 F.3d at 7; *Castano v. United States*, 425 F.2d 1331, 1334-35 (8th Cir. 1970). The act imposed a much higher tax on transfers of any potentially hallucinogenic portions of the plant to anyone who had not registered with the Treasury Depart-

the 1937 Act was abandoned in 1970 in favor of the CSA's broad criminal ban on the production of hemp regardless of its intended use,¹²⁶ the court upheld the trial court's determination that the CSA prohibits hemp cultivation "even if grown solely for the production of industrial products."¹²⁷ Other federal courts have reached the same conclusion.¹²⁸

IV. THE DEA'S RESISTANCE TO INDUSTRIAL HEMP PRODUCTION

Under a delegation from the United States Attorney General, the DEA has the statutory authority to reschedule any controlled substance.¹²⁹ Any interested party can initiate this process by submitting a rescheduling petition to the DEA.¹³⁰ Courts generally hold that, short of persuading Congress to amend or

ment (presumably those intending to use the plant for illicit drug-related purposes). See *N.H. Hemp Council*, 203 F.3d at 7; *Lynn v. West*, 134 F.3d 582, 591 (4th Cir. 1998). Conversely, "no tax was applied to transfers of the mature stalk of the plant, which is useful only for industrial use." *N.H. Hemp Council*, 203 F.3d at 7 (emphasis omitted); see also *Cassady*, 224 N.W.2d at 653 ("[L]egislative history reveals that the major definitional emphasis was on excluding from the tax those portions of the cannabis plant which were harmless and had industrial use.").

¹²⁶ See *N.H. Hemp Council*, 203 F.3d at 7; cf. *White Plume*, 447 F.3d at 1071 ("[W]hile the definition of 'marijuana' in the modern CSA was carried forward from the Marihuana Tax Act of 1937 (Tax Act), which the CSA replaced, the Tax Act's practical effect of excluding industrial-use portions of the plant from regulation by not taxing them, was not carried forward.").

¹²⁷ *N.H. Hemp Council*, 203 F.3d at 4, 8; cf. *Dwyer*, *supra* note 2, at 1164 (footnote omitted) ("The 1970 Act retained the definition of marijuana used in the Marihuana Tax Act, . . . but dismantled the taxation and registration scheme of the Marihuana Tax Act that provided hemp farmers the means to exempt themselves from marijuana's taxation. The 1970 Act explicitly made all cultivation and sale of marijuana illegal, effectively outlawing industrial hemp along the way by removing registration procedures.").

¹²⁸ See, e.g., *White Plume*, 447 F.3d at 1072 ("When Congress passed the CSA, it adopted the Tax Act's definition of marijuana verbatim. But since the CSA abandoned the Tax Act's complex tax scheme in favor of criminal sanctions (which could be avoided by a DEA registration), as a way to regulate marijuana production and distribution, the CSA now criminalize[s] the growing of marijuana whether . . . intended for industrial-use or drug-use.").

¹²⁹ See *John Doe, Inc. v. DEA*, 484 F.3d 561, 563 (D.C. Cir. 2007) ("Congress assigned primary responsibility to the DEA to add or remove substances from the schedules, or to transfer a drug or substance between schedules."); *United States v. Burnes*, 816 F.2d 1354, 1358 (9th Cir. 1987) (citation omitted) ("The Act gives authority to the Attorney General to . . . transfer substances between schedules, or remove substances from the schedules in accordance with certain statutorily specified procedures and criteria. In 1973, the Attorney General delegated . . . these functions under the Act to the DEA."); *Dwyer*, *supra* note 2, at 1167 (footnote omitted) ("The [CSA] gave the Attorney General the power to reschedule or deschedule a substance if it has been inappropriately scheduled. This power has been delegated to the DEA.").

¹³⁰ See *Gettman v. DEA*, 290 F.3d 430, 432 (D.C. Cir. 2002) ("[T]he DEA may . . . revise the schedules . . . on the petition of any interested party." (citing 21 U.S.C. § 811(a) and 21 C.F.R. § 1308.43(a)); *Bergoffen & Clark*, *supra* note 13, at 137 ("The [CSA] allows the Schedules to be amended by rule 'on the petition of any interested party.'" (quoting 21 U.S.C. § 811(a))); *Dwyer*, *supra* note 2, at 1167 ("The DEA can initiate proceedings to reschedule a drug *sua sponte* or upon the request of the Department of Health and Human Services or any other interested party.").

repeal the CSA,¹³¹ the submission of a rescheduling petition is the only way to change the classification of a controlled substance.¹³²

Because the CSA's restrictions on controlled substance production vary depending on the substance's designated schedule,¹³³ and hemp (like marijuana)¹³⁴ falls within the most restrictive of the CSA's five schedules,¹³⁵ some commentators advocate rescheduling hemp as a potential means of re-legalizing industrial hemp production.¹³⁶ However, no one has ever actually pursued

¹³¹ See *White Plume*, 447 F.3d at 1072 (“The language of the CSA unambiguously bans the growing of marijuana, regardless of its use, and . . . we find no evidence that Congress intended otherwise. . . . [T]he proper venue for amending a statute is, of course, the duly elected legislature, equipped as it is to make those policy decisions.”); *United States v. Monroe*, 408 F. Supp. 270, 274 (N.D. Cal. 1976) (“[T]he substances initially listed by Congress on the schedules that it provided are to remain controlled substances until they are expressly removed from the schedules”), *aff’d*, 552 F.2d 860 (9th Cir. 1977); Bergoffen & Clark, *supra* note 13, at 140 (“Congress always has the authority to amend or repeal the [CSA] or any part of it.”).

¹³² See, e.g., *Pearson v. McCaffrey*, 139 F. Supp. 2d 113, 125 (D.D.C. 2001) (observing that challenges to CSA scheduling classifications must be taken “to the appropriate forum—to the DEA, the agency responsible for scheduling controlled substances, or Congress”); *cf.* *Krumm v. Holder*, No. CIV 08-1056 JB/WDS, 2009 WL 1563381, at *9 (D.N.M. May 27, 2009) (“Courts would be in a position to greatly undermine the CSA if they could . . . make or second-guess the scheduling decisions that Congress has charged to the Attorney General, and that the Attorney General has properly delegated to the DEA.”); *United States v. Gaertner*, 519 F. Supp. 585, 594 (E.D. Wis. 1981) (“[T]he proper method to argue for reclassification of [a controlled substance] is through a petition to the Attorney General [sic].”).

¹³³ See *Nat’l Org. for Reform of Marijuana Laws v. DEA*, 559 F.2d 735, 737 (D.C. Cir. 1977) (“The control mechanisms imposed on manufacture . . . of substances listed under the Act vary according to the schedule in which the drug is contained.”); *Monson v. DEA*, 522 F. Supp. 2d 1188, 1192 (D.N.D. 2007) (“The restrictions the CSA places on the manufacture . . . of a controlled substance depend upon the ‘schedule’ in which the drug has been placed.”), *aff’d*, 589 F.3d 952 (8th Cir. 2009); *United States v. Hovey*, 674 F. Supp. 161, 163 (D. Del. 1987) (“The CSA established five schedules of controlled substances, with prohibitions . . . varying according to the schedule in which a particular substance was placed.”).

¹³⁴ See *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1133 (D.C. Cir. 1994) (“Marijuana is assigned by statute to Schedule I, the most restrictive of [the schedules].”); *Nat’l Org for Reform of Marijuana Laws*, 559 F.2d at 737 (footnote omitted) (“In drafting the CSA Congress placed marihuana in Schedule I, the classification that provides for the most severe controls and penalties.”).

¹³⁵ See *Shepherd*, *supra* note 9, at 256 (“[T]he governing bodies in charge of scheduling drugs keep industrial hemp on the most restrictive of all placements.”). See generally *Olsen v. Holder*, 610 F. Supp. 2d 985, 990 (S.D. Iowa 2009) (“Schedule I substances are subject to the most stringent controls and the harshest penalties.”).

¹³⁶ See, e.g., Bergoffen & Clark, *supra* note 13, at 137 (“[A] petition might be filed to explicitly remove hemp from the schedules and the statutory definition of marijuana”); Rheingans, *supra* note 64, at 130 (“[One] possible method by which one could be successful in legalizing industrial hemp with respect to federal law is to petition the Drug Enforcement Agency [sic] . . . to either re-list or de-list hemp as a controlled substance.”); Thedinger, *supra* note 30, at 445 (“The DEA should reclassify products containing less than 0.3 percent THC as ‘not marijuana.’”).

this possibility,¹³⁷ presumably due partly to a widespread perception that any such effort would be futile.¹³⁸

In this regard, the DEA also has authority (again, delegated to it by the Attorney General)¹³⁹ to authorize individuals “to grow a controlled substance in certain circumstances, particularly when the prohibited substance has a legitimate use.”¹⁴⁰ However, the DEA has repeatedly refused to authorize hemp production.¹⁴¹ In large part, this is due to the professed concern that permitting hemp cultivation, even for legitimate industrial purposes,¹⁴² would undermine the CSA’s objective of eradicating illegal drug trafficking.¹⁴³ Given its persis-

¹³⁷ See Rheingans, *supra* note 64, at 131 (footnotes omitted) (“Attempts to reschedule marijuana from a Schedule I to a Schedule II controlled substance have been made in the federal courts. However, these attempts have focused on the ability to prescribe marijuana for its therapeutic uses. It is apparent that this is a totally different motive than de-listing industrial hemp because of its potential economic benefits to the farmers of this nation.”).

¹³⁸ See Duppong, *supra* note 8, at 432 (“[I]t seems highly unlikely that the DEA will alter its classification of industrial hemp.”); *cf.* Lash, *supra* note 3, at 353-54 (“[A]dvocates for hemp have provided the DEA with insurmountable evidence of hemp’s safe, non-psychoactive, qualities but the DEA refuses to consider this information.”). *But see* Rheingans, *supra* note 64, at 131 (“[I]t seems that a petition to re-schedule or de-list industrial hemp should be successful. . . . Significantly, there have been successful attempts to create exemptions to classifications in the past . . .” (citing as an example the DEA’s regulatory authorization of the religious use of peyote by Native Americans, despite peyote’s status as a Schedule I controlled substance under the CSA)).

¹³⁹ See *Wedgewood Vill. Pharm. v. DEA*, 509 F.3d 541, 542 n.1 (D.C. Cir. 2007) (“The CSA requires manufacturers, distributors and dispensers to register with the Attorney General, 21 U.S.C. § 822(b); the Attorney General, in turn, has delegated the registration authority to DEA. See 28 C.F.R. § 0.100(b).”).

¹⁴⁰ Thedinger, *supra* note 30, at 438-39 (footnote omitted); Dwyer, *supra* note 2, at 1168 (“Potential growers can seek permits to grow industrial hemp from the DEA”); Kolosov, *supra* note 27, at 246-47 (“[T]he CSA does not make growing hemp illegal; rather, it requires prospective growers to obtain registration from the DEA.”). *See generally* Kolosov, *supra* note 27 at 261 (discussing 21 U.S.C. § 823(a)(1)) (“[F]or those Schedule I substances for which there are legitimate industrial purposes, Congress intended some domestic manufacturing.”).

¹⁴¹ *See, e.g., Monson v. DEA*, 522 F. Supp. 2d 1188, 1197 (D.N.D. 2007) (“As a practical matter, there is no realistic prospect that the plaintiffs will ever be issued a license by the DEA to grow industrial hemp.”), *aff’d*, 589 F.3d 952 (8th Cir. 2009); *see also* Dwyer, *supra* note 2, at 1168 (“[P]ermits [to grow industrial hemp] have been very few in number, limited almost entirely to research plots.”); Kolosov, *supra* note 27, at 247 (“[I]n practice, the DEA unilaterally rejects almost all such applications.”); Murphy, *supra* note 58, at 776 (footnote omitted) (“[T]he DEA requires a type of permit for industrial hemp that . . . the DEA does not, in practice, issue to would-be hemp growers who apply for it, creating a functional bar to regulatory compliance.”).

¹⁴² *See United States v. White Plume*, 447 F.3d 1067, 1076 (8th Cir. 2006) (“[T]here are a countless number of beneficial products which utilize hemp in some fashion.”).

¹⁴³ *See Duppong, supra* note 8, at 430 (“[T]he DEA has stood firm on its position that allowing industrial hemp production would increase the illegal marijuana trade.”); Kolosov, *supra* note 27, at 249-50 (noting the DEA’s argument that “permitting industrial hemp farming would intensify covert production of marijuana and complicate the DEA’s enforcement activities”); Shepherd, *supra* note 9, at 240 (“[T]he D.E.A. argues that legalization of industrial hemp will create hiding places for illegal marijuana growers or, alternatively, the industrial hemp growers will secretly

tent refusal to authorize hemp production even on an individualized basis,¹⁴⁴ the DEA is unlikely to be receptive to a rescheduling petition that, at least in theory,¹⁴⁵ might result in hemp being cultivated on a much broader scale.¹⁴⁶

V. STATES' LARGELY-FRUITLESS EFFORTS AT LEGALIZING INDUSTRIAL HEMP PRODUCTION

A. *State Legislation Hamstrung by the CSA*

The few successes the hemp legalization movement has experienced have all come at the state legislative level.¹⁴⁷ In this regard, a handful of state legislatures have enacted laws purporting to authorize industrial hemp cultivation,¹⁴⁸ and several others have considered, but not enacted similar

attempt to enhance the THC levels in hemp to produce marijuana.”); *cf.* *Commonwealth v. Harrelson*, 14 S.W.3d 541, 547 (Ky. 2000) (discussing expert testimony to the effect that “there would be serious difficulties for law enforcement in controlling marijuana trafficking if hemp were legalized”).

¹⁴⁴ See Duppong, *supra* note 8, at 403 (noting that “the United States government has refused to allow the production of industrial hemp, due to the classification of industrial hemp as marijuana under the federal Controlled Substances Act (CSA).”); *id.* at 430 (discussing “the DEA’s refusal to grant industrial hemp licenses”); *cf.* Shepherd, *supra* note 9, at 245 (“[T]he cultivation of hemp in America is technically illegal, since the D.E.A. would arrest anyone who tried to plant hemp seeds having even a negligible amount of THC.”).

¹⁴⁵ It is not entirely clear that rescheduling hemp would lead to its widespread cultivation, because “[a]nyone who manufactures *any* controlled substance must, to avoid conviction for illegal manufacture, obtain an annual registration.” *United States v. McWilliams*, 138 F. App’x 1, 2 (9th Cir. 2005) (citing 21 U.S.C. § 822(a)(1)). The Ninth Circuit, for example, rejected an individual’s contention that marijuana is not properly classified as a Schedule I substance, in part because it was not clear that “the different requirements for manufacturing Schedule I drugs . . . and Schedule III, IV and V drugs . . . would have affected his registration application.” *Id.* at 2-3.

¹⁴⁶ See Duppong, *supra* note 8, at 431 (“Given the repeated refusals to grant permits . . . it seems highly unlikely that the DEA would change its position.”); *cf.* Smith, *supra* note 23, at 1168 (“More research must be conducted on . . . various strains of the plant before implementing a schedule that permits individual growers to harvest the plant.”). See generally *Krumm v. Holder*, No. CIV 08-1056 JB/WDS, 2009 WL 1563381, at *12 (D.N.M. May 27, 2009) (“The rescheduling petition is one in which an interested party asks the DEA to reconsider a comprehensive policy stance regarding how it treats a controlled substance. Thus, the DEA’s decision is not one directed at merely addressing the grievance of one harmed individual or group. Instead, a decision . . . will be a manifestation of an overall policy shift.”).

¹⁴⁷ See Brady, *supra* note 3, at 108 (“Any industrial hemp legislation has been done at the state level. There has not been any at the federal level.”); *cf.* JOHNSON, *supra* note 12, at 18 (“Beginning around 1995, an increasing number of state legislatures began to consider a variety of initiatives related to industrial hemp.”).

¹⁴⁸ See Avi Brisman, *Crime-Environment Relationships and Environmental Justice*, 6 SEATTLE J. FOR SOC. JUST. 727, 742 (2008) (footnote omitted) (“Recognizing the economic and environmental benefits of hemp cultivation, legislatures in Maine, Montana, North Dakota, West Virginia, and other states have passed bills allowing farmers to grow industrial hemp.”); Lash, *supra* note 3, at 326 (“Hawaii and Maryland have also passed legislation legalizing hemp.”).

legislation.¹⁴⁹ The movement's apparent focus on the state legislative arena may reflect a mistaken assumption that the enactment of state laws authorizing hemp cultivation would enable farmers to grow the plant lawfully within the states enacting those laws.¹⁵⁰ As one commentator erroneously asserted:

Perhaps the easiest way to legalize industrial hemp is to submit a bill to a state's legislature that would amend the definition of marijuana, as used in the criminal statutes of that state, to exclude industrial hemp and provide for monitoring of its growth. This would allow the cultivation of industrial hemp while still permitting the state to have ample control over its production.¹⁵¹

The fallacy of this assumption is illustrated by North Dakota's experience¹⁵² as the first state to enact legislation purporting to authorize industrial hemp cultivation within its borders.¹⁵³ The Court of Appeals for the Eighth Circuit, in *Monson v. Drug Enforcement Administration*,¹⁵⁴ addressed the

¹⁴⁹ See, e.g., *N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 3 (1st Cir. 2000) (discussing a bill introduced in the New Hampshire legislature "to legalize and regulate the cultivation of 'industrial hemp[]'" that "was defeated on a relatively close vote"); Brady, *supra* note 3, at 90 (footnote omitted) ("In 1995 one politician in Colorado introduced legislation allowing for industrial hemp cultivation but it was defeated. The following year, Colorado along with [] Missouri, Hawaii, and Vermont, proposed similar legislation which, although defeated, garnered significant support."); see also Kolosov, *supra* note 27, at 247 ("[T]wenty-eight states have considered some type of legislation liberalizing their laws regarding industrial hemp; fifteen have enacted such legislation, and eight of those 'have removed barriers to its production or research.'" (quoting Vote Hemp, <http://www.votehemp.com/state.html> (last visited June 7, 2009))).

¹⁵⁰ See, e.g., Brady, *supra* note 3, at 85-86 ("California should pass legislation legalizing the growing of industrial hemp allowing it to become an economically viable crop in California."); see also Dwyer, *supra* note 2, at 1164-65 ("With the federal structure of licensing procedures [established by the Marihuana Tax Act] now removed, the states would seem to have the authority to regulate the cultivation and processing of industrial hemp and encourage the renaissance of the industry if they so desire.").

¹⁵¹ Rheingans, *supra* note 64, at 126; cf. Ballanco, *supra* note 41, at 1173-74 ("[N]o federal law or authority should prevent farmers . . . from raising legitimate industrial hemp crops.").

¹⁵² For a prior examination of the North Dakota experience, see Duppong, *supra* note 8 *passim*. However, Mr. Duppong's article was published before the Eighth Circuit's important decision in *Monson v. Drug Enforcement Administration*, 589 F.3d 952 (8th Cir. 2009), was issued. See Duppong, *supra* note 8, at 403 n.4 ("As of the publication of this article, no decision by the Eighth Circuit has been made.").

¹⁵³ See Kolosov, *supra* note 27, at 247 ("In 1999, North Dakota became the first state to authorize and create a licensing scheme for industrial hemp production."); Lash, *supra* note 3, at 326 ("In 1999, North Dakota became the first state since 1937 to legalize and set guidelines for cultivation of industrial hemp."); cf. Rheingans, *supra* note 64, at 126 ("North Dakota is one state that has successfully introduced industrial hemp legislation.").

¹⁵⁴ *Monson*, 589 F.3d 952. For an academic discussion of the district court decision affirmed by the Eighth Circuit in *Monson*, see Duppong, *supra* note 8, at 424-25.

impact of North Dakota's industrial hemp statute that distinguishes between varieties of the hemp plant based on THC concentration levels.¹⁵⁵

The North Dakota statute required any person seeking a state license to grow industrial hemp to also obtain the federal registration necessary to grow marijuana under the CSA.¹⁵⁶ However, the North Dakota Commissioner of Agriculture petitioned the DEA to waive the federal registration requirement for farmers seeking to grow industrial hemp as defined and regulated by the state statute,¹⁵⁷ in effect asking the federal agency "to forego all regulation of marijuana that meets North Dakota's definition of 'industrial hemp.'"¹⁵⁸

The DEA denied the Commissioner's request.¹⁵⁹ The agency explained that waiving the federal registration requirement for those authorized to grow industrial hemp under state law would constitute an abdication of its obligation to administer and enforce the CSA.¹⁶⁰ The DEA also cautioned the Commissioner that cultivating industrial hemp without the registration required by the

¹⁵⁵ The statute defines industrial hemp as cannabis containing "no more than three-tenths of one percent" THC. *Monson*, 589 F.3d at 957 (quoting N.D. CENT. CODE § 4-41-01). This is a common standard. See, e.g., VT. STAT. ANN. tit. 6, § 562(3) (2013) ("'Industrial hemp' means varieties of the plant cannabis sativa having no more than 0.3 percent tetrahydrocannabinol . . ."); see also Ballanco, *supra* note 41, at 1166 ("In order for *Cannabis* plants to be classified as [industrial] hemp under European Economic Community standards, which have been proposed in Kentucky and Colorado, the plants must contain no more than 0.3% THC."); Murphy, *supra* note 58, at 770 n.32 ("Although the United States has not . . . authorized the cultivation of industrial hemp, [a] bill to allow its production . . . set its THC content at '0.3 percent' or less, 'on a dry weight basis.'" (quoting Industrial Hemp Farming Act of 2009, H.R. 1866, 111th Cong. § 2(B) (2009))).

¹⁵⁶ See *Monson*, 589 F.3d at 957. This requirement undoubtedly reflected the legislature's recognition that the legalization of industrial hemp as a matter of state law "does not change its status as a Schedule I controlled substance under federal law." *Monson v. DEA*, 522 F. Supp. 2d 1188, 1200 (D.N.D. 2007), *aff'd*, 589 F.3d 952 (8th Cir. 2009). The North Dakota statute was not unique in this regard. Cf. VT. STAT. ANN. tit. 6, § 561 (2013) ("The intent of this act is to establish policy and procedures for growing industrial hemp in Vermont so that farmers and other businesses in the Vermont agricultural industry can take advantage of this market opportunity when federal regulations permit.") (emphasis added).

¹⁵⁷ See *Monson*, 589 F.3d at 957.

¹⁵⁸ *Monson*, 522 F. Supp. 2d at 1193; cf. Ballanco, *supra* note 41, at 1173 (arguing that the DEA lacks the "authority . . . to include commercial hemp crops in the definition of marijuana").

¹⁵⁹ See *Monson*, 589 F.3d at 957.

¹⁶⁰ See *id.* (alterations in original omitted) ("For the DEA to simply turn over to any state the agency's authority and responsibility to enforce the CSA would be directly at odds with the Act." (quoting the DEA's letter to the North Dakota Commissioner of Agriculture)); cf. *Manna v. U.S. Dep't of Justice*, 832 F. Supp. 866, 875 (D.N.J. 1993) (noting that the DEA is "the federal agency charged with the primary responsibility for enforcing federal drug laws"), *aff'd*, 51 F.3d 1158 (3d Cir. 1995); *Henke v. United States*, 43 Fed. Cl. 15, 18 (1999) ("The DEA is the lead agency responsible for enforcing the controlled substances laws and regulations of the United States.").

CSA would be a violation of federal law,¹⁶¹ regardless of whether or not the grower was authorized to engage in that activity as a matter of state law.¹⁶²

Upon being apprised of the DEA's position, the North Dakota legislature amended the state statute to eliminate its reference to the federal registration requirement.¹⁶³ Nevertheless, the plaintiffs in *Monson*, who were issued state licenses but no federal registration,¹⁶⁴ did not immediately begin raising hemp.¹⁶⁵ Instead, the plaintiffs filed suit against the DEA because they feared criminal prosecution if they proceeded without federal registrations.¹⁶⁶ The plaintiffs sought a declaration that the CSA does not preclude hemp cultivation that state law has authorized¹⁶⁷ and that farmers who have received such authorization cannot be prosecuted for violating the CSA.¹⁶⁸

B. The Commerce Clause: A Roadblock to State Efforts

The plaintiffs in *Monson* argued that because the North Dakota statute allows only those portions of the hemp plant Congress excluded from the CSA's definition of marijuana to "leave a farmer's property and enter interstate commerce,"¹⁶⁹ industrial hemp cultivation done in accordance with the state statute would constitute "purely intrastate activity"¹⁷⁰ that is not subject to fed-

¹⁶¹ The cultivation of marijuana without a federal registration is punishable as a felony under the CSA. See *United States v. Angel*, 576 F.3d 318, 321 n.2 (6th Cir. 2009); *Masters v. Schiltgen*, 28 F. App'x 712, 714 (9th Cir. 2002). Thus, "anyone cultivating marijuana or hemp without [a DEA registration is] subject to criminal prosecution." *United States v. White Plume*, 447 F.3d 1067, 1069 (8th Cir. 2006).

¹⁶² See *Monson*, 589 F.3d at 958.

¹⁶³ See *id.* at 957, 959.

¹⁶⁴ See *Monson v. DEA*, 522 F. Supp. 2d 1188, 1194 (D.N.D. 2007), *aff'd*, 589 F.3d 952 (8th Cir. 2009). The DEA refused a request to expedite consideration of the plaintiffs' federal registration applications, citing its statutory and regulatory obligation to investigate their backgrounds and inspect their production facilities. See *Monson*, 589 F.3d at 957.

¹⁶⁵ See *Monson*, 589 F.3d at 957.

¹⁶⁶ See *Monson*, 522 F. Supp. 2d at 1191 ("The plaintiffs . . . have an economic need to begin cultivation of industrial hemp, and apparently stand ready to do so but are unwilling to risk federal prosecution . . . for manufacture or sale of a controlled substance.").

¹⁶⁷ See *Monson*, 589 F.3d at 955-57.

¹⁶⁸ See *id.* at 960 (noting that the plaintiffs were seeking "a declaration that the CSA [did] not apply to their planned cultivation of industrial hemp under North Dakota state law and that, as a result, they [could not] be prosecuted under the Act").

¹⁶⁹ *Id.* at 957 (citing N.D. CENT. CODE § 4-41-02); see also *Monson*, 522 F. Supp. 2d at 1191 ("North Dakota . . . authoriz[ed] the cultivation of industrial hemp so that its farmers could supply the legal parts of the plant—stalk, fiber, seed and oil—that would otherwise have to be imported from other countries."); Kolosov, *supra* note 27, at 251-52 (footnotes omitted) ("[U]nder North Dakota law, hemp growers may only sell or transfer parts of the cannabis plant that are exempted by the CSA Therefore, no part of the cannabis plant other than those explicitly permitted under federal law may ever leave a farmer's property.").

¹⁷⁰ *Monson*, 589 F.3d at 962.

eral regulation.¹⁷¹ However, the court rejected this argument, finding that the plaintiffs' intent "to grow cannabis on a large scale for the undeniably commercial purpose of generating products for sale in interstate commerce"¹⁷² was sufficient to enable Congress to regulate that activity.¹⁷³ This conclusion is consistent with the analysis in other cases,¹⁷⁴ and was all but compelled by the Supreme Court's decision in *Gonzales v. Raich*,¹⁷⁵ on which the *Monson* court relied.¹⁷⁶

In *Gonzales*, the Supreme Court held that as long as there is a rational basis for concluding that marijuana production could substantially affect interstate commerce—specifically, Congress's "interest in eliminating commercial transactions in the interstate market in their entirety"¹⁷⁷—Congress has the constitutional authority to regulate that production under the Commerce Clause.¹⁷⁸ The *Monson* court in turn held that in the case of industrial hemp cultivation,

¹⁷¹ See *id.* at 964 (internal quotation marks omitted) ("[Plaintiffs] contend that because Congress chose to exclude certain components of the *Cannabis sativa* L. plant from the CSA's definition of marijuana, Congress cannot constitutionally regulate *intrastate* state-regulated and licensed activity that results only in putting those unregulated components into interstate commerce.").

¹⁷² *Id.* at 963-64. The court noted that one of the plaintiffs intended to grow "up to 100 acres of industrial hemp from which he planned to supply other North Dakota farmers with seeds," and the other plaintiff "obtained a state license to plant up to ten acres with 300 pounds of industrial seeds in order to produce over 2.4 million industrial hemp plants." *Id.* at 964 n.5.

¹⁷³ See *id.* at 965 ("[A]ny attempt by [the plaintiffs] to draw distinctions between *Cannabis sativa* L. varieties for purposes of Commerce Clause analysis ignores the indisputable fact that they seek to engage in a commercial enterprise that will result in the introduction of goods into interstate commerce. . . . [B]ecause cultivation of *Cannabis sativa* L. substantially affects the interstate market for commodities such as the fiber, seed and oil of the plant, Congress may regulate that cultivation.").

¹⁷⁴ See, e.g., *United States v. Visman*, 919 F.2d 1390, 1393 (9th Cir. 1990) ("Congress may constitutionally regulate intrastate . . . cultivation of marijuana plants found rooted in the soil"); cf. Duppong, *supra* note 8, at 414 (footnote omitted) ("Congress has the authority to regulate any economic activities that substantially affect interstate commerce. . . . The production and distribution of industrial hemp is quintessentially [such] an economic activity, as the purpose of its growth is to sell its bi-products throughout the country and the world, placing it squarely under the control of Congress through the Commerce Clause.").

¹⁷⁵ *Gonzales v. Raich*, 545 U.S. 1 (2005).

¹⁷⁶ See *Monson*, 589 F.3d at 963-64 (finding the plaintiffs' "attempts to distinguish *Raich* . . . unpersuasive"). For a thoughtful academic discussion of *Gonzales*, see Steven K. Balman, *Constitutional Irony: Gonzales v. Raich, Federalism and Congressional Regulation of Intrastate Activities Under the Commerce Clause*, 41 TULSA L. REV. 125 (2005).

¹⁷⁷ *Gonzales*, 545 U.S. at 19.

¹⁷⁸ See *id.* at 22. The district court in *Monson* asserted that the analysis in *Gonzales* "disposes of the . . . argument that the Controlled Substances Act cannot be interpreted, consistent with the Commerce Clause, to reach the . . . intrastate cultivation and processing of marijuana." *Monson v. DEA*, 522 F. Supp. 2d 1188, 1200-01 (D.N.D. 2007), *aff'd*, 589 F.3d 952 (8th Cir. 2009); cf. *Gonzales*, 545 U.S. at 22 ("[W]e have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture . . . of marijuana would leave a gaping hole in the CSA.").

the standard articulated in *Gonzales* is satisfied by the DEA's need to prevent the "unlawful diversion of controlled substances"¹⁷⁹—that is, to guard against the "removal of the material out of the industrial hemp production stream and into the flow of drug trafficking."¹⁸⁰ Because the federal government need not defer to the states' efforts to address this concern,¹⁸¹ the *Monson* court held that Congress properly vested the DEA, rather than the North Dakota legislature or an administrative agency of that state, with the authority to regulate industrial hemp cultivation within the state.¹⁸²

¹⁷⁹ *Monson*, 589 F.3d at 964; cf. *United States v. Lepp*, No. CR 04-00317 MHP, 2008 WL 3843283, at *11 (N.D. Cal. Aug. 14, 2008) ("This interest—disallowing the diversion of Schedule I controlled substances away from permissible . . . uses—is a compelling governmental interest."), *aff'd*, 446 F. App'x 44 (9th Cir. 2011), *cert denied*, 132 S. Ct. 790 (2011).

¹⁸⁰ Bergoffen & Clark, *supra* note 13, at 138 n.137. One commentator has observed that the need to prevent unlawful diversion is the "DEA's primary argument against hemp cultivation." Kolosov, *supra* note 27, at 249. The agency claims that such cultivation "would intensify covert production of marijuana and complicate the DEA's enforcement activities." *Id.* at 249-50; cf. *N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 6 (1st Cir. 2000) ("[P]roblems of detection and enforcement easily justify a ban broader than the psychoactive variety of the plant."); Duppong, *supra* note 8, at 430 ("[C]ourts have justified the DEA's refusal to grant industrial hemp licenses largely because of the detection and enforcement problems of growing industrial hemp.").

¹⁸¹ See *Monson*, 589 F.3d at 964 ("[S]tate restrictions on marijuana possession and cultivation 'cannot serve to place [those] activities beyond congressional reach.'" (quoting *Gonzales*, 545 U.S. at 29)); Kolosov, *supra* note 27, at 268 (acknowledging "the DEA's argument that it, rather than the State of North Dakota, has the exclusive duty to protect against diversion of controlled substances into illegal channels"); cf. *Krumm v. Holder*, No. CIV 08-1056 JB/WDS, 2009 WL 1563381, at *9 (D.N.M. May 27, 2009) ("The CSA does not contemplate that state legislatures' determinations about the use of a controlled substance can be used to bypass the CSA's rescheduling process."). But see Kolosov, *supra* note 27, at 252 ("Nothing in [the CSA] precludes the DEA from considering state laws that protect against 'diversion' when weighing whether granting a license is consistent with the public interest.").

¹⁸² See *Monson*, 589 F.3d at 964-65 ("By regulating all *Cannabis sativa* L. plants, Congress, through the CSA, vested the DEA with the authority to determine whether a particular proposal for its growth is sufficiently controlled so as not to undermine the objectives of the Act."); cf. *Alaska v. ACLU of Alaska*, 204 P.3d 364, 370 (Alaska 2009) ("[T]he Federal Drug Enforcement Agency [sic] enforces the Controlled Substances Act without deference to state laws or policies."); Scott Gast, *Who Defines "Legitimate Medical Practice?": Lessons Learned from the Controlled Substances Act, Physician-Assisted Suicide, & Oregon v. Ashcroft*, 10 VA. J. SOC. POL'Y & L. 261, 289-90 (2002) ("Because the federal interest in preventing the abuse of marijuana [is] consistent with the purpose and intent behind the CSA—preventing the diversion of controlled substances to illegal use, and more particularly, preventing easily disguised illegal diversions—the federal interest appropriately [overrides] . . . contrary state law."). See generally *Am. Pharm. Ass'n v. Weinberger*, 377 F. Supp. 824, 831 (D.D.C. 1974) ("The problem of unlawful diversion is one presently consigned by Congress to the Drug Enforcement Administration"), *aff'd sub nom. Am. Pharm. Ass'n v. Mathews*, 530 F.2d 1054 (D.C. Cir. 1976).

In reaching this result, the *Monson* court followed the First Circuit's reasoning in *New Hampshire Hemp Council v. Marshall*,¹⁸³ as well as the reasoning of *United States v. White Plume*,¹⁸⁴ another case involving industrial hemp cultivation in which the Eighth Circuit had followed *New Hampshire Hemp Council*.¹⁸⁵ The courts in all three of these cases held that hemp grown solely for industrial purposes is nevertheless "marijuana" within the meaning of the CSA,¹⁸⁶ and thus subject to regulation by the DEA.¹⁸⁷

Because no court has disagreed with the analysis in these cases,¹⁸⁸ and Congress has shown little inclination to amend the CSA in response to them,¹⁸⁹ courts considering the issue in future cases are unlikely to depart from the view that it is unlawful to cultivate industrial hemp without the DEA's authorization.¹⁹⁰ As the federal appellate court that decided *New Hampshire Hemp*

¹⁸³ *N.H. Hemp Council v. Marshall*, 203 F.3d 1 (1st Cir. 2000); *see supra* notes 103-128 and accompanying text. *New Hampshire Hemp Council* differed from *Monson*, however, because in the *Hemp Council* case, unlike in *Monson*, "no state law authorizing the cultivation of industrial hemp was in effect." *Monson*, 522 F. Supp. 2d at 1195.

¹⁸⁴ *United States v. White Plume*, 447 F.3d 1067, 1071-72 (8th Cir. 2006).

¹⁸⁵ *See id.* *White Plume* involved the impact of a tribal ordinance authorizing the cultivation of industrial hemp on the Pine Ridge Indian Reservation, *see id.* at 1069, which prompted the district court in *Monson* to conclude that the two cases were "identical in all relevant respects." *Monson*, 522 F. Supp. 2d at 1199. For a critical examination of the Eighth Circuit's analysis in *White Plume*, *see* Murphy, *supra* note 58 *passim*.

¹⁸⁶ *See Monson*, 589 F.3d at 962 ("[T]he District Court . . . properly concluded that industrial hemp . . . is marijuana for purposes of the CSA."); *White Plume*, 447 F.3d at 1073 (noting that "the CSA does not distinguish between marijuana and hemp in its regulation"); *N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 4 (1st Cir. 2000) (citation omitted) (affirming district court's determination that "the federal statutory definition of marijuana, includes cannabis sativa plants even if grown solely for the production of industrial products").

¹⁸⁷ *See Monson*, 589 F.3d at 961-62 (discussing *White Plume* and *New Hampshire Hemp Council*).

¹⁸⁸ *See Monson*, 522 F. Supp. 2d at 1199 ("The federal courts that have considered this issue agree that Cannabis plants grown for industrial purposes . . . are 'marijuana' within the meaning of the Controlled Substances Act."); JOHNSON, *supra* note 12, at 17 ("[E]very federal court that has addressed the issue has ruled that any person who seeks to grow any form of marijuana (no matter the THC content or the purpose for which it is grown) must obtain a DEA registration." (quoting D.E.A., DEA HISTORY IN DEPTH: 2003-2008, at 176, available at <http://www.justice.gov/dea/about/history/2003-2008.pdf>)); Kolosov, *supra* note 27, at 248 ("Parties in North Dakota and other states have . . . argu[ed] that [hemp] is not marijuana and thus not subject to regulation under the CSA; at present, they have been uniformly unsuccessful.").

¹⁸⁹ *See Brady*, *supra* note 3, at 108 ("There has not been any challenge to change the CSA itself."). One commentator observed that federal courts "have hinted that congressional legislation would help resolve the industrial hemp issue." Duppong, *supra* note 8, at 431 (citing *Monson*, 522 F. Supp. 2d at 1202).

¹⁹⁰ *See United States v. Sanapaw*, 366 F.3d 492, 495 (7th Cir. 2004) ("Congress's thirty-year acquiescence to a definition of marijuana that includes all Cannabis . . . indicates that the courts have properly interpreted the Act."); Bray, *supra* note 107, at 1294 ("Once the legal process has culminated in a juridically bivalent result about whether industrial hemp is 'marijuana,' the same

Council explained in an earlier case: “One of the principles of statutory interpretation is that a ‘settled construction of an important federal statute should not be disturbed unless and until Congress so decides.’”¹⁹¹

VI. CONGRESS’S HISTORICAL REFUSAL TO LEGALIZE INDUSTRIAL HEMP PRODUCTION

As the foregoing discussion illustrates, the *de facto* federal prohibition of domestic industrial hemp cultivation effectively preempts more permissive state laws¹⁹² and prevents farmers from growing industrial hemp, even in those states that have attempted to legalize that activity.¹⁹³ This situation is unlikely to change unless and until Congress amends the CSA to permit industrial hemp cultivation as a matter of federal law.¹⁹⁴

result will likely be reached for the other cases that are relevantly identical, regardless of the parties involved. . . . We would not expect variance from case to case as to whether industrial hemp is ‘marijuana’ under a federal criminal statute.”); Dwyer, *supra* note 2, at 1166 n.158 (“[A] court might find that Congress’s inaction since 1970, while the DEA has pursued its current approach to industrial hemp, implies authorization through acquiescence.”).

¹⁹¹ Bath Iron Works Corp. v. Dir., Office of Workers’ Comp. Programs, 136 F.3d 34, 42 (1st Cir. 1998) (quoting *Reves v. Ernst & Young*, 494 U.S. 56, 74 (1990) (Stevens, J., concurring)); *see also* *United States v. Kelly*, 105 F. Supp. 2d 1107, 1115 (S.D. Cal. 2000) (“The only rational interpretation of congressional idleness in the face of voluminous precedent that it has the power to set straight is to assume that Congress agrees.”); *In re Adoption of Baby E.Z.*, 2011 UT 38, ¶ 23, 266 P.3d 702, 709 (“Congress surely is cognizant of the fact that parties rely on judicial interpretations of legislation and, if the interpretation is in error, Congress ordinarily will take steps to either correct the legislation or provide additional guidance to the courts.”).

¹⁹² *See* Bergoffen & Clark, *supra* note 13, at 135 (noting that a state’s regulation of a controlled substance “is preempted by federal law to the extent that it is inconsistent with federal controls and prohibitions regarding the same substance”); Murphy, *supra* note 58, at 772 (“‘Currently, at least 14 states have hemp-related laws in effect,’ although federal law presently preempts their application.” (quoting JEAN M. RAWSON, CONG. RESEARCH SERV., RL 32725, HEMP AS AN AGRICULTURAL COMMODITY 2 (2005))).

¹⁹³ *See* Brisman, *supra* note 148, at 742 (“[F]armers have not undertaken cultivation of industrial hemp out of fear that such efforts, even with state licenses, would violate the Controlled Substances Act.”); Kolosov, *supra* note 27, at 248 (footnote omitted) (“[B]ecause North Dakota farmers face federal criminal prosecution if they plant industrial hemp without a license from the DEA, none have benefited from their state licenses.”); Thedinger, *supra* note 30, at 439 (“North Dakota and Maryland[] have legalized hemp growing, but the DEA’s restrictions and the liability for producing hemp ensure that it will not be grown.”).

¹⁹⁴ *See, e.g.*, *N.H. Hemp Council v. Marshall*, 203 F.3d 1, 4 (1st Cir. 2000) (noting that if industrial hemp was “declared not to be marijuana under the federal statute, this would in due course probably lead to [its] treatment as lawful under New Hampshire law”); *see also* *Monson v. DEA*, 522 F. Supp. 2d 1188, 1202 (D.N.D. 2007) (“Whether . . . farmers will be permitted to grow industrial hemp in the future . . . should ultimately rest in the hands of Congress rather than the hands of a federal judge.”), *aff’d*, 589 F.3d 952 (8th Cir. 2009); Kolosov, *supra* note 27, at 246-47 n.85 (suggesting that federal legislation is necessary to “permit hemp production under state law without preemption by the federal government”).

The occasional successes the hemp legalization movement has experienced at the state level actually have prompted modest political interest in the industrial hemp issue at the federal level,¹⁹⁵ despite the DEA's attempt to portray the movement as a stalking horse for more controversial efforts to legalize marijuana production for recreational and medicinal drug use.¹⁹⁶ In particular, Congressman Ron Paul has proposed federal legislation, known as the Industrial Hemp Farming Act,¹⁹⁷ which would exclude industrial hemp from the CSA's definition of marijuana,¹⁹⁸ and thus "could provide for commercial cultivation of hemp in the United States."¹⁹⁹

Although the enactment of this legislation undoubtedly would be met with approval in many quarters,²⁰⁰ the bill's prospects for passage appear to be dim.²⁰¹ Substantially identical legislation has been introduced without success

¹⁹⁵ See Duppong, *supra* note 8, at 425 ("The collective efforts by the states have resulted in the introduction of congressional legislation aimed at permitting the cultivation of industrial hemp in America."); *cf.* Cockrel v. Shelby Cnty. Sch. Dist., 270 F.3d 1036, 1051 (6th Cir. 2001) (noting that erstwhile presidential candidate Ralph Nader "spoke out in favor of the legalization of industrial hemp and of the benefits it would have for small family farmers").

¹⁹⁶ See Kolosov, *supra* note 27, at 256 (noting that the DEA "claims that the true goal of those endeavoring to legalize industrial hemp is to decriminalize high-THC marijuana"); Shepherd, *supra* note 9, at 241 ("The D.E.A. claims that all efforts to legalize industrial hemp are no more than a ruse by marijuana advocates . . ."); *cf.* Poole, *supra* note 15, at 208-09 ("[S]ome would argue that legalizing industrial hemp is just one step in the overall campaign to legalize the drug variety of marijuana."). *But see* Rheingans, *supra* note 64, at 133 ("[T]he de-criminalization of hemp is more than a mere ruse to promote illicit marijuana use.").

¹⁹⁷ See H.R. 1831, 112th Cong. (2011).

¹⁹⁸ See *Monson v. DEA*, 522 F. Supp. 2d 1188, 1202 (D.N.D. 2007) ("The undersigned is aware of recent efforts in Congress to exclude industrial hemp from the definition of 'marijuana' as defined under the Controlled Substances Act.") (discussing Industrial Hemp Farming Act of 2007, H.R. 1009, 110th Cong. (2007)), *aff'd*, 589 F.3d 952 (8th Cir. 2009); Duppong, *supra* note 8, at 431 ("[T]he Industrial Hemp Farming Act . . . would clearly exempt industrial hemp from the CSA.").

¹⁹⁹ JOHNSON, *supra* note 12, at 1; *see also* Duppong, *supra* note 8, at 427 (footnotes omitted) ("The Industrial Hemp Farming Act would . . . allow individual states to determine whether plants grown for industrial hemp meet the concentration limitation set forth in the Act. This would presumably shift the responsibility for classifying industrial hemp from the DEA to the state[s] . . . and allow . . . farmers to grow industrial hemp."); Kolosov, *supra* note 27, at 246-47 n.85 ("The bill explicitly states that marijuana does not include industrial hemp and, if enacted, would permit hemp production under state law without preemption by the federal government.").

²⁰⁰ See, e.g., Dhooge, *supra* note 3, at 148 ("[T]here is no factual basis upon which to characterize hemp or its derivative products as Schedule I controlled substances."); Lash, *supra* note 3, at 323 ("Clearly, industrial hemp should not be included as a Schedule I narcotic. Industrial hemp is grown for industrial purposes not for medical or psychoactive purposes."); Rheingans, *supra* note 64, at 129 ("[T]he current definition of marijuana under federal law must . . . be changed because it includes hemp.").

²⁰¹ See Duppong, *supra* note 8, at 431 (asserting that enactment of the Industrial Hemp Farming Act seems unlikely); *cf.* Thedinger, *supra* note 30, at 446 (asserting that congressional action

in several consecutive congressional sessions,²⁰² and given the prevailing political climate (as exemplified by the DEA's continued strenuous opposition to legalizing hemp),²⁰³ most observers believe Congress is unlikely to legalize industrial hemp cultivation in the foreseeable future.²⁰⁴

VII. PRACTICAL OBSTACLES TO REVITALIZING THE AMERICAN HEMP INDUSTRY

A. *Scientific Advances Stymied by the Federal Ban*

Those hoping to revitalize the American hemp industry face significant economic and logistical challenges even if domestic industrial hemp production is legalized.²⁰⁵ Although hemp is relatively easy to grow,²⁰⁶ it is not easy to

to permit the cultivation of industrial hemp "will not occur until . . . politically feasible, which requires that a majority of the electorate believe in industrial hemp's possibilities").

²⁰² See Duppong, *supra* note 8, at 426 (footnotes omitted) ("The Industrial Hemp Farming Act of 2005 was the first bill introduced in Congress designed to separate industrial hemp from marijuana. Due to a lack of congressional support, the Act failed to become law. . . . [T]he Industrial Hemp Farming Act of 2007 . . . renewed the issue in Congress."); Kolosov, *supra* note 27, at 246-47 n.85 ("On April 2, 2009, Representative Ron Paul introduced the Industrial Hemp Farming Act of 2009. . . . Paul had previously introduced similar legislation in 2005.").

²⁰³ See, e.g., *Monson v. DEA*, 589 F.3d 952, 960 (8th Cir. 2009) ("[T]he DEA has . . . indicated in no uncertain terms its intent to treat industrial hemp as a Schedule I controlled substance under the CSA and to require registration pursuant to the Act before industrial hemp can be grown under [state] law."); Brady, *supra* note 3, at 91 ("The DEA is . . . opposed to revising existing federal law which would allow industrial hemp to be cultivated."); Dwyer, *supra* note 2, at 1165 ("The DEA . . . has been hostile to attempts to revive industrial hemp cultivation.").

²⁰⁴ See *N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 7 (1st Cir. 2000) ("Nor, given Congress' enlargement of drug crimes and penalties in recent years, would one bank on its adoption of an exception strongly opposed by the DEA as constituting a threatened loophole in the ban on illegal drugs."); *Bergoffen v. Clark*, *supra* note 13, at 140 ("[T]he current fixation on prohibition exhibited by the conservative majority in both Houses likely dooms any effort at allowing hemp production by amending the [CSA]."); Dwyer, *supra* note 2, at 1169 ("[A] political issue stymies congressional action in favor of industrial hemp. No United States representative or senator would find it easy to be the one who opened the door to hemp, as long as the spectre of marijuana is present.").

²⁰⁵ See Duppong, *supra* note 8, at 411 ("The potential success and profitability of industrial hemp in America is not an absolute certainty."); Dwyer, *supra* note 2, at 1152 ("Any efforts to reinstitute the cultivation of industrial hemp will be worthwhile only if hemp can be grown profitably. Looking at hemp production worldwide, the figures are not encouraging."); Thedinger, *supra* note 30, at 441 ("[T]he hemp industry, like all other new industries, is not immune from problems.").

²⁰⁶ See *United States v. Adams*, 293 F. Supp. 776, 779 (S.D.N.Y. 1968) (footnote omitted) ("Despite the practically total end of licit cultivation, [hemp] continues to grow spontaneously or adventitiously in a substantial area of the world and, most interestingly for us, can grow in every State of the United States It spreads, grows, and reproduces itself without human attention."); Ballanco, *supra* note 41, at 1168 (footnote omitted) ("[H]emp can grow in a variety of climates. Farmers claim that they can grow hemp without pesticide or herbicide application

harvest or process,²⁰⁷ and the lengthy federal ban on domestic production has impeded the development of technology and processing methods that would enable American farmers to produce the crop more efficiently.²⁰⁸ As a result, American farmers authorized to begin growing industrial hemp undoubtedly would have difficulty competing with hemp producers in other countries who have faced no comparable historical impediment.²⁰⁹

In addition, the strains of hemp available domestically are of inferior quality,²¹⁰ in part because the DEA has either discouraged,²¹¹ or in many cases flatly prohibited, research involving hemp production that might have improved those strains.²¹² The inferior quality of what little hemp seed remains available

because it grows quickly and is not likely to fall to disease.”); Dwyer, *supra* note 2, at 1147 (footnotes omitted) (“Once hemp begins to grow, it requires very little care. Fertilizers . . . can help farmers achieve optimal fiber yields, but little else is required.”); Kolosov, *supra* note 27, at 244 (noting that “hemp can be successfully grown under natural conditions,” and discussing “its heartiness and adaptability to a wide variety of climates and growing conditions”); Rheingans, *supra* note 64, at 124 (observing that “hemp can be grown with relatively little oversight”).

²⁰⁷ Dwyer, *supra* note 2, at 1149 (footnote omitted) (“Although hemp demands little labor during its growing season, harvesting and processing the crop for fiber is a labor-intensive task, especially when male and female plants are being harvested separately. Breaking the stalks and removing the fiber and hurds after retting is difficult and tedious. . . . [M]echanization has been hailed as the means to make hemp processing easier and more cost efficient.”). *See generally* Bergoffen & Clark, *supra* note 13, at 121 (referring to “the labor-intensive nature of the retting process”).

²⁰⁸ *See* Dwyer, *supra* note 2, at 1155 (“For the last fifty years, the United States has failed to invest either money or time in research into, and development of, methods and tools to improve hemp production.”); Kolosov, *supra* note 27, at 254 (“[W]hereas the art of manufacturing industrial hemp has progressed to the public’s benefit outside of the United States, the DEA’s policies have blocked comparable development . . .”).

²⁰⁹ *See* Kolosov, *supra* note 27, at 254 (“In contrast [to the situation in the United States], researchers in hemp-producing countries are making advancements . . . in processing methods.”); Thedinger, *supra* note 30, at 421 (footnote omitted) (“Twenty-nine countries . . . allow hemp production. These countries . . . are making great strides in hemp production and technology.”).

²¹⁰ *See* Dwyer, *supra* note 2, at 1155 n.95 (“Seeds bred for high yield have been lost . . .”); Kolosov, *supra* note 27, at 253 (“[T]he DEA eradicated the strongest domestically grown strains. Consequently, extensive research is required in order to breed new varieties.”).

²¹¹ *See* Dwyer, *supra* note 2, at 1168 (footnotes omitted) (“[T]he DEA . . . requires that applicants seek registration as a ‘manufacturer of marijuana’ (referring to both marijuana and industrial hemp) rather than as a researcher. The measures required to receive a permit as a manufacturer are considerable and costly, creating a significant deterrent to anyone interested in growing experimental industrial hemp.”); Kolosov, *supra* note 27, at 253 (“The DEA’s policies . . . have obstructed further domestic research.”); *cf.* *United States v. White Plume*, 447 F.3d 1067, 1076 (8th Cir. 2006) (discussing “the burdens imposed by a DEA registration necessary to grow hemp legally, such as the security measures required by the regulations”).

²¹² *See* JOHNSON, *supra* note 12, at 12 (“Most reports indicate that the DEA has not granted any current licenses to grow hemp, even for research purposes.”); Dwyer, *supra* note 2, at 1155 n.95 (lamenting “governmental regulation limiting cultivation even for research”); Lash, *supra* note 3, at 323 (“[I]n almost every instance the DEA refuses to grant permits for industrial hemp research

in this country (essentially seed from “feral ditch weed – remnants of the hemp grown during World War II”)²¹³ leaves potential hemp farmers in the United States at a further competitive disadvantage in relation to their counterparts in countries where hemp cultivation has long been permitted.²¹⁴

Finally, the federal ban on domestic hemp cultivation has limited the number of American companies manufacturing industrial hemp products,²¹⁵ even though the CSA does not prohibit domestic manufacturing of products made from hemp grown in other countries.²¹⁶ The dearth of American manufacturing facilities is primarily due to the significant cost involved in manufacturing products in facilities that are far away from the source of the raw materials necessary for production.²¹⁷ As a result, American farmers ultimately author-

. . . .”). See generally Kolosov, *supra* note 27, at 254 (“Technical advances cannot be promoted domestically unless the DEA grants federal licenses”).

²¹³ Kolosov, *supra* note 27, at 253 n.129; see also *Monson v. DEA.*, 522 F. Supp. 2d 1188, 1197 (D.N.D. 2007) (internal quotation mark omitted) (discussing state legislation enacted in North Dakota that directed one of the state’s universities “to collect feral hemp seed stock and develop appropriate adapted strains of industrial hemp”), *aff’d*, 589 F.3d 952 (8th Cir. 2009); cf. Ballanco, *supra* note 41, at 1174 (“The [United States Department of Agriculture] retained ten bags of hemp seed from the [federal government’s] Hemp for Victory program at the National Seed Laboratory in Ft. Collins, Colorado, for future emergencies. When those seeds were tested in 1994, however, they were not viable”); Shepherd, *supra* note 9, at 246 (“[T]he stores of seed left over from the war effort are no longer viable.”).

²¹⁴ One commentator has observed that “researchers in hemp-producing countries are making advancements in the crop itself.” Kolosov, *supra* note 27, at 254; see also Ballanco, *supra* note 41, at 1174 (noting that “hemp’s environmental and economic promise have spurred research in several countries”). Canada, for example, legalized industrial hemp production in 1998, and the Canadian government has been “experimenting with feral hemp seeds to produce better native strains of hemp.” Thedinger, *supra* note 30, at 441, 444. In Italy, government-financed researchers have bred varieties of hemp with increased yields, modified fatty acid profiles, and enhanced resistance to pests and disease. See Kolosov, *supra* note 27, at 254. In the United States, by contrast, the “stagnation of hemp and fiber research” may make domestic hemp production “non-competitive” even if the cultivation of industrial hemp is ultimately legalized. Thedinger, *supra* note 30, at 430.

²¹⁵ See Dwyer, *supra* note 2, at 1153 (“Infrastructure to support the hemp industry is . . . lacking. . . . [T]he United States [has] a dearth of hemp processing capabilities”); Lash, *supra* note 3, at 322 (observing that “hemp mills shut down” after World War II).

²¹⁶ See, e.g., *Hemp Indus. Ass’n v. DEA.*, 357 F.3d 1012, 1013 n.2 (9th Cir. 2004) (discussing domestic products manufactured “from industrial hemp plants grown in Canada and in Europe”); see also *State v. Wright*, 588 N.W.2d 166, 169 n.2 (Minn. Ct. App. 1998) (“[I]ndustrial hemp products can be legally imported into this country.”); Poole, *supra* note 15, at 198 (“Currently industrial hemp is . . . legal to import.”). But see Dwyer, *supra* note 2, at 1153 (“[W]hile the United States imports hemp, it is primarily in the form of value-added goods rather than raw fiber, oil, or seed.”).

²¹⁷ See, e.g., Dwyer, *supra* note 2, at 1153 (“Processing plants are few, and for those that do exist, costs involved in transporting raw hemp to the plant are very high.”); Kolosov, *supra* note 27, at 258 (“Because of hemp’s bulk, it is most profitable to process the crop close to its source.”); cf. RAWSON, *supra* note 192, at 8 (“[T]he infrastructure for efficiently transporting and handling

ized to grow hemp are likely to find it difficult, at least initially, to find markets for their crops.²¹⁸ This would again place American hemp producers at a competitive disadvantage in relation to their peers in other countries.²¹⁹

B. An Uncertain Market

In fact, a study published by the United States Department of Agriculture in January 2000 cautioned that the market for hemp in this country “. . . will likely remain . . . small [and] thin”²²⁰ As one pair of commentators observed:

Even if industrial hemp production becomes legal very soon, technological barriers and market conditions will prolong the time before hemp is widely used by such industries as paper and textiles. To be cost-effective, investment in production facilities requires a strong, steady supply of raw materials, which will take time to create.²²¹

However, others paint a more optimistic picture.²²² Proponents of legalizing industrial hemp point to evidence that the global hemp market is

the heavy, bulky product is lagging.”). *See generally* Bergoffen & Clark, *supra* note 13, at 129 (“[B]uilding the production plant at or near the site of cultivation makes good economic sense for any industrial undertaking.”).

²¹⁸ *See* Dwyer, *supra* note 2, at 1153 (“[I]t would seem that there is no guaranteed market, even a domestic one, for raw hemp grown by American farmers.”); *cf.* RAWSON, *supra* note 192, at 9 (“The world market for hemp products is relatively small, and China, as the world’s largest hemp fiber and seed producer, has had and likely will continue to have major influence on . . . producers and processors in other countries.”).

²¹⁹ *See, e.g.,* Thedinger, *supra* note 30, at 429 (footnote omitted) (“China . . . benefits from local hemp production, a concentration of hemp textile factories, and low labor costs. These factors give China the competitive edge in the hemp textile industry.”).

²²⁰ *Industrial Hemp in the United States: Status and Market Potential*, USDA, 10, 25 (2000), http://www.ers.usda.gov/ersDownloadHandler.ashx?file=/media/328262/ages001e_1_.pdf; *see also* Dhooge, *supra* note 3, at 85 (“Although the U.S. Department of Agriculture has characterized the market potential for hemp seed in the United States as unknown, an estimation of such market is most likely small.”); Dwyer, *supra* note 2, at 1152 (“A 1997 study done by . . . a professor of agricultural economics at the University of Kentucky[] concluded that global markets for industrial hemp continue to shrink despite the fact that hemp is legally grown in many countries.”).

²²¹ Bergoffen & Clark, *supra* note 13, at 129-30 n.82; *see also* Dwyer, *supra* note 2, at 1155 n.95 (“[L]ack of research into harvesting and processing methods [is] a major constraint on the development of viable hemp cultivation in the United States.”).

²²² *See, e.g.,* JOHNSON, *supra* note 12, at 7 (noting that studies by Canadian agricultural agencies, among others, provide a more positive market outlook, given growing consumer demand and also certain “production advantages to growers, such as relatively low input and management requirements for the crop.”); Kolosov, *supra* note 27, at 259 (“Hemp’s . . . profitability could be significantly higher than the USDA’s 2000 estimates.”); Duppong, *supra* note 8, at 409 (“[I]ncreased efficiency in industrial hemp cultivation and production, coupled with a growing

expanding,²²³ and suggest that with the increased research and technological advances that can be expected to accompany the legalization of production in the United States,²²⁴ hemp has the potential to again be a viable and profitable American agricultural commodity.²²⁵

In any event, the resolution of this debate should not be foreclosed by the inflexible application of a federal drug law that was never intended to preclude industrial hemp cultivation.²²⁶ The debate should instead be resolved by the competitive forces of the open market.²²⁷ As another commentator succinctly explained:

market for environmentally friendly products, has created a promising future for industrial hemp products.”); Thedinger, *supra* note 30, at 421 (“Hemp advocates are extremely optimistic about hemp’s possibilities . . .”).

²²³ See Duppong, *supra* note 8, at 411 (“Overall, the continued growth in demand for industrial hemp products combined with greater productivity, ingenuity, and product offerings has created a promising global market for industrial hemp products and producers.”); Thedinger, *supra* note 30, at 444 (“Experts predict that the markets for . . . hemp will continue to grow, dramatically increasing hemp production.”).

²²⁴ See, e.g., Duppong, *supra* note 8, at 411 (“[I]f America allowed the growing of industrial hemp, emergence of new technologies and economies of scale would create more efficiency in the hemp market.”); Poole, *supra* note 15, at 208 (“If hemp were a legal alternative, the technology to process it effectively would continue to develop.”); Thedinger, *supra* note 30, at 429 (“If America were to legalize hemp production, it would create a local supply, drastically decreasing shipping costs and encouraging research and development . . .”).

²²⁵ See, e.g., *Monson v. DEA*, 522 F. Supp. 2d 1188, 1202 (D.N.D. 2007) (“There seems to be little dispute that the retail hemp market is significant, growing, and has real economic potential for North Dakota.”), *aff’d*, 589 F.3d 952 (8th Cir. 2009); Rheingans, *supra* note 64, at 133 (“With research and advances in technology, hemp has the potential to be a viable crop for Kentucky’s economy.”); see also Bergoffen & Clark, *supra* note 13, at 128 (“Yields will certainly increase with refinement of germ plasm and growing methods, as well as with the catalysis of an increased market for raw fiber and finished products.”); Dwyer, *supra* note 2, at 1153-54 (footnote omitted) (“[M]ills in the United States are currently importing raw hemp to produce specialty papers and composite boards. Production at these mills could expand drastically if hemp were available domestically, due to reduced costs of transportation alone.”).

²²⁶ See *N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 7 (1st Cir. 2000) (“[W]e can find no indication that Congress in 1970 gave any thought to how its new statutory scheme would affect [industrial hemp] production.”); Duppong, *supra* note 8, at 429 (“[T]here is a possibility that Congress would not have adopted the CSA in its present form if it had been aware of its negative effect on the domestic cultivation of plants for industrial uses.” (citing *United States v. White Plume*, 447 F.3d 1067, 1072 (8th Cir. 2006))); Murphy, *supra* note 58, at 776 (“Many potential industrial hemp producers . . . have argued that Congress did not consider the consequences of the CSA on non-psychoactive hemp. . . . Congress might very well have accidentally criminalized industrial hemp.”).

²²⁷ See *VoteHemp, Inc. v. DEA*, 237 F. Supp. 2d 55, 65 (D.D.C. 2002) (noting that “a free market for industrial hemp . . . could directly benefit those who seek to make a profit from deregulation, such as farmers and commercial entities”); Thedinger, *supra* note 30, at 445 (“Legalizing hemp production would allow the market to decide whether this plant should succeed and would allow American farmers to make the choice of whether or not to grow hemp.”).

It is questionable whether hemp will be able to compete with other fibers in the textile industry, such as cotton, and whether it is an economically prudent alternative for paper production. Regardless of these questions, it would be a disservice if the United States . . . did not explore these possibilities . . . thereby forfeiting potential employment opportunities in the production of end products that could supplement [the] economy.²²⁸

VIII. CONCLUSION

Public sentiment in this country appears to be evolving in favor of legalizing certain controlled substances that the federal government currently regulates to the point of prohibition.²²⁹ This trend is evident in the recent legalization of medical marijuana use in several states,²³⁰ and the “decriminalization”²³¹ of even recreational marijuana use and possession in some of the

²²⁸ Rheingans, *supra* note 64, at 133; *see also* Thedinger, *supra* note 30, at 446 (“As farmers in other nations make a living off of this versatile plant, American farmers are left out at a time when new innovative crops could greatly help small farms. . . . The United States should allow hemp to grow on American soil, allow industry and science to devise and study new uses, and realize the benefits of industrial hemp.”).

²²⁹ *See, e.g.*, Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAP. L. REV. 555, 566 n.44 (2010) (“[T]he sudden surge in public opinion support for marijuana legalization has . . . taken many political observers by surprise.”); Robert A. Mikos, *State Taxation of Marijuana Distribution and Other Federal Crimes*, 2010 U. CHI. LEGAL F. 223, 251 (2010) (“[T]here is substantial public support for marijuana legalization.”).

²³⁰ *See* Ingram, *supra* note 27, at 591 (“Reflecting . . . public opinion, a number of states have enacted laws legalizing the use of marijuana for medical purposes.”); Taylor W. French, Note, *Free Trade and Illegal Drugs: Will NAFTA Transform the United States Into the Netherlands?*, 38 VAND. J. TRANSNAT’L L. 501, 539 (2005) (asserting that national drug policy “is moving toward legalization of certain substances, as represented by the current medical-marijuana and decriminalization movements”). For an academic discussion of one recent state medical marijuana enactment, *see* Melissa Brown, Comment, *The Garden State Just Got Greener: New Jersey Is the Fourteenth State in the Nation to Legalize Medical Marijuana*, 41 SETON HALL L. REV. 1519 (2011).

²³¹ Decriminalization is a term “susceptible of various definitions.” *Hein v. Lacy*, 616 P.2d 277, 285 (Kan. 1980). However, the term “usually refers to the lessening or removal of criminal sanctions for the possession or use of small amounts of controlled substances, and focuses on the rehabilitation of drug abusers through drug treatment.” Asa Hutchinson, *An Effective Drug Policy to Protect America’s Youth and Communities*, 30 FORDHAM URB. L.J. 441, 441 n.2 (2003); *see also* Ekow N. Yankah, *A Paradox in Overcriminalization*, 14 NEW CRIM. L. REV. 1, 7 (2011) (“Decriminalization statutes typically remove the criminal sanctions for the possession of marijuana for personal use.”). In this sense, “decriminalization is not synonymous with legalization.” *Commonwealth v. Cruz*, 945 N.E.2d 899, 911 (Mass. 2011); *see also In re Johnson*, 729 P.2d

same and other states.²³² The current hemp legalization movement is a reflection—and perhaps also to some extent a beneficiary²³³—of these developments.²³⁴

Nevertheless, even among the states (which generally have been more receptive to drug legalization and decriminalization efforts than the federal government),²³⁵ the hemp legalization movement has experienced relatively little success to date.²³⁶ Even if this situation were to change dramatically,²³⁷ the federal prohibition on hemp production would continue to subject those attempting to grow industrial hemp in accordance with state law to potential

1175, 1179 (Kan. 1986) (“[T]here is a vast difference between decriminalizing drug use penalties and legalizing the use of drugs.”).

²³² See *State v. Seekins*, 8 A.3d 491, 505 (Conn. 2010) (“[S]ome states have taken steps to decriminalize the recreational use of [the] drug”); Michael P. O’Connor & Celia M. Rumann, *Market Solutions to Global Narcotics Trafficking and Addiction*, 5 PHX. L. REV. 123, 140-41 (2011) (footnote omitted) (“Recently, in the United States, a patchwork of state initiatives have attempted to decriminalize or legalize certain drugs, sometimes for limited medicinal uses and sometimes for general recreational use. Currently the legislatures of sixteen states and the District of Columbia have approved medicinal use of marijuana. Some elimination of criminal penalties on small amounts of marijuana have passed in thirteen additional states.”); Yankah, *supra* note 231, at 7 (“[T]he 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. . . . Thirteen states have now adopted some form of decriminalization.”).

²³³ See Brady, *supra* note 3, at 92 (discussing the contention that “marijuana legalizers are pushing industrial hemp”); Dwyer, *supra* note 2, at 1180 (“Some see the push for industrial hemp as a cover for legalizing marijuana.”); Poole, *supra* note 15, at 209 (“Legalizing industrial hemp may . . . be part of the greater campaign to legalize marijuana.”).

²³⁴ See, e.g., Matthew L.M. Fletcher, *The Drug War on Tribal Government Employees: Adopting the Ways of the Conqueror*, 35 COLUM. HUM. RTS. L. REV. 1, 16 (2003) (noting that “many South Dakota farmers support the legalization of industrial hemp”); see also Duppong, *supra* note 8, at 432 (“[T]here appears to be a national trend to legalize industrial hemp.”); cf. Stern & DiFonzo, *supra* note 86, at 759 (“With far less fanfare than the medical marijuana movement, advocates of industrial hemp have also demonstrated a willingness to take on the federal government.”).

²³⁵ See *ACLU v. Mineta*, 319 F. Supp. 2d 69, 79 n.1 (D.D.C. 2004) (“Congress has determined that it is in the interest of the general welfare to oppose the legalization of controlled substances.”), *appeal dismissed*, No. 04-5285, 2005 WL 263924 (D.C. Cir. Feb. 2, 2005); cf. *State v. Nelson*, 2008 MT 359, ¶ 37, 346 Mont. 366, 195 P.3d 826, 834 (acknowledging “the tension created between the criminalization of marijuana on the federal level, and its legalization for medical use in states such as Montana”).

²³⁶ See Shepherd, *supra* note 9, at 241 (“At every opportunity, the D.E.A. has used its power and authority to bully state legislatures into killing bills aimed at industrial hemp legalization.”); cf. Lash, *supra* note 3, at 325 (“The progress for some states . . . has been slow.”).

²³⁷ See Dwyer, *supra* note 2, at 1167 (“The lack of legal justification for the DEA’s inclusion of industrial hemp within the [CSA’s] definition of marijuana theoretically clears the way for states to authorize systems allowing for hemp cultivation”); cf. JOHNSON, *supra* note 12, at 17 (“The past decade has witnessed a resurgence of interest in the United States in producing industrial hemp.”).

arrest and federal criminal prosecution.²³⁸ Given the DEA's continued opposition to legalizing industrial hemp,²³⁹ and the many other practical and political obstacles to successful hemp cultivation in this country,²⁴⁰ those seeking to revitalize the American hemp industry face a daunting challenge.²⁴¹ Nevertheless, the challenge ultimately may prove to be one well worth undertaking.²⁴²

²³⁸ See *Olsen v. Holder*, 610 F. Supp. 2d 985, 994 (S.D. Iowa 2009) (citing *Monson v. DEA*, 522 F. Supp. 2d 1188, 1200 (D.N.D. 2007)) (“[F]armers could be prosecuted for growing industrial hemp, despite state authorization to do so, because industrial hemp [falls] squarely within the definition of marijuana in the CSA.”); *Shepherd*, *supra* note 9, at 245 (“[T]he cultivation of hemp in America is technically illegal, since the D.E.A. would arrest anyone who tried to plant hemp seeds having even a negligible amount of THC.”). See generally *Monson*, 522 F. Supp. 2d at 1202 (“Industrial hemp may not be the terrible menace the DEA makes it out to be, but industrial hemp is still considered to be a Schedule I controlled substance under the current state of the law in this . . . country.”).

²³⁹ See *N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 3 (1st Cir. 2000) (“[R]egardless of intended ‘industrial’ use, the DEA views the cultivation of cannabis sativa plants as the manufacture of marijuana and therefore illegal under federal law (absent federal licensing).”); *Dwyer*, *supra* note 2, at 1178 (“While . . . efforts to rejuvenate the hemp industry continue to surface, the DEA is still hostile to state efforts to allow for industrial hemp.”); *Shepherd*, *supra* note 9, at 247 (“It is not uncommon for hemp proponents to be summarily shut down by the strong opposition the D.E.A. has to offer. . . . Other states attempting to pass pro-hemp legislation will meet with the same obstacles as the D.E.A. mounts a severe campaign threatening federal preemption of any state law that comes close to passage.”).

²⁴⁰ See, e.g., *Shepherd*, *supra* note 9, at 244 (footnote omitted) (“Technically, industrial hemp is in the same genus/species as marijuana. This close relationship has been the primary source of problems for the hemp legalization movement.”); see also *Poole*, *supra* note 15, at 205 (noting that “industrial hemp is not without its critics”); *TheDinger*, *supra* note 30, at 420 (“Industrial hemp has both a long history and a dubious reputation.”).

²⁴¹ See *Lash*, *supra* note 3, at 355 (“There are . . . many organizations calling for the legalization of industrial hemp, but their requests have fallen on deaf ears.”); *Shepherd*, *supra* note 9, at 242 (“Although the positive truths about industrial hemp far outweigh the potential for abuse, the D.E.A. continues to thwart the growing number of farmers, entrepreneurs, and consumers demanding access to the crop and its yield.”); cf. *Poole*, *supra* note 15, at 198 (“Legalizing industrial hemp will require a concerted effort demanding that Congress reclassify it as a plant distinct from marijuana.”).

²⁴² See *Lash*, *supra* note 3, at 354, 355 (asserting that the federal government “must take a hard look at the plant’s ecological benefits” and “recognize that, in the long run, cultivation of industrial hemp benefits this country and all its people”); *Poole*, *supra* note 15, at 198 (asserting that the “agricultural benefits” of industrial hemp “demand its legalization”).

GUNS, VIOLENCE, AND SCHOOLS: POLICIES TO PREVENT AND RESPOND TO SCHOOL SHOOTINGS

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I. INTRODUCTION

Friday, December 14, 2012, at 9:30 a.m., twenty-year-old Adam Lanza walked onto the Sandy Hook Elementary School campus in Newtown, Connecticut, armed with an assault rifle and two handguns.¹ Over the next twenty minutes, he shot and killed twenty students and six adults.² Less than a month later, on Thursday, January 10, 2013, at 9 a.m., a 16-year-old student walked

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¹ See *Sandy Hook Shooting: What Happened?*, CNN (Dec. 2012), <http://www.cnn.com/interactive/2012/12/us/sandy-hook-timeline/index.html>.

² *Id.*

onto a high school campus in Taft, California, armed with a shotgun.³ He shot a fellow student with the shotgun.⁴ These are the two most recent United States school shootings that have occurred over the past several decades.

School shootings have “ignited an explosion of public fear that has propelled parents, school officials, and politicians to action.”⁵ Perhaps, what is most concerning about school shootings is the young age of the shooters, the large numbers of innocent victims, and the randomness of the killings.⁶ School shootings have almost become a “commonplace phenomenon.”⁷ In fact, school shootings continue despite the different strategies used to prevent them, such as tightening school security, increasing penalties for offenders, and increasing public awareness.⁸

One popular response to school shootings is to tighten restrictions on guns and assault weapons.⁹ After the Sandy Hook School massacre, President Obama said he supported the reinstatement of the federal ban on assault weapons.¹⁰ However, the nation is divided about gun restrictions and ownership. For example, a 2011 Pew poll, conducted after the shooting of Representative Giffords, found that forty-nine percent of Americans believed it was “more important to protect the rights of Americans to own guns,” whereas forty-six percent believed it was “more important to control gun ownership.”¹¹

Even discussions about how to make schools safer can be difficult. Before the deadly shooting at Columbine High School in Littleton, Colorado, parents and others were taking strong positions in the debate over school safety and

³ Dylan Stableford, *Student Opens Fire at California High School, Wounding One*, YAHOO! NEWS (Jan. 10, 2013, 1:30 PM), <http://news.yahoo.com/blogs/lookout/high-school-shooting-taft-california-183012601.html>.

⁴ *Id.*

⁵ Ira M. Schwartz et al., *School Bells, Death Knells, and Body Counts: No Apocalypse Now*, 37 HOUS. L. REV. 1, 2 (2000).

⁶ David Hemenway, *Lethal Violence in the Schools*, 27 J. HEALTH POL. POL'Y & L. 267, 267 (2002).

⁷ Timothy L. Jacobs, *School Violence: An Incurable Social Ill That Should Not Lead to the Unconstitutional Compromise of Students' Rights*, 38 DUQ. L. REV. 617, 617 (2000).

⁸ *Id.* at 617-18.

⁹ See, e.g., Halimah Abdullah, *Obama Remains Committed to Assault Weapons Ban, White House Says*, CNN (Dec. 19, 2012, 8:46 AM), <http://www.cnn.com/2012/12/14/politics/obama-assault-weapons/index.html>.

¹⁰ See *id.* The prohibition did not ban all assault weapons but it did restrict some of their features such as limiting the capacity of magazines, and regulating attachments such as pistol grips and flash suppressors; *But see* Dan Frosch, *Some Sheriffs Object to Call for Tougher Gun Laws*, N.Y. TIMES, Feb. 1, 2013, at A19, available at http://www.nytimes.com/2013/02/01/us/some-sheriffs-object-to-call-for-tougher-gun-laws.html?ref=us&_r=0 (stating that Sheriffs from Colorado, Utah, Arizona, Kentucky, Oregon, and Wisconsin oppose President Obama's proposal for stiffer gun laws).

¹¹ See Abdullah, *supra* note 9.

how to prevent school shootings.¹² One side of the debate argued for more school safety officers, metal detectors, and zero tolerance for weapons at school.¹³ Others argued that nobody should infringe upon children's constitutional rights to privacy and expression.¹⁴

After a school shooting, it is common for schools to review their policies and implement strategies to prevent another school shooting. For example, such strategies have included updating gun laws,¹⁵ creating gun-free school zones,¹⁶ and changing the infrastructure of schools.¹⁷ Even with the numerous preventative strategies to prevent school shootings, they continue to occur.

This comment argues that current laws and policies are not sufficient to prevent, or respond to school shootings. The time has arrived for society to overcome the fear of guns and consider arming certain teachers and school officials so they can protect school children. Part II reviews some of the recent school shootings that have occurred in the United States, giving special attention to the shootings at Virginia Tech, Columbine, and Sandy Hook. Part III analyzes California initiatives used to reduce gun violence in schools. Part IV reviews the Federal Safe School Initiative. Part V outlines President Obama's 2013 recommendations for reducing school gun violence. Part VI recommends strategies that school districts should adopt/update to prevent school shootings. Part VII proposes that school officials and parents consider a new strategy to prevent and respond to school shootings—arming certain teachers and school personnel. Part VIII provides a conclusion.

II. RECENT SCHOOL SHOOTINGS IN THE UNITED STATES

For many decades, the public has witnessed school shootings ranging from elementary schools¹⁸ to colleges.¹⁹ The following describes some of the most recent U.S. school shootings followed by a brief overview on three of the most

¹² See Joel Epstein, *Breaking the Code of Silence: Bystanders to Campus Violence and the Law of College and University Safety*, 32 STETSON L. REV. 91, 98 (2002).

¹³ *Id.*

¹⁴ *Id.* at 98, 122-23.

¹⁵ See, e.g., CAL. PENAL CODE §§ 23500-34370 (West 2012) (detailing laws controlling deadly weapons).

¹⁶ See, e.g., *id.* §626.9 (California Gun-Free Zone Act).

¹⁷ See, e.g., Susan Meeker, *Shooting Spurs Review of School Safety*, ORLAND PRESS REG. (Cal.), Dec. 21, 2012, available at 2012 WLNR 27687462 (describing how after a school shooting, one strategy to prevent future school shooting was to erect fences around the school).

¹⁸ Gary Stoller et al., *Gunman Kills Mom, 26 Others in School Shooting Spree*, USA TODAY, Dec. 15, 2012, <http://www.usatoday.com/story/news/nation/2012/12/14/school-shooting-connecticut/1769367/> (describing the 2012 shooting at Sandy Hook Elementary School).

¹⁹ See, e.g., Christine Hauser & Anahad O'Connor, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. TIMES, Apr. 16, 2007, http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html?pagewanted=all&_r=0 (describing the 2007 shooting at Virginia Tech University).

notorious school shootings: Virginia Tech, Columbine High School, and Sandy Hook Elementary School.²⁰

On January 10, 2013, a 16-year-old year old high school student in Taft, California, arrived at the school's campus with a 12-gauge shotgun, walked into his first period class, and shot one student.²¹

On January 31, 2013, a student walked onto Price Middle School in Atlanta, Georgia, and shot another student in the back of the neck.²²

On February 27, 2012, a 17-year-old student took a .22 caliber pistol to his high school in Chardon, Ohio.²³ Once he was at the school, he fired ten shots into a group of students, killing three students.²⁴

On April 2, 2012, a 43-year-old former student walked onto the school campus of Oikos University in California.²⁵ Once he arrived on campus, he randomly shot at students in a classroom, killing seven people.²⁶

A. *Virginia Tech University, Blacksburg, Virginia*

On April 16, 2007, Seung Hui Cho walked into a dorm room on the Virginia Tech campus, and shot Emily Hilscher.²⁷ Shortly thereafter, another student, Ryan Christopher Clark entered the room and Cho shot him.²⁸ Both students died at the scene as a result of their gunshot wounds.²⁹ At approximately 7:17 a.m., Cho returned to his dorm room and changed out of his bloody clothing.³⁰ Between 9:15 a.m. and 9:30 a.m., Cho entered Norris Hall and chained the three main entrances shut.³¹ At approximately 9:40 a.m., Cho started his shooting rampage in Norris Hall.³² Cho's shooting spree lasted

²⁰ The purpose of this summary is to provide a broader perspective of the locations, ages, and magnitude of the shootings.

²¹ Stableford, *supra* note 3.

²² See Kate Brumback, *Authorities: Teen Wounded at Ga. Middle School*, YAHOO! NEWS (Jan. 31, 2013, 5:59 PM), <http://news.yahoo.com/authorities-teen-wounded-ga-middle-school-215019573.html>.

²³ See *Deadliest U.S. School Shootings*, S.F. CHRON., Dec. 14, 2012, <http://www.sfgate.com/crime/article/Deadliest-U-S-school-shootings-3454376.php>.

²⁴ See *id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ See VIRGINIA TECH REVIEW PANEL, *MASS SHOOTINGS AT VIRGINIA TECH 25 (2007)*, available at <http://www.governor.virginia.gov/tempcontent/techPanelReport-docs/FullReport.pdf>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 26.

³² *Id.* at 27.

approximately eleven minutes, during which he killed thirty people and wounded seventeen people.³³

B. Columbine High School, Littleton, Colorado

On April 20, 1999, between 11:14 a.m. and 11:22 a.m., two students, Dylan Klebold and Eric Harris, walked onto the Columbine High School campus carrying two large duffel bags filled with explosives.³⁴ They placed the duffel bags near two different lunch tables in the school's cafeteria and walked away.³⁵ Each duffel bag contained a twenty-pound propane bomb, set to explode at 11:17 a.m.³⁶ At approximately 11:19 a.m., they started randomly shooting at students. This shooting rampage lasted approximately forty-nine minutes, killing thirteen people.³⁷

C. Sandy Hook Elementary School, Newtown, Connecticut

On December 14, 2012, at approximately 9:30 a.m., a 20-year-old gunman, Adam Lanza, arrived at the Sandy Hook Elementary School armed with three guns: a semi-automatic AR-15 assault rifle, and two semi-automatic handguns.³⁸ Once Lanza gained access to the classrooms, he started his shooting rampage.³⁹

The police department received its first 911 call at 9:30 a.m.⁴⁰ Police and other first responders arrived at the school approximately twenty minutes later.⁴¹ Once on scene, the police discovered Lanza dead as a result of a self-inflicted gunshot wound.⁴² In the end, Lanza killed twenty-six people (twenty students and six adults).⁴³

III. CALIFORNIA INITIATIVES

The following sections discuss two legal strategies California has instituted to make schools safer and keep guns off school grounds. The first is the Cali-

³³ *Id.* at 27-28.

³⁴ *Jefferson County Colorado, Sheriff Department: The Columbine High School Shootings*, CNN, <http://www.cnn.com/SPECIALS/2000/columbine.cd/Pages/NARRATIVE.Time.Line.htm> (last visited Nov. 1, 2013).

³⁵ *See id.*

³⁶ *See id.* (stating the propane bombs never exploded).

³⁷ *See Greg Toppo, 10 Years Later, The Real Story Behind Columbine*, USA TODAY, Apr. 14, 2009, http://usatoday30.usatoday.com/news/nation/2009-04-13-columbine-myths_N.htm.

³⁸ *See Sandy Hook Shooting*, *supra* note 1.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

ifornia Gun-Free School Zone Act of 1995 that makes it a crime to have a firearm on or near school grounds. The second is California's Zero Tolerance that requires schools to suspend students who possess a firearm on campus and notify the authorities.

A. *California Gun-Free School Zone Act of 1995*

The federal government enacted the Gun-Free Schools Act in October of 1994.⁴⁴ This Act required states, which wanted to receive federal funds, to enact a state law requiring local schools expel, for a minimum of one year, any student "who is determined to have brought a firearm to school."⁴⁵ The Act also contained additional requirements, such as mandatory referral to the justice system of any juvenile who brings a gun to school.⁴⁶ Beginning in 1994, most states adopted Gun-Free Schools Zone laws that mirrored the federal law regarding punishment and expulsion of students found to be in possession of a gun while on school grounds.⁴⁷

California codified the federal Gun-Free School Zone Act in the California Penal Code ("CPC") section 626.9.⁴⁸ This Act prohibits a person from possessing a firearm in any place that the person knows or should know is a school zone, unless the person has written permission.⁴⁹ It also prohibits any person from recklessly discharging a firearm in a school zone.⁵⁰ In defining a school zone, CPC section 626.9 (e)(1) defines a school zone as an area, private or public that provides instruction from kindergarten through the twelfth grade.⁵¹ Punishment for violating these sections includes imprisonment for two, three or five years.⁵²

Supporters of California's Gun-Free School Zone Act state that it makes schools safer by giving schools the ability to ban firearms on campus.⁵³ Some

⁴⁴ See *Guidance Concerning State and Local Responsibilities Under the Gun-Free School Act of 1994*, U.S. DEP'T EDUC., <https://www2.ed.gov/offices/OSDFS/gfsaguidance.html> (last visited Nov. 1, 2013).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See Kathleen M. Cerrone, Comment, *The Gun-Free Schools Act of 1994: Zero Tolerance Takes Aim at Procedural Due Process*, 20 PACE L. REV. 131, 163-64 (1999).

⁴⁸ CAL. PENAL CODE. § 626.9 (West 2010).

⁴⁹ *Id.* § 626.9(b).

⁵⁰ *Id.* § 626.9(d).

⁵¹ *Id.* § 626.9(e)(1).

⁵² *Id.* § 626.9(f)(1).

⁵³ See Arlette Saenz, *Michigan Veto Preserves 'Gun Free' Schools*, ABC NEWS (Dec. 18, 2012), <http://abcnews.go.com/Politics/OTUS/michigan-gov-rick-snyder-vetoes-bill-gun-free/story?id=18005967> (quoting Michigan Gov. Rick Snyder, "While we must vigilantly protect the rights of law-abiding firearms owners, we must also ensure the right of designated public entities to exercise their best discretion in matters of safety and security.").

have argued that labeling a campus as “weapon-free” or “weapons free” means, “free of weapons carried by law-abiding persons.”⁵⁴ Supporters also point out that if someone is believed to be armed they are less likely to be a victim of a crime.⁵⁵ For example, in a survey of criminals, many said that if they knew their intended victim was armed, it would deter them from committing the intended offense.⁵⁶

B. California’s Zero Tolerance

To comply with the Federal Gun-Free Schools Act, the California state legislature amended California Education Code section 48915(c).⁵⁷ In section 48915(c)(1), California added the requirement for a mandatory suspension and recommendation for expulsion of students for “[p]ossessing, selling, or otherwise furnishing a firearm.”⁵⁸ California Education Code section 48902 requires school officials to refer any student found with a firearm to the police.⁵⁹

The Department of Education provided a rationale for the zero tolerance policies by stating, “[g]iven public concern about escalating incidences of school violence, and in the wake of school shootings, school district governing boards adopted zero tolerance policies to send a ‘get tough’ message to the community that violent behavior, incidents, and crime would not be tolerated.”⁶⁰

California’s Zero Tolerance laws have received mixed reviews.⁶¹ The controversy with California’s Zero Tolerance laws centers on the methods used to implement the policy rather than the goals of such policies.⁶² Critics have cited three main criticisms.⁶³ First, it appears as if the policies are being used beyond their original intent of applying only to students who possess firearms.⁶⁴ Second, school officials are being told that zero tolerance policies will

⁵⁴ See David B. Kopel, *Pretend “Gun-Free” School Zones: A Deadly Legal Fiction*, 42 CONN. L. REV. 515, 583 (2009).

⁵⁵ *Id.* at 537.

⁵⁶ *Id.* (stating that in a National Institute of Justice survey it was determined that 56% of criminals would not commit a crime if they thought the intended victim was armed, 40% said that they would not attack a potential victim if they thought the victim had a gun, and 74% said that burglars avoided houses where people were still home due to the fear of being shot).

⁵⁷ See CAL. EDUC. CODE §48915(c)(1) (West 2006).

⁵⁸ *Id.*

⁵⁹ *Id.* § 48902.

⁶⁰ *Zero Tolerance*, CAL. DEP’T EDUC., <http://www.cde.ca.gov/lr/ss/se/zerotolerance.asp> (last visited June 23, 2013).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

These findings suggested that educators, law enforcement officers, and others should take proactive actions in response to the problem of school shootings.⁷⁵ The initiative's findings provided new information to develop strategies focusing on preventing school shootings.⁷⁶

V. PRESIDENT OBAMA'S 2013 SOLUTION TO GUN VIOLENCE

On January 16, 2013, President Obama released a number of legislative proposals and executive actions in an attempt to reduce gun violence.⁷⁷ President Obama said the proposals addressed four goals: "keeping guns out of the wrong hands, keeping 'weapons of war' off the streets, making schools safer, and improving mental health services."⁷⁸ His proposals will include federal funding that will allow communities to hire 1,000 school resource officers and counselors.⁷⁹

Unfortunately, the President's proposals would have done very little to prevent the Sandy Hook Elementary School Shooting.⁸⁰ For example, Lanza's semi-automatic rifle complied with the laws of Connecticut, and he was not the person who purchased the gun.⁸¹ Even the President's banning of high capacity magazines would only have slowed Lanza's shooting rampage.⁸²

VI. RECOMMENDED STRATEGIES TO PREVENT SCHOOL SHOOTINGS⁸³

School shootings are horrific and deserve a swift response from school officials, police, and legislators. Policy decisions should not be made "in such an emotionally charged environment [because they] may to be ineffective or disproportionate to the actual danger posed."⁸⁴ If decisions are made too quickly, policies could be based on misconceptions that school violence is on the rise, and school children are not safe.⁸⁵ In responding to school shootings,

⁷⁵ *Id.* at 11.

⁷⁶ *Id.* at 31.

⁷⁷ Michael A. Memoli, *Obama Announces Sweeping Proposals to Curb Gun Violence*, L.A. TIMES, Jan. 16, 2013, available at <http://www.latimes.com/news/politics/la-pn-obama-gun-policy-proposals-20130116,0,765863,print.story>.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See Michael Cooper, Michael Lou & Michael D. Shear, *Obama Proposal to Look Beyond Mass Shootings*, N.Y. TIMES, Jan. 16, 2013, at A1, available at <http://www.nytimes.com/2013/01/16/us/politics/obama-gun-proposal-to-look-beyond-mass-shootings.html?hp>.

⁸¹ *Id.*

⁸² *Id.*

⁸³ The purpose of this part is not to dictate to school districts what strategies to use; it is to provide possible strategies to choose from in order to fit their particular situation.

⁸⁴ See Schwartz, *supra* note 5.

⁸⁵ *Id.* at 2-3.

policymakers, parents, and school officials need to “have time for reasoned prudence in crafting responses to school violence.”⁸⁶

School officials and legislators respond to school violence using a variety of strategies.⁸⁷ These strategies commonly include a “[c]ombination of deterrence, prevention, and punishment.”⁸⁸ In response to school gun violence, schools are going beyond the traditional reprimand tactics or home suspension.⁸⁹ For example, some schools have focused on prevention by instituting an anti-violence program.⁹⁰

After a school shooting, the public can expect the usual heightened security, an increase in searches, and an array of legislative bills in an attempt to deter future school shootings.⁹¹ However, constitutional challenges to such measures will likely slow the implementation of new strategies to make schools safe.⁹²

The current laws, policies, and procedures do not provide the best solutions to school shootings.⁹³ Policy makers drafted these solutions at a time when school shootings were an isolated phenomenon in specific urban settings.⁹⁴ However, present-day school shootings are surprise attacks that can occur at any school.⁹⁵

The response to school shootings should not revolve around just gun laws and restrictions. As stated by Dr. Carl Bell of the Community Mental Health Council in Chicago, “you can’t blame [school shootings] on the school, you can’t blame it on the family, the breakdown of religion or the availability of guns. It is not that simple. It is usually a combination of things. Behavior is multidetermined.”⁹⁶ Vice President Biden reiterated this by stating, “there’s no silver bullet” when asked how to prevent school shootings.⁹⁷

Schools must take two actions because school shooting will continue to occur. The first is to review and update current preventative strategies. The second is to adopt a new policy, namely arming certain schoolteachers and

⁸⁶ *Id.* at 3.

⁸⁷ *Id.* at 13.

⁸⁸ *Id.*

⁸⁹ See Cerrone, *supra* note 47, at 154.

⁹⁰ *Id.* (describing how New Jersey Passaic High School instituted their own anti-violence program which includes peer meditation and leadership programs).

⁹¹ See Jacobs, *supra* note 7, at 618.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 618-19.

⁹⁶ Cerrone, *supra* note 47, at 153.

⁹⁷ See Olivier Knox, *Biden: ‘No Silver Bullet’ Against Gun Violence*, YAHOO! NEWS (JAN. 11, 2013, 4:25 PM), <http://news.yahoo.com/blogs/ticket/biden-no-silver-bullet-against-gun-violence-212503247—politics.html>.

officials so they can minimize the causalities of the next school shooting. The recommended strategies are as follows.⁹⁸

A. *Understand the Influence of Violence in the Media*

Some allege that violence in the media encourages violent behavior in children.⁹⁹ For example, the shooting at Frontier Middle School in the State of Washington, where a 14-year-old boy went on a shooting spree.¹⁰⁰ After the shooting, the boy's background was analyzed.¹⁰¹ It turned out that guns and violent video games were prevalent in his house.¹⁰² Additionally, "he picked up a pose from the Oliver Stone movie 'Natural Born Killers,' telling a friend it would be 'pretty cool' to go on a killing spree just like the two lead characters in the film."¹⁰³ According to court records, as the boy stood over one victim who was choking on his own blood he said, "[t]his sure beats algebra, doesn't it?"¹⁰⁴

Some also allege that violence in music can cause children to act in a violent manner.¹⁰⁵ For example, in the Jonesboro attack, the shooter was a fan of gangster rap.¹⁰⁶ People close to the shooter said that the shooter's favorite song was "Crept and We Came," which is about committing killings in a massacre-like way.¹⁰⁷ The shooter's mother said her son also liked playing *Mortal Kombat*, a video game involving the graphic killing of opponents.¹⁰⁸

However, not everyone blames culture and media for violent behavior.¹⁰⁹ Millions of children, who are exposed to violence through music, culture, and media do not become murderers.¹¹⁰ Dr. Unis, a psychiatrist who analyzed the Frontier shooting, "is reluctant to blame violent cultural influences."¹¹¹ Dr. Unis and others agree there is a syndrome at work where a child sees a shootout

⁹⁸ This comment is not recommending that schools adopt all of these strategies. But, the more schools adopt, the safer the school will be.

⁹⁹ See Timothy Egan, *Where Rampages Begin: A Special Report; From Adolescent Angst To Shooting Up Schools*, N.Y. TIMES, June 4, 1998, at 11, available at <http://www.nytimes.com/1998/06/14/us/where-rampages-begin-special-report-adolescent-angst-shooting-up-schools.html?pagewanted=all&src=pm>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

on the news and is inspired to do something similar.¹¹² As stated by Renee Erb, an Alaskan prosecutor, “[t]he media or violent videos do not by themselves make the event happen . . . [but] it shows them a way.”¹¹³

B. Security and Police on Campus

One possible strategy to reduce school shootings is to place security guards or police on the school campus.¹¹⁴ Some schools that did not have security before the Sandy Hook Elementary School shooting are evaluating the pros and cons of hiring armed security guards.¹¹⁵ Even schools that cannot afford hiring security guards are finding creative ways to pay for them.¹¹⁶ For example, the superintendent of schools in Stamford, Connecticut is hiring security guards and paying for them using the money budgeted for school supplies.¹¹⁷

If schools do not want security guards on campus, another possible strategy to protect students is to have a police officer on campus during school hours.¹¹⁸ This strategy has been around since the mid-1990s.¹¹⁹

C. School Involvement

School personnel should be looking for clues that usually precede school violence.¹²⁰ As stated by the Center for Disease Control, the most important things schools can do to improve safety are be aware of behavior that might precede violent outbursts, watch for threats, and respond to bullying behav-

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See, e.g., *Security Guards Hired for Stamford Elementary Schools Using Budget for Supplies*, MYFOXNY.COM (Jan. 2, 2013, 7:13 PM), <http://www.myfoxny.com/story/20489760/security-guards-hired-for-stamford-elementary-schools-using-budget-for-supplies>.

¹¹⁵ See, e.g., Memorandum from William S. McKersie, Superintendent, Greenwich Pub. Sch. (Jan. 3, 2013), available at <http://s3.documentcloud.org/documents/551126/010313-supt-safety-letter.pdf>.

¹¹⁶ *Security Guards Hired for Stamford Elementary Schools Using Budget for Supplies*, *supra* note 114.

¹¹⁷ *Id.*

¹¹⁸ See, e.g., Paul Foy, *Gun Group Offers Training for Utah Teachers*, DAILY HERALD, Dec. 26, 2012, http://www.heraldextra.com/news/state-and-regional/gun-group-offers-training-for-utah-teachers/article_bf803f81-64f7-5e69-bfc0-2a3e840c8dd1.html.

¹¹⁹ See, e.g., Larry Margasak, *Experts: Trained Police Needed for Schools*, DAILY BREEZE (Cal.), Dec. 29, 2012, at A11.

¹²⁰ See Sarah E. Redfield, *Threats Made, Threats Posed School and Judicial Analysis in Need of Redirection*, 2003 B.Y.U. EDUC. & L.J. 663, 665-69 (2003) (stating that the Frontier Middle School shooter wrote a violent poem that foreshadowed his plans).

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ior.¹²¹ It is important that school officials respond to threats and allegations of threats, quickly and appropriately.¹²²

As pointed out in the Safe Schools Initiative, teachers, and other school officials play a large role in identifying warning signs that a student may be planning an attack.¹²³ The teachers and school officials must know the students well enough to spot behavior changes that could indicate that a student is considering or planning a school attack.¹²⁴

VII. PROPOSED STRATEGY TO PREVENT AND RESPOND TO SCHOOL SHOOTINGS—ARMING TEACHERS¹²⁵

As noted above, school officials use many strategies to prevent school shootings. Arming certain teachers and school personnel must be a strategy used to prevent, and respond to, school shootings.¹²⁶ There are two logical rationales behind this strategy.¹²⁷ The first rationale is that if people know a schoolteacher or official may have a gun on campus they will be less likely to attack that campus.¹²⁸ The second rationale is that when someone goes on another school shooting spree an armed teacher will be able to quickly stop the shooter.¹²⁹

A bill in South Carolina, would allow teachers and other school employees to carry guns at school as long as they meet certain requirements.¹³⁰ As stated by the bill's sponsor, Rep. Phillip Lowe, "Schools are gun-free zones right no[w] . . . [s]o the deranged killers know they can go there and wreak the most havoc."¹³¹

¹²¹ *Id.* at 666-68.

¹²² *Id.* at 670.

¹²³ See VOSSEKUIL ET AL., *supra* note 67, at 32-33.

¹²⁴ *Id.* at 33-35.

¹²⁵ The purpose of this part is not to advocate that every teacher and school employee should be armed, it is to emphasize that this is one strategy that is debated and considered when dealing with school shootings. Some school districts may find this a viable option while others may not.

¹²⁶ See, e.g., Robert Kittle, *Prefiled Bill Would Let SC Teachers Carry Guns at School*, WLTX.COM (Dec. 19, 2012, 9:01 PM), <http://www.wltx.com/news/article/213331/2/Prefiled-Bill-Would-Let-SC-Teachers-Carry-Guns-at-School>.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* (These requirements would include having a permit to carry a concealed weapon, qualify as a expert marksman, have no history of violence, notify the school district they are armed, and they would have to keep their guns concealed while at school).

¹³¹ *Id.*

Some gun activists are relying on arming teachers to prevent future school shootings.¹³² For example, in the Harrold Independent School District in Northwest Texas, certain teachers are allowed to carry firearms to prevent shooting rampages such as the one in Newtown, Connecticut.¹³³ This policy—started after a 2006 schoolhouse shooting in Pennsylvania and the shooting spree at Virginia Tech in 2007—was the first program designed to arm teachers.¹³⁴ The teachers in the program who carry firearms must complete training and receive approval from the school board to carry the concealed weapons.¹³⁵ However, the Harrold Independent School District appears to have a good reason for arming its teachers—the school is thirty minutes from the nearest police department.¹³⁶ In this school, the teachers are the first responders and need to protect the children.¹³⁷

Any move toward arming teachers would be one step closer to safety “for students and teachers—not for predators who are legally guaranteed that their victims will be defenseless.”¹³⁸ Pending legislation in Pennsylvania “would allow teachers, principals, and other personnel to carry firearms on school property.”¹³⁹ As stated by Rep. Greg Lucas, “We trust our teachers with our students’ minds. However, current law prevents them from defending our children’s bodies during an emergency situation.”¹⁴⁰

There are many people opposed to arming teachers.¹⁴¹ For example, Rep. Sellers (D-Denmark) worries that if there is a shooting at a school and a teacher has a gun, the police will not know whom to shoot.¹⁴² Some argue that teachers should not be armed because the teachers do not have a locking drawer or secure place to keep the gun.¹⁴³ Finally, others argue that teachers should not

¹³² See Kevin Fagan, *Gun Backers Want to Arm Schoolteachers*, S.F. CHRON., Dec 17, 2012, <http://www.sfgate.com/crime/article/Gun-backers-want-to-arm-schoolteachers-4126214.php#page-2>.

¹³³ See Mark Gollom, *The Latest U.S. Debate: Should Teachers Carry Guns?*, CBC NEWS (Dec. 19, 2012, 5:19 AM), <http://www.cbc.ca/news/world/the-latest-u-s-debate-should-teachers-carry-guns-1.1167167>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See Kopel, *supra* note 54, at 584.

¹³⁹ See Myles Snyder, *Pa. Bill Would Allow Teachers to Carry Guns in School*, ABC27-WHTM (Jan 7, 2013, 2:16 PM), <http://www.abc27.com/story/20523990/pa-bill-would-allow-teachers-to-carry-guns-in-school>.

¹⁴⁰ *Id.* (stating that current Pennsylvania law prohibits guns on school property).

¹⁴¹ See, e.g., Kevin Hardy, *Tennessee Bill Would Allow Armed Teachers*, TIMESFREEPRESS.COM (Jan. 6, 2013), <http://www.timesfreepress.com/news/2013/jan/06/bill-would-allow-armed-teachers/>.

¹⁴² See Kittle, *supra* note 126.

¹⁴³ See Hardy, *supra* note 141.

be put into a position where they are making “life-ending” decisions, and those decisions “could cost more lives in the long run.”¹⁴⁴

Even with such opposition to arming teachers, some lawmakers in Southeast Tennessee are introducing legislation that will allow school districts to opt into a program that would permit educators to receive specialized training to carry a concealed firearm at school.¹⁴⁵ The legislative bill has several provisions that may quell some of the criticisms of allowing teachers to carry firearms.¹⁴⁶ For example, the bill would require teachers who have firearm permits to take forty hours of hostile crisis management training, and would require teachers to pay for the associated costs of the training.¹⁴⁷ Additionally, the bill would require that teachers use frangible bullets, and the bill would indemnify the teachers against accidentally shooting a student.¹⁴⁸

To further the goal of arming teachers, gun groups in different states are taking it upon themselves to train teachers in the use of handguns.¹⁴⁹ For example, a gun rights activist group in Utah is offering 200 teachers a six-hour course in the handling of concealed weapons in an effort to arm teachers so the teachers can confront school assailants directly.¹⁵⁰ Also, a firearms group in Ohio is starting a program to give tactical firearms training to twenty-four teachers.¹⁵¹

However, even though legislators are pushing bills to arm teachers, there are certain labor groups,¹⁵² activists,¹⁵³ and professionals who oppose the bills.¹⁵⁴ Perhaps teachers who want to be armed and those who do not want to be armed can reach a compromise. Such a compromise could involve arming teachers and other school personnel with less than lethal/non-lethal weapons.¹⁵⁵

¹⁴⁴ *Id.* (quoting Hamilton County school board member Donna Horn).

¹⁴⁵ *Id.* (stating the training would be law enforcement type training).

¹⁴⁶ *See id.*

¹⁴⁷ *See id.*

¹⁴⁸ *See id.* (noting frangible bullets are ones “designed to prevent ricochet”).

¹⁴⁹ *See, e.g.,* Foy, *supra* note 118.

¹⁵⁰ *Id.*

¹⁵¹ Cathy Lynn Grossman & Greg Toppo, *Trainer for Gun-toting Teachers: ‘Make It Hard to Kill a Kid’*, USA TODAY, Dec. 28, 2012, <http://www.usatoday.com/story/news/nation/2012/12/27/gun-classes-teachers-utah-ohio-shooting/1793773/>.

¹⁵² *See* Gollom, *supra* note 133 (stating that the American Federation of Teachers is trying to get the Michigan governor to veto the new law).

¹⁵³ *See id.* (stating that the president of the Brady Campaign, Dan Gross, said the idea of arming teachers is “insane” and would only cause “more carnage”).

¹⁵⁴ *See id.* (stating that Gary Kleck, a criminologist at Florida State University argued that arming teachers goes “too far”).

¹⁵⁵ *Id.* *See also Purpose, NON-LETHAL WEAPONS PROGRAM, U.S. DEP’T DEF.*, <http://jnlwp.defense.gov/> (last visited Nov. 1, 2013) (defining non-lethal weapons as “weapons, devices and munitions that are explicitly designed and primarily employed to immediately incapacitate targeted personnel or materiel, while minimizing fatalities, permanent injury to personnel, and

Such weapons include sock round munitions,¹⁵⁶ Oleoresin Capsicum spray (also known as pepper spray),¹⁵⁷ and Tasers.¹⁵⁸ With six states planning to introduce legislation in 2013 allowing teachers to be armed, the debate over arming teachers is far from over.¹⁵⁹

School districts should create policies to arm teachers based on a solid foundation of policies and procedures.¹⁶⁰ Before arming teachers or school personnel, policies and procedures must be in place that address the following areas:¹⁶¹

- (1) describe who is eligible to be armed (minimum requirements);¹⁶²
- (2) define the background check process;¹⁶³
- (3) explain who will pay for the expenses associated with arming school personnel;¹⁶⁴

undesired damage to property in the target area or environment. Non-lethal weapons are intended to have reversible effects on personnel and materiel.”).

¹⁵⁶ See *12-Gauge Munitions*, NON-LETHAL WEAPONS PROGRAM, U.S. DEP’T DEF., [http://jnlwp.defense.gov/CurrentNonLethalWeapons/12GaugeMunitions\(point,area,marking,warning\).aspx](http://jnlwp.defense.gov/CurrentNonLethalWeapons/12GaugeMunitions(point,area,marking,warning).aspx) (last visited Nov. 1, 2013) (“These munitions are shotgun rounds that are designed to deliver blunt trauma effects to individuals.”).

¹⁵⁷ See *Oleoresin Capsicum Dispensers*, NON-LETHAL WEAPONS PROGRAM, U.S. DEP’T DEF., <http://jnlwp.defense.gov/CurrentNonLethalWeapons/OleoresinCapsicumDispensers.aspx> (last visited Nov. 1, 2013) (“The Oleoresin Capsicum Dispensers are a hand held dispensers [sic] providing variable range, single stream (MK-4) or area fog (MK-46) RCA against single or multiple targets with irritant effects.”).

¹⁵⁸ See *X26 Taser*, NON-LETHAL WEAPONS PROGRAM, U.S. DEP’T DEF., <http://jnlwp.defense.gov/CurrentNonLethalWeapons/X26Taser.aspx> (last visited Nov. 1, 2013) (“The X26 TASER is an electro-muscular incapacitation device that uses a nitrogen air cartridge propulsion system to launch two probes tethered to an electrically charged cartridge. Effective range is 0-35 feet, depending on cartridge type, penetrates up to two inches of clothing.”).

¹⁵⁹ See Mark Memmott, *Let Teachers Carry Guns? Some State Lawmakers Say Yes*, NAT’L PUB. RADIO (Dec. 19, 2012, 1:19 PM), <http://www.npr.org/blogs/thetwo-way/2012/12/19/167622812/let-teachers-carry-guns-some-state-lawmakers-say-yes> (reporting that the six states are Florida, Minnesota, Oklahoma, Oregon, South Dakota, and Tennessee).

¹⁶⁰ The purpose of this comment is not to create a boilerplate policy schools can adopt when deciding to arm its teachers. Rather, the purpose is to urge schools to arm certain teachers and school personnel as a strategy to respond to school shootings. The writing of a policy for arming teachers should include school personnel, law enforcement, parents, and attorneys.

¹⁶¹ This is not a complete list. School districts must develop policies they feel are important and that respond to their needs and concerns.

¹⁶² Those eligible would include individuals with a police or military background, and school employees who volunteer to go through the training and are able to pass a background check.

¹⁶³ The candidate should pass a Department of Justice background check. This would include, among other things, that the person is not a felon, and that the person does not suffer from a mental illness.

¹⁶⁴ It is suggested that the individual teachers / school personnel purchase the gun they want to use rather than the school issuing a standard gun.

- (4) specify how the gun will be worn or stored;¹⁶⁵
- (5) list required initial and ongoing training;¹⁶⁶
- (6) provide guidelines for firearm use;¹⁶⁷
- (7) specify what types of gun(s) and ammunition are permitted;¹⁶⁸
- (8) define procedures to prevent incorrectly identifying a teacher as an attacker;¹⁶⁹ and
- (9) discuss the scope of indemnification for school personnel if they shoot a student during an incident.¹⁷⁰

Although deciding whether to arm certain school personnel is controversial, it is a strategy requiring immediate attention and consideration. Background checks, specific guidelines, training, and policies can address the concerns of arming teachers. Moreover, the benefits of preventing school shootings and quickly ending a school shooting outweigh the outdated thinking that nobody should have guns on a school campus.¹⁷¹

VIII. CONCLUSION

School violence and shootings are an epidemic that has been prevalent for over forty years in U.S. schools.¹⁷² Schools use several strategies to prevent school shootings from happening. These strategies include: changing the

¹⁶⁵ It is suggested that the gun is either worn or secured in the classroom in a locked desk drawer/cabinet. Since this may require installing locks on school property, the school district should pay for this expense.

¹⁶⁶ This training should include different aspects of a shooting including how and when to shoot, how to deal with the stress of shooting, and what to expect after a shooting. Also, teachers should be required to qualify on a regular basis at their own expense. The training should be similar to that done by police where simulated stressful situations are used.

¹⁶⁷ The policy should specify that teachers are authorized to use their firearm in the case of an immediate threat to their life or the life of their students. For example, teachers would not be allowed to pull their firearm to stop a simple school fight, or if they think they hear gunshots somewhere, (in this case they should contact the principal or police). But the teacher would be allowed to use his or her gun if there is a school shooter threatening the students and the teacher believes immediate action must be taken to save lives.

¹⁶⁸ There are many guns and calibers that teachers and school officials should be able to choose from. Many guns use a small caliber round and can be easily concealed on a person's body.

¹⁶⁹ School officials must work with police to develop a strategy so police officers recognize a teacher with a gun and do not mistake the teacher as an attacker. This can include requiring the teacher to wear recognizable vest, or not allowing the teacher to roam the campus in search of a shooter.

¹⁷⁰ Schools should indemnify teachers who use their gun in the course of protecting lives, even if the teacher accidentally shoots a student.

¹⁷¹ See Kittle, *supra* note 126 (stating deranged killers go to school gun-free zones because they know they can wreak the most havoc there).

¹⁷² See, e.g., *Deadliest U.S. School Shootings*, *supra* note 23.

physical layout and structures of the school;¹⁷³ closing gun loopholes;¹⁷⁴ enforcing tougher gun laws;¹⁷⁵ examining how violent media influences children;¹⁷⁶ and building relationships with students to detect warning signs by watching their behavior, and communications.¹⁷⁷ However, school shootings will continue even though schools have implemented these preventative strategies.

Perhaps the most hotly contested issue in regard to preventing and responding to school shootings is that of arming certain teachers and school personnel.¹⁷⁸ There are two distinct viewpoints to arming teachers: those who do not want guns on campus¹⁷⁹ and those who believe arming teachers would make schools safer.¹⁸⁰ In situations where there is an extended period of time before law enforcement responds, the need to arm teachers becomes more important.¹⁸¹

Unfortunately, the sad truth is that there will be another school shooting in the United States. School shootings are frightening because they are sudden, random, and unpredictable.¹⁸² Although there will be a police response to a shooting, as stated by David Kopel, “by the time the S.W.A.T. team arrives, it will be too late.”¹⁸³

The time has come for schools to arm certain teachers and school personnel. School policies need to prepare teachers and school personnel for when the preventative measures fail. For example, Sandy Hook Elementary School locked its classrooms before the shooter came onto campus.¹⁸⁴ The locks did not stop the shooter. Rather, the shooter shot through the locked doors and started his violent rampage.¹⁸⁵ As stated in the Safe School Initiative findings, means other than law enforcement involvement are needed to stop most school

¹⁷³ See, e.g., Meeker, *supra* note 17 (stating possible improvements could be added fencing and a new security system).

¹⁷⁴ See Patrick Howe, *What Assault Weapons Ban?*, NEW TIMES, July 17, 2009, available at <http://www.newtimeslo.com/cover/2922/what-assault-weapons-ban/>.

¹⁷⁵ See, e.g., CAL. PENAL CODE §626.9 (West 2010) (California Gun-Free Zone).

¹⁷⁶ See, e.g., Egan, *supra* note 99.

¹⁷⁷ See VOSSEKUIL ET AL., *supra* note 67, at 33-35.

¹⁷⁸ See Saenz, *supra* note 53.

¹⁷⁹ See, e.g., Kittle, *supra* note 126.

¹⁸⁰ See Saenz, *supra* note 53.

¹⁸¹ See Saenz, *supra* note 53 (describing that one reason a Texas school district arms its teachers is because there is a 30 minute police response time).

¹⁸² See James Alan Fox, Op-Ed., *Gun Control or Carry Permits Won't Stop Mass Murder*, CNN (July 21, 2012, 4:13 PM), <http://www.cnn.com/2012/07/20/opinion/fox-mass-murder/index.html>.

¹⁸³ See Kopel, *supra* note 54, at 541.

¹⁸⁴ See *Sandy Hook Shooting*, *supra* note 1.

¹⁸⁵ *Id.*

shooters.¹⁸⁶ As past school shootings have shown, it is often teachers or other school personnel who confront the shooter before the police arrive.¹⁸⁷

Taken together, the strategies in Part VI and VII will help prevent future school shootings and help minimize the devastating carnage that results when a gunman decides to open fire on a school campus. One can only speculate about what affect arming teachers would have had in past school shootings. Could an armed teacher have minimized the injury and death toll at the Virginia Tech School shooting? The shooting lasted eleven minutes and involved the gunman entering almost ten classrooms. Could an armed teacher have minimized the death toll at the Columbine High School shooting where thirteen people were killed during the forty-nine minute rampage? Could an armed teacher have minimized the tragedy at the Sandy Hook Elementary School shooting where the shooter went into several classrooms and killed twenty-six people? The answers will never be known. However, had the teachers been armed they would have had a fighting chance to protect innocent lives.

Discussions among legislators, academics, law enforcement, and the public should seek to improve current laws and policies designed to prevent school shootings. Considering the most recent mass shooting at Sandy Hook Elementary School, school officials should adopt policies to arm certain teachers and school personnel so when the next school shooting occurs the shooter can be quickly stopped.

¹⁸⁶ See VOSSEKUIL ET AL., *supra* note 67, at 37.

¹⁸⁷ See, e.g., Stableford, *supra* note 3.

LIFE, LIBERTY, AND PROPERTY—EXCEPT IF YOU KILL YOUR SPOUSE:
A DISCUSSION OF THE RECENT ADDITION TO THE
ARIZONA SLAYER STATUTE

Michael Westerberg*

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I. INTRODUCTION

The Arizona court system has many remedies at its disposal.¹ If applied correctly, these remedies can correct many different wrongs. If applied incorrectly, these remedies can be ineffective—leaving problems unsolved or even violating citizens’ rights.

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¹ See generally RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT, ch. 7 (2011); see also *Turley v. Ethington*, 146 P.3d 1282, 1285 (Ariz. Ct. App. 2006).

One such remedy is a “constructive trust.”² This “trust” is, in fact, not a trust at all.³ It is a forced disposition of specifically identifiable property to the rightful title-holder.⁴ A constructive trust is used only if one gaining title to another’s specifically identifiable property is unjustly enriched.⁵ The Arizona Legislature has attempted to use this remedy as a sword with its recent modification to the Arizona Revised Statutes Section 14-2803 (“Slayer Statute”)—attempting to make it easier to collect after a civil judgment against a convicted slayer.⁶ Section “K” of the Slayer Statute allows a constructive trust on “the property or *estate* of the killer, effective from the time of the killer’s act that caused the death.”⁷ The killer’s estate includes all property interests⁸ possessed from the moment the crime is committed,⁹ including property that is wholly unrelated to the victim.

A constructive trust is not designed to hold property from anyone unless such acquisition of property unjustly enriches the slayer at the expense of the victim.¹⁰ The Slayer Statute uses language that would allow a court to use the constructive trust properly: to seize the killer’s assets and attach them to the criminal trial to secure payment of any fines stemming from the criminal trial. The Slayer Statute also allows improper use of a constructive trust: holding the killer’s assets for an indefinite time in expectation of any civil suit that may arise out of the killer’s actions.¹¹ If a court engages in the latter, it would most likely violate the killer’s due process rights.¹² This situation does not call for a

² “Constructive trust is the principal device for vindicating equitable ownership against conflicting legal title.” RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 (2011); *Turley*, 146 P.3d at 1285.

³ BLACK’S LAW DICTIONARY 1647-48 (9th ed. 2009). “A constructive trust, imposed to prevent unjust enrichment, creates no fiduciary relationship. Despite its name, it is not a trust at all.” *Id.* at 1649; *see also* ARIZ. REV. STAT. ANN. § 14-10402 (2012); *Ariz. Farm Bureau Fed’n v. Brewer*, 243 P.3d 619, 624 (Ariz. Ct. App. 2010).

⁴ BLACK’S LAW DICTIONARY 1647-49 (9th ed. 2009); *Turley*, 146 P.3d at 1285.

⁵ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 (2011) (“A transaction in which the defendant (i) has been unjustly enriched (ii) by acquiring legal title to specifically identifiable property (iii) at the expense of the claimant or in violation of the claimant’s rights is one in which—by the traditional formula—the defendant’s title to the property is subject to the claimant’s equitable interest.”); *see generally* *Young v. Lujan*, 461 P.2d 691, 694 (Ariz. Ct. App. 1969); *Turley*, 146 P.3d at 1285.

⁶ ARIZ. REV. STAT. ANN. § 14-2803(K) (2012).

⁷ *Id.* (emphasis added).

⁸ BLACK’S LAW DICTIONARY 626 (9th ed. 2009).

⁹ § 14-2803(K) (2012).

¹⁰ *See* sources cited *supra* note 5 and accompanying text.

¹¹ § 14-2803(K) (2012).

¹² *See* U.S. CONST. amend. V (“nor be deprived of life, liberty, or property, without due process of law”).

constructive trust, but rather a provisional remedy.¹³ Provisional remedies throughout the nation,¹⁴ including Arizona, are written specifically to avoid due process problems previously identified by the Supreme Court.¹⁵ These provisional-remedy statutes perfectly address what the Slayer Statute seeks to accomplish¹⁶—holding one’s property to ensure the greatest chance of collect-

¹³ See ARIZ. REV. STAT. ANN. § 12-2402 (2003); ARIZ. REV. STAT. ANN. § 12-2403 (2003).

¹⁴ See, e.g., N.Y. C.P.L.R. 1312 (McKinney 2013).

¹⁵ See *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969) (A Wisconsin woman’s wages were garnished by a Wisconsin statute. The Supreme Court found this statute unconstitutional because it did not afford adequate notice or any opportunity to be heard before garnishing the woman’s wages, thus violating the Fourteenth Amendment of the United States Constitution.); see also *Connecticut v. Doebr*, 501 U.S. 1 (1991) (The Court held a Connecticut statute violated the Due Process clauses of the Fourteenth and Fifth Amendments because the plaintiff’s interests in favor of attachment were too minimal to justify encumbering the defendant’s property without a hearing to determine the validity of the plaintiff’s recovery. The Connecticut statute allowed provisional attachment, without prior notice, upon plaintiff’s verification that there was “probable cause” to sustain the validity of the plaintiff’s claim. The Court further reasoned, “Even if the provision requires the plaintiff to demonstrate . . . probable cause to believe that judgment will be rendered in favor of the plaintiff, the risk of error was substantial in this case. . . . [O]nly a skeletal affidavit need be, and was, filed. . . . It is self-evident that the judge could make no realistic assessment concerning the likelihood of an action’s success based upon these one-sided, self-serving, and conclusory submissions. . . . [I]n a case like this involving an alleged assault, even a detailed affidavit would give only the plaintiff’s version of the confrontation. Unlike determining the existence of a debt or delinquent payments, the issue does not concern ‘ordinarily uncomplicated matters that lend themselves to documentary proof.’” (internal citation omitted). The likelihood of resulting error illustrates that “fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.” *Id.* at 14; *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (The Court held a Georgia statute that allowed an officer other than a judge to issue an attachment upon nothing more than an affidavit containing only conclusory allegations violated the Due Process clauses of the Fourteenth and Fifth Amendments.); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974) (The Court found a Louisiana statute valid when it did not allow for a pre-seizure hearing. The statute allowed a creditor to petition the court *ex parte* for the seizure of property. However, the debtor could seek immediate dissolution of the petition, which must be granted, unless the creditor could prove the grounds on which the petition was issued. Furthermore, the petition would not be issued unless dually proven by the creditor by specific facts in a verified affidavit.); *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972) (The Court concluded that the Florida and Pennsylvania prejudgment replevin statutes violated the Fifth and Fourteenth Amendments because they provided “a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor.” The statutes violated due process even though there were remedies for the defendant who had his property seized, and the statutes allowed for a post-seizure hearing. The court did, however, recognize a limited governmental exception for extraordinary circumstances that would allow the postponement of a pre-seizure hearing.)

¹⁶ See ARIZ. REV. STAT. ANN. § 12-2402 (2003); ARIZ. REV. STAT. ANN. § 12-2403 (2003); see also *Arizona State Senate, Committee on Judiciary: HB 2742—Murder; Domestic Violence; Inheritance*, ARIZ. ST. LEGISLATURE, at 1:43:54 (Mar. 5, 2012) [hereinafter *H.B. 2742*], http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=10452 (1:43:54).

ing civil judgments by attaching the property to the action. That way the person cannot dispose of any property.¹⁷ The plaintiff must file a complaint before the petition to attach the property to the civil action, or contemplate filing a complaint very near to the time of filing a petition for attachment.¹⁸ Filing a complaint before or near the attachment petition is very important to due process.¹⁹ A court cannot hold a person's property without appropriate cause and procedure.²⁰ The remedies of constructive trusts and provisional remedies are meant to act in connection with an action²¹—typically because someone was unjustly enriched or for other equitable purposes.²²

Section “K” of the Slayer Statute does not make a clear distinction between what is and is not permissible under due process.²³ The section even suggests the killer's property can be held in a constructive trust for a long period to await the final disposition of potentially many different civil suits.²⁴ Due process concerns are abundant with this suggested action.²⁵ The language of section “K” allows conduct that likely violates due process by depriving the killer of his property.²⁶ Under the Slayer Statute, without more guidance, any judge who does not exercise the utmost diligence when hearing petitions from the decedent's estate may violate due process by granting a constructive trust to hold the killer's property for the benefit of the decedent's family or estate.²⁷

II. BACKGROUND

A. Constructive Trusts

“A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.”²⁸ A constructive trust requires the liable party to be unjustly enriched by acquiring title to specifically identifiable property at the plaintiff's expense or otherwise in violation of the plaintiff's

¹⁷ See ARIZ. REV. STAT. ANN. § 14-2803 (2012); see also *H.B. 2742*, *supra* note 16.

¹⁸ See ARIZ. REV. STAT. ANN. § 12-2402 (2003); ARIZ. REV. STAT. ANN. § 12-2403 (2003).

¹⁹ See sources cited *supra* note 15.

²⁰ *Pa. Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 123-25 (1978).

²¹ See sources cited *supra* note 5 and accompanying text; See also ARIZ. REV. STAT. ANN. § 12-2402 (2003); ARIZ. REV. STAT. ANN. § 12-2403 (2003).

²² See sources cited *supra* note 5 and accompanying text.

²³ See ARIZ. REV. STAT. ANN. § 14-2803(K) (2012).

²⁴ *Id.*

²⁵ See sources cited *supra* note 15.

²⁶ See § 14-2803(K) (2012); U.S. CONST. amend. V; U.S. CONST. amend XIV.

²⁷ See sources cited *supra* note 15.

²⁸ *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378, 380 (N.Y. 1919).

rights.²⁹ The decision to impose a constructive trust is best explained with a particular sequence of factors.³⁰ Courts do not specifically use these factors by name, but a court's analysis always includes these factors in some form or another.³¹ First, a court must establish the defendant is liable for the damages the plaintiff claims.³² Second, a transaction where the defendant acquired specifically identifiable property must be the source of liability.³³ If the property is a substitute for the original property, then it must be traceable³⁴ through the defendant's estate.³⁵ For example, in *Amtitle Trust Company v. Fitch*, Fitch sued Amtitle after a real estate transaction and sought to place a constructive trust on the money Amtitle distributed to an officer of a corporation, which Fitch held a one-fifth interest in.³⁶ Even though the corporate officer received a property interest in property rightfully belonging to Fitch, the court found a constructive trust inappropriate because the property was not traceable from Fitch through the corporation, through the title company, and ultimately to the corporate officer.³⁷ The property was untraceable because Fitch did not have the requisite interest in any property that passed through the hands of the title company.³⁸ Fitch's claim was only tangential to her general claim for damages against how the corporate officer was managing the corporation.³⁹

A constructive trust, in fact, is not a trust at all.⁴⁰ A constructive trust is merely a two-fold remedy that: (1) affirms the defendant's title is subject to the plaintiff's superior interest, and (2) is a mandatory injunction requiring the

²⁹ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 (2011); *See also* Harmon v. Harmon, 613 P.2d 1298, 1300 (Ariz. Ct. App. 1980) ("The gist of the conduct which will lead to the imposition of a constructive trust is the wrongful holding of property which unjustly enriches the defendant at the expense of the plaintiff. . . . It is a remedial device, used whenever title to property has been obtained through actual fraud, misrepresentation, concealment, undue influence, duress or through any other means which render it unconscionable for the holder of legal title to continue to retain and enjoy its beneficial interest.").

³⁰ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55, cmt. a (2011); *Harmon*, 613 P.2d at 1300; *Turley v. Ethington*, 146 P.3d 1282, 1285 (Ariz. Ct. App. 2006).

³¹ *Harmon*, 613 P.2d at 1300; *Turley*, 146 P.3d at 1285.

³² RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55, cmt. a (2011); *Harmon*, 613 P.2d at 1300; *Turley*, 146 P.3d at 1285.

³³ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55, cmt. a (2011).

³⁴ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 58 (2011); *Harmon*, 613 P.2d at 1300; *Turley*, 146 P.3d at 1285.

³⁵ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 (2011); *Harmon*, 613 P.2d at 1300; *Turley*, 146 P.3d at 1285.

³⁶ *Amtitle Trust Co. v. Fitch*, 541 P.2d 1166, 1166-67 (Ariz. Ct. App. 1975).

³⁷ *Id.* at 1169.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55, cmt. b (2011); *Harmon*, 613 P.2d at 1300; *Turley*, 146 P.3d at 1285.

defendant to surrender the property to the plaintiff, or other equivalent remedial measures.⁴¹ For example, the court found a constructive trust appropriate in *King* because a conveyance of land was made upon condition that the grantee reconvey a one-half interest back to the original grantor.⁴² The grantee never made the reconveyance, and thus was unjustly enriched.⁴³

A constructive trust can only be used in narrow circumstances⁴⁴ and is merely a remedy, not a cause of action.⁴⁵ It must involve a defendant unjustly profiting off of the acquisition of title at the expense of the plaintiff.⁴⁶ Finally, a court should only impose a constructive trust if the defendant is deemed liable and the transaction that is the source of the liability concerns specifically identifiable property—even if it must be traced through the defendant’s estate.⁴⁷

B. Arizona Revised Statutes Section 14-2803—The Slayer Statute

The Arizona Legislature originally passed the Slayer Statute in 1994.⁴⁸ It was amended in 2012 to the current version.⁴⁹ The vast majority of the statute mimics other states’ versions and the Uniform Probate Code’s version of the slayer statute.⁵⁰ The only glaring difference in the Arizona Slayer Statute is section “K,” which provides:

The decedent’s estate may petition the court to establish a constructive trust on the property or the estate of the killer, effective from the time of the killer’s act that caused the death, in order to secure the payment of all damages and judgments from conduct that, pursuant to subsection F of this section,

⁴¹ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55, cmt. b (2011).

⁴² See generally *King v. Uhlmann*, 437 P.2d 928 (Ariz. 1968).

⁴³ *Id.*

⁴⁴ See generally *Harmon v. Harmon*, 613 P.2d 1298 (Ariz. Ct. App. 1980).

⁴⁵ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 (2011) (Comment f., Illustrations 12-13).

⁴⁶ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 (2011); *Harmon*, 613 P.2d at 1300; *Turley v. Ethington*, 146 P.3d 1282, 1285 (Ariz. Ct. App. 2006).

⁴⁷ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55, cmt. a (2011).

⁴⁸ ARIZ. REV. STAT. ANN. § 14-2803 (1994), amended by 2012 ARIZ. LEGIS. SERV. Ch. 277 (H.B. 2742).

⁴⁹ ARIZ. REV. STAT. ANN. § 14-2803 (2012).

⁵⁰ See S.D. CODIFIED LAWS § 29A-2-803 (2004); see also ALASKA STAT. ANN. § 13.12.803 (West 2007); COLO. REV. STAT. ANN. § 15-11-803 (West 2011); FLA. STAT. ANN. § 732.802 (West 2010); IDAHO CODE ANN. § 15-2-803 (West 2006); MICH. COMP. LAWS ANN. § 700.2803 (West, Westlaw through P.A.2013, No. 277 (end), of the 2013 Regular Session, 97th Legislature); MONT. CODE ANN. § 72-2-813 (West 2009); NEB. REV. STAT. § 30-2354 (2013), available at <http://nebraskalegislature.gov/laws/statutes.php?statute=30-2354>; UNIFORM PROBATE CODE § 2-803 (West 2013).

resulted in criminal conviction of either spouse in which the other spouse or a child was the victim.⁵¹

If one is convicted under the Slayer Statute, he loses the inheritance a person would receive from his spouse or child; the statute treats the killer as if he had predeceased the child or spouse.⁵² The Slayer Statute only applies to certain offenses⁵³ that are labeled as felonious and intentional.⁵⁴ It further revokes any election in which the killer would hold a fiduciary relationship with the decedent's estate.⁵⁵ The Slayer Statute also severs community property,⁵⁶ which becomes a tenancy in common.⁵⁷ The remainder of the Slayer Statute protects innocent personal representatives, trustees, or other fiduciaries that act in good faith upon a governing instrument without first having notice of the killer's wrong doing.⁵⁸

Section "K," the new addition to the Slayer Statute in 2012, adds a recommended remedy to for the courts.⁵⁹ Such a remedy is not found in other slayer statutes around the country,⁶⁰ including the Uniform Probate Code.⁶¹ The provision allows a decedent's estate to petition the court to impose a constructive trust on the killer's property or estate.⁶² This constructive trust is to secure payment of all judgments, past and future, that result because of the conduct for which the killer was convicted or adjudicated.⁶³

The addition to the Slayer Statute mimics most other states' slayer statutes⁶⁴ and functions exactly as the Uniform Probate Code's slayer statute intended.⁶⁵ However, section "K" is an addition to the Slayer Statute that has not been tested or compared in any other forum other than Arizona.⁶⁶

⁵¹ ARIZ. REV. STAT. ANN. § 14-2803(K) (2012).

⁵² § 14-2803.

⁵³ § 14-2803(A).

⁵⁴ § 14-2803(F). See ARIZ. REV. STAT. ANN. § 13-1105 (2010).

⁵⁵ ARIZ. REV. STAT. ANN. § 14-2803(B)(1) (2012).

⁵⁶ § 14-2803 (B)(2).

⁵⁷ "A tenancy by two or more persons, in equal or unequal undivided shares, each person having an equal right to possess the whole property but no right of survivorship." BLACK'S LAW DICTIONARY 1604 (9th ed. 2009) (tenancy in common).

⁵⁸ § 14-2803 (C)-(E),(G),(I).

⁵⁹ § 14-2803(K).

⁶⁰ See sources cited *supra* note 50 and accompanying text.

⁶¹ UNIFORM PROBATE CODE § 2-803 (West 2013) (Effect of Homicide on Intestate Succession, Wills, Trusts, Joint Assets, Life Insurance, and Beneficiary Designations).

⁶² ARIZ. REV. STAT. ANN. § 14-2803(K) (2012).

⁶³ *Id.*

⁶⁴ See sources cited *supra* note 50 and accompanying text.

⁶⁵ See UNIFORM PROBATE CODE § 2-803 (West 2013) (Effect of Homicide on Intestate Succession, Wills, Trusts, Joint Assets, Life Insurance, and Beneficiary Designations).

⁶⁶ See sources cited *supra* note 50 and accompanying text; see also ARIZ. REV. STAT. ANN. § 14-2803(K) (2012).

C. *Arizona Revised Statutes Section 12-2402(A)(3)—Provisional Remedies*

The “Arizona Provisional Remedy Statutes” allow a plaintiff to file a petition with the court to impose a remedy before the court enters any judgment.⁶⁷ These remedies are allowed in few circumstances⁶⁸ and have been criticized for their due process concerns.⁶⁹

There are two types of provisional remedies allowed under Arizona law: (1) a provisional remedy without notice;⁷⁰ and (2) a provisional remedy with notice.⁷¹ Provisional remedies without notice are highly scrutinized by the Court.⁷² They are allowed when the defendant intends to defraud creditors or others by disposing of property or moving it out of a court’s jurisdiction when the person claiming the remedy has lawful ownership interests in the property, such as a creditor seeking to enforce a security agreement.⁷³ Another key ingredient to a provisional remedy without notice is the affidavit requirement.⁷⁴ The party seeking the remedy must submit an affidavit to the court that states sufficient facts supporting the party’s claim.⁷⁵ In *North Georgia Finishing Inc.*, the plaintiff only stated conclusory statements in the affidavit and did not support its position with sufficient facts, which the Court found to be insufficient to order a provisional remedy.⁷⁶ The party against whom the provisional remedy is issued may immediately move to quash the judicial order, and the court must have a hearing on the matter within five days.⁷⁷ The final requirement is a notice requirement.⁷⁸ Within three days of the seizure of property, the party seeking the provisional remedy must attempt to serve the party against whom the provisional remedy is sought with notice of the judicial order.⁷⁹

A provisional remedy with notice requires the application and the notice for the provisional remedy to be filed with the court, and the party against whom the provisional remedy is sought must be afforded an opportunity for a hearing.⁸⁰

⁶⁷ See ARIZ. REV. STAT. ANN. § 12-2402 (2003); ARIZ. REV. STAT. ANN. § 12-2403 (2003).

⁶⁸ § 12-2402; § 12-2403.

⁶⁹ See sources cited *supra* note 15.

⁷⁰ ARIZ. REV. STAT. ANN. § 12-2402 (2003).

⁷¹ ARIZ. REV. STAT. ANN. § 12-2403 (2003).

⁷² See sources cited *supra* note 15.

⁷³ ARIZ. REV. STAT. ANN. § 12-2402(A) (2003).

⁷⁴ See § 12-2402(B).

⁷⁵ *Id.*

⁷⁶ *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 611 (1975).

⁷⁷ ARIZ. REV. STAT. ANN. § 12-2402(C) (2003).

⁷⁸ § 12-2402(D).

⁷⁹ *Id.*

⁸⁰ *Id.*

Provisional remedies are in place to afford a plaintiff a way to stop a defendant from disposing of his or her property to avoid paying a pecuniary judgment.⁸¹ However, the Supreme Court has scrutinized these remedies, and laid down strict procedures for these remedies to comply with due process.⁸²

D. Due Process

The right of due process of law is a concept that predates the United States Constitution.⁸³ It is not expressly stated in so many words, but the Magna Carta does enumerate the ideas of due process.⁸⁴ There are two types of due process: substantive due process⁸⁵ and procedural due process.⁸⁶ This Article specifically deals with procedural due process by focusing on the procedures the government must follow when taking one's property.⁸⁷ The two fundamental requirements of procedural due process are notice of an impending action and the opportunity to be heard at a meaningful time and in a meaningful place.⁸⁸ Due process under the Fourteenth and Fifth Amendments to the United States Constitution also require a state actor because these amendments do not apply to purely private persons.⁸⁹ However, because there is a state procedure used to enforce a remedy, there is a presumed state action for the purposes of this Article.⁹⁰

Substantive due process is an entirely different section of the Due Process clauses of the Fourteenth and Fifth Amendments to United States Constitution.⁹¹ Substantive due process is the concept that there is a limit to the State's police power and there should be certain realms of personal life, liberty, and

⁸¹ See ARIZ. REV. STAT. ANN. § 12-2402 (2003); ARIZ. REV. STAT. ANN. § 12-2403 (2003).

⁸² See sources cited *supra* note 15.

⁸³ See *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1855); see also U.S. CONST. amend. V; see also U.S. CONST. amend. XIV.

⁸⁴ *Den ex dem. Murray*, 59 U.S. at 276.

⁸⁵ "The doctrine that the Due Process Clauses of the 5th and 14th Amendments require legislation to be fair and reasonable in content and to further a legitimate governmental objective." BLACK'S LAW DICTIONARY 575 (9th ed. 2009) (substantive due process).

⁸⁶ "The minimal requirements of notice and a hearing guaranteed by the Due Process clauses of the 5th and 14th Amendments, esp. if the deprivation of a significant life, liberty, or property interest may occur." *Id.* (procedural due process).

⁸⁷ *Id.*

⁸⁸ *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950).

⁸⁹ U.S. CONST. amend. XIV ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); see also *Shelley v. Kraemer*, 334 U.S. 1, 4-5, 13-14, 16 (1948).

⁹⁰ *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991) ("Without doubt, state procedures for creating and enforcing attachments, as with liens, 'are subject to the strictures of due process.'" (quoting *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 85 (1988))).

⁹¹ See U.S. CONST. amends. V, XIV.

property that should be free from government regulation unless there is a certain level of governmental interest involved.⁹² The depths of substantive due process and whether the Arizona Legislature's actions under the Slayer Statute are appropriate under substantive due process are not discussed at length in this Article because it is a topic that is worthy of a completely separate article.

Procedural due process is very particular to the circumstances of each case.⁹³ Notice and opportunity to be heard can be satisfied in a multitude of ways.⁹⁴ In *Mitchell*, procedural due process was satisfied because the Louisiana statute was narrowly tailored to allow pre-notice property seizure in very few circumstances—for instance, after the petitioning party attests to appropriate facts and a hearing is immediately held if the defending party objected to the seizure.⁹⁵ In *Mullane*, a New York corporate trust company attempted to combine many different trusts, pursuant to a New York statute, to avoid disproportional procedural expenses associated with small trusts.⁹⁶ Because the beneficiaries' property interests are different in their separate trusts as compared to their interests in the common trust, the New York corporate trustee was required to give notice of the change to the beneficiaries and did so only through a newspaper ad.⁹⁷ The Court ruled this was not adequate notice for the beneficiaries that the corporate trust company had known addresses for because the interest the beneficiaries had in the trust was great and no one can be expected to scour through every publication looking for a notice that may affect one's interests in property.⁹⁸ However, notice to the beneficiaries was adequate for the beneficiaries that the corporate trust company did not have known addresses.⁹⁹ If the corporate trust company had mailed out a separate notice to the beneficiaries it had addresses for, it would have satisfied all procedural due process requirements.¹⁰⁰

Even though procedural due process is very moldable to the situation at hand, there are a set of factors the Court applies.¹⁰¹ The Court stated it considers:

⁹² *Lochner v. New York*, 198 U.S. 45, 56 (1905).

⁹³ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.”).

⁹⁴ See *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 617-18 (1974); see also *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 319-20 (1950); see also *In re MH-2008-000867*, 236 P.3d 405, 408 (Ariz. 2010).

⁹⁵ *Mitchell*, 416 U.S. at 617-18.

⁹⁶ *Mullane*, 339 U.S. at 309-10.

⁹⁷ *Id.* at 311-12.

⁹⁸ *Id.* at 319-20.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁰²

In *Doehr*, the Court demonstrated the use of the *Mathews* factors perfectly.¹⁰³ First, even though the deprivation of property was only partial and most likely temporary, the deprivation was significant, thus warranting due process protection because attachment can affect the ability to transfer title, it can adversely affect one's credit rating, or could even place a home mortgage in technical default.¹⁰⁴ Second, the Court ruled the probable cause standard was not sufficient protection compared to the risk of erroneous deprivation of the defendant's assets.¹⁰⁵ If the statute only required investigation into the sufficiency of the complaint or the petitioning party's good-faith belief that the petition was adequate, a judge could authorize seizure of the defendant's property if no reasonable jury could find for the petitioner.¹⁰⁶ Even if the standard was higher, a judge could not make a realistic assessment of the case merely based on the petitioner's one-sided affidavit.¹⁰⁷ Even though the statute has a bond requirement and a quick post-attachment hearing, there were no protections for erroneous attachment in the first place.¹⁰⁸ Finally, there were no exigent circumstances, such as the defendant disposing of the property, that would make the postponement of a hearing necessary. The defendant's interest the state sought to protect was *de minimis*, and the state already provided for a post-deprivation hearing so it could not claim undue administrative or financial burden pertaining to conducting pre-deprivation hearings.¹⁰⁹

Procedural due process will always consist of the right to notice and the right to be heard at a meaningful time and in a meaningful place.¹¹⁰ Such requirements can be satisfied in many different ways,¹¹¹ and will look substan-

¹⁰² *Id.*

¹⁰³ *Connecticut v. Doehr*, 501 U.S. 1, 13-14 (1991).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950).

¹¹¹ See sources cited *supra* note 94.

tially different in many cases,¹¹² but will always take on the consideration of the *Mathews* factors.¹¹³ No matter what process a court conducts for evaluating constitutionality based on procedural due process, it will always be lengthy, in depth, and complicated¹¹⁴ because due process is a concept that is rooted deeply in the Constitution.¹¹⁵

III. ARGUMENT

A. *Arizona Revised Statutes Section 14-2803(K) Operating as a Constructive Trust*

The original intent behind the Slayer Statute is to prevent the killer, in a domestic violence situation, from profiting from his wrongful act.¹¹⁶ The intent behind section “K” is to secure funds for any criminal or civil penalty associated with the criminal act.¹¹⁷ This intent works through the constructive trust allowed in the Slayer Statute.¹¹⁸ However, section “K” includes language that would allow the court to not only secure the killer’s property for the satisfaction of criminal fines and penalties, but also for potential civil torts—even before a civil action is commenced.¹¹⁹ Such torts include wrongful death,¹²⁰ survivor action,¹²¹ intentional infliction of emotional distress,¹²² etc. When a court imposes a constructive trust before an action is filed, it raises red flags for due process issues because a constructive trust is a remedy typically used after liability is established.¹²³

The Slayer Statute allows the decedent’s estate, from the moment of the killer’s act, to petition the court to potentially seize all of the killer’s property in a constructive trust for the benefit of the decedent’s estate.¹²⁴ This does not

¹¹² *In re* MH-2008-000867, 236 P.3d 405, 408 (Ariz. 2010).

¹¹³ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹¹⁴ *See generally Mathews*, 424 U.S. at 319.

¹¹⁵ *See Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1855); *see also* U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV.

¹¹⁶ *H.B. 2742*, *supra* note 16.

¹¹⁷ *Id.*; *see also* ARIZ. REV. STAT. ANN. § 14-2803(K) (2012).

¹¹⁸ § 14-2803(K).

¹¹⁹ *Id.*

¹²⁰ ARIZ. REV. STAT. ANN. § 12-612 (2003).

¹²¹ ARIZ. REV. STAT. ANN. § 12-611 (2003).

¹²² *Ford v. Revlon, Inc.*, 734 P.2d 580, 585 (Ariz. 1987).

¹²³ *Harmon v. Harmon*, 613 P.2d 1298, 1300 (Ariz. Ct. App. 1980) (“The gist of the conduct which will lead to the imposition of a constructive trust is the wrongful holding of property which unjustly enriches the defendant at the expense of the plaintiff. . . . It is a remedial device, used whenever title to property has been obtained through actual fraud, misrepresentation, concealment, undue influence, duress or through any other means which render it unconscionable for the holder of legal title to continue to retain and enjoy its beneficial interest.”).

¹²⁴ ARIZ. REV. STAT. ANN. § 14-2803(K) (2012).

merely include the life insurance money that the killer may have received because he or she was the beneficiary on the decedent's life insurance policy.¹²⁵ This language includes all assets in the killer's estate.¹²⁶ This language would include property that the decedent has no interest in under any circumstance (e.g., any separate inherited property held by the killer).¹²⁷ This version of a constructive trust is not a constructive trust at all under the traditional requirements.¹²⁸ In fact, this version of constructive trust operates more like a prejudgment remedy¹²⁹ when its goal should be to rectify unjust enrichment.¹³⁰

This method of using a constructive trust is used elsewhere by the Arizona Legislature.¹³¹ Arizona Revised Statutes Section 46-455 is part of the set of statutes designed to protect elder adults that could be vulnerable to exploitation or harm committed by others.¹³² This statute allows a court to enforce a constructive trust on the wrongdoer in favor of the wronged elder adult before liability is determined.¹³³ A constructive trust is just one remedy the court can enforce under this statute and the statute leaves the enforcement in the absolute discretion of the court.¹³⁴ The statute, however, gives no other guidance for the constructive trust.¹³⁵ This is different from the Slayer Statute, which gives specific guidelines on when and what property funds the constructive trust.¹³⁶ Arizona Revised Statutes Section 46-455 gives the court the freedom to operate the constructive trust allowed in the statute within normal parameters.¹³⁷ These normal parameters include the vulnerable adult having property taken from them in an inappropriate manner, unjustly enriching the person taking advantage of the elder adult.¹³⁸ The Slayer Statute, on the other hand, does not allow

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See generally *Amtitle Trust Co. v. Fitch*, 541 P.2d 1166 (Ariz. Ct. App. 1975); see also RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 (2011).

¹²⁹ Prejudgment remedies, as termed in the United States Code Annotated, 28 U.S.C. § 3101 (2012), are known as provisional remedies in the Arizona Revised Statutes. ARIZ. REV. STAT. ANN. §§ 12-2402 to -2403 (2003).

¹³⁰ See sources cited *supra* note 5 and accompanying text.

¹³¹ ARIZ. REV. STAT. ANN. § 46-455(G) (2005).

¹³² §§ 46-451 to -459.

¹³³ ARIZ. REV. STAT. ANN. § 46-455 (West, Westlaw through First Regular and First Special Sessions of the Fifty-first Legislature).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ ARIZ. REV. STAT. ANN. §14-2803(K) (2012).

¹³⁷ ARIZ. REV. STAT. ANN. §46-455(G) (2005).

¹³⁸ *Id.*

for such great parameters.¹³⁹ This lack of freedom could lead to deprivation of property without due process.¹⁴⁰

The Slayer Statute prohibits the killer from obtaining property from the decedent he or she killed.¹⁴¹ For a constructive trust to be appropriate under Arizona law, the killer must unjustly hold a property interest at the expense of the rightful owner and typically such an interest must be acquired through fraud or other deceit.¹⁴² As in *King v. Uhlmann*, where the court held a one-half interest in real property in constructive trust for the benefit of Mr. King.¹⁴³ If any property interest was obtained inequitably, at the expense of the decedent, and through fraud or other deceit, the Slayer Statute already precludes the killer from inheriting such assets.¹⁴⁴ For example, if one were to kill his or her spouse to accelerate inheritance of valuable personal or real property, the court could force the killer to hold the personal property inherited from the dead spouse in constructive trust for the benefit of the decedent's estate.¹⁴⁵ A killer is certainly unjustly enriched, at least prematurely, by inheriting personal or real property from the decedent spouse at the expense of the decedent spouse's life, which makes a constructive trust worthy of application.¹⁴⁶ However, a constructive trust would be unnecessary because the Slayer Statute already prevents such an occurrence.¹⁴⁷ Even if the killer did inherit unjustly from the

¹³⁹ See ARIZ. REV. STAT. ANN. §14-2803(K) (2012).

¹⁴⁰ See sources cited *supra* note 15.

¹⁴¹ ARIZ. REV. STAT. ANN. § 14-2803 (2012).

¹⁴² *Harmon v. Harmon*, 613 P.2d 1298, 1300 (Ariz. Ct. App. 1980) ("The gist of the conduct which will lead to the imposition of a constructive trust is the wrongful holding of property which unjustly enriches the defendant at the expense of the plaintiff. . . . It is a remedial device, used whenever title to property has been obtained through actual fraud, misrepresentation, concealment, undue influence, duress or through any other means which render it unconscionable for the holder of legal title to continue to retain and enjoy its beneficial interest.").

¹⁴³ *King v. Uhlmann*, 437 P.2d 928, 936-37 (Ariz. 1968) (The Uhlmanns refused to reconvey property they had agreed to convey to Mr. King. Thus, the court held the property in a constructive trust for Mr. King pursuant to: (1) "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." (2) "[W]here actual fraud does not exist in the acquisition of property, a constructive trust will arise whenever the circumstances make it inequitable that the property should be retained by the one who holds the legal title. . . . The forms and varieties of these trusts are practically without limit and the principle is applied wherever it is necessary for the obtaining of complete justice." (quoting *Markel v. Phoenix Title & Trust Co.*, 410 P.2d 662 (Ariz. 1966)).

¹⁴⁴ ARIZ. REV. STAT. ANN. § 14-2803 (2012).

¹⁴⁵ See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 (2011); *Harmon*, 613 P.2d at 1300; *Turley v. Ethington*, 146 P.3d 1282, 1285 (Ariz. Ct. App. 2006).

¹⁴⁶ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 (2011); see also *Harmon*, 613 P.2d at 1300; see also *Turley*, 146 P.3d at 1285.

¹⁴⁷ ARIZ. REV. STAT. ANN. § 14-2803(B)(2) (2012).

decendent despite the Slayer Statute, a separate section¹⁴⁸ is not necessary to authorize a court to use any remedy it wishes, including a constructive trust, to return the inheritance to the estate of the decendent spouse.¹⁴⁹ Even if the killer is disposing of the property sought to fund the constructive trust, a provisional remedy is better suited for this situation, not a constructive trust.¹⁵⁰ A constructive trust, therefore, is an inappropriate remedy for the purposes of section “K” of the Slayer Statute when the circumstances that could bring about the use of a constructive trust are already prevented by previous sections of the statute.

The intention of section “K” of the Slayer Statute is not to act as a true constructive trust. The circumstances under which the section would apply do not fit neatly into the criteria for a constructive trust.¹⁵¹ The section clearly outlines circumstances more appropriate for the provisional-remedy statutes.¹⁵² Coupling this with the court’s ability to use a myriad of remedies, including a constructive trust, pursuant to the other sections of the statute, the constructive trust in section “K” is an inappropriate remedy given the circumstances implied by section “K.”¹⁵³ The Arizona Legislature’s intent shines through the words of section “K,” making the section function exactly how the legislature describes.¹⁵⁴ However, the vehicle the Arizona Legislature chose cannot possibly secure payment of civil liabilities to victims of domestic violence because a constructive trust simply cannot function as the Arizona Legislature intends it to function. This line of thinking and concern for domestic violence victims is new to the Slayer Statute, but is not new to the law or even Arizona.¹⁵⁵ This line of thinking and concern has merely taken a different form as a provisional remedy.

B. Arizona Revised Statutes Section 14-2803(K) Operating as a Provisional Remedy

The Slayer Statute allows the decendent’s estate to petition a court to hold assets of the killer’s estate in constructive trust to ensure the collectability of any judgment, past or future, as a result of the killer’s act that caused the death

¹⁴⁸ § 14-2803(K).

¹⁴⁹ RESTATEMENT (SECOND) OF JUDGMENTS § 1 (1982).

¹⁵⁰ See ARIZ. REV. STAT. ANN. §§ 12-2402 to -2403 (2003).

¹⁵¹ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 (2011); *Harmon*, 613 P.2d at 1300; *Turley*, 146 P.3d at 1285.

¹⁵² ARIZ. REV. STAT. ANN. § 14-2803(K) (2012).

¹⁵³ See *id.*

¹⁵⁴ *Id.*

¹⁵⁵ See generally ARIZ. REV. STAT. ANN. § 12-2402 (2003).

of the decedent.¹⁵⁶ This is not a constructive trust, but rather attachment,¹⁵⁷ which is a provisional remedy.¹⁵⁸

The Slayer Statute would allow a judge to seize all of a convicted killer's estate to satisfy future claims arising out of the killer's act that caused the death of the decedent spouse or child.¹⁵⁹ The Arizona Legislature clearly meant for this protection of the decedent's estate to operate as soon as possible—most likely before any civil actions (i.e., wrongful death, survivor action, etc.) are filed.¹⁶⁰ The Statute allows a judge to do this through the decedent's estate filing a petition for a constructive trust,¹⁶¹ even if the constructive trust is an inappropriate vehicle for this situation. Such a remedy requires an action to be fully litigated.¹⁶² Section "K" makes it clear an action does not even have to be filed.¹⁶³ In fact, every form of provisional remedy, including the attachment referenced here, requires the filing of an action for damages—with the exception of one.¹⁶⁴ A provisional remedy without notice can be filed before the start of an action and without notifying the adverse party, as long as there is a showing of extraordinary circumstances.¹⁶⁵ This is the exact type of remedy the Slayer Statute describes.¹⁶⁶ However, section "K" does not refer to time in any sense.¹⁶⁷ Under the Slayer Statute, the petition could hold the killer's assets for an unlimited period,¹⁶⁸ and even the provisional-remedy-without-notice statute alludes to, and may even require in some cases, an action being filed within close proximity to the grant of the provisional remedy.¹⁶⁹

The provisional-remedy-without-notice statute is the only remedy that can function to accomplish any of the goals of section "K" of the Slayer Statute.¹⁷⁰ However, the provisional remedy statute is very narrow in scope and clearly

¹⁵⁶ See ARIZ. REV. STAT. ANN. § 14-2803(K) (2012).

¹⁵⁷ "The seizing of a person's property to secure a judgment or to be sold in satisfaction of a judgment." BLACK'S LAW DICTIONARY 145 (9th ed. 2009) (attachment).

¹⁵⁸ See ARIZ. REV. STAT. ANN. §§ 12-1521, -2401 to -2403 (2003).

¹⁵⁹ See ARIZ. REV. STAT. ANN. § 14-2803(K) (2012); *H.B. 2742*, *supra* note 16.

¹⁶⁰ *H.B. 2742*, *supra* note 16.

¹⁶¹ *Id.*

¹⁶² See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55, cmt. a (2011); *Harmon v. Harmon*, 613 P.2d 1298, 1300 (Ariz. Ct. App. 1980); *Turley v. Ethington*, 146 P.3d 1282, 1285 (Ariz. Ct. App. 2006).

¹⁶³ ARIZ. REV. STAT. ANN. § 14-2803(K) (2012).

¹⁶⁴ See ARIZ. REV. STAT. ANN. § 12-2402 (2003).

¹⁶⁵ *Id.*

¹⁶⁶ ARIZ. REV. STAT. ANN. § 14-2803(K) (2012).

¹⁶⁷ *Id.*

¹⁶⁸ *See id.*

¹⁶⁹ See ARIZ. REV. STAT. ANN. § 12-2402 (2003).

¹⁷⁰ *See id.*; *see also* ARIZ. REV. STAT. ANN. § 14-2803(K) (2012).

does not cover all actions condoned under section “K” of the Slayer Statute.¹⁷¹ For some activities allowed under section “K,” there are no legal vehicles to constitutionally accomplish its goals.¹⁷²

C. Due Process Concerns

Due process is an essential requirement of the Constitution before a state can seize one’s property.¹⁷³ Provisional remedies implicate that requirement before litigation concludes, and in some cases before the complaint is filed.¹⁷⁴ Provisional remedies, under Arizona law, include only three remedies:¹⁷⁵ (1) attachment;¹⁷⁶ (2) garnishment, but not the garnishment of wages;¹⁷⁷ or (3) replevin.¹⁷⁸ On several occasions, the Supreme Court has scrutinized prejudgment remedy statutes and other statutes that have similar qualities to provisional-remedy statutes, for raising due process issues.¹⁷⁹ If an Arizona court attaches property to an action in accordance with the requirements set forth in Arizona Revised Statutes Section 12-2402(A)(3) and current case law, the elements of due process are met because the Arizona statute provides, absent proven extraordinary circumstances, notice must be given to the defendant and a hearing must be scheduled before attachment of the property to the dispute.¹⁸⁰ Given the almost complete discretion given to the courts by the Slayer Statute,¹⁸¹ however, the potential for improper and unconstitutional attachment is higher than necessary because the operation of the statute is hidden behind the guise of constructive trust language.¹⁸²

To ensure the killer and his or her estate due process of the law requires a high level of understanding of provisional remedies and procedural due pro-

¹⁷¹ See ARIZ. REV. STAT. ANN. § 12-2402 (2003); see also ARIZ. REV. STAT. ANN. § 14-2803(K) (2012).

¹⁷² See ARIZ. REV. STAT. ANN. § 14-2803(K) (2012); see sources cited *supra* note 15.

¹⁷³ See sources cited *supra* note 83.

¹⁷⁴ See ARIZ. REV. STAT. ANN. §§ 12-2402 to -2403 (2003).

¹⁷⁵ ARIZ. REV. STAT. ANN. § 12-2401(3) (2003).

¹⁷⁶ “The seizing of a person’s property to secure a judgment or to be sold in satisfaction of a judgment.” BLACK’S LAW DICTIONARY 145 (9th ed. 2009) (attachment).

¹⁷⁷ “A judicial proceeding in which a creditor (or potential creditor) asks the court to order a third party who is indebted to or is bailee for the debtor to turn over to the creditor any of the debtor’s property (such as wages or bank accounts) held by that third party.” BLACK’S LAW DICTIONARY 750 (9th ed. 2009) (garnishment).

¹⁷⁸ “An action for the repossession of personal property wrongfully taken or detained by the defendant, whereby the plaintiff gives security for and holds the property until the court decides who owns it.” BLACK’S LAW DICTIONARY 1413 (9th ed. 2009) (replevin).

¹⁷⁹ See sources cited *supra* note 15.

¹⁸⁰ See ARIZ. REV. STAT. ANN. § 12-2402 (2003).

¹⁸¹ See ARIZ. REV. STAT. ANN. § 14-2803(K) (2012).

¹⁸² *Id.*

cess. This understanding is far from clear in section “K” of the Slayer Statute.¹⁸³ It would be relatively easy for an Arizona court to impose a constructive trust on the entirety of the killer’s estate based merely on a petition. This would place the killer as the trustee over his own property, waiting to distribute it as the court deems appropriate pursuant to any civil judgment that may never even be filed against the killer.¹⁸⁴ What level of scrutiny should the court use with the decedent’s petition? Even if this petition has sufficient facts to base a claim, it will surely be one-sided, making it almost impossible for a neutral court to make an adequate decision on the petition.¹⁸⁵ The Court in *Doehr* scrutinized this very issue.¹⁸⁶ Furthermore, without extraordinary circumstances (typically, where the title holder of the property sought to be encumbered attempts to get rid of such property or criminally hide such property from collectability)¹⁸⁷ due process requires that a defendant be given notice of the action and an opportunity to be heard at a meaningful time and place.¹⁸⁸ The Slayer Statute does not require that the defendant receive notice at any specific time after the grant of the petition,¹⁸⁹ nor does it mention a hearing on the petition either before or after the petition is granted.¹⁹⁰ Clearly, some of the condoned actions under the Slayer Statute would deprive the killer of procedural due process.¹⁹¹

If a section “K” petition was granted and challenged, a court would apply the *Mathews* factors¹⁹² to see if the procedure afforded in the statute comports with proper procedural due process.¹⁹³ Seizing the killer’s estate significantly affects the killer’s interest in favor of the decedent’s estate, which may or may not be able to prove substantial damages. The killer has a significant interest in protecting the entirety of his or her assets from encumbrance for any length of

¹⁸³ *See id.*

¹⁸⁴ *Id.*

¹⁸⁵ *See Connecticut v. Doehr*, 501 U.S. 1, 13-14 (1991).

¹⁸⁶ *Id.*

¹⁸⁷ *See ARIZ. REV. STAT. ANN.* § 12-2402 (2003).

¹⁸⁸ *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

¹⁸⁹ *ARIZ. REV. STAT. ANN.* § 14-2803(K) (2012).

¹⁹⁰ *Id.*

¹⁹¹ *See* sources cited *supra* note 15.

¹⁹² *Mathews*, 424 U.S. at 335 (“First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”).

¹⁹³ *Id.* at 334 (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected.” (internal citation omitted) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972))).

time.¹⁹⁴ The second *Mathews* factor is the strongest argument in support of the assertion that the statute satisfies due process because the probability of a completely erroneous deprivation is low since the killer has already been convicted through a criminal trial or the Slayer Statute's alternative procedure.¹⁹⁵ However, this argument fails because the amount of damages the decedent's estate will be able to prove is tenuous. Establishing the likelihood of a damage award requires evidence, as in *Doehr*, but the petition the decedent's estate must file requires no evidence.¹⁹⁶ In the context of erroneous deprivation, the Supreme Court has regularly discussed the procedural safeguard of requiring the petitioning estate to secure a bond.¹⁹⁷ However, the Court previously found there is no less erroneous deprivation of the defendant's property when there is a bond requirement.¹⁹⁸ The Court does not make it habit to allow wrongful deprivations if they can later be undone.¹⁹⁹ Without any other procedural safeguards to consider, a court would finally consider any significant governmental burden.²⁰⁰ The only burden that would be thrust upon the state is that of notice and a hearing. In most cases of this nature, the provisional-remedy statutes are appropriate and they already provide for a hearing.²⁰¹ However, the Slayer Statute does not mention any such hearing or procedure for notice.²⁰² There very well may be a significant burden on the state to have to dedicate court resources to a hearing and state money to providing notice to the defendant. This, however, is not a substantial burden when compared to the potential complete deprivation of the killer's procedural due process rights and property.

Based on the *Mathews* factors, the Slayer Statute potentially provides for a significant deprivation of the killer's due process rights.²⁰³ The killer's interest in his property that is being seized by the decedent's estate, which may not be able to prove substantial damages, is great.²⁰⁴ Without the requirement of a particularized affidavit, it is impossible for a judge to determine if there is

¹⁹⁴ *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991) (“[O]ur cases show that even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection. Without doubt, state procedures for creating and enforcing attachments, as with liens, ‘are subject to the strictures of due process.’” (quoting *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 85 (1988))).

¹⁹⁵ ARIZ. REV. STAT. ANN. § 14-2803(F) (2012).

¹⁹⁶ *Doehr*, 501 U.S. at 13-14; ARIZ. REV. STAT. ANN. § 14-2803(K) (2012).

¹⁹⁷ See sources cited *supra* note 15.

¹⁹⁸ *Doehr*, 501 U.S. at 15.

¹⁹⁹ *Stanley v. Illinois*, 405 U.S. 645, 647 (1972) (“This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.”).

²⁰⁰ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

²⁰¹ ARIZ. REV. STAT. ANN. § 12-2402 (2003).

²⁰² ARIZ. REV. STAT. ANN. § 14-2803(K) (2012).

²⁰³ *Doehr*, 501 U.S. at 13-15.

²⁰⁴ See *id.*

potential for erroneous deprivation of the killer's interest in his estate. Finally, there is no substantial burden imposed on the state by requiring the state to provide further procedure to the killer to give him or her proper due process. Thus, some of the procedures condoned by section "K" of the Slayer Statute will likely result in the unconstitutional deprivation of the killer's due process rights pertaining to his property.

D. But He Killed Someone . . .

The Arizona Legislature may have intended to use the constructive trust language to avoid the provisional-remedy requirements altogether. If this was the intent, the Arizona Legislature is most likely relying on the first and second prongs of the *Mathews* test weighing heavily in the decedent's favor.²⁰⁵ If those two factors weigh heavily enough in the decedent's favor, the basic due process requirements of notice and a hearing may be much less important when viewed by a court.²⁰⁶

The two competing interests at stake when the Slayer Statute is involved are the killer's interest in the unencumbered use of his property, and the interest of the decedent's estate and family to collect money from the killer for the wrong that he or she committed against them so they may begin to heal and get over the death of a loved one. The loss of a loved one is undoubtedly a tragic event that requires significant recourse but there is no constitutional protection for the family's pecuniary interest after the loss of a loved one. There is a strong societal interest in preventing persons from killing others, hence criminal statutes—but no explicit constitutional protections exist.²⁰⁷ There are, however, two constitutional provisions that protect property rights.²⁰⁸ Without more than an empathetic urge to make the decedent's family as whole as possible after such a tragic event, there can be little argument that the killer's interest in his or her own property does not outweigh the pecuniary interest of the decedent's family.

²⁰⁵ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) ("First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

²⁰⁶ See *Goichman v. Rheuban Motors, Inc.*, 682 F.2d 1320, 1324-25 (9th Cir. 1982).

²⁰⁷ U.S. CONST. amend. XIV ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); see also *Shelley v. Kraemer*, 334 U.S. 1, 4-5, 13-14, 16 (1948).

²⁰⁸ U.S. CONST. amend. V; U.S. CONST. amend. XIV.

The second test in *Mathews* is how likely the attachment is to result in an erroneous deprivation of property.²⁰⁹ How can one doubt the killer will be found liable for any civil judgments stemming from the killing of his or her spouse or child, especially when the civil suit is filed after a conviction has been handed down? One must consider that a civil suit after a death and subsequent conviction, typically a wrongful death action,²¹⁰ determines not only whether the killer is liable for the damages to the decedent's family and estate, but also the amount of damages.²¹¹ The Slayer Statute allows the decedent's estate to file a petition to hold the killer's property long before considering whether to file a civil suit.²¹² How can a court consider the likelihood of a party proving its claim when that party has not seriously considered filing such a complaint? Furthermore, the Slayer Statute applies to several different offenses,²¹³ which can result from very different circumstances.²¹⁴ Such contrasting circumstances could result in the killer being civilly liable for very different amounts.²¹⁵ Only the most egregious acts could possibly justify depriving the killer of his entire estate,²¹⁶ especially if the killer is very wealthy. Damages can be very difficult to prove and without a complaint nearly ready to be filed, it is impossible for a judge to determine the likelihood of erroneous deprivation. Even the provisional-remedy-without-notice statute, which allows one to file attachment proceedings before a complaint is filed, contemplates a complaint being filed in close proximity to the petition.²¹⁷

²⁰⁹ *Mathews*, 424 U.S. at 335 ("First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

²¹⁰ ARIZ. REV. STAT. ANN. § 12-612 (2003).

²¹¹ *Id.*

²¹² ARIZ. REV. STAT. ANN. § 14-2803(K) (2012).

²¹³ *Id.*

²¹⁴ See ARIZ. REV. STAT. ANN. §§ 13-1102 to -1105 (2010).

²¹⁵ See *U.S. v. Houser*, 130 F.3d 867, 868-69 (9th Cir. 1997) (Defendant was convicted of second-degree murder. The defendant got into a fight with his girlfriend outside of a bar, during which he shot her with a handgun in the neck at close range.); *State v. Velazquez*, 166 P.3d 91, 95-97 (Ariz. 2007) (Velazquez was convicted of first-degree murder and seven counts of child abuse. Velazquez assaulted his girlfriend's twenty-month-old daughter, causing her to fall backward and hit her head, ultimately killing her. Velazquez and his girlfriend tied a rock to the deceased girl's body and dumped the body in a canal.); *State v. Harvey*, 974 P.2d 451, 453 (Ariz. Ct. App. 1998) (Defendant was convicted of negligent homicide. Defendant exited a bar and got in his car with the deceased. The bouncer yelled at the defendant as he was backing out and the defendant reached under his driver's seat for a handgun. The handgun discharged, ultimately killing the decedent.).

²¹⁶ See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); see also *Goichman v. Rheuban Motors, Inc.*, 682 F.2d 1320, 1324-25 (9th Cir. 1982).

²¹⁷ See ARIZ. REV. STAT. ANN. § 12-2402 (2003).

The Arizona Legislature may be relying on the killer's interest in his or her property rights being substantially outweighed by the decedent family's interest in pecuniary restitution, but the United States Constitution clearly favors property rights.²¹⁸ Erroneous deprivation is also not in the decedent's favor if the complaint is not filed in close proximity to the filing of the decedent's petition because without sufficient evidence the judge will not be able to adequately weigh the likelihood of deprivation.²¹⁹ In any situation that involves the Slayer Statute, it is very unlikely that anything could sufficiently outweigh the killer's interest in his or her property to make the notice and opportunity-to-be-heard requirements of due process less important.

E. What to do With Section "K"?

Section "K" of the Slayer Statute, if used exactly how the language suggests, violates procedural due process rights on its face.²²⁰ This leaves a court with two options: (1) allow the statute to operate as intended but issue a declaratory judgment and injunction prohibiting the use of section "K" when it would violate procedural due process;²²¹ or, (2) invalidate section "K" altogether and strike it from the Slayer Statute.²²² Either method is perfectly adequate. However, because the Arizona Legislature had a noble intent in mind when it passed section "K," a court may find it difficult to justify completely striking the addition to the Slayer Statute.

The Court looks at three basic related principles to decide whether to invalidate a statute. First, the Court tries not to invalidate more of a legislature's work than is necessary.²²³ Second, the Court restrains itself from rewriting state law to conform to constitutional requirements.²²⁴ Third, the Court determines whether the legislature would prefer the still-valid portions of the statute to no statute at all.²²⁵

²¹⁸ U.S. CONST. amend. V; U.S. CONST. amend. XIV.

²¹⁹ See *Connecticut v. Doehr*, 501 U.S. 1, 13-14 (1991).

²²⁰ See ARIZ. REV. STAT. ANN. § 14-2803 (2012); see also sources cited *supra* note 15.

²²¹ Cf. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 320 (2006) (A New Hampshire law violated substantive due process by unduly burdening a woman's privacy right in receiving an abortion and the Court held it was not the judiciary's job to rewrite statutes to make them conform with constitutional principles. However, the Court attempts to limit the solution to the problem by only invalidating the offending portions of the law and leaving the rest in force.).

²²² Cf. *Stenberg v. Carhart*, 530 U.S. 914, 945-46 (2000) (A physician brought suit challenging a Nebraska law that banned partial birth abortions. The Court found the law unduly burdened women's privacy rights to choose an abortion because it lacked a "health of the mother" exception and struck down the statute.)

²²³ See *Ayotte*, 546 U.S. at 329.

²²⁴ See *id.* at 330.

²²⁵ *Id.* at 320.

In this case, there would be no need to rewrite any portion of section “K” because the same language allows both conduct that violates procedural due process and constitutionally acceptable conduct. If a court merely enjoined certain uses of section “K,” it would have to delineate many situations when it would be inappropriate to use the statute. In fact, there is most likely more prohibited conduct possible through section “K” than constitutionally sound conduct. Finally, the Arizona Legislature’s intent was to secure funds for victims of domestic violence before a judgment is entered, or possibly even before a complaint is filed.²²⁶ An injunction, essentially equating section “K” to the three Arizona Provisional Remedy statutes, would severely frustrate the legislature’s intent and only leave section “K” applicable in very narrow circumstances. Furthermore, such an injunction combined with the existence of the provisional-remedy statutes would essentially make section “K” redundant law.

A court could either strike section “K” of the Slayer Statute or enter an injunction against unconstitutional use of the section. It seems pointless, however, to carve out most of the uses of section “K” and leave the section applicable to only those situations already covered by other Arizona statutes. Therefore, it only makes logical sense to strike section “K” in its entirety.

IV. CONCLUSION

Section “K” of the Slayer Statute was intended to prevent a killer from profiting from killing his spouse by selling or transferring assets normally inherited from a spouse who dies of natural causes, before a criminal conviction or civil adjudication can stop such conduct.²²⁷ The same language that specifically contemplates impending civil suits, can be used to hold a killer’s assets before the filing of any civil suit.²²⁸

Properly holding a killer’s assets prior to commencement of any suit is possible, but has pitfalls around every corner.²²⁹ Notice and an opportunity to be heard at a meaningful time and place are required before a state can take property.²³⁰ The only avenue around these requirements is the existence of extraordinary circumstances, such as the killer transferring assets out of his estate before a court has a chance to adjudicate or enter a conviction.²³¹ Such circumstances can be difficult and time consuming to prove, making the aim of section “K” of the Slayer Statute pointless because it still leaves adequate time

²²⁶ See ARIZ. REV. STAT. ANN. § 12-2402 (2003); ARIZ. REV. STAT. ANN. § 12-2403 (2003); see also *H.B. 2742*, *supra* note 16.

²²⁷ *H.B. 2742*, *supra* note 16.

²²⁸ ARIZ. REV. STAT. ANN. § 14-2803(K) (2012).

²²⁹ See ARIZ. REV. STAT. ANN. § 12-2402 (2003).

²³⁰ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

²³¹ See ARIZ. REV. STAT. ANN. § 12-2402(A) (2003).

for the killer to dispose of assets.²³² However, the due process rights of the killer are not to be cast aside lightly, because property rights are one of the fundamental rights guaranteed to United States citizens by the Constitution.²³³

While it may be appropriate for the trial court to impose a constructive trust on the killer's estate in contemplation of paying any criminal fines,²³⁴ it becomes improper when the court uses a constructive trust to hold the killer's property without notice and an opportunity to be heard in contemplation of a potential civil suit.²³⁵

The Slayer Statute is not unconstitutional because the language leaves room for conduct that is perfectly in line with due process.²³⁶ However, it would be very easy for a judge to allow the decedent's estate to hold the killer's estate in constructive trust without affording the killer the requisite due process. The Arizona Legislature should revisit Section "K" of the Slayer Statute to provide more guidance to any judge contemplating using the statute to avoid any of the unconstitutional pitfalls that are easily trod upon. The Slayer Statute should include due process protections in the statute. Without language requiring a hearing very near to the time of petition, any seizure of property for the benefit of a person filing a civil case will almost certainly violate the killer's due process rights.²³⁷

²³² *H.B. 2742*, *supra* note 16.

²³³ *See* U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV.

²³⁴ *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 (2011); *Harmon v. Harmon*, 613 P.2d 1298, 1300 (Ariz. Ct. App. 1980); *Turley v. Ethington*, 146 P.3d 1282, 1285 (Ariz. Ct. App. 2006).

²³⁵ *See* sources cited *supra* note 15.

²³⁶ *See* ARIZ. REV. STAT. ANN. § 14-2803(K) (2012).

²³⁷ *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *see also* sources cited *supra* note 15.

REFORMING A VISA TO SNITCH: THE CASE FOR SELF-PETITIONING

Perna Lal*

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As a young college student from Nigeria, studying in the United States during the height of the drug war, Hansi Augustine had no idea that he would set off a chain reaction ensuring his removal from the United States when he accidentally sold some narcotics to undercover Drug Enforcement Administration (“DEA”) agents.¹ After arresting and charging Augustine for possession and sale of narcotics, the DEA agents arrested and jailed Augustine’s two sisters to ensure that he pleaded guilty and cooperated with future DEA investigations.² The DEA promised Augustine that it would work with the former Immigration and Naturalization Service (“INS”) to seek a permanent legal status for him and protect him from removal if Augustine agreed to serve as a DEA informant.³ Augustine agreed to the offer and pled guilty to the charges.⁴ He served on multiple missions with the DEA, with the understanding that they would work with the former INS to obtain legal status for him.⁵ After five years of cooperation, the DEA dropped Augustine, stating that his sources had dried up and that he was no longer any use to them.⁶ Augustine sought Congressional help to obtain legal status, and even hired a Washington D.C. lobbying group to aid in his efforts.⁷ Help never came, and instead, a few years later, Immigration and Customs Enforcement (“ICE”) agents detained Augustine to process him for removal from the United States.⁸ Augustine, who is a husband

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¹ The name “Hansi Augustine” is a pseudonym used to protect the privacy and confidentiality of a client.

² Telephone Interview with Hansi Augustine (Apr. 11, 2013).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

and father to U.S. citizens, and suffers from multiple health problems, now faces removal to Nigeria, a country he last saw in 1985.⁹

Augustine and his family would have endured far less emotional trauma had the United States government allowed him to remain in the United States and self-petition for an S-visa for his cooperation with federal law enforcement.¹⁰ Following the 1993 bombing of the World Trade Center in New York City, Congress amended the Immigration and Nationality Act (“INA”) to establish a new “S” temporary non-immigrant visa category for non-citizen witnesses and informants who could provide critically reliable information for the prosecution of a criminal or terrorist organization.¹¹ “The provision establishing the S visa in the INA was originally due to expire on September 13, 1999”¹² However, in response to the attacks on September 11, 2001, Congress passed legislation to make the S-visa permanent.¹³ Under the S-visa, up to 200 criminal informants, designated as S-5, and 50 terrorist informants, designated as S-6, can be admitted annually to the United States.¹⁴ Accompanying family members are referred to as S-7 nonimmigrants and not subject to the overall cap of 250.¹⁵

The length of stay for an S-5 or S-6 nonimmigrant is limited to three years with no extensions.¹⁶ However, the Secretary of the Department of Homeland Security (“DHS”) (formerly, the Attorney General) may adjust the status of an S-visa holder to lawful permanent residence¹⁷ (“LPR”) status if the law enforcement agency that initially filed for the S-visa also files a request for

⁹ *Id.*

¹⁰ See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130003, 108 Stat. 1796, 2024-26.

¹¹ *Id.*

¹² KARMA ESTER, CONG. RESEARCH SERV., RS 21043, IMMIGRATION: S VISAS FOR CRIMINAL AND TERRORIST INFORMANTS 2 (rev. 2007).

¹³ *Id.* at 4; see also Act of Oct. 1, 2001, Pub. L. No. 107-45, 115 Stat. 258 (admission of “S” visa nonimmigrants).

¹⁴ See 8 U.S.C. § 1101(a)(15)(S) (2012) (defining the “S” nonimmigrant classification); 8 U.S.C. § 1184(k)(1) (2012) (“The number of aliens who may be provided a visa as nonimmigrants under section 1101(a)(15)(S)(i) of this title in any fiscal year may not exceed 200. The number of aliens who may be provided a visa as nonimmigrants under section 1101(a)(15)(S)(ii) of this title in any fiscal year may not exceed 50.”).

¹⁵ See ESTER, *supra* note 12, at 2-3.

¹⁶ 8 U.S.C. § 1184 (k)(2) (2012).

¹⁷ *Lawful Permanent Resident (LPR)*, U.S. DEP’T OF HOMELAND SECURITY, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/tools/glossary/lawful-permanent-resident-lpr> (last visited Apr. 30, 2014) (a lawful permanent resident is described as “[a]ny person not a citizen of the United States who is residing the [sic] in the U.S. under legally recognized and lawfully recorded permanent residence as an immigrant. Also known as ‘Permanent Resident Alien,’ ‘Resident Alien Permit Holder,’ and ‘Green Card Holder.’”).

adjustment of status within the three-year period.¹⁸ In such cases, the DHS Secretary may use her discretion to determine whether the S-visa holder provided information that “substantially contribute[s] to the success of an authorized criminal investigation or the prosecution of an individual . . .” or to “the prevention or frustration of an act of terrorism . . .”¹⁹ In this manner, after a temporary three-year reprieve from removal, the ultimate reward for cooperation with the authorities is lawful permanent resident status in the United States.

I. CURRENT S-VISA PROCEDURES

Although the federal government issues S-visas, local and state law enforcement agencies play an indispensable role. Only a federal or a state law enforcement agency (hereinafter LEA) can apply for a visa on behalf of a non-citizen witness.²⁰ Law enforcement officials must file Form I-854, certifying that the non-citizen informant or witness has critical, reliable knowledge of the criminal organization or enterprise, “is willing to supply, or has supplied, such information to federal or state LEA, and is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise.”²¹ The law enforcement agency must certify the need for and nature of the proposed cooperation, and provide certain required information.²² As part of Form I-854, non-citizens must certify that they knowingly have waived their rights to a removal hearing and to contest any action to remove them from the country, including detention pending deportation.²³

The U.S. Attorney with jurisdiction over the investigation, along with the highest-level state or federal law enforcement agency, must endorse the I-854.²⁴ The S-visa application is filed with the Assistant Attorney General for the Justice Department’s Criminal Division, who reviews it for completeness and accuracy and forwards it to the appropriate DHS officer for final

¹⁸ ESTER, *supra* note 12, at 3-4.

¹⁹ See 8 U.S.C. § 1255(j) (2012); *see also* 9 U.S. DEPT’T OF STATE, FOREIGN AFFAIRS MANUAL § 41.83 n.7.1 (2010) (“Adjustment from S-5 Status”); 9 U.S. DEPT’T OF STATE, FOREIGN AFFAIRS MANUAL § 41.83 n.7.2 (2010) (“Adjustment from S-6 Status”).

²⁰ See 8 C.F.R. § 212.4(j) (2012). Under this designation, a law enforcement agency also includes a state or federal court or United States Attorney’s Office. *Id.*

²¹ 8 C.F.R. § 214.2(t).

²² See ESTER, *supra* note 12, at 2.

²³ U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-72.000 (2011); U.S. Department of Justice, *S Visa Program—Application Procedures* (updated July 2011) [hereinafter *S Visa Application Procedures*], http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01863.htm.

²⁴ *Id.*

approval.²⁵ Upon receiving the complete certified application, the DHS has the discretion to waive any ground of exclusion for an S nonimmigrant, except for those regarding Nazi persecution, genocide, torture, and extra-judicial killings.²⁶ While in S nonimmigrant status, the non-citizen must report regularly to the supervising law enforcement agency and may obtain work authorization.²⁷

This statutory scheme clearly reflects Congress's overarching intent to assure criminal informants and witnesses that cooperating with law enforcement will not put them or their families in danger of deportation. However, the S-visa system has been plagued with abuse since the inception of the program. Government agents and law enforcement officials have dangled the promise of the S-visa in front of informants and witnesses on various occasions to tempt their cooperation, only to renege on the promise later.²⁸ In many cases, non-citizen informants have risked their lives for the U.S. government after being promised an S-visa, only for the government to turn around and initiate removal proceedings against them.²⁹ A law enforcement agency's promise to apply for an S-visa provides no guarantee that a non-citizen informant or witness will receive relief because the agency does not have jurisdiction to award the visa.³⁰ Oftentimes, ICE detains and deports informants and witnesses even after promising them S-visas.³¹ After the initiation of removal proceedings, a non-citizen informant or witness often has no other option but to seek a stay of removal from the very agency trying to deport him or her.

II. CASE STUDIES

There are no statistics available for how many times law enforcement and ICE have reneged on promises made to informants and witnesses. A few sto-

²⁵ 8 C.F.R. § 214.2(t)(4) (1995). With the breakup of legacy INS into various agencies, it is unclear to whom the final application is forwarded for approval. The current regulations state "Commissioner of INS." *Id.*

²⁶ See 8 C.F.R. § 212.4(j) (2012); Immigration and Nationality Act of 1952, § 212(a)(3)(E), 8 U.S.C. § 1182(a)(3)(E) (2012).

²⁷ See 8 U.S.C. § 1184(k)(4) (2012); 8 C.F.R. § 1274a.12(c) (2008).

²⁸ See, e.g., Andrew Becker, *Retired Drug Informant Says He Was Burned*, NPR (Feb. 13, 2010, 4:18AM), <http://www.npr.org/2010/02/13/122357350/retired-drug-informant-says-he-was-burned>.

²⁹ *Id.*

³⁰ S Visa Application Procedures, *supra* note 23.

³¹ See, e.g., *ICE Reneged on Deportation Deal, Say Immigrants*, Wash. Times (Feb. 17, 2010), <http://www.washingtontimes.com/news/2010/feb/17/ice-reneged-on-deportation-deal-say-immigrants/> ("They use the most vulnerable people to do dangerous work, make them all sorts of promises and then just abandon them," says New York immigration lawyer Claudia Slovinsky. In more than 25 years of practice, Ms. Slovinsky says, she doesn't know of a single case of someone receiving an S visa.").

ries have received media attention due to the work of investigative journalists and community advocates. In February 2010, NPR ran a story on Ernesto Gamboa, an El Salvadoran man who worked with federal agents for fourteen years, helping to obtain nearly 100 convictions.³² Gamboa offered to help Seattle police in the 1990s as a way to gain legal status in the country while avenging the drug-overdose death of a friend and earning a living.³³ The United States ascertained that Gamboa provided a “significant public benefit” through his help with state and federal drug investigations and granted him parole.³⁴ However, in 2009, when ICE stopped paying Gamboa the measly \$14,000 stipend he received every year, he quit in the middle of a case to pursue a job offer in Florida.³⁵ ICE initially moved to deport Gamboa to El Salvador, but dropped its efforts in August 2009, seeing that it was not in its best interests to pursue deportation.³⁶ His whereabouts are currently unknown.

Since Gamboa’s story hit the airwaves, several informants have come forward to share their stories. The New York Times covered the story of Edmond Demiraj, an Albanian national, who agreed to serve as a government witness against Bill Bedini, an Albanian mobster who was charged with human smuggling.³⁷ Demiraj had information about Bedini because he had worked for the mobster in a construction business.³⁸ Marina Garcia Marmolejo, the federal prosecutor at the time, asked Demiraj to testify against the mobster. Marmolejo had leverage because Demiraj was a citizen of Albania residing in the United States without legal status.³⁹ Demiraj and Marmolejo struck a deal; in exchange for his testimony, the United States would ensure his safety by granting him a green card.⁴⁰ However, nothing was in writing and when Bedini posted bail and promptly fled the United States, the government also promptly deported Demiraj to Albania, where Bedini kidnapped, beat, and shot Demiraj, almost killing him in the process.⁴¹ Unable to get the protection of the Albanian police, Demiraj escaped to the United States,⁴² where he managed to

³² Becker, *supra* note 28.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Adam Liptak, *Witness Feels Betrayed as U.S. Plans to Divide Family*, N.Y. Times, Aug. 9, 2011, at A11, available at <http://www.nytimes.com/2011/08/09/us/09bar.html>.

³⁸ *Id.*

³⁹ Carrie Johnson, *Immigrant Witness Says U.S. Reneged on Protection*, NPR (Aug. 30, 2011, 12:01 AM), <http://www.npr.org/2011/08/30/140042057/immigrant-witness-says-u-s-reneged-on-protection>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Editorial, *Mr. Demiraj’s Nightmare*, N.Y. Times, Aug. 21, 2011, at SR10, available at <http://www.nytimes.com/2011/08/21/opinion/sunday/mr-demirajs-nightmare.html>.

receive withholding of removal.⁴³ His horror story should have ended there but his wife and son—unlawfully residing in the country since 2000—were subject to deportation as Demiraj’s withholding of removal status granted no derivative benefits to his spouse or children.⁴⁴ The Department of Justice argued against giving his wife and son asylum, and the appeals court agreed.⁴⁵ As a result of public pressure and outcry, while the case was pending at the U.S. Supreme Court, DHS granted the Demiraj family asylum, putting a happy ending to an unnecessarily tortured experience.⁴⁶

Public pressure has made the difference in other cases of informants who were subjected to abuse by law enforcement. Last summer, Dream Activist, a network of undocumented youth organizers, received news that Julio Berti, a young man who left El Salvador as a teenager to escape gang violence, was facing deportation for cooperating with law enforcement officials in Kansas.⁴⁷ In 2005, while enrolled at the Adult Education Center in Kansas, Berti was offered a fake Kansas state driver’s license.⁴⁸ Knowing that he was not eligible for one as an unauthorized non-citizen in the U.S., Berti reported the incident to his teachers, who informed the Kansas Bureau of Investigations (“KBI”).⁴⁹ The KBI discovered that Berti had a prior order of removal and promised him that if he cooperated with its investigation it would work with federal officials to obtain a green card for him.⁵⁰

Over the course of the next two years, Berti worked with the KBI to aid in the investigation under the impression the KBI would work with the federal government to obtain a green card or more permanent status for him.⁵¹ However, after the conclusion of the investigation, Berti never heard from the

⁴³ See 8 C.F.R. § 208.16 (2013) (Withholding of removal is similar to asylum, in that it provides protection from removal to a country where an immigrant has a clear probability of persecution on account of one’s race, religion, nationality, political opinion, or membership in a particular social group.).

⁴⁴ *Id.*; *Demiraj v. Holder*, 631 F.3d 194, 195-96 (5th Cir. 2011) (affirming IJ and BIA decision that Mrs. Demiraj and her son were not eligible for asylum in the U.S.); see also *Arif v. Mukasey*, 509 F.3d 677, 682 (5th Cir. 2007) (withholding of removal does not confer any derivative benefits or protections on the non-citizens family).

⁴⁵ *Demiraj*, 631 F.3d at 195-97.

⁴⁶ Adam Liptak, *Albanian Wins Bid for Asylum, Lawyers Say*, N.Y. Times, May 9, 2012, at A16, available at <http://www.nytimes.com/2012/05/09/us/albanian-informant-wins-us-asylum.html>; see also *Demiraj v. Holder*, Nos. 08-60991, 09-60585, 2012 WL 2051799 (5th Cir. May 31, 2012) (vacating the 2011 decision).

⁴⁷ Allen Twitchell, *Emporia Family Fights Father’s Deportation*, Emporia Gazette (Feb. 25, 2013, 9:45 AM), http://www.emporiagazette.com/latest_news_and_features/article_5f30e218-7f62-11e2-9238-001a4bcf6878.html.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

KBI.⁵² In July 2012, ICE agents detained Berti and attempted to deport him from the country even though Berti has a U.S. citizen wife and five U.S. citizen children.⁵³ After his family and several immigrant rights organizations mobilized strongly on his behalf, ICE released Berti from detention in late March 2013 and allowed him to reopen his immigration case.⁵⁴ However, in some instances, even community outcry and public pressure is not enough to save a long-time resident from deportation. This type of situation highlights the need for statutory and administrative changes to the S-visa program.

A resident of Jersey City since 1989, Charbel Chehoud arrived in the United States on a valid visa and applied for asylum from persecution based on his religious beliefs.⁵⁵ A former coworker admitted to Chehoud in 2006 that he had committed a homicide during a fishing trip in 1999 and made it look like an accidental drowning.⁵⁶ Chehoud tipped off authorities, and two months later, the New Jersey state police and the Monmouth County Prosecutors arrested two men and charged them with aggravated manslaughter.⁵⁷ While Chehoud was working undercover with a New Jersey police detective and pursuing an asylum claim, his car broke down and he missed a court date, leading an Immigration Judge to order his removal from the United States.⁵⁸ Despite his cooperation with local law enforcement in resolving a homicide, ICE detained Chehoud and placed him in removal proceedings.⁵⁹ In response, Chehoud's U.S. citizen fiancée, Veronica Garcia, launched a Change.org petition for him, and it quickly garnered the support of more than 13,000 people across the country.⁶⁰ Sergeant Anthony Musante and Lieutenant Frederick Younger of the Jersey City police, and then-Monmouth County Prosecutor,

⁵² *Id.*

⁵³ See Allen Twitchell, *Keep Julio Here*, Emporia Gazette (Feb. 26, 2013, 1:13 PM) http://www.emporiagazette.com/opinion/editorials/article_a356ebfe-8048-11e2-9178-001a4bcf6878.html.

⁵⁴ Allen Twitchell, *Berti Remains in U.S. for Now*, EMPORIA GAZETTE (Mar. 7, 2013, 12:00 PM) http://www.emporiagazette.com/news/article_e0cbd918-8750-11e2-ab89-10604b9f6eda.html?mode=jqm.

⁵⁵ Erica Pearson, *Immigrant Charbel Chehoud Faces Deportation Despite Helping Solve High-Profile New Jersey Murder Case*, N.Y. Daily News, Dec. 30, 2011, at 3, available at <http://www.nydailynews.com/news/crime/jersey-cops-vouch-sandy-hook-murder-tipster-fights-stay-u-s-article-1.999043>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Veronica Garcia, *He Helped Police Solve Murder Crimes! Don't Deport Charbel Chehoud*, Change.org (updated Jan. 11, 2012), <http://www.change.org/petitions/he-helped-police-solve-murder-crimes-don-t-deport-charbel-chehoud>.

⁵⁹ *Id.*

⁶⁰ Erica Pearson, *Thousands Sign Petition to Support Charbel Chehoud in Bid to Avoid Deportation After Immigrant Helped Solve Murder Case*, N.Y. Daily News, Jan. 31, 2012, at 28, available at <http://www.nydailynews.com/news/thousands-sign-petition-support-charbel-chehoud->

Luis Valentin, wrote letters in support of Chehoud to Immigration and Customs Enforcement.⁶¹ However, ICE alleged that Chehoud had physically and verbally resisted deportation on five separate occasions and that it was time to deport him from the country.⁶² Despite the overwhelming amount of support and a U.S. citizen fiancée, in February 2012, the United States deported Chehoud back to Lebanon.⁶³ His whereabouts are unknown, and his deportation from the United States, even after helping law enforcement solve a homicide case, emphasizes the need to make changes to the S-visa program.

Besides unfulfilled promises from an agency gone rogue, there are some additional notable limitations to the S-visa system. The visa is a temporary three-year immunity from deportation, so there is no real incentive to snitch for a non-citizen who was a minor participant in a crime but who would face a harsh criminal sentence if she or he pleaded guilty.⁶⁴ Nonetheless, because those who commit minor offenses should not receive harsh punishments, the S-visa remains a valuable incentive. The second limitation is the paradox that the most “substantial assistance” in resolving crimes probably can be offered by those persons who have been most central to the commission of offenses.⁶⁵ This paradox may explain why the S-visa has been so under-utilized in the past. Under current regulations, the government probably does not want to give any sort of legal status to persons who can provide substantial assistance, as they are most likely to be the ones committing crimes. However, in spite of this paradox, a line must be drawn between assisting criminals in earning the right to stay in the United States and helping those who have worked with law enforcement as good Samaritans.

III. RECOMMENDATIONS

As these cases detail, both law enforcement and government officials have abused the S-visa process to meet their own needs, and have reneged on their promises toward good Samaritans such as Hansi Augustine, Ernesto Gamboa, Edmond Demiraj, Julio Berti, and Charbel Chehoud. An informant and witness

bid-avoid-deportation-immigrant-helped-solve-murder-case-article-1.1014451; *see also* Garcia, *supra* note 58.

⁶¹ Eunice Lee, *U.S. Informant, Lebanese National Deported After Essex County Detainment*, N.J. Star Ledger (Feb 28, 2012, 7:00 AM), http://www.nj.com/news/index.ssf/2012/02/us_informant_lebanese_national.html.

⁶² Pearson, *supra* note 55.

⁶³ Erica Pearson, *Deported After Case—Solve Aid*, N.Y. Daily News, Feb. 24, 2012, at 16, available at <http://www.nydailynews.com/news/lebanese-immigrant-helped-cops-solve-slay-case-deported-article-1.1027869>.

⁶⁴ Rachel Frankel, Note, *Sharks and Minnows: Using Temporary Alien Deportation Immunity to Catch the Big Fish*, 77 Geo. Wash. L. Rev. 431, 456 (2009).

⁶⁵ *Id.*

protection system such as the S-visa program, which is ridden with such abuse, does not encourage non-citizen participation. Horror stories about how non-citizen informants are used and discarded by law enforcement officials makes future recruitment and cooperation with law enforcement much more difficult among immigrants, many of whom are particularly vulnerable to crime.⁶⁶ What follows are some proposed statutory and administrative revisions that should be made to the S-visa program to protect non-citizen informants and to encourage their participation in the program:

- Mandate law enforcement agencies to disclose annually a list of non-citizen informants and witnesses to the office of the Attorney General.
- Allow former and current informants and witnesses, who have no criminal convictions, to self-petition for the S-Visa under the program. As part of the self-petitioning process, applicants must prove that they have provided substantial assistance to a law enforcement agency or have served as a key witness in a trial.
- ICE should exercise prosecutorial discretion and not remove these self-petitioners from the United States while their applications are pending.
- Once the Attorney General's office provides certification for the petition, the U.S. Citizenship and Immigration Service ("USCIS") must approve it, unless the applicant has other bars to admissibility.⁶⁷
- Restructure the cap of 250, such that unused S-visas from previous years can be recaptured if the numbers run out, so as to prevent backlog. In the event of a backlog, applicants must be placed on a wait list with the USCIS, and granted a stay of deportation until such time as a visa becomes available.

Informants and witnesses should be allowed to self-petition for the S-visa. This is not an unprecedented or unimaginable change because the United States currently allows for self-petitioning in several visa categories, from EB-1, for high-skilled intending immigrants, to the Violence Against Women's Act

⁶⁶ Jacob Bucher et al., *Undocumented Victims: An Examination of Crimes Against Undocumented Male Migrant Workers*, 7 *Southwest J. Crim. Just.* 159, 168-70 (2010) ("Due mostly to fear or lack of trust of law enforcement, the majority of crimes committed against undocumented workers go unreported and unresolved. Offenders are therefore often aware that the victims will not contact police and could be more vulnerable targets."), available at [http://swacj.org/swjcf/archives/7.2/Bucher%20Article%20\(3\).pdf](http://swacj.org/swjcf/archives/7.2/Bucher%20Article%20(3).pdf).

⁶⁷ U.S. Citizenship and Immigration Services, an arm of the Department of Homeland Security (DHS), has the primary responsibility of issuing visas to persons in the United States. See U.S. DEP'T OF HOMELAND SEC., *U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement* 4 (2012), http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf; ESTER, *supra* note 12.

(“VAWA”), for abused spouses of U.S. citizens.⁶⁸ On the contrary, it is a slight change that could reduce the exploitation and deportation currently plaguing many informants and witnesses.

For S-visa self-petitioners, the challenge is in setting what constitutes the floor for cooperation in assisting with the investigation or prosecution of a crime. Congress has had similar challenges with the nonimmigrant U-visa, most recently expanding what constitutes a serious crime for which victims could seek to remain in the United States.⁶⁹ Cooperation with a law enforcement agency should constitute activities such as: giving substantive tips that result in the investigation of a criminal enterprise; working as a police or federal informant; and agreeing to serve as a witness in a criminal trial. Anonymous tips should not amount to cooperation. In the least, persons must come forward, reveal themselves to a law enforcement agency, and provide reliable information that can aid and assist in the investigation or prosecution of a criminal enterprise or activity to obtain the right to self-petition for the S-Visa.

The law enforcement agency must make a note of cooperation and disclose all informants and witnesses to the Attorney General’s office to assist with the new self-petitioning process. Once the Attorney General’s office determines that an applicant meets the floor for cooperation, verifies the information provided by the law enforcement agency and certifies the application, the application shall be sent to USCIS for final approval. In this manner, informants such as Hansi Augustine, Edmond Demiraj, Julio Berti, and Charbel Chehoud would earn the right to remain in the United States without developing a reliance on the unscrupulous and untrusting authorities seeking to deport them.

While snitches are not regarded fondly in their communities, informants such as Demiraj, Berti, and Chehoud have received considerable support from their communities following efforts by the government to deport them. It is critical to ensure that the S-visa program is not used to create and increase distrust in the community, but to increase community cooperation in the prevention, investigation, and prosecution of serious crimes against community members. As such, non-citizen informants should not receive S-visas for informing law enforcement about the whereabouts of other unauthorized aliens and other minor immigration violators. In certifying an S-visa, the Attorney General must note the impact to the community and ensure that the non-citizen informant or witness is safe in her or his community following cooperation with law enforcement.

⁶⁸ See Immigration and Nationality Act of 1952 § 204(a)(1)(A), 8 U.S.C. § 1154(a)(1)(A)(vii) (2012) (“Procedure for granting immigrant status”); 8 C.F.R. § 204.5 (2012) (“Petitions for employment-based immigrants”).

⁶⁹ *US: Violence Against Women Act Renewed*, HUM. RTS. WATCH (Feb. 28, 2013), <http://www.hrw.org/news/2013/02/28/us-violence-against-women-act-renewed>.

Some naysayers claim that reforming the S-visa system to permit self-petitioning may increase the incentive to commit crimes to gain legal permission to stay in the United States. However, a single criminal conviction can render a person inadmissible and deportable from the United States, such that committing a crime is a perverse disincentive for any intending immigrant.⁷⁰ Upon receiving a certified application from the Attorney General's Office, if the USCIS finds evidence that someone has deliberately engaged in criminal activities to obtain an S-visa, it has the discretion to deny the visa and initiate removal proceedings. Additionally, S-visa holders face more scrutiny after three years on the temporary visa, as the Secretary of Homeland Security can exercise her or his discretion to deny lawful permanent residence ("LPR") to the S-visa holder.⁷¹ These checks and balances ensure that S-visas are provided to persons who substantially assist with law enforcement efforts without the perverse incentive to commit crimes.

The S-visa system, a relic of the war against terrorism, should be reformed into a system whereby intending immigrants show their allegiance to the United States through their actions. As a country, the United States benefits from the presence of good Samaritans like Charbel Chehoud, who should be rewarded with citizenship, not deportation. Allowing persons who assist efforts to drive out serious crime from their communities to self-petition for themselves incentivizes citizen participation in a flailing democracy. For many, self-petitioning can be an empowering act to rehabilitate and correct a past wrong. It should be available to many, rather than to the lucky few who are not abused and exploited by U.S. law enforcement on their way to the American dream.

⁷⁰ Immigration and Nationality Act of 1952, § 212(a)(2), 8 U.S.C. § 1182(a)(2) (2012).

⁷¹ See 8 U.S.C. § 1255(j) (2011); see also 9 U.S. DEPT'T OF STATE, FOREIGN AFFAIRS MANUAL § 41.83 n.7.1 (2010) (These provisions state that the Attorney General may, not must, adjust the status of the S-visa holder, which makes adjustment of status under the S-Visa a discretionary benefit).

SEARCHING SMARTPHONES INCIDENT TO AN ARREST

Vikram Iyengar*

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I. INTRODUCTION

In 1973, in *United States v. Robinson*, the U.S. Supreme Court held that the government’s search incident to arrest for a driver’s traffic infraction, including opening effects on a person, is a valid exception to the Fourth Amendment’s warrant requirement.¹ Thirty-four years later, the Fifth Circuit in *United States v. Finley* held that police officers are not constrained to search only for weapons on an arrestee’s person; they may also open cell phones found on a person and search the digital information.²

This Article discusses that while *Robinson* and *Finley* may appear to set dangerous precedent for government prying, *Finley*’s characterization of cell phones as “containers” is apt and applicable to smartphones as well.³ In this age of heightened national security, smartphone data can readily be used as a weapon or serve as evidence of a public safety threat. Treating smartphones as containers reflects the latest technology but creates a need to demarcate the extent of the container and what information is subject to a warrantless search. Balancing the needs of police efficiency with citizens’ rights requires a more

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¹ *United States v. Robinson*, 414 U.S. 218, 236 (1973) (three justices dissenting).

² Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 38 (2008) (citing *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007)).

³ See generally *State v. Smith*, 124 Ohio St. 3d 163, 2009-Ohio-6426, 920 N.E.2d 949, at ¶ 6 (citing *Finley*, 477 F.3d 250).

nanced approach to treating smartphones as containers, based on their connection to the crime at issue and data access capabilities.

II. SMARTPHONES AS “CONTAINERS”

In the early twentieth century, the U.S. Supreme Court first approved the warrantless search of a person incident to an arrest⁴ and then of objects found on the person or in his control.⁵ By authorizing the warrantless search of containers found on a person, the Fifth Circuit further broadened the exception to the Fourth Amendment.⁶ In *Finley*, the court extended the term “containers” to include cell phones, recognizing no legal difference between physical containers for drugs and “electronic equipment for digital information.”⁷ One of the few court opinions disallowing cell phones from being characterized as containers was *Ohio v. Smith*. In *Smith*, the Ohio Supreme Court defined “container” as “any object capable of holding another object”; hence, cell phones—with digital data—were not containers.⁸

Extending the precedential definition of “containers” to smartphones raises serious constitutional questions.⁹ A smartphone search is capable of constructing a record of an individual’s political, religious, and sexual associations.¹⁰ Such a search is inexpensive and can record data that the government can mine for years, such as trips to revealing destinations like abortion clinics or mosques. Moreover, smartphone searches can evade constitutional checks and construct profiles of citizens’ lives from social media; the resulting awareness that the government may be watching can chill expressive freedoms.

III. OBJECTIVES OF A SMARTER DEFINITION

The traditional objective of a search incident to arrest is to look for “weapons, instruments of escape, and evidence of crime.”¹¹ Especially in this age of heightened national security, smartphones can function as weaponry; for example, smartphones were originally believed to have been used in the Boston

⁴ *Chimel v. California*, 395 U.S. 752, 755 (1969) (citing *Weeks v. United States*, 232 U.S. 383 (1914)).

⁵ *Id.* at 755-56 (citing *Carroll v. United States*, 267 U.S. 132, 158 (1925)).

⁶ Gershowitz, *supra* note 2, at 32-36.

⁷ *Id.* at 38-39.

⁸ *State v. Smith*, 124 Ohio St. 3d 163, 2009-Ohio-6426, 920 N.E.2d 949, at ¶ 19 (describing the definition in *New York v. Belton*, 453 U.S. 454, 460 (1981) of a container as an object capable of holding another physical object).

⁹ See generally Gershowitz, *supra* note 2.

¹⁰ See *id.* at 44.

¹¹ *People v. Diaz*, 244 P.3d 501, 503 (Cal. 2011) (citing *United States v. Edwards*, 415 U.S. 800, 802-03 (1974)).

bombings of 2013.¹² Improvised Explosive Devices (IEDs) are also routinely triggered by smartphones.¹³ Moreover, terrorist cells are known to communicate using smartphones.¹⁴ A new definition of smartphone “containers” must therefore consider public safety objectives. However, the law must reflect that the framers of the Fourth Amendment lived in the presence of potential treason, bomb attacks, and war, and yet defined no exceptions to the Amendment.¹⁵

While the “exigent circumstances” argument raised by the state in *Smith* was overruled,¹⁶ it raises important considerations. If the police have information, but not enough for probable cause, that a smartphone may trigger an explosive or contains evidence subject to imminent deletion, the definition of a smartphone container should be flexible enough to allow a search in deference to public safety. However, to prevent police from engaging in “fishing expeditions,” it may be necessary to require them to prove that they would have been unable to obtain the data sought from the smartphone service provider in time.¹⁷ Partitioning smartphone data that is susceptible to a search is therefore vital.

IV. PARTITIONING DATA WITHIN SMARTPHONES

The Ohio Supreme Court insisted that (1) the definition of “container” is “any object capable of holding another physical object within,” and (2) pagers of the 1990s bear little resemblance to today’s cell phones, which are capable of storing a wealth of digitized information—wholly unlike any *physical* object found within a container—therefore a cell phone is not a container.¹⁸ However, almost all smartphones retain data on SIM and SD cards, which are physical objects within the phone that can be slid out and plugged in to readers much like a printed page can be slid out of a binder and read using a magnifying

¹² Larry Greenemeier, *Aftermath of Boston Marathon Bombing: How Do Terrorists Use Improvised Explosive Devices?*, SCI. AM. (Apr. 15, 2013), <http://www.scientificamerican.com/article.cfm?id=boston-marathon-bomb-attack>.

¹³ Peter Mansoor, *Improvised Explosive Device (IED)*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/1102178/improvised-explosive-device-IED> (last visited May 1, 2014).

¹⁴ Kieron Monks, *‘Al Qaeda on your Android’: Smartphones New Frontier in Terror War*, METRO (Apr. 15, 2013), <http://www.metro.us/newyork/lifestyle/tech/2013/04/15/al-qaeda-on-your-android-smartphones-new-frontier-in-terror-war>.

¹⁵ See generally Gershowitz, *supra* note 2, at 45 (describing Fourth Amendment law as “ridled with exceptions, caveats, and uncertainty.”).

¹⁶ *State v. Smith*, 124 Ohio St. 3d 163, 2009-Ohio-6426, 920 N.E.2d 949, at ¶ 29.

¹⁷ See generally *id.* (describing the state’s assertion that the evidence of call records is helpful to police to ensure the correct identification of the suspect).

¹⁸ *State v. Smith*, 124 Ohio St. 3d 163, 2009-Ohio-6426, 920 N.E.2d 949, at ¶ 19 (describing the definition in *New York v. Belton*, 453 U.S. 454, 460 (1981) of a container as an object capable of holding another physical object).

glass. Moreover, the court has held that a container's susceptibility to search does not depend on the container's character.¹⁹ *Finley's* definition of containers as including cell phones therefore stands.

A novel definition of smartphones as containers that follows precedent, yet limits remote access, is to conceptualize a smartphone as a binder of printed material. This would enable the police to search local data just as if they had opened a binder carried by the arrestee but not allow police to connect to internet accounts.²⁰ Such a definition "allows a full-scale search of some areas beyond the person of the arrestee if the area is in the immediate grabbing space."²¹ This definition also follows precedent from *Ross*, in which the Court declared that whether a particular container may be searched without a warrant does not depend on the character of the container because "a constitutional distinction between 'worthy' and 'unworthy' containers would be improper."²² Smartphones could thus be treated like any other container and fully searched for the local data contained within them.

A prohibition on internet data searches without probable cause protects persons other than the arrestee who police may spy on using the arrestee's smartphone. The Court in *Chadwick* authorized the police to inspect the contents of a cell phone found on an arrestee without a warrant because the cell phone was immediately associated with the arrestee's person.²³ A no-internet-search rule follows this precedent since data stored on the internet is not immediately associated with an arrestee's person. Moreover, in the case of a national security threat, it would be possible to allow police to access remote data by following the Court's decision in *Gant*.²⁴

Finally, the modern understanding of the Fourth Amendment recognizes that it protects an individual's expectation of privacy.²⁵ While smartphones contain digital addresses akin to traditional address books carried on the person, entitled to a lower expectation of privacy, they also "have the ability to transmit large amounts of data," likening them to laptops, entitled to a higher expecta-

¹⁹ *People v. Diaz*, 244 P.3d 501, 507 (Cal. 2011) (citing *United States v. Ross*, 456 U.S. 798, 825 (1982)).

²⁰ See generally *Gershowitz*, *supra* note 2.

²¹ See *id.* at 9.

²² See *Diaz*, 244 P.3d at 507 (internal quotation mark omitted) (quoting *Ross*, 456 U.S. at 825).

²³ *Id.* at 503 (citing *United States v. Chadwick*, 433 U.S. 1, 15 (1977)).

²⁴ See *e.g.*, *id.* at 507 n.9 (citing *Arizona v. Gant*, 556 U.S. 332 (2009) ("holding that police may not search containers . . . unless 'it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.'")); *Gershowitz*, *supra* note 2, at 48 (citing *Thornton v. United States*).

²⁵ *State v. Smith*, 124 Ohio St. 3d 163, 2009-Ohio-6426, 920 N.E.2d 949, at ¶ 22 (citing *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)).

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tion of privacy.²⁶ Defining a smartphone as a container whose local data is akin to a binder, but whose internet functions and remote data are off-limits in the absence of probable cause, solves the problem of protecting the owner's reasonable expectation of privacy during an arrest.

²⁶ *Id.*

LAST CALL FOR ALCOHOL . . . YOU DON'T HAVE TO GO HOME, BUT
 YOU CAN'T STAY HERE: PROBLEMS AND SOLUTIONS FOR
 ARIZONA'S BEVERAGE SERVICE POLICIES

Ed Perez*

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* Ed Perez received his Juris Doctor degree from Arizona Summit Law School, in Phoenix, Arizona, in December 2013. This article is dedicated to all people that have suffered because of alcohol and the hope that someday society will take the reasonable steps necessary to prevent such pain that did not have to happen. I would like to thank my wife, Maricela, for challenging me to write about a subject that mattered to people beyond the legal community. Professor Guerra asked, "What will go unsaid, if you do not write this paper?" Her words compelled me to tackle this immense and ambitious endeavor. Gracias Profe.

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PREFACE

Sometime after 1:00 a.m. the bartender cautions, “Last call. . . Anything else before the bar closes?” The common response is a sense of urgency and another round of drinks to take advantage of this limited time offer. By 2:30 a.m., the bar closes and pushes freshly inebriated patrons onto the streets to face a gauntlet of challenges. Ironically, the driving force behind this nightly gamble are the same policies intended to keep society safe from alcohol-related dangers. Would a responsible host do this in their home—invite people over, encourage them to drink right up until the last moment, and then shove them out the door intoxicated? Or would a host offer their guests a chance to get sober before they leave? This article explores the policies of drinking establishments at closing, and how those policies affect society at large. This article uses data from DUI statistics, F.B.I. uniform crime reports relating to alcohol, ethanol pharmacokinetics, social studies of alcohol consumption, policy analysis, and other relevant factors. Finally, using the science of how the body actually metabolizes alcohol, this article proposes an innovative alternative to the flawed policies of bars and restaurants that can significantly curb the public harm they cause.

I. INTRODUCTION—CURRENT ALCOHOL & PUBLIC SAFETY POLICY

Evidence suggests that humans have been drinking alcoholic beverages for over 8000 years.¹ Archeologists have found various remnants of alcohol use ranging from artifacts associated with its production, consumption, and even its regulation.² This and other discoveries suggest that shortly after man discovered alcohol, man soon discovered all the interesting behaviors that come with

¹ Patrick E. McGovern et al., *The Beginnings of Winemaking and Viniculture in the Ancient Near East and Egypt*, EXPEDITION, Spring 1997, at 3, 3, 5-6. Based on the chemical composition of pottery that archeologists discovered, McGovern infers the items, of the Neolithic period from 4000 to 8500 BC, contained wine. Nevertheless, more recent evidence offers strong proof of the long history of humans drinking alcoholic beverages:

Yet a thriving royal winemaking industry had been established in the Nile Delta by at least Dynasty 3 (ca. 2700 BC) Winemaking scenes appear on tomb walls . . . [including] wine that was definitely produced at vineyards in the Delta. By the end of the Old Kingdom, five wines . . . constitute[d] a canonical set of provisions, or fixed ‘menu,’ for the afterlife.

Id. at 5-6.

² *Id.*

it: changes in mood, bad judgment, and other deviant acts.³ Excess drinking undoubtedly has produced many victims; bystanders and the actual drinker.⁴

Even before this nation's founding, people have been trying to address these problems.⁵ For example, the *Temperance* movement⁶ eventually resulted in the Prohibition Era of the 1920s.⁷ Even though the United States later decided that an outright ban on drinking was not the right solution, our nation still tries to control alcohol consumption through its government.⁸ Despite excess drinking being a problem for thousands of years, society has yet to find a solution.⁹

Rather than attempting to solve this problem, this Article will focus on mitigation. The goal of this Article is to show the detrimental effect Arizona's alcohol laws have on public safety by the way bars and restaurants operate at closing time, and to propose an alternative to the closing policies of drinking establishments that may reduce the amount of harm to the general public and simultaneously increase revenue for these businesses.

When one takes a close look at Arizona's alcohol statutes,¹⁰ the way businesses actually apply them at the end of the night,¹¹ and the resulting statistics of alcohol-related incidents,¹² clearly this system is wrought with failure. One reason for this failure is simple: the laws do not effectively account for how humans metabolize alcohol.¹³ In other words, bars and restaurants encourage

³ *Id.* at 17 ("Fermented beverages such as wine also have profound mind-altering effects on humans that led to their incorporation into social and religious rites and customs of peoples around the world from antiquity up to the present."); see also IAIN GATELY, *DRINK: A CULTURAL HISTORY OF ALCOHOL* 1, 16 (2008) (Regarding Classical Greek literature, "Excessive indulgence could make 'an old man dance against his will' and was the 'sire of blows and violence.'").

⁴ GATELY, *supra* note 3, at 1 ("In small doses, ethanol [alcohol] generates a sense of euphoria and diminishes inhibitions. Larger quantities cause slowed brain activity, impaired motor function, slurred speech . . . and in very high doses it is fatal.").

⁵ *Id.* at 150 (Puritan law in 1645 New England regulated alcohol).

⁶ See ERIC BURNS, *THE SPIRITS OF AMERICA: A SOCIAL HISTORY OF ALCOHOL* 64-67 (2004).

⁷ See U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

⁸ See U.S. CONST. amend. XXI. This includes federal, state, and local government. *Id.*

⁹ See *supra* notes 1-4; see generally INTERMODAL TRANSP. DIV., ARIZ. DEP'T OF TRANSP., *ARIZONA MOTOR VEHICLE CRASH FACTS: 2010*, at 2, 32-40 (2011) [hereinafter *AZ CRASH FACTS 2010*], available at <https://www.azdot.gov/docs/mvd-services/2010-crash-facts.pdf?sfvrsn=0>.

¹⁰ See *infra* Part IV.A.1.

¹¹ See *infra* Part IV.A.2.

¹² See generally *AZ CRASH FACTS 2010*, *supra* note 9, at 2 ("Alcohol Related crashes accounted for 5.17% of all crashes and 30.09% of all fatal crashes.").

¹³ *Id.* See generally Samir Zakhari, *Overview: How Is Alcohol Metabolized by the Body?*, 29 *ALCOHOL RES. & HEALTH* 245, 245 (2006) ("BAC is influenced by environmental factors (. . . the rate of alcohol drinking, the presence of food in the stomach, and the type of alcoholic beverage) . . .").

their patrons to leave drunk.¹⁴ In fact, Arizona’s Department of Liquor Licenses and Control (“DLLC”) gives bars and restaurants incentive to act in this manner through its laws.¹⁵

One way to decrease the amount of intoxicated people that hit the streets after they take their last *chug*—something that responsible hosts have been doing in their homes for years—instead of kicking out your guests who have been drinking, give them a chance to stay a while to sober up.

In a perfect world, businesses would willingly embrace and apply this idea for the benefit of public safety. However, in the real world, bars and restaurants would likely need regulatory obligation or some financial incentive to keep their doors open. This Article proposes both ideas.

A. Overview

The analysis begins with the way Arizona’s DLLC enforces its regulations,¹⁶ followed by a view of alcohol-related incidents, and how police address those situations. All references to blood alcohol content (“BAC”) presented here are displayed in grams over deciliters (g/dl), unless indicated otherwise.¹⁷

Next, this Article presents a general overview of the common practices of bars and restaurants, legally referred to as “on-sale retailers.”¹⁸ Finally, this Article proposes the “Good Host” alternative and the means for applying it.¹⁹ This Article highlights the events that occur in that last hour when bars and restaurants serve alcohol, and the chain of social harms that follow.

¹⁴ Interview with Kelley Dupps, Program Specialist, Mothers Against Drunk Driving (MADD) Ariz., in Phx., Ariz. (Nov. 29, 2012).

¹⁵ See generally ARIZ. REV. STAT. ANN. § 4-244.15 (2011) (limited hours of alcohol service that have the effect of discouraging licensees from staying open); ARIZ. DEP’T OF LIQUOR LICENSES & CONTROL, TITLE 4-ARIZONA LIQUOR LAW (2013) (DLLC Rule book for Licensees) [hereinafter DLLC RULES], available at http://www.azliquor.gov/assets/documents/Title%204%20Law%20Book/8-13-13_t4_lawbook.pdf; see also Interview with Kelley Dupps, *supra* note 14.

¹⁶ See generally DLLC RULES, *supra* note 15.

¹⁷ ICAP B??? B???: Annex 1. *The Basics about Alcohol*, INT’L CTR. FOR ALCOHOL POLICIES, at AX.7 [hereinafter *ICAP Annex 1*], <http://www.icap.org/LinkClick.aspx?fileticket=GBymBdj56CI%3d&tabid=116> (last visited Jan. 4, 2014) (“The most commonly used measurements are grams of ethanol per deciliter of blood (g/dl=g/100ml), used in the United States, and milligrams of ethanol per milliliter of blood (mg/ml), used in much of Europe. For example, 0.05 g/dl = 0.5 mg/ml. Other metrics frequently used in policy and research are mg/dl (e.g., 50 mg/dl) or g/l (e.g., 0.5 g/l).”).

¹⁸ ARIZ. REV. STAT. ANN. § 4-101.24 (2011) (“‘On-sale retailer’ means any person operating an establishment where spirituous liquors are sold in the original container for consumption on or off the premises or in individual portions for consumption on the premises.”).

¹⁹ Term used by author of this paper describing the policy of licensees staying open two hours after alcohol service.

II. ALCOHOL LAW & PUBLIC SAFETY

A. *History of Alcohol Policy & Regulation*

Why do societies create drinking laws? Historically, social norms influenced alcohol policy—often based on the predominant religious beliefs of the time.²⁰ Societies have been regulating the consumption of alcohol for thousands of years, through various forms of religious dominance and under various social conditions.²¹ Society seems to have a universal need to control how people drink alcohol, regardless of the era.²² Today public safety is the most common reason for enacting drinking laws.²³ The logic is simple: alcohol makes people feel different—euphoric, more confident, relaxed, and happier.²⁴ People drink because they like these effects;²⁵ but, drinking alcohol also causes people to behave dangerously.²⁶ Dangerous behavior leads to harm; which economically and emotionally affects society.²⁷ Research shows that government policies can make a difference.²⁸

American efforts at regulating alcohol can be traced to the Temperance Movement of the 1800s,²⁹ followed by the Prohibition era,³⁰ and finally to the DUI movement of the 1980s championed by Mothers Against Drunk Driving

²⁰ BURNS, *supra* note 6; GATELY, *supra* note 3, at 150.

²¹ GATELY, *supra* note 3, at 4, 6, 11, 150.

²² See U.S. CONST. amend. XVIII, *repealed* by U.S. CONST. amend. XXI.; GATELY, *supra* note 3, at 4, 6, 11, 65, 98, 150.

²³ *About DLLC*, ARIZ. DEP'T OF LIQUOR LICENSES & CONTROL, <http://www.azliquor.gov/aboutdllc.cfm> (last visited Jan. 4, 2014).

²⁴ *ICAP Annex 1*, *supra* note 17, at AX.4; GATELY, *supra* note 3, at 91.

²⁵ *ICAP Annex 1*, *supra* note 17, at AX.4 (“Alcohol . . . acts on the brain as an anesthetic, sedative, and stimulant, depending on how much of it is consumed. . . . Many people drink alcohol for these effects. . . . This (generally beneficial) effect of alcohol is why it is sometimes described as ‘a social lubricant.’”); GATELY, *supra* note 3, at 1, 16.

²⁶ *ICAP Annex 1*, *supra* note 17, at AX.4 (“There are also potentially negative effects, such as, for some people, increased bravado and a greater willingness to be sexually active. Some people who drink—even at relatively low levels—may become aggressive and even violent.”).

²⁷ See generally GATELY, *supra* note 3, at 1, 16; see generally AZ CRASH FACTS 2010, *supra* note 9, at 4, 33.

²⁸ ARTHUR GOODWIN ET AL., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 811 727, COUNTERMEASURES THAT WORK: A HIGHWAY SAFETY COUNTERMEASURES GUIDE FOR STATE HIGHWAY SAFETY OFFICES 1-1 (7th ed. 2013) [hereinafter NHTSA COUNTERMEASURES]; Paul J. Gruenewald et al., *Evaluating the Alcohol Environment: Community Geography and Alcohol Problems*, 26 ALCOHOL RES. & HEALTH 42, 42 (2002) (referencing GRIFFITH EDWARDS ET AL., ALCOHOL POLICY AND THE PUBLIC GOOD (1994)).

²⁹ See BURNS, *supra* note 6.

³⁰ U.S. CONST. amend. XVIII, *repealed* by U.S. CONST. amend. XXI (prohibition of alcohol).

(“MADD”).³¹ Despite all these efforts, people still drink excessively and continue to sustain alcohol-related injuries.³²

B. Drunkenness

TABLE 1³³

BAC Levels and Their Effects for a Typical Person	
BAC Level (g/dl)	Effects
.02 - .09	Mood changes, acting inappropriately, impaired coordination, slowed reaction time, diminished response to pain
.10 - .19	Lack of coordination, inability to correctly interpret what is happening, impaired judgment, difficulty in walking and standing steadily
.20 - .29	Serious intoxication, lowered body temperature, partial amnesia (“blackout”) likely
.30 - .39	Nausea, vomiting, visual impairment, changes in mental state.
≥ .40	Alcohol poisoning, coma, risk of death (about 50% of people who have a BAC = 4.00 will die of alcohol poisoning)

Drunkenness has a specific meaning when it comes to law and forensic science. The law often refers to drunkenness as a physical and mental impairment to function sufficiently to care for oneself or others.³⁴ However, a person’s impairment is not easily measurable by judging a person’s appearance.³⁵ The most common unit of measurement courts and lawmakers use when referring to drunkenness is a person’s blood alcohol content (“BAC”).³⁶ Table 1 shows some broad effects that alcohol has on people at certain BACs.³⁷

³¹ GATELY, *supra* note 3, at 455; NHTSA COUNTERMEASURES, *supra* note 28, at 1-1 (“[P]ublic attention to the issue of alcohol-impaired driving . . . [and growth in] organizations such as Mothers Against Drunk Driving . . .”).

³² See generally GATELY, *supra* note 3.

³³ ICAP Annex 1, *supra* note 17, at AX.7 (Table 1) (Converted ICAP unit of measurement from mg/ml to g/dl for uniformity).

³⁴ ARIZ. REV. STAT. ANN. § 28-1381(A)(1) (2012) (“[U]nder the influence of intoxicating liquor . . . if the person is impaired to the slightest degree.”); see also CAL. PENAL CODE § 647(f) (West 2010) (“[U]nder the influence of intoxicating liquor . . . in a condition that he or she is unable to exercise care for his or her own safety or the safety of others . . .”).

³⁵ See Zakhari, *supra* note 13, at 245. (“The consequent deleterious effects caused by equivalent amounts of alcohol also vary among individuals.”).

³⁶ Kurt M. Dubowski, *Absorption, Distribution and Elimination of Alcohol: Highway Safety Aspects*, J. STUD. ON ALCOHOL (SUPPLEMENT No. 10) 98, 98 (1985) (footnote omitted) (“It is well established and universally accepted that the concentration of alcohol in blood or breath, properly determined and interpreted, constitutes the best and most objective indicator of the absence or presence and degree of acute alcohol-induced impairment of driving ability in living subjects.”).

³⁷ *Id.* at 98, 105-06.

TABLE 2³⁸

		BLOOD ALCOHOL CONTENT (BAC) Table for Male (M) / Female (F)							Driving Condition	
Number of Drinks		Body Weight in Pounds								
		100	120	140	160	180	200	220	240	
0	M	.00	.00	.00	.00	.00	.00	.00	.00	Only Safe Driving Limit
	F	.00	.00	.00	.00	.00	.00	.00	.00	
1	M	.06	.05	.04	.04	.03	.03	.03	.02	Driving Skills Impaired
	F	.07	.06	.05	.04	.04	.03	.03	.03	
2	M	.12	.10	.09	.07	.07	.06	.05	.05	
	F	.13	.11	.09	.08	.07	.07	.06	.06	
3	M	.18	.15	.13	.11	.10	.09	.08	.07	Legally Intoxicated
	F	.20	.17	.14	.12	.11	.10	.09	.08	
4	M	.24	.20	.17	.15	.13	.12	.11	.10	
	F	.26	.22	.19	.17	.15	.13	.12	.11	
5	M	.30	.25	.21	.19	.17	.15	.14	.12	
	F	.33	.28	.24	.21	.18	.17	.15	.14	

Subtract .01% for each 40 minutes of drinking.
 1 drink = 1.5 oz. 80 proof liquor, 12 oz. 5% beer, or 5 oz. 12% wine.
Fewer than 5 persons out of 100 will exceed these values.

Table 2 shows the relation between the number of drinks and BAC for women and men.³⁹ While scientists have shown a correlation between drunkenness and BAC, two people with the same BAC will not necessarily display the exact same level of impairment.⁴⁰ One of those people may have trouble maintaining his balance and have slurred speech, while the other person may hide his intoxication and show few signs of impairment.⁴¹ This phenomenon, commonly referred to as “functionally drunk,” has scientific support.⁴² Yet despite someone’s competent appearance, as of 2010, the national standard for driving impairment is .08 BAC—*per se* DUI.⁴³

³⁸ California Driver Handbook - Actions That Result in Loss of Driver License, CAL. DEP’T MOTOR VEHICLES, http://apps.dmv.ca.gov/pubs/hdbk/actions_drink.htm (last visited Jan. 6, 2014).

³⁹ *Id.*

⁴⁰ See *supra* Table 1; see generally Zakhari, *supra* note 13, at 245.

⁴¹ Zakhari, *supra* note 13, at 245 (“The alcohol elimination rate varies widely (i.e., three-fold) among individuals and is influenced by factors such as chronic alcohol consumption, diet, age, smoking, and time of day.”).

⁴² Roberto Rimondini et al., *Long-lasting Tolerance to Alcohol Following a History of Dependence*, 13 ADDICTION BIOLOGY 26, 26 (2007) (“[R]epeated exposure to alcohol induces tolerance, i.e. decreased sensitivity to drug effects.”).

⁴³ NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 811 606, TRAFFIC SAFETY FACTS 2010 DATA: ALCOHOL-IMPAIRED DRIVING I (2012) [hereinafter NHTSA 2010 TRAFFIC SAFETY FACTS], www.nrd.nhtsa.dot.gov/Pubs/811606.pdf; RICHARD COMPTON & AMY BERNING, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 811 175, TRAFFIC SAFETY FACTS RESEARCH NOTE: RESULTS OF THE 2007 NATIONAL ROADSIDE SURVEY OF ALCOHOL AND DRUG USE BY DRIVERS 3 (2009) (“A strong relationship between BAC level and impairment has been established, as has the correlation between BAC level and crash risk.”).

C. Alcohol-Related Crimes: When Good Times Go Bad

One cannot know, with absolute certainty, who will leave a bar and die in a fatal crash or become some other drunken statistic. Yet, disturbing evidence shows alcohol-related harm frequently occurs, despite society's best efforts, legal or otherwise.⁴⁴ The following statistics cover the rate of occurrence and economic costs of DUI arrests, DUI collisions, DUI fatalities, and non-vehicular incidents.⁴⁵

Most of the national data will focus on 2010 because the agency that collects such data, the National Highway Traffic Safety Administration ("NHTSA"), must wait on local agencies to report their numbers—which are subject to delays due to ongoing investigations and other factors.⁴⁶ Otherwise, data relating to Arizona will focus mainly on the most recent statistics available at the time of this Article.⁴⁷

III. THE TRUE COST OF ALCOHOL

A. DUI and Other Alcohol-Related Crime

While Arizona's DUI threshold is the same as the rest of the nation, .08 BAC, the way this state applies its DUI laws puts Arizona in the minority with only two other states.⁴⁸ To start with, the DUI statute in Arizona not only follows the national *per se* .08 BAC standard, it actually allows for a lower level of intoxication to qualify as an offense.⁴⁹ Arizona Revised Statutes § 28-1381(A)(1) makes it unlawful for a person to drive under the influence of alcohol if they are "impaired to the slightest degree."⁵⁰ In practice, this means that if a police officer observes a driver behaving in a way that would indicate the

⁴⁴ Press Release, Ariz. Governor's Office of Highway Safety, Final 2011 Stats Report (Feb. 6, 2012), <http://azgohs.gov/media/2011%20Final%20Stats.pdf> (yearly comparison of alcohol-related incidents).

⁴⁵ AZ CRASH FACTS 2010, *supra* note 9, at 2; Raul Caetano et al., *Alcohol-Related Intimate Partner Violence Among White, Black, and Hispanic Couples in the United States*, 25 ALCOHOL RES. & HEALTH 58, 59-63 (2001); Press Release, Ariz. Governor's Office of Highway Safety, *supra* note 44.

⁴⁶ *About NCSA & Contact Info*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN, <http://www.nhtsa.gov/Data/About+NCSA+&+Contact+Info> (last visited Jan. 6, 2014); Interview with Andrew Alonzo, Lieutenant, Mesa Police Dep't, in Phx., Ariz. (Nov. 30, 2012); Interview with Carlton Aki Stant, former Sergeant, Maricopa Police Dep't, in Phx., Ariz. (Nov. 7, 2012).

⁴⁷ See *supra* notes 9, 43, 44.

⁴⁸ ARIZ. REV. STAT. ANN. § 28-1381(A) (2012) (Arizona uses the "impaired to the slightest degree" standard of DUI, a standard also used by Nevada and Texas) (emphasis added).

⁴⁹ *Id.* § 28-1381(A)(1) ("impaired to the slightest degree"). See also *id.* § 28-1381(A)(4) ("If the vehicle is a commercial motor vehicle that requires a person to obtain a commercial driver license . . . and the person has an alcohol concentration of 0.04 or more.").

⁵⁰ *Id.* § 28-1381(A)(1).

driver may be impaired, and upon subsequent investigation the officer determines the driver has been drinking, the officer can infer—based on his or her training and experience—that the driver’s behavior is the result of *impairment to the slightest degree* from alcohol. Then, the officer can arrest that driver for DUI, even if the driver’s BAC is less than .08.⁵¹ Thus, Arizona’s elements for DUI are much easier to satisfy than those of its neighboring states.⁵²

1. DUI Arrests

Based on the population estimates from the 2011 U.S. Census Bureau, Arizona ranks 16th with an estimated 6.48 million residents;⁵³ yet, it ranks 8th in the U.S. for DUI arrests.⁵⁴ Of course, one cannot assume that because Arizona’s DUI arrest rank is so much higher than its population, that Arizona has more drunk drivers than more populated states. Other possible explanations may include the fact that Arizona is a tourist destination, perhaps bringing in more people who like to drink from other states.⁵⁵ Arizona’s high ranking also could be the result of more aggressive DUI enforcement or its lower DUI standard.⁵⁶ Regardless of the reason for Arizona’s high DUI ranking, the truth is that an alarming number of people drive with enough intoxication to give police reasonable suspicion to make the stop, investigate, and arrest.⁵⁷

⁵¹ *See id.*

⁵² CAL. VEH. CODE § 23152 (West, Westlaw Current with all 2013 Reg. Sess. laws, all 2013-2014 1st Ex. Sess. laws, and Res. c. 123 (S.C.A.3)) (.08 BAC for DUI); NEV. REV. STAT. ANN. § 484C.110 (West 2012) (.08 BAC for DUI; N.M. STAT. ANN. § 66-8-102 (West, Westlaw through Ch. 228 (end) of the First Regular Session of the 51st Legislature (2013)) (.08 BAC for DUI); TEX. PENAL CODE ANN. § 49.04 (West 2011) (.08 BAC for DUI); Interview with Andrew Alonzo, *supra* note 46; Interview with Carlton Aki Stant, *supra* note 46.

⁵³ *See infra* Table 4.

⁵⁴ *See infra* Table 4.

⁵⁵ *See generally* ARIZ. OFFICE OF TOURISM, TRAVEL AND TOURISM WORKS FOR ARIZONA (2012) [hereinafter AZ TOURISM].

⁵⁶ ARIZ. GOVERNOR’S OFFICE OF HIGHWAY SAFETY, STATE OF ARIZONA ANNUAL PERFORMANCE REPORT: FEDERAL FISCAL YEAR 2011, at 20 [hereinafter ARIZONA FISCAL YEAR 2011]; *see generally* sources *supra* note 46.

⁵⁷ Press Release, Ariz. Governor’s Office of Highway Safety, *supra* note 44.

TABLE 3⁵⁸

2011 Arrests for DUI & Drunkenness by States (By DUI Ranking)						
Population Rank	State	Population (Million)	DUI Rank*	DUI Arrests	Drunkenness	Drunkenness Rank
1	California	37.69	1	104,345	99,017	2
2	Texas	25.67	2	85,715	117,766	1
10	N. Carolina	9.66	3	53,700	0	n/a
6	Pennsylvania	12.74	4	48,519	23,971	4
4	Florida	19.06	5	43,784	0	n/a
7	Ohio	11.54	6	36,528	3,117	8
3	New York	19.47	7	35,541	0	n/a
16	Arizona	6.48	8	35,496	0	n/a
9	Georgia	9.82	9	31,176	3,384	7
8	Michigan	9.88	10	29,443	391	9
12	Virginia	8.1	11	28,950	33,460	3
11	New Jersey	8.82	12	26,206	0	n/a
15	Indiana	6.51	13	20,043	16,303	5
35	Nevada**	2.72	14	11,834	200	10
13	Washington	6.83	15	11,101	29	10
14	Massachusetts	6.59	16	9,887	7,249	6
5	Illinois	12.87	17	3,619	0	n/a

* Ranking based on states included in this chart only

** Nevada included for comparison because state law allows twenty-four hour alcohol service

2. DUI Prosecution & Incarceration

In 2011, Arizona taxpayers spent an enormous amount of money on prosecuting and incarcerating DUI crimes. In Maricopa County alone, the cost of prosecuting misdemeanor and felony DUI sums up like this: \$1.3 million in court costs;⁵⁹ over \$3 million in prosecution expenses;⁶⁰ and public defense

⁵⁸ FBI, UNIFORM CRIME REPORTS: ARRESTS BY STATE tbl. 69 (2011); *Population Estimates, State Total: Vintage 2011*, U.S. CENSUS BUREAU, <http://www.census.gov/popest/data/state/totals/2011/> (last visited Jan. 6, 2014) (rounded up).

⁵⁹ MARICOPA CNTY. ATTORNEY'S OFFICE, 2011 MCAO ANNUAL REPORT 4 (2011); *FY 2010-11 Adopted Budget*, MARICOPA COUNTY FY 2010-11 ANNUAL BUSINESS STRATEGIES ADOPTED BUDGET 539, 899 (2010) [hereinafter 2010-11 MARICOPA COUNTY BUDGET] (noting sum of Superior Court expenses for felony DUI cases (\$695,244), plus Justice Court expenses for misdemeanor DUI cases (\$655,384)).

⁶⁰ MARICOPA CNTY. ATTORNEY'S OFFICE, 2011 MCAO ANNUAL REPORT, *supra* note 59, at 4; 2010-11 MARICOPA COUNTY BUDGET, *supra* note 59, at 372. (Figure estimated by multiplying total number of 2011 MCAO DUI cases (2,661) by average case cost of adult crimes (\$1,131.49)).

costs of \$142.47 per misdemeanor case,⁶¹ \$1,147.91 per felony non-capital case,⁶² and \$4,121 per appeals case.⁶³ These figures do not even take into account juvenile DUI crimes, DUI probation costs, Sheriff's courthouse security costs, or victim's rights expenses that also add to the DUI taxpayer burden.

Incarceration for DUI convictions represents an even bigger taxpayer expense. Statewide in FY 2011, the Arizona Department of Corrections spent over \$24 million dollars on DUI prisoners alone—a daily expense of \$65,771.⁶⁴ In Maricopa County, each DUI inmate costs the taxpayer about \$36,000 per year.⁶⁵

3. *DUI Collisions*

Unfortunately, not all drunk drivers get arrested before they crash.⁶⁶ DUI collisions in Arizona are very costly, economically and in terms of lives lost.⁶⁷ First, when a collision happens, the consequences of that crash are not limited to the obvious damage at the scene.⁶⁸ In addition to the vehicle repair costs, other consequences may include lost wages, lost job productivity, short and long-term medical expenses, and increased labor costs.⁶⁹ In 2010, motor vehicle crashes cost Arizonans \$2.67 billion;⁷⁰ alcohol-related collisions accounted for approximately \$416 million of that total.⁷¹

Secondly, the loss of life is a DUI consequence that can never truly be quantified in dollars. Nationally, out of the 32,885 vehicle fatalities, thirty-six percent were alcohol-related.⁷² Arizona was not far behind, as thirty percent of its vehicle fatalities involved alcohol.⁷³ In simpler terms, if somebody in Arizona died in a car crash, there is a one in three chance the crash involved

⁶¹ 2010-11 MARICOPA COUNTY BUDGET, *supra* note 59, at 667.

⁶² *Id.* at 666.

⁶³ *Id.* at 668.

⁶⁴ BUREAU OF PLANNING, BUDGET & RESEARCH, ARIZ. DEP'T OF CORRECTIONS, FISCAL YEAR 2011 ADC DATA & INFORMATION (2011), *available at* http://www.azcorrections.gov/data_info_081111.pdf (Calculated by estimating 5% of ADOC total daily prison population cost. ADOC's daily prison population is 27,502. DUI prisoners represent 5% of ADOC's total prison population. ADOC's per capita daily expense is \$47.83.)

⁶⁵ 2010-11 MARICOPA COUNTY BUDGET, *supra* note 59, at 869. (Estimated by quarterly per inmate cost (\$8,996.04) times 4 quarters).

⁶⁶ AZ CRASH FACTS 2010, *supra* note 9, at 2.

⁶⁷ *Id.* at 2, 4, 32-40.

⁶⁸ *Id.* at 4.

⁶⁹ *Id.*

⁷⁰ *Id.* at 2.

⁷¹ *Id.* at 33.

⁷² NHTSA 2010 TRAFFIC SAFETY FACTS, *supra* note 43, at 6.

⁷³ AZ CRASH FACTS 2010, *supra* note 9, at 2.

alcohol.⁷⁴ This statistic implies such a death was avoidable, but for the alcohol. Such death would be even more unfortunate if it happened because a person felt compelled to order another drink at last call, or because 2:00 a.m. came around and the driver had no choice but to leave the bar.

For Arizona collisions involving alcohol, fatal or otherwise, the time and place at which they occur should not be surprising.⁷⁵ Maricopa County leads the state in alcohol-related crashes, accounting for sixty-two percent of the total, with Pima County at a distant second place, accounting for only fifteen percent of crashes overall.⁷⁶ These counties likely lead the state because they are: (1) the most populated; and (2) have the most on-sale retail sources of alcohol—bars and restaurants.⁷⁷

The time of the collisions is quite telling as well. Nationally, according to NHTSA, “The rate of alcohol impairment among drivers involved in fatal crashes in 2010 was four times higher at night than during the day.”⁷⁸ Not far behind, seventy-four percent of Arizona’s alcohol-impaired crashes happen between 6:00 p.m. and 6:00 a.m.⁷⁹ Perhaps not coincidentally, these also are the peak business hours for bars and restaurants.⁸⁰ In case this correlation does not explain the causal relationship between drinking hours and DUI crashes, consider this next statistic.

The hour of the day in which the most alcohol-related collisions occur is 2:00 a.m., followed closely in second place by 1:00 a.m.⁸¹ These times are significant because they also are the hours in which bars and restaurants start ushering their customers out the door.⁸² These are shocking figures considering more cars are on the road during daytime rush hours, which would presumably offer more opportunity for crashes than at night.⁸³ Thus, the practice of making people leave a drinking establishment between 1:00 a.m. and 3:00 a.m.

⁷⁴ *Id.*; NHTSA 2010 TRAFFIC SAFETY FACTS, *supra* note 43, at 6.

⁷⁵ See AZ CRASH FACTS 2010, *supra* note 9, at 37 (Table 6-13).

⁷⁶ *Id.*

⁷⁷ *Id.* Census: Arizona’s Population by Cities, Counties, ARIZ. REPUBLIC (Mar. 10, 2011, 2:55 PM), <http://www.azcentral.com/community/pinal/articles/2011/03/10/20110310census-arizona-new-2010-numbers-brk10-ONbox.html>. See also *State and County QuickFacts: Arizona*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/04000.html> (last visited Jan. 7, 2014).

⁷⁸ NHTSA 2010 TRAFFIC SAFETY FACTS, *supra* note 43, at 3.

⁷⁹ AZ CRASH FACTS 2010, *supra* note 9, at 36 (Table 6-10), 39-40.

⁸⁰ Interview with Bill Amato, Legal Counsel, Tempe Police Dep’t, in Tempe, Ariz. (Dec. 7, 2012).

⁸¹ AZ CRASH FACTS 2010, *supra* note 9, at 40 (Table 6-14).

⁸² Interview with Bill Amato, *supra* note 80; Interview with Andrew Alonzo, *supra* note 46.

⁸³ See AZ CRASH FACTS 2010, *supra* note 9, at 2.

may play a huge role in the number of alcohol-related crashes that take place around closing time.⁸⁴

4. Non-Vehicular Incidents

Not every alcohol-related incident involves vehicles or DUI.⁸⁵ Research shows that alcohol and assaults are related.⁸⁶ Alcohol turns people into offenders and victims.⁸⁷ Many fights happen inside drinking establishments during operating hours and afterwards once the bar ushers everyone out.⁸⁸ Broader studies show assaults tend to occur near businesses that are sources of alcohol.⁸⁹ Furthermore, studies suggest over half of sexual assaults involve alcohol, many involving situations where the victim does not know the offender.⁹⁰ Alcohol's reach even extends into people's home, as it contributes to domestic violence.⁹¹

IV. CLOSING TIME—TURN OUT THE LIGHTS, THE PARTY'S OVER

A. Alcohol Service Statutes in Bars and Restaurants

1. Arizona Alcohol Statutes

Arizona's statutes control: which establishments can sell alcohol, a "licensee"; who can serve the alcohol, an "employee"; how much alcohol to serve;

⁸⁴ Interview with Bill Amato, *supra* note 80; Interview with Andrew Alonzo, *supra* note 46.

⁸⁵ Interview with Bill Amato, *supra* note 80; Interview with Andrew Alonzo, *supra* note 46.

⁸⁶ Gruenewald et al., *supra* note 28, at 43-45; *see also* Billie Goodsite et al., *The Impact Of Behavioral Signs Of Intoxication On Bartender Service*, 15 DRUGS: EDUC., PREVENTION & POL'Y 545, 546 (2008); *see, e.g.*, John L. Gray, *Policing Liquor Establishments: A Holistic Approach*, F.B.I. LAW ENFORCEMENT BULL., Nov. 2010, at 14, 14-15, <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2010-pdfs/november10leb> ("A small American town of 17,000 residents had one of the highest crime rates in the county. By day, it was a vibrant cluster of small retail shops with residents and visitors enjoying the friendly feeling. At night . . . a climate of street fights, open-air drug deals in the parking lots of bars, impaired drivers, property damage from vandalism, and minor thefts had existed for several years. . . . This establishment had fights that often included the bar's employees nearly every night in the parking lot. . . . Police received numerous complaints of drug dealing, fights, and property damage.").

⁸⁷ Goodsite et al., *supra* note 86, at 546; *Alcohol and Crime: Data from 2002-2008*, BUREAU JUST. STAT., at app. tbl.1, http://bjs.ojp.usdoj.gov/content/acf/apt1_crimes_by_type.cfm (last updated July 28, 2010) (From 1997-2008, according to victims of violent crimes, an average of 22% of incidents involved an offender using alcohol.).

⁸⁸ *State v. Munguia*, 668 P.2d 912, 913 (Ariz. Ct. App. 1983); Brittany Noble, *Benson Man Fatally Run Over During Bar Fight*, ARIZ. REPUBLIC (Dec. 14, 2011, 1:20 PM), <http://www.azcentral.com/news/articles/20111214benson-man-fatally-run-over-during-bar-fight-abrk.html>.

⁸⁹ Gruenewald et al., *supra* note 28, at 43-45; *see also* Gray, *supra* note 86.

⁹⁰ *See generally* Antonia Abbey et al., *Alcohol and Sexual Assault*, 25 ALCOHOL RES. & HEALTH 43, 44 (2001).

⁹¹ *See generally* Caetano, *supra* note 45.

the hours of service; who can drink the alcohol; whether the consumer can remove the alcohol from the permitted establishment, an “off-sale retailer”; and if the patron must consume the alcohol on the premises, an “on-sale retailer.”⁹² The DLLC enforces these laws, regulates the permitting of drinking establishments, and collects the relevant fees and fines.⁹³

Until 2004, retailers could only serve alcohol until 1:00 a.m.⁹⁴ Arizona’s H.B. 2570 extended alcohol service hours.⁹⁵ Now, permitted establishments can sell alcohol until 2:00 a.m., but they cannot allow any open alcohol containers to remain in the public’s possession after 2:30 a.m.—meaning the staff must collect all alcohol from the patrons by that time.⁹⁶ These two times are very significant—2:00 a.m. and 2:30 a.m.—because they dictate the licensee’s closing procedures.⁹⁷ The entire premise of this Article is based on what happens at closing time.

Once again, the purpose of highlighting DUI and alcohol-related crime is to show that there are real and reliable consequences associated with the level of intoxication of a person at the moment they leave a bar or restaurant.⁹⁸ This Article focuses directly on one component of this causal chain that is rarely addressed⁹⁹—the policy of forcing drinkers to leave a drinking establishment when they are at the peak of their consumption, and likely at the peak of posing a risk to themselves and others.

2. End of Alcohol Service and Closing Time

Because bars and restaurants are subject to sanctions, including the loss of their alcohol license if they violate the service hours, they are diligent in following DLLC laws.¹⁰⁰ For many establishments, selling alcohol is the reason why they are in business—losing their DLLC license would be a financial

⁹² ARIZ. REV. STAT. ANN. § 4-101 (2011) (Definitions); ARIZ. REV. STAT. ANN. § 4-244 (2011).

⁹³ ARIZ. REV. STAT. ANN. § 4-112 (2011) (powers and duties of board and director of department of liquor licenses and control; investigations; county and municipal regulation).

⁹⁴ H.R. 2570, 46th Leg., 2d Reg. Sess. (Ariz. 2004).

⁹⁵ *Id.*

⁹⁶ ARIZ. REV. STAT. ANN. § 4-244 (2011).

⁹⁷ Interview with Andrew Alonzo, *supra* note 46; Interview with Bill Amato, *supra* note 80; Interview with Carlton Aki Stant, *supra* note 46; Telephone Interview with Eddy Dees, former Club Manager, The Catalyst (Dec. 20, 2012).

⁹⁸ *Battistello v. Jacobs*, No. CV2007-021244, 2010 WL 2677407 (Ariz. Super. Ct. Jan. 27, 2010) (patron leaves bar intoxicated and rear-ends a bus).

⁹⁹ Interview with Andrew Alonzo, *supra* note 46; Interview with Bill Amato, *supra* note 80; Interview with Carlton Aki Stant, *supra* note 46.

¹⁰⁰ *See* ARIZ. REV. STAT. ANN. § 4-112 (2011).

death sentence.¹⁰¹ Therefore, bars and restaurants tend to decrease any risk that may compromise their license such as serving alcohol past the permitted hours.¹⁰² For this reason, alcohol establishments apply a *last call for alcohol* practice—where the staff puts all patrons on notice that serving hours are about to end, and customers may order one last round of drinks.¹⁰³

The time of the last call announcement depends on the establishment's own policies and procedures because the DLLC has no set time for this warning.¹⁰⁴ The Sky Lounge, a night club in downtown Phoenix, makes its last call announcement at 1:30 a.m., stops serving alcohol at 2:00 a.m., and clears the floor of all drinks by no later than 2:15 a.m.¹⁰⁵ The Sandbar, located in northern Phoenix, is a bar and grill that makes its last call between 1:45 a.m. and 2:00 a.m., depending on how long the bar anticipates it will take to complete drink orders.¹⁰⁶

Regardless of whether licensees announce last call as a courtesy to the customer or to maximize profits, the negative effect is the same.¹⁰⁷ Last call induces many already inebriated patrons to order another drink against their better judgment.¹⁰⁸ Worse still, last call may induce patrons to order, not of their own free will, but only because the bartender solicited the final round of drinks.¹⁰⁹ All one has to do is observe how much busier the bartenders get during this limited time offer to know that many people are ordering a final round of drinks.¹¹⁰

Despite the patron's consumption rate prior to last call, or whether he or she ordered again at that time, the patron cannot get a DUI or stumble into on-

¹⁰¹ Interview with Bill Amato, *supra* note 80; Interview with Andrew Alonzo, *supra* note 46; Telephone Interview with Eddy Dees, *supra* note 97.

¹⁰² Telephone Interview with Eddy Dees, *supra* note 97; Interview with Bill Amato, *supra* note 80; Interview with Andrew Alonzo, *supra* note 46; Interview with Francisco (last name omitted by request), Bar Manager, Sky Lounge in Phx., Ariz. (Dec. 1, 2012).

¹⁰³ Telephone Interview with Eddy Dees, *supra* note 97; Interview with Bill Amato, *supra* note 80; Interview with Andrew Alonzo, *supra* note 46.

¹⁰⁴ Interview with Maria Sainz, Representative, Ariz. Dep't of Liquor Licenses & Control, in Phx., Ariz. (Nov. 6, 2012).

¹⁰⁵ Interview with Francisco, *supra* note 102.

¹⁰⁶ Interview with Justin Jereb, Assistant Manager, Sandbar Desert Ridge, in Phx., Ariz. (Nov. 12, 2012).

¹⁰⁷ Interview with Bill Amato, *supra* note 80; Telephone Interview with Eddy Dees, *supra* note 97; Interview with Erika Sparks, former bar server, Froggy's Bar & Grill (Davis, CA), in Phx., Ariz. (Nov. 12, 2012).

¹⁰⁸ Interview with Bill Amato, *supra* note 80; Telephone Interview with Eddy Dees, *supra* note 97; Interview with Erika Sparks, *supra* note 107.

¹⁰⁹ Interview with Bill Amato, *supra* note 80; Interview with Andrew Alonzo, *supra* note 46; Interview with Erika Sparks, *supra* note 107.

¹¹⁰ Interview with Justin Jereb, *supra* note 106; Telephone Interview with Eddy Dees, *supra* note 97; Interview with Erika Sparks, *supra* note 107.

coming traffic while they are still inside the business.¹¹¹ Although many problems can still happen inside the drinking establishment such as bar fights and alcohol poisoning, closing time is what puts all these social ills into motion.¹¹²

There is a distinction between the legal requirement to stop serving alcohol and the decision to close the drinking establishment.¹¹³ The requirement that a licensee stop serving alcohol by 2:00 a.m. and clear the floor of all drinks by 2:30 a.m. does not mean the establishment must close and make the patrons leave.¹¹⁴ Yet, that is what so many bars and restaurants do—they serve alcohol into the middle of the night, cause people to increase their drinking at the end with a last call, then they rush everyone out the door—like a raging bull escaping a rodeo chute, everyone around them is at risk.¹¹⁵

Arizona law does not require a licensee to close once drinking hours are over.¹¹⁶ The decision to do so is based on other factors: the desire to close once the most profitable portion of the night is over; trying to avoid the liability that a room full of drunks may bring; cleaning and preparing for the next day's business; or simply letting tired employees go home after a long shift.¹¹⁷ On the other hand, twenty-four hour restaurants and casinos are just some examples of drinking establishments that remain open and do not kick their customers out just because they can no longer serve alcohol.¹¹⁸ These businesses generate revenue even after last call.¹¹⁹ However, these businesses are the exception, not the norm; most bars and restaurants close their doors and unleash waves of drunken people onto society.¹²⁰ This article proposes changing that policy.

V. ALTERNATIVE—THE GOOD HOST PROGRAM

The following proposal will not likely be a remedy for patrons who are determined to drink beyond normal excess—those who surpass .20 BAC into

¹¹¹ Interview with Andrew Alonzo, *supra* note 46; Interview with Bill Amato, *supra* note 80.

¹¹² Interview with Andrew Alonzo, *supra* note 46; Interview with Bill Amato, *supra* note 80; Interview with Carlton Aki Stant, *supra* note 46.

¹¹³ Interview with Maria Sainz, *supra* note 104.

¹¹⁴ *Id.*; *see generally* DLLC RULES, *supra* note 16.

¹¹⁵ Interview with Andrew Alonzo, *supra* note 46; Interview with Bill Amato, *supra* note 80; Interview with Carlton Aki Stant, *supra* note 46.

¹¹⁶ Interview with Maria Sainz, *supra* note 104; *see generally* DLLC RULES, *supra* note 16.

¹¹⁷ Telephone Interview with Eddy Dees, *supra* note 97; Interview with Francisco, *supra* note 102; Interview with Erika Sparks, *supra* note 107.

¹¹⁸ Interview with Maria Sainz, *supra* note 104; *see generally* DLLC RULES, *supra* note 16.

¹¹⁹ *See generally* Interview with Maria Sainz, *supra* note 104; *see generally* DLLC RULES, *supra* note 16.

¹²⁰ Interview with Andrew Alonzo, *supra* note 46; Interview with Bill Amato, *supra* note 80; Interview with Carlton Aki Stant, *supra* note 46.

levels of unconsciousness and possible alcohol poisoning.¹²¹ Police do not commonly encounter that kind of extremely intoxicated driver.¹²² In fact, a recent study suggests that accident severity increases with BAC levels far below .08.¹²³ Nevertheless, approximately fifty percent of DUI crashes or arrests involve drivers with BACs below .15.¹²⁴ This level is only .012 above the .08 DUI limit,¹²⁵ meaning that the amount of alcohol present in much less than a single standard-sized drink can not only put a person over the legal limit, but also put them into the higher risk area for getting into an accident.¹²⁶ Drinkers with a BAC in this danger zone are the target of this proposal—patrons who really have had one or two drinks too many.¹²⁷ Therefore, if licensees gave customers an opportunity to metabolize those excess drinks that lead to DUI and other social harm, this option would be preferable, safer, and more effective than the usual tough DUI enforcement¹²⁸ that fails to deter alcohol-related crime.¹²⁹

The following proposal is based on the idea that when a private person invites guests into his or her home, provides them with alcohol, and encourages them to drink, the worst thing the host could do is force the guest to leave while they are too drunk to drive. Yet, this is essentially the routine practice for drinking establishments.¹³⁰ In stark contrast to that practice, this article proposes that a good host would offer the guest the chance to stay longer, eat a

¹²¹ See *supra* Tables 2 and 3; Interview with Bill Amato, *supra* note 80.

¹²² Interview with Andrew Alonzo, *supra* note 46; Interview with Bill Amato, *supra* note 80; Interview with Carlton Aki Stant, *supra* note 46.

¹²³ David P. Phillips & Kimberly M. Brewer, *The Relationship Between Serious Injury and Blood Alcohol Concentration (BAC) in Fatal Motor Vehicle Accidents: BAC = 0.01% Is Associated With Significantly More Dangerous Accidents Than BAC = 0.00%*, 106 ADDICTION 1614, 1621 (2011).

¹²⁴ NHTSA COUNTERMEASURES, *supra* note 28, at 1-3 (“[H]alf of impaired drivers in crashes or arrests have BACs of .15 or higher.”).

¹²⁵ NHTSA 2010 TRAFFIC SAFETY FACTS, *supra* note 43, at 1.

¹²⁶ See *supra* Tables 2 and 3.

¹²⁷ See *supra* Tables 2 and 3 (BAC level to number of drinks); see also NHTSA COUNTERMEASURES, *supra* note 28, at 1-2 to -3.

¹²⁸ See NHTSA COUNTERMEASURES, *supra* note 28, at 1-2 (“[B]asic strategies are used to reduce alcohol-impaired crashes and drinking and driving [including]: Deterrence[—]enact, publicize, enforce, and adjudicate laws prohibiting alcohol-impaired driving so that people choose not to drive impaired.”).

¹²⁹ Interview with Kelley Dupps, *supra* note 14; Interview with Andrew Alonzo, *supra* note 46; Interview with Bill Amato, *supra* note 80; Interview with Carlton Aki Stant, *supra* note 46; Telephone Interview with Eddy Dees, *supra* note 97; Interview with Erika Sparks, *supra* note 107; AZ CRASH FACTS 2010, *supra* note 9.

¹³⁰ Interview with Andrew Alonzo, *supra* note 46; Interview with Bill Amato, *supra* note 80; Interview with Carlton Aki Stant, *supra* note 46.

snack, and drink some water or coffee—in short, to sober up enough to leave safely.

A. *Race to Sobriety, Race to Safety*

When patrons have consumed too much alcohol come closing time and have no safe way of getting home, they engage in a race to sobriety.¹³¹ This race starts at the point when the patron stops drinking or leaves at closing time. Ideally, the patron wins the race by achieving sobriety by the time they encounter police. Yet, too often, the race ends with a DUI arrest or a DUI crash investigation.¹³² Considering that people generally metabolize alcohol at the slow rate of .015 BAC per hour, the odds are stacked against the patron.¹³³ However, these metabolism rates do not reflect combining time with eating food—which this alternative proposes.¹³⁴

B. *Alcohol Metabolism (Ethanol Pharmacokinetics)—Not Your Dad's Cup of Coffee*

While the conventional wisdom for sobering up (water, coffee, aspirin, dancing, exercise, etc.)¹³⁵ has some merit,¹³⁶ it also has flaws and fails to give enough credit to the effect of consuming food.¹³⁷ Research spanning over

¹³¹ Interview with Andrew Alonzo, *supra* note 46; Interview with Bill Amato, *supra* note 80; Interview with Carlton Aki Stant, *supra* note 46.

¹³² Interview with Andrew Alonzo, *supra* note 46; Interview with Bill Amato, *supra* note 80.

¹³³ See *ICAP Annex 1*, *supra* note 17, at 7 (“In very broad terms, one standard drink of wine, beer, or spirits raises BAC to approximately 0.02 [g/dl].”).

¹³⁴ *Cf. id.* at AX.7-8 (these metabolism rates are based broadly on healthy liver and do not take into account consuming food).

¹³⁵ Interview with Andrew Alonzo, *supra* note 46; Interview with Bill Amato, *supra* note 80; Interview with Carlton Aki Stant, *supra* note 46; Interview with Kelley Dupps, *supra* note 14; *Myths*, RESPONSIBLE PARTY, <http://www.responsible-party.com/alcohol/myths/4/96> (last visited Jan. 7, 2014) (“Nothing will speed up the break down of alcohol in your bloodstream except time.”).

¹³⁶ See generally *ICAP Annex 1*, *supra* note 17, at AX.7-8.

¹³⁷ Yuko Abe et al., *Influence of Drinking Conditions on Alcohol Metabolism in Healthy Men with ALDH2*1/*1 Genotype: Comparison between Different Alcoholic Drinks with or without Meal*, 3 *FOOD & NUTRITION SCI.* 997, 1002 (2012); A.W. Jones & K.Å. Jönsson, *Food-Induced Lowering of Blood-Ethanol Profiles and Increased Rate of Elimination Immediately After a Meal*, 39 *J. FORENSIC SCI.* 1084, 1090 (1994) (“The results presented . . . demonstrate that eating a meal seemingly boosts the rate of disappearance of ethanol from blood by 36 to 50% on average.”) [hereinafter *Jones & Jönsson 1994*]; Vijay A. Ramchandani & Sean O’Connor, *Studying Alcohol Elimination Using The Alcohol Clamp Method*, 29 *ALCOHOL RES. & HEALTH* 286, 289 (2006) (“AERs [Alcohol Elimination Rates] following any meal studied consistently were about 45 percent higher than the AER from the fasted session but with no differential effect on meal composition on the AER.”).

twenty-five years shows that environmental factors such as eating can significantly reduce alcohol intoxication.¹³⁸

The idea that drinking on an empty stomach makes one drunker at a faster rate is not only common knowledge but is scientifically proven as well.¹³⁹ Scientists call the study of alcohol metabolism, “Ethanol Pharmacokinetics.”¹⁴⁰ Although this discussion warrants a thorough explanation of the science behind the effects of drinking on the human body, such an attempt would cloud the simpler proposal offered here—evidence suggesting that eating food can make an already intoxicated person significantly more sober over time.¹⁴¹ Therefore, the following paragraph provides a condensed version of alcohol metabolism.

When alcohol enters the human body and makes contact with the stomach lining, it triggers other organs to begin a breakdown process.¹⁴² These organs produce various chemical enzymes custom tailored to digest the particular type of substance consumed.¹⁴³ The body primarily breaks down alcohol in the small intestine with the help of the liver.¹⁴⁴ Here the body strips down the beverage into its simplest chemical compound, ethanol.¹⁴⁵ If a person consumes a drink with a low concentration of alcohol over an extended period of time, the body is able to metabolize the ethanol—rendering its effects on the drinker to a minimum.¹⁴⁶ However, if a person drinks beverages with high amounts of concentrated alcohol over a shorter amount of time, then this process gets overwhelmed and the ethanol bypasses the body’s safeguards and

¹³⁸ See Abe et al., *supra* note 137; Jones & Jönsson 1994, *supra* note 137; Ramchandani & O’Connor, *supra* note 137; A.W. Jones, *Evidence-Based Survey of the Elimination Rates of Ethanol from Blood with Applications in Forensic Casework*, 200 FORENSIC SCI. INT’L 1 (2010) [hereinafter *Jones 2010*] (citations omitted) (“Besides delaying gastric emptying and slowing the rate of absorption, the presence of food in the stomach seems to boost the rate of ethanol metabolism. BAC curves obtained for subjects in the fed-state returned to the zero level earlier than curves obtained when the same dose of alcohol was taken on an empty stomach. . . . But the most likely explanation is that first-pass metabolism after eating food was more effective and extensive so that part of the ingested alcohol fails to reach the systemic circulation.”).

¹³⁹ Interview with Andrew Alonzo, *supra* note 46; Interview with Bill Amato, *supra* note 80; Interview with Carlton Aki Stant, *supra* note 46; Abe et al., *supra* note 137, at 1001; Jones & Jönsson 1994, *supra* note 137, at 1086.

¹⁴⁰ Dubowski, *supra* note 36, at 98 (“Most of the relevant factors and considerations affecting the alcohol contents of various body tissues and fluids and the dose-time-effect relationships fall into the field of pharmacokinetics, which broadly concerns the absorption, distribution, biotransformation and excretion of drugs.”); Åke Norberg et. al., *Role of Variability in Explaining Ethanol Pharmacokinetics*, 42 CLIN PHARMACOKINET 1, 1 (2003).

¹⁴¹ See Abe et al., *supra* note 137; Jones & Jönsson 1994, *supra* note 137; Ramchandani & O’Connor, *supra* note 137.

¹⁴² *ICAP Annex 1*, *supra* note 17, at AX.1-3.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

reaches the brain, affecting the various systems that lead to the signs and symptoms of intoxication.¹⁴⁷ Despite some of the ethanol reaching the part of the body where intoxication occurs, the body continues to work on eliminating what already got through and any remaining ethanol still in the early stages of the process.¹⁴⁸ This mechanism explains why although the effect of one drinking his or her first beer can come quickly, the ethanol of that beer will not exist after a while.

TABLE 4¹⁴⁹

Disappearance rates of alcohol from blood (/3-slopes, mg/dUh) before and after healthy men (N = 16) drank 0.51, 0.68 or 0.85 g ethanol/kg body weight after an overnight fast. Five hours after the drinking started the subjects ate a substantial meal.			
Time after drinking	Ethanol dose .51 g/kg	Ethanol dose .68 g/kg	Ethanol dose .85 g/kg
2-3 hrs	11 ± 2.2	10 ± 2.8	13 ± 2.8
3-4 hrs	11 ± 1.8	11 ± 2.6	12 ± 3.2
4-5 hrs	10 ± 1.4	11 ± 2.4	12 ± 2.0
5-6 hrs	14 ± 2.4	15 ± 1.9	18 ± 2.7
6-7 hrs	BAC at zero	15 ± 2.8	18 ± 2.2
7-8 hrs	BAC at zero	BAC at zero	17 ± 2.8

Researchers have long believed food intake has some effect on how the body metabolizes alcohol,¹⁵⁰ but more recent studies have confirmed this theory.¹⁵¹ At least two things happen when a person eats after he has been drinking, regardless of how intoxicated the person may be, that lead to accelerated elimination of alcohol in the body. First, when food enters the stomach, some

¹⁴⁷ See Jones 2010, *supra* note 137.

¹⁴⁸ *Id.*

¹⁴⁹ This table adapted from Jones & Jönsson 1994, *supra* note 137, at 1089 tbl.2 (units not altered) (“The results presented . . . demonstrate that eating a meal seemingly boosts the rate of disappearance of ethanol from blood by 36 to 50% on average. This increase in the elimination rate of ethanol was seen after three different doses of alcohol. Other workers reported similar observations when subjects received a meal during the postabsorptive portion of the blood-alcohol profile.”).

¹⁵⁰ See Jones & Jönsson 1994, *supra* note 137, at 1084, 1089-91 (“Many earlier studies have shown that the peak BAC is less when alcohol is ingested after a meal compared with the same dose taken on an empty stomach.”).

¹⁵¹ Abe et al., *supra* note 137; Ramchandani & O’Connor, *supra* note 137; Jones 2010, *supra* note 138; Zhi-Li Ma et al., *The primary structure identification of a corn peptide facilitating alcohol metabolism by HPLC-MS/MS*, 37 PEPTIDES 138, 142-43 (2012).

of the alcohol present will latch onto the food, creating a suspension or floating effect.¹⁵² Alcohol can remain trapped here to some degree for as long as six hours.¹⁵³ As long as trapped alcohol does not continue on to the later stages of digestion, it will not affect the body, giving the liver the time it needs to meet the demand of the trapped alcohol when it finally does get through.¹⁵⁴ Second, when food enters the stomach, it triggers the body to increase the blood flow needed to metabolize food.¹⁵⁵ That increased blood flow also contains an elevated amount of the same enzymes that neutralize alcohol (ethanol).¹⁵⁶ The combination of these two mechanisms with the time necessary for them to occur can significantly reduce BAC, thus reducing the drinker's level of impairment.¹⁵⁷

TABLE 5¹⁵⁸

Comparison of Parameters in Ethanol Metabolism Among 4 Drinking Conditions		
Group	BAC (g/dl)	Ethanol Degradation Rate (EDR)(mg/kg/h)
Beer, NO Food	.035 ± .006	97.8 ± 6.8
Spirits, NO Food	.047 ± .008**	87.3 ± 11.1**
Beer & Food	.022 ± .006**	111.7 ± 3.4**
Spirits & Food	.027 ± .007††	105.0 ± 6.3††#

Blood-ethanol profiles were plotted for each subject and a set of parameters was worked out as described in detail by Widmark. EDR (mg/kg/h) was calculated by dividing ethanol dose (0.32 g/kg) by the duration of alcohol metabolism, which was obtained from the x-intercept of a regression line fitted by the linear least-squares method to the blood alcohol concentrations from 1 hr to 3 hr after ethanol intake. The data are expressed as means ± SD in each drinking condition. **: p < 0.01 vs B(-), ††: p < 0.01 vs S(-), #: p < 0.05 vs. B(+) by Tukey's test.

¹⁵² ICAP Annex 1, *supra* note 17, at 1-3.

¹⁵³ See Jones & Jönsson 1994, *supra* note 137, at 1090.

¹⁵⁴ ICAP Annex 1, *supra* note 17, at 1-3.

¹⁵⁵ Norberg, *supra* note 140 (“feeding state affects the rate and extent of ethanol absorption because it is related to gastric emptying time.”).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Abe et al., *supra* note 137, at 999 (Adapted from Table 1. Converted BAC from mg/ml to g/dl. Ethanol degradation rate (EDR) here not converted. EDR here shows that test subjects that consumed food after five hours of drinking metabolized alcohol at a higher rate than test subjects that did not eat.).

C. *Stay and Eat*

1. The Proposal—The Good Host Program

Given that consuming food significantly reduces BAC over a shorter amount of time,¹⁵⁹ after alcohol service is over, drinking establishments should allow their customers to remain and eat for a given period of time—ideally two hours—to accelerate alcohol elimination. This would reduce the number of over-intoxicated people that leave the establishments, thereby reducing the amount of alcohol-related harms. Table 6 below shows how eating food five hours after drinking affected the BAC of test subjects in one independent study.¹⁶⁰

Customer demand for food after leaving a drinking establishment is well known.¹⁶¹ People commonly refer to this appetite as “The Munchies.”¹⁶² Taco Bell coined the phrase, “The Fourth Meal,” as a way to advertise its late-night offerings to these crowds.¹⁶³ The twenty-four hour restaurant, Denny’s, experiences a rise in customers after 1:00 a.m.¹⁶⁴ Tempe is an Arizona college town with a vibrant downtown bar scene, with several restaurants that specifically cater to masses of people that leave drinking establishments after closing time.¹⁶⁵

¹⁵⁹ *Id.*; Jones & Jönsson 1994, *supra* note 137; Jones 2010, *supra* note 138; Ma et al., *supra* note 151 (“The alcohol eliminating rate of the synthetic peptide (20 mg/kg), the mixed peptides (200 mg/kg) and the HWJZ (400 mg/kg) were 31.90%, 27.40% and 30.30%, respectively.”); Ramchandani & O’Connor, *supra* note 137.

¹⁶⁰ Jones & Jönsson 1994, *supra* note 137, at 1090 (“The results presented . . . demonstrate that eating a meal seemingly boosts the rate of disappearance of ethanol from blood by 36 to 50% on average. This increase in the elimination rate of ethanol was seen after three different doses of alcohol. Other workers reported similar observations when subjects received a meal during the postabsorptive portion of the blood-alcohol profile . . .”).

¹⁶¹ Interview with Kelley Dupps, *supra* note 14; Interview with Andrew Alonzo, *supra* note 46; Interview with Bill Amato, *supra* note 80; Interview with Erika Sparks, *supra* note 107.

¹⁶² MADD, *supra* note 11; Alonzo, *supra* note; Amato, *supra* note 80; Sparks, *supra* note 107.

¹⁶³ MADD, *supra* note 11; Alonzo, *supra* note; Amato, *supra* note 80; Sparks, *supra* note 107.

¹⁶⁴ MADD, *supra* note 11; Alonzo, *supra* note; Amato, *supra* note 80; Sparks, *supra* note 107. Interview with Ramon Medina, former manager, Denny’s Redwood City, in Fremont, Cal. (Oct. 6, 2012).

¹⁶⁵ MADD, *supra* note 11; Alonzo, *supra* note; Amato, *supra* note 80; Sparks, *supra* note 107.

TABLE 6¹⁶⁶

Disappearance rates of alcohol from blood (/3-slopes, mgldUh) before and after healthy men (N = 16) drank 0.51, 0.68 or 0.85 g ethanol/kg body weight after an overnight fast. Five hours after the drinking started the subjects ate a substantial meal.			
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3-4 hrs	11 ± 1.8	11 ± 2.6	12 ± 3.2
4-5 hrs	10 ± 1.4	11 ± 2.4	12 ± 2.0
5-6 hrs	14 ± 2.4	15 ± 1.9	18 ± 2.7
6-7 hrs	BAC at zero	15 ± 2.8	18 ± 2.2
7-8 hrs	BAC at zero	BAC at zero	17 ± 2.8

Studies suggest that the heavy foods these types of places serve, such as those high in fat and carbohydrates, are the most effective at inducing alcohol elimination.¹⁶⁷ Corn also has an alcohol elimination rate between twenty-seven and thirty-two percent on the body, compared to the average stand-alone rate of fifteen percent.¹⁶⁸ These findings fit well with common late night bar foods like fried goods, tacos, burgers, and pizza.¹⁶⁹

Research in other fields may inadvertently yield support for this method of alcohol metabolism. Professor Will Corbin of Arizona State University conducts psychology research on human decision making abilities while under the influence of alcohol.¹⁷⁰ Under a controlled environment, Corbin asks study participants to drink until they reach a specific BAC to conduct his study.¹⁷¹ Corbin measures their BAC throughout the session. Once the session is over, Corbin has the participants eat various foods to reach sobriety more quickly than simply letting the time pass.¹⁷² Corbin's decision to give participants

¹⁶⁶ Jones & Jönsson 1994, *supra* note 137, at 1089-90 ("The results presented . . . demonstrate that eating a meal seemingly boosts the rate of consumption of ethanol from blood by 36% to 50% on average. This increase in the elimination rate of ethanol was seen after three different doses of alcohol. Other workers reported similar observations when subjects received a meal during the postabsorptive portion of the blood-alcohol profile . . .").

¹⁶⁷ *Id.* at 1085.

¹⁶⁸ Ma et al., *supra* note 151.

¹⁶⁹ Interview with Erika Sparks, *supra* note 107.

¹⁷⁰ Anne Ryman, *ASU Professor's Lab Pays Students to Get Drunk*, ARIZ. REPUBLIC (July 22, 2011, 12:00 AM), http://www.azcentral.com/community/tempe/articles/2011/07/22/20110722-asu-professor-study-drinking.html?nclick_check=1#ixzz2SAAbg8ur.

¹⁷¹ *Id.*

¹⁷² *Id.*

chips may have common sense roots, but there may also be a scientific basis for thinking that eating food after intoxication helps significantly with the body's ability to metabolize alcohol. Corbin intended to use his data to better understand the decision-making processes when subjected to alcohol, however, the same BAC data from his study may also yield support for the idea that food helps metabolize alcohol even after a person is already intoxicated. Additional research is needed to further this theory as it is beyond the scope of this Article. Nevertheless, such results would simply be further support for the following data that already exists.¹⁷³

2. How Much Time?

Estimates of how much BAC goes down after eating food range from a conservative thirty-six percent to as high as fifty percent per hour.¹⁷⁴ Those percentages amount to a decrease in BAC of .0204 BAC to .0225 BAC less per hour.¹⁷⁵ Considering risk analysis research shows people with BACs below .15 "pose highly elevated risk both to themselves and to other road users,"¹⁷⁶ the reduction offered by eating food alone could mitigate that risk significantly.¹⁷⁷ A two hour period would result in a total decrease of .04 to .045 BAC; a decrease that could represent the difference between the inability to stay in one lane and a release of inhibition.¹⁷⁸

3. The Incentives

Because this concept is new and unproven, it must be presented in the most appealing and palatable way to business owners who may be skeptical of participating in a program that involves higher operating costs.¹⁷⁹ Although the DLLC has the authority to compel licensees to comply with this kind of program, the best chance for its success is to take the path of least resistance by

¹⁷³ See generally Abe et al., *supra* note 137; Jones & Jönsson 1994, *supra* note 137; Ramchandani & O'Connor, *supra* note 137; Jones 2010, *supra* note 138; Ma et al., *supra* note 151.

¹⁷⁴ Jones & Jönsson 1994, *supra* note 137, at 1089.

¹⁷⁵ *Id.*; Abe et al., *supra* note 137, at 999.

¹⁷⁶ Paul L. Zador et al., *Alcohol-Related Relative Risk of Driver Fatalities and Driver Involvement in Fatal Crashes in Relation to Driver Age and Gender: An Update Using 1996 Data*, 61 J. STUD. ALCOHOL 387, 387 (2000).

¹⁷⁷ See generally Abe et al., *supra* note 137; Jones & Jönsson 1994, *supra* note 137; Ramchandani & O'Connor, *supra* note 137; Jones 2010, *supra* note 138; Ma et al., *supra* note 151.

¹⁷⁸ See generally Abe et al., *supra* note 137; Jones & Jönsson 1994, *supra* note 137; Ramchandani, *supra* note 137; Ma et al., *supra* note 151; see also Table 1.

¹⁷⁹ Interview with Kelley Dupps, *supra* note 14; Interview with Andrew Alonzo, *supra* note 46; Interview with Bill Amato, *supra* note 80; Interview with Erika Sparks, *supra* note 107; Interview with Francisco, *supra* note 102.

making these policies voluntary. This approach also offers the best opportunity for licensees to embrace this program sincerely and effectively.

The benefits of staying open later may not be readily apparent to many drinking establishments.¹⁸⁰ Concerns over increased labor costs, the morale of tired employees, and the liability of having to deal with belligerent and intoxicated customers even longer are not without merit.¹⁸¹ However, as stated above, many businesses cater to hungry customers who normally leave drinking establishments inebriated, presumably because these businesses turn a profit.¹⁸² The likelihood that a person has not eaten in several hours, combined with his or her impaired judgment and a functioning credit card, can mean big business for a savvy owner that meets this demand.¹⁸³ Additionally, research suggests that the most effective types of food for reducing blood alcohol, which are mentioned above, coincidentally, are some of the most economical to serve.¹⁸⁴

4. Even More Incentives

The following additional incentives may inspire a drinking establishment to help in this effort to reduce death and injury caused by excess drinking—a harm that bars contribute to with the alcohol they sell.¹⁸⁵ The ideal program would offer businesses flexibility in how they implement the policy. To increase profitability, businesses would not have to remain open if only a negligible amount of patrons remain in the establishment. If licensees fear unruly people coming from other drinking establishments may enter their business, the licensee has the discretion to refuse entry to these new patrons.

In exchange for participating in this “Good Host” program, the State of Arizona, via the DLLC and the Department of Revenue, could offer the following: (1) a tax deduction to cover a portion of the labor costs involved with staying open after alcohol service is over; and (2) Dram Shop civil liability protection for the business to cover alcohol-related incidents—and any alcohol-related injuries suffered or caused by a patron that relate to the service of alcohol at the participating business—that occur within the premises between 8:00 p.m. and 4:00 a.m., or some practical amount of time as determined by the legislature. The rationale here is that a business should not fear a lawsuit for

¹⁸⁰ Interview with Bill Amato, *supra* note 80; Telephone Interview with Eddy Dees, *supra* note 97; Interview with Erika Sparks, *supra* note 107.

¹⁸¹ Amato, *supra* note 80; Dees, *supra* note 97; Sparks, *supra* note 107.

¹⁸² Interview with Bill Amato, *supra* note 80; Telephone Interview with Eddy Dees, *supra* note 97.

¹⁸³ Amato, *supra* note 80; Dees, *supra* note 97; Sparks, *supra* note 107.

¹⁸⁴ Amato, *supra* note 80; MADD, *supra* note 11.

¹⁸⁵ Interview with Bill Amato, *supra* note 80; Interview with Kelley Dupps, *supra* note 14.

negligent alcohol service because its participation in this sobering program shows its commitment to serving responsibly.

5. Public Image and Tourism

Arizona's public officials have proudly promoted its aggressive DUI enforcement measures.¹⁸⁶ The many celebrities that police have arrested for DUI have made national news and potentially impact whether people choose to visit this state.¹⁸⁷ Sheriff Joe's Tent City, intended to deter DUI, serves as a warning against having too good of a time in Arizona.¹⁸⁸ This position may not compliment the state's reputation when it comes to its tourism.¹⁸⁹ The Grand Canyon, Lake Havasu, spring training, and the great weather are all widely recognized features that attract tourists from other states.¹⁹⁰ This "Good Host" policy could be a counter-measure to any negative perceptions Arizona's tourism industry faces in this regard.¹⁹¹

VI. CONCLUSION

If a social engineer wanted to create an alcohol policy that would put the most drunks on the streets at one time, the policy would look quite similar to what Arizona has now. In the same way the 5:00 p.m. hour symbolizes when workers flood the roads on their way home, the 2:00 a.m. hour is when drunks hit the streets, except that during the 2:00 a.m. hour less people get home safely.¹⁹² The fact that more collisions occur in the hours when people leave drinking establishments, despite the presence of more drivers on the road in

¹⁸⁶ See generally ARIZONA FISCAL YEAR 2011, *supra* note 56; Interview with Kelley Dupps, *supra* note 14; Interview with Andrew Alonzo, *supra* note 46; Interview with Bill Amato, *supra* note 80 (At a press conference regarding holiday DUI enforcement, Tempe Police Chief, Tom Ryff, stated he wanted the public to know that if somebody chose to drink and drive in Tempe, his department would hunt them down.).

¹⁸⁷ See generally Charles Barkley in *DUI Bust*, SMOKING GUN (Dec. 31, 2008), <http://www.thesmokinggun.com/documents/crime/charles-barkley-dui-bust>; Singer Diana Ross Busted for "Extreme DUI", SMOKING GUN (Dec. 31, 2002), <http://www.thesmokinggun.com/documents/celebrity/diana-ross-busted-extreme-dui>; *Ex-Cub Mark Grace Indicted on 4 Felony DUI Counts*, CHI. SUN-TIMES (Oct. 26, 2012, 9:40 AM), <http://www.suntimes.com/sports/baseball/cubs/15975366-573/ex-cub-mark-grace-indicted-on-4-felony-dui-counts.html>.

¹⁸⁸ George Vecsey, *At All-Star Game, Politics and Passion Are Also in Play*, N.Y. TIMES, July 11, 2011, at D2, available at http://www.nytimes.com/2011/07/11/sports/all-star-game-2011-protests-yes-but-no-boycott.html?_r=0 (referring to Sheriff Joe Arpaio, "He used chain gangs of D.U.I. offenders during Super Bowl XLII and unveiled a winking neon 'Vacancy' sign outside a jail during Super Bowl XXX:").

¹⁸⁹ Interview with Kelley Dupps, *supra* note 14; Interview with Bill Amato, *supra* note 80.

¹⁹⁰ See AZ TOURISM, *supra* note 55.

¹⁹¹ Interview with Kelley Dupps, *supra* note 14; Interview with Bill Amato, *supra* note 80.

¹⁹² AZ CRASH FACTS 2010, *supra* note 9, at 40 (Table 6-14).

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daytime hours, indicates Arizona can do much more to address the social harms of alcohol than simply prosecute more people. This “Good Host” program will allow patrons who know they are not fit to drive to minimize the risk they pose to themselves and others by taking scientifically proven steps to get sober enough to leave the establishment safer than current practices allow. After thousands of years of flawed efforts to curb alcohol-related harm, it is time to try something new—meaning new for business. This “Good Host” program is an idea that has always been at our home’s doorstep that will effectively reduce alcohol related harm.

THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES
WATER ACCESS RIGHTS: CITY OF TOMBSTONE V. USA, ET AL.

Speakers:

Professor Peter Appel, Alex W. Smith Professor of Law,
University of Georgia School of Law

Nick Dranias, Director,
Center for Constitutional Government, Goldwater Institute

Moderator:

Dean A. Reuter, Vice President and Director of Practice Groups,
The Federalist Society

This transcript was edited for print publication and ease of reading. To listen to the podcast in its entirety, readers may visit the Federalist Society website and download a copy at <http://www.fed-soc.org/publications/detail/water-access-rights-city-of-tombstone-v-usa-et-al-podcast>.

ANNOUNCEMENT: Welcome to The Federalist Society's Practice Group Podcast. The following podcast, hosted by The Federalist Society's Environmental Law and Property Rights Practice Group, was recorded on Thursday, February 14, 2013, during a live Teleforum conference call held exclusively for Federalist Society members.

DEAN A. REUTER: Welcome to The Federalist Society's Practice Group Teleforum conference call on the Tombstone, Arizona, case. I am Dean Reuter, Vice President and Director of Practice Groups at The Federalist Society.

Please note that all expressions of opinion are those of the experts on today's call. Also, this call is being recorded for use as a podcast in the future.

As we typically do, we will hear brief opening remarks from each speaker, followed by an exchange between our speakers, followed by your questions. First up will be Mr. Nick Dranias. He is the Director of the Center for Constitutional Government at the Goldwater Institute and he represents the City of Tombstone in the case we are going to be discussing today. Second, we will hear from Professor Peter Appel, who is a professor at the University of Georgia School of Law, where he teaches in the areas of property, natural resources law, and environmental law. Extensive bios for each speaker are available on our website.

So why don't we turn right to the discussion. Mr. Dranias, please go right ahead with your opening remarks.

NICK DRANIAS: Thank you, Dean, and thank you, Peter. Also, to the audience, I really appreciate your attention to this critical matter.

The *City of Tombstone v. United States of America* raises a critical existential question for the western states. In the western states, it is not uncommon for a typical state, such as Arizona, to have [about forty-seven percent] of its land still owned or controlled by the federal government.¹ For these states west of the Mississippi, the question of the 10th Amendment and the nature of their sovereignty is inextricably bound up with the question of who can exercise jurisdiction over federal lands.

What is fascinating about the City of Tombstone's case is that it involves, indeed, the historic City of Tombstone. You may have heard of Wyatt Earp and the O.K. Corral. Well, that is the exact city involved. It is an old city, the first chartered city in Arizona, and it was established during the 1880s. And at that time, it would not have existed but for its water supply in the Huachuca Mountains. The Huachuca Mountains are close to the Mexican border. Wyatt Earp and others associated with the leaders of the city reached out to that area and developed a water supply with the Huachuca Water Company in the early 1880s and ran a 26-mile pipeline to the city.² Since then, Tombstone's very existence as a town is dependent on it.

Fast-forward a hundred years. In July of 2011, the Monument Fire raged across the Huachuca Mountains. This was a disastrous fire. It burned so many trees down that, even to this day, it looks like a moonscape. As a result of denuding the mountains, when the monsoon season came, the water had nothing to trap it, nothing to drain it into the soil, so it just created massive mudslides. Consequently, these mudslides completely wiped out the City of Tombstone's municipal water supply and infrastructure.

Naturally, the City of Tombstone applied to the Governor and declared a local state of emergency. Also, the City got out there with equipment and machinery to try to fix their infrastructure. When the Governor of Arizona, Governor Brewer, issued a Declaration of Emergency, authorizing and funding that effort, the U.S. Forest Service ordered them, in some cases with gentlemen on the ground toting guns, to stop restoring their water system. This order put the City of Tombstone in a position where it would be forced to beg and plead with the U.S. Forest Service to reestablish its essential water infrastructure that

¹ This figure is an approximation that includes both land owned by the federal government and tribal lands managed by federal agencies. See ROSS GORTE ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 3-8 (2012); U.S. FOREST SERV., FS-600, FOREST SERVICE NATIONAL RESOURCE GUIDE TO AMERICAN INDIAN AND ALASKA NATIVE RELATIONS app. D, tbl.D.2 (1997), available at <http://www.fs.fed.us/people/tribal/tribexd.pdf>; Niraj Chokshi, *More Than Half the West is Federally Owned. Now Some States Want that Land*, WASH. POST (Oct. 15, 2013, 3:45 PM), <http://www.washingtonpost.com/blogs/govbeat/wp/2013/10/15/almost-half-the-west-is-federally-owned-now-some-states-want-their-land-back/>.

² See Justin Sayers, *Tombstone's 130-year Water Odyssey*, ARIZ. SONORA NEWS SERVICE (Dec. 11, 2013), <http://arizonasonoranews-service.com/tombstones-130-year-water-odyssey/>.

it needed to exist. The mudslide resulted in the City's loss of fifty or more percent of its water supply, a water supply without which the city would never have been founded and never would have been sustained. As a result, the City brought a lawsuit, trying to get a preliminary injunction to get in there and fix the water supply using mechanized and motorized equipment under the authority of the state of emergency issued by the Governor. That was denied. Then, after the fact, the Goldwater Institute got involved to bring up what we think are the critical 10th Amendment issues in this case.

What I want to focus on really quickly, before turning it over to Peter, is the central issue in this case that we are taking to the U.S. Supreme Court. We should have a petition for writ of certiorari filed in a week or two.³ A central issue in this case is whether the 10th Amendment allows state and local governments, like the City of Tombstone, to restore their own essential infrastructure after a natural disaster, once it is authorized by a gubernatorially declared state of emergency, without begging the permission of intransigent federal authorities.

We believe that this absolutely has to be answered in the affirmative if the U.S. Supreme Court meant what it said in its recent series of 10th Amendment cases beginning in the late 1980s, but, most recently, if it meant what it said in *Alden v. Maine*.⁴ You may recall *Alden v. Maine* is the case where the U.S. Supreme Court held that the principles underlying the 11th Amendment's immunity, or sovereign immunity for the states implied that the framework of the Constitution, barred any federal action that threatened the continued existence of the states.

We believe that that principle clearly applies here; where you have a desert town that is fully dependent on a water supply in an area surrounded by federal lands, the continued existence of the states or its political subdivisions depends on the freedom to fully restore that water supply during a declared state of emergency after a natural disaster.

So our ultimate goal in this case is to test the seriousness of the Court and to apply the principle of *Alden v. Maine* and to urge the Court to recognize that no city, no town, no county, no state can be threatened with disaster within their own jurisdiction by the federal government without running afoul of the

³ The City of Tombstone's petition for writ of certiorari was filed on March 1, 2013. A copy is available for download here: <http://www.goldwaterinstitute.org/sites/default/files/Tombstone%20AZ%20v%20USA%2010th%20Amend%20Cert%20Petition.pdf>. The petition from the underlying appeal of the denial of a motion for preliminary injunction was ultimately denied, returning the case to the district court for discovery and litigation on the merits. At the time of printing, cross-motions for summary judgment were due to be filed.

⁴ *Alden v. Maine*, 527 U.S. 706 (1999).

structure and purpose of our federal Constitution, which is to guarantee the continued existence of the states.

There is a lot more to it, but at this point, I probably should turn it over to Peter.

PROFESSOR PETER APPEL: Well, thank you, Nick, and I want to thank everyone at the Federalist Society for inviting me to speak today. I really appreciate the Federalist Society reaching out to have the debates and discussion with people from different perspectives. I clearly have a different perspective than Nick. Nevertheless, I have participated in Federalist Society debates here at the University of Georgia and I think that these kinds of debates are constructive action to broaden the discussion.

I should note that I was not involved in the *Tombstone* case and I have not reviewed the entire record. So on some of the facts, Nick has an upper hand on me.

I have reviewed the briefs that were filed in the Ninth Circuit and I think, after reviewing all of that, it is not surprising to me that the Ninth Circuit affirmed the District Court's denial of the preliminary injunction in an unpublished decision, because the law in this area is abundantly clear.

In my remarks today, I am going to briefly talk about some of the things that Nick did not mention. Specifically, I am going to talk very briefly about the Property Clause and the federal government's power over what is, after all, its own property. Then I will talk about the 10th Amendment implications it has. Also, if I have time remaining, I will talk about the specific rules that are at issue in this case with a focus on the Wilderness Act, which Nick did not mention, but it is an area where I have actually done some scholarship.

The Property Clause provides that Congress shall have the power to make needful rules and regulations for the territory and other property of the United States.⁵ Originally, the Property Clause was designed to deal with land grants from the original thirteen colonies, which were then granted to the United States. As the United States expanded, so did the property that it owned. One of the things I noted in Nick's remarks is that he said this is land controlled by the United States; that is not true. This is land that is owned in fee by the United States and I know that many of the people on this call are interested in so-called "property rights." In this area, the United States is not just a proprietor, but it is also a sovereign. In almost every case that the U.S. Supreme Court has looked at, they have broadly defined the power that the federal government has over land it owns in fee.

⁵ U.S. CONST. art. IV, § 3, cl. 2.

In an early case from 1840, *United States v. Gratiot*, the U.S. Supreme Court said that the United States did not have to dispose of these lands.⁶ Instead, it could lease them out and hold them as a proprietor within the states.

In *U.S. v. City of San Francisco*, a case discussed in the briefs, the U.S. Supreme Court said that the power the United States has over its property under the Property Clause is a power without limitation.⁷ That was the phrase they used, “without limitation.”⁸

In fact, the only case where the U.S. Supreme Court interprets the Property Clause narrowly is *Dred Scott*.⁹ Nick, if you want to defend *Dred Scott* in the discussion, you are more than welcome to. However, every other case defines it broadly, saying it is a plenary power and defining the United States as a proprietor, rather than a sovereign.

Thus, in addressing the 10th Amendment, where Nick was focusing, it really has no application in this area. I realize that that might be a controversial statement, but I think it is true.

The *Alden v. Maine* case that Nick identified is inapplicable here. That was where Congress was trying to get state courts to allow jurisdiction over certain federal actions within state court. This is not related to the federal government controlling its own property. It is important to remember that what the City of Tombstone was trying to do was restore and develop certain water resources on federal lands.¹⁰

An analogy for this would be to think of federal property within the states. I realize that the federal government owns a large portion of property in many of the western states, but think of that federal property as embassies in foreign lands. This is not the state anymore in some ways; it is the federal government. It is the United States.

Now, Congress can in its wisdom subject lands to state control that it owns. However, in the *Kleppe* case, the Supreme Court recognized that where Congress has not spoken, state law governs.¹¹ Nevertheless, where Congress has spoken, then the typical principles under the Supremacy Clause govern, meaning that federal law is supreme.

Here, Congress has spoken through several laws that are relevant to the *Tombstone* case. They are the National Environmental Policy Act (or NEPA),

⁶ *United States v. Gratiot*, 39 U.S. 526, 539 (1840).

⁷ *United States v. City & Cnty. of S.F.*, 310 U.S. 16 (1940); see generally Peter Appel, *The Power of Congress “Without Limitation”: The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1 (2001).

⁸ *City & Cnty. of S.F.*, 310 U.S. . at 29.

⁹ *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

¹⁰ See Sayers, *supra* note 2.

¹¹ *Kleppe v. New Mexico*, 426 U.S. 529, 543(1976).

the Endangered Species Act, and the Wilderness Act. I am going to focus on these laws because I think they are probably the most central part of Tombstone's complaint against the United States.

Under the Wilderness Act, there can be no permanent roads and motor vehicles (or motorized equipment) cannot be used in a wilderness area.¹² However, Congress did add the exception where these prohibited items are necessary to meet minimum requirements for the administration of the wilderness area. Part of the Colorado National Forest is included within this wilderness area.¹³

From what I can tell from the briefs, since Congress has said that this is a special area, the Forest Service was making an evaluation as to whether it could allow motorized equipment, motor vehicles, or motorized uses and these are the rules that apply.¹⁴ So although Governor Brewer issued a declaration of an emergency, it is irrelevant. On the contrary, what Congress has said about the lands that the United States owns is relevant. Again, from what I am able to tell from the briefs, since Congress has said this is a wilderness area, the Forest Service was simply evaluating its decisions about how to allow Tombstone to reestablish water uses, consistent with the rules that Congress had established for lands owned by the United States. And so, again, as I started out with, it is not surprising to me that the District Court denied the motion for a preliminary injunction and that the Ninth Circuit affirmed that decision in an unpublished decision, because to me the law is exceptionally clear in this area.

And with that, I do not want to take up too much time. I do want to leave time for Q&A, so I will conclude.

DEAN A. REUTER: Well, thank you very much, Professor.

Let's turn to the audience for questions. In a moment, you will hear an announcement that the floor mode is on. Once you hear that, to ask a question, you will push the Star button and then the Pound button on your telephone.

But before we turn to the audience, I want to give Mr. Dranias a minute or two to respond to Professor Appel's argument.

NICK DRANIAS: Yes. Unfortunately, Peter is wrong about a couple of things. The City of Tombstone's water system predates any designation of a national forest and is in fact a property owned by the City in a limited fee interest nature. The source of that authority is the famous 1866 Mining Act,

¹² 16 U.S.C. § 1133 (2012).

¹³ 16 U.S.C. § 1132 (2012).

¹⁴ See generally Appellant's Reply Brief (Preliminary Injunction Interlocutory Appeal), *City of Tombstone v. United States*, 501 Fed. Appx. 681 (9th Cir. 2012) (No. 12-16172), 2012 WL 3105260.

also known as R.S. 2339 and 2340.¹⁵ Additionally, through R.S. 2447 [sic: reference should be to 2477], the 1866 Mining Act also produces a road right-of-way authority. The bottom-line is the forest designation carved out explicitly any lands encumbered by previously existing valid claims; that was an expressed provision in the designation of this forest.¹⁶ Basically, what Tombstone held from the 1880s should have been treated as an inholding that was subject only to the jurisdiction of the county, except for dealing with marginal disputes over the scope of the activities that are authorized by those rights.

So let's be very clear. The City of Tombstone owns limited fee interest to draw water and to maintain a water infrastructure in the national forests, which are not themselves within the jurisdiction of the Forest Service. Essentially, the Forest Service is not only trying to exercise jurisdiction where it has no jurisdiction, but it is trying to do so in the midst of a natural disaster where a town's very existence is at stake.

When I say that, I am not being hyperbolic. The U.S. Supreme Court, in an un-overturned decision from about 1937 called *Brush*, ruled that the federal government could not even tax the income of a guy working for a municipal water supply because of the dangerous precedent that would establish should the federal government decide to tax excessively.¹⁷ The Court said that it would threaten in a very real sense the very existence of the city and therefore was not a proper tax under the structure of the Constitution.¹⁸

So let me just end by highlighting the 50,000-foot point here. Congress can pass any law that it wants; it can cite any provision of the Constitution as authority for that law. However, in the bottom-line analysis that the Court articulated in *Alden v. Maine*, the Court still has to look at the structure of the Constitution and its implicit guarantee of dual sovereignty that is meaningful and ask, even if Congress invokes the right magic words or the right portions of the Constitution to justify their laws, if this is in fact consistent with the underlying principle that is interwoven throughout the Constitution concerning the continued existence of the states. If it is not, then it is unconstitutional, period, because otherwise we do not have a real system of dual sovereignty. So given this unique set of facts, after a natural disaster, when the water supply of a town

¹⁵ Act of July 26, 1866, ch. 263, 14 Stat. 253, and the Act of July 9, 1870, ch. 236, 16 Stat. 218 (codified at 43 U.S.C. § 661, sec. 9 (1970)), *repealed* by the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1785 (2006) (subject to savings clause in 43 U.S.C. § 1761(c)(2)(A) (2006) for previously granted rights of way).

¹⁶ By the President of the United States of America: A Proclamation, U.S.-Den., Nov. 6, 1905, 34 Stat. 2887 (Proclamation of President Theodore Roosevelt) (stating “[t]his proclamation will not take effect upon any lands . . . which may be covered by any prior valid claim”).

¹⁷ *Brush v. Comm’r of Internal Revenue*, 300 U.S. 352, (1937), *overruled by* *Graves v. People of State of New York ex rel. O’Keefe*, 306 U.S. 466 (1939).

¹⁸ *Id.* at 364.

that would not exist but for this water supply that is at stake and in the context of a gubernatorially declared state of emergency, it simply cannot be seriously disputed that the continued existence of the state through its charter city political subdivision is at issue. Accordingly, this fundamental question, which for some reason still has not been grappled with, has to be addressed by the U.S. Supreme Court.

Did the U.S. Supreme Court in *Alden v. Maine* lay down a principle that extends beyond just the question of whether or not a state can be sued in its own courts by private litigants? Did it in fact articulate a principle that subjects every claimed federal power or federal legislation to a test? Does this threaten the continued existence of the states or not? If in fact *Alden v. Maine* does that; if in fact *Alden v. Maine* requires the Court to assess with regard to any federal legislation, no matter how it is premised on being invoked under the Property Clause or the Commerce Clause or anything else; if there has to be a threshold test asking whether this threatens the continued existence of the states or not; then that test has been met here without a doubt. A desert town's water supply has been disrupted by a natural disaster. Its continued existence is at stake. The viability of a state as a sovereign body is at issue, particularly in the western states where [forty-seven] percent of their lands are controlled by the federal government and where there is inevitably essential infrastructure needed for their existence located on those lands.¹⁹

So for our position, this case is about a very fundamental question: Is the U.S. Supreme Court going to enforce, as a general principle, the ideas that it articulated in *Alden v. Maine*?

DEAN A. REUTER: Well, let's go back to Professor Appel now and give him a minute or two. I am particularly interested, Professor, about the factual matter of the state having an inholding within the forest system.

PROFESSOR PETER APPEL: And here, Dean, this is where because I have not reviewed the whole record, I am a little bit at a disadvantage. Although I do not think that it is relevant to the points I was trying to make, my understanding from the Justice Department's brief and the brief filed by Tombstone is that there might be some dispute about exactly how many of these water sources are actually proprietary to Tombstone.²⁰

It is very clear from the U.S. Supreme Court's precedent and from the applicable precedent in the Ninth Circuit that even if Tombstone has a private

¹⁹ See *supra* note 1 and accompanying text. To generate maps of transportation, electrical, and water infrastructure in the State of Arizona for comparison with federal and tribal lands, visit the GIS Inventory website at http://gisinventory.net/pages/data_layers.html, and select appropriate data layers.

²⁰ See sources cited *supra* note 14.

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property right, there is also a property right that the United States owns. Also, the line of cases is very consistent that if the United States is the proprietor of where Tombstone wants to go, then the laws of the United States, like the Wilderness Act, NEPA, the Endangered Species Act, all apply. Furthermore, the regulatory power, which makes property owned by the United States a little bit different because, of course, the United States is not just a common proprietor but also a sovereign, is applicable. This has been consistent with mining claims in National Forests within wilderness areas. This has been consistent with water claims in National Forests and National Parks within wilderness areas. The courts have mostly been uniform about this, so I understand Nick's point about the pressure on Tombstone. Again, I am not representing the United States. I am simply looking at this, as best as I can, as a legal issue.

It is unfortunate, I guess, for Tombstone that it is dealing with a proprietor who is also a sovereign and who has commands by Congress that it has to follow. When I looked at the briefs in the case, it looked like the Forest Service did try to expedite reviews and did try to work with Tombstone. However, at the same time, the Forest Service has a boss it must respond to, which is Congress. Consequently, if the Forest Service cut corners or just allowed Tombstone to do whatever it wanted to do, then it would be facing a lawsuit from environmental plaintiffs saying, "You're doing the wrong thing on public lands."

It seems to me that while Tombstone's interests are not insignificant, they nevertheless are dealing with land owned in fee by a proprietor and a sovereign, namely the United States, and the Supreme Court has said that the power that Congress has over lands owned by the United States are plenary and without limitation.

DEAN A. REUTER: Very good. Once again, if you have a question for either of our experts in the audience, push the Star button and the Pound button on your telephone. We have one question at this point, and then our lines will be open. Let's go to our first caller question.

QUESTIONER: Hello. Yes. This is Belinda Noah. How are you? Very good discussion.

I wanted to basically reiterate that a state is a sovereign, and that should take precedent over any federal encroachment. Also, as all of you know, this is the United States of America. So I find it appalling that the federal government would attempt to encroach in this manner, especially when you are dealing with such a vital issue with respect to Tombstone's survival.

So I would like to have you all address that point; that less federal government is better. This is quite contrary to that philosophy when you have an attempt to exercise power in this manner. So how would you address that concern?

DEAN A. REUTER: Who wants to respond to that?

NICK DRANIAS: Well, I would like to just take a crack at that, because I am obviously ideologically sympathetic with that point of view. However, I do not think this is just an ideological perspective.

If you look at *Alden v. Maine* again, the central message of the U.S. Supreme Court is that no matter what else it may say, interwoven into the very fabric of the Constitution is the guarantee of the continued existence of the states as viable sovereign bodies.²¹ So that means that regardless of how many articles you can point to justifying a piece of federal legislation, if that piece of federal legislation undermines the continued existence of the states as viable sovereign bodies, it is unconstitutional.

Accordingly, the question that our case poses is, Did the Court mean what it said? Here are a set of facts that, if applied narrowly without looking at it from the perspective of the principle articulated in *Alden v. Maine*, do not work easily with the case law. On the other hand, if you look at the facts in light of the principle articulated in *Alden v. Maine*, it is clear that the state's continued existence through its charter, or political subdivision, is at issue. It is at issue by virtue of the state declaring a state of emergency. It is at issue by virtue of the fact that historically Tombstone would not exist without this water supply.

So since it is clearly at issue, does the Court mean it when it says that the structure, the nature, the implicit promises of the Constitution all stand against any kind of federal legislation that might threaten the continued existence of the state? I believe that the Court will rule that federal legislation cannot go that far, no matter how many articles it cites as its authority. It cannot extinguish or threaten to extinguish the existence of a state or its political subdivisions.

DEAN A. REUTER: Professor Appel?

PROFESSOR PETER APPEL: This is Peter Appel.

This is a central disagreement that I have with Nick and the caller, because I think that the area of property owned by the United States, which *Alden v. Maine* had nothing to do with, is a very distinct one. If you go back to the *United States v. Gratiot*, all the way back to 1840, the U.S. Supreme Court said that there was nothing inconsistent with the United States retaining proprietorship of land within a state and the United States could hold that land in perpetuity.²²

Now, we can have debates about should we have more federal government or less federal government. We can have debates about should the United States sell all of the lands that it owns, while keeping in mind that it owns about

²¹ See *Alden v. Maine*, 527 U.S. 706 (1999).

²² See *United States v. Gratiot*, 39 U.S. 526, 539 (1840).

28 percent of the landmass of the United States.²³ We can have that debate, which is up to the judgment of Congress. However, when the United States owns these lands, as both proprietor and sovereign, it owns it “without limitation.”²⁴ I think cases like *Alden v. Maine*, which Nick keeps citing, have nothing to do with Tombstone because it is talking about the property of the United States. With the one exception of *Dred Scott*, since 1840 the U.S. Supreme Court has consistently interpreted the United States owning property as a power “without limitation.”²⁵ The U.S. Supreme Court has heard these 10th Amendment arguments before and rejected them. Consequently, I do not think that *Alden v. Maine* has any import here.

NICK DRANIAS: Let me just briefly respond to that with just this comment. Again, the fundamental question is whether or not *Alden v. Maine* is articulating a principle that applies across the board to the entire structure of the Constitution. Is it a constitutional principle that the federal government may not threaten the continued existence of the states? That is the issue that we want to squarely put before the U.S. Supreme Court under a set of facts where no one can seriously dispute that the continued existence of the states through its political subdivision is at stake.

DEAN A. REUTER: All right. We have one more caller question at this point

And I also want to mention, that we’ve noted here a couple of times, the amount of public land owned, especially in the western states, by the federal government.²⁶ We do have one of our older Teleforum conference calls, which is now available online as a podcast, on our site that specifically talks about the future of publicly owned lands, and you can get to that on our Federalist Society website as well.²⁷

We now have two questions pending, so let’s go to our next caller.

QUESTIONER: Good afternoon. My name is Thelma Tormina, and I’m not an attorney. I run an educational non-profit.

My question is, in regards to all of this, how does the federal government justify destroying a town and the people that live within it under the Constitution? I mean, I just don’t understand, I guess, how they can do that. With the constitutional rights, aren’t they supposed to uphold the Constitution?

²³ See GORTE ET AL., *supra* note 1, at 3.

²⁴ See generally *id.*

²⁵ Appel, *supra* note 7, at 108-112.

²⁶ See GORTE ET AL., *supra* note 1, at 3.

²⁷ Donald J. Kochan, David Garbett & Dean A. Reuter, *The Future of Publicly Owned Lands—Podcast*, FEDERALIST SOC’Y (Feb. 7, 2013), <http://www.fed-soc.org/publications/detail/the-future-of-publicly-owned-lands-podcast>.

DEAN A. REUTER: Who wants to take a shot at that question?

PROFESSOR PETER APPEL: This is Peter Appel. I will start with that.

A couple of things, and I know that Nick is going to disagree with me, and again, I'm basing this just on reading the briefs that were filed. The District Court found, contrary to Nick's repeated invocation of this, which I have not tried to dispute with him, simply because I don't know all of the facts—the District Court found and the Ninth Circuit upheld that there wasn't any kind of extreme danger facing the Town of Tombstone. But I think the more important point is that the reason that the federal government is doing what it's doing—and again, they are not saying that Tombstone can't get water²⁸—what they are saying is you have to go by the rules that apply to our lands if you want to repair the water sources that you have, and they are doing that because Congress said so²⁹, and what Congress said with regard to the lands that the United States owns is what goes.

And under our Constitution, under the Supremacy Clause, that's what governs; and, it doesn't matter that a governor has declared a state of emergency or whatever.³⁰ We're talking about an area that is owned by the United States³¹, and it has been declared to be a wilderness area, and that has been in the judgment of Congress to be the best disposition of these lands. That power of Congress is something that goes back to the founding.³² The lands that the United States owns were originally lands that were granted to the United States by the original colonies.³³ They were originally for the benefit of all of the people of the United States. That has been the common understanding since the founding.

So the 10th Amendment arguments that Nick is making and his repeated discussion about *Alden v. Maine* and some implications of that case—which I think might be reading it a little bit too broadly, but that's getting beyond the scope of our conversation—really don't apply here.

NICK DRANIAS: I'd like to drill down into the case just a little bit; just to respond to the assertion that the District Court found that there was not a signif-

²⁸ *City of Tombstone v. United States*, 501 Fed. App'x 681, 682 (9th Cir. 2012); see *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir.2011).

²⁹ See *supra* notes 15-16.

³⁰ U.S. CONST. art. VI, cl. 2

³¹ See Sayers, *supra* note 2.

³² *Printz v. United States*, 521 U.S. 898, 920 (1997) (“It suffices to repeat the conclusion: ‘the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.’” (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)).

³³ *Land Grants from the Federal Public Domain*, PORTLAND ST. U., http://www.upa.pdx.edu/IMS/currentprojects/TAHv3/Content/PDFs/Land_Grants_Federal_Public_Domain.pdf (last visited Apr. 30, 2014).

icant risk. The District Court’s decision really was pretty conclusory. It didn’t identify any specific findings of fact.³⁴ It just stated things without any reference to the evidence.

Most significantly, on the issue of the threat to the City of Tombstone is the fact that the Forest Service itself repeatedly admitted and recognized the threat to public health and safety³⁵ that existed in allowing the City of Tombstone to use hand tools and some mechanized equipment to restore 3 of its 25 spring sites—3 of its 25 spring sites, 13 percent of its water supply.³⁶ So the critical piece of evidence that never received any comment whatsoever from the District Court was the admissions of the Forest Service that public health and safety was at issue, that the safe potable water and water needs for fire suppression were at issue.³⁷ These are things that are in the administrative findings of the Forest Service itself,³⁸ and yet the District Court simply in a conclusory fashion said, “Ah, there’s nothing there.”

The Ninth Circuit, in a very interesting decision, although it did affirm the lower court’s decision, it specifically said that it was not reaching any other issue other than the 10th Amendment issue we raised.³⁹ So I look at that as not really affirming anything that the District Court did, but simply trying to tee up the 10th Amendment issue that I have been articulating for the Supreme Court to decide. The Ninth Circuit felt that its hands were bound in a certain respect because there isn’t any directly on-point guidance. There are only the principles that the U.S. Supreme Court has articulated in *Alden v. Maine* and in other cases, and so the Ninth Circuit teed this case up to the U.S. Supreme Court, and it asked the Supreme Court to provide the guidance that it felt it did not already have.

So this case is, I think, incredibly attractive for the U.S. Supreme Court to take. It is at an early stage of the litigation, yes, but if we don’t have this issue decided now, it will radically change the course of the case, because we don’t know how to handle the overall litigation. Do we treat it as a simple property rights matter, because of the fact that these water rights and rights of way predate the Forest Service, predate the forest designation, are not subject to the

³⁴ See Petition for Writ of Certiorari at app. 4-24, *City of Tombstone v. United States*, 501 F. App’x 681 (9th Cir. filed Mar. 1, 2013) (No. 12-16172), available at <http://www.goldwaterinstitute.org/sites/default/files/Tombstone%20AZ%20v%20USA%2010th%20Amend%20Cert%20Petition.pdf>.

³⁵ *Id.* at 8-11.

³⁶ *Id.* at 10.

³⁷ *Id.* at app. 4-24.

³⁸ *Id.* at 8-11.

³⁹ *City of Tombstone*, 501 F. at 682 (“On this record, we conclude that Tombstone failed to raise serious questions going to the merits of its Tenth Amendment challenge and we do not reach whether the City has satisfied the other requirements for a preliminary injunction.”).

jurisdiction of the Forest Service, and that the Forest Service is therefore engaging in a regulatory taking, which is completely unauthorized, or do we proceed ahead with developing and proving the true threat to public health and safety that this sort of interference represents?

You know, our petition for certiorari is going to raise that question to the U.S. Supreme Court and point out that there could never be a better time for the U.S. Supreme Court to provide guidance for this case and for many, many other cases like this case throughout the western states, because it turns out that these 1866 Mining Act rights, which establish mining rights, water rights, rights of ways, road rights of way, the Forest Service is disregarding these rights, these ancient rights, pretty much throughout the western states, and they are treating them as if they don't mean anything anymore, even though they are just as congressionally rooted as anything that they are relying on today.

And I think that the U.S. Supreme Court is going to recognize what's attractive about this case is its implications of that kind of disrespect for property rights. This is not just a proprietary issue. This implicates sovereignty when we're talking about essential infrastructure during a natural disaster in a state where [forty-seven] percent of its lands are not under its control.⁴⁰

DEAN A. REUTER: All right. We've got two questions pending at this point. Again, if you have a question for either of our experts, you need to push the star button and the pound button on your telephone to join the queue. Let's go to our next question.

QUESTIONER: Hi, Nick. This is Steve Klein from the Wyoming Liberty Group, and I heard you mention earlier some of the old revised statutes from back in the day of western settlement, and I was just curious if R.S. 2477 has come up in any way. That's an old law that allows rights of way over federal land, and that wasn't foreclosed until 1976.

And they've had a lot of success with that in Utah. We're finally bringing state law up to speed here in Wyoming, and I was wondering if Tombstone had considered possibly finding some old rights of way to get their power equipment up the mountain.

NICK DRANIAS: Well, thanks, Steve.

Yes. Well, the 1866 Mining Act had a number of provisions which were separately codified under different numbers. It turns out that that is the same Act that provides authority for recognizing water rights under R.S. 2339 and for recognizing public highway rights of way under R.S. 2447 [sic: reference should be to 2477]. So, you know, these are related congressional enactments, and if you look at the case law, the courts have drawn on precedent relating to

⁴⁰ See *supra* note 1 and accompanying text.

the water rights portion, to provide guidance with respect to the public highway portion, and vice versa. So these are very intimately connected concepts when it comes to determining whether or not these sorts of rights of way exist across federal lands.

And in our case, we do believe that there are public highway rights of ways that were confirmed by the county board of supervisors in 1901 that allow for access to our water rights and our water rights of way, which include pipelines, and the challenge there is to have that question determined, we have to have the district court actually grapple with it. And one of the challenges we had is that because the District Court did not issue any specific findings of fact,⁴¹ it didn't even address the R.S. 2447 [sic: reference should be to 2477] issue, and so for purposes of this petition for certiorari of the U.S. Supreme Court, we are really going to focus on the 10th Amendment issue, which is most plainly at issue when dealing with the water rights side, because as important as R.S. 2447 [sic: reference should be to 2477] public highways are, we think that the connection between the continued existence of the state and its political subdivision from the R.S. 2339 water rights is much more—is much more essential and much more persuasive.

So our focus for at least the petition for certiorari is going to be almost entirely on the deprivation of free and full restoration of our longstanding water rights and water rights-related rights of way.

DEAN A. REUTER: All right. Professor Appel, did you have anything on this point?

PROFESSOR PETER APPEL: Two brief points; one specific one, one more general. The specific point is regardless of what rights Tombstone might have under the 1866 Act, the courts have been very clear that that's not abandonment of the federal government's power to regulate those.⁴² That's been very clearly recognized with regard to mining rights, roads, et cetera.

The broader point is getting back to the point I've been reiterating through the course of this conversation, which is by talking about the rights granted by the 1866 Act, there is implicit in that, that it's Congress, the federal government that has the power to regulate what's going to happen on its lands; Congress didn't have to pass that Act. Now, having passed that Act, then there are questions about, okay, well, what rights remain, how far can regulation go, et cetera,

⁴¹ *City of Tombstone*, 501 Fed. App'x 681.

⁴² See *New York v. United States*, 505 U.S. 144, 181 (1992) (“The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: “Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.”).

et cetera, but the more important point is that Congress could have made the judgment in 1866, “You know what, we’re not going to open these lands for settlement. We’re not going to open them for mining. We’re not going to open them for roads,” and that would be the judgment of Congress, which the Supreme Court would say, “Well, that’s your choice.”

DEAN A. REUTER: Okay. It looks like we have one final question. Still time for more questioners. If you have a question, push the star button and then the pound button on your telephone, but for now, let’s go with what seems to be the final question.

QUESTIONER: Hi. This is Tyler Ward from Vermont Law School.

My question is, does the Equal Footing Doctrine have a role to play in any of this?

NICK DRANIAS: Well, Peter, if you don’t mind, I’d—

DEAN A. REUTER: Go ahead.

NICK DRANIAS: We considered that. We considered that theory. It’s a challenging theory to—even more challenging theory to advance. What you are referring to is the idea that when states are admitted from—you know, subsequent to the ratification of the Constitution, when states are admitted subsequently to that, carved out of territorial lands, they are supposed to be admitted on an equal footing with the original 13 states, . . . that they have to have all of the rights, privileges, authorities, sovereignties in exactly the same way as the original 13 states.⁴³ And applied to a case like this, the argument would be that the mere fact that the federal government has retained control over 70 percent of its lands, it categorically treats the western states as a different kind as entity in a significant way than the original 13 states, and that it deprives them of essential attributes of sovereignty and so forth. All of this is a very plausible argument to me. I think it’s probably from an original understanding of the Equal Footing Doctrine, correct. The problem is it’s been blown away by the U.S. Supreme Court squarely for over a hundred years.

So, you know, you pick your battles where you’ve got a foothold, and unfortunately for the Equal Footing Doctrine, we didn’t see much of a foothold for that specific theory. I think what we see in the Court’s recent 10th Amendment cases, though, is a much more solid way of thinking about this particular case, the idea that implicit in the Constitution, that conditioning all claims of federal power is the guarantee that states are continuing to—shall continue to exist in a meaningful sovereign capacity. That to me is a much more lively, active legal principle to try to enforce, which is why we have focused our case

⁴³ *Pollard v. Hagan*, 44 U.S. 212, 229-30 (1845).

on it. Moreover, the principles that Peter is articulating, this idea that there is a federal plenary power under the Property Clause, that is increasingly under siege.⁴⁴

I mean, it used to be that the federal government had a plenary spending power, and then we saw in the Affordable Health Care Act that now the federal government's spending power is limited by the 10th Amendment.⁴⁵ It used to be that the federal government had a plenary treaty power, and we saw that in *Bond v. United States*, the Supreme Court was willing to entertain 10th Amendment claims against the use of the treaty power.⁴⁶

We actually believe at the Goldwater Institute that this use of the term "plenary federal power" is a term that is outdated, that it was never consistent with the original understanding of the Constitution, which the federal government is supposed to have limited and enumerated powers, not plenary powers, and we believe that it's on its way out. And we want to help it on its way out with a case like *City of Tombstone v. United States*.

DEAN A. REUTER: Thank you.

PROFESSOR PETER APPEL: This is Peter Appel. Just to respond briefly, the short answer is no. The Equal Footing Doctrine has no applicability here.

I know that Nick was more reluctant to maybe get there and was saying, "Well, you've got to pick your battles," but he was correct in saying that the Supreme Court has rejected equal footing arguments for a long time.⁴⁷ The Equal Footing Doctrine, with one exception⁴⁸, has been basically limited to the ownership that states have when they're admitted to the union over submerged lands. The word "equal footing" appears nowhere in the Constitution. The case law which develops the Equal Footing Doctrine says that it's implied that every state is admitted on equal footing, but where they have applied it has been—as I said, with one exception—has been with regard to submerged lands under navigable waters.⁴⁹ And the one exception is when Oklahoma was admitted to the Union, Congress said that it had to keep its capital at Guthrie—I don't even know where Guthrie, Oklahoma, is—for a period of time, and before that period of time expired, the Oklahoma legislature decided to move the capital to Oklahoma City. And the folks in Guthrie were not happy about that, and it went to the Supreme Court, and the Supreme Court said, you can't

⁴⁴ See *supra* notes 20-21.

⁴⁵ Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2606-07 (2012).

⁴⁶ *Bond v. United States*, 131 S. Ct. 2355 (2011).

⁴⁷ See *United States v. Gratiot*, 39 U.S. 526, 537-38 (1840).

⁴⁸ See *supra* note 27.

⁴⁹ See, e.g., *United States v. Alaska*, 521 U.S. 1, 5 (1997).

tell a state that's now a sovereign where its state capital has to be, and they used the "equal footing" language to justify that.⁵⁰

I don't have a problem with that result, but as Nick pointed out, when it comes to the ownership of federal lands within the states, the Supreme Court has long ago rejected the application of the Equal Footing Doctrine as being violated by the ownership of federal property within the states,⁵¹ and I would disagree with Nick because going again back to *United States v. Gratiot*, 1840, the Supreme Court said it's perfectly fine for the United States to own property, retain perpetual ownership, manage the property as it wants to within states that are admitted to the Union.⁵²

DEAN A. REUTER: We're apparently touching a couple of nerves here. We've got two more questions and about ten minutes, so I'm going to ask the callers to be concise with their questions if they could. Let's go to the next caller.

QUESTIONER: Hi. Good afternoon. I am not an attorney, but I am a federal worker, and I want to thank you for putting this very interesting Teleforum on.

My question is, while I'm hearing that the Forest Service said no because Endangered Species Act was invoked and NEPA was invoked, I'm not sure if I got this right, and I'd like to know, is that really the issue? And if it is, why don't they just—if they did a NEPA document and did their Endangered Species consultation, I mean, I can't believe that it's even gotten to the point where it's so bad that we're even going to the Supreme Court. Would that resolve it? Are you waiting for—I mean, if they did a document, would that allow things to move forward and resolve the issue?

NICK DRANIAS: Well, Peter, I guess is more in the weeds, so I'll take that.

DEAN A. REUTER: Yeah, go ahead.

NICK DRANIAS: Actually, it's very unclear why the Forest Service—what regulatory authority the Forest Service is relying upon and denying us access.

If you look at—if you look at their decision memoranda, the regulatory documents that they generated, the only point in their own decision memoranda where you see any reasoning for why they won't let us restore more than three of our twenty-five spring sites is in reference to a cultural, historical consultation where their archeologist said that he didn't want them to restore any spring sites that didn't look like they were in recent use. And so from a strictly on-

⁵⁰ *Coyle v. Smith*, 221 U.S. 559, 565 (1911) ("The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers.").

⁵¹ *United States v. Gratiot*, 39 U.S. 526, 537-38 (1840).

⁵² *Id.*

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the-record analysis, to this day, the best explanation we have for what the Forest Service is doing is apparently based on the advice of their archeologist as part of the NEPA review, not to touch anything else other than these three spring sites, which is incredibly curious, because at the same time that their archeologist is trying to preserve those other sites, I guess for the benefit of history, they have been denying that we've ever established them. And so it's just a very curious thing.

Now, the one interesting thing about the law in this case is when it comes to water rights, there really is no federal law that, as a matter of field preemption, displaces state jurisdiction or political subdivision jurisdiction over water within the states. In fact, to the contrary, all of the federal laws impacting water rights and water use in the western states have carefully carved out and preserved concurrent jurisdiction for the states, and so one of the very, very curious things about our case, if you want to get into the statutory interpretation weeds, is that there really is no federal law that squarely stands against the restoration work that the City of Tombstone wants to do. In fact, all of the enabling authorities that the Forest Service is relying upon that have been articulated in the case seem to want to protect our existing water rights.

In a lot of ways, you know, the way that we view this case is this is sort of the rogue conduct of an administrative agency that is not even looking to the plain meaning of its own authorizing statutes and certainly not doing so with sensitivity to the federalism interest at issue in this case. Now, that approach to me is not as satisfying as raising their more fundamental question, which is, Does the City of Tombstone have any right to exist under the 10th Amendment? Because that to me is the fundamental when you are disrupting a water supply, and that's the issue we're going to try to take to the U.S. Supreme Court.

DEAN A. REUTER: Professor Appel, do you want to weigh in here before we go to our next caller?

PROFESSOR PETER APPEL: Yeah. And I'll be really brief.

The one thing that Nick didn't mention is that there are considerations about what the Forest Service was doing under the Wilderness Act, and again, Nick has much more knowledge of the record of this case than I do, because I was not involved in the litigation of this case, but there is the Wilderness Act, and that's some of the reason why the Forest Service was saying—that was—excuse me—trying to regulate some of the ways that it was going to permit Tombstone to repair the three well sites that it did allow.⁵³

DEAN A. REUTER: Let's go to our final question.

⁵³ Wilderness Act, 16 U.S.C. §§ 1131-1136 (2012).

QUESTIONER: Yes. This is John Wright in Billings, Montana.

I was wondering about the application of the McCarran Amendment⁵⁴ and adjudication of Federal Reserve to water rights in this situation and whether this is really just a state court issue that's dragged into federal court.

NICK DRANIAS: Hey, that's a great question. Sorry, Peter. I just got to jump on that.

It's not a—the McCarran Amendment basically says that you can join the federal government to a water rights adjudication should you file it in federal court, but if there's an existing water rights adjudication in state court, then federal courts—or at least courts have interpreted that as requiring federal courts to abstain on adjudicating water rights and to wait for state courts to proceed.⁵⁵

What's important about our case, though, is that we're not asking to adjudicate water rights. What we're trying to get is the right of way to restore essential infrastructure, and that is not a question that is among the issues that can be decided in a state court-based water adjudication.⁵⁶ The state court-based water adjudication deals with relative rights between adverse claimants and their priorities.⁵⁷ It's sort of like a debate among creditors over who has priority in some collateral. That is a complete side issue to our case, and unfortunately, it has been raised as sort of a defense by the Forest Service. It hasn't got a whole lot of traction. It isn't even referenced in the Ninth Circuit's decision.

But here's the bottom line. The bottom line is it doesn't matter who has priority interests or whose rights come first in the use of the water. What we are trying to do is simply exercise the right to put down the pipeline and restore the infrastructure that was swept away in a natural disaster.

DEAN A. REUTER: Professor Appel?

PROFESSOR PETER APPEL: I'll just comment very briefly on that. I don't have a lot of disagreement with Nick on the substance of the McCarran Amendment and how that applies here, and of course, he knows the record much more, much better than I do.

I know that there has—from the briefs that there has been a disagreement between the Forest Service and Tombstone about exactly where the water rights are, but as Nick pointed out, this isn't a water rights case, and so the McCarran Amendment doesn't have a whole lot of applicability.

⁵⁴ McCarran Amendment (McCarran Act), 43 U.S.C. § 666 (2006).

⁵⁵ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-20 (1976).

⁵⁶ 43 U.S.C. § 666.

⁵⁷ *Colo. River Conservation Dist.*, 424 U.S. at 810-11 (“[A]ll water users on a stream, in practically every case, are interested and necessary parties to any court proceedings.”).

What I will point out is—and this just gets back to one of the themes that I’ve been trying to articulate in today’s discussion—the McCarran Amendment was a judgment by Congress to waive the sovereign immunity of the United States for general stream adjudications and allow the United States to be sued in state courts.⁵⁸ Congress didn’t have to do that.⁵⁹

Similarly, Congress could make the choice that it wasn’t going to create a wilderness area. They made the opposite choice. They are making decisions about the sovereignty and the sovereign property of the United States, and if Congress had never passed the McCarran Amendment, the United States would never be showing up in state court. And that’s just simply the principles that have been operating under the Constitution since the time of the founding.

DEAN A. REUTER: Thank you very much, Professor Peter Appel, Mr. Nick Dranias. We certainly appreciate you joining our call today and sharing your thoughts. This has been a stimulating debate and discussion.

I want to thank our audience as well for your thoughtful questions and invite you to join us for our Teleforum conference call tomorrow at 1 p.m., Eastern Time, at this same number when we’ll be discussing the *Bronx Household* case in the Second Circuit, but until then, we are adjourned.

Thank you very much, everyone. Thank you for listening. We hope you enjoyed this Practice Group podcast. For materials related to this podcast and other Federalist Society multimedia, please visit The Federalist Society’s website at federalistsociety.org/multimedia.

⁵⁸ 43 U.S.C. § 666; *see, e.g.*, *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 564 (1983).

⁵⁹ *Price v. United States*, 174 U.S. 373, 375-76 (1899).

DEPORTATION PROCEEDINGS: WHY TEXAS COURTS SHOULD ABANDON
CHAIDEZ AND APPLY *PADILLA* RETROACTIVELY

Amir Tavakkoli*

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I. INTRODUCTION

The Sixth Amendment of the United States Constitution gives the accused in criminal prosecutions the right to the assistance of counsel for his defense.¹ Courts have long recognized that the Sixth Amendment’s right to counsel is the right to effective counsel.² There is a two part test to determine whether counsel was so ineffective in a criminal prosecution that a reversal of the conviction

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¹ U.S. CONST. amend. VI.

² See *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

is required.³ First, counsel had to have been deficient; and second, the deficient performance must have prejudiced the defense.⁴

When I was a teenager, my mother and I had an extraordinary opportunity to move to the United States. It was a dream come true. I always knew that somehow I could move to Europe to live with some of my uncles and aunts, but the United States is something else. I never could have imagined coming to the United States of America. This opportunity genuinely humbled me. In the middle of eighth grade, I left school, packed my bags, and next thing I knew, my parents enrolled me in a middle school in the United States.

I began to learn about American culture. I learned English, I learned that it is not proper to look down at the ground during a conversation, I learned not to talk when another person is talking, I learned to be more patient and understanding of others' feelings, and I learned how to be an American. Within the blink of an eye, I saw myself enrolled in law school, pursuing my dream of becoming a lawyer.

The summer of my first year in law school, after making the top five percent of my class, I packed my bags and headed to Washington for an internship with the United States House of Representatives. All I could think was "WOW!" There I was, pursuing my dreams in the United States and working for the United States House of Representatives. It was unbelievable, indescribable, and beyond my imagination. I certainly believed this was a blessing. After my internship, I packed my bags to travel overseas for a wedding. I was enjoying my wonderful life, until I came back to the United States.

Upon my arrival at the airport, in July 2012, immigration officers took me into custody because I had a misdemeanor possession of marijuana conviction from 2006. At first, I thought there was a mistake. I had traveled abroad several times after the 2006 incident and never had any problems returning to the United States. I did not know that there would be any immigration issues for my 2006 conviction. It seemed like my conviction happened so long ago; I did not understand the impact that it could have on the rest of my life. In 2006, when I served time in a Texas county jail for that charge, an immigration hold was placed on me, but the immigration judge, without seeing me, decided that my case was too minor to pursue, so he released me. Unfortunately, the judge did not properly document his ruling to release the hold, leaving my case open for future judges to pursue deportation. Upon my conviction for the misdemeanor, neither my lawyer nor the judge made me aware that I would be at risk of deportation or that I could not leave the country; I thought the only problem I would face would be in getting my citizenship. I even thought the original

³ See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

⁴ *Id.*

immigration hold the government had placed on me in 2006 was a mistake. After all, I came to the United States legally and have always had a legal residency card.

In July 2012, upon my arrival to the United States, immigration officials took custody of me at the airport and transported me to an immigration detention center. I begged, cried, and explained that I was a second year law school student scheduled to begin a judicial clerkship with a Harris County Judge the next day. My family, not knowing what was going on, was waiting outside the airport. It was horrifying for me to call my mother and tell her I would not be coming home that night because immigration officials would be keeping me in their custody. The next few months were the hardest of my life. There I was, living a dream; one day I was working in the most powerful building in the world, the United States Congress. The next day I was being held in an immigration detention center. It was an experience I would wish upon no one.

The way immigration officials treated me and the three weeks I spent at the immigration detention center are beyond the scope of this Article. Luckily, I was able to get out of detention just in time to start school and begin a long, hard battle to overcome my 2006 misdemeanor conviction and avoid immediate deportation.

My life is here—my family, friends, school, job—everything I have is here. What would happen if the government deported me? I could be executed for my involvement in Christian and Jewish Organizations (in Iran, it is a crime punishable by death for a Muslim to convert to another religion. In Iran, involvement means conversion). I could be put in jail. Iran's government could think that I am a spy because I have worked for both the United States and Texas House of Representatives. These are concerns that keep crossing my mind. In fact, I consider myself an American. Except for a few mistakes I made back in my high school years, I have always worked hard in this country. I have continually volunteered my time and services to different government and private organizations, I donate blood, and every time I see a person in need of help, I do whatever I can to help him or her. From stopping on the roads to help a driver in a broken-down car, to researching the law and coming up with solutions to people's problems, I consider myself an individual who puts others' needs on the same level, if not higher than my own. Was the intent of the United States Congress to deport someone like me?

Not having been advised of any immigration consequences I may face in the future for pleading guilty to the 2006 possession of marijuana charge, I turned to *Padilla v. Kentucky* to get me out of my nightmare. I filed a writ of habeas corpus in County Court where the charge occurred. It is important to know that this is not an individual problem that I have. Year after year, immigration officials physically remove thousands of people from the United States

and separate them from their families, friends, and lives. In 2009 alone, the government removed 131,837 legal individuals from the United States for having committed a crime; this number does not include the 224,402 legal individuals deemed inadmissible when coming back to the United States after a short trip.⁵

This Article articulates reasons why, under Texas law, Texas courts should apply the Supreme Court's holding in *Padilla v. Kentucky*⁶ retroactively, rather than apply the holding of *Chaidez v. United States*⁷ for immigrants who are in immigration proceedings. Part II discusses the background of *Padilla* and the expanded role of criminal defense attorneys. Part III discusses a line of cases applicable in criminal cases with immigrant defendants in Texas. Part IV concludes with a summarization of this Article and my final thoughts of my experience in removal proceedings.

II. BACKGROUND

A. *Padilla v. Kentucky and Criminal Defense Attorneys' Expanded Roles*

In March 2010, the Supreme Court held in *Padilla v. Kentucky* that “counsel must inform her client whether his plea carries a risk of deportation.”⁸ The Court found in *Padilla* that: (1) counsel engaged in deficient performance by failing to advise the defendant that his plea of guilty made him subject to automatic deportation; and (2) defendant's claim was subject to the Strickland ineffective assistance test, not only to the extent that he alleged affirmative misadvice but also to extent that he alleged omissions by counsel.⁹ The defendant in *Padilla* was a legal permanent resident from Honduras who had lived in the United States for more than forty years; he was arrested for transportation of marijuana, a federal offense for which deportation is “virtually mandatory.”¹⁰ The defendant in *Padilla* pleaded guilty to the offense and subsequently faced removal proceedings.¹¹ “[T]he terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for *Padilla*'s conviction.”¹²

⁵ OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., YEARBOOK OF IMMIGRATION STATISTICS: 2011, at 96, 109 (2012), available at http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf.

⁶ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

⁷ *Chaidez v. United States*, 133 S. Ct. 1103, 1105 (2013).

⁸ *Padilla*, 130 S. Ct. at 1486.

⁹ *Id.* at 1483-84, 1486.

¹⁰ *Id.* at 1477-78.

¹¹ *Id.* at 1477.

¹² *Id.* at 1483.

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.¹³

The defendant in *Padilla* contended that his counsel failed to advise him of the deportation consequence prior to entering his plea and stated “that he did not have to worry about immigration status”¹⁴ The defendant in *Padilla* relied on counsel's erroneous advice when he decided to plead guilty to the drug charges that made his deportation virtually mandatory, and he contended that had he not received this incorrect advice, he would have insisted on going to trial.¹⁵

Under the Sixth Amendment to the United States Constitution and Article 1, Section 10, of the Texas Constitution, a defendant has the right to effective assistance of counsel at a guilty-plea proceeding.¹⁶ In *Padilla*, the United States Supreme Court recognized that deportation is “uniquely difficult to classify as either a direct or collateral consequence,” given its “close connection” to criminal proceedings, and it concluded that “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.”¹⁷ The *Strickland* framework applies.¹⁸ Under *Strickland*, courts must determine “whether counsel's representation ‘fell below an objective standard of reasonableness’”; and then “whether ‘there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.’”¹⁹

The *Padilla* Court found that “constitutionally competent counsel” would have advised the defendant in *Padilla* that a conviction for drug distribution subjected him to automatic deportation.²⁰ In its analysis, the Court noted that “[t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important. . . . [D]eportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on

¹³ 8 U.S.C. § 1227(a)(2)(B)(i) (2012).

¹⁴ *Padilla*, 130 S. Ct. at 1478.

¹⁵ *Id.*

¹⁶ U.S. CONST. amend. VI; Tex. Const. art. I, § 10; *Ex Parte Reedy*, 282 S.W.3d 492, 500 (Tex. Crim. App. 2009); *Padilla*, 130 S. Ct. at 1480-81 (citing *McMann v. Richardson*, 397 U.S. 759, 771; *Strickland v. Washington*, 466 U.S. 668, 686 (1984)).

¹⁷ *Padilla*, 130 S. Ct. at 1482.

¹⁸ *Id.*

¹⁹ *Id.* (quoting *Strickland*, 466 U.S. at 688, 694).

²⁰ *Id.* at 1478.

noncitizen defendants”²¹ Further, that “deportation is nevertheless intimately related to the criminal process.”²² The *Padilla* Court, in applying the *Strickland* framework for ineffective assistance of counsel, noted that:

Padilla’s counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which . . . specifically commands removal for all controlled substances convictions Instead, Padilla’s counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla’s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.²³

The Court held that when the deportation consequences are clear, criminal defense counsels owe an “equally clear” duty to provide accurate advice.²⁴

The Court refused to hold that defense counsel must only avoid providing “affirmative misadvice” to a noncitizen client, and it instead determined that “there is no relevant difference between an act of commission and an act of omission in this context.” Silence regarding the negative immigration consequences of a guilty plea, therefore, also constitutes constitutionally deficient representation under *Strickland*. The Court also noted that professional norms already generally impose an obligation of defense counsel to provide advice regarding deportation consequences of guilty pleas. The Court ultimately held that “counsel must inform her client whether his plea carries a risk of deportation.”²⁵

“It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so ‘clearly satisfies

²¹ *Id.* at 1480 (footnote omitted).

²² *Id.* at 1481.

²³ *Id.* at 1483.

²⁴ *Ex parte Tanklevskaya*, 361 S.W.3d 86, 92 (Tex. Ct. App. 2011) (reviewing *Padilla*).

²⁵ *Id.* at 92-93 (discussing *Padilla*). “Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of ‘the advantages and disadvantages of a plea agreement.’” *Padilla*, 130 S. Ct. at 1484 (quoting in part *Libretti v. United States*, 516 U.S. 29, 50-51 (1995)).

the first prong of the *Strickland* analysis.’”²⁶ “[W]e have long recognized that the negotiation of a plea bargain is a critical phase of the litigation for purposes of the Sixth Amendment right to effective assistance of counsel.”²⁷

In applying these relevant court findings, in January 2013 I filed a writ of habeas corpus in County Court at Law 1 in Montgomery County alleging ineffective assistance of counsel under the Sixth Amendment to the United States Constitution and Article 1, Section 10 of the Texas Constitution. The court denied my writ on January 22, 2013, because it held that under *Chaidez v. United States, Padilla* does not apply retroactively to cases decided before that decision. The lower court erred in making this decision for several reasons: first, the ruling in *Chaidez* has a loophole that courts have not discussed, and *Padilla* should be applied retroactively under this loophole; second, the lower court erred in applying *Chaidez* because states have the right to give broader rights than those required by federal law, and the lower court should have relied on Texas cases to decide how it should make its ruling; and last, under the Texas constitution, the writ of *habeas corpus* is a right, not a privilege, that shall *never* be denied.

III. ANALYSIS

A. *Retroactivity of Padilla and the Loophole in Chaidez*

1. *Chaidez v. United States*

In *Chaidez v. United States*, the United States Supreme Court held that *Padilla*’s new requirement regarding the obligation of criminal attorneys to inform their clients of immigration consequences does not apply retroactively to cases decided before the holding in *Padilla*.²⁸

The defendant in *Chaidez* was a citizen of Mexico who became a lawful permanent resident of the United States in 1977.²⁹ About twenty years later, she was charged with and pleaded guilty to two counts of mail fraud, in violation of 18 U.S.C. § 1341.³⁰ This violation subjected her to removal from the country.³¹ According to the defendant, her attorney never advised her of this immigration consequence, so she stayed “ignorant” of it.³² In 2009, immigra-

²⁶ *Padilla*, 130 S. Ct. at 1484 (quoting in part *Hill v. Lockhart*, 472 U.S. 52, 62 (1985) (White, J., concurring in judgment)).

²⁷ *Id.* at 1486.

²⁸ *Chaidez v. United States*, 133 S. Ct. 1103, 1105 (2013).

²⁹ *Id.* at 1105.

³⁰ *Id.* at 1105-06.

³¹ *Id.*

³² *Id.*

tion officials started removal proceedings against her.³³ Subsequently, she filed a writ of *coram nobis* in the federal district court to have her conviction overturned based on ineffective assistance of counsel.³⁴

The Court in *Chaidez* held that *Padilla*'s ruling requiring criminal defense attorneys to inform clients of potential immigration consequences is a "new rule" of criminal procedure and therefore does not apply retroactively to cases decided before *Padilla*.³⁵ The Court reasoned that prior to *Padilla*, courts considered deportation consequences as collateral consequences of pleading guilty to a criminal offense, and thus did not fall under the Sixth Amendment's right to effective counsel.³⁶ *Padilla* changed this rule and made it a requirement under the Sixth Amendment for defense attorneys to inform their clients about immigration consequences.³⁷

2. The Loophole in *Chaidez*

Despite the fact that my 2006 conviction was final at the time the Supreme Court decided *Padilla* in 2011, and despite the Supreme Court's ruling in *Chaidez v. United States* that *Padilla* created a "new rule," the decision in *Padilla* can and should still apply retroactively to cases on collateral review.³⁸

First, the decision in *Chaidez* lacks very important analysis: whether the holding in *Padilla* falls within an exception to the general rule in *Teague v. Lane* prohibiting individuals from retroactively attacking finalized cases based on new rules of criminal procedure.³⁹ Under *Teague v. Lane*, new rules of criminal procedure do not apply to cases that became final before the new rules were announced.⁴⁰ However, *Teague* gave two exceptions to this: in a writ of *habeas corpus* proceeding, (1) a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"; and (2) if the rule deals with procedures that are "implicit in the concept of ordered liberty", or "watershed rules of criminal procedure" as the Court in *Teague* described it.⁴¹ The Court relied on Justice Harlan's concurring opinion in *Mackey v. United States*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 1107.

³⁶ *Id.* at 1109.

³⁷ *Id.* at 1110-11.

³⁸ *Id.* at 1111.

³⁹ *See id.*

⁴⁰ *Teague v. Lane*, 489 U.S. 288, 310 (1989).

⁴¹ *Id.* at 311 (internal quotation marks omitted) (quoting *Mackey v. United States*, 401 U.S. 667, 692-93 (1971)).

to establish these exceptions.⁴² To be “implicit in the concept of ordered liberty,” a new rule must be one “without which the likelihood of an accurate conviction is seriously diminished.”⁴³

The first exception does not apply to my case as it only applies to conduct that was illegal at the time of conviction but is no longer illegal at the time a defendant files a writ of *habeas corpus*. For example, if a person is convicted of unlawfully hunting a deer in 2002 and Congress decides in 2006 that hunting deer is no longer illegal, even if the time for all appeals has ended for the 2002 conviction, that person can still file a writ of *habeas corpus* to overturn his or her 2002 conviction under the first exception to *Teague*.

Turning to the second exception of *Teague*, does it apply to my case? Is the defense attorney’s duty to inform a non-citizen of his or her potential immigration consequences of pleading guilty or *nolo contendere* to a conviction “implicit in the concept of ordered liberty,” or a “watershed [rule] of criminal procedure?” The Supreme Court simply failed to answer this question in its ruling in *Chaidez*. Although the Court gave no explanation, legal scholars have suggested that because the Court has held that the classes of cases that fall under this exception are “extremely narrow” it is unlikely that any have yet emerged.⁴⁴ In fact, the Court has never found a rule to meet the requirements of this exception.⁴⁵ However, there is always a first for everything. If Justice Harlan’s use of language and the thorough analysis by the Court in *Teague* to create this exception was meant for nothing, what is the use and purpose of continuously analyzing this exception? Why not overrule *Teague* and say there is only one exception, instead of using significant time and resources, case after case and appeal after appeal, only to conclude at the end that the second *Teague* exception would never apply to any case?

The closest “new rule” of criminal procedure that has received the attention of the Court in meeting the strict, if not impossible, criteria for being a watershed rule of criminal procedure was the right to counsel in *Gideon v. Wainwright*.⁴⁶ In *Beard v. Banks*, the Court recognized that in “providing guidance as to what might fall within this exception, we have repeatedly referred to the

⁴² *Id.* See generally *Mackey*, 401 U.S. 667 (holding that evidence introduced at trial which later become inadmissible due to new Court decisions, cannot be retroactively attacked in future proceedings).

⁴³ *Teague*, 489 U.S. at 313.

⁴⁴ *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (citing *Tyler v. Cain*, 533 U.S. 656, 667 (2001)).

⁴⁵ Tadhg Dooley, *Whorton v. Bockting and the Watershed Exception of Teague v. Lane*, 3 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 1, 6 (2007).

⁴⁶ *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963).

rule of *Gideon v. Wainwright*.⁴⁷ The Court continued by citing to *Gideon and stating*:

Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.⁴⁸

A close look at *Padilla* would give insight that those issues regarding the defense attorneys' responsibility to inform a client of potential immigration consequences could fall under the second exception of *Teague*. That is, they would be "implicit in the concept of ordered liberty."⁴⁹ As Justice Stevens explained in *Padilla*'s majority opinion "[t]he importance of accurate legal advice for noncitizens accused of [293] crimes has never been more important[;] . . . deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."⁵⁰ If the Court is ever going to make use of the second exception to *Teague*, post-*Padilla* is the time. The right to counsel is the right to effective counsel, especially concerning matters regarding immigration consequences. Who would want ineffective counsel? What value is legal counsel if the representing attorney does not inform his client of potential immigration consequences, thus leading the client to make a harmful, uninformed, and unintelligent plea bargain agreement? What good is counsel who takes the worst possible plea agreement and encourages his client to plead

⁴⁷ *Beard v. Banks*, 542 U.S. 406, 417 (2004).

⁴⁸ *Id.* at 417-18 (quoting *Gideon*, 372 U.S. at 344).

⁴⁹ *Teague v. Lane*, 489 U.S. 288, 311 (1989) (internal quotation marks omitted) (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971)).

⁵⁰ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010) (footnote omitted).

guilty, knowing—or being completely unaware—that the government can deport his client? I know I would rather not have that counsel.

An argument can be made that the Court in *Chaidez* decided not to analyze the *Teague* exceptions because *Chaidez* was deciding a *coram nobis*, and the ruling in *Teague* only applies to *habeas* writs.⁵¹ Whatever the case, *Chaidez* left us with a loophole that deserves further exploration. Knowing the significant importance of this issue upon many cases such as mine, and the Supreme Court's oversight or inopportunity to address the loophole in *Chaidez*, the lower court in my case should have taken the time to conduct a more thorough analysis rather than simply saying writ denied.

B. Danforth v. Minnesota and States' Rights to Give Broader Rights Than Those Required by Federal Law

Notwithstanding the loophole in *Chaidez* and whether the *Padilla* ruling falls under the second exception of *Teague*, Texas can and should still apply *Chaidez* retroactively. In *Danforth*, the United States Supreme Court held that “the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law.”⁵² The Court continued to state that “[f]ederal law simply ‘sets certain minimum requirements that States must meet but may exceed in providing appropriate relief.’”⁵³

The defendant in *Danforth* was charged and convicted in state court for criminal sexual conduct with a child.⁵⁴ During the trial, the molested child did not testify, but the court played a taped interview with the child.⁵⁵ The defendant appealed his conviction based on the confrontation clause of the United States Constitution.⁵⁶ The Minnesota Court of Appeals upheld the conviction, and time for any appeals elapsed.⁵⁷ After the defendant's conviction became final, the Supreme Court announced a “new rule” in *Crawford v. Washington* requiring that courts give defendants the opportunity to confront witnesses to test the reliability of testimonial evidence (the taped interview in this case).⁵⁸ The defendant then filed a state post-conviction petition arguing he was entitled to a new trial because the admission of the tape during his trial violated the new rule.⁵⁹ The state's highest court concluded that under *Teague v. Lane*, new

⁵¹ *Teague*, 489 U.S. 288.

⁵² *Danforth v. Minnesota*, 552 U.S. 264, 288 (2008).

⁵³ *Id.* (quoting *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 178-79 (1990)).

⁵⁴ *Id.* at 267.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

rules of criminal procedure do not apply to cases that were finalized before the new rules were announced.⁶⁰ The Supreme Court of the United States overturned the state's highest court's ruling and held that states have the authority to give broader effects to new rules of criminal procedure than what the United States Supreme Court requires.⁶¹ The Court reasoned that the ruling in *Teague*, which states that new rules of criminal procedure do not apply retroactively, applies only to federal proceedings.⁶² The Court further stated that "considerations of comity [and respect for the finality of state convictions] militate in favor of allowing state courts to grant habeas relief to a broader class of individuals than is required by *Teague*."⁶³ "States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees."⁶⁴

The decision in *Chaidez* should not apply to Texas because states have a right to give their citizens broader rights and protections than those required by federal law and are encouraged to do so.⁶⁵ Except for a few cases, Texas has historically held that *Padilla* applies retroactively.⁶⁶ Although *Chaidez* decided that *Padilla* set new rules, Texas still has the right to give a broader application to *Padilla* as it continuously has done in the past and make *Padilla* retroactive. Therefore, it should continue to do so despite the ruling in *Ex parte De Los Reyes*, which stated that although "we recognize that [based on *Danforth*] we could accord retroactive effect to *Padilla* as a matter of state habeas law [.] [b]ut we decline to do so."⁶⁷ Texas should not rely on *Ex parte De Los Reyes* because not only did *Chaidez* have a loophole that was not addressed concerning habeas cases, but also *Ex parte De Los Reyes* also failed to follow the standards set in *Danforth* as described below.

⁶⁰ *Id.* at 266-67 (citing *Teague v. Lane*, 489 U.S. 288, 310 (1989)).

⁶¹ *Id.* at 266.

⁶² *Id.* at 275-82.

⁶³ *Id.* at 279-80.

⁶⁴ *Id.* at 280.

⁶⁵ *See id.*

⁶⁶ *See* TEX. CODE CRIM. PROC. ANN. art. 26.13 (West, Westlaw through the end of the 2013 Third Called Session of the 83rd Legislature); *See also Ex parte Tanklevskaya*, 361 S.W.3d 86, 95 (Tex. App. 2011) (citing *Marroquin v. United States*, No. M-10-156, 2011 WL 488985, at *2 (S.D. Tex. Feb. 4, 2011)); *Ex parte Murillo*, 389 S.W.3d 922, 927 (Tex. App. 2013); *Ex parte Fassi*, 388 S.W.3d 881, 886 (Tex. App. 2012); *Aguilar v. State*, 375 S.W.3d 518, 524 (Tex. App. 2012); *Ex parte Olvera*, 394 S.W.3d 572, 577 (Tex. App. 2012); *Ex parte De Los Reyes*, 350 S.W.3d 723, 729 (Tex. App. 2011).

⁶⁷ *See Ex parte De Los Reyes*, 392 S.W.3d 675, 676 (Tex. Crim. App. 2013) (holding that Texas will not apply *Padilla* retroactively, but giving no explanation and failing to go through the *Danforth* analysis).

C. *Does Ex Parte De Los Reyes Support the Notion That Padilla Does Not Apply Retroactively to Texas Cases?*

1. *Ex Parte De Los Reyes*

In *Ex parte De Los Reyes*, the defendant was a permanent legal resident admitted into the United States in 1993.⁶⁸ In 1997, he pled guilty to a misdemeanor theft charge, and again in 2004 he pleaded guilty to another misdemeanor theft charge.⁶⁹ Under section 1227(a)(2)(A)(ii) of the Immigration and Nationality Act, “[a]ny alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.”⁷⁰ The defendant was then placed under deportation proceedings in February 2010, after time for all appeals had run.⁷¹ The following month, the Supreme Court of the United States decided *Padilla v. Kentucky*, and the defendant filed a writ of habeas corpus based on that ruling.⁷² The El Paso Court of Appeals rendered judgment in favor of the defendant and concluded that *Padilla* applies retroactively in post-conviction habeas corpus proceedings because the ruling in *Padilla* was not a “new rule,” but “an instance in which the well-established standard for determining claims of ineffective assistance of counsel was applied to a specific circumstance.”⁷³ The Texas Court of Criminal Appeals reversed, citing to *Chaidez v. United States*, acknowledging that the lower court did not have the benefit of the decision in *Chaidez* because it was not yet decided.⁷⁴

The court failed to give an explanation regarding why it would not follow precedent in Texas and apply *Padilla* retroactively, simply stating: “This Court follows *Teague* as a general matter of state *habeas* practice, and this case does not present us a reason to deviate here.”⁷⁵ One reason to deviate would be what *Danforth* suggested: “retroactive effect of each new rule should be determined on a case-by-case basis by examining the purpose of the rule, the reliance of the States on the prior law, and the effect on the administration of

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* (alteration in original) (internal quotation marks omitted) (quoting 8 U.S.C. § 1227(a)(2)(A)(ii)).

⁷¹ *Id.* at 677.

⁷² *Id.*

⁷³ *Id.* at 678 (quoting *De Los Reyes*, 350 S.W.3d at 729).

⁷⁴ *Id.*

⁷⁵ *Id.* at 679.

justice of retroactive application of the rule.”⁷⁶ *Danforth* also suggested that “considerations of comity [and respect for the finality of state convictions] militate in favor of allowing state courts to grant habeas relief to a broader class of individuals than is required by *Teague*.”⁷⁷ A close look at the *Padilla* ruling shows that had the court considered these factors in *Ex parte De Los Reyes*, the decision of the court would likely have been different. Other important factors include: the significant importance of the issue; Texas’s high number of immigrants who could be facing deportation; Texas’s longstanding reliance on the *Padilla* rule before *Padilla* was decided; the justice it could bring to many families; and the instruction by the Court in *Danforth* that states should give broader rights than required by federal law. These factors should make the *Padilla* ruling retroactively applicable to Texas cases. Not only did the court not complete this analysis in *Ex Parte De Los Reyes*, the court also failed to address the loophole in *Chaidez*. That is, does *Padilla*’s retroactivity fall under the second exception of *Teague* in habeas cases?⁷⁸ The court in *Ex Parte De Los Reyes* also failed to discuss another important factor that may have affected the outcome of its decision: the Texas Constitution.

2. According to the Texas Constitution, the Writ of *Habeas Corpus* Is a Right, Not a Privilege, that Shall *Never* Be Denied

The United States Constitution recognizes the writ of *habeas corpus* as a “privilege” that shall not be suspended unless “in Cases of Rebellion or Invasion the public Safety may require it.”⁷⁹ In comparison, under the Texas Constitution, a writ of *habeas corpus* is a “right” rather than a “privilege” and “shall never be suspended” under any circumstances.⁸⁰ The disparity between the Texas and the United States Constitutions, regarding the writ of *habeas*

⁷⁶ *Danforth v. Minnesota*, 552 U.S. 264, 273 (2008) (citing *Linkletter v. Walker*, 381 U.S. 618 (1965)).

⁷⁷ *Id.* at 279-80.

⁷⁸ Other than *Ex parte De Los Reyes*, a rare case that supported the notion of Texas not giving more rights than required by federal law is *Ex parte Lave*. The court in that case also failed to go through the *Danforth* analysis and gave no explanation of why it ruled against retroactivity. See *Ex parte Lave*, 257 S.W.3d 235, 237 (Tex. Crim. App. 2008) (holding that the right to confront witnesses in *Crawford* is a “new rule” and Texas would not apply it retroactively). Further, as it was indicated in the dissent in *Crawford*, an argument could have been made that the new rule given in *Crawford* was actually less trustworthy and gave less rights to defendants than the previous test, which stated that testimony can only be admitted if reliable. See *Crawford v. Washington*, 541 U.S. 36 (2004) (C.J. Rehnquist, with whom J. O’Connor joins, concurring in the judgment). Under *Crawford*, unreliable testimony can be admitted so long as the defendant has had an opportunity to cross-examine the witness. See *Crawford*, 541 U.S. at 58.

⁷⁹ U.S. CONST. art. I § 9.

⁸⁰ TEX. CONST. art. I §12.

corpus, clearly indicates that states, specifically Texas, give more rights and broader effects to the writ of *habeas corpus*.

IV. CONCLUSION

This Article opened with my personal story and the immigration consequences I am facing because of my 2006 misdemeanor conviction. It then turned to *Padilla v. Kentucky* and how it relates to my case. *Padilla* showed that defense counsel has a duty to inform a client of possible immigration consequences. The Article then discussed the retroactivity application of *Padilla* to cases on collateral review. Under *Teague v. Lane*, new rules of criminal procedure, such as the ruling in *Padilla*, as the Court in *Chaidez* recognized, do not apply retroactively to cases on collateral review, unless they meet one of the two exceptions: (1) if something was illegal and the new rule has made it legal; or (2) if it is a watershed rule of criminal procedure.⁸¹ Although the ruling in *Padilla* does not fall under the first exception, it may fall under the second exception of *Teague*. Unfortunately, this issue has never been analyzed by the courts. *Padilla*'s ruling is as close as it gets to the ruling in *Gideon* (the right to counsel), which the Supreme Court looked at as a model to decide whether a "new rule" is a watershed rule of criminal procedure.⁸² Although the Court has never found a rule to fall under the second exception of *Teague*, it exists for a reason. *Gideon* and *Padilla* are the best cases to fit under this exception.

This Article then went into the discussion of states' rights to give broader rights than those required by federal law and whether Texas should give retroactivity effect to *Padilla*. This Article looked at *Danforth v. Minnesota* and the suggestion of a case-by-case analysis by states to determine whether new rules of criminal procedure apply retroactively to state cases. Texas's highest court held that *Padilla* is not retroactive,⁸³ but it failed to go through the case-by-case analysis as suggested by *Danforth*. The court also failed to address the loophole in *Chaidez* and the application of Article 1, Section 12, of the Texas Constitution, which grants the right of *habeas corpus*, stating that this right shall *never* be denied. The disparity between the Texas Constitution and United States Constitution is an indication that states are to give more rights and broader effects to the writ of *habeas corpus*. Moreover, the majority of cases in Texas, other than the Texas Criminal Court of Appeals, have applied *Padilla* retroactively.⁸⁴

⁸¹ *Teague v. Lane*, 489 U.S. 288, 311 (1989).

⁸² *Beard v. Banks*, 542 U.S. 406, 417 (2004).

⁸³ *Ex parte De Los Reyes*, 392 S.W.3d 675, 676 (Tex. Crim. App. 2013).

⁸⁴ See sources cited *supra* note 66.

V. FINAL THOUGHTS AND NEW ISSUES

One concern of applying *Padilla* retroactively is the heavy workload that courts could go through trying to resolve writs based on ineffective counsel. This is not a major concern. Defendants make the majority of guilty pleas in plea bargains, and defendants usually get a much better deal in a plea agreement than going to trial and being found guilty.⁸⁵ Many defendants would not take the chance of reopening their case and going to trial only because there is a slight possibility that they would be found not guilty. Only individuals who are certain that they have a very good chance of overturning their unjust convictions are most likely to use this opportunity; thus, increasing justice for all. Furthermore, not all aliens are facing deportation because of their conviction.⁸⁶ Many would not want to go through the hassle to reopen a case they may not win. Also, one more person having the chance of reopening his or her unjust conviction and getting it overturned equals one less person to go through the “Nation’s overburdened immigration courts,” as Justice Sotomayor described in *Moncrieffe v. Holder* in April 2013.⁸⁷

I came to this country in 2002 with very big dreams. Yes, I made my share of mistakes, and I feel very remorseful about them. I have worked very hard to recoup and to get where I am today. The only just thing to do is to apply *Padilla* retroactively, as most Texas courts have done. This is not just about me; this is about thousands of immigrants coming to this country to build better lives and to improve this nation. This is about the future of the United States. Although this may all sound interesting to read and write about, we must remember that we are dealing with people with life-changing problems. We are dealing with real separation from families and friends. We are dealing with people who may not even speak the language of their birth country and people who do not know anybody or anything from their birth country. My life has been like hell for the past year, not knowing what the future holds. Will it all go to waste? I feel as if I am in jail. Yes, I deserve to pay consequences, but

⁸⁵ Jeff Palmer, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505, 513 (1999).

⁸⁶ For example, some convictions are not deportable offenses: assault (*In re Ahortalejo-Guzman*, 25 I. & N. Dec. 465 (B.I.A. 2011)); child abandonment (*Rodriguez-Castro v. Gonzales*, 427 F.3d 316 (5th Cir. 2005)); and alien smuggling under 8 U.S.C. § 1324(a) (*United States v. Sucki*, 748 F. Supp. 66 (E.D.N.Y. 1990)). See also the petty offense exception. INA § 212(a)(2)(A)(ii)(II). A crime involving moral turpitude committed more than five years from the last date of admission and where the maximum sentence is less than one year are generally not deportable offenses. See generally § N.7 CRIMES INVOLVING MORAL TURPITUDE, IMMIGRANT LEGAL RESOURCE CENTER (2013), http://www.ilrc.org/files/documents/n.7-crimes_involving_moral_turpitude.pdf. Also, sometimes immigration officials simply overlook one’s conviction, as they did in my case for the first seven years after my conviction.

⁸⁷ *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1690 (2013).

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how severe should these consequences be? Should they last forever? Does this country want a person like me deported? Should there be more consideration in the laws so that different circumstances and scenarios are considered? Or should we just deport anyone with a conviction? Do all people, regardless of nationality, ethnicity, or race deserve adequate advice in a trial proceeding? *On equality and justice for all, we take pride.*

OBAMA’S CONGRESSIONAL GAMBLE:
THE CALL FOR AN INTERNATIONAL RED LINE

Janae A. Perry-Meier*

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“Some have tried to suggest that the debate we’re having today is about President Obama’s red line. I could not more forcefully state that is just plain and simply wrong. This debate is about the world’s red line. It’s about humanity’s red line. And it’s a red line that anyone with a conscience ought to draw.” - Secretary of State, John F. Kerry¹

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¹ *The Authorization of the Use of Force in Syria: Hearing Before the S. Foreign Relations Comm.* 113th Cong. 1 (2013) (statement of Secretary of State John F. Kerry).

I. INTRODUCTION

On August 21, 2013, Bashar Hafez al-Assad² used Sarin gas³ in the Ghouta area of Damascus,⁴ killing thousands of Syrian civilians—including hundreds of children.⁵ President Barack Obama was the first president in the United States' history to defer to Congress to decide whether military strikes were appropriate. His gamble set lawmakers and the public ablaze with mixed reviews. Some called him a straw man,⁶ who ceded his responsibilities by shirking his Article II powers⁷ rather than taking a strong and immediate response to the horrific attacks. Others called him a model president, setting precedent for future conflicts. Regardless of whether it showed strength or weakness, President Obama's deference to Congress and the United Nations (U.N.) clearly illustrated the uncertainty in the international community regard-

² Bashar Hafez al-Assad is the President or "Chief of State" of Syria (since July 17, 2000). *The World Factbook: Syria*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html> (last updated Apr. 22, 2014). He was approved by popular referendum for a second seven-year term in late May of 2007, and on June 3, 2014. *Id.* The next election will be held in June of 2021. *Id.* Syria's form of government is characterized as a "republic under an authoritarian regime" under which the "president appoints the vice presidents, prime minister, and deputy prime ministers." *Id.*

³ Joe Lauria, *U.N. Confirms Sarin Gas Killed Civilians in Damascus: Aug. 21 Incident Brought U.S. to Brink of Attack*, WALL STREET JOURNAL (Sept. 16, 2013, 1:55 PM), <http://online.wsj.com/article/SB10001424127887324665604579078960813544386.html>.

⁴ United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syria-Arab Republic: Report on the Investigation of Alleged use of Chemical Weapons in the Ghouta Area of Damascus, http://www.un.org/disarmament/content/slideshow/Secretary_General_Report_of_CW_Investigation.pdf (last visited June 20, 2014).

⁵ Louis Charbonneau & Michelle Nichols, *U.N. confirms Sarin used in Syria attack; U.S., UK, France blame Assad*, REUTERS (Sept. 16, 2013, 7:12 PM), <http://www.reuters.com/article/2013/09/16/us-syria-crisis-un-idUSBRE98F0ED20130916>.

⁶ Matthew Pinsker, *Obama fails Lincoln lesson on Syria*, NATIONAL CONSTITUTION CENTER (Sept. 21, 2013), <http://blog.constitutioncenter.org/2013/09/obama-fails-lincoln-lesson-on-syria/>.

⁷ "The power to commit American military forces under various sets of circumstances is shared by Congress and the Executive." *Davi v. Laird*, 318 F. Supp. 478, 480 (W.D. Va. 1970) (citing *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970)). Article II provides, in relevant part that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." U.S. CONST. art. II, § 2, cl. 1. "In exercising the power to wage war, the President finds authorization in the Constitution itself to 'direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.' Within these functions are 'important incident[s] to the conduct of war' such as 'the adoption of measures by the military command . . . to repel and defeat the enemy' They also include 'the power to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.'" *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1363 (Fed. Cir. 2004) (citations omitted).

ing the appropriate punitive action for chemical weapons use, and the overall need for chemical weapons policy reform.⁸

This article addresses the need for chemical weapons reform using parallels between the situation in Syria and past chemical weapons use to demonstrate the benefits of reform. Part II of this article provides a brief summation of the history of chemical weapons use both within and outside the theatre of war. It touches on the development of chemical weapons technology, the devastating effects of chemical weapons use, and the reasons they are so despised worldwide. Part II also provides context for the reasons why chemical weapons use and regulation have changed since the Cold War era and why stronger regulation—in light of the changed dynamics within the international community—is currently needed. Part III focuses on influential laws and norms governing chemical weapons use and the authority that those laws and norms have in the international community. Part III also points out the weaknesses within the international laws and the organizations meant to enforce those laws. Finally, Part III proposes reform to specific international laws, norms, and policies, which may help modernize and expedite the process by which the international community responds to chemical weapons use. This article concludes in Part IV with a summary of the proposed reforms.

II. BACKGROUND

A. History of Chemical Weapons Use

Historians believe that chemical weapons, in more rudimentary forms such as poison, resins, and sulfur, were used in war as early as 600 B.C.⁹ Since that time, technological advances, growth in the chemical industry,¹⁰ and the development of sophisticated weaponry have drastically changed the landscape of chemical warfare, increasing the scale of fatalities.¹¹

⁸ Tim Lister, *What justifies intervening if Syria uses chemical weapons?*, CNN (Aug. 28, 2013, 11:45 AM), <http://www.cnn.com/2013/08/27/us/syria-intervention-justification/index.html>. “President Obama believes there must be accountability for those who would use the world’s most heinous weapons against the world’s most vulnerable people.” *Id.* (quoting U.S. Secretary of State John Kerry). “The international community must act should the use of such weapons be confirmed.” *Id.* (quoting German Foreign Minister Guido Westerwelle).

⁹ Megan Eshbaugh, *The Chemical Weapons Convention: With Every Step Forward, We Take Two Steps Back*, 18 ARIZ. J. INT’L & COMP. L. 209, 211 (2001); Jean Pascal Zanders, *Assessing the Risk of Chemical and Biological Weapons Proliferation to Terrorists*, THE NONPROLIFERATION REV., no. 4, 1999 at 17, 19.

¹⁰ See Eshbaugh, *supra* note 9.

¹¹ Jeffery K. Smart et al, *History of the Chemical Threat, Chemical Terrorism, and Its Implications for Military Medicine*, in MEDICAL ASPECTS OF CHEMICAL WARFARE 115, 119-25 (Martha K. Lenhart et al. eds., 2009).

In World War I, for example, chemical weapons injured an estimated 1.3 million people and fatally wounded about 100,000.¹² In World War II, chemical weapons were widely used in Asia,¹³ killing or maiming tens of thousands. They were also used in Nazi Concentration Camps, where asphyxiating gas killed more than 6,000,000 Jews.¹⁴ During the Cold War, nearly 25 states,¹⁵ including the United States and Russia,¹⁶ continued to manufacture and stockpile chemical weapons, despite conventions and protocols¹⁷ evidencing the general international aversion to such weaponry at that time.

Later, in the 1980s, chemical weapons were commonly used by Iraq against Iran and against their own Kurdish population in the North. The 1988 genocidal attack on Halabja, for example, killed an estimated 5,000 Kurds.¹⁸ The events surrounding this attack are frighteningly similar to those surrounding the recent attack in Syria in the sense that, in both cases, the international community was aware of smaller-scale uses of chemical weapons on many occasions¹⁹ prior to a major chemical weapons attack. Arguably, both of these

¹² Eshbaugh, *supra* note 9, at 211.

¹³ During WWII, the Nazi's used chemical weapons in concentration camps in Asia, and the Japanese used chemical weapons in attacks on China. *Brief History of Chemical Weapons Use, ORG. FOR THE PROHIBITION AGAINST CHEM. WEAPONS*, <http://www.opcw.org/about-chemical-weapons/history-of-cw-use/> (last visited Oct. 26, 2013). The Japanese used biological and chemical weapons "in many parts of China during the Sino-Japanese War of 1931-1945 . . ." including the provinces of Hunan, Jiangsu, Jilin, Kwangtung, Yunnan, and Heilongjiang. Don Tow, *Japan's Biological and Chemical Warfare in China during WWII*, DON TOW'S WEBSITE (Apr. 2009), <http://www.dontow.com/2009/04/japans-biological-and-chemical-warfare-in-china-during-wwii/>. Japan is responsible—as a member of the CWC—for retrieving and disposing of chemical weapons they used in China, which resulted in what are known today as "rotten leg villages" throughout areas such as the previously mentioned provinces in China where the Japanese used chemical weapons. *Id.*

¹⁴ Eshbaugh, note 9, at 213 n.47; Timothy L. H. McCormack, *International Law and the Use of Chemical Weapons in the Gulf War*, 21 CAL. W. INT'L L.J. 1, 8 (1991).

¹⁵ Eshbaugh, *supra* note 9, at 211.

¹⁶ *Brief History of Chemical Weapons Use, supra* note 13.

¹⁷ The Geneva Convention and Chemical Weapons Convention are two examples of protocols and conventions in place at that time.

¹⁸ Sebastian Amar et al., *International Legal Updates*, HUM. RTS. BRIEF, no. 2, 2006, at 33, 36. Sadam Hussein's regime killed more than 180,000 Kurds in the Anfal Campaign. *Id.* Peter Gailbraith, *Kurdistan in the Time of Saddam Hussein*, A Staff Report to the Committee of Foreign Relations of the United States Senate 15 (Nov. 1991).

¹⁹ See U.N. Secretary-General, *Report of the Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict Between the Islamic Republic of Iran and Iraq*: Rep. of the Secretary-General, U.N. Doc. S/17911 (Mar. 12, 1986) (UN report from specialists investigating mustard gas use in Iraq finds that mustard gas and nerve gas had been used on "many occasions" prior to the massacre in Halabja); see also Syria Chemical Weapons Allegations, BBC (Oct. 31, 2013), <http://www.bbc.com/news/world-middle-east-22557347> (BBC report solidifying allegations that on at least six separate occasions, chemical weapons resulted in thousands of deaths).

larger attacks could have been prevented if it were not for the collective inaction of the international community. The international response to the attack on Halabja—which held few responsible and did little to deter future chemical weapons use²⁰—and the current response to the use of Sarin gas in Syria illustrate that chemical weapons may still be used with categorical impunity in some cases. Neither instance shows a strong reproach to the use of chemical weapons, and because of the absence of a strong international response, similar chemical-based atrocities are likely to continue if definitive action is not taken to deter their use. To date, both state and non-state actors' use of chemical weapons have claimed the lives of millions globally.²¹

B. International Law Governing the Use of Chemical Weapons

The international laws that govern the use of chemical weapons come in two main forms: those encompassed by positive law, and those categorized as natural law. Positive, or hard law, is comprised of norms that are generally contained in treaties or other agreements that are binding among their international state signatories. Conversely, Natural, or International Customary Law,²² consists of non-binding international norms expressed in instruments,²³ through the conduct of state actors, or otherwise.

1. International Positive Law

The Hague Conferences of 1899 and 1907 were some of the first international meetings to address chemical weapons use. At those conferences and in the conventions that resulted, the international community took a qualitative²⁴ approach to arms control, by prohibiting poisonous projectiles or projectiles

²⁰ See Amar, *supra* note 18, at 35. In the end, the Hussein regime blamed Iran, the U.N. condemned Iraq's behavior, the international community seemed unwilling to take definitive action—military or otherwise—and The Hague sentenced only one of Hussein's men, Van Anraat, to fifteen years in prison. See *Id.* Because of the weak enforcement, similar chemical-based atrocities such as Hussein's 1991 use of Sarin gas, occurred. *Chemical Weapons*, UNITED NATIONS OFF. FOR DISARMAMENT AFF., <http://www.un.org/disarmament/WMD/Chemical/> (last visited Oct. 26, 2013); Michael Nguyen, *Report confirms Iraq used Sarin in 1991*, ARMS CONTROL TODAY, http://www.armscontrol.org/act/2006_01-02/JANFEB-IraqSarin (last visited June 20, 2014).

²¹ *Syria Chemical Weapons Allegations*, *supra* note 19.

²² *Customary International Law*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/customary_international_law (last visited June 20, 2014).

²³ Instruments include conventions and treaties such as the Geneva Conventions. For a list of instruments specifically pertaining to international humanitarian law see *Rules of Warfare, Arms Control*, THE FLETCHER SCHOOL, TUFTS UNIVERSITY, <http://fletcher.archive.tusm-oit.org/multilaterals/warfare.html> (last visited Apr. 11, 2014).

²⁴ See Detlev F. Vagts, *The Hague Convention on Arms Control*, 94 AM. J. INT'L L. 31, 31 (2000).

used to disburse poison. Less than fifty years later, in 1925, the Geneva Protocol was created and signed in response to the atrocities that resulted from chemical weapons use in WWI.²⁵ Forty-five representatives signed the Geneva Protocol in an effort to discourage states from using chemical weapons in warfare.²⁶ Currently there are 194 signatory states to the Geneva Conventions and their subsequent Protocols, including Iraq, Iran, and Syria, although not all parties have agreed to all three of the Protocols to the Geneva Convention.²⁷

The Geneva Protocols, however, are not without their shortcomings. For example, the the 1925 Geneva Protocol prohibited the use of asphyxiating, poisonous, or other gasses, stating, “The High Contracting Parties will exert every effort to induce other States to accede to the present Protocol,”²⁸ but failed to prohibit the manufacture, storage, and proliferation of such weapons or to delineate whether the Protocol was meant to apply to situations outside the arena of war.²⁹ In fact, there is evidence that shortly after the Geneva Protocol of 1925 was signed—during the inter-war period, specifically in 1936 and 1937—Italy and Japan, respectively, violated the Protocol by using gases while invading other countries.³⁰ Further evidencing the absence of protocol language allowing punitive action, international states continued to produce and stockpile chemical weapons without consequence until the adoption of the Chemical Weapons Convention (CWC) in 1993.³¹

²⁵ *Id.*

²⁶ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter Geneva Protocol].

²⁷ The Geneva Conventions of 1949 and Their Additional Protocols, INT’L RED CROSS COMMITTEE, <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> (last updated May 5, 2014) (The Geneva Conventions and the subsequent Protocols are the First Geneva Convention, 1949; Second Geneva Convention, 1949; Third Geneva Convention, 1949; Fourth Geneva Convention, 1949; Protocol I additional to the Geneva Conventions, 1977; Protocol II additional to the Geneva Conventions, 1977; Protocol III additional to the Geneva Conventions, 2005).

²⁸ Geneva Protocol, *supra* note 26.

²⁹ *Id.*

³⁰ McCormack, *supra* note 14, at 1 n.2. “It is alleged that, during the inter-war period, Italy used mustard gas in Ethiopia in 1936 in the Abyssinian Campaign and that Japan also used gases in its invasion of northern China in 1937.” *Id.*; See STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, YEARBOOK OF WORLD ARMAMENTS AND DISARMAMENT 1969/70 193. The International Committee of the Red Cross also verified allegations that Egypt used poison gas in 1967 against Yemeni loyalists in the Yemen Civil War. See G. VON GLAHN, LAW AMONG NATIONS 648 (4th ed. 1981).

³¹ See *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, ORG. FOR THE PROHIBITION OF CHEMICAL WEAPONS, http://www.opcw.org/index.php?eID=dam_frontend_push&docID=6357 (last visited May 20, 2014).

The CWC “aims to eliminate an entire category of weapons of mass destruction by prohibiting the development, production, acquisition, stockpiling, retention, transfer or use of chemical weapons by States Parties.”³² “States Parties, in turn, must take the steps necessary to enforce that prohibition in respect of persons (natural or legal) within their jurisdiction.”³³ One-hundred and ninety parties³⁴—almost all of the international states in the world—have agreed to follow and enforce the CWC provisions, even in non-international conflicts.³⁵

While the CWC helps alleviate the lack of positive international law on chemical weapons stockpiling and proliferation, it too has shortcomings. The CWC does not provide a credible economic or military threat to states or individual actors who violate its provisions. Enforcement of a ban against chemical weapons and deterrence against chemical weapons use cannot be anchored in moral retribution³⁶ alone. Even the body responsible for implementing the CWC, the Organisation for the Prohibition of Chemical Weapons (OPCW),³⁷ has its shortcomings. The OPCW cannot authorize punitive action against CWC violations, which detracts from its authority in the international community. Further, though the OPCW has made progress in disarming and dismantling chemical weaponry worldwide, it struggles to remain relevance and “finds itself coping with structural challenges” in the ever-changing security environment.³⁸ “This is partly a consequence of increased terrorist threats (and threat

³² *Id.*

³³ *Id.*

³⁴ *OPCW Member States*, ORG. FOR THE PROHIBITION OF CHEMICAL WEAPONS, <http://www.opcw.org/about-opcw/member-states/> (last visited Mar. 20, 2014). Angola, Egypt, North Korea, and South Sudan are the only states that have not signed, ratified, or acceded the CWC. *Id.* Burma and Israel have signed, but not ratified, the CWC. *Id.* Syria ratified, acceded, and entered into force their membership to the CWC in mid-October of 2013. *Id.*

³⁵ *Id.*

³⁶ Retribution, in the context of retributive punishment, “adheres to the basic assumption that a wrongful act *must* be prepaid by a punishment that is as severe as the wrongful act.” GRAEME NEWMAN, *THE PUNISHMENT RESPONSE* 190 (2d ed.2008). “Philosophers and legal theorists have developed three basic moral theories to justify the use and distribution of criminal punishment.” *Id.* at 189. These are the theories of retribution, utilitarianism, and social defense. *Id.* The phrase “moral retribution” is meant to signify “punishment that affirms the moral order.” *Id.* at 281. While the moral response is the most widely recognized, a better legal framework must be set in place to support the kind of punishment that moral retribution encompasses.

³⁷ The OPCW is “an independent, autonomous international organization with a working relationship with the United Nations” that consists of a 41 member-state Executive Council, which presides over a Technical Secretariat, subsidiary bodies, and the Conference of the States Parties, the “main policy-making organ of the OPCW.” *About the OPCW*, ORG. FOR THE PROHIBITION OF CHEMICAL WEAPONS, <http://www.opcw.org/about-opcw/> (last visited Mar. 20, 2014).

³⁸ MOHAMED DAUDI ET AL., *THE FUTURE OF THE CHEMICAL WEAPONS CONVENTION: POLICY AND PLANNING ASPECTS* 9 (2013).

perceptions), as well as of the implications emanating from changes in science and technology.”³⁹ Due to the outdated structure of the OPCW and its lack of authority to take punitive action, the world looks to the United Nations to determine the appropriate course of action with respect to chemical weapons attacks such as the recent attack in Syria.

The United Nations was established in 1945 in order to “save succeeding generations from the scourge of war.”⁴⁰ In furtherance of conflict prevention, the U.N. Security Council (UNSC) is authorized under Chapter VII of the Charter to maintain peace and security. The U.N. Charter, however, only provides only a vague justification for military intervention in Article 51, which states that members have an inherent right both collectively and individually to exercise their right of self-defense until the UNSC has “taken the measures necessary to maintain international peace and security.”⁴¹ Absent a claim of self-defense, the U.N. Charter actually *prohibits* member states from acting unilaterally in response to attacks on other states such as the August 21, 2013 Sarin attack in Syria.⁴² For example, Article 4 of the U.N. Charter requires all members to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁴³ Another example of a provision that impedes unilateral retaliation, is Article 7 of that same chapter. Article 7 explicitly prohibits the U.N. from intervention in matters of domestic jurisdiction as long as they do not “prejudice the application of enforcement measures under Chapter VII,”⁴⁴ which is the section that discourages action absent UNSC authorization or a justifiable self-defense claim.⁴⁵ While the U.N. was designed to promote international peace and security,⁴⁶ these charter provisions often delay the process by which international peace and security can be reached.

To punish the use of chemical weapons by individual actors or by non-state actors, the world often relies on the International Criminal Court (ICC). The ICC is an independent international association seated at The Hague, which is governed by the Rome Statute. It “is the first permanent, treaty-based, international criminal court established to help end impunity for the perpetrators of the

³⁹ *Id.*

⁴⁰ *See generally* U.N. Charter pmbl.

⁴¹ U.N. Charter art. 51.

⁴² U.N. Charter art. 4.

⁴³ *Id.*

⁴⁴ U.N. Charter art. 7.

⁴⁵ U.N. Charter arts. 39-51.

⁴⁶ U.N. Charter, pmbl.

most serious crimes of concern to the international community.”⁴⁷ The ICC prosecutes individuals for crimes against humanity, genocide, and war crimes.⁴⁸ In 2010, Article 8 of the Rome Statute was strengthened to address chemical weapons use outside of war crimes, by adding a ban on “employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices” in “armed conflict not of an international character.”⁴⁹ While this is a great improvement to the once-vague Rome Statute language pertaining to chemical weapons use,⁵⁰ the ICC only has jurisdiction as a court of last resort. Unless there is evidence that a national proceeding is not genuine the ICC will not interfere.⁵¹

Finally, international positive law governing chemical weapons use exists in the treaties, conventions, and agreements of multi-national groups. The North Atlantic Treaty Organization (NATO),⁵² for example, condemns the use of chemical weapons.⁵³ “If diplomatic efforts fail, it [NATO] has the military capacity needed to undertake crisis-management operations,” which “are carried out under Article 5 of the Washington Treaty—NATO’s founding treaty—or under a U.N. mandate, whether alone or in cooperation with other countries and international organizations.”⁵⁴

⁴⁷ *About the Court*, INT’L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx (last visited Mar. 21, 2014).

⁴⁸ *Id.*

⁴⁹ Rome Statute of the International Criminal Court art. 8 subpara (2)(b)(xiv), July 17, 1998, 2187 U.N.T.S. 38544, 37 I.L.M. 1002. “Paragraphs 2 (e) (xiii) to 2 (e) (xv) were amended by resolution RC/Res.5 of 11 June 2010 (adding paragraphs 2 (e) (xiii) to 2 (e) (xv)).” *Id.* at art. 8 n.2.

⁵⁰ Prior to the 2010 amendment, the Rome Statute did not expressly contain the words “chemical weapons” and did not address chemical weapons use outside of the “war crimes” context. *Id.* art. 8.

⁵¹ *About the Court*, *supra* note 47.

⁵² “In 1949, there were 12 founding members of the Alliance: Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom and the United States.” *Member Countries*, N. ATLANTIC TREATY ORG., http://www.nato.int/cps/en/natolive/topics_52044.htm (last visited Mar. 22, 2014). “The other member countries are: Greece and Turkey (1952), Germany (1955), Spain (1982), the Czech Republic, Hungary and Poland (1999), Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia, Slovenia (2004), and Albania and Croatia (2009).” *Id.*

⁵³ *What is Nato?*, N. ATLANTIC TREATY ORG., <http://www.nato.int/nato-welcome/index.html> (last visited Mar. 22, 2014).

⁵⁴ *Id.*

2. International Customary Law (ICL)

Increasingly, states are using ICL⁵⁵ to justify military intervention and other actions that are not explicitly recognized under positive law. International organizations⁵⁶ play a large role in the development of ICL. Non-governmental organizations (NGOs), for example, play a consultative role in international law-making by lobbying and participating in “other behind-the-scenes activities vis-à-vis States”⁵⁷; however, they “can never contribute directly. . .to the creation of customary norms.”⁵⁸

Two of the most persuasive examples of ICL related to chemical weapons use are: (1) The International Committee of the Red Cross’ (ICRC) rules of customary international humanitarian law, specifically, Article 74⁵⁹, which explicitly bans the use of chemical weapons, and Article 71⁶⁰, which bans the use of indiscriminate weapons generally; and (2) The Responsibility to Protect Doctrine (R2P Doctrine), which allows military intervention when a state fails to protect its population.⁶¹

The R2P Doctrine is the most relevant and most cited natural-law doctrine with respect to the recent attacks in Syria. It is comprised of three pillars: one that holds the state responsible for the protection of its population;⁶² another

⁵⁵ Natural law, soft law, and customary law are all generally synonymous with International Common Law (ICL).

⁵⁶ International Intergovernmental Organizations (IGO’s) are comprised of states and can contribute to state practice. Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 82 INT’L L. STUD. SER. US NAVAL WAR COL. 99, 102 (2006). “Intergovernmental bodies can play pivotal roles in conducting on-site investigations and fact-finding missions. Under Article 34 of the Charter, the Security Council ‘may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuation of the dispute or situation is likely to endanger the maintenance of international peace and security.’” U.N. Secretary-General, *Integrated and coordinated implementation of and follow-up to the outcomes of the major United Nations conferences and summits in the economic, social and related fields: Follow-up to the outcome of the Millennium Summit*: Rep. of the Secretary-General, ¶ 52, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter U.N. Secretary-General, *Implementing the responsibility to protect*] (citing U.N. Charter, art. 34).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² U.N. Secretary-General, *Implementing the responsibility to protect*, *supra* note 56, at ¶ 11. Pillar one, “The protection responsibilities of the State,” provides:

(a) Pillar one is the enduring responsibility of the State to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement. The latter, I would underscore, is critical to effective and timely prevention strategies. The declaration by the Heads of State and Government in paragraph 138 of the Summit Outcome that “we accept that responsibil-

that promises international assistance to the state to carry out its responsibility;⁶³ and finally, if the state is unable to protect its population, one that assigns the responsibility to the international community.⁶⁴

Pillar I addresses the individual responsibility of each state to look after its own people.⁶⁵ It also suggests that whether or not people are nationals, if individuals are within the borders of the state, the state is obligated to protect those individuals from crimes such as chemical-weapons attacks, and from the incitement of such crimes.⁶⁶ Pillar II commits the states to work together with the

ity and will act in accordance with it” is the bedrock of the responsibility to protect. That responsibility, they affirmed, lies first and foremost with the State. The responsibility derives both from the nature of State sovereignty and from the pre-existing and continuing legal obligations of States, not just from the relatively recent enunciation and acceptance of the responsibility to protect.

⁶³ *Id.* Pillar two, “International assistance and capacity-building,” provides:

(b) Pillar two is the commitment of the international community to assist States in meeting those obligations. It seeks to draw on the cooperation of Member States, regional and subregional arrangements, civil society and the private sector, as well as on the institutional strengths and comparative advantages of the United Nations system. Too often ignored by pundits and policymakers alike, pillar two is critical to forging a policy, procedure and practice that can be consistently applied and widely supported. Prevention, building on pillars one and two, is a key ingredient for a successful strategy for the responsibility to protect.

⁶⁴ *Id.* Pillar three, “Timely and decisive response,” provides:

(c) Pillar three is the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection. Though widely discussed, pillar three is generally understood too narrowly. As demonstrated by the successful bilateral, regional and global efforts to avoid further bloodshed in early 2008 following the disputed election in Kenya, if the international community acts early enough, the choice need not be a stark one between doing nothing or using force. A reasoned, calibrated and timely response could involve any of the broad range of tools available to the United Nations and its partners. These would include pacific measures under Chapter VI of the Charter, coercive ones under Chapter VII and/or collaboration with regional and subregional arrangements under Chapter VIII. The process of determining the best course of action, as well as of implementing it, must fully respect the provisions, principles and purposes of the Charter. In accordance with the Charter, measures under Chapter VII must be authorized by the Security Council. The General Assembly may exercise a range of related functions under Articles 10 to 14, as well as under the “Uniting for peace” process set out in its resolution 377 (V). Chapters VI and VIII specify a wide range of pacific measures that have traditionally been carried out either by intergovernmental organs or by the Secretary-General. Either way, the key to success lies in an early and flexible response, tailored to the specific needs of each situation.

⁶⁵ U.N. Secretary-General, *Implementing the responsibility to protect*, *supra* note 62.

⁶⁶ *Id.*

international community to achieve these goals.⁶⁷ This promotes camaraderie and the forging of multinational and multi-organizational agreements to foster peaceful enforcement and prevention of horrendous chemical-weapons attacks, genocide, and other crimes against humanity.⁶⁸ Pillar III vests a responsibility in member states to act in a decisive, timely manner while working together to respond when a member state fails to protect the people within its borders under Pillar I.⁶⁹

The third pillar is the most relevant to the discussion of appropriate response in the case of chemical-weapons use because it implores the international community to respond, even in cases that may be outside the scope of the current legal framework. The R2P doctrine creates a responsibility to prevent, react, and rebuild.⁷⁰ This responsibility, however, is not a legal responsibility agreed upon in positive international law. Thus, while ICL is commonly used to justify military or punitive action by state actors, its invocation is often controversial⁷¹ and not authoritative enough to command a decision from the UNSC.⁷²

III. PROBLEMS & RESOLUTIONS

A. *The Indiscriminate Nature of Chemical Weapons*

Chemical weapons, as opposed to biological weapons, “achieve their desired effects through their chemistry and not their physical effects,” and may be delivered in several forms, including “vapor, gas, liquid, or solid” chemicals

⁶⁷ U.N. Secretary-General, *Implementing the responsibility to protect*, *supra* note 56.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*; The R2P doctrine provides:

A. The responsibility to prevent: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.

B. The responsibility to react: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.

C. The responsibility to rebuild: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.

⁷¹ INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 54 (2001) (“Interventions by ad hoc coalitions (or, even more, individual states) acting without the approval of the Security Council, or the General Assembly, or a regional or sub-regional grouping of which the target state is a member, do not – it would be an understatement to say – find wide favour.”).

⁷² *Id.* at 50-51 (The UNSC’s decisions are limited and controlled by the U.N. Charter, specifically in articles that limit their power to intervene in deference to state sovereignty). See U.N. Charter, art 2.1 and 2.7, with regard to the norm of non-intervention and state sovereignty generally.

comprised of nerve, blister, blood, vomiting, or incapacitating agents.⁷³ “One of the most threatening advances in the last half century has not only been the development of nerve agents, but the development of effective means in carrying those agents to a target.”⁷⁴ The biggest problems associated with chemical weapons—often referred to as “the poor man’s atomic bomb”—is that they are relatively inexpensive, easy to produce, inherently indiscriminate, and they often leave lasting, if not fatal, effects. The use of chemical weapons—whether in the theatre of war, between international state actors, by state actors, or by non-state actors—raises human-rights concerns internationally and reaches beyond crimes of moral turpitude to a level of disdain reserved only for crimes against humanity. This is because the authority to act punitively against chemical weapons use is unclear and the positive law needs to be amended to provide for a more immediate response. The current positive law governing chemical weapons use is dated. Much of it was created during World Wars I and II and during the Cold War era. In the current era, there have been more technological developments and instances of non-state actors using chemical weapons to achieve their purpose. The old laws do not reflect the new and ever-changing climate in chemical weapons use.

B. Authority to Act is Unclear in International Law

The “concept of acceptable or civil behavior in warfare dates from ancient times, but the idea of seeking international agreement to the rules of warfare is relatively modern.”⁷⁵ This is largely due to the psychological and paradigmatic shift away from the U.N. framework “of rights and obligations that reflects the political circumstances of the Cold War.”⁷⁶ “The current paradigm embraces a

⁷³ Richard J. Niemann, *Chemical, Biological, Radiological, and Nuclear Terrorism: Weapons of Mass Terror*, in *TERRORISM AND HOMELAND SECURITY: PERSPECTIVES, THOUGHTS, AND OPINIONS* 229, 239 (Dale L. June ed., 2011).

⁷⁴ Megan Eshbaugh, *The Chemical Weapons Convention: With Every Step Forward, We Take Two Steps Back*, 18 *ARIZ. J. INT’L & COMP. L.* 209, 211 (2001) (citing HUGH D. CRONE, *BANNING CHEMICAL WEAPONS* 45 (1992)).

⁷⁵ Eshbaugh, *supra* note 9 (citing VICTOR A. UTGOFF, *THE CHALLENGE OF CHEMICAL WEAPONS* 82 (1990)).

⁷⁶ DAUDI ET AL., *supra* note 38, at 3; INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 71, at 53 (explaining “[a]lthough the General Assembly lacks the power to direct that action be taken, a decision by the General Assembly in favour of action, if supported by an overwhelming majority of member states, would provide a high degree of legitimacy for an intervention which subsequently took place, and encourage the Security Council to rethink its position.”). The U.N. General Assembly is the main place for state actors to seek international accord for their actions. *Id.* Regarding the authority of states or international bodies to act in response to chemical weapons use, however, even if a majority of the U.N. General Assembly agrees to an appropriate course of action, the ultimate determination comes from the UNSC and their authority is unclear. *Id.*

wider variety of actors—including civil society, academia, and industry—whose interests and mandates extend beyond prohibiting or controlling a given weapon system,” and is more concerned with threats from non-state actors such as terrorists as opposed to “widespread total destruction.”⁷⁷

The CWC is one such Cold War era agreement. The CWC was primarily established to eliminate stockpiled weapons from the Cold War, but less than half of the signatories have provided proof that they are “fully implementing all key provisions of Article VII.” Some states suggest this lack of complicity “implies that ‘anything goes’” for the remaining member-states that “have no laws to regulate the requirements of the Convention.”⁷⁸ “Chemical industries can mushroom without any kind of restrictions, chemical products can come in and out of the country freely, and what is most fearful—chemical weapons can be produced in the said country without the slightest knowledge of the authorities.”⁷⁹

The problem with the CWC is that it is difficult to justify responding to a conflict such as that in Syria, where the state actor is not a party to that convention.⁸⁰ It is even more difficult to respond in situations involving non-state actors.⁸¹ This is where ICL provides a remedy. The international response to the Ghouta area attacks in Syria is a prime example of when ICL, such as the R2P Doctrine, was invoked to support military intervention. There seemed to be a general cry of outrage ringing from all corners of the earth, calling for someone to punish the deplorable acts of the Assad regime, yet positive law provided insufficient support. In acknowledgement of this problem, one member of the media noted, “[s]uch are the vagaries of international law, when what is illegal may nevertheless be legitimate, and when what may well be best is in direct contravention of international law.”⁸² To legitimize future responses to chemical weapons use, the positive law should be amended to reflect the ICL and humanitarian ideals, such as the R2P Doctrine, and create an almost outright ban on chemical weapons use.

⁷⁷ DOUDI ET AL, *supra* note 38, at 3.

⁷⁸ *Id.* at 12.

⁷⁹ *Id.*

⁸⁰ Note that Syria is currently a party to the CWC, but was not a party in August 2013 when the Ghouta area attacks occurred. See *OPCW Member States*, ORG. FOR THE PROHIBITION AGAINST CHEM. WEAPONS, <http://www.opcw.org/about-opcw/member-states/> (last visited June 20, 2014).

⁸¹ See, e.g. *Bond v. United States*, 134 S. Ct. 2077 (2014).

⁸² David Davenport, *International Law? U.S. Military Action In Syria Is Actually Prohibited By The UN Charter*, FORBES (Sept. 11, 2013, 8:44 AM), <http://www.forbes.com/sites/david-davenport/2013/09/11/international-law-u-s-military-action-is-actually-prohibited-by-the-un-charter/>.

C. *Proposals for International Chemical Weapons Reform*

The international community must come to an agreement allowing for definitive, quick mobilization and response to chemical-weapons attacks. The UNSC is the current body charged with determining the appropriate action in response to CWC violations, where self-defense is inapplicable under the U.N. Charter. The UNSC is responsible for ensuring prompt and effective action by the United Nations; for the maintenance of international peace and security; and the UNSC agrees to act on behalf of the U.N. and its General Assembly in carrying out those duties.⁸³

“Prompt” and “effective,” however, are words seldom used to describe the UNSC’s response to chemical weapons use and other humanitarian atrocities. In fact, with regard to the UNSC’s response—or lack thereof—to the use of chemical weapons in Syria, President Obama described the Council as “paralyzed.”⁸⁴ This characterization illuminates some of the core problems of the UNSC: inefficiency and ineffectiveness. While this article does not address the overall suggested reforms to the UNSC, this section will address proposed reforms needed to make the UNSC more efficient and effective with respect to their response to chemical weapons uses.

The UNSC needs explicit authorization to react to chemical weapons use. The international community needs a clearly drawn red line that deters state actors, non-state actors, CWC signatory states and non-signatory states alike from the use of chemical weapons. The UNSC needs to be decisive in the face of heinous chemical weapons offenses, rather than wait for others to act.

Though the UNSC is in dire need of procedural reform,⁸⁵ it is still the best-situated international group to determine the appropriate response to chemical weapons use.⁸⁶ The CWC should be expanded to condemn chemical weapons use by any person or state and the UNSC should have procedures in place to

⁸³ U.N. Charter art. 24.

⁸⁴ Laura Smith-Spark et al., ‘Constructive’ talks but little headway on Syrian crisis, CNN (Sept. 7, 2013, 3:24 AM), <http://www.cnn.com/2013/09/06/world/meast/syria-civil-war/index.html>.

⁸⁵ See Anna Spain, *The U.N. Security Council’s Duty to Decide*, 4 HARV. NAT’L SECURITY J. 320, 320 (2013).

⁸⁶ See generally G.A. Res. 60/1, ¶ 152, U.N. Doc. A/RES/60/1 (Oct. 25, 2005) (“We reaffirm that Member States have conferred on the Security Council primary responsibility for the maintenance of international peace and security, acting on their behalf, as provided for by the Charter of the United Nations.”); see also INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 71, at 49 (“the Commission is in absolutely no doubt that there is no better or more appropriate body than the Security Council to deal with military intervention issues for human protection purposes If international consensus is ever to be reached about when, where, how and by whom military intervention should happen, it is very clear that the central role of the Security Council will have to be at the heart of that consensus.”).

allow for swift, definitive action—military or otherwise—in response to chemical weapons use.

1. Amend the CWC and Strengthen the Authority of the UNSC

The time for pragmatic diplomacy in reform of the international laws governing the use of chemical weapons is now. On the cusp of the Geneva II Middle East Peace Conference,⁸⁷ hopes are high that, through diplomacy, peace and international security will reign supreme and the civil war in Syria will be brought to an end. One way to achieve an outright ban on chemical weapons use is to take the Geneva Protocols (banning creation of chemical weapons) and CWC (complementing the Protocols and adding a ban on stockpiling and proliferation of such weapons) a step further to create an outright ban on chemical weapons use by any actor. A mandate should be implemented within the CWC, which states that the use of chemical weapons will not be tolerated. Though some might argue that this undermines international law by holding state and non-state actors accountable for a convention to which they are not signatories, the responsibility to protect others in humanitarian instances such as the Ghouta area attacks is practically a *jus cogens* norm⁸⁸ in international law and is certainly worthy of codification. Geopolitical concerns and sovereignty should not permit an individual or a state actor to use chemical weapons with impunity.

Specifically, the articles should be amended so that (1) chemical weapons use is proportionately punishable; (2) chemical weapons “use” is defined as it pertains to use on humans specifically; and (3) non member-states are urged to join the CWC and are incentivized by a cognizable threat of military action or economic sanctions by member-states. All member-states have already pledged to provide assistance and protection to fellow member-states threatened by the use of chemical weapons or attacked with chemical weapons. Over 98% of states are parties to the CWC. The non-member states—Israel,

⁸⁷ “The Geneva II conference on the peaceful settlement of the Syrian conflict has been postponed from mid-November this year to the end of the month, and possibly even at the beginning of December or January the year after.” Raed Omari, *It's better to not even talk about Geneva II*, AL ARABIYA NEWS (Nov. 21, 2013), <http://english.alarabiya.net/en/views/news/middle-east/2013/11/21/It-s-better-to-not-even-talk-about-Geneva-II.html>. With respect to the delay of Geneva II, Mr. Omari reasoned “the peace conference on Syria is always subject to ‘cold-blood’ procrastination, although an unmistakable sign of weakness in the international diplomacy, is anyway an inseparable element of the absurdity and perplexity engulfing the Syrian crisis since its very outbreak in March 2011.” *Id.*

⁸⁸ Additionally, there is an argument that the Geneva Protocol is now both a multilateral treaty and customary law. McCormack, *supra* note 14, at 5; “It is generally assumed and commonly argued that the Protocol has become a part of customary international law and therefore binds all states whether or not they have become a party to it.”

Myanmar,⁸⁹ Angola, Egypt, North Korea, and South Sudan⁹⁰—should be urged to join the CWC and should face harsh and immediate economic sanctions if even the slightest evidence of chemical weapons use comes to light. Of course, this kind of expansion in the law will need to be checked by a narrowing of the law in other areas, specifically in terms of “use” of chemical weapons as it is currently defined and in the need for proportionality as a factor. Currently, the first article of the CWC contains the following language:

Article I. General Obligations

1. Each State Party to this Convention undertakes never under any circumstances:

(a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;

(b) To use chemical weapons;

(c) To engage in any military preparations to use chemical weapons;

(d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

2. Each State Party undertakes to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.

3. Each State Party undertakes to destroy all chemical weapons it abandoned on the territory of another State Party, in accordance with the provisions of this Convention.

4. Each State Party undertakes to destroy any chemical weapons production facilities it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.

5. Each State Party undertakes not to use riot control agents as a method of warfare.⁹¹

⁸⁹ Both Israel and Myanmar signed the CWC in 1993, but neither has ratified the CWC. *Non-Member States*, ORG. FOR THE PROHIBITION AGAINST CHEM. WEAPONS, <http://www.opcw.org/about-opcw/non-member-states/> (last visited June 20, 2014).

⁹⁰ *Id.* Angola, Egypt, North Korea, and South Sudan have neither signed nor acceded to the CWC.

⁹¹ *Chemical Weapons Convention: Article I General Obligations*, ORG. FOR THE PROHIBITION AGAINST CHEM. WEAPONS, <http://www.opcw.org/chemical-weapons-convention/articles/article-i-general-obligations/> (last visited June 20, 2014).

This language should be amended so that section 1, subsections b and c specify that “use” of chemical weapons mean the use of chemical weapons *on humans*. This could also be accomplished by adding “use” as a definition in Article II. This will prevent possible instances of CWC violations arising from chemical dumping or use of chemicals—encompassed in the definition of “chemical weapons” under the CWC—that results in animal fatalities. The definition of “use” must also be expanded to include a proportionality factor that dictates, unless the use of chemical weapons reaches a predetermined fatality rate, it will not be considered a CWC violation. This will prevent cases of individual prosecution for CWC violations such as the recent case *Bond v. United States*, in which the court discussed the overbroad nature of the CWC.⁹² Finally, the current state-parties to the CWC should utilize a diplomatic approach to encourage the remaining non member-states to sign and accede to the CWC.

The OPCW has had an “Action Plan to Promote the Universality of the Chemical Weapons Convention” (Action Plan) in place since 2003, evidencing the desire to achieve the membership of all states worldwide; however, it has not been fully utilized.⁹³ The Action Plan was meant to be a framework for implementation of Article VII of the CWC, which states that each party to the

⁹² *Bond v. United States*, 134 S. Ct. 2077 (2014).

⁹³ *Action Plan to Promote the Universality of the Chemical Weapons Convention*, ORG. FOR THE PROHIBITION AGAINST CHEM. WEAPONS, <http://www.opcw.org/our-work/universality/action-plan/> (last visited June 6, 2014). As a participant in the Action Plan, the Technical Secretariat must prepare a comprehensive annual document and provide information to the Council on proposed initiatives, including targets for increased membership.

In particular, the document could include:

- (a) measures envisaged by the Technical Secretariat to assist States ready to join the Convention in their national preparations for implementing it;
- (b) bilateral assistance visits;
- (c) bilateral meetings with States not Party not represented in The Hague, as well as those represented in The Hague, and other activities of participation support and outreach;
- (d) regional and sub-regional seminars and workshops;
- (e) international cooperation activities which might include States in the process of ratifying or acceding to the Convention;
- (f) measures to increase awareness of the Convention, and of the work of the OPCW, including publications in official languages, as well as measures to reach the appropriate audience in States not Party; and
- (g) attendance at meetings of, or joint activities with, relevant international and regional organizations.

CWC should adopt any measures necessary to fulfill its obligations under the CWC,⁹⁴ and should:

- (a). Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under [the CWC], including enacting penal legislation with respect to such activity;
- (b). Not permit in any place under its control any activity prohibited to a State Party under [the CWC]; and
- (c). Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under [the CWC] undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.

Similar to the R2P Pillars, the next section of that same article—section II of CWC Article VII—then asks member-states to take their responsibility a step further by working with other member-states to meet their obligations pursuant to section 1.⁹⁵ This is similar to the R2P Doctrine’s Pillar I, in that it vests individual responsibility in the member-state to protect the people within its borders.⁹⁶ Section VII of the CWC also provides that each member-state, “shall assign the highest priority to ensuring the safety of people and to protecting the environment, and shall cooperate as appropriate with other States Parties” and the OPCW in that regard.⁹⁷

In an effort to enforce Article VII of the CWC, the OPCW’s Action Plan strongly encourages parties to the CWC to strengthen efforts in promotion of its universality and “pursue this objective, as appropriate, in their contacts with States not Party, and to seek the cooperation of relevant international and regional organizations.”⁹⁸ Efforts should be increased to follow this plan and non-member states should be pressured, politically, to join in light of the recent attacks in Syria. The current responsibility of member-states to initiate Article VII and follow the action plan does not seem to provide strong enough incentive for non-member states to join the CWC. If the CWC is amended to include language authorizing military retaliation in response to chemical weapons use, the remaining countries would have more incentive to join the convention.

⁹⁴ *Chemical Weapons Convention: Article VII. National Implementation Measures*, ORG. FOR THE PROHIBITION AGAINST CHEM. WEAPONS, <http://www.opcw.org/chemical-weapons-convention/articles/article-vii-national-implementation-measures/> (last visited June 20, 2014).

⁹⁵ *Id.* at sec. 2.

⁹⁶ *Id.*

⁹⁷ *Id.* at sec. 3-7.

⁹⁸ *Id.*

2. The UNSC and Chemical Weapons Policy Reform

The UNSC plays a key role in resolving international disputes, including those involving chemical weapons use. In the instant example, the UNSC was instrumental in negotiating a peaceful resolution and in convincing Syria to become a state party, however, they should not rest on their laurels. This role and their credibility, though oft maligned, should not be discounted. Instead, the UNSC should be modernized and reformed so that their decisions carry some weight and so that member-states respect the process by which they have agreed to work together to maintain international peace and security.

Amendments to the CWC, as discussed above, should help take some of the mystery out of the decision process. If the UNSC has a clearly defined agreement prohibiting more narrowly defined chemical weapons uses, then it should not be as difficult for them to make a decision as to the appropriate response.

IV. CONCLUSION

Some of the strongest calls for chemical weapons reform have recently come from the survivors of Halabja, who “demonstrated and called on the international community and organizations to investigate this crime [in Syria] and bring to court those who use chemical weapons and also those who produce them.”⁹⁹ Yet, the international community has not come together to agree on the use of chemical weapons and the appropriate, swift response to events such as the Assad regime’s use of Sarin gas on innocent civilians on August 21, 2013. President Barack Obama was hesitant about how he should respond to the situation in Syria, asking, “If the U.S. goes in and attacks another country without a U.N. mandate and without clear evidence that can be presented, then there are questions in terms of whether international law supports it . . . do we have the coalition to make it work?”¹⁰⁰

This raises the question—why would President Obama, the leader of a sovereign nation, need a U.N. mandate to launch air strikes when he consistently

⁹⁹ Golnaz Esfandiari, *Return Of Chemical Warfare Resonates Among Survivors In Iran, Iraq*, RADIO FREE, EUROPE RADIO LIBERTY (Sept. 7, 2013), <http://www.rferl.org/content/syria-gas-iraq-iran/25098713.html>; Ban Ki-moon, U.N. Secretary-General, *Secretary-General’s briefing to the General Assembly on the Report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic: Report on the Incident of 21 August 2013 in the Ghouta Area of Damascus*, UNITED NATIONS (Sept. 17, 2013), <http://www.un.org/sg/statements/index.asp?nid=7090>. “This is the most significant confirmed use of chemical weapons against civilians since Saddam Hussein used them in Halabja in 1988.” *Id.*

¹⁰⁰ Alan Silverleib, *Exclusive: Obama tells CNN key decisions nearing on Syria, Egypt*, CNN (Aug. 23, 2013, 11:01 AM), <http://www.cnn.com/2013/08/23/politics/obama-cnn-new-day-interview>.

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argued the human rights, soft law position in the media to justify his red line policy? Some speculate that President Obama sought a U.N. mandate and Congressional approval for purely political reasons, while others argue it lent credibility to international law. Whatever the motivation for his deferral to Congress and the U.N., it certainly highlighted the need for international reforms in the laws governing chemical weapons use.

CWC member-states should use Geneva II as an opportunity to highlight the need for chemical weapons reform and should advocate for amendments to the CWC and procedural reform in the UNSC so that chemical weapons crimes are outlawed on virtually every forefront. Specifically, the CWC and U.N. Charter should be amended so that punitive measures may be taken and all chemical weapons attacks are actionable. The UNSC is in dire need of procedural reform in order to function swiftly and appropriately in the face of such attacks, and the language in the UN Charter and CWC must be strengthened to allow for improved, proportionate, regulation of chemical weapons. Though the best-situated international political bodies¹⁰¹ are already in place to determine the course of action in these situations, they face a tough battle in enforcing international law when weighed against an international norm such as the R2P Doctrine. Strengthening the language in the positive law, as suggested in this article, will help remedy these procedural and administrative impediments to justice.

¹⁰¹ See the OPCW and UNSC. *Supra* note 37 and note 86.

ACCORD CASE BRIEFS

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REMODELING ARIZONA'S ECONOMIC LOSS DOCTRINE

Sullivan, et al (P) v. Pulte Home Corp. (D)

232 Ariz. 344, 306 P.3d 1

Brief by: Denise Ho

KEYWORDS: Economic loss doctrine; non-contracting parties; construction defect; breach of implied warranty; recovery for purely pecuniary loss.

AREAS OF LAW: Tort law, construction defect and recovery for non-contracting parties.

BASIS OF CASE: Appellants (P) seek to clarify the application of the economic loss doctrine under Arizona's Laws.

BRIEF FACTS: Appellants (P) were subsequent purchasers of a residential home that the Appellee (D) had constructed. Since Appellants (P) were not the initial purchasers, they did not have a contractual relationship with Appellee (D). When Appellants (P) noticed there were defects in their home, they requested Appellee (D) to cover for the cost of repairs, to which Appellee (D) refused.

RULE OF LAW: In Arizona, the economic loss doctrine does not bar non-contracting parties from bringing tort claims and seeking recovery for purely economic losses against a homebuilder. The doctrine limits only contracting parties to the terms and conditions of their agreed contract for remedies.

ISSUE: Whether the economic loss doctrine bars a homeowner, who lacks a contractual relationship with a homebuilder, from bringing tort claims against that homebuilder.

RELEVANT FACTS: In 2000, Pulte Home Corp. (D) constructed a residential home and sold it to the first buyer. Three years later, the first buyer re-sold the home to Sullivan (P). Since Sullivan (P) did not purchase the home directly from Pulte Home Corp. (D), a contractual relationship did not exist between the Sullivan (P) and Pulte Home Corp. (D).

In 2009, Sullivan (P) noticed some irregularities with the home's hillside retaining wall. As a result, they hired an engineer to evaluate their home. The engineer determined the home site and wall were constructed in a dangerously

defective manner. Thereafter, Sullivan (P) notified Pulte Home Corp. (D) of its findings and requested Pulte Home Corp. (D) to cover for the costs of repairs. Pulte Home Corp. (D) refused to bear the costs claiming it was no longer responsible for any construction defects.

HOLDING: No. The Arizona Supreme Court held that the economic loss doctrine bars only recovery of pecuniary loss to contracting parties, who are subjected to the terms and conditions of their agreed upon remedies. The Court declined to extend the doctrine's limitation to non-contracting parties. It reasoned that to hold otherwise would be contrary to public policy. The Court focused on the doctrine's purposes to "encourage the private ordering of economic relationships, protect the expectations of contracting parties, ensure the adequacy of contractual remedies, and promote accident-deterrence and loss-spreading" as the underlying principles for its holding.¹ As such, it concluded that in a situation where there is no contractual relationship between the parties, there is no barrier that would prevent a non-contracting party from bringing a tort claim, that would be otherwise permitted by substantive law, because Arizona's economic loss doctrine "protects the expectations of contracting parties."²

Pulte Home Corp. (D) contended that despite an absence of a contractual relationship with Sullivan, the economic loss doctrine barred Sullivan's (P) tort claims because Sullivan (P) had an available contractual remedy for breach of implied warranty under Arizona law. The Court did not agree with the Pulte Home Corp. (D) and found that Sullivan's (P) possible contractual remedy, via implied warranty, does not substantiate the implication of the economic loss doctrine to bar their negligence claims. The Court concluded that, despite the non-contracting parties' lack of contractual privity, Sullivan (P) has an actionable claim against the homebuilder for any damage or loss due to construction defects.

RATIONALE: The Arizona Supreme Court based its holding on equity. While the Court's opinion did not expressly mention equity, underlying inferences can be seen throughout the Court's decision that it would be unjust to extend the economic loss doctrine to a non-contracting homeowner, who lacks the opportunity to negotiate with a homebuilder about remedies for damages or loss. In essence, limiting the economic loss doctrine to contracting parties allows legitimately injured homeowners, who lack a contractual relationship, remedies for

¹ Sullivan, et al v. Pulte Home Corp., 232 Ariz. 344, 346; 306 P.3d 1, 3.

² *Id.*

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economic loss. Barring non-contracting parties from bringing tort claims because they merely lack a contractual relationship would allow homebuilders to evade liability for their tortious conduct to subsequent buyers.

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ACCORD CASE BRIEFS

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**THE “SPECIALTY” REQUIREMENT IN ARIZONA MEDICAL MALPRACTICE
LITIGATION: APPLICATION AND CONSTITUTIONALITY
OF A.R.S. §12-2604**

Baker (P) v. University Physicians Healthcare (D),
231 Ariz. 379, 296 P.3d 42 (2013).

Brief by: Janae A. Perry-Meier

KEYWORDS: Equal protection, rational basis, medical malpractice, specialty, medical, expert witness, testimony, standard of care, locality, board certification, wrongful death, A.R.S. §12-2604.

AREAS OF LAW: Tort law, constitutional law, evidence, medical malpractice.

BASIS OF CASE: Baker (P) appeals the Court of Appeals interpretation of A.R.S. §12-2604 of the requirements for expert witnesses to have the same specialty and board certification of the treating physician when testifying in medical malpractice claims.

BRIEF FACTS: The plaintiff’s daughter, age 17, died after the defendant treated her for blood clots. Her father, Robert Baker (P), filed a medical malpractice action against the University Physicians Healthcare (D) and the treating physician.

RULE OF LAW: A physician testifying as an expert witness in medical malpractice cases must share the specialty or claimed specialty of the treating physician, if the treatment at issue was within that specialty. For purposes of the statute, “specialty” means the area in which the physician is or may become board certified and includes any subspecialties that may apply.

ISSUES: Whether A.R.S. §12-2604:

- (1) abrogates Baker’s (P) common-law negligence claim such that it violates article 18, section 6 of the Arizona Constitution?
- (2) denies Baker (P) due process, equal protection of the laws, the benefits of state and federal separation of powers, and the protection of the ban against special laws such that it violates both the state and federal constitutions?

(3) requires that expert witnesses in medical malpractice cases be of the same specialty and board certification of the treating physician such that Baker's (P) expert witness was not qualified?

RELEVANT FACTS: Tara Baker, a seventeen-year-old, was hospitalized for blood clots. After Tara's release from the hospital, she was treated by Dr. Wittman, an employee of University Physicians Healthcare and the Arizona Board of Regents ("UPH") (D). Tara died from other blood clots as a result of Dr. Wittman's alleged malpractice. Mr. Baker (P), father of the deceased, brought a wrongful-death action against UPH, Dr. Wittman, and her spouse, alleging that Dr. Wittman breached the standard of care owed to his daughter.

In the Pima County Superior Court, Mr. Baker (P) disclosed that he planned to call Dr. Brouillard as an expert witness. Dr. Brouillard is certified by the American Board of Internal Medicine to practice internal medicine and hematology and medical oncology, while Dr. Wittman is certified by the American Board of Pediatrics to practice pediatrics and pediatric hematology-oncology. UPH (D) moved for summary judgment based on the argument that Dr. Brouillard was not qualified to testify as an expert under A.R.S. §12-2604. The trial court granted the motion for summary judgment and determined that Dr. Brouillard was not qualified to testify because his certification was not in the same specialty. Dr. Brouillard is certified in the subspecialty of hematology-oncology, not *pediatric* hematology-oncology.

The Court of Appeals, Division Two, reversed the trial court's decision in part, ruling that "specialty," as referred to in A.R.S. §12-2604, does not apply to subspecialties, but rather to the specialty boards, which make up the American Board of Medical Specialties. Thus, Dr. Brouillard was still not qualified despite the distinguished definition of "specialty" as his board certified specialty is in internal medicine while Dr. Wittman is board certified in pediatrics. Mr. Baker (P) appealed the Court of Appeals' decision arguing that A.R.S. §12-2604 is unconstitutional at both the state and federal levels and that his expert witness, Dr. Brouillard, was qualified to testify as to Dr. Wittman's professional conduct and the applicable standard of care. The Arizona Supreme Court granted review to address the application and constitutionality of A.R.S. §12-2604.

HOLDING: Yes. A.R.S. §12-2604 is constitutional. A physician testifying as an expert witness in medical malpractice cases must share the specialty or claimed specialty of the treating physician if the treatment at issue was within that specialty. For purposes of the statute, "specialty" means the area in which the physician is or may become board certified and includes any subspecialties

that may apply. The trial court did not abuse its discretion in holding that Mr. Baker's (P) expert witness was not qualified under the statute. The statute itself does not violate the anti-abrogation clause or open court guarantees of the Arizona Constitution and survives the rational-basis scrutiny of the equal protection challenge. The statute is not a "special law" for purposes of the constitutional prohibition against enacting special laws that change the rules of evidence, regulate the practice of courts of justice, and the limits of civil actions since its application to any party offering an expert witness in a medical malpractice case differs on a case-by-case basis. Rational basis scrutiny is appropriate and no greater scrutiny is applied to non-suspect classifications in an equal protection challenge than would be applied to the Arizona Constitution's anti-abrogation clause itself.

RATIONALE: In medical malpractice cases, the necessary elements of proof that injury resulted from the failure of a health care provider to follow the accepted standard of care are as follows: (1) "[t]he health care provider failed to exercise that degree of care, skill and learning expected of a reasonable, prudent health care provider in the profession or class to which he belongs within the state acting in the same or similar circumstances;" and (2) "[s]uch failure was a proximate cause of the injury."³ The Court first considered the "appropriate standard" of care and then considered the meaning of the terms "specialist," "specialty," and "board certified" as interpreted from Arizona Revised Statute §12-2604.⁴ Based on its interpretation, the lower court properly held that Baker's (P) expert witness was not qualified under the statute to testify as to the standard of care owed by the treating physician. The Court then addressed the issue of constitutionality, under a rational basis standard of scrutiny, since no suspect classes were involved, holding that the statute was constitutional.

Standard of Care: The Court reasoned that the standard of care is dependent upon the care or treatment at issue in the case.⁵ "Thus only if the care or treatment involved a medical specialty will expertise in that specialty be relevant to the standard of care in a particular case."⁶

Specialist, Specialty, Board Certified: The Court then interpreted Ariz. Rev. Stat. §12-2604 to require that expert witnesses testifying as to the care or treat-

³ Ariz. Rev. Stat. Ann. §12-563.

⁴ Baker v. Univ. Physicians Healthcare, 231 Ariz. 379, 296 P.3d 42, 47 (2013).

⁵ Ariz. Rev. Stat. Ann. §12-563(1) (The "degree of care, skill and learning expected of a reasonable, prudent health care provider in the profession or class to which he belongs within the state acting in the same or similar circumstances.").

⁶ Baker v. Univ. Physicians Healthcare, 231 Ariz. 379, 296 P.3d 42, 47 (2013).

ment within a particular specialty “specialize in the same specialty or claimed specialty” as the treating physician.⁷ To define “specialty” and “specialist,” the Court examined dictionary definitions,⁸ local statutory provisions and case law,⁹ medical journals,¹⁰ and cases and statutes from other jurisdictions.¹¹ The Court concluded that a specialist is “someone who devotes most of his or her professional time to a particular “specialty,” and defined specialty as a practice area or limited area of medicine in which the physician is or may be board certified.¹²

⁷ *Id.*

⁸ Dorland’s Illustrated Medical Dictionary (Specialist is defined as “a physician whose practice is limited to a particular branch of medicine or surgery, especially one who, by virtue of advanced training, is certified by a specialty board as being qualified to so limit his practice. Specialty is defined as “the field of practice of a specialty.”) Baker, 231 Ariz. 379, 296 P.3d 42, 47 (2013) *citing* Dorland’s Illustrated Medical Dictionary 1767 (31st ed. 2007); The American Heritage Dictionary (Specialist is defined as a “physician whose practice is limited to a particular branch of medicine or surgery, especially one who is certified by a board of physicians: a specialist in oncology.” Specialty is defined as a “branch of medicine or surgery, such as a cardiology or surosurgery, in which a physician specialized; the field or practice of a specialist.”) Baker, 231 Ariz. 379, 296 P.3d 42, 47 (2013) *citing* The American Heritage Dictionary of the English Language 1681 (5th ed. 2011).

⁹ Ariz. Rev. Stat. Ann. §12-2604 (requiring that a testifying expert be one that has spent the majority of their professional career practicing or teaching in the specialty or claimed specialty during the year preceding the occurrence); State v. Jones, 188 Ariz. 388, 392, 937 P.2d 310, 314 (1997).

¹⁰ Legal Implications of Specialty Board Certification, 17 J. Legal Med. 73, 73–76 (1996).

¹¹ Mayo Found. for Med. Educ. & Research v. United States, 131 S.Ct. 704, 708, 178 L.Ed.2d 588 (2011); Woodard v. Custer, 476 Mich. 545, 561, 719 N.W.2d 842, 851 (2006).

¹² Baker v. Univ. Physicians Healthcare, 231 Ariz. 379, 296 P.3d 42, 48 (2013).

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**PARTITIONING ARIZONA DUI BREATH TESTS TO
THE SLIGHTEST DEGREE**

State (P) v. Cooperman (D)

232 Ariz. 347, 306 P.3d 4 (2013)

Brief by: Erika Sparks

KEYWORDS: Admissibility, Ariz. R. Evid. 403, DUI, driving under the influence, blood test, breath test, intoxication, partition ratio.

AREAS OF LAW: Criminal law, driving under the influence.

BASIS OF CASE: The State (P) seeks review of trial court's holding that partition ratio evidence is relevant whenever breath test results are introduced as evidence of driving under the influence ("DUI").

BRIEF FACTS: Cooperman (D) was arrested and charged with driving under the influence of an intoxicating liquor or substance and having an alcohol concentration of 0.08 or more within two hours of driving.

RULE OF LAW: In Arizona, the partition ratio evidence is relevant and admissible as evidence to prove or disprove whether a defendant was impaired while driving.

ISSUES: (1) Whether partition ratio evidence is admissible in prosecution for DUI in violation of A.R.S. §28-1381(A)(1) if the state chooses to introduce breath test results only to prove the charge under A.R.S. §28-1381(A)(2) and not use that same evidence to prove the charge under A.R.S. §28-1381(A)(1); and (2) whether evidence relating to the variability of partition ratios in the general population is relevant to a particular defendant's state of impairment.¹³

RELEVANT FACTS: Cooperman (D) was charged with two counts of DUI. The first charge was in violation of A.R.S. §28-1381(A)(1), the "impairment" charge, because Cooperman was operating a motor vehicle while under the influence of an intoxicating liquor or substance, and his ability to operate that

¹³ The Court declined to address whether Arizona Rule of Evidence 702 bars the admission of evidence at issue in this case because the State did not raise this issue until the supplemental briefing stage.

vehicle was impaired to the slightest degree. The second charge was in violation of A.R.S. §28-1381(A)(2), the “per se” charge, because Cooperman (D) had a blood alcohol concentration of 0.08 or more within two hours of driving a vehicle. The municipal court held that partition ratio evidence is relevant whenever breath test results are introduced in connection with a charge under A.R.S. §28-1381(A)(1). Additionally, the municipal court rejected the State’s argument that this type of evidence should be excluded under Arizona Rule of Evidence 403. The superior court accepted special action jurisdiction and denied relief, and the court of appeals affirmed.

HOLDING: Yes. The Arizona Supreme Court held the partition ratio evidence is admissible and relevant in a DUI prosecution when breath test results are introduced to prove whether a defendant was intoxicated while driving a vehicle. The State argued that because it did not intend to use the breath test results to prove intoxication, the defendant could not use the partition ratio evidence to refute the defendant’s state of impairment. The Court concluded that the evidence offered was relevant to support the defendant’s argument that he was not impaired and held that such evidence should not be excluded under Arizona Rule of Evidence 403. The trial court properly held that the partition ratio evidence does not need to be excluded. The Court reasoned that the inclusion of the evidence is not unfairly prejudicial, confusing, misleading, or a waste of time. Presenting the partition ratio evidence requires an instruction to the jury that the evidence is to be considered solely for purposes relating to the charge under A.R.S. §28-1381(A)(1). Likewise, limiting the ratio evidence for sole consideration for the charge under A.R.S. §28-1381(A)(2) requires an instruction to the jury that the evidence be considered solely for that charge. The Court determined that one instruction is not inherently more confusing than the other.

RATIONALE: Blood alcohol concentration evidence is relevant to show impairment or a lack of impairment. “Alcohol in the breath does not cause impairment; impairment results when alcohol enters the body, is absorbed into the bloodstream, and is transported to the central nervous system and the brain.”¹⁴ A partition ratio “is not relevant to a prosecution for per se DUI” under A.R.S. §28-1381(A)(2) because the charge is based solely on alcohol concentration measured by breath readings.¹⁵ Nothing in the legislative history or text of A.R.S. §28-1381 supports an argument that precludes a DUI defendant from presenting alcohol concentration or partition ratio evidence establishing impairment or a lack thereof under A.R.S. §28-1381(A)(1) at trial. Evidence showing

¹⁴ Guthrie v. Jones, 202 Ariz. 273, 274 (App. 2002).

¹⁵ *Id.* at 274.

that the partition ratio varies in the general population could potentially introduce doubt pertaining to the relationship between breath alcohol concentration and impairment. This is relevant to the defense when creating doubt about the relationship between the defendant's breath alcohol concentration results and his state of impairment. Other jurisdictions, such as California and Vermont, have similarly held that partition ratio evidence is admissible and relevant.¹⁶¹⁷ The court has the power to determine if evidence is inadmissible under Arizona Rule of Evidence 403 "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."¹⁸ The State maintained that admission of the evidence would confuse the jury because of the differing jury instruction it would require. If the evidence were allowed solely for use in connection with the impairment charge, under A.R.S. §28-1381(A)(1) (A)(1), the State maintained it may confuse the jurors because they would be instructed to not use the evidence for the charge under A.R.S. §28-1381(A)(2). The instruction would be for consideration only in connection with the charge under A.R.S. §28-1381(A)(1). Limiting the breath alcohol concentration evidence to the charge under A.R.S. §28-1381(A)(2) requires an instruction that the jury is to not consider the evidence as to the charge under A.R.S. §28-1381(A)(1) for use in establishing impairment. The Court held that one set of instructions is no more or less confusing than the other, as it trusts that the jurors will be able to follow the court's instructions, and that the partition ratio evidence should not be ruled inadmissible under Rule 403.

¹⁶ *People v. McNeal*, 210 P.3d 420, 431 (Cal. 2009).

¹⁷ *State v. Hanks*, 772 A.2d 1088, 1091-93 (Vt. 2001).

¹⁸ *Ariz. R. Evid.* 403.

NO WARRANT? NO VOLUNTARY CONSENT? NO BLOOD DRAW

State (P) v. Butler (D)

232 Ariz. 84, 302 P.3d 609 (2013)

Brief by: Stephanie R. Pitel

KEYWORDS: A.R.S. § 28-1321, Arizona, arrestee, blood draw, blood test, consent, Fourth Amendment, implied consent statute, juvenile, search and seizure, voluntary, warrant, warrantless, driving under the influence, DUI.

AREAS OF LAW: Fourth Amendment, constitutional law, criminal law.

BASIS OF CASE: The Arizona Supreme Court reviewed a Court of Appeals decision finding the juvenile court abused its discretion when it suppressed evidence of a blood draw.

BRIEF FACTS: A juvenile arrestee that gave verbal and written permission for a blood draw later moved to suppress the blood draw evidence claiming his consent was involuntary and that he lacked the legal capacity to consent due to his age.

RULE OF LAW: The Fourth Amendment to the United States Constitution requires voluntary consent before law enforcement may conduct a blood draw without a warrant. If the arrestee is a juvenile, the presence of the parents and the juvenile's age are important, but not dispositive, factors in determining whether consent to submit to a blood draw is voluntary or not.

ISSUE: Whether the Fourth Amendment to the United States Constitution requires a juvenile arrestee's voluntary consent to permit a blood draw without a warrant.¹⁹

¹⁹ The court declined to address whether the juvenile lacked the legal capacity to consent because of his age, whether the Arizona Constitution provides greater protection than the Fourth Amendment in such cases, and whether the blood draw violated the Arizona Parents' Bill of Rights ("PBR") statute. *See* ARIZ. REV. STAT. ANN. § 1-602 (Westlaw through legislation effective April 23, 2014 of the Second Regular Session of the Fifty-first Legislature) (defining Parents' Bill of Rights). Although the court declined to address the question related to the PBR, it explained that the juvenile lacked standing to argue the violation because the statute concerns the rights of parents and not the juvenile.

RELEVANT FACTS: A sixteen-year-old high school student and two friends were detained by a school monitor who smelled marijuana and noticed drug paraphernalia in the juvenile’s car after the students arrived late to school. After hearing *Miranda* warnings, the juvenile admitted to driving his car after smoking marijuana as well as to owning some of the drug paraphernalia. He became agitated following his arrest and was subsequently handcuffed for approximately ten minutes while the deputy sheriff retrieved a phlebotomy kit. Because the juvenile later calmed down, the deputy removed the handcuffs and twice read an admonition explaining Arizona’s implied consent statute to the juvenile. The admonition included, in part, the consequence of suspended driving privileges for refusal to submit to breath or blood tests as well as a statement that the arrestee is “required” to submit to testing. The juvenile then agreed to the blood draw verbally and in writing.

The juvenile court granted a motion to suppress the blood draw evidence. It found among other things that under the totality of the circumstances, the juvenile’s consent was not voluntary.²⁰ The Court of Appeals reversed the decision after the State filed a petition for special action relief. The Court of Appeals concluded the blood was not testimonial evidence, and therefore the Fifth Amendment did not apply in this instance. It further noted there were no Fourth Amendment issues presented by the informed consent statute. Because it raised an important question of first impression, the Arizona Supreme Court granted review of the case.

HOLDING: Yes, the Fourth Amendment to the United States Constitution requires voluntary consent before law enforcement may administer a blood draw without a warrant—independent of the implied consent statute.²¹ Furthermore, when assessing the voluntariness of a juvenile’s consent in light of the totality of the circumstances, age and the presence of parents are relevant, although not dispositive, factors.

RATIONALE: The Court noted that a blood draw remains a search subject to the Fourth Amendment when administered in accordance with Arizona’s implied

²⁰ The juvenile court based its decision in part on *In re Andre M.*, 88 P.3d 552 (Ariz. 2004), an Arizona Supreme Court decision that assessed the voluntariness of a juvenile’s confession under the Fifth Amendment, noting the “increased susceptibility and vulnerability of juveniles” discussed in the decision. *Id.* at 555.

²¹ This decision narrows the statute’s application to blood tests and requires consent to be voluntary as well as express. *See State v. Butler*, 302 P.3d 609, 613 (Ariz. 2013) (The Court ruled in *Carillo v. House*, 232 P.3d 1245, 1245 (Ariz. 2010), that breath and bodily fluid tests be expressly consented to by arrestees if there is no search warrant).

consent statute.²² The Court rejected the State's arguments that implied consent under the statute satisfies the Fourth Amendment's voluntary consent requirement or, alternatively, serves as an exception to the requirement for a warrant.²³ The Court focused on the right to security in one's person protected by the Fourth Amendment and that searches without a warrant "are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions."²⁴ A factor important to the Court in determining the voluntariness of consent or waiver of rights is the arrestee's knowledge of the right to withhold such consent or waiver.²⁵ Additionally, the Court focused on the language of the statute instructing an officer to request an arrestee to submit to testing, and to obtain a warrant for the test if the arrestee refuses. The Court also noted the State did not argue that exigent circumstances existed at the time to meet an exception to the requirement for a warrant. Finally, weighing the facts surrounding the juvenile's detention and subsequent consent to the blood draw—including a two-hour detention, visible signs of the juvenile's nervousness and agitation, and being told the he was "required" to submit to testing before finally consenting—the Court concluded the juvenile court did not abuse its discretion when it found the juvenile's consent to be involuntary and granted the motion to suppress the blood draw evidence.

CONCURRENCE: Justice Pelander concurred with the holding because the Court applies the abuse of discretion standard when reviewing voluntariness determinations and motions to suppress evidence. Justice Pelander wrote separately to question the appropriateness of the continued use of the abuse of discretion standard for appellate review of motions to suppress evidence. He

²² ARIZ. REV. STAT. ANN. § 28-1321 (Westlaw through legislation effective April 23, 2014 of the Second Regular Session of the Fifty-first Legislature). The statute states that a person, by way of operating a motor vehicle in Arizona, consents to a breath, blood, urine, or other bodily substance test determined at the discretion of the officer if arrested for driving under the influence of drugs or alcohol. *Id.* § 28-1321(A). Following an arrest, an arrestee must be asked, and expressly agree, to submit to and complete tests prescribed under the statute or face suspension or denial of the arrestee's license or permit to drive. *Id.* § 28-1321(B).

²³ The Court noted its prior holding on the requirement for express consent based on statutory grounds in *Carillo*, 232 P.3d at 1245, and that provisions in the statute still require the officer to ask an arrestee to submit to testing and to obtain a warrant if the arrestee refuses. ARIZ. REV. STAT. ANN. § 28-1321(B), (D) (Westlaw through legislation effective April 23, 2014 of the Second Regular Session of the Fifty-first Legislature).

²⁴ *Butler*, 302 P.3d at 612 (alteration in the original) (internal quotation marks omitted) (quoting *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (noting exigent circumstances are an exception). Consent is another exception. *Id.* (citing *Schneckloth v. Bustamonte*, 423 U.S. 218, 226-229 (1973) ("Voluntariness is assessed from the totality of the circumstances. Relevant circumstances include the suspect's age and intelligence as well as the length of the detention." (internal citations omitted))).

²⁵ *Id.* at 613 (citing *Schneckloth*, 423 U.S. at 234).

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further expressed concerns that the decision will encourage more claims and suppression hearings related to testing administered to impaired drivers. Finally, Justice Pelander argued that the decision “dilut[es] the effectiveness” of the implied consent statute by creating uncertainty for law enforcement officers that have been given express consent on whether the consent is actually voluntary.²⁶

²⁶ *Id.* at 617. The facts of this case do not support the concern expressed in the concurring opinion that this decision will cause confusion among law enforcement. The juvenile was detained, then handcuffed, and then told he was required to submit to the test before expressly consenting to the blood draw. It is reasonable to conclude that the juvenile may have felt he had no choice other than to consent.

2013 ARIZONA LEGISLATIVE UPDATE
51TH LEGISLATURE, 1ST REGULAR SESSION

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MOVING AHEAD FOR PROGRESS IN THE 21ST CENTURY ACT:
HOW H.B. 2182 HAS TOUGHENED ARIZONA'S DUI LAW

Fabian Zazueta*

I. INTRODUCTION

Arizona House Bill 2182 (“HB 2182”) has made significant changes to the Arizona Revised Statutes Annotated §§ 28-1401¹, 28-1464², 28-3319³, and 28-3511.⁴ These changes will impact individuals with repeat Driving Under the Influence (“DUI”) offenses.⁵

The bill removes two key exceptions to the use of an ignition interlock device (“IID”).⁶ First, a person required to install an IID is no longer permitted to operate an employer-owned motor vehicle.⁷ Second, “a person unable to

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¹ ARIZ. REV. STAT. ANN. § 28-1401 (Westlaw through the First Regular and First Special Sessions of the Fifty-first Legislature (2013)). This section is titled, “Special ignition interlock restricted driver licenses; application fee.”

² *Id.* § 28-1464. This section is titled, “Ignition interlock devices; violations; classification; definition.” Section A, in its entirety, was removed from this provision, which allowed an individual whose driving privileges were limited due to a DUI, to operate a motor vehicle without an ignition interlock device. H.B. 2182, 51st Leg., 1st Reg. Sess. (Ariz. 2013). *See also DUI; Ignition Interlock Devices: Hearing on H.B. 2182 Before the H. Comm. on Transp.*, 51st Leg., 1st Reg. Sess. (Ariz. Jan. 31, 2013) [hereinafter *H. Transportation Hearing*], http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=11540 (statement of Kevin Beasty, Ariz. Dep’t of Transp.) (audio at approximately 01:25).

³ ARIZ. REV. STAT. ANN. § 28-3319 (Westlaw through the First Regular and First Special Sessions of the Fifty-first Legislature (2013)) (“Action after license suspension, revocation or denial for driving under the influence or refusal of test; ignition interlock device requirement; definition.”); *see infra* Part II.

⁴ ARIZ. REV. STAT. ANN. § 28-3511 (Westlaw through the First Regular and First Special Sessions of the Fifty-first Legislature (2013)). This section is titled, “Removal and immobilization or impoundment of vehicle.”

⁵ Ariz. H.B. 2182.

⁶ LEAGUE OF ARIZ. CITIES & TOWNS, 2013 NEW LAWS REPORT 1 (2013), available at <http://www.azleague.org/DocumentCenter/View/2184>. An “ignition interlock device” is a device that “connects a breath analyzer to a motor vehicle’s ignition system.” ARIZ. REV. STAT. ANN. § 28-1301(4) (2006). The device monitors the alcohol in the breath of any person attempting to start a motor vehicle. *Id.*

⁷ *Id.*

operate an IID can no longer opt into a continuous alcohol-monitoring program” (“CAMP”⁸) in lieu of equipping his or her vehicle with an IID.⁹ HB 2182 will discourage employers to hire employees with IID requirements, while encouraging individuals to reconsider drinking and driving; but the monetary incentives to abandon the DUI exceptions do not outweigh the burdens this abandonment places on individuals.

Part II will discuss the modifications to each respective Title 28 provision of the Arizona DUI law. Part III will provide a background summary for reasons why the legislature removed the employer-employee and CAMP exceptions. Part IV will discuss the effects of the new DUI modifications. Lastly, Part V will conclude by summarizing key points of HB 2182.

II. SUBSTANTIVE CHANGES TO ARIZONA DUI LAWS

A. *Changes to § 28-1401 and 28-3319*

Prior to September 13, 2013, the Arizona Revised Statutes Annotated section 28-1401(F) stated that, “The department [of transportation] shall make a notation on a special ignition interlock restricted driver license that is issued to a person who is placed in a continuous alcohol monitoring program pursuant to section 28-3319, subsection I.”¹⁰ This CAMP exception is no longer permitted; however, individuals placed in CAMPs prior to the bill’s enactment can remain in CAMPs without installing an IID.¹¹ Thus, HB 2182 does not apply retroactively, giving individuals who are compliant with all applicable laws the ability to refrain from installing an IID in their vehicles.¹²

⁸ CAMPs allow individuals to wear Secure Remote Alcohol Monitoring bracelets (“SCRAM”). *SCRAM Bracelets*, FINDLAW.COM, <http://dui.findlaw.com/dui-cases/scram-bracelets.html> (last visited Apr. 8, 2014). SCRAM bracelets are a form of a CAMP with the benefit of not requiring frequent in-person alcohol monitoring. For repeat DUI offenders, a judge normally orders the offender to wear an ankle bracelet. *Id.* Every hour, the bracelet measures the person’s blood alcohol through his or her sweat, allowing the individual to attend work. *Id.* See also *H. Transportation Hearing*, *supra* note 2 (statement of Alberto Gutierrez, Ariz. Dep’t of Transp.) (audio at approximately 01:39).

⁹ LEAGUE OF ARIZ. CITIES & TOWNS, *supra* note 6. Continuous alcohol monitoring programs monitor an individual’s blood alcohol content continuously for the duration in which he would normally use an IID. *H. Transportation Hearing*, *supra* note 2 (statement of Alberto Gutierrez, Ariz. Dep’t of Transp.) (audio at approximately 01:29).

¹⁰ See Ariz. H.B. 2182 § 1.

¹¹ See *Id.* § 5; LEAGUE OF ARIZ. CITIES & TOWNS, *supra* note 6; *H. Transportation Hearing*, *supra* note 2 (statement of Alberto Gutierrez, Ariz. Dep’t of Transp.) (audio at approximately 01:29).

¹² See Ariz. H.B. 2182 § 5.

Furthermore, former section J of the Arizona Revised Statutes section 28-3319 provided the procedures and requirements for CAMPs.¹³ Because HB 2182 removes the ability for subsequent DUI offenders to be placed in CAMPs pursuant to section 28-1401(F), section J of 28-3319 was removed entirely.¹⁴

B. Changes to § 28-1464 and 28-3511

HB 2182 removes section A of section 28-1464 in its entirety. The section provided:

A person whose driving privilege is limited pursuant to section 28-1381, 28-1382, 28-1383 or 28-3319 or restricted pursuant to section 28-1402 and who is required to operate a motor vehicle owned by the person's employer in the course and scope of the person's employment may operate that motor vehicle without the installation of a certified ignition interlock device if the person notifies the person's employer that the person, in conjunction with the person's sentence or if the person has been issued a special ignition interlock restricted driver license pursuant to section 28-1402, has specific requirements in order to operate a motor vehicle and the nature of the requirements and the person has proof of the employer's notification in the person's possession while operating the employer's motor vehicle for normal business. For the purposes of this subsection, a motor vehicle that is partly or entirely owned or controlled by the person whose driving privilege is limited pursuant to section 28-1381, 28-1382, 28-1383 or 28-3319 or restricted pursuant to section 28-1402 is not a motor vehicle that is owned by an employer.¹⁵

By removing this exception, employees required to install an IID are faced with either convincing their employer to install an IID for every vehicle the employee drives, or employment termination.¹⁶ Unlike the CAMP, individuals already exempted from installing an IID—due to this exception—are not afforded the luxury of maintaining their exemption status.¹⁷ Therefore,

¹³ See *id.* § 3 (explaining that an individual placed on a CAMP “shall remain in the program for the same amount of time the person is required to maintain an ignition interlock device. . . . If the person tests positive for alcohol,” the person is required to install a certified IID).

¹⁴ *Id.*

¹⁵ See *id.* § 2.

¹⁶ See discussion *infra* Part IV.

¹⁷ See Ariz. H.B. 2182 § 2.

employees whose driving privileges are limited or restricted are required to install a functioning IID in every single vehicle they may drive.¹⁸

Further, section 28-3511 provides that peace officers can remove, immobilize, or impound any vehicle if an individual subject to an IID requirement is driving the vehicle without an IID.¹⁹ Before HB 2182, individuals with IID requirements were exempted from having their vehicle impounded, immobilized, or removed if they were driving an employer's vehicle.²⁰ Now, employers will have to install an IID for every vehicle the employee drives.²¹

III. BACKGROUND

Arizona has been recognized nationally for its strict DUI and Zero Tolerance laws.²² However, The National Highway Transportation Safety Administration²³ (“NHTSA”) informed the Arizona Department of Transportation that Arizona's DUI laws are inconsistent with federal DUI laws.²⁴ The federal DUI statute provides, “‘repeat intoxicated driver law’ means a State law that provides . . . that an individual convicted of a second . . . offense for driving while intoxicated . . . after a previous conviction for that offense shall receive a suspension of all driving privileges for not less than 1 year.”²⁵ Nowhere in the

¹⁸ *H. Transportation Hearing*, *supra* note 2 (statement of Alberto Gutierrez, Ariz. Dep't of Transp.) (audio at approximately 01:29).

¹⁹ ARIZ. REV. STAT. ANN. § 28-3511 (Westlaw through the First Regular and First Special Sessions of the Fifty-first Legislature (2013)).

²⁰ See Ariz. H.B. 2182 § 4.

²¹ Melanie Beauchamp, *Arizona House Bill 2182: Stricter Laws on Ignition Interlock Device Requirement*, BEAUCHAMP LAW OFFICE P.C., (Aug. 17, 2013), [http://www.arizona. dui.com/arizona-house-bill-2182-stricter-laws-on-ignition-interlock-device-requirement/](http://www.arizona. DUI.com/arizona-house-bill-2182-stricter-laws-on-ignition-interlock-device-requirement/). Melanie Beauchamp is a DUI defense attorney in Awatukee, Arizona.

²² *H. Transportation Hearing*, *supra* note 2 (statement of Alberto Gutierrez, Ariz. Dep't of Transp.) (audio at approximately 01:29). In 2012, the state of Arizona reported 30,400 DUIs. *Id.* (audio at approximately 01:35) (Four thousand of the reported DUI cases were super extreme, including drug offense DUI. Alberto Gutierrez also discusses how Arizona has some of the toughest laws in the country, which Arizona's law enforcement officers effectively execute).

²³ The Highway Safety Act of 1970, under the United States Department of Transportation, established the National Highway Transportation Safety Administration. *Who We Are and What We Do*, NAT'L HIGHWAY TRANSP. SAFETY ADMIN., <http://www.nhtsa.gov/About+NHTSA/Who+We+Are+and+What+We+do> (last visited Apr. 8, 2014). One of the administration's tasks is to help “states and local communities reduce the threat of drunk drivers.” *Id.*

²⁴ Victor M. Mendez, *Notice: Revised Apportionment of Federal-Aid Highway Program Funds For Fiscal Year (FY) 2013*, FED. HIGHWAY ADMIN., U.S. DEP'T TRANSP. (July 19, 2013), <http://www.fhwa.dot.gov/legisregs/directives/notices/n4510765/n4510765.pdf>; see generally FED. HIGHWAY ADMIN., U.S. DEP'T TRANSP., MAP-21—MOVING AHEAD FOR PROGRESS IN THE 21ST CENTURY: PENALTY TRANSFER PROVISIONS INTERIM GUIDANCE-OPEN CONTAINER AND REPEAT OFFENDER LAWS (23 U.S.C. §§ 154 AND 164) (2013) [hereinafter MAP 21].

²⁵ 23 U.S.C. § 164(a)(4) (2012). This section is titled, “Minimum penalties for repeat offenders for driving while intoxicated or driving under the influence[.]”

statute are Arizona's CAMPs and the employer-employee exceptions recognized.²⁶

Moreover, on July 6, 2012, President Barack Obama signed into law the Moving Ahead for Progress in the 21st Century Act ("MAP-21").²⁷ MAP-21 encourages states to enact Open Container Laws and Repeat Intoxicated Driver Laws, setting minimum federal standards.²⁸ Under MAP-21, any state whose DUI laws were inconsistent with the federal DUI statute was subject to penalties and labeled as "non-compliant" states.²⁹ The NHTSA penalizes each non-compliant state by withholding 2.5 percent of apportioned federal-aid funds.³⁰ Additionally, to comply with MAP-21, every non-compliant state has thirty days from the receipt of its non-compliance letter to appeal its non-compliant status. Each state is also afforded the opportunity to enact DUI laws consistent with the federal statute and given until October before federal-aid is withheld.³¹ Lastly, each non-compliant state's penalties are independently different from one another, ranging from approximately \$3,000,000 to \$70,000,000.³²

The NHTSA's recent audit of Arizona's DUI laws required immediate change.³³ Because of Arizona's noncompliance, it would have no control over the allocation of \$15,098,988 of its federal-aid funds.³⁴ Thus, HB 2182 was proposed, signed, and enacted into law to comply with the federal government's DUI statute.³⁵

²⁶ *Id.*; see also *H. Transportation Hearing*, *supra* note 2 (statement of Alberto Gutierrez, Ariz. Dep't of Transp.) (audio at approximately 01:37).

²⁷ See sources cited *supra* note 24.

²⁸ See sources cited *supra* note 24. The minimum federal standards are laid out in 23 U.S.C. § 164, requiring a one-year hard suspension of a driver's license and IID requirements. § 164(a)(4).

²⁹ *H. Transportation Hearing*, *supra* note 2 (statement of Alberto Gutierrez, Ariz. Dep't of Transp.) (audio at approximately 01:36) (noting that when Arizona was first notified about this non-conformity, twenty-three other states were also non-compliant and subject to similar federal penalties); see sources cited *supra* note 24.

³⁰ *H. Transportation Hearing*, *supra* note 2 (statement of Alberto Gutierrez, Ariz. Dep't of Transp.) (audio at approximately 01:37); see MAP 21, *supra* note 24.

³¹ MAP 21, *supra* note 24 (States that are non-compliant have until October 1 to comply with the federal DUI statute. During this non-compliant period and prior to October 1, federal-aid funds for each state will be withheld. States will have to allocate their federal-aid funds to either Highway Safety Improvement Programs or their State Department of Transportation.)

³² See *infra* Appendix I.

³³ *H. Transportation Hearing*, *supra* note 2 (statement of Alberto Gutierrez, Ariz. Dep't of Transp.) (audio at approximately 01:31).

³⁴ *Id.* (statement of Kevin Beasty, Ariz. Dep't of Transp.) (audio at approximately 01:25); see *infra* Appendix I.

³⁵ See *Bill Status Overview: HB2182, ARIZ. ST. LEGISLATURE*, http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/51leg/1r/bills/hb2182o.asp&Session_ID=110 (last visited Apr. 8, 2014) (showing the bill was signed by the Governor on April 17, 2013).

IV. EFFECTS OF REMOVING DUI EXCEPTIONS

A. *Financial Hardship*

The Arizona DUI modifications are troublesome for two reasons. First, repeat DUI offenders who were exempted from the IID requirement due to the employer-employee exception are faced with a financial hardship. An Arizona employee has the burden of convincing his employer to install an IID for every vehicle he may drive. This is a nearly impossible task to accomplish. For example, if a small business owner has a company vehicle that multiple employees operate, and one of those employees requires an IID, a non-DUI offender attempting to operate the vehicle will not be permitted to do so.³⁶ The most logical and equitable solution for this dilemma is to terminate the repeat-offender employee.

HB 2182 has already created concerns for Arizona law enforcement agencies regarding some of their members who may be affected.³⁷ Bill sponsor, Karen Fann, expressed how she has received phone calls from the representative of the Arizona Firefighters Association asking for clarification on HB 2181.³⁸ The firefighter association's job requirements conflict with the new law change, which will affect some of its members.³⁹ Karen Fann anticipates that the new law changes will affect other members from other law enforcement agencies.⁴⁰ Thus, employees, whether they are employed by a government agency or small business, will suffer a loss of income.

Second, the CAMPs allowed for repeat offenders to wear SCRAM ankle bracelets, allowing them the ability to work without having to install an IID.⁴¹ Because this exception is no longer valid, a person may be left jobless. People cannot afford to lose their employment positions, especially when the current

³⁶ See *How The Ignition Interlock Device Works*, IGNITION INTERLOCK DEVICE.ORG, <http://www.ignitioninterlockdevice.org/ignitioninterlockdevice.html> (last visited Apr. 8, 2014) (IIDs are connected to the driver's glove compartment, connecting to the ignition system with a hard wire. When a person is ready to start the vehicle, he must blow approximately 1.5 liters of air into the handheld alcohol sensor unit. If the person's blood alcohol content is over a certain alcohol limit (typically in the range of .02% to .04%) the vehicle will not start.); see also ARIZ. REV. STAT. ANN. § 28-1464(D) (Westlaw through the First Regular and First Special Sessions of the Fifty-first Legislature (2013)) (In Arizona, "A person shall not breathe into an ignition interlock device or start a motor vehicle equipped with an ignition interlock device for the purpose of providing an operable motor vehicle to a person whose driving privilege is limited").

³⁷ E-mail from Karen Fann, Rep., Ariz. State Legislature, to author (Oct. 31, 2013, 12:00 MST) (on file with author).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See *supra* note 8.

unemployment rate is 6.7 percent.⁴² A possible solution is to allow for the CAMPs. The first step is to amend the federal DUI statute so that the federal law recognizes CAMPs. Arizona DUI laws would, therefore, be consistent with MAP-21 and U.S.C § 164. With this amendment, Arizona could allocate its federal-aid funds in the manner in which it pleases, repeat offenders could remain employed, and employers would not have to entertain the idea of installing IIDs. Looking at all the modified provisions of HB 2182 together, the monetary incentives to abandon the key exceptions to Arizona DUI laws do not outweigh the burdens on those affected.

V. CONCLUSION

HB 2182 was a necessary approach to conform to the federal DUI laws. The exigency of Arizona's situation required immediate change. However, this change places Arizona citizens in a predicament, leaving many with no employment. Moreover, employers will not benefit from installing IIDs in their company vehicles. MAP-21 may appeal to the federal government, but removing these Arizona exceptions will create anticipated litigation for years to come.

⁴² *Labor Force Statistics from the Current Population Survey*, U.S. DEP'T LAB., <http://data.bls.gov/timeseries/LNS14000000> (last visited Apr. 8, 2014).

APPENDIX I.⁴³

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

N4510.759 - TABLE 3

FY 2013 PENALTIES ASSESSED PURSUANT TO 23 U.S.C. 164
(before designation of any penalty shifts by States)

State	23 U.S.C. 164 Penalty Amounts (Minimum Penalties for DWI or DUI Repeat Offenders)		Total
	National Highway Performance Program	Surface Transportation Program	
ALABAMA	\$0	\$0	\$0
ALASKA	7,242,375	3,331,265	10,573,640
ARIZONA	10,341,995	4,756,993	15,098,988
ARKANSAS	0	0	0
CALIFORNIA	48,312,949	22,222,439	70,535,388
COLORADO	0	0	0
CONNECTICUT	0	0	0
DELAWARE	0	0	0
DIST. OF COL.	0	0	0
FLORIDA	0	0	0
GEORGIA	0	0	0
HAWAII	2,410,599	1,108,800	3,519,399
IDAHO	4,172,153	1,919,059	6,091,212
ILLINOIS	0	0	0
INDIANA	13,831,028	6,361,839	20,192,867
IOWA	7,198,282	3,310,984	10,509,266
KANSAS	0	0	0
KENTUCKY	0	0	0
LOUISIANA	10,551,305	4,853,269	15,404,574
MAINE	0	0	0
MARYLAND	8,261,616	3,800,084	12,061,700
MASSACHUSETTS	0	0	0
MICHIGAN	0	0	0
MINNESOTA	9,450,199	4,346,795	13,796,994
MISSISSIPPI	0	0	0
MISSOURI	0	0	0
MONTANA	6,048,677	2,782,201	8,830,878
NEBRASKA	4,258,272	1,958,671	6,216,943
NEVADA	0	0	0
NEW HAMPSHIRE	0	0	0
NEW JERSEY	0	0	0
NEW MEXICO	5,444,203	2,504,162	7,948,365
NEW YORK	0	0	0
NORTH CAROLINA	15,114,498	6,952,194	22,066,692
NORTH DAKOTA	0	0	0
OHIO	18,921,978	8,703,516	27,625,494
OKLAHOMA	9,532,017	4,384,428	13,916,445
OREGON	7,326,373	3,369,902	10,696,275
PENNSYLVANIA	0	0	0
RHODE ISLAND	3,170,468	1,458,316	4,628,784
SOUTH CAROLINA	0	0	0
SOUTH DAKOTA	4,116,868	1,893,630	6,010,498
TENNESSEE	0	0	0
TEXAS	0	0	0
UTAH	4,720,184	2,171,137	6,891,321
VERMONT	2,901,965	1,334,813	4,236,778
VIRGINIA	0	0	0
WASHINGTON	9,729,919	4,475,457	14,205,376
WEST VIRGINIA	0	0	0
WISCONSIN	0	0	0
WYOMING	3,751,725	1,725,676	5,477,401
Total	\$216,809,648	\$99,725,630	\$316,535,278

⁴³ See *supra* note 24 and accompanying text. The graph represents twenty-three states that were non-complaint with 23 U.S.C. § 164 and the total amount of apportioned federal-aid funds. According to the graph, California lies at the top of the list, losing over seventy million in federal-aid funds. According to Representative Alberto Gutierrez, of the Arizona Department of Transportation, California DUI laws are in complete contradiction to the federal statute. *H. Transportation Hearing, supra* note 2 (statement of Alberto Gutierrez, Ariz. Dep't of Transp.) (audio at approximately 01:37).

WHAT'S IN A WORD: LIMITING CITIES' ABILITY TO
FIGHT URBAN BLIGHT

David Keys-Nunes*

I. INTRODUCTION

Arizona mandates that its counties, cities, and towns compel owners, lessees, or occupants of real property to maintain their property in a condition that does not pose a threat to the public's health or safety.¹ The Fifty-first Legislature of Arizona, during the First Regular Session, passed Senate Bill 1466, which relates directly to the power of cities and towns to remove hazardous structures.² This bill amended section 9-499 of the Arizona Revised Statutes ("A.R.S.") by replacing the words "dilapidated structures" with "dilapidated buildings."³

With the change in wording came a new definition of a dilapidated building. The new definition of a dilapidated building limits the authority of a city to order the removal of an improvement to a "real property structure that is likely to burn or collapse" that also endangers the public.⁴ This comment addresses the changes made to A.R.S. § 9-499 by S.B. 1466 and why those changes were made. Additionally, it objectively evaluates the impact this bill's passage will have on Arizona's cities and towns. While the change to the wording seems minor, the effect is a much narrower ability for cities and towns to use this statute to address urban blight.

II. CHANGES AND PASSAGE

Title 9 of the Arizona Revised Statutes delegates powers to Arizona's cities and towns. Similarly, the powers of the various counties are addressed in Title

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¹ ARIZ. REV. STAT. ANN. §§ 9-499, 11-268 (Westlaw through the First Regular and First Special Sessions of the Fifty-first Legislature (2013)).

² S.B. 1466, 51st Leg., 1st Reg. Sess. (Ariz. 2013).

³ *Id.*

⁴ § 9-499.

11. Arizona's counties, cities, and towns all possessed the authority to order the removal of structures that constituted a hazard to public health; however, prior to the passage of S.B. 1466, the statutory language differed between counties and towns.⁵

A.R.S. § 11-268 allowed counties to remove a building that was “in such disrepair or is damaged to the extent that its strength or stability is substantially less than a new building.”⁶ Senator Gail Griffin introduced Senate Bill 1207 in 2011 to address concerns brought to her attention by county supervisors within her district.⁷ S.B. 1207 removed the provision that allowed removal of a building that was damaged to the extent that it was substantially less stable than a new building.⁸ What remains of the definition of a dilapidated building is a real property structure that “is likely to burn or collapse and its condition endangers the life, health, safety, or property of the public.”⁹

The powers granted to cities and towns under A.R.S. § 9-499 were very similar to those allowed to the counties under A.R.S. § 11-268.¹⁰ While the powers were similar, the definition of what cities could remove was different. Rather than allowing removal of dilapidated buildings (as the counties had), the statute gave cities the power to remove dilapidated structures.¹¹ A dilapidated structure was defined as “buildings, improvements, and other structures that are constructed or placed on land.”¹²

In 2013, Senator Griffin sponsored Senate Bill 1466 which sought to remove the definition of a dilapidated structure from A.R.S. § 9-499 and replace it with the definition of a dilapidated structure contained in A.R.S. § 11-268.¹³ Lobbyist Amanda Rusing with the Dorn Policy Group, on behalf of the Arizona Planning Association, spoke in favor of S.B. 1466 before the Senate Committee on Government and Environment, as well as the House Committee on Government.¹⁴ Ms. Rusing stated before the House Committee

⁵ See Ariz. S.B. 1466 (The previous version allowed cities to remove a dilapidated structure, which had a broad definition.); Ariz. S.B. 1207, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (The previous version had a more expansive definition of a dilapidated building.).

⁶ See Ariz. S.B. 1207.

⁷ *Dilapidated Building, Definition: Hearing Before the H. Comm. on Gov't*, 50th Leg., 1st Reg. Sess. (Ariz. Mar. 5, 2011), http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=8825 (statement of Sen. Gail Griffin).

⁸ *Id.*; Ariz. S.B. 1207.

⁹ Ariz. S.B. 1207.

¹⁰ See Ariz. S.B. 1466; Ariz. S.B. 1207.

¹¹ See Ariz. S.B. 1466.

¹² *Id.*

¹³ S.B. 1466, 51st Leg., 1st Reg. Sess. (Ariz. 2013).

¹⁴ *Cities, Towns, Dilapidated Buildings: Hearing before the S. Comm. on Gov't and Env't*, 51st Leg., 1st Reg. Sess. (Ariz. Feb. 18, 2013), http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=11795; *Cities, Towns, Dilapidated Buildings: Hearing before the H. Comm. on*

on Government that “some of the cities . . . may have some issues with [the bill].”¹⁵ The City of Phoenix expressed concern that the definition may tie its hands with regard to the issue; however, the city never followed up with Ms. Rusing when invited to do so.¹⁶

Ms. Rusing stated that one of the reasons Senator Griffin wanted to pass the bill was “to discourage local governments from overstepping their bounds” by tearing down any structure that they chose.¹⁷ The bill was passed with overwhelming support in both the House and the Senate.¹⁸

III. IMPACT ON CITIES AND TOWNS

In the previous iteration of A.R.S. § 9-499, cities and towns could order the removal of any structure that posed a hazard to the public’s health or safety.¹⁹ This power to order removal was not without safeguards for property owners. Section 9-499 required at least a thirty-day notice be provided to the owner by the city, in addition to requiring that the city establish a method for the owner to appeal the notice.²⁰ This affords property owners the right to due process before any action is taken by local governments.²¹

This statute is an important tool for local governments in the maintenance of their municipalities. In *City of Tempe v. Fleming*, the Court of Appeals held that a local government could not use eminent domain to abate a nuisance.²² The court then specifically pointed to the authority granted to cities under A.R.S. § 9-499 as the specific authority provided by the legislature to local governments to abate nuisance properties.²³ S.B. 1466 has limited the ability of cities and towns to use § 9-499 for this important purpose.

What can Arizona cities and towns do to address problem properties that are not at risk of collapse or burning? The City of Atlanta has sought to address the problem of drug use and prostitution in abandoned houses by

Gov’t, 51st Leg., 1st Reg. Sess. (Ariz. Mar. 11, 2013) [hereinafter *2013 Hearing before the H. Comm. on Gov’t*], http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=12096.

¹⁵ *2013 Hearing before the H. Comm. on Gov’t*, *supra* note 14.

¹⁶ Email from Amanda Rusing, Lobbyist, Dorn Policy Grp., Inc., to author (Sept. 6, 2013, 11:58 MST) (on file with author).

¹⁷ *Id.*

¹⁸ *Bill Status Overview: SB1466*, ARIZ. ST. LEGISLATURE, http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/51leg/1r/bills/sb1466o.asp&Session_ID=111 (last visited Apr. 5, 2014) (Senate: 29 ayes, 0 nays, 1 not voting; House: 59 ayes, 0 nays, 1 not voting).

¹⁹ See S.B. 1466, 51st Leg., 1st Reg. Sess. (Ariz. 2013).

²⁰ *Id.*

²¹ *City of Safford v. Seale*, No. 2 CA-CV 2008-0185, 2009 WL 3390172, at *3 (Ariz. Ct. App. Oct. 21, 2009) (discussing the right of a home owner to remedy a public nuisance before abatement or demolition).

²² *City of Tempe v. Fleming*, 815 P.2d 1, 4-5 (Ariz. Ct. App. 1991).

²³ *Id.* at 5.

removing those houses from the property.²⁴ Similar measures have been examined in several other cities.²⁵ Under S.B. 1466, a structure that is being used for illicit drug or gang activity would not qualify as a dilapidated structure.²⁶

Some cities have adopted voluntary measures in an attempt to remove these types of structures,²⁷ but that does not address what options are left to the city for owners who refuse to participate in those programs. In circumstances where drugs or prostitution within a property present an issue, the affected municipality could declare the property a public nuisance and seek abatement under alternative statutes.²⁸ For abatement to be effective, it would have to be read in its broadest sense to mean removal of the physical structure.²⁹ Often drugs and prostitution are occurring within vacant and abandoned homes; therefore, service of an injunction upon the owner is unlikely to remedy the issue.³⁰

IV. CONCLUSION

Senate Bill 1466 changes the definition of what types of buildings a local government may compel an owner to remove and the conditions under which removal may be ordered. The purpose of the bill was to prevent cities from overstepping their bounds by demolishing buildings arbitrarily. For cities that relied upon A.R.S. § 9-499 to remove structures that threatened their communities, a restructuring of their approach will be necessary.

Through the new restrictions placed upon cities, it is unclear what alternatives local governments will have to address problems associated with blighted structures that fall outside of the new definition provided by S.B. 1466. Many cities will likely have to rely upon other statutes in Titles 13 and 36 that define public nuisances as they attempt to combat blight and crime. In the event that removal of dilapidated structures becomes problematic for cities and towns, this issue will have to be readdressed at the legislature.

²⁴ Hollis R. Towns, *Cracking Down on Crack Houses Atlanta Official Wants to Hold Owners Responsible*, ATLANTA J. & CONST., Dec. 16, 1997, available at 1997 WLNR 3238593.

²⁵ Alex Kotlowitz, *All Boarded Up*, N.Y. TIMES, Mar. 8, 2009, at MM28, available at http://www.nytimes.com/2009/03/08/magazine/08Foreclosure-t.html?pagewanted=all&_r=0.

²⁶ S.B. 1466, 51st Leg., 1st Reg. Sess. (Ariz. 2013) (unless it was at risk of collapse or burning).

²⁷ *Program Clears City of Dilapidated Buildings*, ARIZ. REPUBLIC, Mar. 2, 2013, available at 2013 WLNR 10650898.

²⁸ See e.g., ARIZ. REV. STAT. ANN. §§ 13-2917, 36-601 (Westlaw through the First Regular and First Special Sessions of the Fifty-first Legislature (2013)).

²⁹ BLACK'S LAW DICTIONARY 3 (9th ed. 2009) ("The act of eliminating or nullifying").

³⁰ See generally Kotlowitz, *supra* note 25.

H.B. 2517: ARIZONA'S ATTEMPT TO FIGHT DOMESTIC VIOLENCE
CLAIMS WITH NON-MANDATORY ARRESTS

Haley Harrigan*

I. INTRODUCTION

Domestic violence is ubiquitous in today's society. However, whether domestic violence "offenses" in fact qualify as offenses under the law is often left unanswered.¹ In June 2013, the Arizona Legislature attempted to close this question by imposing a minimum age requirement of fifteen years in cases of domestic violence before a peace officer can make a warrantless arrest.² This authorization stems from House Bill 2517 ("H.B. 2517"), which is a relaxed departure from the prior law, providing law enforcement with less stringent requirements when deciding whether to make arrests for potential domestic violence offenses.³

This Comment will further explore H.B. 2517's provisions, the justifications for its change, and will conclude with a pro-con analysis of the new law, noting the potential future implications that H.B. 2517 might carry.

* Haley Harrigan is a May 2015 Juris Doctor candidate at Arizona Summit Law School and has enjoyed being a part of *Arizona Summit Law Review*. She would like to dedicate this piece to anyone that has ever been a victim of domestic violence.

¹ "Domestic violence occurs when "any of a set of prescribed acts is committed against a person who has a familial relationship to the defendant as defined in [A.R.S. § 13-3601(A)]". Ariz. S. Fact Sheet for H.B. 2517, 51st Leg., 1st Reg. Sess. (2013), http://www.azleg.gov/legtext/51leg/1r/summary/s.2517jud_as%20passed.pdf ("These acts include, but are not limited to, dangerous crimes against children, homicide, assault, kidnapping, sexual offenses, criminal trespass, property damage and offenses against public order.").

² *Domestic Violence; Arrest: Hearing on H.B. 2517 Before the H. Comm. on the Judiciary*, 51st Leg., 1st Reg. Sess. (Ariz. Feb. 14, 2013) [hereinafter *Hearing on H.B. 2517*], http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=11748 (audio at approximately 38:37).

³ See generally H.B. 2517, 51st Leg., 1st Reg. Sess. (Ariz. 2013) (An act amending Section 13-3601 of the Arizona Revised Statutes relating to domestic violence offenses.).

II. ARIZONA'S NEW LAW: AN OVERVIEW OF H.B. 2517

H.B. 2517 unanimously passed through both the House and Senate, with minor technical amendments in the Senate.⁴ The Senate Engrossed version was adopted and signed by Governor Jan Brewer on June 19, 2013.⁵

H.B. 2517 stipulates that, in cases of domestic violence, a peace officer is only *required* to make an arrest if the offense involves physical injury, or the discharge, use, or threatening exhibition of a deadly weapon or dangerous instrument *if* that person is at least fifteen years of age.⁶ This does not mean, however, that officers cannot arrest the minor; the law does not prohibit arrests for perpetrators younger than age fifteen where probable cause authorizes the arrest.⁷

H.B. 2517 encompasses both mandated and discretionary provisions.⁸ This statute's modification states that officers do not have to make an arrest unless it is *necessary*, whereas before, officers were required to make an arrest every

⁴ See *Bill Status Overview: HB2517*, ARIZ. ST. LEGISLATURE, http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/51leg/1r/bills/hb2517o.asp&Session_ID=110 (last visited Apr. 21, 2014). Arizona Senator Adam Driggs proposed two floor amendments: (1) Adding websites for local domestic violence related resources to the list of resources that a peace officer must provide to any alleged or potential victim when responding to a domestic violence call; and (2) made technical changes ("musts" were changed to "shalls" in Section N. See Driggs Floor Amendment: Senate Amendments to HB 2517, 51st Leg., 1st Reg. Sess. (Ariz. 2013), <http://www.azleg.gov/legtext/51leg/1r/adopted/2517driggs903.pdf>.

⁵ *Bill Status Overview: HB2517*, *supra* note 4.

⁶ See *Hearing on H.B. 2517*, *supra* note 2 (audio at 2:38:42); Ariz. H.B. 2517 ("A peace officer, with or without a warrant, may arrest a person if the officer has probable cause to believe that domestic violence has been committed and the officer has probable cause to believe that the person to be arrested has committed the offense, whether the offense is a felony or a misdemeanor and whether the offense was committed within or without the presence of the peace officer. In cases of domestic violence involving the infliction of physical injury or involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument, the peace officer shall arrest a person *who is at least fifteen years of age*, with or without a warrant, if the officer has probable cause to believe that the offense has been committed and the officer has probable cause to believe that the person to be arrested has committed the offense, whether the offense was committed within or without the presence of the peace officer, unless the officer has reasonable grounds to believe that the circumstances at the time are such that the victim will be protected from further injury.") (emphasis added).

⁷ See *Hearing on H.B. 2517*, *supra* note 2 (statement of Rebecca Baker, Legis. Liaison, Maricopa Cnty. Attorney's Office clarifies that "[this law] simply allows the . . . officer to make the decision. It says they don't have to, whereas before, if an injury occurred, an arrest was mandatory.").

⁸ Ariz. H.B. 2517 (Arrest is mandatory in cases "involving infliction of physical injury or involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument." In these situations, peace officers are required to make the arrest "whether the offense was committed within or without the presence of the peace officer, unless the officer has reasonable grounds to believe that the . . . victim will be protected from further injury.").

time an injury occurred.⁹ Under the prior mandatory arrest provision of the domestic violence statute,¹⁰ if an injury occurred, arrest was required. Instead, H.B. 2517 provides a more flexible approach where officers may, on a case-by-case basis, make the call when determining whether an arrest is necessary under the circumstances.¹¹

Two other minor provisions were implemented for peace officers' response to calls alleging domestic violence offenses. The clause "websites for local resources related to domestic violence" was added to the list that peace officers must distribute to potential victims when responding to calls alleging that domestic violence has been or may be committed.¹² Also, when responding to domestic violence calls, the "musts" were changed to "shalls" for determining (1) whether a minor is present, and (2) if so, whether the child is safe or may be a victim of domestic violence or child abuse.¹³ This technical change reflects the flexibility an officer has when responding to any domestic violence calls.

III. JUSTIFICATIONS FOR CHANGE: THE BIRTH OF H.B. 2517

The genesis of this bill stems from the Juvenile Crimes Division at the Maricopa County Attorney's Office ("MCAO").¹⁴ Prosecutors from this division first brought the issue to the attention of the MCAO, which then brought the issue to the attention of the bill's sponsor, Representative Justin Pierce.¹⁵ Prior to this legislation's enactment, courts and police departments interpreted the law to require arrests even in scenarios where siblings got into arguments that turned into altercations.¹⁶ The MCAO reported seeing a large number of

⁹ See *id.* (stating however, that under both the prior and amended law, an officer's failure to make an arrest does not give rise to civil liability).

¹⁰ See *id.*

¹¹ See *generally id.* (The language of the new statute reflects this change, where the "musts" were changed to "shalls.")

¹² See ARIZ. REV. STAT. ANN. §13-3601(J) (Westlaw through the First Regular and First Special Sessions of the Fifty-first Legislature (2013)) ("When a peace officer responds to a call alleging that domestic violence has been or may be committed, the officer shall inform in writing any alleged or potential victim of the procedures and resources available for the protection of the victim including . . . *websites for local resources related to domestic violence*" and, among others, orders of protection, injunctions against harassment, emergency telephone numbers for the local police agencies, and emergency services in the local community.) (emphasis added).

¹³ § 13-3601(N) ("When a peace officer responds to a call alleging that domestic violence has been or may be committed, the officer *shall* determine if a minor is present. If a minor is present, the peace officer *shall* conduct a child welfare check to determine if the child is safe and if the child might be a victim of domestic violence or child abuse.") (emphasis added).

¹⁴ See *Hearing on H.B. 2517*, *supra* note 2.

¹⁵ *Id.*

¹⁶ E-mail from Justin Pierce, Representative, Ariz. State Legislature, to author (Oct. 31, 2013, 10:41 AM) (on file with author) (Representative Pierce describes a particular situation where "a couple of young brothers got into a fight and the police were called" and, acting upon their duties

cases where young siblings got into fights that turned violent and, as required under the prior law, officers reluctantly had to make arrests.¹⁷

Since this enactment, police officers have been informed of the law's new provisions and their expanded discretionary power when making arrests.¹⁸

IV. THE NEW LEGISLATION: A PRO-CON ANALYSIS

The impact of H.B. 2517 extends to both peace officers and the judicial system when dealing with these new domestic violence arrest procedures. Much debate occurred during the bill's hearings. Advocates believe this legislation will be a positive change for law enforcement while opponents believe this bill will preclude young perpetrators from having a bright future down the road.

A. *Advocates Promise Positive Results*

Predictably, less litigation should ensue now that police officers are not *required* to make arrests every time an injury occurs.¹⁹ Therefore, the Juvenile Crimes Division should likely see fewer claims involving sibling altercations—putting the climbing number of these incidents to a halt. In other words, The MCAO feels this legislation will alleviate an overburdened juvenile court when cases are not merited.²⁰

Furthermore, the cessation of mandatory arrests will allow family members to take remedial measures in these scenarios, where many supporters believe that sibling disputes and other minor matters are often better left to be resolved within the family.²¹ This legislation will reduce the probability of minors

required under the law, both were arrested. Several years later, a young man in a similar situation was “rejected from consideration for a military academy because he had been arrested for a sibling fight” even though the incident was years prior to his application. In this case, the police “felt they had to arrest the brothers, even though nobody was ever prosecuted and the law enforcement agency did not believe it was even necessary for them to intervene.” Pierce also noted the “new language at least draws the line at [age fifteen] so that a young kid [does not] have a record for the rest of his life.”).

¹⁷ E-mail from Adam Driggs, Senator, Ariz. State Legislature, to author (Nov. 29, 2013, 11:06 PM) (on file with author) (statement of Senator Adam Driggs recounting, “[o]fficers have reluctantly made arrests when they have felt it would have been better to let the parents and family take care of the situation.”).

¹⁸ See E-mail from Justin Pierce, *supra* note 16.

¹⁹ See E-mail from Adam Driggs, *supra* note 17 (Driggs believes that “[w]ith this legislation, officers still have the ability to make an arrest of a minor under 15 in these situations, but they are not required to.”).

²⁰ See *id.* (However, Driggs clarifies that “[o]bviously, when an officer feels the facts merit an arrest they will still make an arrest.”).

²¹ *Id.*

under the age of fifteen from automatically getting hauled to jail as a result of a fight and having to endure an unnecessary juvenile system experience.²²

However, Representative Justin Pierce does not necessarily believe that these changes will impact the Juvenile Crimes Division. He says, “[t]his [bill] was mostly for law enforcement to have cover that they don’t have to make an arrest in these situations where they never felt it was appropriate to arrest in the first place.”²³

B. Foes Promise Fight

Opponents to H.B. 2517 quarrel over the minimum age requirement. This bill does not explain why the age of fifteen was chosen.²⁴ The problematic arguments with setting the age limit at fifteen years of age are twofold: there are many violent offenders under age fifteen, and these minors are still adolescents enduring life changes; it would therefore be unfair to subject these children to domestic violence tags that attach to them for the rest of their lives.²⁵ Bill opponents challenged this bill as having a “chilling effect,” urging the committee to reconsider this low age requirement.²⁶ These opponents rely merely on anecdotal evidence, taking the stance that “the children are the future” and we are not to hold them back from growing and correcting the mistakes these teenagers made when they were in a heated altercation when they were young.²⁷

One bill challenger spoke in opposition to this bill, arguing that these children are now—because they have a domestic violence tag associated with them—not allowed to go to college, join the military, or participate in government jobs.²⁸ Therefore, this legislation will deprive children of these crucial benefits that every individual deserves, contradicting the purpose of rehabilitation in the first place.²⁹ In response, opponents argue that this age requirement should be raised to age eighteen, at the very least.³⁰

²² *Id.*

²³ E-mail from Justin Pierce, *supra* note 16.

²⁴ See E-mail from Adam Driggs, *supra* note 17 (Senator Driggs states, “[t]he only issue I was aware of is why age 15 was chosen, and what is the significance of that age.”).

²⁵ See *Hearing on H.B. 2517*, *supra* note 2 (statement of Mike Espinoza, speaking in opposition to the bill, arguing that these children will be stripped of education, jobs, and other crucial benefits.).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* (Espinoza concurs with the bill’s purpose, acknowledging that “we are on the right track . . . but let’s make it 18!”).

C. Future Implications

The passage of H.B. 2517 will have future implications regarding the amount of litigation and number of arrests relating to domestic violence. This legislation will either frustrate the system by allowing law enforcement potentially too much discretion, or it will benefit the Juvenile Crimes Division, where there will be fewer litigation claims involving sibling disputes. However, H.B. 2517's most likely implication points to fewer domestic violence arrests, particularly in scenarios of sibling disputes, but only time will tell if this legislation will result in an overall decrease in domestic violence offenses. Furthermore, "[t]here is no anticipated fiscal impact to the state General Fund associated with this legislation."³¹

V. CONCLUSION

H.B. 2517 provides an answer to the seemingly uncontrollable number of domestic violence offenses by allowing peace officers to make the call regarding when to make an arrest. This bill's intent is to give law enforcement more discretion when investigating domestic violence situations in which young minors are the perpetrator, while also mandating arrests in certain situations.³² The Arizona Legislature's decision to provide law enforcement with more discretion reflects its trust that peace officers will make arrests only under warranting circumstances. While the age selection of fifteen is somewhat arbitrary, concerns with H.B. 2517 have failed to stand in the way of its implementation.

The enactment of every law leaves an unsubstantiated question mark for what the future may hold. It remains to be seen whether the MCAO will, in fact, see a declining number of domestic violence claims, but H.B. 2517 seems to be a step in the right direction and a positive change for Arizona.

³¹ Ariz. S. Fact Sheet for H.B. 2517, *supra* note 1.

³² ARIZ. REV. STAT. ANN. §13-3601(B) (Westlaw through the First Regular and First Special Sessions of the Fifty-first Legislature (2013)) (These circumstances require arrest where "physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument" is involved.).

ALL EYES AND EARS ON TJ: A COLLECTION OF VIDEOS AND AUDIOS
RELATING TO THERAPEUTIC JURISPRUDENCE

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Therapeutic Jurisprudence (TJ) is an interdisciplinary perspective that has moved from theory to practice and has now attracted the attention of academics and practitioners internationally. The International Network on Therapeutic Jurisprudence at www.therapeuticjurisprudence.org has an extensive bibliography—with an increasing number of links to full articles—and may be searched under author, subject area, keywords, language, etc.

Here, we have listed a handful of representative videos and audios that are TJ relevant. As this entire project is and will remain a work in progress, reader feedback—and suggestions of other videos and audios for inclusion— will be most appreciated: davidbwexler@yahoo.com.

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