LINCOLN MEMORIAL UNIVERSITY
LAW REVIEW

VOLUME 4 SPRING 2017 ISSUE 2

THE UNIVERSAL EQUATION TO PRICE ALL CIVIL JUDGMENTS

David Cook

I. THE CRUSADE DOWN THE PATH OF GENUINE JUSTICE

Many fraudulent conveyances emerge from the catastrophes that cause great financial and sometimes personal losses. Two antagonistic parties emerge from the debris of civil litigation. The first is the defendant who has defaulted on an obligation, or worse, committed some grievous wrong, including a sexual assault, maiming of a person, brazen theft, infringement, swindle or cheat. The second is the plaintiff who won a big-dollar judgment, but finds that the defendant, now called a debtor, is unresponsive, unwilling, or unable to pay the civil judgment.[1] In other cases, a financial catastrophe produces legions of victims who have suffered at the hands of a Ponzi operator or peddler of defective products on a wide scale.[2] Other victims include victims of

[1] Homeowner's insurance typically provides the cost of defense, but not the indemnity. "Even conduct that is traditionally classified as 'intentional' or 'wilful' has been held to fall within indemnification coverage." Gray v. Zurich Ins. Co., 419 P.2d 168, 177 (Cal. 1966).

[2] *See* Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581, 1587 (2016), which held that fraudulent conveyance (siphoning off corporate assets) is fraud and nondischargeable under Bankruptcy Code Section 523(a)(2) (fraud). Fraudulent conveyances typically

investment schemes, real estate frauds, stock follies, and pyramid schemes, among other large-scale wrongs.[3] While the misery level might ascend or descend for each victim, the end result is the same in each case. The debtor owes a large sum of money, including punitive damages, arising from an egregious wrong and refuses to compensate the victims that are cast as the creditors in an ensuing fraudulent conveyance action.[4]

These creditors seek payment of their judgments. Payment is more than just recompense for personal and financial losses that might include the loss of a breadwinner, loss of life savings, enormous financial damage or harm, damage to property, or the inability to engage in meaningful employment. Payment restores the personal dignity and self-esteem suffered by the victim at the hands of malevolent individuals who committed the wrong for their own self-aggrandizement, greed, or malice. Getting paid is more than getting even. Getting paid is getting back a life, and no less.

The quest to seek compensation as restorative of personal esteem is the starter's pistol down this marathon. Astute to the personal anger and unrequited rage of the victim who is now a creditor under fraudulent conveyance

---

involve "a transfer to a close relative, a secret transfer, a transfer of title without transfer of possession, or grossly inadequate consideration."

[3] "What are the obligations of class counsel when he learns that the defendant in the class action he is prosecuting has ceased operations, sold its assets to a third party, and intends to file for bankruptcy?" Barboza v. W. Coast Digital GSM, Inc., 102 Cal. Rptr. 3d 295, 296 (Cal. Ct. App. 2009).

[4] *See* Cal. Civ. Code § 3439 et seq. Civil Code Section 3439.01(b) (stating claim includes tort claim, without regard to being reduced to a judgment). FRCP 69 compels the court to follow the state law remedies of the domicile state where the court sits, save discovery. The substantive body of fraudulent conveyance law is state law. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). Interest accrues at the federal (.6%), not state rate (10% plus). *See also*, Cal. Civ. Code § 3439.05 (West) (discussing balance sheet fraudulent conveyance) or Cal. Civ. Code § 3439.04 (West) (discussing conveyance with the intent to hinder, delay or defraud, and other claims).

laws, the debtor commences his or her (or its) campaign of asset protection to shield any assets from civil enforcement under the judgment.[5] To avoid any doubt, a fraudulent conveyance is a fraud upon the creditor, even without the necessary representation.[6] Asset protection means that the debtor either: changes the form or names on the title; or hides, conceals, transfers, buries, or reconfigures assets.[7] Asset protection cloaks the assets with a veil that conceals the asset from discovery and hides the assets from plain sight.[8] Even if the assets are discovered, lifting the veil to reach the assets compels the creditor to spend real money to seize the debtor's assets through legal process.[9] At some point, the financial toll to reach these assets becomes intolerable, which forces the creditor to abandon the quest.[10] All parties are sensitive to the fact that the creditor

---

[5] "A. cannot lay a trap for B., secure his confidence, induce him to make a conveyance of his property in the expectation that it will be returned, and thereafter retain the fruits of his perfidy on the ground that B. too readily yielded to temptation to save himself at the possible expense of creditors." Chamberlain v. Chamberlain, 95 P. 659, 661 (Cal. Ct. App. 1908).

[6] "The degree to which this statute remains embedded in laws related to fraud today clarifies that the common-law term "actual fraud" is broad enough to incorporate a fraudulent conveyance." *Husky*, 136 S.Ct. at 1587.

[7] *See* Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, *Inc.* 527 U.S. 308, 338–39 (1999) (stating "Moreover, increasingly sophisticated foreign-haven judgment proofing strategies, coupled with technology that permits the nearly instantaneous transfer of assets abroad, suggests that defendants may succeed in avoiding meritorious claims in ways unimaginable before the merger of law and equity").

[8] "It is in the acts of concealment and hindrance." *Husky*, 136 S. Ct. at 1587.

[9] The Uniform Voidable Transactions Act succeeded the Uniform Fraudulent Transfer Act, which is successor to the Uniform Fraudulent Conveyance Act. Courts still apply the UFCA. " . . .UFTA [history] . . . makes clear its remedies are cumulative to pre-existing remedies for fraudulent conveyances." Cortez v. Vogt, 60 Cal. Rptr. 2d 841, 849 (Cal. Ct. App. 1997).

[10] "Appellants correctly state that the UFTA does not itself authorize a fee award . . ." Cardinale v. Miller, 166 Cal. Rptr. 3d 546, 550 (Cal. Ct. App. 2014). However, Cal. Civ. Proc. Code

will expend enormous sums to unwind the debtor's fraudulent conveyance. The ultimate barrier that shields the debtor's assets is the financial burden incurred by the creditor in dismantling the veil to reach the assets. Every dollar that the debtor spends in lifting the veil of asset protection is an additional expense that deters the creditor from reaching the asset. Making the creditor spend money is the debtor's goal. The more that is spent, the closer the debtor comes to shielding all assets, assuming that sometime in the future the creditor will run out of money and quit. In addition, many debtors perceive that the trial courts and appellate courts treated them unfairly in the original proceedings. The debtor seeks to nullify this "unjust result" through asset protection by rendering the judgment uncollectible. Asset protection litigation is the continuation of the prior litigation by other means.[11]

The battle to recover attorney's fees incurred by a creditor in a fraudulent conveyance action or enforcement takes center stage.[12] Under *Cardinale v. Miller*, the creditor would not collect fees in the fraudulent conveyance action *per se*, but the creditor could recover fees against the debtor (or third party) in the original action, assuming that the judgment itself provides for an award of attorney's fees.[13] In response, the debtor will necessarily engage in various machinations to prevent the creditor from recovering fees based on the fraudulent conveyance litigation by a timely and precipitous cash payment of the underlying judgment.[14]

Section 685.040 imposes fees arising from the fraudulent conveyance actions upon the judgment debtor.

[11] "War is the continuation of politics by other means." Carl von Clausewitz. *Clausewitz: War on Politics by Other Means*, ONLINE LIBRARY OF LIBERTY: A COLLECTION OF SCHOLARLY WORKS ABOUT INDIVIDUAL LIBERTY AND FREE MARKETS (Apr. 13, 2016), http://oll.libertyfund.org/pages/clausewitz-war-as-politics-by-other-means.

[12] *See* Cal. Civ. Code § 3439.07(a) (avoid the conveyance), (b) (attachment of asset), (c) (execute on fraudulently conveyed asset).

[13] *Cardinale*, 166 Cal. Rptr. 3d at 550.

[14] *See In re* Conservatorship of McQueen, 328 P.3d 46, 55 (Cal. 2014). (holding that by timely payment before filing of cost bill

Here are few example of how asset protection accrues an expense that deters enforcement:

1. Facing civil claims arising from sexual assault charges, the perpetrator transferred his home to third parties. In ensuing civil litigation, the victim sought, and was granted, an injunction against the further transfer of the property.[15]

2. In the face of a $78,000,000 liability, the corporate defendant deeded property to the insiders and related parties. The creditor proceeded to attach the property, but the third parties (the conveyees and company insiders) filed a third party claim that the court denied. The appellate court reversed based on the trial court's error in failing to compel the creditor to prove a fraudulent conveyance.[16]

3. Husband, a doctor, engaged in an extra-marital affair that produced a daughter. The wife filed for a divorce that culminates in a marital settlement agreement that rendered the husband impecunious. The paramour filed suit to vacate the MSA that landed in the California Supreme Court.[17]

---

or fee motion, debtor avoided liability for post-judgment fees arising from fraudulent actions).

[15] "The timing of defendant's conveyance of his personal residence to a trust after he was arrested on charges of molestation may be indicative of an intent to protect his assets against creditors." Oiye v. Fox, 151 Cal. Rptr. 3d 65, 84 (Cal. Ct. App. 2012).

[16] "A creditor wishing to pursue a fraudulent transfer theory may not escape the burden of proving its claim merely because the contest is played out in a third party claim proceeding." Whitehouse v. Six Corp., 48 Cal. Rptr. 2d 600, 604 (Cal. Ct. App. 1995).

[17] "They entered into an M.S.A. under which Husband conveyed all his interest in the couple's real estate to Wife, and she conveyed her interest in Husband's medical practice to him. The M.S.A. provided that Husband would be solely responsible for his extramarital child support obligation . . . By June 1997, Husband had abandoned his medical practice. He now lives with his mother. He has no assets and little income." Mejia v. Reed, 74 P.3d 166, 168 (Cal. 2003).

The simple fact-pattern in these cases illustrates that the victims, including the victim of a sexual assault, a commercial creditor cheated out of payment, and an aggrieved mother, confronted a fraudulent conveyance that was intended to hinder, delay or defraud the plaintiff out of payment of a just liability.[18]

II. FRAUDULENT CONVEYANCE ACTION AND ENFORCEMENT ACCRUE EXPENSE AND EFFORT AND REQUIRE SKILL

Cardinale v. Miller shoulders attorney's fees upon each party in a fraudulent conveyance action.[19] Given the proclivity of the debtor to hide and conceal assets, the creditor must take pro-active steps to lock down the assets, lest the debtor launders the property through a bona fide sale or loan transactions that is called "safe harbor."[20] To insure that the conveyee will not dispose of the property pending the outcome of the UVTA, the creditor can record a *lis pendens.*[21] The creditor can attach the fraudulently conveyed property.[22] The creditor can execute upon the

---

[18] Fraudulent cases abound in bankruptcy court. *In re* High Strength Steel Inc., 269 B.R. 560 (USBC, D. De, 2001) (discussing the right of receivable owed by related party); *In re* Bernard, 96 F.3d 1279 (9th Cir. 1996) (discussing cashing out account in the face of attachment); *In re* Wilbur, 211 B.R. 98, 104 (USBC, M.D. Fla, 1997) (stating that post judgment, debtor converts accounts into cashier's check); *In re* Schafer, 294 B.R. 126, 128 (USDC, ND, CA 2003) (discussing changing banks in the face of attachment); *See* Bankruptcy Code Sections 548 and 544(b) (discussing incorporating state remedies under the UVTA seq.).

[19] Cardinale v. Miller, 166 Cal. Rptr. 3d 546, 550 (Cal. Ct. App. 2014).

[20] "Thus, a showing of good faith and reasonably equivalent value is all that is required to defeat a creditor's action based on Civil Code section 3439.04, subdivision (a)." Annod Corp. v. Hamilton & Samuels, 123 Cal. Rptr. 2d 924, 929 (Cal. Ct. App. 2002).

[21] "We believe that this broad language [of the UFTA] allows a *lis pendens* remedy." Kirkeby v. Super. Ct. of Orange Cty., 93 P.3d 395, 401 (Cal. 2004).

[22] Cal. Civ. Code § 3439.07(a)(2) (West).

fraudulently conveyed property.[23] In response, the third party (i.e., the conveyee) can file a third party claim which, as in *Whitehouse v. Six Corp.*, compels the creditor to prove up a fraudulent conveyance.[24] To obtain information to prosecute a fraudulent conveyance claim, the creditor would proceed with an examination of the debtor and even compel production of records.[25] Judgment debtors are less than forthcoming at a debtor's examination.[26] Fraudulent conveyances are built on circumstantial evidence based on a conveyance with the intent to hinder, delay, and defraud.[27] All of this legal activity accrues attorney's fees and expenses including experts.[28]

A creditor can enforce a judgment upon entry.[29] A judgment creditor must pre-pay the sheriff in order for the sheriff to enforce the judgment under a writ of execution.[30] The creditor must identify the property and location of the property in the sheriff's instructions.[31] While the sheriff is a law enforcement officer, the sheriff is not a detective and

---

[23] Cal. Civ. Code § 3439.07(c) (West).
[24] Cal. Civ. Proc. Code § 720.360 (West) [Burden of proof].
[25] Cal. Civ. Proc. Code §§ 708.110(a) and 708.130 (West). "Generally, there is no opportunity for discovery." Whitehouse v. Six Corp., 48 Cal. Rptr. 2d 600, 604 (Cal. Ct. App. 1995).
[26] "And the sanctity of the oath, by itself, does not ensure that all judgment debtors will be completely forthcoming during a judgment debtor examination." Jogani v. Jogani, 45 Cal. Rptr. 3d 792, 813 (Cal. Ct. App. 2006).
[27] Cal. Civ. Code § 3439.04(b) (badges of fraud); Neumeyer v. Crown Funding Corp., 128 Cal. Rptr. 366, 369 (Cal. Ct. App. 1976), *overturned due to legislative action on other grounds* (stating fraudulent conveyance cases based on fraud are supported by circumstantial evidence).
[28] Mehrtash v. Mehrtash, 112 Cal. Rptr. 2d 802, 805 (Cal. Ct. App. 2001) (describing necessity to prove "leviable interest in real property through an appraisal of the real property"). Court cannot judicial notice of appraisal from Zillow. *In re* Marriage of Trejo, No. E054775, 2013 WL 1779606, at *5 (Cal. Ct. App. Apr. 26, 2013).
[29] Cal. Civ. Proc. Code § 683.010 (West).
[30] Cal. Civ. Proc. Code § 683.100(a)(1) (West) (sufficient deposit sheriff to pay the costs of enforcement).
[31] Cal. Civ. Proc. Code § 687.010(a) (West) (adequate description of any property to be levied upon).

has no obligation to ferret out assets.[32] Upon entry of a judgment, the debtor is still free to dispose of assets, but the judgment creditor can impose a lien on the judgment debtor's assets.[33] The creditor is entitled to a turnover order at the conclusion of an examination of the debtor or third party.[34] These remedies enable a creditor to reach all property of the debtor but only if the creditor seeks to initiate enforcement.[35] Enforcement is statutory.[36] However, a court can order extraordinary relief in the preservation of property or order the sheriff to take exceptional steps.[37]

Given the financial burden of the creditor to enforce the judgment, and the complexity and expense of legal process to recover a fraudulent conveyance or any other asset, the debtor is motivated to hide, conceal, or secret assets solely for the purpose of increasing the creditor's absolute expense. Without a description of the assets in the sheriff's instructions, the sheriff will not enforce a judgment. In the event of a fraudulent conveyance, the creditor must "lock down" the property and therefore plead and prove a fraudulent conveyance by a preponderance of the evidence. Absent affirmative action by the creditor, and subject to the distraint, if at all, arising from any liens, the debtor is free to sell, dispose

---

[32] The sheriff follows the written instructions of the creditor. Cal. Civ. Proc. Code § 687.010(b) (West).

[33] Cal. Civ. Proc. Code § 697.340 (West) (regarding real property); *id*. § 697.530 (allows filing of JL-1, which is similar to a UCC, to encumber certain personal property); *id*. §§ 708.110(d), 708.120(c) (allowing liens on personal property of the debtor and lien on personal property of the debtor in the hands of the third party), among other liens.

[34] *Id*. §§ 708.180, 708.205(a); *Id*. § 699.040 (describing a turnover order).

[35] *Id*. § 695.010(a) (stating that all property of a judgment is subject to enforcement, unless declared immune or exempt).

[36] Imperial Bank v. Pim Electric, Inc. 39 Cal. Rptr.2d 432 (Cal. Ct. App. 1995).

[37] Cal. Civ. Proc. Code § 699.070(a) (West) (stating a court may issue extraordinary relief as circumstances might warrant).

transfer or liquidate any assets.[38] Consider the judgment, absent enforcement, in a state of stasis and subject to renewal.[39]

Given this expense and effort, and burden befalling upon the creditor to prove a fraudulent conveyance, the debtor has every motive in the world to hide, conceal or secret assets.[40] A conveyance, even if fraudulent, is still a valid conveyance between the parties.[41] The purpose of a fraudulent conveyance is to hinder, delay, and defraud the creditor that deters the creditor from enforcement the judgment itself by concealing accessible assets.[42]

III. THE UNIVERSAL EQUATION OF IMMUNITY FROM ENFORCEMENT

Compelled to finance enforcement, much less a fraudulent conveyance action and its inherent burden of proof, the conundrum for the creditor and counsel is weighing the likelihood of success. This test is more than a legal analysis of the UVTA and related claims, but rather

---

[38] The UVTA enables a creditor to set aside a conveyance. *Id*. § 3439.07(a) (stating that a "creditor" has standing).

[39] *Id*. § 683.020.

[40] Fraudulent conveyance is potential a nondischargeable debt. Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581, 1581 (2016). A fraudulent conveyance within one year of the bankruptcy might bar the entire discharge. Bernard, 96 F.3d at 1279; *see also,* Cal. Bankr. Code § 727(a)(2)(A) (West).

[41] "As Annod points out, a fraudulent conveyance is void as ***against the transferor's creditors*** and title remains in the transferor as if no conveyance had been attempted." Annod Corp. v. Hamilton & Samuels, 123 Cal. Rptr. 2d 924, 934 (Cal. Ct. App. 2002). (emphasis added); *see also,* Slater v. Bielsky, 6 Cal. Rptr. 683, 686 (Cal. Ct. App. 1960). Absent timely action, the conveyance becomes immune from enforcement under the UVTA statute of limitations. Cal. Civ. Code §§ 3439.09(a)-(c) (West) (setting the statute of limitations and statute of repose at 7 years).

[42] *Husky*, 136 S. Ct. at 1587 (holding that fraudulent conveyance as concealment).

an analytical analysis of the financial return to the client after expending time, effort, and most important, money.[43]

The test is to predict of efficiency of the asset protection scheme. For example, if the debtor successfully hid all assets that renders the assets immune from any enforcement, the efficiency of the asset protection scheme is 100%, or even greater, if the creditor expended money, no matter the cost and whether the outcome was unsuccessful. From these facts, the asset is 0% accessible to the creditor. If, on the other hand, the asset protection scheme immediately failed, and without any expense, the asset fell into the lap of the creditor, the efficiency of the asset protection is 0%, or flipped around, the asset was 100% accessible.

By framing a fraudulent conveyance as an act of concealment, *Husky International Electronics, Inc. v. Ritz* casts assets as inaccessible because these assets are concealed and therefore unavailable to the creditor, absent a fraudulent conveyance action or enforcement. When and if the creditor reaches the "concealed assets," as framed by *Husky,* the asset, in the hand of the creditor, is "accessible." What moves the asset from inaccessibility to accessibility, or not at all, involves an anagram of hard and soft factors, as follows: the hard factor is the dollar value of the concealed asset that has been found or targeted and therefore subject to some type of enforcement, whether successful or not; and second, the burden of the enforcement. The next hard factor is the "burden." The burden means the legal fees, court costs, expert fees, and soft costs (overnight charges, title reports, appraisals etc.) necessarily expended to prosecute the fraudulent conveyance action or enforcement proceeding. Add to the burden the lost opportunity costs, given that the creditor will advance funds and forego another investment opportunity for the funds. Consider the burden an

[43] These claims include UVTA, resulting trust theories (no conveyance was made), common law fraudulent conveyances, unlawful corporate distributions under California Corporations Code § 316(a), 506(b), and 2009(b), violation of the Bulk Sales Act (Article 6 of the Uniform Commercial Code), and breach of fiduciary duty if an improper corporate distribution.

element of legal "energy" or "work" that is expended to reach an accessible asset, if possible. The soft factors, which are difficult, but not impossible, to calculate, are the skills of the attorneys (on both sides of the equation), the devotion of each attorney to the case at hand, the availability of capital to prosecute or defend a case, the reputations of the attorneys, the personal and professional risks assumed in reaching property from the grip of an unstable person, the disposition of the particular judge, and the particular body of law (pro debtor or pro-creditor). The factors are incorporated into the attorney's fees that are part of the burden and, therefore, calculable in part. While bankruptcy would stop nearly all state court fraudulent conveyance actions given that the trustee is the owner of the claims, bankruptcy is generally irrelevant because the trustee subsumes the position of the creditor.[44]

Here is the equation that measures the fraudulent conveyance. Under *Husky*, the court frames a fraudulent conveyance as a tool of concealment.[45] The converse is that the legal action is to reach the fraudulent conveyed property, now reframed as inaccessible, and thereby lift the veil of the concealment. The fraudulent conveyance action filed by the creditor attacks an asset subject to concealment, reveals its existence as property of the debtor, and makes it accessible to enforcement.[46]

The denominator is the total of the claim, i.e., $1,000,000.00.[47] The numerator is the following: the dollar value of the recovered asset minus the burden equals the net recovery. This is what the equation looks like:

1- Total Cash Recovery-Total Burden =Net due the Client ÷ Total Dollar value of the Claim= Inaccessibility rate @(%).

---

[44] Cal. Bankr. Code §§ 548, 544(b) (West) (stating trustee stands in shoes of creditors).

[45] *Husky*, 136 S. Ct. at 1587 (describing fraudulent conveyance as concealment).

[46] Cal. Civ. Code § 3439.07(a)(1) (West) (describes avoiding the transfer of obligation to the extent necessary to satisfy the creditor's claim).

[47] The hypothetical is that the judgment is in the amount of $1,000,000. The accrual of interest is irrelevant for these calculations, but when factored in, would necessarily alter the outcome on an incremental basis.

#1. If the claim is $1,000,000, the cash recovery is $252,000, the fees are $151,000.00, the inaccessibility efficiency of the asset protection scheme is 89.9% and the accessibility efficiency is 10.1%.

#2. If the claim is $1,000,000, and the cash recovery is $1,000,000, but the burden is $500,000, the inaccessibility efficiency is 50%, even though the creditor collected 100% on the dollar.

#3. If the claim is $632,000, and the cash recovery is $185,000, but the burden is $100,000.00, the inaccessibility efficiency is 86.6%.[48]

#4. What if the creditor spent more money that the amount of the gross collection? The claim is $1,000,000.00. The creditor collected $353,000, but spent $500,000.00. The inaccessibility efficiency is 114.7% or 14.7% above 100%, which means that the asset protection further damaged the creditor by increasing the creditor's net loss.

#5. Sometimes the debtor succeeds under *Husky* in concealing all assets that leaves the creditor penniless, even for costs. The claim is $1,000,000. The recovery due the creditor is zero, but the creditor spent $500,000.00. The inaccessibility efficiency rate is 150%, or increasing the creditor's damages by another $500,000.

#6. What if the creditor spent just $1,000 to collection $1,000,000? The inaccessibility efficiency is .01% and the accessibility efficiency is 99.9%.

The equation establishes a realistic market pricing for any civil judgment. For example, take hypothetical #6 that sounds like an attorney writing up the payoff of the judgment that the judgment debtor or insurance company will pay. The market value of the judgment in #6 is 99.9% or par.[49] For another example, take hypothetical #5. This is

---

[48] To be really exact the inaccessibility efficiency is 86.55363912%. The accessibility efficiency is 13.449367088%

[49] Par means the face amount of the judgment that includes the principal damages, pre-judgment interest under the California Civil Code § 3287 (West) (describing the right to pre-judgment interest if the amount is fixed] or § 3289(a) (describing the interest on contract debt), court costs and potentially pre-judgment attorney's fees, if any. Wisper Corp. v. California

a judgment, which is cloaked under the veil of asset protection. The market value of the judgment in #5 is a negative $500,000.00, i.e. toxic value.

This equation proves that, at a given time the market value of judgment appreciates, or depreciates, based on the total recovered less the burden and divided by the total. However, should the creditor later discover the hidden "treasure map" that reveals the debtor's secret bank account, or box of gold doubloons, the probable recovery skyrockets accompanied by an increase, or maybe decrease, in costs to collect the judgment itself. Given that enforcement is linear (i.e., from event to another event), and that the debtor might dance around each act of enforcement, this equation can predict the future value. If the debtor ramps up an asset protection campaign by opening the closing bank accounts, or cashing out bank accounts, the response by the creditor is to levy every bank in town, and likewise serve a subpoena on every bank.[50]

Unstated, but part of the equation, is the fact that the debtor might be incurring attorney's fees in fending off enforcement. The equivocation in this sentence is not by happenstance. The fact that the debtor files papers with the sheriff or court in pro per, while the creditor has to pay for an attorney to likewise file papers with the sheriff or the court, is part and parcel of all asset protection which is to bleed the other party to death. The more polite language is a "war of attrition," which should not be understated. A famous New Yorker cartoon stated "You have a pretty good case, Mr. Pitkin. How much justice can you afford?"[51] The wonderful expression applies to both parties, but the judgment debtor needs not to retain an attorney to exchange in penny-ante tricks, including

---

Commerce Bank, 57 Cal. Rptr. 2d 141 (Cal. Ct. App. 1996) (describing entitlement to prejudgment interest).

[50] $40.00 for the sheriff's fee per bank; $100.00 for the process server to serve the levy; and $100.00 to serve the subpoena for each bank for a total of about $240 per package. Given 10 banks in town, the total burden is $2,400.00 to reach all banks to serve the levy and subpoena, plus paying for the subpoena charges incurred by the bank.

[51] Cartoon by J.B. Handelsman. Copyrighted The New Yorker Collection, 1973.

moving funds from bank to bank or opening bank accounts in the name of newly minted LLC's which are domestic, out-of- state, or even offshore. The debtor need not spend too much money in depositing cash into the bank account of a related entity that provides unrestricted access to the debtor. With little or virtually no effort, the debtor can: transfer title in real property to family members; record false and fraudulent mortgages, deeds of trust and financial statements; create promissory notes and bogus contracts that would make the debtor look insolvent; or establish "trusts" that warehouse all assets. While the debtor might fill out the asset protection forms or hire an attorney, the burden on the debtor is a trifle when compared to the time, effort, and energy of the creditor and attorney, given that the burden of proof falls upon the creditor to prove a fraudulent conveyance.[52]

Should the creditor engage in a relentless and highly aggressive campaign to collect a judgment, a judgment debtor might raise the white flag of surrender and offer a cash settlement that be the 100% of the judgment or a cash settlement. This equation still applies, because the debtor would not have settled unless the creditor had expended a lot money, time, and resources to bring the debtor to the bargaining table.

IV. PRICING THE JUDGMENT PRICES THE SETTLEMENT

Everything has a price including civil judgments. Absent judgment for the recovery of personal property, consent decrees, or injunctive relief; nearly all judgments award money damages to the plaintiff for a precise and specified sum of money.[53] All judgments accrue interest that range from less than 1% for federal judgment to about 10% in most states.[54] Given the accrual of interest, and the

---

[52] Whitehouse v. Six Corp., 48 Cal. Rptr. 2d 600, 604 (Cal. Ct. App. 1995).

[53] "In any judgment, or execution upon such judgment, the amount shall be computed and stated in dollars and cents, rejecting fractions." Cal. Civ. Proc. Code § 577.5 (West).

[54] *Id.* § 685.010(a) (listing 10% for California).

statutory right to recover post-judgment attorney's fees and costs, the debtor is motivated to pay off the judgment in order to shrink the liability footprint.[55] This judgment, given the absence of any burden and its appreciating value, is priced at 100% or even more should the debtor "dally," which enables the creditor to collect accrued interest. A delay in payment penalizes the solvent debtor given the accrual of interest in state court but not federal court.[56]

On the other hand, the debtor is recalcitrant.[57] Recalcitrance causes the creditor to accrue fees and costs which resets the price of the judgment. Take the example of the $632,000 civil judgment that produces a net return of $85,000.00. The market price of the judgment is 13.4% of its face value.[58] What does 13.4% really mean? The equation that the defendant successfully shrunk the liability footprint by 86.6%, even though losing the original [tort] case at the jury trial. This victory replicates a jury award for $85,000 when in fact the damages equaled $632,000.00. Better stated, the 13.4% price recalibration of the judgment is a repudiation of the original jury award. Granted that a judgment for $85,000 is an affront to the plaintiff, much less to the court itself, but the inaccessibility at 86.6% of enforcement resets the price of the judgment.

This equation accurately monetizes the efforts of a debtor to frustrate the efforts of a creditor in seeking to enforce a judgment in the face of robust asset protection strategies. *Husky International Electronics, Inc. v. Ritz* resets the price of every judgment. Asset protection renders inaccessible the debtor's assets that shrink to a finite number the debtor's liability under the civil judgment of this equation. Alternatively, a robust campaign, well-

---

[55] *Id.* § 685.040 (enables the creditor to collect post-judgment attorney's fee if the judgment allows fees as a line item).

[56] The daily rate of interest for $1,000,000 is $273.97 in state court, and $16.44 in federal court.

[57] Family law courts are common forums for fraudulent conveyances. *See In re* Marriage of Dick, 18 Cal. Rptr. 2d 743 (Cal. Ct. App. 1993) (optimizes offshore asset protection schemes). The family law court awards attorney's fees. *Id*. at 168 (granting $750,000-in part related to asset protection).

[58] This number is rounded to the nearest 10th of a decimal point.

financed and with competent representation, alters the pricing of the judgment, which would, of course, expand, or even exceed, the debtor's true liability footprint under the original judgment.[59] This equation prices to the judgment all "price points" up and down this asset protection continuum. The efforts to hide, and the efforts to seek, assets are now calculated to 7th decimal point, which includes, for example, the net payment of $84,999.999691 due the creditor based on the $632,000 judgment.[60]

Pricing through this equation is more than just quantifying the success or failure of asset protection campaign. The pricing of judgment through this equation takes center stage in the medium of settlement, whether by direct contact, a judicially mandated settlement conference, or mediation, when the parties have a good idea in pricing the potential judgment at par. After years of litigation, and rounds of discovery, chances are that the parties can reasonably predict the outcome of the case. Clearly, parties and their attorneys are sometimes surprised, but generally experienced attorneys have a good grip on the final "price" of the judgment. Absent a fully insured defendant for the costs of defense and indemnity, or a very solvent defendant, the equation becomes part of, if not overwhelms, all dispute resolutions. Nothing is more important than getting paid and paid without further litigation, expensive enforcement or toppling asset protection schemes. This imperative drives all settlements and the respective strategies of the warring parties that reveal themselves in settlement "Technicolor." The erstwhile defendant boasts that the plaintiff never collects come "hell or high water" or, alternatively, the plaintiff

[59] If the creditor collected interest, costs and attorney's fees, and tort damages that arise out of the fraudulent conveyance action, the price of the original judgment would exceed its par value. A creditor can recover damages arising from a fraudulent conveyance and even punitive damages. Cardinale v. Miller, 166 Cal. Rptr. 3d 546, 549 (Cal. Ct. App. 2014) (granting compensatory damages of $2,170,593; punitive damages of $900,000; and $293,937.50 in attorneys' fees). The accessibility quotient might exceed 100%.

[60] Based on hypothetical #3.

threatens that "no stone shall be unturned."[61] Based on the risk of nonpayment of a settlement and applying this equation, the plaintiff's counsel is instructed to: demand security to insure performance under a payment program given the risk of a later asset protection or debtor fatigue; agree to accept a cash sum to avoid the risk of the pre-ordained default under the payment program; or demand and receive a personal guaranty from a solvent party.[62] Other settlement options abound.

Whatever the charges or counter charges in the medium of a settlement, the parties and their attorneys apply this equation to reach, if possible, a number that fairly reflect the true price of the judgment and settle the case accordingly.

[61] Hooser v. Superior Court, 101 Cal. Rptr. 2d 341 (Cal. Ct. App. 2000).

[62] Debtor fatigue means that the debtor defaults because the debtor decides that "enough money has been paid." This term is common in Chapter 13s.

LINCOLN MEMORIAL UNIVERSITY
LAW REVIEW

VOLUME 4 SPRING 2017 ISSUE 2

UNIFORM COMMERCIAL CODE STUDY AS BUSINESS CAREER CERTIFICATE PREPARATION: THAT CERTIFIED COMMERCIAL CONTRACTS MANAGER CREDENTIAL

GEORGE SWAN[a1]

I. INTRODUCTION

Standard 1 of the 2013 Business Accreditation Standards of the Association to Advance Collegiate Schools of Business ("AACSB") regards the mission, impact, and innovation of a college of business:

> The school articulates a clear and distinctive mission, the expected outcomes this mission implies, and strategies outlining how these outcomes will be achieved. The school has a history of achievement and improvement and specifies future actions for continuous improvement and innovation consistent

[a1] Associate Professor at North Carolina A&T University's College of Business

> with this mission, expected outcomes, and strategies.[1]

In view thereof, salutary support of a practical teaching-enhancement device is discussed herein: the Certified Commercial Contracts Manager ("CCCM") credential. The CCCM is awarded by the National Contract Management Association ("NCMA"). Tomorrow, the CCCM increasingly could serve as a signaling tool for business school-graduates in their challenging employment market. This business title constitutes a Uniform Commercial Code-focused credential. As such, today it appears particularly relevant to classroom teachers of business law. Business schools' law professors' summoning students' attention toward the CCCM appears particularly timely for 2018 in light of America's ever-commercializing employment market.

II. BUSINESS SCHOOLS', LAW PROFESSORS, AND ACCOUNTANCY

It was Germany wherein developed the intial model for the research-based college of business.[2] In Germany, business education and research proved accountancy-oriented.[3] Modern America's business law professors have adopted curricula comporting with AACSB International goals and objectives for years, while perceiving a duty to train their accounting students for public accounting careers.[4] A law school's graduates' capacity to surmount the bar examination squares with the institution's own educational goals; naturally, the legal curriculum typically suffices (assuming a

---

[1] AACSB INTERNATIONAL, ELIGIBILITY PROCEDURES AND ACCREDITATION STANDARDS FOR BUSINESS ACCREDITATION (2016), http://www.aacsb.edu/-/media/aacsb/docs/accreditation/standards/businessstds_2013_update-3oct_final.ashx.

[2] Kimmo Alajoutsijärvi, et al., *The Legitimacy Paradox of Business Schools: Losing by Gaining?* 14 ACAD. OF MGMT. LEARNING & EDUC. 277, 279 (2015).

[3] *Id*. at 280.

[4] M.C. Kocakulah, et al., *The Present State of the Business Law Education of Accounting Students: The Business Law Professor's Perspective*, 26(1) J. OF LEGAL STUD. EDUC. 137, 139 (2009).

reasonable review-effort by just-graduated Juris Doctors) to arm graduates for that ordeal.[5]

Consequently predictable is a vision of themselves, held by most professors of business law as preparers of accounting students aspiring to the Certified Public Accountant ("CPA") credential:

> Just as lawyers receive training within the three-year law school curriculum that helps them to pass their state bar examinations, accounting students who master a comprehensive curriculum in business law and the regulatory environment will find the business law portion, or law-related questions on the CPA examination a much less significant hurdle than those who have had no curriculum in law.[6]

In other words: "The law courses that business schools offer to potential CPAs should be designed to ensure mastery of the subjects covered on the CPA examination . . ."[7] This might remain true whether or not twenty-first century voices in accountancy education disclaim passage of the CPA Examination as an accountancy educational goal.[8] To the minds of surveyed business law educators of 1993 and 2005, UCC-topics numbered among the topmost ranks among CPA Examination subject-matters of salience to accountancy students contemplating a public accounting career.[9]

However, the 1980s was when the law component of the CPA Examination held a sway wider than thereafter.[10] Upon CPA Examination revisions of 1994 through 2004 or still more recently, the business law element of the test reached its

---

[5] *Id*. at 161, 180.

[6] *Id*. at 180; Christine Neylon O'Brien & John Neylon, *The Role of Business Law in the 150 Hour Educational Requirement for CPA Certification*, 18 J. OF LEGAL STUD. EDUC. 1, 19 (2000).

[7] *Id*. at 18.

[8] KOCAKULAH ET AL., *supra* note 4, at 156.

[9] *Id*. at 160-161, 174-175.

[10] Carol J. Miller & Susan J. Crain, *Legal Environment v. Business Law Courses: A Distinction Without a Difference?* 28 J. OF LEGAL STUD. EDUC. 149, 158 (2011).

then-nadir.[11] Examination-revision diminishing business law-and-accountancy professors' potent rationale for business law course-requirements, the incentives for accountancy students to register for elective business law coursework faded accordingly.[12] Meanwhile, between 1969 and 2009 corporate law was removed from the majority of business schools' curricula.[13] As early as 1969 the AACSB excised language from its standards that looked to business law as a curricular requirement.[14]

For decades, new Certified Public Accountants have deemed business law as of comparatively slight import respecting their own professional competence. [15] And nowadays prominent organizations of the accountancy field treat business law acumen as of eroding import for their calling's college graduates.[16] The Uniform Accountancy Act Model Rules require no business law coursework, albeit expressly exacting income taxation-training. [17] Universities overwhelmingly have come to require but a single business-core law-based course for their majors in business; the decline from a minimum of two such business law courses to this decade's solitary one transpired over 1960-2010.[18] Proceedings of the AACSB Golden Jubilee Meeting over April 25-29, 1966, already evidenced the shifting tide.[19]

The American Institute of Certified Public Accountants ("AICPA") released an Exposure Draft: Maintaining the Relevance of the Uniform CPA Examination on September 1, 2015.[20] Said "relevance" communicates to the citizenry that the

---

[11] KOCAKULAH ET AL., *supra* note 4, at 144.
[12] *Id*. at 182.
[13] J.C. Spender, *The Past Is Present,* BizEd, 42-44 (March/April 2016).
[14] KOCAKULAH ET AL., *supra* note 4, at 152.
[15] *Id*. at 146.
[16] *Id*. at 139.
[17] *Id*. at 141, 178.
[18] MILLER & CRAIN, *supra* note 11, at 166.
[19] *Id*. at 166-167, 167 n.83.
[20] AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, EXPOSURE DRAFT: MAINTAINING THE RELEVANCE OF THE UNIFORM CPA EXAMINATION 3 (2015), https://www.aicpa.org/BecomeACPA/CPAExam/nextexam/DownloadableDocuments/Next-CPA-Exam-Exposure-Draft-20150901.pdf.

AICPA's Certified Public Accountant credential maintains its assurance of high professional capacities. Accommodating an entrepreneurial spirit, the Exposure Draft related: "The accounting profession is dynamic, and the required skills and abilities of CPAs need to evolve to keep pace with the increasing rate of change in the marketplace."[21] That Exposure Draft delivered proposals for the impending version of the Uniform CPA Examination.

The Exposure Draft delineated proposed revisions to become effective upon approval by the AICPA Board of Examiners:[22] "The AICPA will consider all responses received on or before November 30, 2015,"[23] i.e., in eleven weeks from the Exposure Draft's release. Actual revisions were to be announced during 2016 toward adoption for the 2017 Exam.[24] The structure of the Exam was to continue as that of its current four sections.[25]

Business Law was to remain as area II of the Regulation section: "The Regulation (REG) section tests knowledge and skills that a newly-licensed CPA must demonstrate with respect to federal taxation, ethics and professional responsibilities related to tax practice, and business law."[26] Anticipated was extension of the Exam's length from 14 to 16 hours.[27] But the proportion of the upcoming version of the Exam allocated area II shriveled to 5-15 percent from its current 17 to 21 percent.[28] Business Law's contemplated ceiling falls beneath its prior floor: "Additionally, the content percentage allocated to Area II will be reduced."[29] For example: "The group Uniform Commercial Code will be eliminated; however, the topic *Secured Transactions*, formerly in that group, will move to the group Debtor-Creditor Relationships."[30]

---

[21] *Id*. at 23.
[22] *Id*. at 2.
[23] *Id*. at 6.
[24] *Id*. at 4.
[25] *Id*. at 3.
[26] *Id*. at 21.
[27] *Id*. at 4.
[28] *Id*. at 21, A55.
[29] *Id*. at 21.
[30] *Id*. at 21 (italics in original).

The National Association of State Boards of Accountancy ("NASBA") reacted to this Exposure Draft via its October 23, 2015, joint letter from NASBA's President-CEO, and its Chair, to the AICPA Board of Examiners. Regarding significant areas of content, this reply propounded, inter alia:

> In REG, Area II – Business Law, Topic D. Government Regulation of Business: The International Qualifications Appraisal Board (IQAB) is concerned about deleting a significant portion of the content that has been tested regarding the Uniform Commercial Code, as well as other federal laws and regulations (including antitrust, copyright, patents, money laundering, labor, employment and ERISA). This is important because the REG section of the Examination is used as the International Qualifications Examination (IQEX). It is imperative that this section not be reduced.[31]

Imperative. Respecting the content ranges within each section of the Examination, this NASBA response offered:

> a. The reduction in emphasis on REG, Area II, Business Law is concerning. A reduction from a minimum of a 17% focus to only a 5% focus seems extreme, as the basic understanding of business law is crucial to all CPAs. We would suggest a minimum range would be between 10% and 15%. Further, if REG is going to continue to serve as the IQEX Exam, Business Law topics should be

[31] Letter from Walter C. Davenport, Chair of the NASBA, and Ken L. Bishop, President and CEO of the NASBA, to the Board of Examiners of the AICPA (Oct. 23, 2015), *available at*https://media.nasba.org/files/2015/10/Response-to-CPA-Exam-Exp-Oct-23-2015.pdf.

> increased to range between 15% and 20% of the Examination.
> b. We note that throughout all four sections of the Examination, the number of content areas has been reduced and the percentage bands within each reconstituted area have been expanded.Why were bands with ranges from 4-6% previously, now all given ranges of 10%? This has the effect of providing less granularity and insight to stakeholders, including candidates, regarding the importance of various topics. . .
> c. This expansion of percentage bands also seems to give much latitude in creating panels. As an example, as outlined in the Exposure Draft, 85% of one REG. Examination could be devoted solely to taxation topics, leaving only 15% for business law, ethics, professional responsibilities and federal tax procedure. . ..[32]

Hence assume, arguendo, that within accountancy the requisite command of business law (expressly embracing the Uniform Commercial Code) were to shrink. There transpires an actual, years-long annual evaporation from business schools' applicant-pool.[33] Hence assume, arguendo, that such yearly diminution endures. If those conditions prevailed in 2017, then how during 2018 could undergraduate commerce colleges' business law professors substantiate their own value more vigorously?

III. COMMERCIALIZED EMPLOYMENT-MARET CAPABILITIES SIGNALING

[32] *Id*. at 4-5.
[33] Alexandra Wolfe, *Clayton Christensen,* WALL ST. J., Oct. 1-2, 2016, at C17.

The undergraduate school of business law professor constructively could reinforce 2018's students and future alumni and alumnae through facilitating award to them of well-earned professional business certifications. Undergraduate business colleges'entering freshmen seek more structured support and career guidance, even tailored career advice, than that on-offer hitherto.[34] Simultaneously, knowing scholars of business assert: "When assessed from an employer's perspective, any evidence of a student's study for professional designations and/or passing those exams may suggest a high level of ambition, strong work ethic and career commitment from that student."[35]

Any payoffs from students' display to employers of such affirmative evidence might particularly prove practical for an identifiable population of the student-bodies found among America's many undergraduate commerce colleges. For in 2016, economists Eric R. Eide, Michael J. Hilmer and Mark H. Showalter reported their study of the earnings of approximately 7,300 college graduates a decade postgraduation. [36] Their report controlled for variables influencing graduates' incomes including, e.g., age at conferral of degree, ethnicity/race, family income, graduate degrees, marital status, SAT scores, and sex.[37] It disclosed that the sharpest earnings gaps develop among business majors; products of selective institutions command 12% greater average earnings than do midtier-colleges' products and 18% more in earnings than graduates of least-selective colleges.[38] These economists add: "[I]t could be related to differences in

---

[34] Srilata Zaheer, *Business is Our Classroom,* BIZED (February 23, 2016), http://www.bizedmagazine.com/archives/2016/2/features/business-is-our-classroom.

[35] Joseph W. Goetz, et al., *Integration of Professional Certification Examinations With the Financial Planning Curriculum: Increasing Efficiency, Motivation, and Professional Success,* 4 AM. J. OF BUS. EDUC. 35 (2016), https://www.cluteinstitute.com/ojs/index.php/AJBE/article/view/4111.

[36] Eric R. Eide & Michael J. Hilmer, *Is It Where You Go or What You Study? The Relative Influence of College Selectivity and College Major on Earnings*, 34 CONTEMP. ECON. POL. 37, 39 (2016).

[37] *Id*.

[38] *Id*., at 41.

alumni networks and other connections with potential employers for jobs and internships due to institutional prestige." [39] Truly could it be connected with those divergences, because 21 years earlier Cornell University Professor of Economics, Ethics, and Public Policy Robert H. Frank and Duke University Professor of Public Policy Philip Cook discerned: "Many of the nation's most prestigious employers have an interest in hiring the graduates of elite institutions quite independently of how they perform on the job."[40]

So faculty members serving less-exclusive student bodies within less-prestigious institutions ought, for their identifiable student-segment among America's undergraduate business schools, to help level an uneven jobhunting-field. Pursuit of a business professional designation by commerce college undergraduates exemplifies the signaling exercise: "The use of a mechanism by which someone indicates to someone else that they have certain characteristics, even though those characteristics are not directly observable…. Economists have been increasingly inclined to explain economic and non-economic phenomena as signals."[41] Paul Seabright, respected professor of economics at the Toulouse School of Economics, observes how, after all, everyone serves within networks shaping self-presentation to everybody else.[42] Consider the following:

> . . . students may seek qualifications through formal examinations even though they have no interest in a subject, and it is well known that it will be of no use to them in actually doing a job. This is rational conduct if they believe that prospective employers will regard

---

[39] *Id.*

[40] ROBERT H. FRANK & PHILIP J. COOK, THE WINNER-TAKE-ALL SOCIETY: WHY THE FEW AT THE TOP GET SO MUCH MORE THAN THE REST OF US 148 (1995).

[41] GRAHAM BANNOCK, ET AL., DICTIONARY OF ECONOMICS 380 (1998).

[42] PAUL SEABRIGHT, THE WAR OF THE SEXES: HOW CONFLICT AND COOPERATION HAVE SHAPED MEN AND WOMEN FROM PREHISTORY TO THE PRESENT 125 (1st ed. 2012); PAUL SEABRIGHT, THE COMPANY OF STRANGERS: A NATURAL HISTORY OF ECONOMIC LIFE (rev. ed. 2010).

> success in examinations as signaling ability, so that such success helps obtain a good job.[43]

Reinforced employment-marketplace signaling capability is advisable for less prestigious institutions' graduates, even after factoring-in their presumptive willingness to work for less. For employers' hiring is impeded by information costs, even when labor's marginal value product exceeds its remuneration.[44]

Respecting human capital, employer-employee certification signals also succeed in reverse. Those burgeoning "Best Places to Work" certifications correspond to lower rates of turnover. There seem such turnover abatements across multiple certifications, albeit at shrinking marginal turnover-diminutions. With an employer's certifications-increase comes an elevation of applicant pool quality for smaller enterprises.[45]

Certified Public Accountants boast generalist practicioners and specialists to boot, e.g., forensic accountants, management accountants, and tax accountants. [46] Undergraduate school of commerce law professors, heedful of professional business certifications, understand that (like Certified Public Accountants) lawyers specialize, e.g., the bankruptcy attorney or the estate attorney.[47] Most lawyers prefer a practice concentrated on a single area of law.[48] Highly familiar too are medical specialists, e.g., orthopedists. [49] Observe that in these fields a mastery of the discipline, corresponding to that of a general practicioner, must be

---

[43] JOHN BLACK, ET AL., A DICTIONARY OF ECONOMICS 413-14 (3rd ed. 2009).

[44] A. ALLAN SCHMID, BENEFIT-COST ANALYSIS: A POLITICAL ECONOMY APPROACH 115 (1st ed. 1989); A. ALLAN SCHMID, CONFLICT AND COOPERATION: INSTITUTIONAL AND BEHAVIORAL ECONOMICS 229-30 (1st ed. 2004).

[45] Brian R. Dineen & David G. Allen, *Third Party Employment Branding: Human Capital Inflows and Outflows Following "Best Places to Work" Certifications*, 59(1) ACAD. OF MGMT. J. 90 (Feb. 2016).

[46] Catherine Seeber, *There's a Designation for That,* J. OF FIN. PLAN. (May 2014) at 29.

[47] *Id*., at 28.

[48] *Id*.

[49] *Id*. at 29.

absorbed (in the customary expectation) before or at least simultaneously with an expertise in any specialization.

Contrariwise, within the financial industry, specialized credentials are in supply for that market's many predatory participants devoid of knowledge comparable to that of the Certified Public Accountant or attorney. Thus, the temptation for opportunists to prey upon the unsuspecting by flaunting superficial credentials; those credentials less evidence sophisticated professional competence than imply that they are designed to appeal to some assumedly-exploitable consumer market element, like seniors:[50] "There . . . has long been a trend among financial advisers of paying to earn various designations meant to show expertise in a particular niche, such as serving retirees."[51] This contrasts with using specialization to advance (as above) the professional's knowledge *beyond* a generalist's professional-level base.[52]

That point was elaborated upon, in context of the nascent financial therapy field, in America's business media:

> Potential clients should be aware that not all financial therapists have financial-planning backgrounds. Some hail from mental-health fields and often focus on solving one issue, such as anxiety due to cash-flow problems. For comprehensive financial plans and continuing advice, individuals should make sure an adviser has extensive experience and holds a major designation, such as being a certified financial planner.[53]

One witnesses specializing to advance beyond the generalist's disciplinary baseline, ideally anyway, in the instances of the Certified Public Accountant, the attorney, and the physician. The school of business administration's law professors do well to march ahead conscious of prospective payoffs from the economists' salutary signaling device.

---

[50] JANE BRYANT QUINN, HOW TO MAKE YOUR MONEY LAST: THE INDISPENSABLE RETIREMENT GUIDE 29-30 (1st ed. 2016).
[51] Anne Tergesen, *Help Wanted: A Therapist for Your Finances,* WALL ST. J., Aug. 1-2, 2015, at B7.
[52] Seeber, *supra* note 47, at 29; Quinn, *supra* note 51, at 30.
[53] Tergeson, *supra* note 52, at B7.

However, business law professors cautiously must circumvent the hazard of promoting certifications other than those appropriately appreciated as substantive. Most agreeably, one finds information at hand in reassuring measure respecting contract management's CCCM business credential.

IV. CONTRACT MANAGEMENT'S CCCM PROFESSIONAL CREDENTIAL

A. CONTRACT MANAGERS INTERWEAVE THE WORLD

Tyler Cowan, the George Mason University economist, counsels that modern America witnesses a wide array of careers that now, highly frequently, demand a university education short of the master's degree-level.[54] Numbered among these are found the roles of buyers and purchasing agents.[55] The National Contract Management Association discerns that contract management, and procurement, actually mirror one another. Procurement consists of evaluation and selection of sellers. The supplier counterpart-role is that of the contract managers. Contract management is a niche within the procurement profession. Contract managers aim to optimize outcomes bilaterally.[56] Indeed, the Labor Department's Bureau of Labor Statistics in January 2013 delivered (on behalf of the Standard Occupational Classification Policy Committee) a *Direct Match Title File* assimilating the "Contracting Manager" and "Contract Administrator" with "Purchasing Managers."[57] In Canada, similarly, the government's National Occupational Classification 2011 listed "contract manager" among titles of "Purchasing managers."[58]

---

[54] TYLER COWEN, AVERAGE IS OVER: POWERING AMERICA BEYOND THE AGE OF THE GREAT STAGNATION 37 (1st ed. 2013).
[55] *Id.*
[56] CONT. MGMT. ASS'N, WHAT IS CONTRACT MANAGEMENT?, NAT'L (April 3, 2016) (http://www.ncmahq.org/About/content.cfm?ItemNumber=993&navitemNumber=9909).
[57] U.S. DEPARTMENT OF LABOR: BUREAU OF LABOR STATISTICS, DIRECT MATCH TITLE FILE (2016), http://www.bls.gov/soc/soc_2010_direct_match_title_file.pdf.
[58] GOVERNMENT OF CANADA, QUICK SEARCH – RESULTS (April 3, 2016),

The late Douglass C. North, in 1993 the joint recipient of the Nobel Prize for Economics,[59] explained that a division of specializing labor engenders a worldwide populace expert in its specialties yet consequentially more ignorant about the globe's other elements.[60] More than an efficient system for pricing is demanded to integrate specialized knowledge at low-level transaction expense.[61] For products have *indirect* producers, e.g., the guarantors of property and contractual rights, who sustain the structures wherein direct producers prosper.[62] The expense in transacting is identifiable as the burden of agreement-enforcement plus the measurement of what is exchanged.[63] Both enforcement and measurement must prove imperfect even postulating well-specified rights in property.[64] Vended services and goods (e.g., computers and autos) must be presented for purchasers lacking expertise (such as that of, e.g., the computer programmer or automotive engineer): "Warranties, guarantees, trade marks are just illustrations of the vast range of institutions and organizations that enabled specialized individuals to have access to the other consumer markets that they needed in order to take advantage of the potential economies possible in…a world of specialization."[65]

Exemplifying transaction costs, broadly, are the expenses behind, e.g., amassing information, negotiations, monitoring, and contract enforcement;[66] whereas production costs actually result in utility-evoking services and goods.[67] In

---

http://www5.hrsdc.gc.ca/NOC/English/NOC/2011/QuickSearch.aspx?val65=0113.

[59] BANNOCK ET AL., *supra* note 42, at 301.

[60] DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 162 (1st ed. 2005).

[61] *Id*. at 98, 121.

[62] DAVID COLANDER & RONALD KUPERS, COMPLEXITY AND THE ART OF PUBLIC POLICY: SOLVING SOCIETY'S PROBLEMS FROM THE BOTTOM UP 34 (1st ed. 2014).

[63] North, *supra* note 61, at 158.

[64] *Id*. at 123.

[65] *Id*. at 121.

[66] NICHOLAS MERCURO & STEVEN G. MEDEMA, ECONOMICS AND THE LAW: FROM POSNER TO POSTMODERNISM AND BEYOND 113-114 (2nd ed. 2006).

[67] RICHARD A. IPPOLITO, ECONOMICS FOR LAWYERS 123 (1st ed. 2005).

fact, to cut transaction costs impeding the maximizing of wealth is fixed-upon by positive law-and-economics scholars insofar as they define prescriptive corollaries at all.[68] Happily, as North comprehends: "The movement from personal to impersonal exchange always increases total transaction costs but the consequence is a drastic reduction in production costs, which more than offset the increased resources going into transacting—and was responsible for the dramatic growth of modern economies."[69] Impersonal exchange at a level actually definitive of everyday life is indispensable to the economic advance of our species.[70]

More specifically, investigators into law and economics distinguish three transaction cost subvarieties. These are contractual, information, and policing costs. Hence, contractual costs constitute a niche within transaction costs. Negotiation expenses (including the value of lost time), and brokerage and legal fees exemplify the contractual costs behind attaining agreements. [71] Consistently with these realities, the nonprofit International Association for Contract & Commercial Management (IACCM) was established during 1999 due to a need for contract and commercial management skills. That need resulted from global trade's deepening complexity.[72]

B. CONTRACT MANAGEMENT AS A CAREER

Truly is the system of networking, sales, purchases, etc. ("increased resources going into transacting"), a business endeavor? Contracts nonetheless seem within the attorney's

---

[68] JONATHAN KLICK & FRANCESCO PARISI, FUNCTIONAL LAW AND ECONOMICS, THEORETICAL FOUNDATIONS OF LAW AND ECONOMICS 41 (1st ed. 2009).

[69] North, *supra* note 61, at 91.

[70] Peter Boettke, *Institutional Transition and the Problem of Credible Commitment*, I ANN'L PROC. OF THE WEALTH AND WELL-BEING OF NATIONS 41, 46-47 (2008-2009) (https://www.beloit.edu/upton/annual_proceedings/).

[71] A. ALLAN SCHMID, PROPERTY, POWER, AND PUBLIC CHOICE: AN INQUIRY INTO LAW AND ECONOMICS 88 (1st ed. 1978).

[72] TIM CUMMINS, ET AL., CONTRACT & COMMERCIAL MANAGEMENT—THE OPERATIONAL GUIDE (JANE CHITTENDEN ed., 1st ed. 2011).

compass.[73] North states: "[I]nside the firm there are ever increasing numbers of accountants, lawyers, and others devoted to facilitating exchange in the complex world of impersonal exchange."[74] Supposing swelling totals of people working with contracts, the contracts-portfolio's administration and the handling of the risks therein demand attention.[75] Who in the modern day company oversees contractual risks? While the correct reply shifts among projects and organizations, the contract manager bears a major portion of the load.[76]

The Bureau of Labor Statistics' *Occupational Outlook Handbook, 2016-2017 Edition* pronounces: "Purchasing managers plan, direct, and coordinate the buying of materials, products, or services for wholesalers, retailers, or organizations."[77] Furthermore, "Purchasing managers, sometimes known as *contract managers*, are also responsible for developing their organization's procurement policies and procedures. These policies help ensure that procurement professionals are meeting ethical standards to avoid potential conflicts of interest or inappropriate supplier and customer relations."[78]

Understandably, "Purchasing managers usually have at least a bachelor's degree and some work experience in procurement. A master's degree may be required for advancement to some top-level manager jobs."[79] In Canada, one learns of employment prerequisites for purchasing managers: "A bachelor's degree or college diploma in

---

[73] HELENA HAAPIO & GEORGE J. SIEDEL, A SHORT GUIDE TO CONTRACT RISK (New Ed. 2013).
[74] North, *supra* note 61, at 91.
[75] HAAPIO & SIEDEL, *A Short Guide to Contract Risk*, *supra* note 73; HELENA HAAPIO & GEORGE J. SIEDEL, PROACTIVE LAW FOR MANAGERS: A HIDDEN SOURCE OF COMPETITIVE ADVANTAGE 123 (1st ed. 2011).
[76] HAAPIO & SIEDEL, *A ShortGuide to Contract Risk*, *supra* note 73; HAAPIO & SIEDEL, *Proactive Law for Managers*, *supra* note 75.
[77]Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook, 2016-17 Edition*, http://www.bls.gov/ooh/management/purchasing-managers.htm (last visited Jan. 13, 2016).
[78] *Id*. (italics in original).
[79] *Id*.

business administration, commerce or economics is usually required."[80]

Consistently with the foregoing, Robert Half Legal's *U.S. Glossary of Legal Job Descriptions* offers capsule-descriptions of the educational background, jobskills and duties of many employment slots in corporate legal departments. The *Glossary* records:

> Contract administration is the management of contracts made or to be made with customers, vendors, partners or employees. It involves negotiating the terms and conditions in contracts, analyzing and minimizing risk, ensuring compliance with the terms and conditions, documenting and agreeing on any changes or amendments that may arise during implementation or execution, and drafting and executing contracts. Duties may include implementing systems and software to ensure accurate tracking and record-keeping in order to fulfill contractual obligations.[81]

Supervising the contract administration staff is the contract manager, who well could represent a minimum of five years of experience.[82] More suiting the business college senior's aspirations seems the subordinate, contract administrator position (drawing upon some twelve months of experience):

> The Contract Administrator is responsible for reporting on the firm's operations, overseeing administrative departments, managing outside vendors and assisting with the firm's budget. A bachelor's degree and/or a certificate of completion from a paralegal education program are typically required. Strong computer skills in

---

[80]Government of Canada, *supra* note 58.
[81]Robert Half Legal, *U.S. Glossary of Legal Job Descriptions* (2016), http://www.roberthalf .com/legal/industry-resources/us-glossary-of-legal-job-descriptions (last visited March 16, 2016).
[82] *Id*.

> basic computer programs and management software are preferred.[83]

The NCMA website has a Careers Library including information on resumes, jobhunting, etc. Of course, the internet might offer many such useful resources. Yet the NCMA site is one—perhaps the only one—that some undergraduate, would-be contract managers would actually read. This website encompasses a detailed January 2014 "$alary Survey: Executive Summary" with 2013 statistics.[84] A glance at the internet can disclose reports of average contract manager position annual salaries approximating: $79,605;[85] $68,000;[86] $91,730;[87] $95,819;[88] and $62,000;[89] with a median nationally of $109,538.[90]

The NCMA's Student Memberships cost $35.00 annually and include twelve issues of Contract Management magazine. Prospective undergraduate business school matriculants (or their job placement-minded parents) guided by a college of business's website to the NCMA website can there find a 10-minute audiovisual presentation entitled This Is Contract Management: Five Great Reasons to Become a

---

[83] *Id*.
[84] NCMA, http://www.ncmahq.org/ (last visited March 4, 2017).
[85] CONTRACT MANAGER SALARY, http://www.payscale.com/research/US/Job=Contracts_Manager/Salary (last visited Apr. 13, 2015).
[86] CONTRACT MANAGER SALARY, http://www.indeed.com/salary/Contract-Manager.html (last visited Apr. 13, 2015).
[87] CONTRACT MANAGER SALARIES, https://www.glassdoor.com/Salaries/contract-manager-salary-SRCH (last visited Apr. 13, 2015).
[88] CONTRACTS MANAGER, http://salary.careerbuilder.com/Contracts--Manager- (last visited Apr. 13, 2015).
[89] SIMPLYHIRED, www.simplyhired.com (last visited Apr. 13, 2015).
[90] CONTRACTS ADMINISTRATION MANAGER SALARIES, http://www1.salary.com/Contracts-Administration-Manager-Salary.html (last visited Apr. 13, 2015).

Contract Manager.[91] The internet meanwhile affords a 2+ pagelong Contracts Manager Resume Sample.[92]

C. NCMA CERTIFICATION OPPORTUNITIES

The NCMA's CCCM certification examination is legally defensible and is based on psychometrically sound objective testing of knowledge.[93] This pre-credentialing test is a four-hour, multiple-choice examination. The Certified Commercial Contracts Manager (CCCM) examination is 150 questions long, with a passing score of 70 percent. This CCCM credential appears to constitute a legitimate, nearterm, contract management credentialing-opportunity for many among a school of business's impending-degreeholders. The undergraduate degree is one prerequisite to award of the CCCM. Said certification attests to such an education *plus*, experience, and knowledge of the Uniform Commercial Code.[94] Prerequisite to earning CCCM status is a minimum of one year of experience in dealing with commercial contracts (which recalls the experience requisite to attaining that Robert Half contract administrator status), and 80 hours of continuing professional education.[95]

This CCCM seems a serious credential. The scholarly literature of business recognizes that professional societies, generally, aim at educating their memberships in a shared knowledge; such knowhow can be borne by those members to their homebase-firms as an element of their workaday routines.[96] Hence a diffusion of best-practices: the optimal methods whereby to execute a given process. For professional associations endeavor to define their callings through the

---

[91] THIS IS CONTRACT MANAGEMENT, http://www.ncmahq.org/About/content.cfm?ItemNumber=7565&navitem (last visited Apr. 3, 2015).

[92] RESUME4DUMMIES, http://www.resume4dummies.com/contracts-manager-resume-sample/ (last visited Apr. 3, 2016).

[93] WELCOME TO NCMA'S PROFESSIONAL CERTIFICATION PROGRAM, http://www.ncmahq.org/ProfessionalDevelopment/content.cfm?ItemNumber=6068&navit (last visited Apr. 3, 2015).

[94] *Id*.

[95] *Id*.

[96] STEVEN J. KAHL, ASSOCIATIONS, JURISDICTIONAL BATTLES, AND THE DEVELOPMENT OF DUAL-PURPOSE CAPABILITIES 381, 391 (1st ed. 2014).

development of and the standardizations of skills and capabilities. Best-practices are absorbed into enterprises less by imitation than via such an association's trainees' local application of their own training.[97]

Luckily: "Candidates [for the CCCM] lacking only the experiential and continuing education requirements may apply for the designation and take the [CCCM] examination. Upon successful completion of the examination, the candidate will be awarded the designation ONLY when both experiential and continuing education requirements are met."[98] Consequently, despite those continuing education and on-the-job-experience demands upon prospective CCCMs, they can take the CCCM examination shortly post-Commencement—as newborn JDs then take the bar examination. Here enter employment placement-conscious professors teaching undergraduate business law. Their undergrauates can be assisted toward postgraduation mastery of this UCC "bar examination." The CCCM examination is provided at various times weekly through Kryterion Learning Centers; available are more than 600 testing centers nationally and internationally,[99] i.e., wherever the newly-minted business degreeholder nets her job.

Therefore, a professional business credential for recent arrivals to their vocation proves earnable—examwise, at any rate—when the business school's undergraduate UCC-lessons remain fresh. An Economics Department's course in Law and Economics might empower would-be contract manager-students, and instill an overarching logic embedded in a clutch of UCC and additional business administration law-topics. Theories of contract law seem to blur into certain humanities theories, like philosophical theories, or conceptual theories within political science.[100] Yet a law and economics descriptive

---

[97] *Id*. at 391.

[98] CERTIFICATION, http://www.ncmabluegrasschapter.org/Certification.html (last visited Apr. 3, 2015).

[99] CCCM, http://www.ncamahq.org/ProfessionalDevelopment/cccm.cfm?ItemNumber=1067&navitem (last visited Apr. 13, 2015).

[100] BRIAN H. BIX, LAW AND ECONOMICS AND EXPLANATION IN CONTRACT LAW, THEORETICAL FOUNDATIONS OF LAW AND ECONOMICS 203-04 (Mark A. White, ed., 1st ed. 2009).

theory of contract law doctrine, itself, just might become workable. [101] Carlin Romano's booklength discussion of philosophy in the United States [102] elicited Tom Meany's rejoinder: "The book…has a glaring gap in perhaps the most important region of philosophy today—economics, or what used to be called political economy—which, with its reigning orthodoxies and radical challengers, could have been the center of a book like this."[103] Supposing such an overarching logic, the researches and the teaching of lawyers and academic economists could dovetail synergistically[104] when confronting subject-matter like regulation, the legal machinery of market protection, and public policy.[105] How might commerce college law professors empower business students for CCCM's UCC "bar examination"?

V. THE UNDERGRADUATE BUSINESS LAW DEPARTMENT AND THE CCCM

It has been recognized that:

> The National Contract Management Association (NCMA) issues contract management certification. The organization notes that entry-level contract professionals [e.g., bachelor's degree-holding CCCM-examination candidates] usually perform clerical tasks, prepare responses for contract modification, assist upper-management and analyze contract requirements and

---

[101] *Id.* at 213.

[102] CARLIN ROMANO, AMERICA, THE PHILOSOPHICAL (1st ed. 2012).

[103] Thomas Meaney, *Reading the National Mind*, WALL ST. J., June 2-3, 2012, at C6.

[104] Carol J. Miller & Susan J. Crain, *Law-Based Degree Programs in Business and Their Departments: What's in a Name? (A Comprehensive Study of Undergraduate Law-Based Degrees in AACSB-Accredited Universities)*, 24 J. OF LEGAL STUD. EDUC. 235, 275 (2007).

[105] *Academy of Legal Studies in Business: Task Force on General Education, Legal Studies in General Education: Phase I Final Report*, 17 J. OF LEGAL STUD. EDUC. 161, 186 (1999).

> terms to make sure that the contract complies with laws and regulations.[106]

Thereby each rookie rather resembles the classic picture of a lately-graduated JD toiling in a major law firm while studying for, or recently having passed, her bar examination.[107] No surprise is it that the NCMA answers the question "What are the recommended study materials for the CCCM?" with "Cornell University Legal Institute web site http://www.law.cornell.edu/uss/"; a followup question to the NCMA runs: "What are the optional materials for the CCCM[?]," this enquiry evoking: "The Contract Management Body of Knowledge (CMBOK). 4th Edition."[108]

This CMBOK is published by the NCMA itself. That 4th edition dates from 2013.[109] The year 2014 also brought ExamReview's CCCM Contract Management Exam Study Guide & Practice Questions 2015.[110] Its Amazon.com blurb, from pages two and three of this book, proclaims of the CCCM examination: "The focus is more on the UCC Articles 1, 2, and 2a and some general commercial contracting elements…. At the time of this writing, CCCM is in a format of 150 questions per exam...."[111] Indeed that focus falls on the UCC.

This book is just 298 pages long.[112] One learns from a detailed Table of Contents[113] that the great bulk of the substance of its CCCM examination material ought to be quite familiar to innumerable undergraduate business law-course veterans. The wide range of its detailed topics-listing signifies that each such topic's coverage can be but narrow therein,

---

[106] HOW TO BECOME A CERTIFIED CONTRACT MANAGER, http://study.com/articles/How_to_Become_a_Certified_Contract_Manager.html (last visited Apr. 3, 2016).
[107] MARTIN MAYER, THE LAWYERS 330-31 (1967).
[108] CERTIFICATION FAQS, http://www.ncmahq.org/ProfessionalDevelopment/cccm.cfm?ItemNumber (last visited Apr. 3, 2015).
[109] MARGARET G. RUMBAUGH & JOHN WILKINSON, CONTRACT MANAGEMENT BODY OF KNOWLEDGE (4th ed. 2013).
[110] CCCM CONTRACT MANAGEMENT EXAM STUDY GUIDE & PRACTICE QUESTIONS 2014 (Large ed. 2013).
[111] *Id*. at 2-3.
[112] *Id.*
[113] *Id*. at 3-5.

attracting a couple of pages per subject. Article 1 is largely commonsense, at least for a lawyer teaching business law. Undergraduate business law courses routinely teach about UCC Article 2 (Sales). Undergraduate professors of business law might present sufficient CCCM material by advancing as though with one eye on the UCC and another on that Study Guide for 2015.

Professors Carol J. Miller and Susan J. Crain's review of hundreds of catalog course descriptions enabled them to formulate this Legal Environment model-course's composite course description:[114]

> This course explores legal and ethical issues to assist business persons in recognizing, preventing, and managing related risks in the domestic and international regulatory environment in which businesses function. Students are introduced to the U.S. court system, and alternative means of resolving legal disputes. Sustainability of business practices, social responsibility, and rights & duties are explored through discussion of environmental law, employment discrimination, deceptive advertising, products liablility, torts, and agency principles, along with related constitutional law issues. The course also examines how contract rules and practices impact businesses, customers and other constituents.[115]

Miller and Crain contrast that with their Business Law model-course's composite course-description:

> Business organizations are examined in terms of differentiating the structure, legal requirements, liability risks, and agency rights & duties. Fiduciary duties are discussed,

---

[114] MILLER & CRAIN, *supra* note 11, at 202.
[115] *Id.* at 203.

> including their relationship with selected security regulations. Rules related to contracts are studied, along with Uniform Commercial Code requirements as they apply to sale of goods, negotiable instruments and secured transactions. Application of these rules and concepts to business situations is emphasized.[116]

These composite course descriptions comport with CCCM credential considerations. Contract rules impact businesses, cutomers and other constituents. Uniform Commercial Code requirements apply to sale of goods.

VI. CONCLUSION

Appraised herein has been a specific, Uniform Commercial Code-focused certification option. That CCCM credential in its serious business field appears a realistic, postgraduation goal toward which an undergraduate business school can train and aim undergraduates. The CCCM is on-offer through the National Contract Management Association. By no means need "Business Law Department" professors in business schools inaugurate inquiries into the subject of undergraduates and professional certifications in business, particularly regarding the law-related business field of contract management, from Square One. Nearterm, professional certifications in practical business sectors can add muscle to the push of ambitious commerce school-products to win challenging positions, and to prosper therein.

In 2015, Robyn Lawrence and Melissa Wright of the University of Scranton assessed the contemporary role of business law within the accountancy curriculum.[117] They declared their topic's impact beyond the sectors of accountancy's students and their educators.[118] They apprehended that the retreat of law-related instruction within

---

[116] *Id*. at 206.

[117] Robyn Lawrence & Melissa Wright, *The Current Role of Business Law in the Accounting Curriculum*, 15(7) J. HIGHER EDUC. THEORY & PRACTICE 86 (2015).

[118] *Id.*

the accountancy curriculum seemed to have paused through the preceding decade.[119] Yet they also acknowledged the thrust of the September 2015 AICPA Exposure Draft.[120] In the meantime, preparation of business school undergraduates for the CCCM credential presents another avenue whereby "Business Law Department" professors potentially show their mettle afresh, even in a period of shrinking emphasis on legal topics in the Uniform Certified Public Accountant Examination.

[119] *Id.* at 93-94.
[120] *Id.* at 90.

LINCOLN MEMORIAL UNIVERSITY
LAW REVIEW

VOLUME 4 SPRING 2017 ISSUE 2

THE U.S. CONSTITUTION, THE U.S. DEPARTMENT OF JUSTICE, AND STATE EFFORTS TO LEGALIZE MARIJUANA

Zachary C. Bolitho[1]

I. INTRODUCTION

A hypothetical young entrepreneur named Ernest recently read an article reporting that marijuana distribution was a lucrative business. After extensive research and discussions with some friends who work in the "marijuana industry," Ernest decided to open a retail store selling marijuana in his hometown of Raleigh, North Carolina. He entered a supply agreement with a local horticulturist who was also an expert marijuana grower. Ernest named his business "Best Buds Dispensary, Inc.," registered it with the secretary of

[1]Assistant Professor, Campbell University School of Law, Raleigh, North Carolina. The author would like to thank Evan Wright and the staff of the *Lincoln Memorial University Law Review* for the invitation to present this article as part of the law review's symposium. The author would also like to thank Travis LaFay and Thomas Hughes for their research assistance.

state's office, rented a storefront in a strip mall, outfitted the space with display cases and shelving, hung some signs, hired a few employees, and opened for business on December 1, 2016. His dispensary sold loose-leaf marijuana, marijuana joints, and so-called "marijuana edibles."

The business operated on a cash-only basis, and business was booming due in part to an advertising campaign Ernest started on social media. In the first week, Ernest sold over 60 kilograms of marijuana and generated a profit of $50,000. To protect himself, his product, and his profit from would-be robbers, Ernest hired an armed security guard to serve as a sentry at the dispensary's entrance. Ernest opened a business account at the local bank. The bank manager asked some questions before eventually allowing Ernest to use the account to deposit large amounts of cash generated from the dispensary.

Ernest made no secret of the fact that Best Buds Dispensary, Inc. sold marijuana. Everybody in town knew what he was up to, and it did not take long for Ernest to appear on the radar screen of agents with the federal Drug Enforcement Administration (DEA). Within a month, DEA agents raided his dispensary while waiving a federal search warrant in the air. The agents not only seized the marijuana found in the dispensary, they also went to the local bank with a court order authorizing them to seize the contents of Best Buds Dispensary's bank account.

A short time later, the U.S. Attorney's Office presented the matter to the grand jury. The grand jury returned an indictment charging Ernest with a slew of serious federal charges, including distribution of marijuana,[2] renting a property for the purpose of drug distribution,[3] advertising the distribution of a controlled substance,[4] money laundering,[5] and

---

[2]21 U.S.C. § 841(a)(1).

[3]21 U.S.C. § 856(a)(1). This provision of the federal code is commonly referred to as the "crackhouse statute." *See generally* Michael E. Rayfield, *Pure Consumption Cases under the Federal "Crackhouse" Statute*, 75 U. CHI. L. REV. 1805, 1805 (2008).

[4]21 U.S.C. § 843(c)(2)(A) ("It shall be unlawful for any person to knowingly or intentionally use the Internet, or cause the Internet to be used, to advertise the sale of . . . a controlled substance . . . .").

[5]18 U.S.C. §§ 1956-1957.

aiding and abetting the possession of a firearm in furtherance of a drug trafficking crime.[6] The indictment also included an allegation seeking forfeiture of the bank account's contents, as well as any other property that Ernest obtained using the proceeds from his marijuana dispensary.[7] If convicted, Ernest would be sent to federal prison for a significant period of time.[8]

And, the charges were not limited to Ernest. The grand jury also charged the local bank with money laundering for allowing Ernest to conduct financial transactions using drug money.[9] Additionally, the grand jury charged the armed security guard who protected Ernest, his money, and his

---

[6]18 U.S.C. § 2; 18 U.S.C. § 924(c)(1)(A).

[7]21 U.S.C. § 853(a) (providing for forfeiture of "any property constituting, or derived from, any proceeds the person obtained directly, or indirectly, as the result" of violating the federal drug laws).

[8]Conviction on the firearm charge alone would result in a five-year mandatory minimum term of imprisonment. *See* 18 U.S.C. § 924(c)(1)(A)(i) (stating that a defendant convicted of a § 924(c) offense shall "be sentenced to a term of imprisonment of not less than 5 years"). And, that five-year term of imprisonment would be served consecutive to the imprisonment imposed on the other charges. *See* 18 U.S.C. § 924(c)(1)(D)(ii) ("no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed").

[9]The bank would most likely face money-laundering charges under 18 U.S.C. § 1956 and/or 18 U.S.C. §1957. *See* Julie Anderson Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597, 617 (2015) ("In sum, a financial institution that knowingly processes transactions for marijuana-related businesses commits the crime of money laundering."). That is so because, generally speaking, both statutes prohibit banks from knowingly engaging in transactions—such as deposits, transfers, and withdrawals—that involve the proceeds of drug trafficking. *See generally* Christie Smythe, *HSBC Judge Approves $1.9B Drug-Money Laundering Accord*, Bloomberg, http://www.bloomberg.com/news/articles/2013-07-02/hsbc-judge-approves-1-9b-drug-money-laundering-accord (last visited January 19, 2017) (discussing the $1.9 million deferred prosecution agreement between the U.S. Department of Justice and HSBC bank to resolve money laundering charges stemming from transactions involving the proceeds of drug trafficking).

marijuana with possessing a firearm in furtherance of a drug trafficking crime.[10]

Now, imagine that Ernest operated his marijuana dispensary in Denver, Colorado instead of Raleigh, North Carolina. The story would be much different. The DEA agents stationed in Colorado—agents who work for the *same* DEA and are sworn to uphold the *same* federal laws as the DEA agents stationed in North Carolina—would have conducted no raids, secured no search warrants, and seized no funds. The U.S. Attorney in Colorado—who works for the *same* U.S. Department of Justice and is sworn to uphold the *same* federal laws as the U.S. Attorney in North Carolina—would have sought no grand jury indictments and instituted no forfeiture proceedings. Instead of contemplating what life would be like inside of a Federal Bureau of Prisons' facility, Ernest would be in his dispensary selling marijuana and counting his (large amount) of cash. He would be depositing that money in his account at the local bank, and his armed security guard would be standing by his side. Although federal law is the same in Colorado as it is in North Carolina, the DEA Agents and Assistant U.S. Attorneys in Colorado would drive by Ernest's dispensary and do nothing about his blatant and unapologetic violations of crystal clear federal law.

This hypothetical, unfortunately, is not some far-fetched scenario dreamt up by an imaginative law professor. No, it is an illustration of exactly what has been happening in the United States. Marijuana is a controlled substance that is strictly prohibited under federal law;[11] nonetheless, seven states and the District of Columbia have passed measures legalizing

---

[10]18 U.S.C. § 924(c)(1)(A); *see generally* United States v. Archuleta, 19 F. App'x 827, 829-30 (10th Cir. 2001) (affirming § 924(c) conviction for a defendant whose role in the conspiracy was "kind of like a guard," and who "possessed the given firearm for the specific purpose of providing security").

[11]*See* 21 U.S.C. § 812(b)(1) (explaining the criteria for listing a drug as a schedule I controlled substance); 21 U.S.C. § 812, Schedule 1(c)(10) (listing marijuana in schedule I); 21 U.S.C. § 841(a)(1) (stating that it is unlawful to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance"); 21 U.S.C. § 844(a) (stating that it is unlawful for "any person to knowingly or intentionally possess a controlled substance").

marijuana for recreational use.[12] And a total of twenty-six states have legalized marijuana for medical purposes.[13] Rather than challenging those state laws under the Supremacy Clause, and instead of continuing to enforce the longstanding federal law equally across the country, the U.S. Department of Justice under Attorney General Eric Holder announced that it would neither seek to preempt state legalization measures[14] nor (absent exceptional circumstances) bring federal marijuana charges against individuals in those states.[15] Moreover, the Department of Justice and the Department of Treasury have informed financial institutions that, money laundering laws notwithstanding, they may "offer[][financial] services to a marijuana-related business."[16] And, an entire industry has sprung up to provide marijuana dispensaries with armed

---

[12]State Marijuana Laws 2016 Map (available at http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html).

[13]*Id*.

[14]Aug. 29, 2013 Letter from Attorney General Eric Holder to Governors of Colorado and Washington (stating that "the Department will not at this time seek to challenge your state's law").

[15]Aug. 29, 2013 Memorandum from Deputy Attorney General James M. Cole to all United States Attorneys (announcing that, as an exercise of prosecutorial discretion, the Department would not prosecute marijuana cases in those states that have "legalized" marijuana, except in extreme cases where specified criteria were satisfied); *see also* October 19, 2009 Memorandum from Deputy Attorney General David W. Ogden to Selected United States Attorneys (stating that federal prosecutors in states that have authorized medical marijuana "should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana").

[16]February 14, 2014 Memorandum from Deputy Attorney General James M. Cole to All United States Attorneys, "Guidance Regarding Marijuana Related Financial Crimes"; Fin. Crimes Enforcement Network, Dep't of the Treasury, FIN-2014-G0001, BSA Expectations Regarding Marijuana-Related Businesses (Feb. 14, 2014) (providing guidance to banks that "should enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses" in those states that passed "recent state initiatives to legalize certain marijuana-related activity"); *see also* Hill, supra note 9, at 604 ("The guidance explains that the agencies do not prioritize punishment of banks servicing state-legal marijuana businesses.").

security guards.[17] That same Department of Justice, however, has continued to prosecute marijuana cases in the remaining states.[18] This is a problem. Indeed, some have called it a "crisis,"[19] others a "quagmire."[20] Regardless of what it is called, one thing is for certain—it must be resolved.

It should be noted at the outset that this Article has little do with marijuana per se. There is a legitimate debate to be had regarding our national marijuana policy. Perhaps the time has come to move marijuana out of Schedule I of the Controlled Substances List, which would authorize it to be used medicinally. Or, maybe we should consider decriminalizing marijuana altogether. The fact of the matter, however, is that neither of those things has happened. Instead, federal law is clear—marijuana is illegal in all fifty states. If that is going to change, it must be done in the way our Founding Fathers

---

[17]Will Yakowicz, *The Highly Trained Security Force Protecting Colorado's Weed Stash*, Inc. (Apr. 20, 2015) (available at, http://www.inc.com/will-yakowicz/inside-the-backbone-of-the-cannabis-industry.html) (reporting on the activities of Blue Line Protection Group's business of providing armed security for Colorado's marijuana dispensaries and marijuana growing operations); *see also* Alex Kreit, *What Will Federal Marijuana Reform Look Like?*, 65 CASE W. RES. L. REV. 689, 693-94 (2015) (recognizing that "every Colorado marijuana business owner who employs an armed security guard could wind up serving an effective life sentence in prison" if the 18 U.S.C. § 924(c) were enforced).

[18]*See generally* David Sinclar, *Village Man to Forfeit $1 Million in Drug Case*, The Pilot (April 28, 2016) (available at http://www.thepilot.com/news/village-man-to-forfeit-million-in-drug-case/article_3a35452a-0d72-11e6-9e61-571d44b5d3fb.html) (reporting that a North Carolina businessman who was convicted on federal marijuana and money laundering charges faced a federal prison sentence and was required to forfeit $1,000,000 in proceeds from the marijuana sales).

[19]Bradley E. Markano, *Enabling State Deregulation of Marijuana Through Executive Branch Nonenforcement*, Note, 90 N.Y.U. L. REV. 289, 293 (2015) (quoting David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567, 575 (2013)).

[20]Melanie Reid, *The Quagmire that Nobody in the Federal Government Wants to Talk About: Marijuana*, 44 NEW MEX. L. REV. 169 (2014).

envisioned: the passage of a bill in Congress that is signed into law by the President.

Along with a host of other serious matters, the future of federal marijuana enforcement will soon be landing on the desk of Jeff Sessions, the newly appointed Attorney General. It is clear from his confirmation hearing testimony that Sessions is aware of the issue and recognizes that deciding how to handle it "won't be an easy decision."[21] He further stated that "the United States Congress has made the possession of marijuana in every state and distribution of it an illegal act. . . . If that . . . is not desired any longer, Congress should pass the law to change the rule. It's not so much the attorney general's job to decide what laws to enforce."[22] At several other points during the hearing, Sessions reiterated his firm commitment to enforcing federal law and following the Constitution.[23]

Unless and until Congress changes the law, fulfilling that commitment will require the Department of Justice to alter its approach to those states that have legalized marijuana. The current approach is unsustainable and sets a dangerous precedent that threatens the very existence of our federal system. It also violates two provisions of the United States Constitution: (1) the Supremacy Clause; and (2) the Take Care Clause.

First, state laws authorizing the possession, manufacture, distribution, and use of marijuana conflict with the federal Controlled Substances Act (CSA). More specifically, the state laws stand as an obstacle to the federal goal of eliminating the manufacture, distribution, and possession of marijuana. The state laws, therefore, are preempted by operation of the Supremacy Clause. Second, the Department of

---

[21]Alicia Wallace, *Jeff Sessions Vague About Marijuana Strategy at AG Senate Hearing*, The Cannabist, (Jan. 10, 2017) (available at, http://www.thecannabist.co/2017/01/10/jeff-sessions-confirmation-hearing-marijuana-enforcement-first-day/71005/).

[22]*Id*.

[23]*See* Steven Dennis & Chris Strohm, *Sessions Seeks to Reassure Senators on Race, Torture, Clinton*, Bloomberg Politics (Jan. 10, 2017) (available at, https://www.bloomberg.com/politics/articles/2017-01-10/sessions-cites-crime-rebuts-racism-in-u-s-attorney-general-bid) (reporting that Attorney General Sessions testified "he would enforce the laws and Supreme Court decisions—even those he disagreed with").

Justice's non-enforcement policy in those states that have legalized marijuana represents a breach of the Presidential obligation to "take Care that the Laws be faithfully executed."[24] The Take Care Clause requires the President—and his surrogates—to enforce the laws passed by Congress, regardless of whether those laws align with his policy preferences.[25] The current approach is inconsistent with that requirement.

Prosecutors, of course, have broad discretion in deciding what cases to bring. As a former federal prosecutor, that discretion is something I know quite well. Prosecutorial discretion, however, is not boundless. And, it does not extend so far as to allow the Department of Justice to adopt a policy that bases the decision to prosecute on the law of the state where the conduct occurred. Similarly, a state should be unable to fill its coffers with hundreds of millions of dollars in tax revenue generated from an activity that flies in the face of federal law while other states are deprived of such revenue by their commendable choice to follow federal law.[26] There is something fundamentally wrong (and, frankly, offensive) about allowing people to be richly rewarded for their blatant and open defiance of well-settled law.[27] That is especially true

---

[24]Art. II, § 3, U.S. Const.

[25]Robert J. Delahunty & John Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the Dream Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013) (stating that the "Constitution's Take Care Clause imposes on the President a duty to enforce all constitutionally valid acts of Congress in all situations and cases").

[26]*See generally* Carlos Illescas, *Marijuana Sales Tax Revenue Huge Boon for Colorado Cities*, Denver Post (May 26, 2016) (available at, http://www.denverpost.com/2016/05/26/marijuana-sales-tax-revenue-huge-boon-for-colorado-cities/) (discussing the millions in dollars of tax revenue that have been generated by the Colorado law permitting recreational marijuana use and reporting that city of Denver alone "took in $29 million last year from all sales by taxes and licensing fees"); *see also* Tanya Basu, *Colorado Raised More Tax Revenue From Marijuana Than From Alcohol*, Time Magazine (Sep. 16, 2015) ("Legal recreational marijuana is a boon for tax revenues in Colorado . . . . Colorado collected almost $70 million in marijuana taxes.").

[27]*See* Lucy Rock, *Marijuana Millionaires Cashing in on Cannabis Legalisation*, The Guardian (May 22, 2016) (available at, https://www.theguardian.com/society/2016/may/22/cashing-in-

when people doing the same thing in another part of the country are being sent to federal prison and having their money forfeited to the federal government.[28]

This Article explains why the Department of Justice's marijuana policy over the past eight years violates the Constitution. Part II tells the story of how we ended up where we are today. It discusses the history of federal marijuana regulation, including the CSA's treatment of marijuana as a Schedule I drug. Part III provides an overview of recent state marijuana legalization measures. It also discusses the federal government's response to those measures. Part IV discusses the Supremacy Clause, and Part V discusses the Take Care Clause. Part VI consists of a brief conclusion.

II. THE FEDERAL PROHIBITION ON MARIJUANA

Marijuana has been regulated by federal law since 1937 when Congress passed the Marihuana Tax Act.[29] The Tax Act "allowed marijuana to be sold and prescribed medically so long

---

on-cannabis-legalisation) (reporting that one marijuana business owner in Washington made over $3 million in his first twenty months of business); *see also* Vickie Bane & Trevor Dodd, *Marijuana Millionaires* (July 28, 2014) (available, at http://people.com/archive/marijuana-millionaires-vol-82-no-4/) (reporting that one owner of a marijuana dispensary in Colorado "raked in $47,000 in 24 hours; within three months, he says, he grossed $1.5 million").

[28] *See, e.g.*, United States v. White, Case No. 12-cr-03045-BCW, 2016 WL 4473803, at *1 (W.D. Mo. Aug. 23, 2016) (rejecting motion to dismiss filed by defendant who was being federally prosecuted for growing marijuana in Missouri—a state that has not legalized marijuana); *see also* David Sinclar, *Village Man to Forfeit $1 Million in Drug Case*, The Pilot (April 28, 2016) (available at http://www.thepilot.com/news/village-man-to-forfeit-million-in-drug-case/article_3a35452a-0d72-11e6-9e61-571d44b5d3fb.html) (reporting that a North Carolina businessman who was convicted on federal marijuana and money laundering charges faced a federal prison sentence and was required to forfeit $1,000,000 in proceeds from the marijuana sales).

[29] Andrew Renehan, *Clearing the Haze Surrounding State Medical Marijuana Laws: A Preemption Analysis and Proposed Solutions*, 14 HOUS. J. HEALTH L. & POL'Y 299 (2014).

as the requisite tax was paid."[30] Fourteen years later in 1951, Congress criminalized marijuana with the passage of the Boggs Act.[31] The Boggs Act was a hard-hitting statute that imposed a mandatory minimum sentence of two years' imprisonment for first-time marijuana offenders, five years' imprisonment for a second offense, and ten years' imprisonment for any additional offenses.[32] The Boggs Act was largely replaced in 1970 by the CSA.[33] The CSA was a massive enactment intended to "combat[] drug abuse and control[] the legitimate and illegitimate traffic in controlled substances."[34] To that end, the CSA "create[d] a comprehensive, closed regulatory regime criminalizing the unauthorized manufacture, distribution, dispensing, and possession"[35] of "various plants, drugs, and chemicals (such as narcotics, stimulants, depressants, hallucinogens, and anabolic steroids."[36] Although it has been tweaked from time to time, the CSA remains the predominant federal drug law today.

The CSA divides the regulated substances into five different "schedules." Drugs are "scheduled" based on their potential for abuse, accepted use for medical treatment, and their psychological and physical impact on the body.[37] Schedule I drugs are subject to the most stringent regulation, while Schedule V drugs are subject to the least.[38] The manufacture, distribution, possession, or use of Schedule I

---

[30]*Id*.
[31]*Id*.
[32]*See* Alex Kreit, Controlled Substances: Crime, Regulation, and Policy at 408 (Carolina Academic Press 2013) (discussing the evolution of federal marijuana law).
[33]*Id*. at 409.
[34]Gonzales v. Oregon, 546 U.S. 243, 250 (2005).
[35]*Id*.
[36]Todd Garvey & Brian T. Yeh, *State Legalization of Recreational Marijuana: Selected Legal Issues*, Congressional Research Service (Jan. 13, 2014).
[37]Gonzales v. Raich, 545 U.S. 1, 10 (2005).
[38]*Id*.

drugs is flatly prohibited regardless of whether intended for medical or recreational use. Schedule I drugs "may not be dispensed under a prescription, and such substances may only be used for bona fide, federal government-approved research studies."[39] That is so because a drug listed in Schedule I has been determined to have a "high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use . . . under medical supervision."[40] From the CSA's effective date until today, marijuana has been listed on Schedule I.[41] As a result, it cannot be lawfully manufactured, distributed, or possessed anywhere in the United States.[42]

For years, there have been efforts to move marijuana from Schedule I to one of the less regulated schedules.[43] The rescheduling of marijuana could occur in two ways: (1) legislatively by way of an amendment to the CSA, or (2) administratively by the Attorney General, acting in consultation with the Secretary of Health and Human Services.[44] Despite years of debate, Congress has taken no action to remove marijuana from Schedule I.[45] The most recent

---

[39]Garvey, *supra* note 36, at 6.

[40]21 U.S.C. § 812(b)(1)(A)-(C).

[41]21 U.S.C. § 812, Schedule I (c)(10); Garvey, *supra* note 36, at 7 ("When Congress enacted the CSA in 1970, marijuana was classified as a Schedule I drug. Today, marijuana is still categorized as a Schedule I controlled substance and is therefore subject to the most severe restrictions contained within the CSA.").

[42]Garvey, *supra* note 36, at 7 ("Pursuant to the CSA, the unauthorized cultivation, distribution, or possession of marijuana is a federal crime."). The only exception to the flat prohibition is federally approved research. Raich, 545 U.S. at 13 (stating that the "sole exception being use of the drug as part of a Food and Drug Administration preapproved research study").

[43]*See* Raich, 545 U.S. at 13, n.23 (describing various unsuccessful efforts to reschedule marijuana).

[44]21 U.S.C. § 811(a)-(b) (establishing the process that must be followed for the Attorney General to reschedule a controlled substance).

[45]*See* Paul Lewis, *A Gateway to Future Problems: Concerns About the State-by-State Legalization of Medical Marijuana*, 13 UNIV. N. H. L. REV.

attempt at administrative rescheduling was denied in August of 2016 during the tenure of Loretta Lynch, President Obama's second Attorney General.[46] Moving marijuana from Schedule I to a less regulated schedule would not legalize marijuana for recreational purposes. It would, however, allow marijuana to be prescribed by a physician—much like opiate-based painkillers (Schedule II) or anabolic steroids (Schedule III).

Equally unsuccessful have been attempts by marijuana advocates to have the federal judiciary strike down the CSA's regulation of marijuana. Advocates have challenged the constitutionality of applying the CSA to purely intrastate marijuana growers and users whose actions complied with a California law authorizing medicinal marijuana.[47] More specifically, the proponents argued that applying the CSA to homegrown marijuana would exceed Congress' power under the Commerce Clause.[48] The Supreme Court rejected that argument in *Gonzales v. Raich*, holding that the "regulation [of intrastate marijuana] is squarely within Congress' commerce power because production of the commodity meant for home consumption . . . has a substantial effect on supply and demand in the national market for that commodity."[49] In support of its conclusion, the Court stated that Congress had reasonably found that allowing locally grown marijuana "would

---

49, 57 (2014) (recognizing that "federal lawmakers have been, and continue to be, adamantly opposed to the legalization of marijuana").

[46]Catherine Saint Louis, *DEA Keeps Marijuana on List of Dangerous Drugs, Frustrating Advocates*, New York Times (Aug. 11, 2016). The 2016 refusal to reschedule marijuana was not all that surprising, given Attorney General Lynch's stated opposition to legalizing marijuana at the federal level. *See generally* Matt Ferner, *Loretta Lynch Says She Doesn't Support Marijuana Legalization or Obama's Views on Pot*, Huffington Post (Jan. 28, 2015) (available at, http://www.huffingtonpost.com/2015/01/28/loretta-lynch-marijuana_n_6565962.html).

[47]Gonzales v. Raich, 545 U.S. 1, 6 (2005).

[48]*Id*.

[49]*Id*. at 20.

undermine the orderly enforcement of the entire regulatory scheme."[50]

Raich was not the first time the Supreme Court addressed the applicability of the CSA to state medical marijuana laws. Four years earlier, the Court decided *United States v. Oakland Cannabis Buyers' Cooperative*.[51] In that case, a cooperative was formed to distribute medical marijuana under California law.[52] The U.S. Department of Justice sued the cooperative, seeking to enjoin the cooperative on the basis that its conduct violated the CSA.[53] The cooperative argued that the CSA contained an implied exception that allowed marijuana to be distributed and used when it was medically necessary.[54] The Supreme Court rejected that argument because by placing marijuana in Schedule I, "the balance already has been struck against a medical necessity exception" by Congress.[55] And, the judiciary lacks the authority to "override Congress's policy choice, articulated in a statute, as to what behavior should be prohibited."[56]

The lower federal courts have also repeatedly rejected claims that the CSA's treatment of marijuana as a Schedule I drug violates substantive due process or equal protection.[57] Put simply, marijuana proponents have made very little progress at the federal level—marijuana is as illegal under federal law

---

[50]*Id*. at 28.
[51]532 U.S. 483 (2001).
[52]*Id*. at 486.
[53]*Id*. at 486-87.
[54]*Id*. at 490.
[55]*Id*. at 499.
[56]*Id*. at 497.
[57]*See e.g.*, Raich v. Gonzales, 500 F.3d 850, 861, 866 (9th Cir. 2007) ("Raich II") (rejecting argument that CSA's treatment of marijuana as a Schedule I drug violated substantive due process because "federal law does not recognize a fundamental right to use medical marijuana"); United States v. Rogers, 549 F.2d 107, 108 (9th Cir. 1976) (rejecting argument that CSA's treatment of marijuana was "irrational"); United States v. Kiffer, 477 F.2d 349, 355 (2d Cir. 1973) (stating "we cannot say that [marijuana's] placement in Schedule I is so arbitrary or unreasonable as to render it unconstitutional").

today as it was on the day the CSA was enacted in 1970. But, the story has been much different in the states. That is especially true of the past ten years.

III. STATE EFFORTS TO LEGALIZE MARIJUANA AND THE FEDERAL GOVERNMENT'S RESPONSE

For over twenty-five years after the passage of the CSA, marijuana was prohibited under federal law and the laws of every state.[58] That changed in 1996 when California passed the Compassionate Use Act.[59] The Act allowed "seriously ill" patients and their caregivers to "possess[] or cultivate[] marijuana for the patient's medical purposes upon the recommendation or approval of a physician."[60] Several years later, Oregon and Washington passed state laws authorizing medical marijuana.[61] By the year 2004, ten states had such laws.[62]

The initial federal response to those laws was understandably hostile given the existence of the CSA. Federal officials filed lawsuits,[63] obtained injunctions,[64] conducted raids, instituted prosecutions,[65] and developed a plan for

---

[58]Raich II, 500 F.3d at 856 (explaining that "from 1970 to 1996, the possession or use of marijuana—medically or otherwise—was proscribed under state and federal law").

[59]*Id*.

[60]United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 486 (2001).

[61]Robert A. Mikos, *On Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1423 n. 6 (listing states that have passed laws allowing medical marijuana).

[62]*Id*.

[63]*See id*.

[64]*See id*.

[65]*See* Alex Kreit, *What Will Federal Marijuana Reform Look Like?*, 65 CASE W. RES. L. REV. 689, 690 (2015) ("By one estimate, the federal government spent $483 million dollars interfering with state medical marijuana laws between 1996 and 2012, conducting at least 528 raids and dozens of prosecutions of people operating in compliance with state medical marijuana laws."); *see also* Lewis, *supra* note 45, at 59

helping state and local police agencies fight against medical marijuana efforts.[66] Thus, the Department of Justice "under the Clinton and George W. Bush Administrations" aggressively fought state medical marijuana legalization efforts.[67]

The Department of Justice's approach changed dramatically, however, after Eric Holder, Jr. was sworn in as the 82nd Attorney General of the United States.[68] The clearest sign that there was a new (and less stringent) sheriff in town took the form of a "Memorandum for Selected United States Attorneys" that was issued on October 19, 2009, by Deputy Attorney General David Ogden. In that memorandum, Ogden informed U.S. Attorneys that they "should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[69] The Ogden Memorandum represented a major policy shift by the Department of Justice, and marijuana reformers viewed it as a turning point in the fight to loosen marijuana restrictions.[70] Although the Ogden Memorandum contained its fair share of

("The battle against state medical marijuana legalization intensified under the administration of George W. Bush, as Assistant U.S. Attorneys prosecuted several high-profile medical marijuana suppliers during these eight years.").

[66]Florence Shu-Acquaye, *The Role of States in Shaping the Legal Debate on Medical Marijuana*, 42 Mitchell Hamline L. Rev. 697, 738 (2016) (explaining the historical approach of the federal government to state medical marijuana laws).

[67]*Id*.

[68]*See* Lewis, *supra,* note 45, at 60 (stating that President Obama's administration, in which Eric Holder served as Attorney General, took a "180-degree turn from the medical marijuana policies of its predecessors").

[69]October 19, 2009 Memorandum from Deputy Attorney General David W. Ogden to Selected United States Attorneys.

[70]Lewis, *supra* note 45, at 60 (stating that "[i]n 2009, the Obama administration declared that it would take a political 180-degree turn from the medical marijuana policies of its predecessors"); *see also* Shu-Acquaye, *supra* note 66, at 740 (explaining that the Ogden Memorandum was viewed initially as "a groundbreaking shift in federal drug policy").

double-talk and caveats,[71] it was widely viewed as a clear signal that "the Department of Justice (DOJ) would stop enforcing the federal marijuana ban against persons who comply with state medical marijuana laws."[72] There can be no denying that it provided a huge boost to the efforts of state marijuana legalization proponents. Additional states moved almost immediately to legalize medical marijuana, and "the nationwide medical marijuana industry . . . [has grown] at a rate of 13.8 percent since 2009."[73]

In a move that surprised many observers, the Department appeared to take a step back on June 29, 2011 with the release of a Memorandum from Deputy Attorney General James Cole. That memorandum was entitled "Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use," and it reaffirmed the Department of Justice's commitment "to the enforcement of the Controlled Substances Act in all States."[74] And, it further stated that the Ogden Memorandum was "never intended to shield" large commercial, industrial marijuana growing operations from "federal enforcement action and prosecution, even where those activities purport to comply with state law."[75] Despite the 2011 Cole Memorandum, state marijuana legalization measures did not stop.

In fact, they intensified—branching out from medical marijuana to legalization of marijuana for recreational purposes.[76] Both Colorado and Washington passed measures

---

[71]For example, the Memorandum stated that it was merely "guidance" and that "no State can authorize violations of federal law."
[72]Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 633 (2011).
[73]Lewis, *supra* note 45, at 62 (quoting statistics compiled by IBSWorld, a marijuana industry reporting company).
[74]June 29, 2011 Memorandum from James M. Cole to All United States Attorneys.
[75]*Id*.
[76]COLO. CONST. art. XVIII, § 16.

in November of 2012 that legalized recreational marijuana.[77] A short time later, the Department of Justice issued yet another Memorandum relating to state marijuana legalization efforts. In that Memorandum issued on August 29, 2013, Deputy Attorney General James Cole told federal prosecutors in those states that have legalized marijuana to leave even the large-scale industrial marijuana growers alone, so long as they were operating in compliance with eight principles: (1) not selling to minors; (2) preventing money from going to criminal gangs and cartels; (3) preventing diversion to those states that have not legalized marijuana; (4) not using the distribution of marijuana as a cover for trafficking in other drugs; (5) avoiding violence and the use of firearms; (6) preventing impaired driving and other public health issues associated with marijuana use; (7) not growing marijuana on public lands; and (8) not possessing or using marijuana on federal property.[78]

Also on August 29, 2013, Attorney General Holder sent a letter to the governors of Colorado and Washington. In that letter, Attorney General Holder informed the governors that the Department of Justice would "not at this time seek to challenge your state's law."[79] Put another way, Attorney General Holder assured the governors that the Department of Justice would not seek to preempt the Colorado and Washington laws under the Supremacy Clause. That letter, combined with the Cole Memorandum issued the same day, was tantamount to the Department of Justice waving the white flag of surrender. It was surrender, however, to a battle that the Department had stopped trying to win four years earlier. And, the marijuana industry responded by aggressively expanding the list of states

---

[77]Aaron Smith, *Marijuana Legalization Passes in Colorado, Washington*, CNNMoney (Nov. 8, 2012) (available at, http://money.cnn.com/2012/11/07/news/economy/marijuana-legalization-washington-colorado/).

[78]Aug. 29, 2013, Memorandum from James M. Cole to All United States Attorneys at, 1-2.

[79]Letter from Attorney General Eric Holder to Governors of Colorado & Washington (Aug. 29, 2013).

that allow marijuana to be used in one form or another. California, Oregon, Nevada, Alaska, Massachusetts, Maine, and the District of Columbia have all recently joined Colorado and Washington by legalizing recreational marijuana.[80] The number of states authorizing medical marijuana is now at twenty-six, plus the District of Columbia.[81] Thus, over half of the states now expressly permit what federal law expressly prohibits. The Department of Justice has allowed blatant violations of the CSA's marijuana prohibition in those states, but at the same time it has continued to enforce those same marijuana prohibitions in other states. That is the status quo, and it raises serious constitutional problems. Those problems are discussed below.

IV. PREEMPTION

As things stand today, on one side there is a federal law that prohibits manufacturing, distributing, and possessing marijuana. On the other side, there are state laws that authorize manufacturing, distributing, and possessing marijuana. Under the Supremacy Clause of the U.S. Constitution when federal and state law clash, federal law prevails, and the state law is preempted.[82] That is what should happen here—the state laws legalizing marijuana must give way to the federal CSA.

---

[80]State Marijuana Laws in 2016 Map (available at, http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html.)

[81]*Id*.

[82]U.S. CONST. art. VI, ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *see* Mikos, *supra* note 61, at 1422 (explaining that "if Congress possesses the authority to regulate an activity, its laws reign supreme and trump conflicting state regulations on the same subject").

Although some legal commentators have said as much,[83] the issue has not been addressed by the federal courts because the Department of Justice refused to file a lawsuit against the offending states.[84] There is, however, a new captain steering the ship at the Department of Justice. With the swearing in of Jeff Sessions as Attorney General comes the possibility of a lawsuit seeking to preempt state laws that conflict with the CSA. If Attorney General Sessions chooses to go down that road, he will have a strong legal argument.

Preemption is a "doctrine of American constitutional law under which states and local governments are deprived of their power to act in a given area" due to the existence of a federal law that operates in that same area.[85] The Supreme Court has recognized two broad categories of preemption: (1) express preemption, and (2) implied preemption.[86] Express preemption occurs when Congress passes a statute that explicitly withdraws certain powers from the states.[87] In circumstances where Congress has failed to make an explicit

---

[83]*See, e.g.*, Brandon P. Denning, *Vertical Federalism, Horizontal Federalism, and Legal Obstacles to State Marijuana Legalization Efforts*, 65 CASE W. RES. L. REV. 567, 579 (2015) (explaining that "[i]t seems axiomatic that the Supremacy Clause and preemption doctrine prohibit states" such as Colorado and Washington from allowing marijuana when federal law prohibits it); Garvey, *supra* note 36, at 7 ("The Colorado and Washington laws, which legalize, regulate, and tax an activity the federal government expressly prohibits, appear to be logically inconsistent with established federal policy and are therefore likely subject to a legal challenge under the constitutional doctrine of preemption."); *but see* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize a Federal Crime*, 62 VAND. L. REV. 1421, 1423-24 (2009) (opining that preemption of state marijuana laws would run afoul of the Tenth Amendment's anti-commandeering principle).

[84]Aug. 29, 2013 Letter from Attorney General Eric Holder to Governors of Washington & Colorado

[85]James T. O'Reilly, Federal Preemption of State and Local Law: Legislation, Regulation and Litigation at 1 (ABA Publishing 2006).

[86]*See generally* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226 (2000) (providing overview of preemption law).

[87]*Id*.

statement, state law may still be displaced under the doctrine of implied preemption.[88] Implied preemption "occurs where Congress, through the structure or objectives of a federal statute, has impliedly precluded state regulation of that area."[89] Regardless of whether a case involves express or implied preemption, the judiciary's task is the same: "to determine whether state regulation is consistent with the structure and purpose of the [federal] statute as a whole."[90] Or stated another way, "the purpose of Congress is the ultimate touchstone in every pre-emption case."[91]

Over the years, the Supreme Court has come to recognize two types of implied preemption: (1) field preemption, and (2) conflict preemption.[92] Field preemption occurs when federal law has been so dominant in a particular area that "Congress left no room for the States to supplement it."[93] Conflict preemption can take two forms. The first is called physical impossibility preemption, and it occurs when "compliance with both federal and state regulations is a physical impossibility."[94] The second is called obstacle preemption, and it occurs when "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[95]

With respect to the battle between state marijuana laws and the CSA, express preemption is inapplicable because the CSA does not explicitly remove the possibility of state regulation of drugs. The CSA does, however, contain a

---

[88]O'Reilly, *supra* note 85, at 65.
[89]*Id*.
[90]Denning, *supra* note 83, at 572 (internal quotations omitted).
[91]Wyeth v. Levine, 555 U.S. 555, 565 (2009) (internal quotations omitted).
[92]*Id*. at 572.
[93]Nelson, *supra* note 86, at 227 (internal quotations omitted).
[94]Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983) (internal quotations omitted).
[95]*Id*. (internal quotations omitted)

preemption provision in 21 U.S.C. § 903. Section 903 provides as follows:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.[96]

Section § 903 clearly takes field preemption off the table.[97] Equally clear from § 903 is Congress's intent to ensure that conflict preemption remains on the table. Looking to the two subsets of conflict preemption, it has traditionally been very difficult to succeed on a physical impossibility preemption theory.[98] To do so, it must be proven that "state law *requires* what federal law *prohibits*, or state law *prohibits* what federal law *requires*."[99] That is not present here because a person in, say, Colorado could comply with both federal and state law by

---

[96]21 U.S.C. § 903.

[97]Garvey, *supra* note 36, at 9 (stating that § 903 "clarifies that Congress did not intend to entirely occupy the regulatory field concerning controlled substances or wholly supplant traditional state authority in the area").

[98]Wyeth v. Levine, 555 U.S. 555, 573 (2009) ("Impossibility pre-emption is a demanding defense."); *see also* Garvey, *supra* note 36, at 10 ("Courts have only rarely invalidated a state law as preempted under the impossibility prong of the positive conflict test.").

[99]Garvey, *supra* note 36, at 10 (emphasis in original); *see also* Erwin Chemerinksy, Constitutional Law: Principles & Policies at 391 (2d ed. 2002) ("If federal law and state law are mutually exclusive, so that a person could not simultaneously comply with both, the state law is deemed preempted.").

refraining from the manufacture, distribution, and possession of marijuana.[100]

But, there is an argument to be made that this is not the correct way to view physical impossibility preemption. According to Professor Brandon Denning, viewing physical impossibility preemption in that way renders the doctrine meaningless because "a finding of impossibility could always be avoided simply by refraining from engaging in the activity that is the object of the conflicting regulatory regimes."[101] As Professor Denning has explained, physical impossibility preemption only serves a purpose if it is "viewed from the perspective of one who is engaging in the very conduct regulated by both state and federal governments."[102] Under that conception of physical impossibility preemption, state laws legalizing marijuana would be preempted because it would be physically impossible for a person in Colorado to open a marijuana dispensary under state law without simultaneously violating federal law.[103] Although it is certainly an appealing argument, Professor Denning's approach is somewhat difficult to reconcile with language found in the Supreme Court's decision in *Barnett Bank of Marion County, N.A. v. Nelson*.[104]

In *Barnett Bank*, the Court was considering whether a federal law that authorized national banks to sell insurance in small towns preempted a state law that prohibited national

---

[100]Nelson, *supra* note 86, at 228 n.15 (nothing that the Supreme Court has held that "if one sovereign's law purports to give people a right to engage in conduct that the other sovereign's law purports to prohibit, the 'physical impossibility' test is not satisfied; a person could comply with both state and federal law simply by refraining from the conduct. Thus, even when state and federal law contradict each other, it is physically possible to comply with both unless federal law requires what state law prohibits (or vice versa)").

[101]Denning, *supra* note 83, at 578.

[102]*Id*.

[103]*Id*. at 578-79.

[104]517 U.S. 25, 31 (1996).

banks from doing precisely that.[105] Although the Court found the state law to be preempted under the doctrine of obstacle preemption, it rejected the physical impossibility preemption argument. In doing so, the Court explained that this was not a situation where "the federal law said, 'you must sell insurance,' while the state law said, 'you may not.'"[106] Because a national bank could comply with both state and federal law by refusing to sell insurance, there was no physical impossibility preemption.[107] Thus, the argument goes, physical impossibility preemption is inapplicable to the marijuana conundrum because there is an easy way to comply with both laws—do not grow, distribute, or possess marijuana. Given the language of *Barnett Bank* and the Court's treatment of physical impossibility preemption as a "very narrow" doctrine,[108] it is unlikely that state marijuana legalization measures would be preempted under that doctrine.

It seems more likely that state marijuana legalization measures would be preempted under the second subset of conflict preemption—obstacle preemption.[109] Obstacle preemption is appropriate when the state law "stands as an obstacle to the accomplishment and execution of the full

---

[105]*Id*. at 27 ("The question in this case is whether a federal statute that permits national banks to sell insurance in small towns pre-empts a state statute that forbids them to do so.").

[106]*Id*. at 31.

[107]*See* Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518, 528 (Or. 2010) (en banc) (explaining that in *Barnett Bank* it was not physically impossible to comply with both state and federal law because "[a] national bank could simply refrain from selling insurance"); *see also* Wyeth v. Levine, 555 U.S. 555, 590 (2009) (Thomas, J., concurring in judgment) (questioning the physical impossibility preemption doctrine in part because federal and state law may give conflicting commands even though "an individual could comply with both by electing to refrain from the covered behavior").

[108]Wyeth v. Levine, 555 U.S. 555, 589 (2009) (Thomas, J., concurring).

[109]Garvey & Yeh, *supra* note 36, at 10-11 (focusing analysis more on obstacle preemption than physical impossibility preemption because the state laws "would likely survive the impossibility prong").

purposes and objectives of Congress."[110] To determine whether a state law serves as an obstacle, the courts must "examin[e] the federal statute as a whole and identify[] its purpose and intended effects."[111]

Determining the purpose of the CSA is an easy task. It was drafted with one goal in mind—eliminating the abuse, production, and illicit trafficking of certain psychotropic drugs.[112] To achieve that goal, Congress created a comprehensive regulatory regime prohibiting the possession, distribution, or manufacture of certain drugs (i.e., Schedule I) and regulated the possession, distribution, or manufacture of other drugs (i.e., Schedules II-V).[113] In doing so, Congress made clear that the CSA applies to drugs that are manufactured, distributed, and possessed purely intrastate.[114] Congress found that such "[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents" of drug trafficking.[115] Congress believed that its ultimate objective could not be reached if there were an exemption that allowed the manufacture, distribution, or possession of locally grown marijuana.

The application of the CSA to purely intrastate activity was attacked in *Gonzalez v. Raich* as an unconstitutional exercise of Congress's authority under the Commerce Clause. In *Raich*, the Supreme Court upheld the CSA and declared that Congress

---

[110]Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983).

[111]Arizona v. United States, 132 S. Ct. 2492, 2501 (2012) (internal quotations omitted).

[112]*See* 21 U.S.C. § 801a(1) (setting forth Congress's findings regarding the need for the CSA); *see also* Gonzalez v. Raich, 545 U.S. 13, 20 (2005) ("The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.").

[113]Raich, 545 U.S. at 13-14.

[114]21 U.S.C. § 801(3)-(6).

[115]21 U.S.C. § 801(6).

had the authority to regulate even locally grown marijuana that never crossed a state line.[116] According to the Court, exempting marijuana that was "locally cultivated for personal use . . . may have a substantial impact on the interstate market for this extraordinarily popular substance."[117] And, the Court recognized that a state law authorizing the use of medical marijuana (even if locally grown) would "have a significant impact on both the supply and demand sides of the market for marijuana."[118] Perhaps most importantly for purposes of the current debate, the *Raich* Court spoke approvingly of Congress's determination that allowing intrastate marijuana to escape the CSA's reach "would undermine the orderly enforcement of the entire regulatory scheme."[119]

Such undermining, however, has been occurring since the Ogden Memorandum was released in 2009. Because of state legalization efforts and Department of Justice acquiescence, the CSA's regulatory scheme has been significantly undermined. The goal of the CSA was to eliminate the market for marijuana, and "[l]iberal regimes like Colorado's and Washington's are diametrically opposed to th[at] goal."[120] It does not take a law degree to see that a state law authorizing the production, distribution, and use of marijuana makes it difficult for the federal government to achieve its goal of eradicating marijuana. It is made even more difficult when the state actually benefits from *increased* use of the substance that federal law is trying to *decrease*.

---

[116]Raich, 545 U.S. at 19. For those unfamiliar with the case, *Raich* involved several individuals who sought to use and grow marijuana for medicinal purposes under California's Compassionate Use Act. *Id*. at 5-7. The individuals sued the Attorney General of the United States, seeking a declaration that the CSA's prohibition on the manufacture, distribution, and possession of marijuana was unconstitutional as applied to locally grown marijuana that did not travel in interstate commerce. *Id*. at 7.

[117]*Id*. at 28.

[118]*Id*. at 30.

[119]*Id*. at 28.

[120]Denning, *supra* note 83, at 579.

Take Colorado, for example. It legalized marijuana for recreational use in 2012, and in 2015 Colorado collected approximately $135 million in tax revenue from the marijuana industry.[121] That money has been used to fund a variety of state programs and projects ranging from school construction and street paving to bullying prevention.[122] If people stop selling, smoking, and growing marijuana in Colorado, then the state and local governments will lose money. If the government loses money, it will cut programs and services. No government desires to do either of those things. So, what does Colorado want? More marijuana sales! When do they want them? Now!

The good news for Colorado is that it is getting what it wants. The data shows that when a state legalizes marijuana, use of the drug increases in that state.[123] That should come as

---

[121]National Public Radio, All Things Considered, *Where Does Colorado's Marijuana Money Go?* (Oct. 1, 2016) (transcript available at, http://www.npr.org/2016/10/01/496226348/where-does-colorados-marijuana-money-go).

[122]*Id*. (reporting that money from marijuana tax revenues was used to build schools, provide for the homeless, and create college scholarships); *see also* Carlos Illescas, *Marijuana Sales Tax Huge Boon for Colorado Cities*, Denver Post (May 26, 2016) (available at, http://www.denverpost.com/2016/05/26/marijuana-sales-tax-revenue-huge-boon-for-colorado-cities/) (quoting an official of a small Colorado town as saying: "We have such as small tax base . . . .Medical and retail marijuana have definitely helped the town's bottom line. I'd be lying if I said it didn't."); Mahita Gajanan, *Colorado Will Use Extra Marijuana Revenue to Prevent Bullying in Schools*, Time Magazine (Sep. 28, 2016) (available, at http://time.com/4511895/colorado-surplus-marijuana-tax-revenue-bully-prevention/) (reporting that $2.9 million in marijuana tax revenues was used to create a bullying prevention program at 50 schools).

[123]Beau Kilmer, *If California legalizes marijuana, consumption will likely increase. But is that a bad thing?*, LOS ANGELES TIMES (May 16, 2016) (reporting that after legalization, marijuana use increased in Colorado and Washington); *see also* Rocky Mountain High Intensity Drug Trafficking Area, *The Legalization of Marijuana in Colorado: The Impact* (Jan. 2016) (available at, http://www.rmhidta.org/html/FINAL%20NSDUH%20Results-

no surprise. After all, allowing "profit-maximizing firms to produce, sell, and advertise"[124] an item that was previously only available on the black-market will result in an increase in that item's use. So, state legalization efforts have led to an increase in the very activity that the CSA prohibits and seeks to eliminate altogether.

That type of conflict between the effect of a state law and the objective of a federal law is what obstacle preemption is designed to address. When previously confronted with an analogous situation, the Supreme Court struck down the offending state law in *Michigan Canners & Freezers v. Agricultural Board*.[125] The *Michigan Canners* Court held that the federal Agricultural Fair Practices Act preempted the Michigan Agricultural Marketing and Bargaining Act because the Michigan law stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[126]

The federal law was designed to improve the bargaining power of farmers when they brought their food to market.[127] One provision of the federal law prevented an association of food producers from interfering with an individual producer's decision about whether to bring food to the market individually or to sell it through a producers' association.[128] The Michigan law, on the other hand, stated that a producers' association was the exclusive bargaining agent for all producers of a particular

---

%20Jan%202016%20Release.pdf) (stating that "in the two year average (2013/2014) since Colorado legalized recreational marijuana, youth past month marijuana use increased 20 percent compared to the two year average prior to legalization (2011/2012)" while at the same time "nationally youth past month marijuana use declined 4 percent"); Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 17 (2013) ("There is little doubt, then, that marijuana use will increase following state legalization.").

[124]Kilmer, *supra* note 123.

[125]467 U.S. 461 (1984).

[126]*Id*. at 478 (internal quotations and citations omitted).

[127]*Id*. at 463-64.

[128]*Id*. at 464.

food item.[129] Individual producers were required to pay a fee to the association and abide by the terms of the association's contracts.[130] In other words, the Michigan law "empower[ed] producers' associations to do precisely what the federal Act forbids them to do."[131] The Michigan law, therefore, was struck down by the Supreme Court under the obstacle preemption doctrine.[132]

Just like the Michigan law authorized producers' associations to engage in conduct that federal law prohibited, those states that have legalized marijuana have "empower[ed] [marijuana growers, distributors, and users] to do precisely what the federal Act forbids them to do."[133] It is difficult to escape that reality.[134] So, why has no federal court ruled that the CSA preempts state marijuana legalization laws? Because the Department of Justice—through its "policy of benign neglect"[135]—has refused to bring a lawsuit challenging state marijuana legalization laws as preempted under the obstacle preemption doctrine.[136]

In response to the Department of Justice's decision not to file a preemption lawsuit, Oklahoma and Nebraska made a valiant effort to have the Supreme Court rule on the issue. They

---

[129]*Id*. at 466.

[130]Michigan Canners & Freezers Ass'n, 467 U.S. at 467-68.

[131]*Id*. at 477-78.

[132]*Id*. at 478 (holding that the Michigan law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and "therefore, the Michigan Act is pre-empted") (internal quotations and citations omitted).

[133]*Id*. at 477-78.

[134]*See generally* Denning, *supra* note 83, at 580 ("At the risk of seeming obtuse, I find it self-evident that state legalization regimes permitting marijuana use for medical or recreational purposes present a substantial obstacle to the implementation of a federal law that (1) recognizes no medical use for marijuana and (2) seeks to eliminate the national market in marijuana by banning all production, possession, and transfer.")

[135]Denning, *supra* note 83, at 583.

[136]*Id*. at 581 (stating that "[o]nly the DOJ's announced policy of forbearance keeps this conflict from coming to a head").

brought a lawsuit against Colorado directly in the Supreme Court pursuant to Article III, Section 2 of the U.S. Constitution and 28 U.S.C. § 1251(a), both of which vest the Supreme Court with "original jurisdiction" over a lawsuit between two states.[137] In that lawsuit, Oklahoma and Nebraska argued that Colorado's marijuana legalization law "conflicts with and otherwise stands as an obstacle to the full purposes and objectives of Congress."[138] For reasons unknown and unstated, the Supreme Court refused to exercise its jurisdiction to hear the case.[139]

Although no federal court has ruled on the preemption issue, a handful of state courts have addressed it.[140] Of that handful of courts, the most notable opinion is the Supreme Court of Oregon's in *Emerald Steel Fabricators, Inc. v. Bureau of*

---

[137]Motion for Leave to File Complaint, Nebraska & Oklahoma v. Colorado, Supreme Court of the United States (Dec. 18, 2014) (available at, http://sblog.s3.amazonaws.com/wp-content/uploads/2014/12/Neb.-Okla.-original-suit-vs.-Colorado-12-18-14.pdf).

[138]*Id*. at 23.

[139]Nebraska, et al. v. Colorado, 136 S. Ct. 1034 (2016) (Thomas, J., dissenting from the denial of motion for leave to file complaint) (arguing that the Court should have exercised its original jurisdiction to hear the case instead of "denying, without explanation, Nebraska and Oklahoma's motion for leave to file a complaint"). In the wake of the Supreme Court's refusal to hear the case, Nebraska and Colorado sought permission to intervene in a lawsuit brought by some private parties against Colorado. That lawsuit had been previously dismissed by a U.S. District Court judge on the basis that private parties could not seek preemption under the Supremacy Clause. *Safe Streets Alliance, et al. v. John Hickenlooper, Governor of Colorado, et al.*, No. 1:15-CV-00349, 2016 WL 223815, at *3, *5 (D. Colo. Jan. 19, 2016). The plaintiffs appealed to the Tenth Circuit Court of Appeals, and Nebraska and Oklahoma sought permission to intervene in that appeal. The Tenth Circuit allowed the intervention, and the parties are awaiting a decision on the merits. *Safe Streets Alliance, et al. v. John Hickenlooper, Governor of Colorado*, Order Granting Motion to Intervene, Appeal No. 16-1048 (10th Cir. Dec. 22, 2016).

[140]*See* Garvey & Yeh, *supra* note 36, at 14-15 (summarizing several state court rulings).

Labor and Industries.[141] The *Emerald Steel* court concluded that the CSA preempted Oregon's Medical Marijuana Act, which provided that people who had been issued a medical marijuana card could manufacture, distribute, and possess marijuana.[142] According to the court, the Oregon law stood "as an obstacle to the accomplishment of the full purposes of the federal law."[143] The court further explained that when Congress passed the CSA, it "did not intend to enact a limited prohibition on the use of marijuana—i.e., to prohibit the use of marijuana unless a state chose to authorize its use."[144] Instead, Congress meant for the CSA to "impose[] a blanket prohibition on the use of marijuana without regard to state permission to use."[145] And, there is no U.S. Supreme Court precedent holding that "states can authorize their citizens to engage in conduct that Congress explicitly has forbidden."[146] Some scholars[147] and a few

---

[141]348 Or. 159 (2010) (en banc).

[142]*Id*. at 161; *but see* County of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 482 (Cal. App. Ct. 2008) (holding that the CSA does not preempt California's medical marijuana identification card law because "the purpose of the CSA is to combat recreational drug use, not to regulate a state's medical practices").

[143]Emerald Steel Fabricators, Inc., 348 Or. at 186.

[144]*Id*. at 177-78.

[145]*Id*. at 178.

[146]*Id*. at 183.

[147]*See* Sam Kamin, *Pot Prohibition is Almost Over; Oklahoma, Nebraska's Suit is Doomed*, THE CANNABIST (Jun. 29, 2015) (available at, http://www.thecannabist.co/2015/06/29/pot-marijuana-oklahoma-nebraska-lawsuit-colorado/37014/#disqus_thread) (law professor opining that Colorado's marijuana legalization measure is not preempted by the CSA because "the federal government cannot force state officials (cannot commandeer them, to use the constitutional term) to enforce" federal law); *see also* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize a Federal Crime*, 62 VAND. L. REV. 1421, 1423-24 (2009) (arguing that "to say that Congress may thereby preempt state inaction (which is what legalization amounts to, after all) would, in effect, permit Congress to command the states to take some action—namely, to proscribe medical marijuana. The Court's anti-

judges[148] have argued that a finding that the CSA preempts state marijuana legalization laws would run afoul of the anti-commandeering principle embodied in the Tenth Amendment to the U.S. Constitution. That argument is creative and thought-provoking. But, it is wide of the mark—at least as it relates to what has actually happened in those states that have legalized marijuana.

The Tenth Amendment provides as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[149] The Supreme Court has read that language to prevent the federal government from "commandeering" state governments by requiring them to enforce federal law.[150] Perhaps the most significant anti-commandeering case is *Printz v. United States*.[151] At issue in *Printz* was the Brady Handgun Violence Prevention Act, which contained a provision requiring state and local police officers to conduct background checks on handgun purchasers.[152] The Court struck down that provision under the Tenth Amendment because the federal government "may not compel the State to enact or administer a federal regulatory program."[153]

Undoubtedly, the anti-commandeering doctrine applied in *Printz* would prevent the federal government from forcing state and local police officers to enforce the CSA's marijuana prohibition. It is also beyond debate that the federal

---

commandeering rule, however, clearly prohibits Congress from doing this.").

[148]*See, e.g.*, Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 348 Or. 159, 191 (2010) (en banc) (Walters, J., dissenting) (citing the anti-commandeering doctrine as one of the reasons why the CSA does not preempt Oregon's medical marijuana law).

[149]U.S. CONST. amend. X,

[150]New York v. United States, 505 U.S. 144, 188 (1992) (holding that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program").

[151]521 U.S. 898 (1997).

[152]*Id.* at 903.

[153]*Id.* at 933 (internal quotations omitted).

government could not mandate that all states criminalize marijuana. Neither of those things, however, would result from a court holding that the CSA preempts state marijuana legalization laws. A finding that the CSA preempts a state marijuana legalization law would result in the state having no law—authorizing or forbidding—marijuana. And, that is entirely constitutional because states are free by virtue of the anti-commandeering doctrine to decriminalize marijuana through the repeal of their laws that prohibit the manufacture, distribution, and possession of marijuana.[154]

There is, however, a critical difference between decriminalizing marijuana by repealing existing law and authorizing marijuana, regulating it, and making a tremendous amount of money by taxing it. Recognizing as much, the law of preemption distinguishes between failing to criminalize an activity and making the activity lawful.[155] As a panel of the California Court of Appeals explained, "[w]hen an act is prohibited by federal law, but neither prohibited nor authorized by state law, there is no obstacle preemption."[156] But, when a state moves beyond decriminalization and passes a law that affirmatively authorizes and regulates what federal law prohibits, the state's law is preempted, and the anti-commandeering doctrine is not implicated.[157]

---

[154]*See* Garvey & Yeh, *supra* note 36, at 13-14 (explaining that under the "Tenth Amendment and preemption precedent" a state could exempt marijuana-related activities from criminal penalties under state law).

[155]*See* Pack v. Superior Court of Los Angeles, 132 Cal. Rptr. 3d 633, 651 (Cal. App. Ct. 2012). In *Pack*, the court held that the CSA preempted a city ordinance requiring an expensive permit to grow or distribute medical marijuana. *Id*. at 638. The court's decision was accepted for review by the Supreme Court of California, but the appeal was dismissed by request of the parties. Pack v. Superior Court of Los Angeles, Case No. B228781, Order of Aug. 22, 2012) (available at, http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=2&doc_id=1961761&doc_no=B228781).

[156]Pack, 132 Cal. Rptr. 3d at 651.

[157]*Id*. at 652 ("The City's ordinance, however, goes beyond decriminalization into authorization . . . . A law which authorizes

Looking again to Colorado as an example, the state's 2012 marijuana legalization measure did more than simply repeal the state's statute that criminalized marijuana—it created a regulatory scheme that authorizes, permits, and collects large fees[158] from marijuana-related activities that are prohibited by federal law. More specifically, Colorado developed "procedures for the issuance, renewal, suspension, and revocation of licenses; provide[d] a schedule of licensing and renewal fees; and specif[ied] requirements for licensees to follow regarding physical security, video surveillance, labeling, health and safety precautions, and product advertising."[159] There is now an entire state bureaucracy focused on nothing more than administering the marijuana industry.[160] Because the state law expressly authorizes what federal law prohibits, it is preempted because it serves as an obstacle to the fulfillment of Congress' goal to eliminate the manufacturing, distribution, possession, and use of marijuana.

Of course, it is unlikely that a federal court will have the opportunity to reach that conclusion unless the Department of Justice changes its approach and files a lawsuit against the

---

individuals to engage in conduct that the federal Act forbids stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress and is therefore preempted.") (internal quotations and alterations omitted); *see also* Emerald Steel Fabricators, Inc. v. Bureau of Labor Statistics, 348 Or. 159, 177-78 (2010) (en banc) (explaining that Oregon's law was preempted because it went beyond exempting marijuana offenses from state prosecutions by "affirmatively authoriz[ing]" marijuana manufacturing, distribution, and possession); Garvey & Yeh, *supra* note 36, at 14 (stating that the "affirmative act of regulating and licensing marijuana cultivation and distribution may not invoke the same Tenth Amendment protections enjoyed by the states' initial decision to simply remove marijuana-related penalties under state law").

[158]Garvey & Yeh, *supra* note 36, at 5 (reporting that Colorado imposes a 25% tax on retail marijuana sales).

[159]*Id*.

[160]*See https://www.colorado.gov/pacific/enforcement/marijuanaenforcement* (website of the Marijuana Enforcement Division of the Colorado Department of Revenue).

offending states. Although the filing of such a lawsuit after years of sitting on the sidelines while state marijuana legalization measures spread like wildfire will ruffle feathers and disrupt what has become a billion-dollar industry, it is the approach dictated by the law (as opposed to personal preference or political expediency). Aside from the preemption issues discussed above, the Department of Justice's current approach violates the Take Care Clause.

V. TAKE CARE CLAUSE

The Take Care Clause of the U.S. Constitution is, in comparison to other constitutional provisions, largely unknown and infrequently litigated.[161] It provides in simple and direct language that the President "shall take Care that the Laws be faithfully executed."[162] Despite its brevity and relative obscurity, the Take Care Clause packs a mighty punch. It ensures that the power of our federal government is dispersed among the different branches,[163] and it prevents executive "lawlessness in the form of overreach or inaction."[164]

The Take Care Clause was designed to prevent Presidents (and their surrogates, such as the Attorney General) from doing exactly what the Department of Justice has done by refusing to enforce the CSA's prohibition of marijuana in those states that have passed legalization measures. It has been argued that the Department's current approach is an unreviewable exercise of prosecutorial discretion rather than a

---

[161]*See* Ted Cruz, *The Obama Administration's Unprecedented Lawlessness*, 38 HARV. J. L. & PUB. POL'Y 63, 70 (2015) (stating that "[o]nly a few Supreme Court cases have interpreted the Take Care Clause").

[162]U.S. CONST. art. II, § 3.

[163]*See* Todd Garvey, *The Take Care Clause and Executive Discretion in the Enforcement of the Law*, Congressional Research Service (Sept. 4, 2014) (explaining that the "Take Care Clause makes a significant contribution to the separation of powers").

[164]Sam Kamin, *Prosecutorial Discretion in the Context of Immigration and Marijuana Law Reform: The Search for a Limiting Principle*, 14 OHIO ST. J. CRIM. L. 183, 196 (2016).

breach of the Take Care Clause.[165] That argument lacks merit because there is a difference between prosecutorial discretion in individual cases (constitutional and necessary) and a blanket policy of non-enforcement (unconstitutional and dangerous). As explained below, the Department's approach falls on the unconstitutional and dangerous side of the line.

To understand the Take Care Clause and its purpose, a brief historical review is necessary. Prior to the Glorious Revolution of 1688, the English crown possessed suspension and dispensation powers.[166] Generally speaking, those powers allowed the king to nullify or simply disregard statutes passed by Parliament.[167] Because Parliament rarely met and the king was viewed as the "source of all law," the suspension and dispensation powers were viewed for many years as "useful and broadly accepted lubricants" that allowed the king to adjust the law as the circumstances required.[168] Things changed when King James II came to power.[169] He drew the ire of Parliament and the people when he began using his suspension and dispensation to "systematically dispense with a vast array of religious legislation and rules governing the universities."[170] His actions contributed to the Glorious Revolution, which resulted in the ascension of William III to the crown and the elimination of the suspension and dispensation powers.[171] The elimination of those powers was a "central achievement of the English Revolution . . . . [and] formed an important backdrop to the American constitutional enterprise."[172]

---

[165]*Id*. at 200 ("In the context of federal marijuana law enforcement, it seems clear that the Obama administration's guidance to prosecutors regarding the allocation of scarce resources is nothing more than an exercise of prosecutorial discretion.").

[166]Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 690-91 (2014).

[167]Cruz, *supra* note 161, at 66.

[168]Price, *supra* note 166, at 691.

[169]*Id*.

[170]Delahunty & Yoo, *supra* note 25, at 805 (internal quotations omitted).

[171]*See* Price, *supra* note 166 at 691 (explaining that "William III and Mary II replaced King James on the throne. As part of the new constitutional settlement, the monarch was henceforth denied suspending and dispensing powers.").

[172]*Id*. at 692.

Given the experience of their English ancestors, our Founding Fathers took pains to ensure that the President lacked the authority to "make, or alter, or dispense with the laws."[173] Thus, they drafted the Take Care Clause and included it in Article II, § 3. The Clause places upon the President "an obligation and affirmative duty" to enforce the laws passed by Congress.[174] It is worth emphasizing "how strong the language of the Take Care Clause is. It is pitched at the highest register of constitutional obligation. The President *shall*—not may."[175] In fact, it has been argued that the Take Care Clause is one of only two duties expressly imposed on the President by the Constitution—"he *must* take the Oath of Office . . . and he *shall* take care that the Laws be faithfully executed."[176] The obligation is not simply the President's; rather, it is one that is borne by all Executive Branch officials.[177]

Although the President has a role in the legislative process (most notably, the veto power), when a bill becomes a law the President's "legislative role comes to an end and is supplanted by his express constitutional obligation under" the Take Care Clause.[178] Noticeably absent from the Take Care Clause is a footnote clarifying that the President only has to faithfully execute the laws that he personally agrees with or those that are popular with his political base.[179] Permitting the

---

[173]Garvey, *supra* note 163, at 5 (internal quotations omitted).

[174]Cruz, *supra* note 161, at 69.

[175]Brief for the Cato Institute, Professors Randy E. Barnett & Jeremy Rabkin as Amici Curiae, United States v. Texas, Supreme Court Case No. 15-674, 2016 WL 1377723, at *10 (Apr. 4, 2016) (discussing the history and purpose of the Take Care Clause).

[176]*Id*. (internal citations omitted).

[177]*See generally* Kamin, *supra* note 164 at 196 (stating that under the Take Care Clause "the federal executive is charged with taking care that the laws of the United States are faithfully executed"); *see also* Garvey, *supra* note 163, at 5 (explaining that the "President and executive branch officers must 'faithfully' implement and execute the law[s]").

[178]Garvey, *supra* note 136, at 5..

[179]*See* Cruz, *supra* note 171, at 73 (stating that "the President's obligation to enforce the laws does not include the power to disregard duly enacted laws when they become politically inconvenient"); *see also* Delahunty & Yoo, *supra* note 25, at 794 (explaining that the Constitution "imposes on the President a duty to enforce existing

President to ignore or modify congressional enactments would violate the separation of powers doctrine by "cloth[ing] the executive branch with the power of lawmaking."[180] If the Framers wanted the President to have that type of power, they would have given him suspension and dispensation powers instead of saddling him with an affirmative duty to faithfully execute the laws passed by Congress. As Professors Delahunty and Yoo have explained, a "deliberate decision to leave a substantial area of statutory law unenforced or underenforced is a serious breach of Presidential duty."[181]

If you want to see an example of such a breach of Presidential duty, look no further than the Department of Justice's approach to state marijuana legalization efforts. The CSA is a longstanding federal law that makes it clear as day that marijuana is prohibited nationwide for both medicinal and recreational use. Nonetheless, the Department announced that it would not prosecute marijuana offenders in those states that passed legalization measures. Similarly, the Department refused to institute preemption proceedings against the offending states. To the contrary, when two states (Oklahoma and Nebraska) tried to do the Department's job for it by suing Colorado over its marijuana legalization law, the Department actually filed a brief supporting Colorado.[182] Yes, you read that correctly—the U.S. Department of Justice came to the aid of the state that was violating federal law instead of those that were seeking to enforce it.

---

statutes, regardless of any policy differences with the Congresses that enacted them or the presidents who signed them"). The president may, however, refuse to enforce a law if he believes the law violates the Constitution. *See* Cruz, *supra* note 36, at 73-74 ("[I]f a President faces a decision between enforcing a law that Congress has passed and enforcing the Constitution, many scholars have argued that he is obligated to enforce the Constitution."). But, there have been very few circumstances where a president's nonenforcement decision was based on a constitutional concern. *Id*. at 74.

[180]Garvey, *supra* note 163, at 5.

[181]Delahunty & Yoo, *supra* note 25, at 785.

[182]Lyle Denniston, *U.S. Opposes Marijuana Challenge by Colorado's Neighbors*, SCOTUSBlog (Dec. 17, 2015) (available at, http://www.scotusblog.com/2015/12/u-s-opposes-marijuana-challenge-by-colorados-neighbors/).

For the approximately thirty-nine-year period between the passage of the CSA in 1970 and 2009, the Department of Justice (in both Democratic and Republican administrations) took care to see that the CSA's marijuana prohibition was faithfully executed. That all changed approximately one year into President Obama's term when his Deputy Attorney General announced that the Department would no longer seek to prosecute "individuals whose actions [we]re in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[183] A later announcement extended that policy of non-enforcement to those living in states that authorized recreational marijuana.[184] Further, those states have become marijuana meccas where people grow, sell, and smoke marijuana openly. But, the words written into law by Congress remain unchanged—marijuana is a Schedule I controlled substance that is strictly prohibited, and its manufacture, distribution, and possession are punishable by imprisonment. What had changed, however, is that the words written into law by Congress did not align with the policy preferences of those heading up the Executive Branch.[185]

So, the Department of Justice simply decided to suspend the CSA in certain states and to grant dispensations to people

---

[183]October 19, 2009, Memorandum from Deputy Attorney General David W. Ogden to Selected United States Attorneys.

[184]Aug. 29, 2013, Memorandum from James M. Cole to All United States Attorneys.

[185]Both President Obama and Attorney General Holder have made public statements regarding their dissatisfaction with the CSA's treatment of marijuana as a Schedule I controlled substance. *See, e.g.* Jann S. Wenner, *The Day After: Obama on His Legacy, Trump's Win and the Path Forward*, ROLLING STONE MAGAZINE (Nov. 29, 2016) (available at, http://www.rollingstone.com/politics/features/obama-on-his-legacy-trumps-win-and-the-path-forward-w452527) (quoting President Obama as saying that he believes marijuana should be treated the "same way we do with cigarettes or alcohol"); *see also* Nick Wing, *Eric Holder Says It's Ridiculous To Treat Weed Like Heroin, But He Can't Do Anything About It Now*, HUFFINGTON POST (Feb. 24, 2016) (quoting Eric Holder as saying "we treat marijuana in the same way that we treat heroin now, and that clearly is not appropriate"). Ironically, as the Attorney General, Holder could have addressed the issue lawfully by exercising his authority under 21 U.S.C. § 811(a)-(b) to remove marijuana from Schedule I of the CSA. He failed to do so.

who grow, sell, and possess marijuana in those states. There is one slight problem. The American President and his surrogates in the Department of Justice are not 17th-century English monarchs who possess suspension and dispensation powers.[186] That was the whole point of the Take Care Clause.[187] If the President and the attorney general wanted marijuana to be treated differently by federal law, they should have lobbied Congress or followed the administrative rescheduling process that Congress set forth in 21 U.S.C. § 811.

Some have defended the Department's non-enforcement policy as a permissible exercise of prosecutorial discretion, rather than an abdication of the "take care" duty.[188] That argument has some surface appeal. But, it crumbles upon closer inspection because there is a difference between prosecutorial discretion and a policy of non-enforcement.[189] The former is entirely permissible and virtually unchallengeable, the latter is a violation of the Take Care Clause.[190] To understand why, it is necessary to look at what prosecutorial discretion is and the purpose that it serves.

The concept of prosecutorial discretion reflects an understanding that the executive branch's duty to enforce the

---

[186]*See* 4A U.S. Op. Off. Legal Counsel 55 (1980) (opinion by Office Legal Counsel explaining that "[t]he President has no 'dispensing power[,]' meaning that the President and his subordinates may not lawfully defy an Act of Congress if the Act is constitutional").

[187]*See* Cruz, *supra* note 161, at 114 ("The Take Care Clause was explicitly included in the Constitution to prevent the President from wielding the suspension and dispensation powers that had been abused by English kings.").

[188]*See* Kamin, *supra* note 164, at 200 (opining that "the Obama administration's guidance to prosecutors regarding the allocation of scarce resources is nothing more than an exercise of prosecutorial discretion").

[189]*See* Brief of former U.S. Attorneys General as Amici Curiae, United States v. Texas, Supreme Court Case No. 15-674, 2016 WL 1319656, at *3 (Apr. 4, 2016) (explaining that "the Executive's authority to exercise discretion in the enforcement of the laws does not encompass the far broader power to authorize . . . class-wide relief").

[190]*See* Cruz, *supra* note 161, at 77 ("[I]t would violate the Take Care Clause for a President to invoke prosecutorial discretion as a means of failing to enforce those laws of which the President disapproves.") (internal quotations omitted).

laws does not have to be "performed robotically."[191] Rather, federal prosecutors (as the President's surrogates) have the power to decide whether to bring charges in a particular case. Generally speaking, a prosecutor's refusal to bring charges is not subject to judicial review. As the U.S. Court of Appeals for the Fifth Circuit has explained: "It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."[192]

Generally speaking, the decision of whether to institute a prosecution is made by a prosecutor after considering the facts and circumstances of a particular situation. It is a case-specific judgment call that is based on such things as the strength of the evidence, the credibility of witnesses, the constitutionality of police conduct, the preferences of a victim, the potential defendant's criminal history, and resource constraints. A federal prosecutor's exercise of discretion is to be guided by the parameters set forth in a chapter of the U.S. Attorney's Manual entitled "Principles of Federal Prosecution."[193] That chapter begins with the general rule that an "attorney for the government should commence or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense, that the admissible evidence will probably be sufficient to obtain and sustain a conviction, and that a substantial federal interest would be served by the prosecution."[194] A case that meets those requirements should be prosecuted,[195] unless "(1) The person is subject to effective

---

[191]*See* Price, *supra* note 166, at 696.

[192]United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965).

[193]U.S. Dep't of Justice, United States Attorneys' Manual § 9-27.220 (available at, https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.200).

[194]*Id*.

[195]*See* Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Discretion*, 79 NOTRE DAME L. REV. 221, 237 (2003) (discussing the Principles of Federal Prosecution and stating that "the expectation is that where legal evidence of an offense exists, a prosecutor is expected to initiate criminal proceedings").

prosecution in another jurisdiction; or (2) There exists an adequate non-criminal alternative to prosecution."[196]

As a trio of former U.S. Attorneys General[197] have explained, "[e]ach of these situations is intensely case—and person—specific. . . .the core of the discretionary authority exclusively reserved to the Executive is the authority to make a decision in *particular* cases regarding *particular* individuals."[198] Put another way, "executive officials hold discretion only to make case-specific exceptions to enforcement."[199] Thus, the doctrine of prosecutorial discretion does not provide the Attorney General with the authority to decline prosecutions "on a categorical or prospective basis."[200] Nor can the Attorney General rely on the doctrine of prosecutorial discretion to justify the creation of a policy against enforcing a particular provision of federal law.[201] Prosecutorial discretion is not unfettered—the "mere invocation of prosecutorial or enforcement discretion is not to be treated as a magical incantation"[202] that allows the executive to disregard congressional enactments.

Although the judiciary generally refuses to review exercises of prosecutorial discretion, the courts have recognized that there is a difference between the exercise of prosecutorial discretion in an individual case and an agency non-enforcement policy.[203] As the Department of Justice itself previously

---

[196]U.S. Dep't of Justice, United States Attorneys' Manual § 9-27.220 (available at, https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.200).

[197]The trio consisted of Edwin Meese III, Richard Thornburg, and John Ashcroft. Brief of former U.S. Attorneys General as Amici Curiae, United States v. Texas, Supreme Court Case No. 15-674, 2016 WL 1319656, at *1 (Apr. 4, 2016).

[198]*Id*. at *11, *13.

[199]Price, *supra* note 166, at 677.

[200]Cruz, *supra* note 161, at 76-77 (internal quotations omitted).

[201]*See* Brief of former U.S. Attorneys General as Amici Curiae, United States v. Texas, Supreme Court Case No. 15-674, 2016 WL 1319656, at *13 (Apr. 4, 2016) (discussing the difference between individualized prosecutorial discretion and a blanket policy of nonenforcement).

[202]Garvey, *supra* note 163, at 25 (internal quotations omitted).

[203]*See id*. at 25-26 (discussing the judiciary's attempts to distinguish between traditional prosecutorial discretion and an agency nonenforcement policy).

admitted, "the individual prosecutorial decision is distinguishable from instances in which courts have reviewed the legality of general Executive Branch policies."[204] While the courts will not "assume the essentially Executive function of deciding whether a particular alleged violator should be prosecuted," they will make the "conventionally judicial determination of whether certain fixed policies allegedly followed by the Justice Department and the United States Attorney's office lie outside the constitutional and statutory limits of 'prosecutorial discretion.'"[205] And, the question of whether a Department of Justice policy of not enforcing a particular law violates the Take Care Clause is one that can be reviewed by the judicial branch.[206]

It is a good thing that such review is available. Consider the consequences of allowing the Executive Branch to refuse the enforcement of duly-enacted laws under the guise of prosecutorial discretion. An Executive Branch that believed there was too much environmental regulation could refuse to prosecute people who dumped pollutants into the waterways. An Executive Branch that disagreed with federal firearm laws could refuse to prosecute people who sold guns to convicted

---

[204]8 Op. O.L.C. 101, 126 (1984).

[205]Nader v. Saxbe, 497 F.2d 676, 679 (D.C. Cir. 1974).

[206]*Id*. at 679, n.19 (quoting the Take Care Clause and noting that the "law has long recognized the distinction between judicial usurpation of discretionary authority and judicial review of the statutory and constitutional limits to that authority. Judicial review of the latter sort is normally available unless Congress has expressly withdrawn it.") (internal citations omitted). Interestingly, the Supreme Court of the United States last term asked the parties in the case of *United States v. Texas* to address whether the Obama administration's policy of not enforcing certain immigration laws constituted a violation of the Take Care Clause. *See* Leticia M. Saucedo, *The Supreme Court Adds 'Take Care Clause' to the DAPA Debate*, AMERICAN CONSTITUTIONAL SOCIETY BLOG (Jan. 19, 2016) (available at, http://www.acslaw.org/acsblog/the-supreme-court-adds-%E2%80%98take-care-clause%E2%80%99-to-the-dapa-debate). The issue was briefed and argued, but the Court did not issue a decision in the case because Justice Scalia died during the pendency of the case and the remaining justices deadlocked 4-4. *See* United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam) ("The judgment is affirmed by an equally divided court.").

felons. An Executive Branch that disliked the tax system could refrain from prosecuting tax fraud cases. And, an Executive Branch that favored drug legalization could stop prosecuting drug dealers. If that is what prosecutorial discretion allows, then it "threatens to undermine the constitutional lawmaking process."[207] And, we should stop referring to the bills passed by Congress and signed by the President as "laws." A more apt description would be "suggestions for the Executive Branch." The Take Care Clause was designed to prevent that very thing from happening.

At bottom, the Department of Justice's refusal to enforce the CSA's marijuana prohibition in those states that have legalized marijuana is not an exercise of prosecutorial discretion. The decision of whether to prosecute is not being made on an individualized basis—a federal prosecutor is not considering the evidence, looking at the circumstances, applying the factors set forth in the U.S. Attorney's Manual, and deciding whether a prosecution is warranted against a particular suspect. Rather, there is an articulated non-enforcement policy that effectively exempts the residents of twenty-six states from federal marijuana law. As the U.S. House of Representatives, Committee on the Judiciary reported, "the breadth of the Justice Department's position on marijuana non-enforcement goes well beyond the limits of prosecutorial discretion . . . the guidance to U.S. Attorneys establishes a formal, department-wide policy of selective non-enforcement of an Act of Congress."[208] In his famous speech entitled "The Federal Prosecutor," then-Attorney General (later Justice) Robert H. Jackson warned against such behavior, stating: "The federal government could not enforce one kind of law in one place and another kind elsewhere . . . the only long-term policy that will save federal justice from being discredited by entanglements with local politics is that it confine itself to strict and impartial enforcement of federal law, letting the chips

---

[207]Cruz, *supra* note 161, at 78.

[208]Report No. 113-377 of the Committee on the Judiciary, U.S. House of Representatives, regarding Executive Needs to Faithfully Observe and Respect Congressional Enactments of Law (ENFORCE) Act of 2014 (Mar. 7, 2014).

fall in the community where they may."[209] The Department of Justice has disregarded Justice Jackson's admonition, choosing instead to adopt a policy that violates the President's duty to "take care that the Laws be faithfully executed."[210]

VI. CONCLUSION

The approach that the Department of Justice has taken to state laws legalizing marijuana over the past eight years must not continue. At the end of the day, federal law is federal law—meaning that it applies equally in all fifty states regardless of what laws a state may pass. It is not only terrible policy for the federal government to allow states to make a mockery of federal law, but it is also unconstitutional. The notion that people in one part of the country can violate federal law with impunity while people in another part of the country go to federal prison for engaging in the same conduct is un-American. If the time has come to change the way federal law treats marijuana, then that change needs to occur in a lawful manner—either by passing a bill that is signed into law by the President or by following the administrative rescheduling procedure set forth in 21 U.S.C. § 811(a)-(b). Until that occurs, the Department of Justice should return to doing its job by enforcing federal marijuana law uniformly throughout the United States.

---

[209]Robert H. Jackson, Attorney General of the United States, Speech at the Second Annual Conference of United States Attorneys: The Federal Prosecutor at 6 (Apr. 1, 1940).
[210]U.S. CONST., art. III, § 3.

LINCOLN MEMORIAL UNIVERSITY
LAW REVIEW

VOLUME 4 SPRING 2017 ISSUE 2

AGREE TO DISAGREE: MOVING TENNESSEE TOWARD PURE NO-FAULT DIVORCE

Evan Wright[a1]

I. INTRODUCTION

"The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society."[1]

As Justice Kennedy aptly pointed out, the institution of marriage has developed from roots that run deep into human evolution. Divorce emerged as a means for parties to dissolve a legal relationship. For much of our history, domestic relations law reflected religious values that looked unfavorably on

[a1] J.D. Candidate, May 2017, Lincoln Memorial University. The author would like to thank Professor April James for inspiring this Note. This was just one of the many spirited domestic relations debates that we had over the last two years. Also, Duncan School of Law Dean of Academics Matthew Lyon contributed a great deal of time critiquing this Note. Dean Lyon has, without question, raised the level of my writing over the past three years. Thank you to both of these professors for your time and insight.

[1] Obergefell v. Hodges, 135 S. Ct. 2584, 2595 (2015).

divorce.[2] Remedies required proof that at least one party failed to conform to society's expectations—a fault-based divorce. Time brings change. Divorce law's grip on the reigns of marriage loosened during the twentieth century.[3]

Modern divorce laws have no-fault options firmly entrenched in all fifty states.[4] As discussed in more detail below, the manner and process by which parties use no-fault divorce differs significantly across the country. Some states, including Tennessee, ask litigants to overcome significant hurdles to use no-fault grounds.[5] Other states have diverged from these restrictive requirements, allowing litigants to plead no-fault grounds that allow a court to decide any disputed ancillary issues.[6] Some states moved even further, removing fault grounds completely.[7] Despite some ominous forecast,[8] pure no-fault divorce has proved sufficient to dissolve legal relationships without damaging society as a whole.

No-fault opponents have relied on varying economic and moral arguments to further a religion-based agenda that does not reflect current societal realities.[9] Aggrieved parties already have access to more efficient criminal and tort law remedies. These systems, by design, correct and expel unwanted conduct more efficiently than do equity-focused domestic relations laws. Moreover, significant declines in religious affiliation demonstrate a marked change in societal values.[10] Divorce law should reflect this evolution and provide efficient, equitable dissolution to marital relationships.

Tennessee should progress toward a pure no-fault system. The law currently places an unnecessary burden on no-

---

[2] *See* Deborah H. Bell, *Family Law at the Turn of the Century*, 71 MISS. L.J. 781, 782-85 (2002).
[3] *Id.*
[4] *See* David P. Horowitz, *Breaking Up Is [Easier] To Do*, 82 N.Y. ST. B.J. 18 (2010).
[5] *See e.g.*, *infra* note 11.
[6] *See infra* note 56.
[7] *See infra* note 58.
[8] *See infra* Part IV.
[9] *See id.*; *see also infra* Part V.
[10] *See infra* Part V.

fault divorce that requires both parties to agree on all issues.[11] This requirement escalates contentiousness, increases costs, and unnecessarily complicates future disputes over children and alimony. A pure no-fault system, or a move in that direction that removes the agreement requirement, would increase access to the courts for those who need it most. The steadily decreasing number of people that affiliate with marriage's founding father, religion,[12] should cause lawmakers to reevaluate the current statutory requirements and reconsider Tennessee's restricted access.

This Note will discuss various reasons for Tennessee to move toward a pure no-fault divorce system. Part II will discuss the historical developments leading to the current system; part III categorizes the three types of no-fault divorce used across the fifty states; part IV will address several common themes among fault proponents; part V focuses on the significance of religion in divorce laws; and part VI discusses several reasons for changing Tennessee's no-fault divorce statute.

II. DIVORCE LAW'S HISTORICAL DEVELOPMENT

Divorce laws have changed over time to coincide with the evolution of marriage. Justice Kennedy's majority opinion in *Obergefell* recognized that marriage was not an unchanging institution but a reflection of societal values effectuated in the law.[13] Divorce laws have followed along this same path.

A. DEVELOPMENT OF FAULT-BASED GROUNDS FOR DIVORCE

Divorce in the newly formed United States looked to English ecclesiastical courts for guiding precedent.[14] Similar to corporations, many pre-twentieth century divorces came

---

[11] *See* TENN. CODE ANN. § 36-4-103(b) (West, WestlawNext current through end of the 2016 Second Regular and Second Extraordinary Sessions of the 109th Tennessee General Assembly).
[12] *See infra* note 103.
[13] *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
[14] Adiaen M. Morse Jr., Comment, *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605, 607 (1996).

through legislative acts.[15] This cumbersome system gave way to a statutorily created fault-based divorce. Courts relied on the concept of full-fault divorce to dissolve a marriage.[16] Full-fault's narrow proposition required an innocent spouse's proof that the other committed some marital misconduct to grant the divorce.[17] This process proved insufficient as time progressed, eventually giving rise to the concept of no-fault divorce.

The progression of fault-based divorce law exhibited a delayed reflection of societal view of morality. Initially, states recognized adultery as the only ground for absolute divorce.[18] States expanded fault-based grounds during the twentieth century to include variations of cruelty and abandonment.[19] Interestingly, New York held on to a narrow, antiquated, adultery-only definition of fault until 1966, causing director Woody Allen to quip, "while the Ten Commandments forbid adultery, New York demands it if you want a divorce."[20] Fault-based grounds for divorce sufficed throughout most of the twentieth century, but America's liberalization in the 1960s proved too much for these aging laws. California become the first state to implement a pure no-fault system.[21]

During the 1960s, the California legislature recognized that the fault-based paradigm failed to address the obvious—most divorces were actually uncontested dissolutions.[22] The pre-1970 system was fraught with divorces based on false claims of cruelty used to comply with the fault requirement.[23] California's current no-fault statute only permits divorce for

---

[15] *Id*.

[16] Ira M. Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719, 722-24 (1997).

[17] *Id*.

[18] *Id*.

[19] *See* Bell, *supra* note 2, at 783-84.

[20] *See* Gabriella L. Zborovsky, Note, *Baby Steps to "Grown-Up" Divorce: The Introduction of the Collaborative Family Law Center and the Continued Need for True No-Fault Divorce in New York*, 10 CARDOZO J. CONFLICT RESOL. 305, 305 (2008).

[21] Family Law Act of 1969, ch. 1608, 1969 Cal. Stat. 3312, 3314-51; *see* Bell, *supra* note 2, at 784.

[22] Herma Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 297-98 (1987).

[23] *Id*. at 297.

irreconcilable differences,[24] and developed on the theory that fault-based divorce no longer served the public interest.[25]

B. NO-FAULT DIVORCE GAINS TRACTION ACROSS THE UNITED STATES

No-fault divorce allowed parties to avoid many undesirable and all-too-common occurrences in full-fault divorce proceedings. Across the country, fault-based grounds caused collusion and deception between parties to provide courts with sufficient proof to meet statutory requirements.[26] Currently, all fifty states have adopted some form of no-fault divorce that avoids this charade.[27]

States have used no-fault divorce to provide a level of homeostasis between societal values and the law. Because values differ from state to state, divorce laws reflect the principle that states can and should differ. Despite some subtle differences, the basic reasoning behind no-fault divorce revolves around the following principles:

> [T]o strengthen and preserve the integrity of marriage and safeguard family relationships; to promote the amicable settlement of disputes that have arisen between parties to a marriage; to mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage; to make reasonable provision for the spouse and minor children during and after litigation; and to make the law of legal dissolution of marriage effective for dealing with the realities of matrimonial experience by making irretrievable breakdown

---

[24] CAL. FAM. CODE § 2310 (West, WestlawNext current with urgency legislation through Chapter 893 of 2016 Reg.Sess., Ch. 8 of 2015-2016 2nd Ex.Sess., and all propositions on 2016 ballot).
[25] Kay, *supra* note 22, at 299.
[26] Bell, *supra* note 2, at 784.
[27] *See infra* Part III.

> of the marriage relationship the sole basis for its dissolution.[28]

Keeping with these principles, Tennessee, for example, now allows parties to plead irreconcilable differences or to claim to have lived apart continuously for a period of two years.[29] States can be placed into three distinct categories based on how the state allows parties to access no-fault grounds.

III. NO-FAULT DIVORCE STATUTES AND THE CONSEQUENCES

States can experiment with new laws that reflect societal values and address specific needs. As a result, no-fault statutes took on different forms throughout the United States. Predictably, different beliefs emerged within the language of these laws. The following three categories demonstrate how states have diverged from the traditional fault-based paradigm.

A. NO-FAULT ALTERNATIVE IN LIMITED CIRCUMSTANCES

Rather than allow unfettered access to no-fault divorce, some states placed significant limitations on those grounds.[30] These limitations come in several different forms.[31] Some states

---

[28] 24 GEORGE BLUM ET AL., AMERICAN JURISPRUDENCE § 2 No-fault divorce (2d ed. 2016).

[29] TENN. CODE ANN. §§ 36-4-101(14)-(15) (West, WestlawNext current through end of the 2016 Second Regular and Second Extraordinary Sessions of the 109th Tennessee General Assembly).

[30] *See. e.g.*, GA. CODE ANN. § 19-5-3 (West, WestlawNext current with legislation passed during the 2016 Session of the Georgia General Assembly). Georgia law withholds any divorce on this ground be granted until at least 30 days after serving the respondent. *See also* HAW. REV. STAT. ANN. § 580-42 (West, WestlawNext current through Act 1 (End) of the 2016 Second Special Session, pending revision by the revisor of statutes).

[31] *Compare* N.Y. DOM. REL. LAW § 170 (Consol., LexisNexis current through 2016 released chapters 1-396), *with* GA. CODE ANN. § 19-5-3 (West, WestlawNext current with legislation passed during the 2016 Session of the Georgia General Assembly). Some no-fault statutes require complete agreement between the litigants on all ancillary issues, while other no-fault agreement requirements leverage litigants to avoid unnecessary appearances or time.

require significant waiting periods before entering a no-fault divorce decree.[32] In Arkansas, a couple must live apart for eighteen months to obtain a no-fault divorce.[33] Other states vary the waiting period depending on the no-fault ground.[34] New Jersey allows an agreed divorce based on irreconcilable differences after a six-month wait, while a less agreeable couple must live apart for eighteen months before divorce is granted.[35]

A number of states still require complete agreement as a prerequisite to no-fault grounds.[36] To avoid proving fault in

---

[32] ARK. CODE ANN. § 9-12-301(c) (West, WestlawNext current through the end of the 2016 Second Extraordinary, 2016 Fiscal, and 2016 Third Extraordinary Sessions of the 90th Arkansas General Assembly, and include changes made by the Arkansas Code Revision Commission received through May 1, 2016).

[33] *Id*.

[34] *See* ARK. CODE ANN. § 9-12-301 (West, WestlawNext current through the end of the 2016 Second Extraordinary, 2016 Fiscal, and 2016 Third Extraordinary Sessions of the 90th Arkansas General Assembly, and include changes made by the Arkansas Code Revision Commission received through May 1, 2016); LA. CODE ANN. ART. 103.1 (West, WestlawNext current through the 2016 First Extraordinary, Regular, and Second Extraordinary Sessions, for all laws effective through December 31, 2016); N.J. STAT. ANN. § 2A:34-2 (West, WestlawNext current with laws effective through L.2016, c. 55 and J.R. No. 6); N.C. GEN. STAT. § 50-6 (West, WestlawNext current through Chapters 93, 95 to 101 of the 2016 Regular Session of the General Assembly, pending changes received from the Revisor of Statutes); S.C. CODE ANN. § 20-3-10 (West, WestlawNext current through the 2016 session, subject to technical revisions by the Code Commissioner as authorized by law before official publication); VT. STAT. ANN. tit. 15, § 551 (West, WestlawNext current through the laws of the Adjourned and Special Sessions of the 2015-2016 Vermont General Assembly (2016)); VA. CODE ANN. § 20-91 (West, WestlawNext Current through End of the 2016 Reg. Sess.). Virginia appears under both the waiting period group and the complete agreement group because the Old Dominion shortens the waiting period for those more agreeable litigants.

[35] N.J. Stat. Ann. § 2A:34-2 (West, WestlawNext current with laws effective through L.2016, c. 55 and J.R. No. 6). While New Jersey only requires the parties agree on the grounds to avoid the long wait, this could allow one party to leverage the other into a long wait, leaving child or spousal support issues unaddressed.

[36] *See* ALA. CODE § 30-2-1 (West, WestlawNext current through the end of the 2016 Regular Session and through Act 2016–485 of the

these states, parties must resolve all ancillary issues in advance.[37] Whether the couple has children, numerous property or business interests, or one party requires the support of the other, everyone must agree to a resolution to avoid having to prove fault. In most cases, including Tennessee, the divorcing couple submits the agreement with the petition for divorce.[38] Some states also subject the agreement to the court's scrutiny.[39]

These statutes limit access to no-fault grounds, increasing the likelihood that a divorce assumes an adversarial posture that will resurrect the historically defective "kangaroo" court procedures just to access the legal system and settle an ancillary issue. Before adopting pure no-fault divorce, it was estimated that at least ninety-five percent of California divorces were uncontested dissolutions where fault was usually unnecessary.[40] Funneling more litigants toward fault preserves many of the issues surrounding the traditional fault-based system.

2016 First Special Session); ALASKA STAT. § 25-24-200 (West, WestlawNext current with Chapters 2-17, 19-24, 27, 33, 42-43, 52-53 and 55 from the 2016 2nd Reg. Sess. of the 29th Legislature); GA. CODE ANN. § 19-5-3 (West, WestlawNext current with legislation passed during the 2016 Session of the Georgia General Assembly) (requiring complete agreement to avoid an appearance); HAW. REV. STAT. ANN. § 580-42 (West, WestlawNext current through Act 1 (End) of the 2016 Second Special Session, pending revision by the revisor of statutes) (using agreements similarly to Georgia); MD. CODE ANN., FAM. LAW 7-103 (West, WestlawNext Current through all legislation from the 2016 Regular Session of the General Assembly); N.Y. DOM. REL. LAW § 170 (Consol., LexisNexis current through 2016 released chapters 1-396); VA. CODE ANN. § 20-91 (West, WestlawNext Current through End of the 2016 Reg. Sess.).

[37] *See e.g.*, TENN. CODE ANN. § 36-4-102 (West, Westlaw current through end of the 2016 Second Regular and Second Extraordinary Sessions of the 109th Tennessee General Assembly).

[38] *Id*.

[39] *See, e.g.*, ALASKA STAT. § 25-24-200 (West, WestlawNext current with Chapters 2-17, 19-24, 27, 33, 42-43, 52-53 and 55 from the 2016 2nd Reg. Sess. of the 29th Legislature). Alaska requires not only complete agreement but also that the agreement be "fair" as determined by the court.

[40] Kay, *supra* note 22, at 298.

First, the complete agreement requirement needlessly increases the costs involved in situations where the parties are already dividing assets.[41] Moving toward no-fault divorce has decreased costs associated with divorce.[42] The emotional toll affects everyone involved. Why should divorce statutes increase legal fees and other associated costs by requiring fault? These savings could be used to support children or provide mental health counseling, healthcare, and education. Lowering costs and providing more resources at the marriage's end may also avoid other costs associated with future litigation over changes in child or spousal support.

A state-by-state examination of divorce costs indicates that no-fault divorce could decrease divorce costs, even though the no-fault pioneer, California, maintains the highest divorce costs in the nation.[43] States atop the list had much higher hourly attorney fee rates and court filing fees.[44] While the state with the cheapest divorce costs, Wyoming, had the lowest filing fee and the second-lowest average for an attorney's hourly rate.[45] Increased costs were found in states with higher costs of living, such as California, Alaska, and New York.[46] Certainly, a wide range of factors can cause divorce costs to increase, including fault. States that take fault out of the divorce proceeding at least streamline the process, which helps both states with higher and lower hourly rates.

---

[41] Erik V. Wicks, Comment, *Fault-Based Divorce "Reforms," Archaic Survivals, and Ancient Lessons*, 46 Wayne L. Rev. 1565, 1582 (2000) (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 146 (4th ed. 1992)).

[42] *Cf.* Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55, 69-70 (1991). This author posits that no-fault divorce has lowered some litigation costs.

[43] Elyssa Kirkham, The Best and Worst States to Get a Low-Cost Divorce, Go Banking Rates (Feb. 3, 2016), https://www.gobankingrates.com/personal-finance/best-worst-states-low-cost-divorce/.

[44] *Id*.

[45] *Id*.

[46] *Id*; *see also* America's Top States for Business 2016, CNBC, http://www.cnbc.com/2016/07/12/americas-top-states-for-business-2016-the-list-and-ranking.html (last visited Dec. 8, 2016) (cost of living ranking).

Second, requiring complete agreement pressures an aggrieved party to compromise legal or economic outcomes to avoid the harsh realities of fault-based divorce. In short, these requirements provide leverage over weaker parties and could force a less desirable outcome.[47] As former President Bill Clinton taught us, human beings will go to great lengths to avoid the embarrassment of publicly airing sordid details of marital impropriety.[48]

Last, burdening the marital dissolution process with these agreements introduces the same danger that no-fault divorce was designed to cure. These onerous requirements force litigants, at least in some cases, to put on a fault-based farce to settle ancillary issues in court.[49] Placing unnecessary hurdles in the divorce gauntlet urges parties to lie and denigrate the entire legal system.

New York provides an excellent example of just how heinous fault-based divorce can become. The Empire State held on to tradition, retaining adultery as the only grounds for divorce until 1966.[50] Because widespread shenanigans were occurring during divorce proceedings, as early as 1945 the Committee on Law Reform of the City of New York advocated for reform in the legislature.[51] The legislature finally conceded in the 1960s and expanded the grounds for fault.[52] However, no-fault grounds were not allowed in New York until 2010.[53]

---

[47] *See* Allen M. Parkman, *Why are Married Women Working So Hard?*, 18 INT'L REV. L. & ECON. 41 (1998). This article discusses how no-fault divorce has affected settlement negotiations by pushing parties toward equitable outcomes that place too little importance on domestic contribution.

[48] *See* Peter Baker & John F. Harris, *Clinton Admits to Lewinsky Relationship, Challenges Starr to End Personal 'Prying'*, WASHINGTON POST (August 18, 1998), http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/clinton081898.htm.

[49] *See* Kay, *supra* note 22, at 298; *see also* Sanford Katz, *Historical Perspective and Current Trends in the Legal Process of Divorce*, 4 FUTURE OF CHILDREN 1 (1994).

[50] Zborovsky, *supra* note 20, at 309.

[51] Katz, *supra* note 49, at 3.

[52] Zborovsky, *supra* note 20, at 309.

[53] Sophia Hollander, *Divorces Drag on Even After Reform*, THE WALL STREET JOURNAL (May 6, 2012), available at http://www.wsj.com/articles/SB10001424052702304811304577368110112622548.

Even then, New Yorkers were limited by an agreement requirement.[54] Some states have addressed the realities of fault-based divorce by loosening these restrictions.

B. UNRESTRICTED ACCESS TO NO-FAULT ALTERNATIVES

Not all divorces revolve around the elusive concept of identifiable marital misconduct. Even with all fifty states enacting no-fault divorce, some states place significant limitations on the use of those grounds.[55] Although reasonable minds can differ as to what qualifies as a significant limitation, nineteen states have both fault and no-fault grounds for divorce that allow litigants to use no-fault grounds without requiring complete agreement as to ancillary issues.[56] Dissolving a

---

[54] *See* N.Y. DOM. REL. LAW § 170 (Consol., LexisNexis current through 2016 released chapters 1-396).

[55] *See e.g.*, LA. CODE ANN. ART. 103.1 (West, WestlawNext current through the 2016 First Extraordinary, Regular, and Second Extraordinary Sessions, for all laws effective through December 31, 2016). The Pelican State requires a waiting period of 180 days without minor children or 365 days with.

[56] *See* ARIZ. REV. STAT. ANN. § 25-312 (West, WestlawNext Current through the Second Regular Session of the Fifty-Second Legislature (2016)); CONN. GEN. STAT. § 46b-40 (West, WestlawNext current with enactments of the 2016 February Regular Session, the 2016 May Special Session, and the 2016 September Special Session.); IDAHO CODE § 32-603 (West, WestlawNext current through the 2016 Second Regular Session of the 63rd Idaho Legislature); IND. CODE § 31-15-2-3 (West, WestlawNext current with all legislation of the 2016 Second Regular Session of the 119th General Assembly); KAN. STAT. ANN. § 23-2701 (West, WestlawNext current through laws enacted during the 2016 Regular and Special Sessions of the Kansas Legislature); ME. STAT. TIT. 19-a, § 902 (West, WestlawNext Current with legislation through the 2015 Second Regular Session of the 127th Legislature. The Second Regular Session convened January 6, 2016 and adjourned sine die April 29th, 2016. The general effective date is July 29, 2016); MASS. GEN. LAWS CH. 208, § 1 (West, WestlawNext current through Chapter 298 of the 2016 2nd Annual Session); MISS. CODE ANN. § 93-5-2 (West, WestlawNext current through the End of the 2016 First and Second Extraordinary Sessions and the 2016 Regular Session); N.H. REV. STAT. ANN. § 458:7-a (West, WestlawNext current through Chapter 330 (End) of the 2016 Reg. Sess., not including changes and corrections made by the State of New Hampshire,

marriage in these states requires pleading only the no-fault grounds, complying with statutory requirements, and then, if needed, asking the court to decide unsettled issues inhibiting the final dissolution of the marriage.

States with mixed divorce grounds still retain traditional ideas of divorce, while also recognizing that no-fault grounds produce many advantages. These state statutes represent an intermediate step between the traditional full-fault systems and no-fault systems implemented in states taking a different approach to family law. Introducing no-fault divorce would allow parties to proceed without an understanding that some perjury will take place, permit the court to grant a divorce without contorting the law outside of legislative intent, and avoid committing the legal system to a charade that disrespects the entire litigation process.[57]

C. PURE NO-FAULT DIVORCE

Unsatisfied with how a fault-based system addressed family law concerns, seventeen states have adopted a pure no-

---

Office of Legislative Services); N.M. STAT. ANN. § 40-4-1 (West, WestlawNext current through the end of the Second Regular and Special Sessions of the 52nd Legislature (2016)); N.D. CENT. CODE § 14-04-03 (West, WestlawNext current through the 2016 Special Session of the 64th Legislative Assembly and measures passed in the June 14, 2016 election); OHIO REV. CODE ANN. § 3105.01 (West, WestlawNext current through File 124 of the 131st General Assembly (2015-2016)); OKLA. STAT. TIT. 43, § 101 (West, WestlawNext current through Chapter 395 (End) of the Second Session of the 55th Legislature (2016)); 23 PA. CONS. STAT. § 3301 (West, WestlawNext current through 2016 Regular Session Acts 1 to 109); S.D. CODIFIED LAWS § 25-4-2 (West, WestlawNext current through 2016 Session Laws and Supreme Court Rule 16-67); TEX. FAM. CODE ANN. § 6.001 (West, WestlawNext current through the end of the 2015 Regular Session of the 84th Legislature); UTAH CODE ANN. § 30-1-3 (West, WestlawNext current through 2016 Third Special Session); W. VA. CODE § 48-5-201 (West, WestlawNext current with legislation of the 2016 Regular Session, the 2016 First Extraordinary Session, and the 2016 Second Extraordinary Session).

[57] *See* Sanford N. Katz, *Historical Perspective and Current Trends in the Legal Process of Divorce*, 4 CHILDREN AND DIVORCE 1 (1994).

fault system.[58] The language may vary, but the statutes contain a consistent theme—divorce does not require proof of fault. As states have progressed toward this model, naysayers have forecast numerous scenarios that will upend society as we know it.[59] But pure no-fault models simply remove an

---

[58] *See* CAL. FAM. CODE § 2310 (West, WestlawNext current with urgency legislation through Chapter 893 of 2016 Reg.Sess., Ch. 8 of 2015-2016 2nd Ex.Sess., and all propositions on 2016 ballot); COLO. REV. STAT. § 14-10-106 (West, WestlawNext current through the Second Regular Session of the 70th General Assembly (2016)); DEL. CODE ANN. TIT. 13, § 1505 (West, WestlawNext current through 80 Laws 2016, ch. 430); FLA. STAT. § 61.052 (West, WestlawNext current through the 2016 Second Regular Session of the Twenty-Fourth Legislature); 750 ILL. COMP. STAT. 5/401 (West, WestlawNext current through P.A. 99-904 of the 2016 Reg. Sess.); IOWA CODE § 598.17 (West, WestlawNext current with legislation from the 2016 Reg.Sess.); KY. REV. STAT. ANN. § 403.140 (West, WestlawNext current through the end of the 2016 regular session); MICH. COMP. LAWS § 552.6 (West, WestlawNext current through P.A.2016, No. 314 of the 2016 Regular Session, 98th Legislature); MINN. STAT. § 518.06 (West, WestlawNext current with legislation through the end of the 2016 Regular Session.); MO. REV. STAT. § 452.305 (West, WestlawNext current through the end of the 2016 Regular Session and Veto Session of the 98th General Assembly, pending changes received from the Revisor of Statutes. Constitution is current through the November 4, 2014 General Election.); MONT. CODE ANN. § 40-4-104 (West, WestlawNext current through the 2015 session); NEB. REV. STAT. § 42-353 (West, WestlawNext current through the end of the 104th 2nd Regular Session (2016)); NEV. REV. STAT. § 125.010 (West, WestlawNext current through the end of the 78th Regular Session (2015) and 29th Special Session (2015) of the Nevada Legislature and all technical corrections received by the Legislative Counsel Bureau); OR. REV. STAT. § 107.025 (West, WestlawNext current with 2016 Reg. Sess. legislation eff. through 7/1/16 and ballot measures on the 11/8/16 ballot, pending classification of undesignated material and text revision by the Oregon Reviser); WASH. REV. CODE § 26.09.030 (West, WestlawNext current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature that take effect on or before July 1, 2016); WIS. STAT. § 767.315 (West, WestlawNext current through 2015 Act 392, published 4/27/2016); WYO. STAT. ANN. § 20-2-104 (West, WestlawNext current through the 2016 Budget Session).

[59] *See e.g.*, Peter Nash Swisher, *Marriage and Some Troubling Issues with No-Fault Divorce*, 17 REGENT U. L. REV. 243 (2004-2005). This article

unnecessarily contentious aspect of divorce law. Most of these states use the terms "irretrievably broken" or "irreconcilable differences" for the legal ground. Parties may then settle a case by agreement or move forward with litigation or mediation to decide ancillary issues.

Pure no-fault does not leave parties without sufficient remedies, even when fault is the predominant factor in the divorce. For example, assume that a couple in a pure no-fault state marries, maintaining that relationship for ten years and has two children. Husband develops a prescription drug habit that eventually leads to the demise of this marriage. Wife decides the children should stay away from husband's drug habit and files for divorce. No-fault grounds would not cloak the undesirable behavior of the husband. Rather, the court, or a mediator in some cases, would take his behavior into account when addressing child custody, property division, and alimony. A court could then adjudicate ancillary issues using the same equitable principles that the fault-based systems are supposed to be based on.[60]

Many litigants may avoid proof of fault altogether. Determining an equitable distribution is not an exact science. Parties may differ on the accounting methods used to determine business values,[61] or haggle over the type of alimony to be awarded.[62] Why should domestic relations laws force parties to show fault for the court to decide these issues? This appears a puzzling, unnecessary, and counterproductive requirement. Fault advocates have argued that no-fault allows litigants to skirt responsibility.[63] Other fault-based arguments focus on outlier cases with controversial outcomes to disparage the entire system.[64] These arguments against no-fault are

---

attributes increased divorce rates to the adoption of no-fault divorce statutes.

[60] *See* Bell, *supra* note 2, at 793-94.

[61] *See e.g.*, Powell v. Powell, 124 S.W.3d 100 (Tenn. Ct. App. 2003).

[62] *See e.g.*, Gonsewski v. Gonsewski, 350 S.W.3d 99 (Tenn. 2011).

[63] Ellman, *supra* note 16, at 733. The author describes no-fault divorce as reflecting "amoral thinking."

[64] *See* Swisher, *supra* note 59, at 254. The author uses *In re Koch*, 648 P.2d 406 (Or. Ct. App. 1982), as an example of no-fault removing needed remedies for injured parties. In *Koch*, the court held that a wife could not use her injuries from a physical altercation for the basis of a spousal support claim. The wife's tort case against the

treated with more depth below. This back-and-forth does emphasize that in each system individual judges and attorneys will determine how efficiently and effectively the system works. No perfect system exists, but no-fault systems reflect reality and provide access to the judicial system that the fault-based system does not.

IV. NO-FAULT OPPONENTS BLAME THE SYSTEM FOR UNRELATED SOCIETAL TRENDS

The beauty and utility of American democracy lies in the struggle between liberal and conservative ideologies. Middle ground has moved this country forward at a pace that both respects our history and recognizes societal changes. Certainly this system has its faults,[65] and divorce laws are not immune to this struggle. The categories above demonstrate how states have implemented divorce laws that reflect divergent views of marriage. Since no-fault's inception in 1970, time has provided ammunition for both sides to take aim at the other. No-fault opponents rely on a narrow, dystopian view of the results in no-fault states to argue fault back into domestic relations law.

A. NO-FAULT DIVORCE AND THE INCREASE IN DIVORCE RATES

Ostensibly, divorce rates provide an elementary indicator of no-fault's allegedly adverse effect on society. While relevant, divorce numbers only provide a small piece of the entire puzzle. No-fault opponents argue that increased divorce rates are directly related to no-fault divorce statutes.[66]

---

husband for the same injury was pending at the time of the divorce decree.

[65] *See, e.g.*, Eric Warner, *Gridlock in Congress may Presage More of the Same to Come*, WASHINGTON POST (Sept. 29, 2016), https://www.washingtonpost.com/business/congress-clears-stopgap-spending-bill-11b-to-fight-zika/2016/09/28/d233ab98-85e8-11e6-b57d-dd49277af02f_story.html.

[66] Michael McManus, *Confronting the More Entrenched Foe: The Disaster of No-Fault Divorce and Its Legacy of Cohabitation*, THE FAMILY

Overwhelmingly, the increase in the 1970s provides the basis for this assertion.[67] This ignores a much longer trend—divorce rates in America have been steadily rising since the 1860s.[68] One might quickly correlate these increases to expansions in fault and the development of no-fault divorce. But no-fault divorce has only become more prolific since the 1970s.[69] In Tennessee for example, divorce rates have leveled off and even declined during that period.[70]

Arguments based on divorce rates ignore numerous other aspects that affect those numbers. If reducing divorce numbers were as simple as making divorce more difficult, as fault-based divorce certainly does, then barring divorce altogether presumably would lower the rate to zero. As recently as 1997, Ireland amended its constitution to permit divorce for the first time in over 50 years.[71] The same arguments no-fault detractors use were made in opposition to the constitutional amendment permitting the Irish to obtain a divorce.[72] As the

---

IN AMERICA (Spring 2011), http://familyinamerica.org/files/9913/8757/6279/FIA.Spring11.McManus.pdf.

[67] *See* Swisher, *supra* note 59, at 243-44.

[68] *See* 100 YEARS OF MARRIAGE AND DIVORCE STATISTICS, 1973, https://www.cdc.gov/nchs/data/series/sr_21/sr21_024.pdf.

[69] N.Y. DOM. REL. LAW § 170 (Consol., LexisNexis current through 2016 released chapters 1-396). Even the most stringent holdouts adopted no-fault grounds, providing some no-fault access in all 50 states.

[70] *Compare* TENN. DEP'T. OF HEALTH, NUMBER OF MARRIAGES AND DIVORCES WITH RATES PER 1,000 POPULATION BY COUNTY, TENNESSEE RECORDED DATA, 2009, https://www.tn.gov/assets/entities/health/attachments/TN_Marriages_Divorces_-_2009.pdf, *with* TENN. DEP'T. OF HEALTH, NUMBER OF MARRIAGES AND DIVORCES WITH RATES PER 1,000 POPULATION BY COUNTY, TENNESSEE RECORDED DATA, 2014, https://www.tn.gov/assets/entities/health/attachments/TN_Marriages_Divorces_-_2014.pdf; *see also* note 81, *infra*.

[71] James F. Clarity, *Before Date of New Law, Ireland Grants First Divorce*, N. Y. TIMES (Jan. 18 1997), http://www.nytimes.com/1997/01/18/world/before-date-of-new-law-ireland-grants-first-divorce.html.

[72] Kate Holmquist, *Divorce, Irish Style*, THE IRISH TIMES (Jan. 17, 2015), http://www.irishtimes.com/life-and-style/divorce-irish-style-1.2068656.

Irish realized, addressing family law issues requires more nuance than a simple prohibition.[73]

Wealth and education affect divorce numbers across the country more than fault-based divorce statutes. Divorce rates are obviously tied to marriage rates. Socioeconomic status and education affect both marriage and divorce far more than no-fault opponents give credence.[74] A Pew Research study in 2009 found that education levels correlated with both marriage rates[75] and the average age at which people marry.[76] Although the Pew study found no direct correlation between socioeconomic status and divorce, socioeconomic status and education affected the average marriage age, and age did show a correlation to divorce rates.[77] This demonstrates only one factor affecting divorce rates, while many other factors, including religious affiliation,[78] foreign military engagements,[79] and economic recessions also affect divorce.[80] Presuming that people will suddenly abandon a personal relationship or, conversely, stay in a relationship based on a state's legal requirements ignores too many realities.

---

[73] *Id*.

[74] *See* Social and Demographic Trends, *The States of Marriage and Divorce*, PEW RESEARCH CENTER (Oct. 15, 2009) http://www.pewsocialtrends.org/2009/10/15the-states-of-marriage-and-divorce/.

[75] *Id*.

[76] UNITED STATES BUREAU OF LABOR STATISTICS, MARRIAGE AND DIVORCE: PATTERNS BY GENDER, RACE, AND EDUCATIONAL ATTAINMENT (2013), http://www.bls.gov/opub/mlr/2013/article/marriage-and-divorce-patterns-by-gender-race-and-educational-attainment-1.htm.

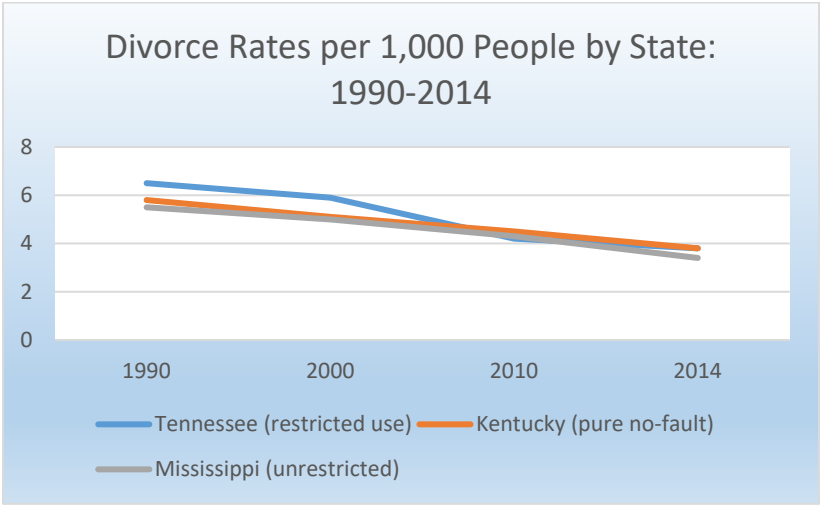
[77] *See* Social and Demographic Trends, *supra* note 74.

[78] *See infra* Part V.

[79] *See* NATIONAL CENTER FOR HEALTH STATISTICS, 100 YEARS OF MARRIAGE AND DIVORCE STATISTICS, UNITED STATES, 1867 – 1967, *supra* note 68. Divorce rates rose around the time of the Second World War.

[80] D'Vera Cohn, *Divorce and the Great Recession*, PEW RESEARCH CENTER (May 2, 2012), http://www.pewsocialtrends.org/2012/05/02/divorce-and-the-great-recession/. This study found a correlation between foreclosure and divorce rates but not between unemployment increase and divorce rates.

Over the past twenty-five years, divorce rates have decreased in both no-fault and fault-based states.[81] The chart below shows these trends using states that are close geographically and have no-fault divorce statutes from each category. Despite the three different approaches, divorce rates have followed the same trend—a decline.[82] Kentucky's pure no-fault approach has at most a negligible impact on divorce rates. These numbers do not corroborate the argument that no-fault divorce equals increased divorce.



B. NO-FAULT DIVORCE FAILS TO PROVIDE SUFFICIENT REMEDIES

Another argument against no-fault divorce is that eliminating fault causes outcomes that fail to provide for aggrieved parties.[83] No-fault opponents have argued that victims of poor marital behavior lack any real recourse when fault does not play a significant role in divorce.[84] Even then,

---

[81] *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, DIVORCE RATES BY STATE: 1990, 1995, AND 1999-2014, https://www.cdc.gov/nchs/data/dvs/state_divorce_rates_90_95_and_99-14.pdf (last visited Dec. 8, 2016).

[82] *Id*.

[83] Swisher, *supra* note 59, at 254.

[84] *Id*.

fault advocates have still suggested tort and criminal law may provide sufficient remedies.[85]

No-fault divorce does not leave victims out in the cold, and these other areas of law are better suited to remedy particular types of marital misconduct. Criminal law reflects society's social norms for expected human behavior.[86] This essential area of the law provides an efficient platform for society to set moral expectations that place limitations in various arenas when undesirable conduct occurs.[87] Physical spousal abuse, behavior unquestionably in violation of society's social norms, could and should be addressed for the most part in the criminal context. Moreover, defendants in criminal procedures receive greater protections, including proof beyond a reasonable doubt, the right to counsel, right to confront witnesses, and the right to a jury.

In the civil context, tort law provides compensatory remedies outside of marriage dissolution. The evolution of interspousal immunity allowed aggrieved parties access to these tort remedies in a variety of situations.[88] Tort law provides time-proven methods to calculate damages, while retaining limits on claims too stale for remedy.[89] The principles underpinning support and alimony laws were designed based on an entirely different idea—equity.[90] Alimony in Tennessee, for instance, focuses on the ability of the spouse seeking the award to live post-divorce, the other spouse's ability to pay the award, and several other equitable factors.[91] In contrast, tort remedies focus simply on the wrongful conduct and the

---

[85] *See id*.

[86] Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1488 (2016).

[87] *See id*.

[88] *See e.g.*, Davis v. Davis, 657 S.W.2d 753 (Tenn. 1983) (holding interspousal tort immunity is totally abolished in Tennessee); *see also* Michelle L. Evans, *Wrongs Committed During a Marriage: The Child that No Area of the Law Wants to Adopt*, 66 WASH. & LEE L. REV. 466 (2009).

[89] PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 1-2 (AM. LAW INST. 2016).

[90] *Id*.

[91] *See, e.g.*, Aaron v. Aaron, 909 S.W.2d 408 (Tenn. 1995).

damage flowing from that conduct.[92] While similar policy considerations may play a part in torts and domestic relations law, the two are fundamentally different.

Divorce should focus on what it was designed to do—dissolve a legal relationship. If the relationship is no longer viable, i.e. irretrievably broken, then the court should only require proof that the relationship is in fact broken and leave the "why" for a possible factor for determining equitable allocation of property, ordering support, or determining child custody. The particulars as to the extent of damage caused or the need for punishment to deter future incidences are better left to criminal or tort law. Introducing these ideas into marriage dissolution bogs down the process and confuses law and equity. This could possibly cause important aspects of marriage dissolution to be resolved inefficiently or in a manner which cannot adequately address or deter undesirable conduct. Simply put: A fault-based divorce is counterproductive.

C. NO-FAULT AVOIDS RESPONSIBILITY

Marriage symbolizes a certain amount of commitment within a relationship. With commitment comes responsibility. Some no-fault critics have contended the absence of fault not only allows parties to avoid moral responsibilities, but also allows certain behavior outside the contractual bonds of marriage to go unpunished.[93] Conservative scholars have argued that catastrophic consequences will result from the ubiquity of divorce, even causing a decline in birth rates.[94] To

---

[92] *See, e.g.*, Rogers v. Louisville Land Co., 367 S.W.3d 196 (Tenn. 2012).

[93] Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 871 (June 1994). The authors argue that changes in divorce law have rendered the marriage contract illusory.

[94] *See id*. Brinig and Crafton discuss the decreasing birth rate when marriage morphs into a long date. *See* Scott Drewianka, *Divorce Law and Family Formation*, 21 J. POPULATION ECON. 484 (2006). Dr. Drewianka's article examines several studies that contend no-fault divorce significantly contributed to the decline, and posits that no-fault divorce had minimal effect on family structure.

steal a line from the rock band R.E.M., under no fault- divorce "it's the end of the world as we know it."[95]

Chaining responsibility to fault is counterintuitive. Child support is an established responsibility in which fault need not play a role. Courts impose obligations that encourage responsibility outside of marital relationships in every jurisdiction. The traditionalist view of divorce holds fast to the fault system to preserve the moral leverage interjected by fault into divorce proceedings. Traditionalists use complete agreements to impose that same leverage to a lesser degree. Some have argued that alimony without fault has no teeth.[96] Yet, alimony statutes, such as Tennessee's, consider a totality of circumstances in each divorce with or without unscrupulous behavior.[97] Removing fault does not render the marital contract illusory, nor does it allow irresponsible behavior to proliferate.

Removing the impediments to no-fault grounds in mixed states would allow parties to access an equitable system for settling disputes. Unnecessary requirements force parties into a fault-based paradigm that expands costs and increases public humiliation. Forcing fault, by requiring complete agreement or imposing long waits, possibly allows irresponsible behavior to go unaddressed. At minimum, litigants should have the no-fault option without coming to an agreement. Imposing substantial conditions on no-fault grounds is a thinly-veiled attempt to keep old fault-based notions of divorce, rather than preventing some injustice.

V. DECLINING RELIGIOUS AFFILIATION AFFECTS SOCIETAL VIEWS ON MARRIAGE AND DIVORCE

Marriage certainly has roots that run deep into human history.[98] The Supreme Court has recognized that "[m]arriage

---

[95] R.E.M., *It's the End of the World as We Know It (And I Feel Fine)*, on DOCUMENT (I.R.S. 1987).

[96] *See* Brinig, *supra* note 93, at 877-78.

[97] *See, e.g.*, Gonsewki, *supra* note 62.

[98] *See* Robert S. Walker, ET AL., *Evolutionary History of Hunter-Gatherer Marriage Practices*, PLOS ONE (April 25, 2011), https://pantherfile.uwm.edu/sdrewian/www/DivorceLawAndFamilyFormation.pdf.

is sacred to those who live by their religions."[99] For much of America's history, an overwhelming majority of the population identified with one faith or another.[100] Although our First Amendment authors recognized the need for separation between government and religion,[101] moral values based on religious beliefs have been manifest through our governing laws.[102] Laws governing marriage and marriage dissolution should continue that process and reflect current societal change. A declining emphasis on religious affiliation could signal the next step for domestic relations law.

A. STUDIES SHOW A DECLINE IN RELIGIOUS AFFILIATION

Religious belief and practice appears to be in decline across the board, and in steep decline among younger generations. A recent study from the Pew Research Center reveals a decline in religious affiliation across the United States.[103] A survey of more than 35,000 adults found that those who say they believe in God has declined in recent years.[104] This decline did not come from older adults, but overwhelmingly from millennials.[105] Many of those millennials simply chose not

---

[99] Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015).

[100] *See e.g.*, LIBRARY OF CONGRESS, *Religion and the Founding of the American Republic* (last visited Sept. 5, 2016), https://www.loc.gov/exhibits/religion/index.html; *see also* PEW RESEARCH CENTER, *Regional Distribution of Christians* (Dec. 19, 2011), http://www.pewforum.org/2011/12/19/global-christianity-regions/.

[101] *See* U.S. CONST. amend. I.

[102] *See e.g.*, TENN. CONST. art. IX, § 2. Article IX, section 2 declares that "no person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this State." *See also* Lawrence v. Texas, 539 U.S. 558 (2003) (holding that a Texas law banning homosexual intimate contact was unconstitutional).

[103] PEW RESEARCH CENTER, *U.S. Public Becoming Less Religious: Modest Drop in Overall Rates of Belief and Practice, but Religious Affiliated Americans Are as Observant as Before* (Nov. 3, 2015), http://www.pewforum.org/2015/11/03/u-s-public-becoming-less-religious/.

[104] *Id*.

[105] *Id*.

to identify with religion at all.[106] The percentage of adults who were religiously unaffiliated rose sharply, with many respondents claiming to have no belief in God whatsoever (referred to in the study as "nones").[107] Specifically, seven in ten millennials say that religion has little to no importance in their life.[108]

Tennessee adults who identified as a "none" made up fourteen percent of the total number.[109] This study noted a significant decline in religious affiliation between 2007 and 2014.[110] Interestingly, Pew's research found that adults in the Volunteer State feel substantially more at peace than in the 2007 study.[111] These trends mirror those in Kentucky, where no-fault divorce has persisted for decades.[112] In fact, downward trends in religious affiliation were found across the southeastern United States.[113]

Recent Gallup numbers show that religious affiliation has been on a steady decline for several decades.[114] The number of people that have no religious affiliation has grown nearly

---

[106] *Id*.

[107] *Id*.

[108] *Id*.

[109] PEW RESEARCH CENTER, *Adults in Tennessee* (Nov. 3, 2015), http://www.pewforum.org/religious-landscape-study/state/tennessee/.

[110] *Id*.

[111] *Id*.

[112] PEW RESEARCH CENTER, *Adult in Kentucky* (Nov. 3, 2015), http://www.pewforum.org/religious-landscape-study/state/kentucky/.

[113] *See* PEW RESEARCH CENTER, *Adult in Alabama* (Nov. 3, 2015), http://www.pewforum.org/religious-landscape-study/state/alabama/; *see also* PEW RESEARCH CENTER, *Adult in Arkansas* (Nov. 3, 2015), http://www.pewforum.org/religious-landscape-study/state/arkansas/; *see also* PEW RESEARCH CENTER, *Adult in Mississippi* (Nov. 3, 2015), http://www.pewforum.org/religious-landscape-study/state/mississippi/; *see also* PEW RESEARCH CENTER, *Adult in Georgia* (Nov. 3, 2015), http://www.pewforum.org/religious-landscape-study/state/gerogia/.

[114] GALLUP, *Religion: What is your religious preference – protestant, Roman Catholic, another religion, or no religion?*. (last visited Sept. 5, 2016), http://www.gallup.com/poll/1690/religion.aspx. This poll shows the rise of the "nones" over several decades.

tenfold over the six decades covered in this survey.[115] These numbers show that Americans are placing less and less emphasis on religious beliefs. As younger generations of Americans replace baby boomer populations, the percentage of Americans who see the law through the lens of religious teachings may fall substantially from where it is now. Looking forward, a move toward less religion-based morality in domestic relations law may align the law with the values of the most affected population. Domestic relations law has followed religious affiliation in the past. Why not now?

B. MARRIAGE IS INEXTRICABLY LINKED WITH RELIGION

American marriage finds its historical underpinnings intertwined with religion. In religious context, the reverence given the marital bond dates back to the book of Genesis, where the Bible says "shall a man leave his father and his mother, and shall cleave unto his wife: and they shall become one flesh."[116] Islam also reveres the bond of marriage, encouraging followers to marry in order to garner the favor of Allah.[117] Judaism defines how a woman is "acquired" as either with money, contract, or sexual intercourse.[118] All of the above, despite subtle differences, refer to a relational bond between persons. The law gives legal recognition to that relationship.

The progression of domestic relations law has tracked America's religious beliefs. Courts could not break the bond of marriage in nineteenth century England.[119] Divorce law has progressed and established divorce, expanded fault grounds, and then developed no-fault grounds.[120] The decrease in religious affiliation seems to accompany, at least in some degree, that trend. That is not to say that the decline in religious affiliation tells the whole story of increased divorce rates. It does not.[121] But the correlation between marriage and religion

---

115 *Id*.
116 *Genesis* 2:22-24 (King James).
117 *Surah* 24:32.
118 *Mishnah Kiddushin* 1:1.
119 Bell, *supra* note 2, at 782.
120 *See supra* Part II.
121 *See supra* Part IV.

is undeniable, and, as some conservatives might argue, necessary to preserve the institution.

Divorce laws reflect the link between society's concept of marriage and religion. A quick survey comparing states populating the Bible belt with more liberal states on the West Coast reveals the philosophical dichotomy of marriage.[122] States in the Bible belt have higher religious affiliation than states that began the no-fault divorce trend on the west coast.[123] This also explains why New York, with its large Catholic population, has resisted the development of no-fault divorce.[124] With religious affiliation on the decline, even in the Bible belt, fault-based divorce should follow suit.

---

[122] *Compare* ALA. CODE § 30-2-1 (West, WestlawNext Current through the end of the 2016 Regular Session and through Act 2016–485 of the 2016 First Special Session), *and* GA. CODE ANN. § 19-5-3 (West, WestlawNext current with legislation passed during the 2016 Session of the Georgia General Assembly), *and* TENN. CODE ANN. § 36-4-102 (West, WestlawNext Current through end of the 2016 Second Regular and Second Extraordinary Sessions of the 109th Tennessee General Assembly), *with* CAL. FAM. CODE § 2310 (West, WestlawNext current with urgency legislation through Chapter 893 of 2016 Reg.Sess., Ch. 8 of 2015-2016 2nd Ex.Sess., and all propositions on 2016 ballot), *and* COLO. REV. STAT. § 14-10-106 (West, WestlawNext current through the Second Regular Session of the 70th General Assembly (2016)), *and* OR. REV. STAT. § 107.025 (West, WestlawNext current with 2016 Reg. Sess. legislation eff. through 7/1/16 and ballot measures on the 11/8/16 ballot, pending classification of undesignated material and text revision by the Oregon Reviser). Bible belt states hold fast to fault-based divorce by restricting access to no-fault grounds in attempt to limit the divorce numbers. California, Colorado and Oregon have discarded fault altogether, focusing resources on other family law related issues.

[123] *Compare* PEW RESEARCH CENTER, *Adult in Oregon* (Nov. 3, 2015), http://www.pewforum.org/religious-landscape-study/state/oregon/; *with* PEW RESEARCH CENTER, *Adult in Tennessee* (Nov. 3, 2015), http://www.pewforum.org/religious-landscape-study/state/tennessee/. Thirty-one percent of the Beaver state's adults do not affiliate with any religion. Compare that with eighteen percent in Tennessee.

[124] *See* Zborovsky, *supra* note 20.

C. SOCIETAL CHANGES URGE DIVORCE LAW REFORM

Legal divorce, expanded fault grounds, and no-fault divorce have all correlated with changes in society.[125] Divorce laws should undergo legislative scrutiny as these changes occur. A liberal movement preceded no-fault laws in states like California, Oregon, and Colorado without catastrophic consequences.[126] Kentucky, a state not necessarily known for its progressive values, adopted a pure no-fault model in 1972.[127] The no-fault model in Kentucky has not significantly increased the divorce rate.[128] Other changes were afoot across the United States that affected those rising numbers.

The late 1960s and 1970s brought about a political revolution that was reflected first in divorce statistics and then the law.[129] A shift toward personal autonomy contributed to legislatures reforming divorce laws.[130] The civil rights movement, women's liberation campaign, and the beginning of the LGBT movement all represented a shift in American politics.[131] Combined with an emotional antiwar movement, the 1960s pushed some American laws to the left, discarding several traditionalist values entrenched for over 100 years.[132]

---

[125] *See supra* Part IV.

[126] *See, e.g.*, Kay, *supra* note 22.

[127] *See* KY. REV. STAT. ANN. § 403.140 (West, WestlawNext current through the end of the 2016 regular session).

[128] *See* KENTUCKY MARRIAGE MOVEMENT, *Marriage & Divorce Rates by County* (last visited Jul. 20, 2016), http://www.kentuckymarriage.org/marriage-in-kentucky/marriage-divorce-rates-by-county/; *see* CENTERS FOR DISEASE CONTROL AND PREVENTION, DIVORCE RATES BY STATE: 1990, 1995, AND 1999-2014, *supra* note 77.

[129] *See* Perry, *supra* note 42, at 62.

[130] *Id*.

[131] *See e.g.* STUDENTS FOR A DEMOCRATIC SOCIETY, PORT HURON STATEMENT (1962), *reprinted in* Radical Reader 468 (Timothy McCarthy & John McMillan eds. 2003). The Port Huron Statement embodied the discontent of a younger generation with oppressive civil rights. *See e.g.*, BETTY FRIEDAN, THE FEMININE MYSTIQUE (1963) *reprinted in* Radical Reader 468 (Timothy McCarthy & John McMillan eds. 2003). Friedan discusses the importance of femininity, and points out the oppressive mores in American society.

[132] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; *see also* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; *see also*

Political changes sculpted a new social landscape across America, including no-fault divorce. More recently, millennials have signaled conservative values that rose to prominence over the past few decades are held in low regard now.[133]

Lawmakers should heed this current evolution, and reflect modern societal realities in divorce laws. As was the case in the 1960s, younger generations come of age with different values than their predecessors. Laws written generations ago are ill-fitted to serve the population now living under them.[134] States could avoid this unnecessary friction by reevaluating laws that no longer represent the governed, and that do not address some societal ill. Declining religious affiliation, particularly among millennials, tasks lawmakers with taking a second look at restrictive divorce laws that have roots in religious beliefs. Liberal movements of the 1960s and 70s spurred no-fault statutes around the country, and the time is ripe for conservative states to discard the leftovers of yesteryear. Lawmakers should reevaluate divorce laws to determine the necessity of complete agreement requirements and extended waiting periods. In the spirit of providing access to the courts to amicably resolve disputes, states should just move to a pure no-fault divorce altogether.

Roe v. Wade, 410 U.S. 113 (1973). Both legislative enactments and the *Roe* opinion provide prominent examples of society departing from what were once thought unshakeable traditional values.

[133] PEW RESEARCH CENTER, *The GOP's Millennial Problem Runs Deep* (Sept. 25, 2014), http://www.pewresearch.org/fact-tank/2014/09/25/the-gops-millennial-problem-runs-deep/. This study shows just how socially liberal millennials are, while baby boomers are progressively more conservative as age increases.

[134] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2595 (2015). The legalization of gay marriage represents one example of societal values changing the law. *See also* Colo. Const. art. 18, § 16. Coloradans amended their state constitution in 2012 to allow the legal possession and marketing of marijuana, joining Washington in decriminalizing and regulating a substance society, especially the younger demographic, saw as an acceptable personal choice.

VI. TENNESSEE SHOULD MOVE TOWARD PURE NO-FAULT DIVORCE

Henry Drummond, depicting the part of attorney Clarence Darrow in *Inherit the Wind*, a movie based on Dayton, Tennessee's Scopes Monkey Trial, declared to the court that "a wicked law, like cholera, destroys everyone it touches. Its upholders as well as its defiers."[135] Granted, Tennessee's restrictive no-fault statute does not qualify as a wicked law. But even laws noble at inception can produce perverse consequences. The adverse effect of this law harms the very people whom proponents of religious-based restrictions sought to protect.

A. TENNESSEE KEEPS COSTS UP AND ACCESS DOWN

Lessening the no-fault burden would improve access to Tennessee courts. The Volunteer State can ill-afford to force its citizens to waste economic resources. Tennessee ranks in the bottom quintile of states with the most people living in poverty.[136] With contested divorce costs running in the thousands of dollars,[137] those below the poverty line, along with most middle class families, can easily be financially wiped out after a contentious divorce proceeding. Tennessee already holds the distinction for the highest bankruptcy rate.[138] Like any

---

[135] INHERIT THE WIND (United Artists 1960).

[136] UNITED STATES DEPARTMENT OF AGRICULTURE, PERCENT OF TOTAL POPULATION IN POVERTY, 2014 (2016), http://www.ers.usda.gov/data-products/county-level-data-sets/poverty.aspx#P345c97c54e8c48339ab8327ebfca5161_2_233iT3. This government survey found over 18% of Tennessee's population live below the poverty line and over 25% of Tennessee children ages 0-17 live below the poverty line.

[137] This estimate was based on a $250.00 hourly rate, which is considered the national average for a divorce attorney. *See* Kathleen Michon, *How Much Will My Divorce Cost and How Long Will it Take?*, NOLO (Sept. 5, 2016), http://www.nolo.com/legal-encyclopedia/ctp/cost-of-divorce.html.

[138] Dave Flessner, *Tennessee Still Leads Nation in Bankruptcies*, CHATTANOOGA TIMES FREE PRESS (Jan. 10, 2016), http://www.timesfreepress.com/news/business/aroundregion/story/2016/jan/10/tennesssee-still-leads-nation-

state, Tennessee's poor have fewer property assets. But the poor typically have more of one common point of emphasis in divorce proceedings—children.[139] Tennessee's family law should focus on providing for these children or, at least, avoid harming them by squandering precious economic resources on fault-based divorce. Onerous agreement requirements may force lower income litigants into inequitable agreements that fail to address the best interest of affected parties, namely children.[140] Equity and best interest aside, directing more people toward fault-based divorce via agreement requirements may cause other poor results.

Moving toward pure no-fault divorce would shift some undesirable behavioral issues into criminal and tort forums better suited to provide sufficient outcomes. Tennesseans injured by conduct actionable in tort who are forced to litigate under a fault-based family law proceeding may preclude future litigation of the same conduct in a forum better situated to provide a remedy.[141] Facts used in divorce proceedings to show fault may not address all the damage that occurred due to the equitable nature of divorce. With particularly egregious behavior, criminal or not, *res judicata* may prevent an injured plaintiff from seeking compensation for non-pecuniary harms or forgo a punitive damages award.[142]

These regrettable outcomes may arise more often in communities with stronger ties to religious ideologies that are resistant to no-fault divorce. Ironically, a recent study in the

---

bankruptcies/343890/. In 2015, Tennessee ranked number one in bankruptcy filings for the 6th consecutive year.

[139] Yang Jiang, ET AL., *Basic Facts About Low Income Children*, NATIONAL CENTER FOR CHILDREN IN POVERTY, (Feb. 2016) http://www.nccp.org/publications/pdf/text_1145.pdf. Children comprise twenty-three percent of the total population but thirty-two percent of all people in poverty, signaling a higher ratio of children among those in poverty.

[140] *Cf.* Parkman, *supra* note 43, at 42. This author discusses the changing landscape of divorce negotiation after no-fault divorce.

[141] *See* Kemp v. Kemp, 723 S.W.2d 138 (Tenn. Ct. App. 1987). In *Kemp*, the court held that the doctrine of *res judicata* prevented her suit against her husband for assault and battery because her divorce award was based on the same facts.

[142] *See id.*; *see also* Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 305 (1997).

American Journal of Sociology found the best indicator for increased divorce by county was the concentration of evangelicals or conservatives in that county.[143] To wit, restrictions based on conservative religious beliefs disproportionately affect the people who support no-fault divorce opponents. This same study identified that low income and lower educational attainment were directly related to higher incidences of divorce—both were common characteristics found in southern, conservative communities.[144] Moreover, communities that increasingly encouraged abstinence until marriage sustained higher incidences of divorce.[145] Rural communities – typically poorer and steadfast in their faith – deserve better.

B. TENNESSEE COURTS CONFUSE THE ISSUE

The complete agreement requirement has such little relevance to actually dissolving the marriage that Tennessee courts have confused the issue.[146] In 1995, the Tennessee Supreme Court reversed a decision that held that a wife had substantially contributed to property owned by her husband before the marriage.[147] The *Harrison* court held that the real property in dispute was not marital property and that the wife was not entitled to share in the value.[148] The majority opinion glossed over the ground for this divorce—irreconcilable differences.[149] Tennessee's complete agreement requirements predates the decision in *Harrison*,[150] and shows just how much sense this requirement actually makes. Appellate court

---

[143] Press Release, Jennifer Glass, Red States, Blue states, and Divorce: Understanding the Impact of Conservative Protestantism on Regional Variation in Divorce Rates, Counsel on Contemporary Families (Jan. 16, 2014), https://contemporaryfamilies.org/impact-of-conservative-protestantism-on-regional-divorce-rates/.

[144] *Id*.

[145] *Id*.

[146] *See* Harrison v. Harrison, 912 S.W.2d 124 (Tenn. 1995).

[147] *Id*.

[148] *Id*.

[149] *Id*. at 124.

[150] *See* TENN. CODE ANN. § 36-4-103(b) (West, WestlawNext current through end of the 2016 Second Regular and Second Extraordinary Sessions of the 109th Tennessee General Assembly).

decisions after *Harrison* have amended or remanded trial court judgments that granted divorce based on irreconcilable differences for failing to comply with the statute.[151]

A simplification of the divorce statute would make the judicial task easier and more efficient. If parties could petition for divorce on only one ground, confusion would be unlikely. Discarding the agreement requirement would limit the cases where a divorce is bounced back-and-forth between appellate and trial courts to comply with a misunderstood statutory requirement. These cases show the room for improvement.

Tennessee lawmakers have made clear the conservative agenda that takes priority in the Tennessee legislature.[152] Traditional conservatives should operate with an eye toward a restrained form of government that believes less is more, rather than moral populism operating under the guise of conservatism. Conservatives love to quote Ronald Reagan who said, "[g]overnment is not the solution to the problem; government is the problem."[153] The underpinnings of fault-based divorce fit well under President Reagan's statement. Tennessee's no-fault statute burdens domestic relations law with enforcing archaic values on a generation that increasingly does not share those same values. Continuing to restrict no-fault divorce ignores current economic and cultural realties. In short, the situation has changed and so should the law. Conservative states like Tennessee should recalibrate divorce laws to reflect true conservative principles.

VII. CONCLUSION

Tennessee domestic relations law should follow the current societal trends and loosen the restrictions on no-fault divorce. Keeping with traditional mores, the legislature persists

---

[151] *See* Cook v. Cook, No. E2016–00042–COA–R3–CV, 2016 WL 3679415 (Tenn. Ct. App. July 5, 2016); Norris v. Norris, No. E2014–02353–COA–R3–CV, 2015 WL 9946262 (Aug. 24, 2015).

[152] *See* Joel Ebert, *Tennessee's 2016 Legislative Session: Key Moments, Key People*, THE TENNESSEAN (Apr. 23, 2016), http://www.tennessean.com/story/news/politics/2016/04/23/tennessees-2016-legislative-session-key-moments-key-people/83400506/.

[153] Ronald Reagan, President of the United States, Inaugural Address (Jan. 20, 1981).

in requiring a complete agreement to avoid the expense and contentiousness of fault. To what end? Forcing parties to prove fault increases costs, decreases access and complicates matters even further.

Tennessee's statute runs the risk of unnecessarily compromising desirable outcomes that could preclude further litigation needed to address more severe misconduct. Pure no-fault has not allowed people to avoid responsibility, significantly increased divorce rates, or adversely affected aggrieved parties. Besides the societal ills of fault-based divorce, the current statute has confused parties, attorneys, and courts. This increases costs and burdens the court system. Other remedies, when combined with pure no-fault divorce, more effectively address Tennessee's domestic issues.

Declining religious affiliation in younger generations and the undesirable consequences of fault-based divorce should compel Tennessee lawmakers to take a second look at the state's current no-fault statute. Even if a pure no-fault model remains infeasible, Tennessee should remove the complete agreement requirement to plead irreconcilable differences, allowing litigants to access the court system without proof of fault. In other words, Tennessee should allow divorcing couples to just agree to disagree.

LINCOLN MEMORIAL UNIVERSITY
LAW REVIEW

VOLUME 4 SPRING 2017 ISSUE 2

BEYOND THE MONEY: EXPECTED (AND UNEXPECTED) CONSEQUENCES OF AMERICA'S WAR ON DRUGS

Cynthia A. Brown

I. INTRODUCTION

A cacophony of cries for criminal justice reform reverberates from a growing chorus of discouraged, disillusioned and divergent concerns across America. Though any number of factors supplies ample cause for unease with the current state of our criminal justice system, extraordinarily high rates of incarceration certainly contribute mightily to the turmoil. Hyper-criminalization challenges abound questioning the necessity of the volumes of crime statutes demanding enforcement. Unacceptable rates of recidivism and questionable policing are included in the catalog of troubling dynamics, but top billing on the list may rightfully belong to the country's costly policies and practices adopted to reduce the demand and eradicate the supply of illicit drugs. Few would argue the merit of removing substances responsible for the degree of destruction attributable to many of the psychoactive drugs receiving attention, but the exorbitant costs of America's punitive plan have failed to deliver results that justify the expense.

An examination of the merits of the efforts expended fighting illicit drugs requires a better appreciation of the objectives and the allocation of resources to achieve those objectives. Reaching a sound understanding requires realistic and rational analysis of the costs – fiscal costs, certainly, but also sacrifices exacted from the constitution,

demands placed on public and private institutions, and the prices associated with less quantifiable measures. An accurate accounting of the costs of the "war on drugs" must then necessarily include all of the collateral damage, arguably as the most costly, the caustic erosion of the cornerstones of U.S. democracy. The court cases resulting from this engagement have significantly diminished our civil liberties by shrinking the Bill of Rights, methodically abridging many freedoms we have previously fought so fervently to preserve – freedom of religion, freedom of speech, freedom from unreasonable searches and seizures, and property rights. Perhaps, the only fact more staggering than the total overhead demanded by the fight against drugs is the balance sheet's telling of our nation's epic failure.

The purpose of this paper is to provide a high-level survey of our nation's prohibition policies within the context of the costs of the law enforcement efforts upholding those policies. The discussion will offer a cursory review of the economic expense of the war on drugs with tangential coverage of the constitutional, institutional and intangible expenses that are inseparable from an assessment of the costs of America's drug control efforts. Part I provides a historical review of illicit drug use in the United States, while Part II supplies the evolution of the country's efforts to codify its drug control policies. Finally, Part III contains a survey of the costs of the current war on drugs.

II. BACKGROUND

Archaeological evidence collected all over the world chronicles human's proclivities for the use of psychoactive substances known to engender altered states of consciousness.[1] It is believed that over 12,000 years ago homo sapiens from the Stone Age ingested hallucinogenic mushrooms.[2] Lake-dwellers in Switzerland more than 4,500 years ago provide the first evidence of the domestication and

[1] Daniel Kunitz, *On Drugs: Gateways to Gnosis, or Bags of Glue?* HARPER'S MAGAZINE, Oct. 2001, at 92. "All the vegetables sedatives and narcotics, all the euphorics that grow on trees, the hallucinogens that ripen in berries or can be squeezed from roots – all, without exception, have been know and systematically used by human beings from time immemorial." *Id.*

[2] TERENCE MCKENNA, FOOD OF THE GODS: THE SEARCH FOR THE ORIGINAL TREE OF KNOWLEDGE 47 (1992).

consumption of poppy seeds.[3] During this same time period in China and Neolithic Europe, there are indications of the cultivation of cannabis or hemp.[4]

Before the lake-dwellers or the Chinese and the Neolithic Europeans, lore from India in the Brahmin tradition recognized the intoxicating properties of cannabis and heralded the plant for granting long life and sexual prowess.[5] Similarly, use of coca and other stimulants by the inhabitants on the continent of South America has been traced to primordial times.[6] The Bronze Age witnessed the expansive use of opium as a painkiller, particularly by women to ease the pains of childbirth and by others to relieve the discomforts of sickness and disease.[7] In 300 B.C., Theophrastus, a Greek naturalist and philosopher who was also a student of Aristotle and a successor to Plato, authored the earliest undisputed reference to the use of poppy juice.[8]

Our ancient predecessors partook of psychoactive plants and plant by-products to alter consciousness, certainly, but also for treating pain, for communing with the gods, and for survival.[9] These plants, often rich in alkaloids, served additionally as a source of nutrition and

---

[3] RICHARD RUDGLEY, ESSENTIAL SUBSTANCES: A CULTURAL HISTORY OF INTOXICANTS IN SOCIETY 24-26 (1993); Ashley Montagu, *The Long Search for Euphoria*, 1 REFLECTIONS 1, 62-69 (1966).

[4] *Id*. at 29.

[5] ANTONIO ESCOHOTADO, A BRIEF HISTORY OF DRUGS: FROM THE STONE AGE TO THE STONED AGE 9 (1996).

[6] RICHARD DAVENPORT-HINES, THE PURSUIT OF OBLIVION: A GLOBAL HISTORY OF NARCOTICS 26 (2002).

[7] (2300 B.C. - 500 B.C.). *See, e.g.,* R. GORDON WASSON, THE WONDROUS MUSHROOM: MYCOLATRY IN MESOAMERICA (1980); R. GORDON WASSON, ALBERT HOFFMANN AND CARL A. P. RUCK, THE ROAD TO ELEUSIS (1978); PETER T. FURST, ED., FLESH OF THE GODS: THE RITUAL USE OF HALLUCINOGENS (1976).

[8] Svend Norn, Poul R. Kruse & Edith Kruse, *History of Opium Poppy and Morphine*, 33 DANSK MEDICINHISTORISK ARBOG 171, 174 (2004). In the 2nd Century, Theophrastus includes in his *Historia Plantarum* descriptions of different poppy varieties and methods for extracting "latex." F.J. Carod-Artal, *Psychoactive Plants in Ancient Greece*, 1 NEUROSCIENCES AND HIST. 28, 31 (2013). Theophrastus's use of latex from the poppy refers to opium, using the term *mekonio* to specifically designate the juice. *Id.* His descriptions include opium's medicinal uses. *Id. See also*, Halil Tekiner & Muberra Kosar, *The Opum Poppy as a Symbol of Sleep in Bertel Thorvaldsen's Relief of 1815*, 19 SLEEP MEDICINE 123, 123-25 (2016), and John Scarborough, *Theophrastus on Herbals and Herbal Remedies*, 11 J. OF THE HIST. OF BIOLOGY 353, 353-385 (1978).

[9] Abbie Thomas, *Survivial of the Druggies*, NEW SCIENTIST, Mar. 30, 2002, at 11.

energy.[10] It is, however, the ancient attraction to intoxicating fruits, berries, roots and other plants that is cited as support for the proposition that intoxication may be a universal human need, the "fourth drive."[11]

Akin to the consumption of psychoactive substances across the globe, drugs have been part of America's story even before it was a country. Native Americans introduced early settlers to tobacco, a crop that eventually financed America's development as a nation.[12] European and Asian settlers brought other products—coffee, tea, alcohol, hemp and the opiates—to America.[13] Until the late 19th century, Americans were largely indifferent to the consumption of these drugs, which were then used legally and with very little government interference.[14]

The turn of the 20th century would witness growing concerns about drug use in America. Interestingly, concerns were compartmentalized to some degree and divided by a drug's specific association with a vulnerable subgroup of American society. For instance, opium use was associated with the Chinese and a rising Chinese immigrant population on the West Coast. Concerns about cocaine grew from the drug's association with the "Negro" population, particularly in the South. Alcohol use was associated with urban Catholic immigrants, while the abuses of heroin were attributed to the

---

[10] *Id.*

[11] RONALD K. SEIGEL, INTOXICATION: LIFE IN PURSUIT OF ARTIFICIAL PARADISE 10 (1989); *see generally,* ANDREW WEIL, THE NATURAL MIND: A NEW WAY OF LOOKING AT DRUGS AND THE HIGHER CONSCIOUSNESS (1972); and HELEN PHILLIPS & GRAHAM LAWTON, THE INTOXICATION INSTINCT (2004).

[12] *See*, *e.g.,* IAIN GATELY, TOBACCO: A CULTURAL HISTORY OF HOW AN EXOTIC PLANT SEDUCED CIVILIZATION (2001).

[13] KING COUNTY BAR ASSOCIATION, DRUGS AND THE DRUG LAWS: HISTORICAL AND CULTURAL CONTEXTS 6 (2005).

[14] The National Commission on Marijuana and Drug Abuse reported to Congress in 1973, "[d]rug policy as we know it today is a creature of the 20th Century. Until the last third of the 19th Century, America's total legal policy regarding drugs was limited to regulation of alcohol distribution, localized restrictions on tobacco smoking, and the laws of the various states regulating pharmacies and restricting the distribution of 'poisons.'" KING COUNTY BAR ASSOCIATION, DRUGS AND THE DRUG LAWS: HISTORICAL AND CULTURAL CONTEXTS 6 (2005) (*quoting* DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE, SECOND REPORT OF THE NATIONAL COMMISSION ON MARIJUANA AND DRUG ABUSE 14 (1973)).

urban immigrants. Concerns of marijuana use and the spread of its popularity were associated with Mexican immigrants.

CHINESE OPIUM AND THE "YELLOW PERIL"

The Civil War was a marker for great change in the United States, including what some consider the beginning of the march toward the country's criminalization of drugs.[15] It was the use of morphine, an opium derivative, during the war that solidified the support of the medical community for the drug.[16] American's use of opiates expanded with the spread of patent medicines containing opium, the invention of the hypodermic syringe, and the broad acceptance of opium derivatives, such as morphine and heroin.[17] Doctors frequently recommended opium, legal and widely available, as a treatment for any number of ailments, and in particular, physicians favored opium as a remedy for "female troubles" related to menstrual and menopausal conditions.[18]

---

[15] By the Civil War, morphine had received broad acceptance in medical practice. *See,* EDWARD M. BRECHER & THE EDITORS OF CONSUMER REPORTS MAGAZINE, LICIT AND ILLICIT DRUGS. THE CONSUMERS UNION REPORT ON NARCOTICS, STIMULANTS, DEPRESSANTS, INHALANTS, HALLUCINOGENS, AND MARIJUANA – INCLUDING CAFFEINE, NICOTINE, AND ALCOHOL 3 (1972). Morphine derives from opium and was first discovered in 1804 by German chemist Friedrich Wilhelm Adam Serturner, responsible for isolating morphine. THOMAS SZASZ, CEREMONIAL CHEMISTRY 189 (1974). By 1826, the Merck Company was producing substantial quantities of the drug. *Id.*

[16] *Id.*

[17] Heroin is a byproduct of morphine after it is subjected to chemical processing, first discovered in 1874. David T. Courtwright, *The Roads to H: The Emergence of the American Heroin Complex, 1889-1956*, ONE HUNDRED YEARS OF HEROIN 3 (David F. Musto, ed., 2002). Bayer Pharmaceuticals secured heroin's popularity when it introduced it in 1898 as "The Sedative for Coughs." *Id.* Heroin was also used as a cure for morphine dependency and to relieve symptoms of morphine withdrawal. *Id.* Its greatest medical demand, however, was in the treatment of patients suffering from tuberculosis, pneumonia and other common respiratory conditions and was widely prescribed by physicians into the 1920s. *Id.*

[18] BRECHER, ET. AL, supra note 14, at 1. Many cure-alls and elixirs legally contained opium, frequently in the form of morphine, an opium derivative, though the pharmacological mixes were not required to disclose their

Large numbers of Chinese also began immigrating to America and accepting low paying jobs, primarily in mines and building railroads, in search of better lives not only for themselves but also for their families. With large populations of Chinese settling on America's west coast, businesses and the business class exploited the Chinese as a moral scapegoat to deflect attention away from the actual causes of California's economic depression in the 1870s.[19] The search for places to lay blame for the poor economic conditions found traction in the assessment of the "moral" aspects of the Chinese inhabitants, with special attention paid to the vices of the Asian communities, not the least of which was their proclivities for opium.[20] The result was duplicitous in that it was, in actuality, part of a thinly veiled discrimination program against Chinese. Anti-Chinese sentiment intensified, Chinese exclusionary laws became commonplace and anti-Chinese hostility toward Chinese workers escalated.[21] By 1890, racism toward the Chinese was rampant, driving the proliferation of negative public sentiment concerning opium.

The Chinese brought with them to America the practice of smoking opium.[22] Although opium was commonly used in the United

---

ingredients. *Id.* The popular patent medicines rarely contained labels identifying their contents. *Id.* As a result, an unsuspecting population became accidental addicts, finding themselves addicted to the opium in the cure-alls and elixirs. *Id.* The addict population consisted largely of middle and upper class white middle-aged women. *Id.*

[19] Patricia A. Morgan, *The Legislation of Drug Law: Economic Crisis and Social Control*, 8 J. OF DRUG ISSUES 56, n.1 (1978). President Rutherford B. Hayes signed the Chinese Exclusion Treaty in 1880, effectively reversing what had been an open-door policy set in 1868. The new law placed strict limits on the number of Chinese immigrants allowed into the U.S. and the number of Chinese allowed to become naturalized citizens. Two years later, Congress passed the Chinese Exclusion Act of 1882, barring immigration from China and prohibiting the naturalization of Chinese immigrants already in the United States for a period of 10 years. The exclusionary treaty and act represent the federal government's reaction to the public's belief that low-paid Chinese workers were taking needed jobs away from whites, particularly during a period of economic downturn, to the public outrage of influence the Chinese smoking parlors had over the white population, and to an increase in anti-Chinese violence. *Id.* 56-58.

[20] *Id.*

[21] *Id.*

[22] The British actually introduced opium to the Chinese. After the Chinese outlawed opium in the late 1700s, the British maintained their lucrative

States and was popular among all classes and races, ingestion of the drug by smoking was a distinctly Chinese practice.[23] As long as the attraction was limited to adventurous young men, the American public voiced little objection, but when white women fell to the temptations of the Chinese opium smoking parlors, Chinese opium sparked public ire. Thus, the smoking of opium quickly became one of the most identifiable Chinese vices and is the reported trigger for the rise of the "yellow menace."[24] Opium and the Chinese smoking dens were synonymous with the corruption of American values and female chastity.[25] They also provided a tantalizing explanation for the social problems of the day, emerging as a target for public antipathy and legislative attention.[26]

Early laws addressing opium addiction varied in their effects, but were consistent in their origins – products of local legislation – and

---

smuggling trade and began what became known as the Opium Wars. Eventually, China fell to the pressure to re-legalize the opium trade.

[23] *See*, RICHARD DAVENPORT-HINES, THE PURSUIT OF OBLIVION: A GLOBAL HISTORY OF NARCOTICS 46 (2002). The Chinese habit of smoking opium grew from the marketing efforts of British smugglers who maintained a lucrative trade bringing opium to China from England after China outlawed the substance in the late 1700's. *Id.* The Chinese ban punished keepers of opium shops with strangulation but was designed to influence a great deal more. *Id.* China hoped to discourage its citizens from comingling with the "barbaric" Europeans, responsible for supplying the drug, and to protect the Chinese economy be curtailing the exporting of China's silver, which was being traded for opium. *Id.*

[24] Patricia A. Morgan, *The Legislation of Drug Law: Economic Crisis and Social Control*, 8 J. OF DRUG ISSUES 58 (1978). William Randolph Hearst, the infamous newspaper publisher, began publishing a series of articles detailing how Chinese men seduced white women with the drug opium, leading them "to 'contaminate' themselves by frequenting the dens in Chinatown." *Id.*; *see also*, Stanford M. Lyman, *The "Yellow Peril" Mystique: Origins and Vicissitudes of a Racist Discourse,* 13 INT'L J. OF POL., CULTURE AND SOC'Y 683 (2000).

[25] The San Francisco Police Department reported that while officers were visiting these opium dens they "found white women and Chinamen side by side under the effects of this drug – a humiliating site to anyone who has anything left of manhood." S. COMM., *Chinese Immigration, It's Social, Moral and Political Effects* (testimony of the San Francisco Police Department) (Ca. 1878). During the same period, the *San Francisco Post* published articles opposing the Chinese for having "impoverished our country, degraded our free labor and hoodlumized our children. [The Chinaman] is now destroying our young men with opium." *Id.*

[26] Morgan, *supra* note 23, at 56.

in their purpose – eradication of the socializing of whites, specifically white women, with the Chinese.[27] In some instances, city ordinances prohibited Chinese from using opium but permitted use by white people.[28] In other instances, local legislation allowed the continued use of the drug by Chinese, but outlawed its use by whites.[29]

"NEGRO" COCAINE AND THE "SOUTHERN MENACE"

As the opium epidemic engulfed America's west, cocaine amassed its attack on the South. Not unlike the Chinese immigrant laborers on the West Coast, in the late 1800's, southern black laborers found cocaine to be of assistance for increasing endurance and withstanding strenuous working conditions. By the turn of the 20th century, poor black laborers were developing habits for the drug and found sniffing or snorting cocaine to be the quickest and cheapest way to reap what was believed to be the drug's benefits.[30] Similar to the Chinese immigrants' association to opium, the poor black laborers of the South became firmly linked to cocaine in the minds of the American public, but contrary to public perception, the predominant users of cocaine in the early 1900's were not the black laborers in the South.[31] The drug was far more popular, in fact, with whites and especially with the white criminal element consisting of prostitutes, pimps, gamblers and other "urban hoodlums."[32]

Notwithstanding the drug's popularity with the whites, the media provided significant aid in anchoring the public's association of blacks and cocaine and in stoking the racial tensions that already existed between the blacks and the whites. Another parallel between opium and cocaine at the turn of the last century was the media's

---

[27] *Id.* at 56-58; Joseph D. McNamara, *The Hidden Costs of America's War on Drugs*, 26 J. OF PRIVATE ENTERPRISE 97, 98-99 (2011).

[28] *Id.*

[29] *Id.*

[30] CHARLES E. DE M. SAJOUS, ANALYTICAL CYCLOPAEDIA OF PRACTICAL MEDICINE, III 506 (1902). Cocaine's popularity was certainly not limited to southern black laborers. *Id.* The act of snorting cocaine distinguished the use by common people from the use by the upper and professional class users who preferred injecting it with a syringe. *Id.* Cocaine's "assistance" was so apparent that some employers, including plantation owners, provided the drug to their black workers to improve productivity and control the laborers. DAVENPORT-HINES, *supra* note 22, at 200.

[31] DAVENPORT-HINES, *supra* note 22, at 200.

[32] *Id.*

sensationalizing the drug's use and its abuses, which the newspapers promptly connected to a marginalized subset of American society. The press fed the whites' fears by publishing shocking fabrications of "cocaine crazed Negro[es]" leaving their farms and job sites on sexual rampages attacking and having their way with white women, reminiscent of the goings on in the Chinese smoking parlors.[33]

MEXICAN IMMIGRANTS AND THE MARIJUANA MENACE

As the 20th century progressed, a new drug threatened the country. Immigrants moving north from Mexico, in search of the American Dream, brought with them cannabis, which they called marijuana.[34] Although hemp and cannabis were not new to the United States, it was the combined effect of prohibition and the expansive prevalence of the recreational use of marijuana by Mexican immigrants and Mexican-Americans that brought cannabis to the forefront in the 1920s.[35]

By the 1930s, marijuana's popularity had spread throughout the country from schoolyards to neighborhood bridge parties.[36] In fact,

---

[33] "Most of the attacks upon white women of the South are the direct result of the cocaine crazed Negro brain . . . Negro cocaine fiends are now a known Southern menace." Dr. Edward H. Williams, *Negro Cocaine "Fiends" Are A New Southern Menace*, N.Y. TIMES, Feb. 8, 1914, at IV-12. Superhuman strength provided another legend attributable to the blacks' use of cocaine and led southern law enforcement to transition from .32 to .38 caliber revolvers because cocaine-frenzied blacks were impervious to the smaller rounds. *See*, MUSTO, *supra* note 16, at 7 (1999). Harry Anslinger, the head of the predecessor to the Drug Enforcement Agency, advocated for harsher penalties related to cocaine use and possession by recounting stories of racially mixed groups dancing together at nightclubs while under the influence of cocaine. *See*, HARRY SHAPIRO, WAITING FOR THE MAN: THE STORY OF DRUGS AND POPULAR MUSIC (1999).

[34] RONALD K. SEIGEL, INTOXICATION: LIFE IN PURSUIT OF ARTIFICIAL PARADISE 273 (1989). America's prohibition of alcohol in the 1920's kindled an increased use of marijuana. *Id.*

[35] BRECHER, ET. AL, *supra* note 14.

[36] WILLIAM O. WALKER, III, DRUG CONTROL IN THE AMERICAS 102 (1981).

> In New Orleans, the reporters in 1926 laid particular stress on the smoking of marijuana by children. "It was definitely ascertained that school children of 44 schools (only a few of these were high schools) were smoking 'mootas.' Verifications came in by the hundreds from harassed parents, teachers, neighborhood pastors, priests, welfare workers and club women . . . The Waif's Home, at this time, was reputedly

marijuana "tea pads," first surfacing in New Orleans and other southern port cities, had infiltrated most major cities in the United States by 1930.[37] The marijuana pads "resembled opium dens or speakeasies except that prices were very low; a man could get high for a quarter on marijuana smoked in the pad, or for even less if he bought the marijuana at the door and took it away to smoke."[38]

Not unlike the associations ascribed to opium and to cocaine before it, it was marijuana's association with Hispanics that attracted negative public attention and opposition.[39] The white majority's bias against anyone not its own now also enveloped Mexicans. The white's intolerance intensified as competition for jobs grew fiercer while the "roaring twenties" fell to the Great Depression. Again, paralleling the Chinese earlier in the century, the Mexican immigrants became an intentional scapegoat for rising unemployment rates in the 1930s and for other social ailments as the country's economic depression continued to bear down on its inhabitants.[40]

The public's indifference and the government's abeyance concerning psychoactive drugs would not continue. Fear, economic pressures, sensational media reports and an epidemic of addiction joined to create a force demanding a response.

> full of children, both white and colored, who had been brought in under the influence of the drug. Marijuana cigarettes could be bought almost as readily as sandwiches. Their cost was two for a quarter. The children solved the problem of cost by pooling pennies among the members of a group and then passing the cigarettes from one to another, all the puffs being carefully counted."

BRECHER, ET. AL, *supra* note 14.

[37] SEIGEL, *supra* note 33, at 273. By 1930, New York City served as host to at least 500 marijuana tea pads. *See,* Mayor's Committee on Marijuana, *The Marijuana Problem in the City of New York*, THE MARIJUANA PAPERS 246 (David Solomon, ed., 1944).

[38] BRECHER, ET. AL, *supra* note 14.

[39] MUSTO, *supra* note 16, at 219-20. The Federal Bureau of Narcotics furthered public fears of marijuana by publicizing official statements about police estimates that "fifty percent of the violent crimes committed in districts occupied by Mexicans, Spaniards, Latin Americans, Greeks or Negroes may be traced to this evil" of marijuana. RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, THE MARIJUANA CONVICTION 100 (1974).

[40] C.M. Goethe, N.Y. TIMES, Sept. 15, 1935, IV-9. "[M]arijuana, perhaps now the most insidious of our narcotics, is a direct by-product of unrestricted Mexican immigration . . . our nation has more than enough laborers." *Id.*

III. AMERICA'S CRIMINALIZATION OF DRUGS

The "war on drugs," at least as we know it, recently marked its forty-fifth anniversary, but America's criminalization of drugs and the escalation of drug enforcement began just over a century ago. Until the turn of the last century, the federal government generally abstained from becoming involved in drug control efforts. Prior to that, the 19th century witnessed state and local governments promulgating the earliest laws addressing drugs; there were no national drug control policies. The laws the states and local governments enacted were quite mild in their restrictions, and most placed the onus of policing drugs' distribution on the health professions.[41] Blanket prohibitions on any drug were rare.

Early national legislative attention centered primarily on opium. Congress increased the import tariff on smoking opium in 1883, but left unaffected opium imported for other purposes.[42] In 1887, Congress barred the importation of opium by any subject of China, but it did not prohibit importing opium by non-Chinese concerns, nor did it restrict importation of opium from Canada.[43] Then, in 1890, Congress passed legislation that limited the manufacture of smoking opium to American citizens.[44]

THE PURE FOOD AND DRUG ACT

In 1906, however, the federal government responded to the growing opium and cocaine epidemics with a new approach. By enacting the Pure Food and Drugs Act,[45] Congress stepped into the realm of public health and safety, an area formerly exclusively held by state governments. The legislation did not prohibit the use of opium, cocaine or any other substance but rather, required all physicians to accurately label medicines to ensure the doctors disclosed the identities and quantities of the medicines' contents and ingredients to all

---

[41] Second Report of the National Commission on Marijuana and Drug Abuse, Drug Use in America: Problem in Perspective 14 (1973).
[42] CHARLES E. TERRY & MILDRED PELLENS, THE OPIUM PROBLEM 747 (1928).
[43] ALEXANDER T. SHULGIN, CONTROLLED SUBSTANCES: A CHEMICAL AND LEGAL GUIDE TO THE FEDERAL DRUG LAWS 244 (1988).
[44] BRECHER ET. AL, *supra* note 14, at 44.
[45] Pure Food and Drug Act of 1906, 34 Stat. 768. It was also known as the Wiley Act.

potential users.[46] Additionally, Congress required appropriate notices be included if the medicines contained any dangerous or habit-forming ingredients.[47]

Despite the success of the Pure Food and Drug Act in reducing opiate addiction, Congress passed the Opium Exclusion Act[48] in 1909, the nation's first federal drug prohibition law. The legislation affected a national ban on imported, non-medicinal smoking opium, and marked the success of the concerted efforts of the U.S. Secretary of State Elihu Root, Dr. Hamilton Wright and others to enact national opium prohibitions in advance of President Roosevelt's Conference of the International Opium Commission in Shanghai in 1909.[49]

Dr. Wright was intent, however, on even greater, more widely sweeping legislation. Upon his return from the Shanghai conference, he drafted legislation entitled the Foster Antinarcotics Bill.[50] The legislation was founded on Congress' constitutionally granted taxing power and provided for a federal tax on all drug transactions.[51] It also required everyone who sold drugs to register with the government and record all drug sales.[52] Unfortunately for Dr. Wright and others who backed the legislation, the popular support did not outweigh the nation's drug manufacturers and retailers who opposed the bill, and the legislation failed, never coming to a vote.[53]

---

[46] *Id.* It did not take long for the new act to debunk the belief that the vast majority of addicts consisted of accidental addicts. It was soon discovered that many opium addicts genuinely sought out the drug solely for its psychoactive effects.

[47] *Id.*

[48] Smoking Opium Exclusion Act of 1909, 35 Stat. 614.

[49] *Id.* It was a proposal drafted by Dr. Hamilton Wright, the U.S. State Department's appointee to the American delegation to the Conference of the International Opium Commission. Dr. Wright advocated strongly that the U.S. serve as a model for other nations by enacting its own exemplary opium laws. MUSTO, *supra* note 16, at 33. [1999] At the time, America had no legal ban limiting the use, sale, or manufacture of products containing opium or coca. *Id.*

[50] H.R. 25241, 61st Cong. (1910); *see also*, Hamilton Wright, *Report on the International Opium Commission and on the Opium Problem as Seen within the United States and Its Possessions*, OPIUM PROBLEM: MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, S. DOC. NO. 377 at 45 (1910).

[51] *Id.*

[52] *Id.*

[53] The Foster Antinarcotics Bill included cumbersome record-keeping and reporting requirements opposed by business and industry. MUSTO, *supra* note 16, at 47-48. [1999]

THE HARRISON NARCOTICS TAX ACT: " . . . A ROUTINE SLAP AT MORAL EVIL"[54]

Dr. Wright was undaunted in his efforts to acquire prohibitionist legislation despite the earlier failure of the Foster Antinarcotics Bill. During the next session of Congress, he, the other physicians who participated in the drafting of the legislation and other supporters succeeded in having the domestic drug prohibition legislation introduced into the House of Representatives.[55] Opposition from business and industry, including the American Medical Association (AMA), remained ardent, but grudging compromises resulted in the Harrison Act being signed into law on December 17, 1914.[56]

The new law required drug manufacturers and sellers to register their activity with the federal government, to keep records of their sales, and to pay taxes on each transaction.[57] For the medical community, the Harrison Narcotics Tax Act provided a legal mechanism to ensure that those responsible for selling and dispensing addictive drugs, drugs such as opium and its derivatives – morphine and heroin, cocaine and others, did so in an orderly fashion, whether the amount distributed was smaller in quantities sold over the counter or was larger and required a physician's prescription.[58] Physicians and pharmacists had participated in drafting the statute, and they felt protected by its language, particularly the language shielding them from government interference in their practices.[59]

---

[54] MUSTO, *supra* note 16, at 65. [1999]

[55] MUSTO, *infra* note 66. [1972]

[56] 36 Stat. 785-90 (1914). The official title of the Harrison Narcotics Tax Act was the following: "An Act to provide for the registration of, with collectors of internal revenue and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives or preparations, and for other purposes." *Id.*

[57] *Id.*; *see also*, EVA BERTRAM, MORRIS BLACHMAN, KENNETH SHARPE, & PETER ANDREAS, DRUG WAR POLITICS: THE PRICE OF DENIAL 68 (1996).

[58] BRECHER, ET. AL, *supra* note 14, at 48.

[59] The Harrison Act included, "Nothing contained in this section shall apply to the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only." Harrison Narcotic Act of 1914, Pub. L. No. 223, 36 Stat. 785, 789.

Little did they know that in only a few short years, the Harrison Narcotic Act would transform from a relatively innocuous revenue measure into a powerful tool for federal authorities to regulate, and ultimately prohibit, a wide range of narcotics-related activities. Further, instead of enjoying protection of the language of the Harrison Act, physicians and pharmacists would soon learn that the language they believed provided them security would be language used against them. Ultimately the language in question, the wording that shielded them from government interference "in their practices," was deemed to be language subject to multiple interpretations. Some interpretations supplied undercover Treasury agents the authority to arrest thousands of doctors and pharmacists for prescribing and administering drugs to narcotics addicts.[60] In the 1920s, the Treasury Department charged and prosecuted more than 25,000 doctors for alleged Harrison Act violations, and over 3,000 of those charged served sentences in the penitentiary.[61] Although contentious legal issues arose, the Court rejected the Treasury Department's attempts to use the Harrison Act as a prohibition against physicians and their patients.[62]

---

[60] DAVENPORT-HINES, *supra* note 22, at 230. The U.S. Treasury Department took advantage of the ambiguous language "in pursuit of their professional practice" and instigated initiatives to adopt regulations forbidding physicians from providing drugs for addiction maintenance in cases where addiction was unrelated to medical issues. "The manifest lack of federal power to regulate medical practice as well as the need to unify professional support of the Harrison Act may have required these vague phrases." MUSTO, *supra* note 16, at 125 (1999).

[61] LAWRENCE KOLB, DRUG ADDITION: A MEDICAL PROBLEM 145-46 (1962).

[62] *United States v. Jin Fuey Moy,* 241 U.S. 394 (1916), provided the first major legal challenge to the constitutionality of the Harrison Narcotic Act. *Id.* In its decision the Supreme Court limited the scope of the statute denying the U.S. Treasury Department's attempt to prosecute a doctor for prescribing drugs to an addict and the Treasury Department's efforts to criminalize the addict's possession of an illicit drug prescribed by his doctor. *Id.* at 401. The Court recognized that an act of Congress is only valid if carried out pursuant to an expressly granted constitutional power and, in so doing, held that the Harrison Act was not required under international treaty as had been promoted. *Id.* at 401. Therefore, where the Act was passed under Congress' taxing power, it could only be valid for raising revenue. *Id.* The Court then found that both preventing a doctor from exercising professional judgment to prescribe drugs and prohibiting mere possession of drugs were actions unrelated to revenue collection, and the federal government could not use the Harrison Act to prosecute doctors who prescribed drugs or to prosecute the individuals who possess the drugs. *Id.*

The victory enjoyed by doctors and pharmacists would prove to be short-lived.[63]

---

[63] Notwithstanding the decision in *Jin Fuey Moy*, the Treasury Department refused to abandon its attempts to regulate the prescription practices of physicians and pharmacists. Rather, it continued its efforts under the pretext of conducting "tax" law enforcement in a fashion it argued was consistent with the language of the Harrison Act and the Court's interpretation in *Jin Fuey Moy*. In *United States v. Doremus*, 249 U.S. 86 (1919), and *Webb v. United States*, 249 U.S. 96 (1919), two companion cases whose decisions the Supreme Court delivered on the same day, the Court explicitly upheld the statute as a legitimate revenue measure in *Doremus*, writing,

> [i]f the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, if cannot be invalidated because of the supposed motives which induced it....The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue.

249 U.S. at 93-94. In the *Webb* decision, the Court went further holding that the legitimate practice of medicine could not include prescribing drugs to patients simply to maintain their addiction with no intent to cure them. 249 U.S. at 97-98. The Treasury Department seized on this language to justify their continued pursuit of doctors and pharmacists.

Three years later, the Treasury Department obtained an undeniable triumph that would consign significant and lasting effects on America's drug enforcement policy. In *United States v. Behrman*, 258 U.S. 280 (1922), the Supreme Court upheld the Treasury Department's criminalization of physicians' prescribing drugs to narcotics addicts whose only medical ailment was the addiction, affirming the federal government's position that providing a narcotics prescription to an addict was a *de facto* criminal act, regardless of the physician's intent or "good faith." *Id.* at 289. The effects of the *Behrman* decision would not be undone by the Court's subsequent decision in *Linder v. United States*, 268 U.S. 5 (1925). In *Linder*, the Court reversed course recognizing constitutional issues with the Harrison Act if in expanding the statute's meaning beyond its taxing authority the Court's interpretation was correct. *Id.* at 21-23. The Court's decision recognized that there could be medically appropriate justifications for prescribing narcotics to an addict "to relieve conditions incident to addition." *Id.* at 22. By 1925, however, the government's punitive enforcement practices were so firmly entrenched that "few were willing to challenge Treasury's actions politically or in court, and the ruling had little real impact." BERTRAM, ET. AL, *supra* note 56, at 75.

THE MARIJUANA TAX ACT OF 1937

The next major piece of legislation in the criminalization of drugs in America was legislation proposed by Narcotics Commissioner Harry J. Anslinger and the Federal Bureau of Narcotics.[64] Proponents sought to bring marijuana under federal control, but they needed a way to do so without running afoul of the Constitution. Relying, again, on Congress' authority to tax presented the solution.

To garner popular support, Anslinger looked to the power of the press. Working through the media, Anslinger perpetuated the public's fear of drugs by arguing that the use of marijuana caused insanity and led to violent crime.[65] The Senate followed Anslinger's lead and issued a report to accompany the bill, describing marijuana's threats in the following way:

> [u]nder the influence of this drug marijuana the will is destroyed and all power of directing and controlling thought is lost. Inhibitions are released. As a result of these effects, many violent crimes have been committed under the influence of this drug…. [M]arijuana is being placed in the hands of high school children…. by unscrupulous peddlers. Its continued use results many times in impotency and insanity.[66]

Though there was opposition, particularly from the American Medical Association, President Franklin D. Roosevelt signed the

---

[64] Congress established the Federal Bureau of Narcotics as a division of the U.S. Treasury Department in 1930, and Treasury Secretary Andrew Mellon appointed his nephew-in-law Harry J. Anslinger as the bureau's first commissioner. SHULGIN, *supra* note 42, at 245. Anslinger would become one of the most influential and prominent figures in the history of America's criminalization of drugs. *Id.* He would become one of the most influential individuals in America's criminalization of drugs and would later earn notoriety as the "father of the drug war." *See*, John C. McWilliams, *Unsung Partner Against Crime: Harry J. Anslinger and the Federal Bureau of Narcotics, 1930-1962*, 113 PENN. MAG. OF HIST. AND BIOGRAPHY 207, 207-236 (1989).

[65] "How many murders, suicides, robberies, criminal assaults, hold-ups, burglaries, and deeds of maniacal insanity it [marijuana] causes each year, especially among the young, can only be conjectured." JOHN KAPLAN, MARIJUANA, THE NEW PROHIBITION 92 (1971) (quoting Commissioner Harry J. Anslinger); *see also*, NORMAN E. ZINBERG & JOHN A. ROBERTSON, DRUGS AND THE PUBLIC 178 (1969).

[66] *Id.* at 178-79 (quoting the U.S. Senate report accompanying the proposed Marijuana Tax Act of 1937).

Marijuana Tax Act into law on October 1, 1937.[67] The statute imposed a tax on all marijuana imported, sold, or otherwise handled by placing a transfer tax on each transaction involving the substance.[68] Additionally, though the new legislation did not actually prohibit the sale or possession of marijuana, it did require anyone handling cannabis to register with the federal government.[69] If one failed to register, to pay the required taxes and to acquire the mandated transfer stamp, he was subject to fines commanding substantial payments and incarceration carrying sentences up to twenty years.[70]

THE BOGGS ACT OF 1951

The Boggs Act of 1951[71] established the country's first mandatory minimum sentences for drug-related offenses.[72] The legislation was in response to the concerns of the Federal Bureau of Narcotics over the rise in illicit drug use following World War II.[73] During wartime, the United States experienced a decline in drug use, a decline attributable to a variety of factors.[74] One factor, a shortage of supply through medical channels, fostered the need for alternative sources for the drugs' supply and unwittingly cultivated a black market demand.[75] As the drug supply steadily diminished, the street price of the drugs continued to rise, attracting even greater numbers of criminal enterprises.[76] In addition to creating mandatory minimum sentences for drug violations, and in part, to address the increased

[67] Marijuana Tax Act of 1937, 50 Stat. 551; *see also*, David F. Musto, *The Marijuana Tax Act of 1937*, 26 ARCHIVES OF GEN. PSYCHIATRY 101, 101-08 (1972).
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] Boggs Act of 1951, Pub. L. No. 255, 65 Stat. 767.
[72] WALKER, *supra* note 35, at 170-71.
[73] Harry J. Anslinger, *The Federal Narcotic Laws,* 6 FOOD, DRUG, AND COSM. L. J. 743, 743-48 (1951).
[74] WALKER, *supra* note 35, at 170-71.
[75] DANIEL GLASER, *Interlocking Dualities in Drug Use, Drug Control and Crime*, DRUGS AND THE CRIMINAL JUSTICE SYSTEM 46 (James A. Inciardi & Carl D. Chambers, eds. 1974).
[76] *Id.*

numbers of black market drug dealers, the Boggs Act modified the prior penalties associated with Harrison Act violations increasing them fourfold.[77]

THE NARCOTIC CONTROL ACT OF 1956

The American Medical Association and the American Bar Association (ABA), troubled by the federal government's punitive drug policies, joined forces to persuade a congressional subcommittee to reexamine the country's drug dilemma, the degree to which narcotic drugs were an issue, and the efficacy of the drug laws in place.[78] The double-team effort succeeded in persuading Senator Price Daniel of Texas to hold hearings across the country to study America's approach to the drug problem.[79]

Daniel's committee concluded in 1956 and reported finding a severe drug problem requiring drastic punitive measures.[80] The committee "accused the Supreme Court of permitting major dope traffickers to escape trial by its too-liberal interpretation of constitutional safeguards; it found the Narcotics Bureau could not fight the traffic effectively without being freed to tap telephones; the allowance of bail in narcotics cases was intensifying the flow of drugs into the country; and Bureau agents ought to have statutory authority to carry weapons."[81] Further, Daniel's committee condemned the concept of drug treatment clinics and demanded increased penalties for drug offenses, including the addition of the death penalty for smuggling and for heroin sales.[82]

Regrettably, it was not what the AMA and the ABA intended when they lobbied for reexamination of America's drug policies, and Daniel's study resulted in Congress' passage of additional, even more repressive legislation – the Narcotic Control Act of 1956, known as the Daniel Act.[83] The newly enacted statute eliminated suspended sentences, probation, and parole for drug violations and, not

---

[77] 65 Stat. 767.

[78] RUFUS KING, THE DRUG HANG-UP, AMERICA'S FIFTY YEAR FOLLY 14 (1972).

[79] *Id.*; *see also*, WILLIAM O. WALKER III, DRUG CONTROL POLICY: ESSAYS IN HISTORICAL AND COMPARATIVE PERSPECTIVE 19-20 (2004).

[80] WALKER, *supra* note 78, at 19-20.

[81] *Id.* at 16.

[82] SHULGIN, *supra* note 42, at 246.

[83] Narcotic Control Act of 1956, 70 Stat. 567.

surprisingly, established new longer mandatory minimum sentences.[84] In addition to raising minimum sentences, the act increased both prison terms and fines for violations of the drug laws.[85] Heeding Daniel's request, Congress also included a provision for imposing the death penalty against anyone over the age of eighteen who provided heroin to anyone under the age of eighteen.[86]

THE DRUG ABUSE CONTROL ACT OF 1965

The Drug Abuse Control Act created provisions that closely paralleled the Harrison Narcotics Act in their mandate requiring registration, inspection, and record-keeping by all persons concerned with any controlled substance covered under the Act and with the trafficking of those substances.[87] Pursuant to the statute, the Food and Drug Administration (FDA) assumed responsibility for enforcement of the addition to America's drug policies through its newly created Bureau of Drug Abuse Control, named for the legislation responsible for its creation.[88] The FDA also promulgated new regulations under the Drug Abuse Control Act establishing quotas and limiting supplies of certain narcotics and placing severe restrictions on the manufacture a pharmaceutical amphetamines.[89] The restrictions did little to forestall the proliferation of users of illicit psychoactive substances but did much to motivate the growth of a black market in "speed."[90]

THE MODERN ERA OF AMERICA'S DRUG POLICIES

Until the late 1960s, the federal government's role in drug enforcement would have been considered minimal, and the U.S.

---

[84] *Id.*

[85] *Id.*

[86] *Id.*; *see also*, ALFRED R. LINDESMITH, THE ADDICT AND THE LAW 26 (1965).

[87] KING, *supra* note 77, at 26.

[88] Drug Abuse Control Act of 1965, 79 Stat. 226.

[89] *Id.*

[90] The supply shortages created by the statute's restrictions in turn sparked an escalation in pricing of the black market drugs sufficient enough to make the street's profit potential attractive to new criminal organizations, a veteran business model first developed with alcohol in the 1920s, and later repeated with the opiates in the 1940s and 1950s. DAVENPORT-HINES, *supra* note 22, at 312-13.

Department of Justice played no role at all.[91] Federal efforts consisted predominantly of customs officials seizing what they could at the nation's borders, the Treasury Department's Federal Bureau of Narcotics investigating heroin rings, and the FDA regulating pharmaceuticals.[92] A "war on drugs" did not exist.

Richard Nixon, however, adopted controlling narcotics as a sizable plank in his campaign platform, and Nixon's proclamation of a nation-wide necessity to restrict the availability, sale and use of illicit drugs gathered increasingly greater popular accord as his campaign progressed.[93] After his election, President Nixon unveiled a global campaign to eradicate drugs and drug traffickers.[94] He established the National Commission on Marijuana and Drug Abuse in 1970 and the Special Action Office for Drug Abuse Prevention.[95] A year later, he declared drugs to be "public enemy number one," becoming the first American president to officially declare a "war on drugs," and setting the stage for each executive that followed.[96]

THE COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970

A hallmark of Nixon's crusade against drugs was the passage of the Controlled Substances Act as Title II of the Comprehensive Drug Abuse Prevention and Control Act.[97] In addition to wholly replacing the Harrison Act as the nation's chief legislative instrument of drug control, it positioned the manufacture, importation, distribution, and possession of certain psychoactive substances under federal authority and regulation.[98] Congress relied on its authority to regulate interstate commerce as the basis to subordinate *all* previously existing drug laws under federal power, but an immediate effect of the legislation was to

---

[91] DAN BAUM, SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE 206-91 (1996).

[92] *Id*.

[93] MUSTO, *supra* note 16, at 253-57. [1988]

[94] DAVENPORT-HINES, *supra* note 6, at 421-423.

[95] *Id*.

[96] In 1971, Nixon declared "total war . . . on all fronts against an enemy with many faces." *See*, SHULGIN, *supra* note 42, at 247.

[97] 84 Stat. 1236 (1970).

[98] *Id*. Three years later, Congress consolidated all anti-drug activities under a newly created Drug Enforcement Administration, further strengthening the federal bureaucratic mechanism for drug control nurtured by the Nixon administration. *See*, Reorganization Plan No. 2 of 1973, 87 Stat. 1091.

"effectively destroy the Federal-State relationship that existed between the Harrison Act and the Uniform Narcotic Drug Act."[99]

In an effort to restore the balance between state and federal authorities that existed prior to the passage of the Controlled Substances Act, the Commissioner on Uniform State Laws drafted the Uniform Controlled Substances Act.[100] It replaced the Uniform Narcotic Drug Act of 1932, and presented an arrangement of complementary federal and state drug control laws that soon became the national standard for the control and legislative enforcement of narcotic and dangerous drugs.

Another feature of the Controlled Substances Act, it introduced five schedules or categories for drugs, arranged in descending order based on a substance's potential for abuse and ascending order determined by a substance's approved medicinal use.[101] As an example, neither of the illicit drugs heroin and Ecstasy have any accepted medical use, but their potential for abuse is quite high. They both fall under Schedule I.[102] While substances that are widely accepted medicinal drugs, like medications that treat diarrhea, fall within Schedule V.[103]

President Gerald Ford's brief administration brought some amount of pragmatism to Nixon's anti-drug measures. Though President Ford maintained pressure for stronger controls, he acknowledged that eliminating drug abuse was an illusory exercise.[104]

---

[99] Shulgin, *supra* note 42, at 247

[100] 84 Stat. 1285 (1970); *see also*, Rufus King, *The 1970 Act: Don't Sit There, Amend Something*,
http://www.druglibrary.ent/special/king/dhu/dhu23.htm. (last visited X)

[101] 84 Stat. 1236 (1970).

[102] Arthur J. Lurigio, *A Century of Losing Battles: The Costly and Ill-Advised War on Drugs in the United States* (Loyola Univ. Chicago Social Justice Centers, Loyola eCommons, Working Paper, Paper No. 21, 2014),
http://ecommons.luc.edu/cgi/viewcontent.cgi?article=1020&context=social_justice&sei-redir=1&referer=https%3A%2F%2Fscholar.google.com%2Fscholar%3Fhl%3Den%26q%3DLurigio%2Bcentury%2Bof%2Blosing%2Bbattles%26btnG%3D%26as_sdt%3D1%252C25%26as_sdtp%3D#search=%22Lurigio%20century%20losing%20battles%22. (last visited X)

[103] *Id.*

[104] Musto, *supra* note 16, at 257. [1999] The Domestic Council Drug Abuse Task Force released its White Paper on Drug Abuse during Ford's administration. *See,* Domestic Council Drug Abuse Task Force, *White Paper*, (1975),
https://www.fordlibrarymuseum.gov/LIBRARY/document/0067/1562951.

The more pragmatic tenor of Ford's administration also found footing in the subsequent administration of President Jimmy Carter. President Carter, addressing Congress, urged that "penalties against possession of a drug should not be more damaging to an individual than the use of the drug itself; and where they are, they should be changed."[105] Federal law never reflected President Carter's suggestions of decriminalizing marijuana nor his more realistic approaches to drug control, and any softening positions eventually dissolved.

When President Ronald Reagan took office, he brought with him an attitude toward drug control reminiscent of the Nixon administration. America was emerging from the Vietnam War, and the reach of the Columbian drug cartels was international. American's fear of drugs experienced renewed momentum and found respite in President Reagan's support of a strong law enforcement approach to drug control.[106] From the White House Rose Garden in 1982, President Ronald Reagan declared, "[w]e can put drug abuse on the run through stronger law enforcement, through cooperation with other nations to stop the trafficking, and by calling on the tremendous volunteer resources of parents, teachers, civic in religious leaders, and state and local officials."[107] Congress' additions to America's drug policies reflected the prohibitionist stance of the Reagan administration.

THE COMPREHENSIVE CRIME CONTROL ACT OF 1984

---

pdf. (last visited X) The Council's white paper indicated the problem of drug abuse was one that the government could only hope to contain, and it warned that the government's ability to totally eliminate drug abuse was an unlikely prospect. *Id*. at 97-98.

[105] Quoted in Musto, *supra* note 16, at 261. [1999] Carter campaigned on a platform that included decriminalizing marijuana and repealing federal laws that penalized people for less than one ounce of an illicit drug. *See, e.g.*, MICHAEL MASSING, THE FIX (1998). – need more detailed reference

[106] *Id*. at 266-67.

[107] President Ronald Reagan, Remarks on Signing Executive Order 12368, Concerning Federal Drug Abuse Policy Functions (June 24, 1982) (*in* William Richard Files, White House Staff Files, Ronald Reagan Library), http://www.presidency.ucsb.edu/ws/index.php?pid=42671. (last visited X) Nancy Reagan's antidrug campaign "Just Say No" became a controversial component of the broad national approach to the elimination of drug abuse but was very popular with parents, schools and the media. The administration's fight focused on white middle-class youth and received funding from corporate and private donations. Musto, *supra* note 16, at 266-68. [1999]

In 1984, the Controlled Substances Act underwent change with a variety of additions known as the Comprehensive Crime Control Act of 1984. [108] The new amendments included provisions for placing certain "designer drugs" into the scheduling formula and for seizing the profits derived from criminal acts.[109]

THE ANTI-DRUG ABUSE ACT OF 1986

By signing the Anti-Drug Abuse Act of 1986[110], President Reagan significantly intensified the federal government's fight for drug control and recognized the bipartisan support for tough new penalties for those who violated the nation's drug laws. The legislation established mandatory minimum sentences for violations of heroin and cocaine statues, and in so doing Congress created marked disparities in legal penalties for the possession and sales of powder cocaine and crack cocaine.[111] Congress also established the possibility of a capital sentence for certain drug offenses.[112]

THE ANTI-DRUG ABUSE ACT OF 1988

President Reagan's intensification of nationwide efforts to control illicit drugs continued with the passage of the Anti-Drug Abuse Act of 1988.[113] With this legislation, the Reagan administration sought

---

[108] 98 Stat. 1976 (1984).

[109] *Id.*

[110] 100 Stat. 3207. The legislation received almost unanimous congressional support, partly in reaction to the overdose death of Len Bias. Earlier that year, Bias, a promising collegiate basketball star, died suddenly from a suspected cocaine overdose. His death and the prominence played by illicit drugs garnered front-page news nationwide.

[111] *Id.*

[112] *Id.*

[113] 102 Stat. 4181. President Reagan was adamant about getting "tough on drugs." RONALD REAGAN, RADIO ADDRESS TO THE NATION ON ECONOMIC GROWTH AND THE WAR ON DRUGS, The American Presidency Project (Oct. 8, 1988), http://www.presidency.ucsb.edu/ws/?pid=34997. (last visited X) Reagan announced that "we will no longer tolerate those who sell drugs and those who buy drugs . . . they must pay." *Id.* President Reagan's declaration was an outward demonstration of his having harnessed the existing public momentum seeking a crackdown on drug use in America. By 1982, over 3,000 parents' groups had assembled and organized under the National

to prevent the manufacture of scheduled drugs and to further discourage drug use by adopting even more stringent penalties.[114] Congress opined "the legalization of illegal drugs, on the Federal or State level is unconscionable surrender in a war in which . . . there can be no substitute for total victory . . . it is the declared policy of the United States Government to create a drug-free America in 1995."[115] The United States would spend billions of dollars and convict thousands of drug offenders, but the notable goal was unattainable.

THE 21ST CENTURY "WAR ON DRUGS"

Each decade of the last century witnessed ever increasing government effort to eradicate addiction, thwart drug trafficking, and prevent drug-related crime. The 1990s and the move into the 21st century continued the pattern – new legislation continues, as does unprecedented spending, increased numbers of arrests and incarceration of drug offenders, and even longer prison sentences with little or no rehabilitative component. The sad reality is that after billions of dollars, millions of man-hours, and untold numbers of lives, America's punitive approach has wholly failed to eradicate drug addiction, failed to thwart trafficking and failed to prevent drug-related crime. In fact, the government's expenditures and efforts have failed even to reduce these numbers for any sustained period.

Success, however, has not been altogether elusive. Our nation's governing bodies, including the individual state governments, have realized unparalleled accomplishments regarding a variety of drug-related matters, though these hallmarks cannot truly be counted as triumphs in the war on drugs. Among those accomplishments, we have allocated and spent more money, enacted more drug-related legislation, created thousands of new drug-related crimes, and prosecuted and jailed more people, all with little in the way of corresponding victories to claim as a result. The prevalence of drug use continues, epidemics of drug abuse are spreading, the rise of incidences of drug offenses and drug-related crimes abound, and the toll of the public costs escalates. The hard truth is that the costs and consequences of America's drug policy, with its increased

---

Federation of Parents for Drug Free Youth. Gonzales, Laurence, *The War on Drugs: A Special Report*, April PLAYBOY 134 (1982).

[114] *Id.*

[115] Shulgin, *supra* note 42, at 250.

criminalization of drugs and drug-related activities, its ever-exacting retributive sanctions and the intensified enforcement efforts have simply failed.

IV. THE COSTS AND CONSEQUENCES OF AMERICA'S WAR ON DRUGS

America's national policy on drug control espouses a commitment to maintaining health, welfare and public safety, a commitment that arguably provides undergirding for all of the nation's drug legislation, regulations, rules, and ordinances. [116] The implementation of our nation's drug policy, however, is realized almost exclusively through prohibitive measures and the application of severe punishment touted as the best means of eliminating drug availability and deterring people from drug consumption through fear of punishment. The upshot is that the entirety of our national drug policy, supposedly aimed at protecting both individuals and society at large from drugs and drug-related harm, is based on the myth that these aims can be achieved through police enforcement. Almost fifty years of practice reveals a different story, but these lessons are not affecting a reduction in the allocation of resources—both capital and human—budgeted for drug control. Below is an overview of some of the costs and consequences of America's war on drugs.

INCARCERATION

The United States has the highest incarceration rate per capita of any country on the planet.[117] Our numbers dwarf those of nearly every developed country, including those of highly repressive regimes, such as Russia, China, and Iran.[118] America's war on drugs is the driving force of these astounding numbers of mass incarcerations over the last four decades, the single largest contributor to new prison

---

[116] The commitment of the United States is not unlike that adopted by the United Nations. In the preamble of the 1961 United Nations Single Convention on Narcotic Drugs, "the health and welfare of mankind" is the described impetus for the UN drug policies. UNITED NATIONS, SINGLE CONVENTION ON NARCOTIC DRUGS, 1961, 1 (1961), *available at* https://www.unodc.org/pdf/convention_1961_en.pdf.

[117] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 6 (rev. ed. 2012).

[118] *Id.*

admissions being drug law violations.[119] The mechanics of these swelling incarceration rates consist of increased numbers of convictions in relation to arrests and increases in average sentence lengths, both influenced by the nation's drug enforcement policies.[120] The Brookings Institution reported that in sixteen years, between 1993 and 2009, thirty million people were arrested on drug charges.[121] Of those arrested, more than three million received convictions with accompanying prison sentences resulting in prison admissions.[122] In fact, each year during the sixteen-year study period, more people were admitted to prison for drug law violations than for violent crimes.[123]

Considering the last 25 years, the number of federal prisoners serving time for drug-related offenses has risen by nearly 2,000%, from approximately 5,000 inmates in 1980 to over 95,000 in 2015.[124] When state prisons and local jail populations are added to the federal numbers, our nation's incarcerated swell from approximately 320,000

---

[119] DRUG POLICY ALLIANCE, THE DRUG WAR, MASS INCARCERATION AND RACE 1 (2016), http://www.drugpolicy.org/sites/default/files/DPA%20Fact%20Sheet_Drug%20War%20Mass%20Incarceration%20and%20Race_%28Feb.%202016%29.pdf. (last visited X)

[120] There are a variety of contributing causes to the explosion in incarceration rates, but regardless of the dynamics that have led to the increase, growing numbers of non-drug related offenses are not part of the equation. In fact, the number of non-drug related convictions has remained relatively constant, if not in a state of decline. The multiplier is a rise in numbers of convicted drug offenders coupled with longer sentences. Criminal justice policies, not changes in underlying crime, account for nearly all of the growth in our nation's incarcerated population in recent decades. Practices of law enforcement, prosecutors and the court systems are also contributors to the growth of America's prisons. *See, e.g.*, STEVEN RAPHAEL & MICHAEL A. STOLL, WHY ARE SO MANY AMERICANS IN PRISON? (2013). NOT CLEAR IF THIS LAST ONE IS A BOOK ETC.

[121] Jonathan Rothwell, *Drug Offenders in American Prisons: The Critical Distinction Between Stock and Flow*, Brookings Institution (2015), http://www.brookings.edu/blogs/social-mobility-memos/posts/2015/11/25-drug-offfenders-stock-flow-prisons-rothwell. (last visited X)

[122] *Id.*

[123] *Id.*

[124] *Id.*

in 1980 to over 2.2 million today.[125] Individuals incarcerated for drug offenses increased more than ten-fold during this same time period.[126]

Related to these statistics is an even more dramatic growth in the numbers of inmates not convicted of a crime and being housed in local jails. Increases in convictions and increases in bail amounts have contributed significantly to the rise in the number of individuals detained in local jails awaiting conviction. Between 1983 and 2014, the proportion of convicted inmates at the local level grew by 90 percent, but the numbers of jail inmates not convicted of a crime escalated by more than 200 percent.[127] Although data indicates that bail may be assigned more often than it was two decades ago, the bail amounts have increased pursuant to statutory amendments making it less financially feasible for defendants to secure bail. For instance, in 1990, large U.S. counties assigned bail to 53 percent of their felony defendants, and in 2009, 72 percent of these defendants were assigned bail.[128] Because of limited resources, a higher percentage of the accused have been unable to finance bail and must remain incarcerated in local jails while awaiting conviction.

Additionally, between 1980 and 2011, the average length of prison sentences for federal drug offenses rose by 36 percent.[129] This is an increase in prison time from approximately fifty-five months to seventy-four months.[130] During the same period, the average prison sentence for all other federal offenders declined.[131] Contributing to the higher numbers of incarcerated drug offenders is the disappearance of probation as a sanction for those convicted. In 1980, 26 percent of those convicted of drug violations received probation.[132] By 2014, judges

---

[125] THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS (2016), http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf. (last visited X)

[126] *Id.*

[127] Bureau of Justice Statistics. 1990-2009. Felony Defendants in Large Counties, Department of Justice. – How can you find this? Not clear from cite.

[128] *Id.*

[129] THE PEW CHARITABLE TRUSTS, FEDERAL DRUG SENTENCING LAWS BRING HIGH COST, LOW RETURN (2015), http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return. (last visited X)

[130] *Id.*

[131] *Id.*

[132] *Id.*

were sending nearly all those convicted of drug offenses to prison, reducing the numbers receiving probation to only 6 percent.[133]

Vast numbers of drug convictions, longer sentences for those convicted, and greater numbers of accused being housed in local jails combine to effect ballooning incarceration costs. In the federal system alone, one out of every four dollars spent by the U.S. Department of Justice, more than $6.7 billion per year, is expended on housing federal convicts.[134] Maintaining state prisons and jails demands an additional $80 billion, an 89 percent increase since 1988.[135] When considering the economic costs of America's "war on drugs," costs associated with incarcerating those convicted occupy a single line item among the legal institutional costs in the pursuit of a drug-free nation.

DRUG USE

According to 2014 National Survey on Drug Use and Health, an estimated 27 million Americans aged twelve or older were current illicit drug users, indicating that they had used an illegal drug during the month prior to the interview.[136] This means that approximately one out of every ten Americans in 2014 was a current illegal drug user. These numbers are higher than those in every year since 2002.[137] The National Institute on Drug Abuse reports that cocaine use among

---

[133] *Id.*

[134] THE PEW CHARITABLE TRUSTS, FEDERAL PRISON SYSTEM SHOWS DRAMATIC LONG-TERM GROWTH (2015), http://www.pewtrusts.org/-/media/Assets/2015/02/Pew_FederalPrison_Growth.pdf. (last visited X)

[135] U.S. DEPARTMENT OF EDUCATION, STATE AND LOCAL EXPENDITURES ON CORRECTIONS AND EDUCATION (2016), https://www2.ed.gov/rschstat/eval/other/expenditures-corrections-education/brief.pdf. (last visited X)

[136] SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, BEHAVIORAL HEALTH TRENDS IN THE UNITED STATES: RESULTS FROM THE 2014 NATIONAL SURVEY ON DRUG USE AND HEALTH 4 (2015), https://www.samhsa.gov/data/sites/default/files/NSDUH-FRR1-2014/NSDUH-FRR1-2014.pdf. (last visited X) The National Survey on Drug Use and Health is in annual survey civilian, nine institutionalized population of the United States aged 12 years old or older. It includes residents of households and individuals in non-institutional groups, but excludes homeless, active military personnel, and residents of jails, prisons, nursing homes, mental institutions, and long-term hospitals.

[137] *Id.* at 5.

college-aged adults has risen sharply,[138] and according to the World Drug Report, heroin use in the United States is up 145 percent.[139] Trafficking numbers in the United Nations' report are based in part on drug seizures. The research reports that heroin and morphine seizures grew from an average of four tons per year from 1998 to 2008, to an average of seven tons per year between 2009 and 2014.[140]

OVERDOSE DEATHS

For the last fifteen years, deaths related to drug overdose have been on a steep rise,[141] nearly tripling between 1999 and 2014.[142] After recording alarming increases in drug overdoses, the Centers for Disease Control (CDC) undertook an examination of overdose deaths in the United States occurring between 2010 and 2015.[143] The drug overdose death rate in 2010 was 38,329, representing 12.3 deaths per 100,000 people.[144] Five years later, overdose death rates increased to 52,404, or 16.3 deaths per 100,000 people, a 37 percent increase.[145] From 2014 to 2015, deaths resulting from drug overdose increased by 5,349

---

[138] National Institute on Drug Abuse, *Drug and Alcohol Use in College-Age Adults,* 2015 MONITORING THE FUTURE (2016), https://www.drugabuse.gov/related-topics/trends-statistics/infographics/drug-alcohol-use-in-college-age-adults-in-2015. (last visited X)

[139] UNITED NATIONS, WORLD DRUG REPORT 4 (2016), *available at* http://www.unodc.org/doc/wdr2016/WORLD_DRUG_REPORT_2016_web.pdf.

[140] *Id.* at xiii.

[141] Press Release, Opioids Drive Continued Increase in Drug Overdose Deaths, Centers for Disease Control (February 20, 2013), https://www.cdc.gov/media/releases/2013/p0220_drug_overdose_deaths.html. (last visited X)

[142] Rose A. Rudd, Puja Seth, Felicita David, & Lawrence Scholl, *Increases in Drug and Opioid-Involved Overdose Deaths – United States, 2010-2015,* Centers for Disease Control, 65 MORBIDITY AND MORTALITY WEEKLY REPORT 1445, 1446 (2016), *available at* https://www.cdc.gov/mmwr/volumes/65/wr/mm655051e1.htm.

[143] *Id*. The CDC report includes drug overdose deaths recorded by the National Vital Statistics System multiple cause-of-death mortality files..*; see also,* http://www.cdc.gov/nchs/nvss/mortality_public_use_data.htm. (last visited X)

[144] CDC , *supra* note 140.

[145] *Id.* at 1446.

persons or 11.4 percent, continuing the rising trend that began in 1999.[146]

CDC researchers suggest that heroin and synthetic opioids (other than methadone) are responsible for the rapid increase in overdose deaths.[147] They report a frightening increase from 2014 to 2015 in the number of deaths caused from overdoses of synthetic opioids (including fentanyl), a staggering 72 percent surge in the death rate in a single year.[148] Heroin overdoses leading to death increased by nearly 21 percent for the same time period.[149] Combining the deaths as a result of overdoses of synthetic opioids and heroin, researchers found increases across all demographic groups, all regions and in twenty-eight states. At least one study reports that illicitly manufactured fentanyl is responsible for some portion of these increased deaths.[150]

The increases are consequences, as unintended as they may be, of failing drug policies and enforcement approaches focused on punishing offenders. The CDC warns of an

> urgent need for a multifaceted, collaborative public health and law enforcement approach to the opioid epidemic, including implementing the CDC Guideline for Prescribing Opioids for Chronic Pain; improving access to and use of prescription drug monitoring programs; expanding naloxone distribution; enhancing opioid use disorder treatment capacity and linkage into treatment, including medication-assisted treatment; implement and harm reduction approaches, such as during services program; and supporting law enforcement strategies to reduce the illicit opioid supply.[151]

---

[146] Rose A. Rudd, Noah Aleshire, Jon E. Zibbell, & R. Matthew Gladden, *Increases in Drug and Opioid Overdose Deaths – United States*, 200-2014, Centers for Disease Control, 64 MORBIDITY AND MORTALITY WEEKLY REPORT 1378 (2016), *available at* https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6450a3.htm.

[147] CDC, *supra* note 141.

[148] *Id.*

[149] *Id.*

[150] R. Matthew Gladden, P Martinez, P Seth, *Fentanyl Law Enforcement Submission and Increases in Synthetic Opioid-involved Overdose Deaths – 27 States, 2013-2014*, Centers for Disease Control, 65 MORBIDITY AND MORTALITY WEEKLY REPORT 837 (2016), available at http://dxdoi.org/10.15585/mmwr.mm6533a2.

[151] CDC, *supra* note 141.

CONSTITUTIONAL COSTS

The War on Drugs raises constitutional alarms dating back to the passage of the Harrison Act. Since adoption of our nation's drug control strategies, much of the enforcement of the drug policies and the effort to eradicate drug use have come with substantial costs extending far beyond monetary expenditures. There are real questions concerning the constitutionality of many of the drug control efforts and the high cost exerted on the Bill of Rights. Legal evolutions of mandatory minimum sentences, drug courts, drug testing in schools, and no-knock warrants arguably in violation of the eighth, sixth, fifth and fourth amendments, respectively, are taking their toll, shrinking civil rights and civil liberties, and threatening the freedoms associated with American democracy.

> Because the drug industry arises from the voluntary transactions of tens of millions of people—all of whom try to keep their actions secret—the aggressive law enforcement schemes that constitute the war must aim at penetrating the private lives of those millions. And because nearly anyone may be a drug user or seller of drugs or an aider and abettor of the drug industry, virtually everyone has become a suspect. All must be observed, checked screened, tested, and admonished – the guilty and innocent alike.[152]

As Professor Wisotsky points out, there is tragic irony in the fact that "while the War on Drugs has failed completely to halt the influx of cocaine and heroin, both of which are cheaper, purer, and more abundant than ever," [153] America's drug strategy and crackdown efforts have systematically curtailed the liberty and privacy of Americans. The law related to search and seizure provides just one example of how our civil rights and civil liberties have become yet another consequence of America's war on drugs.

---

[152] STEVEN WISOTSKY, CATO INSTITUTE POLICY ANALYSIS NO. 180: A SOCIETY OF SUSPECTS: THE WAR ON DRUGS AND CIVIL LIBERTIES (1992), https://www.cato.org/publications/policy-analysis/society-suspects-war-drugs-civil-liberties. (last visited X)

[153] *Id.*

SEARCHES AND SEIZURES

Most recently, the U.S. Supreme Court eroded the exclusionary rule in historic proportions, all but erasing it, upholding the admissibility of evidence seized during an admittedly unlawful stop by police.[154] The Court's holding is simply the latest in a long list of decisions evidencing a slide toward the "anything-goes-in-the-War-on-Drugs attitude."[155] During the Reagan years, the Court usually upheld the government's exercise of power when the power was exercised in the fight against drugs, notwithstanding constitutional challenges, but the trend in judicial decisions was not limited to the Reagan administration and has continued long after President Reagan left office. We see this trend as the Court failed to find objectionable drug agents' use of a drug courier profile to stop, detain, and question people without a warrant and without probable cause;[156] to subject a traveler's luggage to a sniffing examination by a drug-detection canine without a warrant and without probable cause;[157] to search a public school student's purse without a warrant and without probable cause;[158] and to search ships in inland waterways at will.[159]

Homes, too, began to fall to the government's power as the drug war escalated. The right to privacy Americans enjoyed in their residences experienced serious restriction. The Supreme Court approved the use of search warrants for residences obtained on the basis of an anonymous tip alone.[160] It also upheld the use of illegally seized evidence under a "good faith exception" to the exclusionary

---

[154] *See,* Utah v. Strieff, 136 S. Ct. 2056 (2016). In addition to protection from unlawful search and seizure, the exclusionary rule is also designed to provide a remedy, short of criminal prosecution, in response to prosecutors and police who illegally gather evidence in violation of the Bill of Rights.

[155] *See,* Wisotsky, *supra* note 151.

[156] Florida v. Royer, 460 U.S. 491, 498 (1983); *see also,* United States v. Montoya, 473 U.S. 531 (1985); and Florida v. Rodriguez, 469 U.S. 1, 5 (1984).

[157] United States v. Place, 462 U.S. 606, 706 (1983).

[158] New Jersey v. T.L.O., 469 U.S. 325, 333 (1985).

[159] United States v. Villamonte-Marquez, 462 US. 579, 593 (1983).

[160] Illinois v. Gates, 462 U.S. 213 (1983).

rule;[161] the right of law enforcement to make a warrantless search while trespassing in "open fields" that were surrounded by fencing and posted with "No Trespassing" signs;[162] the right of the police to conduct a warrantless search of a barn adjacent to a residence;[163] law enforcement's ability to conduct a warrantless search of a motor home occupied as a residence;[164] the power to conduct a warrantless search of a home on the consent of an occasional visitor lacking legal authority over the premises;[165] and the ability of law enforcement to conduct a "knock-and-announce" procedure allowing less than five seconds before entry.[166] Relatedly, the Court approved the warrantless aerial surveillance over private property.[167]

The Court also significantly expanded the powers of police to stop, question, and detain drivers of vehicles on suspicion with less than probable cause,[168] or with no suspicion at all at fixed checkpoints or roadblocks;[169] to conduct warrantless searches of automobiles and closed containers situated within the vehicles;[170] and to conduct surveillance of suspects by placing transmitters or beepers on vehicles or in containers therein.[171] In another erosive decision, the Court reversed the Florida Supreme Court in upholding the constitutionality of the interrogation of a Greyhound bus passenger and the search of his baggage by armed officers within the confines of the bus.[172]

---

[161] United States v. Leon, 468 U.S. 897, 905 (1984). The Court applied the rule to the search of a home made pursuant to a defective warrant issued without probable cause. *Id. See also,* Massachusetts v. Sheppard*,* 468 U.S. 981 (1984).
[162] Oliver v. United States, 466 U.S. 170 (1984).
[163] United States v. Dunn, 480 U.S. 294 (1987).
[164] California v. Carney, 471 U.S. 386, 390 (1985).
[165] Illinois v. Rodriguez, 497 U.S. 177 (1990).
[166] Hudson v. Michigan, 547 U.S. 586 (2006).

[167] California v. Ciraolo, 476 U.S. 207 (1986); *see also,* Florida v. Riley, 488 U.S. 445 (1989) (allowing aerial surveillance by fixed-wing aircraft at an altitude of 1,000 feet and by helicopter at 400 feet).
[168] United States v. Sharpe, 470 U.S. 675 (1985).
[169] Texas v. Brown, 460 U.S. 730 (1983); *Michigan v. Sitz*, 496 U.S. 444 (1990).
[170] California v. Acevedo, 500 U.S. 565 (1991).
[171] United States v. Knotts, 460 U.S. 276, 284 (1983); United States v. Karo, 468 U.S. 705, 721 (1984).
[172] Florida v. Bostick, 501 U.S. 429 (1991).

UNINTENDED CONSEQUENCES

Mass incarceration and hyper-criminalization are a catalyst for poverty in America. Convicted felons are substantially more likely to face challenging circumstances attempting to re-integrate into society following their release from incarceration. The history of imprisonment and their accompanying criminal record impedes success in the labor market – employment limitations and depressed wages severely restrict a convicted individual's abilities to attain self-sufficiency. A person's criminal conviction negatively impacts him far beyond imprisonment and its associated loss of freedoms. Criminal sanctions affect the felon's health, debt situation, transportation options, housing opportunities, nutrition and security.[173] They also produce adverse consequences for children and contribute to financial and emotional stresses that undermine marriages and familial relationships.[174] At the community level, criminal sanctions promote inequality and often deteriorate citizens' trust in the government.

Convictions create criminal records that can present significant barriers to employment, housing, public assistance, education, family reunification, developing good credit and more.[175] Even a minor criminal record, such as a misdemeanor or arrest without conviction, constructs potential barriers that can prevent an individual's successful acclamation in society.[176]

---

[173] *See,* Economic Perspectives on Incarceration and the Criminal Justice System 45 (2016). – How can you find this? Seems to need a little more in the cite.

[174] *Id.*

[175] The Sentencing Project, *Americans with Criminal Records*, HALF IN TEN 1 http://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf. (last visited X) In one experiment, researchers randomly assigned a criminal record to otherwise identical job applicants finding that those with criminal records were 50 percent less likely to receive an invitation to interview or job offer; percentages for blacks was even higher. Devah Pager, Bruce Western, & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 THE ANNALS OF THE ACAD. OF POLITICAL AND SOC. SCIENCE 195-213 (2009); Devah Pager, *The Mark of a Criminal Record*, 108 AMERICAN J. OF SOCIOLOGY 937-975 (2003).

[176] *Id.* An examination of individual earnings before and after arrest suggests that even arrests without conviction can decrease earning and employment.

As of July 1, 2015, more than seventy million Americans, roughly a third of the nation's adult population, possessed some type of criminal record.[177] By way of comparison, this number is greater than the entire U.S. population in 1900; approximately equal to the number of Americans holding college diplomas; and if criminal record holders were a separate nation, they would comprise the eighteenth largest country on Earth (larger than France and Canada and three times larger than Australia).[178]

To further exacerbate the issues for criminal record holders, recent surveys indicate that more than 70 percent of American employers conduct criminal background checks as a prerequisite for employment.[179] The costs of possessing a criminal record include severely limited employment options. Additionally, individuals with criminal records are often barred from obtaining occupational licenses that would assist them not only with employment opportunities, but also enhance their prospects for improving their socio-economic status. The American Bar Association estimates that there are over 1,000 mandatory license exclusions for individuals with minor records, which may include misdemeanor convictions or arrests without conviction, and nearly 3,000 exclusions for those with felony records.[180]

The incarcerated population is comprised largely of individuals who, even pre-conviction, are disproportionately poor and experience lower education levels.[181] As few as 10 percent of these individuals

---

Jeffrey Grogge, *The Effect of Arrests on the Employment and Earnings of Young Men*, 110 THE QUARTERLY J. OF ECONOMICS 51-71 (1995).

[177] Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, Breannan Center for Justice (2015), https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas. (last visited X)

[178] *Id.*

[179] Harry J. Holzer, Steven Raphael, & Michael A. Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J. OF LAW AND ECONOMICS 451, 452 (2006).

[180] American Bar Association, *National Inventory of Collateral Consequences of Conviction*, http://www.abacollateralconsequences.org/search/. (last visited X)

[181] *See*, Jeffrey R. Kling, *Incarceration Length, Employment, and Earnings* 494 (Princeton Univ. – Industrial Relations Section, Working Paper, 2006) – How can we find this as a working paper? Just checking the cite.; *see also*, Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, Bureau of Justice Statistics Report (2006); and William J. Sabol, *Local Labor market Conditions and Post-prison Employment: Evidence from Ohio* (Bureau of Justice, Working Paper 2007).

have positive pre-incarceration earnings.[182] The period of incarceration further reduces any earnings and places additional strains on families already experiencing a shortage of resources. One study indicates the incarceration of a father increases by 38 percent the probability that a family's economic status will decline to or remain at poverty level.[183]

Incarceration impacts health, posing health risks during imprisonment and increasing the likelihood of health risks post-confinement. Prisons at maximum capacity or, worse, at greater than maximum capacity, amplify the risks of the incarcerated magnifying the possibility of inmate injury, sexual victimization, disease transmission, and even death. Overcrowded prisons forced to reduce their inmate population witnessed a reduction of six inmate deaths per year.[184] Additionally, incidents of sexual assault are higher among the incarcerated than the general population.[185]

Criminal convictions also impact housing, not only for an individual, but potentially for his family as well. The U.S. Department of Housing and Urban Development (HUD) does not unilaterally bar individuals with criminal records from residing in public housing, but it does allow each local Public Housing Authority (PHA) the latitude to establish its own practice concerning criminal record policies. More often than not the restrictions of the PHAs are greater than the federal departmental guidelines, preventing individuals with a criminal history from qualifying for housing. Even low-level, nonviolent offenders, like those convicted of alcohol and drug-related crimes, are

---

[182] *Id.*

[183] Rucker Johnson, *Ever-increasing Levels of Parental Incarceration and the Consequences for Children*, DO PRISONS MAKE US SAFER?: THE BENEFITS AND COSTS OF THE PRISON BOOM 177-206 (Steven Rafael & Michael A. Stoll eds., 2009).

[184] Richard T. Boylan & Naci Mocan, *Intended and Unintended Consequences of Prison Reform*, 30 J. OF LAW AND ECONOMICS 558-586 (2013).

[185] Reports chronicle 3.7 percent of incarcerated men experience sexual abuse, as compared to 8.5 percent of incarcerated women. Allen J. Beck, Marcus Berzofsky, Rachel Caspar, & Christopher Krebs, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12*, Bureau of Justice Statistics, U.S. Department of Justice (2013). Where can we find this document? Seems the cite needs a little more information.

included in the PHAs prohibitions, making them ineligible for public housing assistance.[186]

There are other government assistance programs moved beyond the reach of individuals convicted of crimes. Federal safety net programs, such as Supplemental Nutrition Assistance Program (SNAP) and Temporary Assistance for Needy Families (TANF) have restricted access to those with criminal records. Many states have overridden federal restrictions to provide access to convicted felons, unless an individual received a felony drug conviction.[187] Thirty states deny SNAP benefits to convicted drug felons and thirty-six states deny them access to TANF.[188]

Beyond the ramifications related to housing and federal assistance programs, parental incarceration negatively impacts children. More than five million children have at least one parent who is currently or has been imprisoned.[189] The demographics of incarcerated parents indicate that 1 percent of white children have an incarcerated parent, 7 to 9 percent of black children, and 2 percent of Hispanic children.[190] Further, individuals convicted of non-violent drug offenses are 20 percent more likely to be parents than those persons serving time for violent or property crimes.[191]

For the children, parental incarceration becomes a prominent risk factor for a number of adverse outcomes that include antisocial and violent behavior, mental health problems, school dropout, and unemployment.[192] Boys as young as five years old who had one or

---

[186] Marah A. Curtis, Sarah Garlington, & Lisa S. Schottenfeld, *Alcohol, Drug, and Criminal History Restrictions in Public Housing*, 15 CITYSCAPE: A J. OF POL. DEV. AND RES. 37-52 (2013).

[187] Rebecca Beitch, *States Rethink Restrictions on Food Stamps, Welfare for Drug Felons*, The Pew Charitable Trusts (2015), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/07/30/states-rethink-restrictions-on-food-stamps-welfare-for-drug-felons. (last visited X)

[188] *Id.*

[189] David Murphrey & P. Mae Cooper, *Parents Behind Bars: What Happens to Their Children?*, CHILD TRENDS (2015).

[190] Lauren E. Glaze & Laura M. Maruschak, *Parents in Prison and Their Minor Children*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, U. S. Department of Justice (2010), https://www.bjs.gov/content/pub/pdf/pptmc.pdf. (last visited X)

[191] *Id.*

[192] Joseph Murray and David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 CRIME AND JUSTICE 133, 133-206 (2008). The

more parents in prison exhibited higher levels of physical aggression.[193] Equally disconcerting is a Swedish study reporting children of incarcerated fathers are more likely to be convicted of a crime and subsequently incarcerated, continuing perpetual incarceration throughout generations.[194]

V. CONCLUSION

It is all but impossible to portray a true picture of the costs and consequences of America's war on drugs without a complete assessment, and no complete study of the subject has yet to be undertaken. Certainly, aspects of the costs have been covered over time, but a comprehensive undertaking of the easily quantifiable costs alongside the more subjective consequences warrants attention. Nevertheless, despite the lack of an accurate accounting of the full costs and consequences, there is little doubt that the government attention, human capital, fiscal outlay, constitutional erosions, and hosts of unintended consequences suffered by those convicted and their families present a bill too large for Americans to pay. The unquestionable lack of any measurable success demands significant and expedient reform, and the longer reform is delayed, the greater the costs that will be extracted.

National Task Force on Children Exposed to Violence found parental arrest and incarceration were among the traumatic events that increase the risk of post-traumatic stress disorder in children. ROBERT L. LISTENBEE, REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE, U.S. Department of Justice (2012), *available at* https://www.justice.gov/defendingchildhood/cev-rpt-full.pdf.

[193] Christopher Wildeman, *Parental Incarceration and Children's Physically Aggressive Behaviors: Evidence from the Fragile Families and Child Wellbeing Study*, 89 SOCIAL FORCES 285, 285-309 (2010).

[194] Randi Hjalmarsson & Matthew J. Lindquist, *Like Godfather, Like Son: Exploring the Intergenerational Nature of Crime*, 47 J. OF HUMAN RESOURCES 550, 550-582 (2012).