

November 2012

TJLP (2012) Volume 8 Issue 1

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November 2012

TGLP (2012) Volume 8 Issue 1

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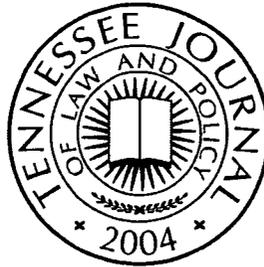
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ISSN 1940-4131

<http://www.law.utk.edu/publications/tjlp.sht>

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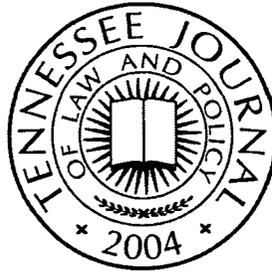
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ARTICLE

CLINICAL USE OF PLACEBOS: MEDICINE, NEUROSCIENCE, ETHICS AND THE LAW

Steven B. Perlmutter, M.D., J.D.¹

"Be enthusiastic. Remember the placebo effect:
30% of medicine is showbiz." ~ Ronald Spark

My patient, a twenty-eight year old woman, presented with a three-week history of constant twitching of her left lower eyelid. She found it distracting and annoying, albeit it did not impair her vision. She had no other ocular symptomatology. Past ocular and medical histories were unremarkable, and she took no medications. She was preoccupied with a toxic divorce, which was traumatizing her eight-year-old son. She noted difficulty falling and staying asleep. Six weeks prior, her internist pronounced her a healthy but stressed woman. My examination revealed left lower orbicularis myokymia, i.e., spontaneous, involuntary twitching of the left lower eyelid. Her ocular examination was otherwise unremarkable, with no signs of foreign body, allergy, or dryness.

Myokymia is usually caused by anxiety and insomnia. I offered her a choice of two highly successful but fundamentally different treatments. Treatment #1 relies on the alternate use of hot packs and ice packs in succession for five minutes, four times a day, along with artificial tears. She was instructed to perform this regimen for one week then report the results directly to me. I

¹Clinical Assistant Professor, Division of Clinical Education, Arizona College of Osteopathic Medicine. Dr. Perlmutter is also an eye surgeon, physician and 2011 graduate of the Arizona State University Sandra Day O'Connor College of Law.

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assured her that over ninety percent of my patients had success with this intervention; however, I did not know how or why it works. I hypothesized that the temperature differential shocks the muscle and restores normal tone. Treatment #2 relies on the pharmaceutical, botulinum toxin (Botox). Ten micrograms of Botox injected into the lower eyelid will paralyze the twitching muscle within forty-eight hours. The effect lasts three to four months. Potential complications include superficial hemorrhage and a sagging eyelid.

Patients invariably ask what I suggest, often framing the question, "What would you recommend if I were your daughter/mother/father/brother?" In my view, the choice was clear. I suggested trying treatment #1 and holding #2 in reserve. Treatment #1 was cheap, easy, and free from side effects. Treatment #2 had a higher success rate (98%) but was expensive (\$300) and riskier. Treatment #1 has been the unanimous selection for over two decades. Treatment #1 is a placebo. There is no scientific basis for its efficacy. In fact, the "shocks the muscle" theory is ipse dixit. Is this good medicine? Did I do the right thing for my patient? Should I have injected Botox into her eyelid and given her "real" medicine? This paper will discuss those considerations.

I. Introduction

When I am sick, I go to my doctor. She takes a history, does a physical examination, and tells me what is wrong. I expect that she will tell me what medicine to take, what exercises to do, what to eat or what surgery is needed. I want an answer and a solution. My thinking can be summed up in just one phrase, "Fix it!" But what if there is no medicine, no treatment, nothing to do about the condition? What then? I still want some remedy that will help me. My doctor wants me to be satisfied with her care and to feel better. Perhaps she will recommend a pill or an

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exercise with no inherent therapeutic value—a placebo—instead of sending me on my way, empty-handed. Is it a good idea? Would other doctors do the same thing?

This paper scrutinizes the use of placebos in clinical medicine from four different perspectives. Section I introduces the subject. Section II defines the essential terms and considers the power of the placebo effect in medical practice. Section III evaluates the clinical treatment of patients with placebos from the physician's perspective. The neuroscience of the placebo effect is explicated in Section IV. Section V contemplates the ethical implications of placebo treatment. Jurisprudential concerns are the subject of Section VI. Section VII discusses inappropriate and appropriate clinical use of placebos. Section VIII contains my conclusion.

II. Definitions and Initial Considerations

Placebo is Latin for, "I shall please."² In order to discuss placebos or the placebo effect, it is necessary to define the terms. The most famous description of a placebo was written by J.H. Gaddum.

Such tablets are sometimes called placebos, but it is better to call them dummies. According to the Shorter Oxford Dictionary the word placebo has been used since 1811 to mean a medicine given more to please than to benefit the patient. Dummy tablets are not particularly noted for the pleasure which they give to their recipients. One meaning of the word dummy is "a counterfeit object." This seems to me the right word to describe a form of treatment

² Sissela Bok, *The Ethics of Giving Placebos*, SCI. AM., Nov. 1974, at 17.

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which is intended to have no effect and I follow those who use it. A placebo is something which is intended to act through a psychological mechanism. It is an aid to therapeutic suggestion, but the effect which it produces may be either psychological or physical. It may make the patient feel better without any obvious justification, or it may produce actual changes in such things as the gastric secretion. . . . Dummy tablets may, of course, act as placebos, but, if they do, they lose some of their value as dummy tablets. They have two real functions, one of which is to distinguish pharmacological effects from the effects of suggestion and the other is to obtain an unbiased assessment of the result of the experiment.³

A placebo is defined as a substance with no known specific pharmacological activity for the condition being treated.⁴ Broadly speaking, any therapeutic procedure lacking potency to treat the disorder in question is a placebo.⁵ A placebic intervention is a diagnostic or therapeutic pretense—an intervention using substances or physical methods having no direct pharmacological, biochemical, or physical mechanism of action. Therefore, the term includes not only the administration of sugar tablets or isotonic

³ J. H. Gaddum, *Walter Ernest Dixon Memorial Lecture: Clinical Pharmacology*, 47 PROC. ROYAL SOC'Y MED. 195, 197 (1953).

⁴ Howard Brody, *Placebo*, in ENCYC. OF BIOETHICS 1951-52 (W.T. Reich, ed., 1995).

⁵ Arthur K. Shapiro, *The Placebo Effect in the History of Medical Treatment: Implications for Psychiatry*, 116 AM. J. PSYCHIATRY 298, 289-99 (1959).

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saline solution, as is commonly thought, but also a wide variety of non-drug interventions.⁶

Placebos are further subdivided into three types. The first type, "pure" placebo, is an inert substance without known pharmacological effect, such as a sugar pill, isotonic saline solution or colored water. "Impure" placebos, the second type, are substances or methods that have known pharmacological or physical activity but have no direct therapeutic effect on the disease extant.⁷ In other words, an impure placebo is a real drug, i.e., an ethical pharmaceutical with a physiological effect, used to treat a disorder for which it is known to be ineffective. Any prescription medication may be used as an impure placebo. Common examples include antibiotics, thyroid hormone, or megavitamins prescribed when there is no bacterial infection, hypothyroidism, or vitamin deficiency. Alternatively, pharmacologically active substances may be prescribed in doses so miniscule that they have no significant therapeutic value. Highly diluted medications used in homeopathy or naturopathy arguably constitute impure placebos. The third category is a subdivision of the pure placebo, which constitutes intervention. Classic examples include simulated surgery and hypodermic saline injections. Other modalities such as acupuncture, behavior modification and biofeedback are probably placebic as well.⁸

The use of placebos relies on the placebo effect or placebo response. Placebos can be therapeutically beneficial to some patients when they give rise to the

⁶ Margrit Fässler, Markus Gnädinger, Thomas Rosemann & Nikola Biller-Andorno, *Use of Placebo Interventions Among Swiss Primary Care Providers*, BMC HEALTH SERVICES RES. 3 (2009), <http://www.biomedcentral.com/content/pdf/1472-6963-9-144.pdf>.

⁷ *Id.* at 2.

⁸ Marshall B. Kapp, *Placebo Therapy and the Law: Prescribe With Care*, 8 AM. J. L. & MED. 371, 374 (1982).

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placebo effect.⁹ As explained by Howard Brody, M.D., Ph.D., “the ‘placebo effect’ refers to an intervention in which the psychological and psychosomatic benefits cannot be fully explained by the strictly biochemical aspects of the therapy. While pharmacologically ‘inert,’ the placebo is not truly ‘inert’ in any useful sense; an intervention which fails to follow our preconceived mechanisms is no less of an intervention.”¹⁰ Any change in a patient’s condition attributable to symbolic aspects of the overall care in lieu of the medicinal qualities of the substance prescribed signifies the placebo effect.¹¹ The placebo effect is “assumed to occur in patients taking active drugs and therefore to account for some fraction of that drug’s total therapeutic effect.”¹²

If placebos were ineffective, there would be little interest in the subject, but they are anything but ineffective. Henry K. Beecher, M.D., performed a meta-analysis of fifteen studies involving over 1000 subjects. He determined that placebos have an average effectiveness rate of 35.2% ± 2.2%.¹³ Other studies document the placebo effect in five percent and forty-two percent of individuals.¹⁴ For example, in the prospective study of psychiatric patients, forty-five percent of the placebo administrations were rated as successful.¹⁵

⁹ Brody, *supra* note 4, at 1952.

¹⁰ Howard Brody, *On Placebos*, 5 HASTINGS CTR. REP. 17, 18 (1975).

¹¹ Howard Brody, *The Placebo Response: Recent Research and Implications for Family Medicine*, 49 J. FAM. PRAC. 649, 650 (2000).

¹² Arthur J. Barsky, Ralph Saintfort, Malcolm P. Rogers & Jonathan F. Borus, *Nonspecific Medication Side Effects and the Nocebo Phenomenon*, 287 JAMA 622, 623 (2002).

¹³ Henry K. Beecher, *The Powerful Placebo*, 159 JAMA 1602, 1604-05 (1955).

¹⁴ Margrit Fässler, Karin Meissner, Antonius Schneider & Klaus Linde, *Frequency and Circumstances of Placebo Use in Clinical Practice - A Systematic Review of Empirical Studies*, BMC MED. 5 (2010), www.biomedcentral.com/content/pdf/1741-7015-8-15.pdf.

¹⁵ *Id.*

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Conversely, not all physicians are convinced about the power of the placebo. Asbjorn Hrobjartsson systematically reviewed 114 clinical trials in which 8,525 patients with various clinical conditions were randomized to placebo or to no active treatment.¹⁶ Both groups actually received a placebo but only one group was informed it was a placebo; the other group was led to believe active medication was being dispensed. Consequently, both the placebo group and the “no treatment” group received exactly the same treatment. The placebos used were: (1) sugar pills; (2) procedures performed with nonfunctioning equipment (e.g., transcutaneous electrical nerve stimulation with the device unplugged); and (3) pseudo-psychotherapy (nondirectional, neutral discussion between patient and treatment provider). No treatment entailed observation only or standard therapy only; when standard therapy was employed, the placebo was additional.

Forty different clinical conditions were investigated including, *inter alia*, pain, high blood pressure, high cholesterol, smoking, depression and obesity. Only trials involving analgesia showed a statistically significant difference in effect between the placebo and the “no treatment” groups. Slight but insignificant placebo effects were observed for obesity, hypertension, and insomnia. No effects were evident for all the remaining conditions. The authors concluded that the “use of placebo outside the aegis of a controlled, properly designed clinical trial cannot be recommended.”¹⁷

¹⁶ Asbjørn Hróbjartsson & Peter C. Gøtzsche, *Is the Placebo Powerless? An Analysis of Clinical Trials Comparing Placebo with No Treatment*, 344 NEW ENG. J. MED. 1594, 1594 (2001).

¹⁷ *Id.* at 1599 (The forty conditions investigated were hypertension, asthma, anemia, hyperglycemia, hypercholesterolemia, seasickness, Raynaud’s disease, alcohol abuse, smoking, obesity, poor oral hygiene, herpes simplex infection, bacterial infection, common cold, pain, nausea, ileus, infertility, cervical dilatation, labor, menopause, prostatism, depression, schizophrenia, insomnia, anxiety, phobia,

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The degree of placebo effect often depends on the nature of the intervention, i.e., some treatment modalities are more efficacious than others. In general, injections are more potent than oral medication, capsules work better than tablets, brightly colored remedies are more efficacious than muted colors, and two pills work better than one.¹⁸

III. Placebos in Clinical Medicine

For practicing physicians, there are clear advantages and disadvantages to the clinical use of placebos. Each practitioner must weigh the benefits and risks in any given circumstance and decide whether placebo use is indicated. This section will consider the pros and cons of placebo use as well as its impact on health care.

A. Pros

Placebos are arguably an ideal treatment. Numerous studies demonstrate the efficacy of the little “sugar pill.” These inert substances or simulated treatments fundamentally lack organic side effects.¹⁹ Placebos are considerably less dangerous than genuine drugs because they confer no direct toxicity.²⁰ There is no physical risk; thus, the dominant consideration is efficacy.

In general, doctors are acutely aware of the vicissitudes of medicine and the challenge of giving meaningful, comprehensible and correct answers to

compulsive nail biting, mental handicap, marital discord, stress related to dental treatment, orgasmic difficulties, fecal soiling, enuresis, epilepsy, Parkinson’s disease, Alzheimer’s disease, attention-deficit-hyperactivity disorder, carpal syndrome, and undiagnosed ailments).

¹⁸ DAN J. TENNENHOUSE, 3 ATTORNEY’S MEDICAL DESKBOOK § 38.2.40 (4th ed. 2006 & Supp. 2010).

¹⁹ Brody, *supra* note 10, at 18.

²⁰ Paul Enck, Fabrizio Benedetti & Manfred Schedlowski, *New Insights into the Placebo and Nocebo Responses*, 59 NEURON 195, 202 (2008).

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patients. There are diseases that are untreatable but patients insist on some instrumentality. If nothing is offered, patients depart feeling dissatisfied, neglected, and shortchanged. If they feel worse at the conclusion of the visit than at its inception, the encounter has been a disaster and the doctor-patient relationship is in peril. The placebo effect can confer a therapeutic advantage even when there is no effective treatment. When the disease is incurable and the situation is hopeless, the placebo offers a “treatment” option. When their physical or psychological needs remain unattended, there is a danger that patients will go doctor-shopping and receive inappropriate or overly aggressive medical care from a less skilled or more self-serving healthcare provider. Perhaps the patient will resort to dangerous Google self-treatment.

Patients often present with vague, non-specific complaints that are not pathognomonic for any particular illness. Underlying psychological or situational difficulties are frequently the genesis of these symptoms. Rather than resort to speculative polypharmacy, a placebo may be both less toxic and more effective. If the problem disappears with the placebo, it was most likely psychogenic. Side effects and drug habituation are avoided.

A study of Swiss healthcare providers revealed the most common indications or reasons for placebo use:

1. pain
2. insomnia
3. anxiety
4. risk of substance abuse
5. difficult or demanding patients
6. patient request
7. to invoke the placebo effect
8. to avoid conflict with patients
9. as a supplement to standard treatment
10. for non-specific symptoms

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11. to avoid informing patients that treatment possibilities were exhausted.²¹

B. Cons

When placebo use displaces comprehensive medical evaluation and treatment, the placebo effect may mask symptoms and delay the indicated treatment of the medical condition.²² One of the most egregious examples of placebo use in lieu of well-established treatment occurred in rural Alabama between the years 1932 and 1972.²³ During the period, African-American men were screened for “bad blood” and then lured into a government sponsored “treatment” program. In reality, the United States Public Health Service screened these men for tertiary syphilis. Rather than receiving penicillin, 399 infected men were treated with placebos. They were neither informed about their syphilitic infection nor given information regarding its treatment or prevention. The purpose of the study, inconceivable in this day and age, was to study the long-term effects of an untreated disease.²⁴ Catastrophes like this remind us of other dark periods in human history when people were abused or tortured based solely on their race or religion. Unfortunately, the use of placebos is sometimes viewed through this lens.

The antithesis of the placebo effect is the “nocebo phenomenon.”²⁵ While placebos produce beneficial results, like genuine therapeutic agents, they can have associated toxic, or nocebo, effects. Beecher observed thirty-five

²¹ Fässler, *supra* note 6, at 5.

²² Paul Hébert, Barry Hoffmaster, Kathleen Glass & Peter Singer, *Bioethics For Clinicians: Truth Telling*, 156 CAN. MED. ASS’N J. 225, 226 (1997).

²³ Amy L. Fairchild & Ronald Bayer, *Uses and Abuses of Tuskegee*, SCIENCE, May 7, 1999, at 919.

²⁴ *Id.*

²⁵ Barsky, *supra* note 12, at 622.

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different toxic effects of placebos. The incidence of side effects was: dry mouth, nine percent; nausea, ten percent; sensation of heaviness, eighteen percent; headache, twenty-five percent; difficulty concentrating, fifteen percent; drowsiness, fifty percent; warm glow, eight percent; relaxation, nine percent; fatigue, eighteen percent; and sleep, ten percent.²⁶ Professor Marshall B. Kapp noted placebo-related side effects in five to ten percent of patients.²⁷ His list of observed nocebo effects was even more comprehensive: nausea, thirst, headache, dizziness, sleepiness, insomnia, fatigue, depression, numbness, vomiting, tremor, fast heart beat, hives, diarrhea, blood pressure changes, pallor, skin rashes, swelling, and unsteady gait.²⁸

Medical students were evaluated in a clinical trial using placebos to assess nocebo effects on otherwise normal subjects.²⁹ Twelve subjects were each given red and white gelatin capsules with lactose, green, and yellow gelatin capsules with lactose, or a drink of water.³⁰ The students taking the colored capsules reported the following fourteen symptoms: flushing of face, euphoria, anxiety, irritability, restlessness, inability to concentrate, thirst, tremors, sedation, headache, bradycardia, dysphoria, flatulence, and diuresis.³¹ Moreover, eight of twelve of the red/white group and ten of twelve of the green/yellow group reported side effects from the placebos.³²

Placebo treatment can be costly. Many individuals correlate effectiveness with cost. In other words, *the cheap*

²⁶ Beecher, *supra* note 13, at 1603.

²⁷ Kapp, *supra* note 8, at 375.

²⁸ *Id.*

²⁹ C.W. Gowdey, J.T. Hamilton & R.B. Philp, *A Controlled Clinical Trial Using Placebos in Normal Subjects: A Teaching Exercise*, 96 CAN. MED. ASS'N J. 1317, 1317 (1967).

³⁰ *Id.*

³¹ *Id.* at 1318.

³² *Id.* at 1319-20.

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stuff is garbage. Spurious procedures still require equipment and professional time. Taken to extremes, the cost of a fictitious surgical procedure complete with an operating room, personnel, and surgical packs would be enormous. Even when the patient pays the price, the efficacy of the placebo effect is still questionable in any given circumstance.

There are emotional risks to the long-term use of placebos. In general, the potency of the placebo effect diminishes with time, inducing something akin to tachyphylaxis. Psychological dependency may develop, requiring increasingly large doses of placebo and withdrawal symptoms when administration ceases.³³

Fässler³⁴ extensively analyzed the frequency of placebo use in clinical medicine by reviewing twenty-two studies conducted from 1973 to 2009. The percentage of physicians who reported using placebos at least once was highly variable. Between seventeen and eighty percent used pure placebos; fifty-four to fifty-seven percent used impure placebos; and forty-one to ninety-nine percent used pure and/or impure placebos. Saline injections, sugar pills or prepared placebo tablets were the most popular modalities. Impure placebos included antibiotics for viral infections as well as vitamins and analgesics for problematical indications. The results indicated that a significant proportion of physicians and nurses have used pure placebos at some point in clinical situations, but the number of frequent users was *de minimis*. Impure placebos, especially superfluous antibiotics, were more likely to be used with frequency.

Placebo use among Swiss primary care providers has been closely studied.³⁵ Seventy-six percent of the two

³³ Oldrich Vinar, *Dependence on a Placebo: A Case Report*, 115 BRIT. J. PSYCHIATRY 1189, 1190 (1969).

³⁴ Fässler, *supra* note 14, at 2.

³⁵ Fässler, *supra* note 6, at 1.

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hundred doctors polled have used bland ointments and/or bandages for contusions without any apparent skin damages. Sugar pills and saline injections were only used by ten percent. Almost two thirds of doctors have prescribed therapies, such as vitamins or antibiotics, without an approved indication or an expectation of efficacy. Regarding diagnostic exams, the sophistication of the test was inversely proportional to the frequency of its use. Eighty-nine percent of physicians admitted to performing unnecessary physical exams; sixty-nine percent ordered non-essential technical exams with no inherent risk (e.g., ultrasound, MRI); and thirty-one percent prescribed non-essential technical exams with some inherent risk (e.g., CT scans).

Americans receive a considerable amount of placebo-related care without being cognizant of it. One-third of Americans turn to alternative medicine, including massage, homeopathy, spiritual healing, and megavitamins.³⁶ Evidently, the total number of visits to non-allopathic care providers each year exceeds the number of visits to primary care physicians. While self-styled healers and their patients are convinced of the efficacy of megavitamins and herbal potions, these popular remedies derive their benefit predominantly from the placebo effect.³⁷

There is considerable evidence to suggest that homeopathy is placebo medicine. Dr. Wayne B. Jonas analyzed four independent, comprehensive reviews to evaluate whether homeopathic remedies and placebos were equivalent in double-blind, randomized studies.³⁸ All homeopathic remedies are highly diluted; a small quantity

³⁶ Walter A. Brown, *The Placebo Effect*, SCIENTIFIC AMERICAN, Jan. 1998 at 90, 95.

³⁷ *Id.*

³⁸ Wayne B. Jonas, Ted J. Kaptchuk, & Klaus Linde, *A Critical Overview of Homeopathy*, 138 ANNALS INTERNAL MED. 393, 395 (2003).

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of either a 1:10 or 1:100 solution is further diluted six to twelve times.³⁹ For the higher dilution (1:100 x 12), the probability of finding a single molecule of the “active” ingredient in a one-liter volume is sixty percent. In other words, if you drink a quart of the concoction, about one half of the time you will ingest a single molecule of the “active” ingredient. Because the doses are virtually non-existent, most authorities assume that homeopathy is safe and its elixirs will not interact with conventional drugs.⁴⁰ This is invariably true since the compounds are not pharmacologically active. Jonas’ study concluded that there is scant evidence that homeopathy is effective for any specific clinical condition.⁴¹ In other words, the homeopathic remedy itself functions as a placebo.

IV. Neuroscience

A neurologist injures her knee skiing and visits the orthopedist. The orthopedist asks, “Where does it hurt?” The neurologist smiles and says, “In my head, of course.”

Neuroscience has taken a perspicacious look into the effects of placebos on the brain, usually in the context of pain relief. A considerable amount of information has already been amassed. Tor Wager is widely recognized for studying the nexus between placebos, the experience and anticipation of pain, and functional magnetic resonance imaging (fMRI) changes.⁴² His work was further confirmed

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 397.

⁴² Tor Wager, James Rilling, Edward Smith, Alex Sokolik, Kenneth Casey, Richard Davidson, Stephen Kosslyn, Robert Rose & Jonathan Cohen, *Placebo-Induced Changes in fMRI in the Anticipation and Experience of Pain*, SCIENCE, Feb. 20, 2004, at 1162.

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by Dr. Jon-Kar Zubieta using positron emission tomography (PET scan).⁴³

Wager found that placebo manipulations decrease brain activity in regions known to be pain-sensitive, and that this decrease correlates with a reduction in subjective pain.⁴⁴ Two studies involving induced pain with electric shock or thermal stimulus demonstrated these findings. Previously identified placebo responders were randomized into two groups.⁴⁵ The placebo group was told that they were getting a pharmacologically active analgesic; the control group was told that their pill was ineffective against pain. Only the placebo group evinced a statistically significant reduction in perceived pain and a divergence in brain activity. First, placebo analgesia was correlated with decreased brain activity in pain-sensitive brain regions, including the thalamus, insula, and anterior cingulate cortex, and with increased activity in the prefrontal cortex. Second, there was an increase in prefrontal activity even before the pain stimulus was administered. The anticipation of a painful stimulus coupled with expectations of pain relief was associated with heightened activity in the dorsolateral prefrontal cortex (associated with cognitive control) and the orbitofrontal cortex (associated with allocation of control).⁴⁶

Placebo analgesia is mediated by both opioid and non-opioid pathways. Analgesia can be partly blocked by the drug, Naloxone, a competitive antagonist of the μ -opioid receptor frequently used to treat opioid overdose. The blockade confirms the importance of endogenous opioids in the placebo response. Moreover, the effect of

⁴³ Jon-Kar Zubieta, Joshua A. Bueller, Lisa R. Jackson, David J. Scott, Yanjun Xu, Robert A. Koeppe, Thomas E. Nichols & Christian S. Stohler, *Placebo Effects Mediated by Endogenous Opioid Activity on μ -Opioid Receptors*, 25 J. NEUROSCIENCE 7754, 7755, 7760 (2005).

⁴⁴ Wager et al., *supra* note 42, at 1165.

⁴⁵ *Id.* at 1162-66.

⁴⁶ *Id.* at 1163-64.

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Naloxone was greater when the subjects had strong expectations regarding the pain relieving effects of the placebo. This was consistent with the notion that expectations of analgesia were associated with increased local release of endogenous μ -opioids. On the other hand, even when subjects had no expectation cues, the placebo still manifested pain relieving effects not blocked by Naloxone, supporting the existence of the non-opioid pathway.⁴⁷

Neuropharmacologists have further differentiated placebo analgesia pathways based on whether the analgesia was activated by the expectation of relief or by prior conditioning. Experimental subjects underwent pretreatment conditioning with morphine or Ketorolac, an anti-inflammatory medication with analgesic effects, prior to the application of painful tourniquet pressure. Groups were then given morphine, Ketorolac, Naloxone, or a placebo to attenuate the pain. Two main findings emerged from the study. Those subjects who believed they had received an analgesic and expected relief of pain noted significantly less pain. Therefore, endogenous opioid systems are triggered by cognitive factors, specifically verbal expectation. In contrast, placebo responses induced by conditioning were not exclusively mediated by endogenous opioids. While placebo analgesia after morphine conditioning did utilize the opioid pathway, Ketorolac conditioning did not. Ketorolac used the cyclooxygenase pathway characteristic of all non-steroidal anti-inflammatory drugs at the level of peripheral and central sites in the spinal cord.⁴⁸

⁴⁷ Fabrizio Benedetti, Helen S. Mayberg, Tor D. Wager, Christian S. Stohler, and Jon-Kar Zubieta, *Neurobiological Mechanisms of the Placebo Effect*, 25 J. NEUROSCIENCE 10390, 10390 (2005).

⁴⁸ Martina Amanzio & Fabrizio Benedetti, *Neuropharmacological Dissection of Placebo Analgesia: Expectation-Activated Opioid Systems versus Conditioning - Activated Specific Subsystems*, 19 J. NEUROSCIENCE 484, 490 (1999).

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In 2011, Wager reanalyzed his original studies to assess individual variations in the robustness of placebo effect. fMRI activity was observed at two points – during the anticipation of pain and while experiencing pain. The fMRI showed that increased anticipatory activity in the frontoparietal network and decreased activity in the posterior insular/temporal network were predictive of the magnitude of placebo analgesia. The most predictive regions were those associated with emotional appraisal rather than cognitive control or pain processing. Wager concluded that engagement of emotional appraisal circuits is the driving force behind the perceived individual variation in placebo analgesia, rather than early suppression of nociceptive processing.⁴⁹

While most placebo-related neuroscientific inquiries have considered analgesia, there is growing interest in the effect of placebo on motor control in Parkinson's disease.⁵⁰ Patients who exhibited improved motor control after placebo administration demonstrated activation of endogenous dopamine release on Positron Emission Tomography (PET) scans.⁵¹

PET scans were obtained on a group of clinically depressed men who participated in an inpatient, randomized, placebo-controlled study of the antidepressant, Fluoxetine (Prozac). Scans were performed at three separate intervals: before treatment (baseline), at one week, and at six weeks. After six weeks, subjects who experienced a clinical response were assessed and change patterns for each individual were determined; then scans from the treatment and placebo groups were compared. Anatomically overlapping changes were evident at six

⁴⁹ Tor D. Wager, Lauren Y. Atlas, Lauren A. Leotti & James K. Rilling, *Predicting Individual Differences in Placebo Analgesia: Contributions of Brain Activity during Anticipation and Pain Experience*, 31 J. NEUROSCIENCE 439, 439 (2011).

⁵⁰ Benedetti, *supra* note 47, at 10392.

⁵¹ *Id.*

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weeks between the Fluoxetine and placebo groups. Both groups manifested corresponding increases in glucose metabolism in the prefrontal, parietal, and posterior cingulate regions, as well as a decrease in subgenual cingulate. The only variation was that the regional changes in the Fluoxetine-treated group were of greater magnitude than the placebo group.⁵²

In summary, placebo analgesia is mediated by both opioid and non-opioid pathways, just like pharmacologically active substances. The placebo effect in Parkinson's disease and depression correlates with altered metabolic activity in neuroanatomical areas known to be impaired in these conditions.

V. Ethics

The use of placebos poses four ethical questions regarding deception, autonomy, malfeasance, and justice. Ethicists find deception the most problematic. Conceptually, many individuals maintain that deception of any kind is morally objectionable. Truth in disclosure is a fundamental aspect of the autonomy and dignity of human beings. Deontology considers manipulation and deception to be a manifestation of disrespect between people. Deception is condemned because it “violates an a priori moral rule—a priori because the rule appeals to the very nature of our beings (that is, persons deserving respect) rather than to the good or bad consequences of our actions.”⁵³

Most people believe that doctors should be prescribing genuine medication. The prescription of

⁵² Helen S. Mayberg ET AL., *Regional Metabolic Effects of Fluoxetine in Major Depression: Serial Changes and Relationship to Clinical Response*, 48 *BIOLOGY PSYCHIATRY* 830, 836 (2000).

⁵³ Howard Brody, *The Lie That Heals: The Ethics of Giving Placebos*, 97 *ANNALS INTERNAL MED.* 112, 113 (1982).

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placebos can be deceptive in three ways. Doctors may: (1) lie about what the medication is; (2) make vague statements about the medication; and (3) say nothing about the medication.⁵⁴ The utilitarian responds, “So what? Who cares as long as it works?” The utilitarian summates all the favorable consequences attributable to placebos, and argues (or assumes) that these outweigh the evils of deception. To prove value, it is necessary only to show that using placebos will increase the sum total of happiness in the world.⁵⁵

Armageddon occurs when the patient discovers that a placebo has been used. Physicians who endeavor to deceive patients by representing placebos as pharmacologically active medications risk undermining their patients’ trust.⁵⁶ Once trust and confidence are undermined, any hope for a productive physician-patient relationship is decimated. Every treatment or intervention is suspect. The motives and candor of the doctor will always be uncertain. The consequences go well beyond individual relationships. Patients, in general, may relinquish trust and confidence in the entire medical profession. The efficacy of bona fide prescription pharmaceuticals will be suspect. Other options, such as medication with greater toxicity or frank quackery, may be selected. In addition to rejecting proper care, patients may opt for uninformed or misinformed self-care.⁵⁷ A computer trip to “Dr. Google” could supplant a visit to the old style, bricks and mortar medical office when illness strikes. Deception is a two-way street; the doctor deceives the patient, and the patient deceives the doctor. Future care would be based on inadequate patient histories and failure to disclose self-

⁵⁴ Kapp, *supra* note 8, at 376.

⁵⁵ Brody, *supra* note 53, at 114.

⁵⁶ Irwin Kleinman, Peter Brown, Larry Librach, *Placebo Pain Medication: Ethical and Practical Considerations*, 3 ARCH FAMILY MED. 453, 453 (1994).

⁵⁷ See Kapp, *supra* note 8, at 377-78.

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treatment. The public may perceive doctors as charlatans, and charlatans are not likely to promote healing with caring explanations or the laying on of hands. To paraphrase Simon and Garfunkel, “[Deception], like a cancer, grows.”⁵⁸ By their very nature, deceptive practices fester, and, as a result, defeat the conventional restraints of obligation. Other parties in the healthcare system, such as the nurse, pharmacist and medical assistant, become co-conspirators.

Placebos are not simply inconsequential “white lies.” The monetary cost of prescription placebos is considerable. In order to be “potent,” placebos cannot be free of charge. If the fee for the placebo prescription is considerable, someone will be making an unjustifiable profit. If it is too low, the patient may be suspicious of a contrivance.⁵⁹ Large expenditures of both time and money may be required for placebo therapy. There is evidence that increasing the cost of a prescription, thus making the remedy appear more valuable and exotic, enhances the placebo effect. This can result in financial loss to private and public third-party insurers who pay the pharmacy fees.

The Council on Ethical and Judicial Affairs of the American Medical Association concluded that, “the deceptive use of placebos is not ethically acceptable because it may harm patients to a greater degree than it helps them.”⁶⁰ Using placebos in a duplicitous fashion is disfavored because it fundamentally conflicts with a

⁵⁸ See generally SIMON & GARFUNKEL, *The Sound of Silence*, on WEDNESDAY MORNING, 3 A.M. (Columbia Records 1964).

⁵⁹ See Brody, *supra* note 53, at 114.

⁶⁰ Robert M. Sade, *Placebo Use in Clinical Practice*, CEJA Report 2-I-06, 2006 AMA HOUSE OF DELEGATES, available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=OCBOQFjAA&url=http%3A%2F%2Fwww.ama-assn.org%2Fresources%2Fdoc%2Fethics%2Fceja_recs_2i06.pdf&ei=R7jVTpyoK4iXgweZkNG_AQ&usg=AFQjCNHP1TUFFnONow6ViQsY_5qCpJnsOA&sig2=_XNilpMgbUCHE-BAGamaiA.

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doctor's professional obligation to promote patient welfare and respect patient autonomy. The Council has elucidated the three most objectionable circumstances where placebos are utilized: (1) to serve the convenience of the physician rather than to promote patient welfare; (2) to mollify the demanding and difficult patient; and (3) to assuage a patient with a complex problem that frustrates the physician.⁶¹

Since the emergence of the movement away from paternalistic medicine, patient autonomy has become of paramount importance in the physician-patient relationship. Placebos are the antithesis of patient autonomy. Autonomy and dignity are violated when the patient is deprived of an opportunity to play a meaningful role in her care. It is the patient's prerogative to make significant life decisions, to participate fully, and to cooperate effectively. The physician has an ethical and fiduciary duty to disclose material facts and the patient has a duty to share responsibility for the treatment.⁶²

Malfesance is a concern when physical harm is directly or indirectly inflicted. Placebo-induced side effects are considered a direct harm. Harm is also caused when a doctor prescribes a placebo to ameliorate subjective symptoms either before or in lieu of a comprehensive medical or psychiatric examination, when that examination would have revealed a significant, treatable illness. Placebos can induce dependency on a number of levels. By its very nature, the dependency is psychological and, arguably, a falsity. This dependency is unhealthy and may result in actual addiction. Individuals may evolve into "professional patients" – every symptom must be treated; unexplained maladies come and go with the assistance of a doctor who uses her sample closet and prescription pad liberally. Constant treatment with magical liquids or

⁶¹ *Id.*

⁶² See Kapp, *supra* note 8, at 378-79.

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capsules can supplant the preventative paradigm. No longer will people feel the need to maintain a healthy lifestyle and use common sense.⁶³

It is axiomatic that similar individuals with similar medical problems should be treated equally, or at least similarly. This basic principle of justice is easily violated when placebo therapy leads to disparate treatment. The risk is especially acute in the context of overly demanding and querulous patients who are given placebos based on the likelihood that they are overstating their level of pain. Physicians may feel the need to prove that the patient is not actually sick.⁶⁴

There are, however, a number of arguments in favor of the ethical acceptance and use of placebo. First, contemptible deception can be eliminated by telling the patient the nature of the treatment. Once prevarication is eliminated, the ethical problem is defused. While the outcome for an informed patient may not be comparable to one who is deceived, undisguised placebo treatment is still associated with a modest rate of success. The earliest empirical rejection of the traditional deception-based heuristic of the placebo response was a non-blind placebo trial of fourteen psychiatric outpatients with somatic symptoms. Each was treated for one week with sugar pills. Subjects were candidly informed that they were taking sugar pills with the caveat that many patients experienced relief with such medication despite the absence of active ingredients. Thirteen patients (ninety-three percent) experienced some degree of subjective or objective symptom reduction.⁶⁵

⁶³ See *id.* at 380.

⁶⁴ James S. Goodwin, Jean M. Goodwin & Albert V. Vogel, *Knowledge and Use of Placebos by House Officers and Nurses*, 91 ANNALS INTERNAL MED. 106, 109 (1979).

⁶⁵ Lee C. Park & Uno Covi, *An Exploration of Neurotic Patients' Responses to Placebo When Its Inert Content is Disclosed*, 12 ARCH. GEN. PSYCHIATRY 336, 338 (1965).

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Certain levels of deception may be acceptable. Placebo treatment can be used without the need for an outright verbal lie. It may be more palatable to deceive a patient in a nonverbal fashion using gestures or visual clues. The placebo effect can be enhanced by the environment in which the prescription is written. “The setting in a doctor's office or hospital room, the impressive terminology, the mystique of the all-powerful physician prescribing a cure - all of these tend to give the patient faith in the remedy.”⁶⁶

If a deception is benevolent, is it any less objectionable? Physicians use placebos for benevolent purposes, i.e., to improve the well-being of their patients. A benevolent lie used to evoke a placebo effect may be sufficiently virtuous for some.⁶⁷ In addition, patients sometimes prefer to be lied to. It is not improper to oblige them. Patients commonly return decision-making power to physicians by not asking for information or recommendations, “but instead pledge – by word or conduct – to follow whatever course of action the physician feels is appropriate.”⁶⁸ A patient's implicit or explicit consent to be deceived renders a lie ethical. There are situations in which lying to a patient is considered humane if it fulfills the patient's wishes. For some, maintaining hope or even the illusion of hope even in the face of near hopelessness improves the quality and duration of life over the short term by eliciting a placebo effect.⁶⁹

Swiss health providers have tried to justify placebo use by differentiating between pure and impure placebos. They contend that use of pure (inert) placebos is ethically unacceptable because it dupes the patient and promotes an

⁶⁶ See Bok, *supra* note 2, at 19.

⁶⁷ Kathleen M. Boozang, *The Therapeutic Placebo: The Case for Patient Deception*, 54 FLA. L. REV. 687, 725 (2002).

⁶⁸ See Kapp, *supra* note 8, at 385.

⁶⁹ See Boozang, *supra* note 67, at 753.

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outdated, unduly paternalistic relationship. These practitioners justify the use of impure (pharmacologically active) placebos with the casuistic argument that active drugs, even those not indicated for the disease in question, could conceivably confer a positive effect on the health of the patient.⁷⁰

VI. Law

Legal issues regarding placebo treatment have not materialized in court cases, legislation, or federal and state regulation because patients have not been informed that they are taking placebos. The law does not specifically and overtly regulate the use of placebos except in the context of the patient's right to pain management.⁷¹ When the United States Supreme Court considered an individual's right to choose physician-assisted suicide, it affirmed an individual's right to refuse pain management and appropriate palliative care.⁷²

Timothy Quill, M.D. challenged the illegality of prescribing lethal medication to terminally ill, mentally competent patients in *Vacco v. Quill*.⁷³ The United States Supreme Court held that physician-assisted suicide was impermissible based on the theory of causation and intent. Justice O'Connor, concurring in another "right-to-die" case, affirmed that a terminal patient in great pain "has no legal barriers to obtaining medication . . . to alleviate that suffering, even to the point of causing unconsciousness and

⁷⁰ See Fässler, *supra* note 6, at 7.

⁷¹ Karen J. Nichols ET AL., *AOA's Position Against Use of Placebos for Pain Management in End-of-Life Care*, 105 J. AM. OSTEOPATHIC ASS'N S2, S3-4 (2005) (discussing legislation regarding a patient's right to pain management).

⁷² *Vacco v. Quill*, 521 U.S. 793, 808 (1997).

⁷³ *Id.* at 793.

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hastening death.”⁷⁴ Placebo substitution for active analgesic medication, however, without the express informed consent of the individual violates the precepts of the American Bar Association.⁷⁵

A cause of action for placebo-related damages can be brought under the theories of fraud, false advertising, lack of informed consent and medical malpractice.

A. Fraud

The elements of fraud giving rise to the “tort action for deceit are: (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or ‘scienter’); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.”⁷⁶ It is apparent that each element of the cause of action is potentially present in a case where placebos are mendaciously used, regardless of whether an outright lie, a vague and non-committal statement, or silence concerning the nature of the treatment is involved. Intent to harm the plaintiff is not requisite.⁷⁷

In *Jurcich v. General Motors Corp.*, an employee brought an action in fraud and deceit against the corporation and its nurse employee for repeatedly treating him for pain with sugar pills, without his knowledge, after a job-related injury.⁷⁸ The issue for the court was whether this case should be brought under the rubric of fraud or

⁷⁴ *Washington v. Glucksberg*, 521 U.S. 702, 737 (1996) (O’Connor, J., concurring) (Justice O’Connor’s concurring opinion also applies to *Vacco*, 521 U.S. at 809).

⁷⁵ *Nichols*, *supra* 71, at S4.

⁷⁶ *Southern Union Co. v. Southwest Gas Corp.*, 180 F. Supp. 2d 1021, 1030 (D. Ariz. 2001) (internal quotations and citations omitted).

⁷⁷ *See Kapp*, *supra* note 8, at 388.

⁷⁸ *Jurcich v. General Motors Corp.*, 539 S.W.2d 595, 595 (Mo. Ct. App. 1976).

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medical malpractice.⁷⁹ The court held that medical malpractice was the appropriate theory, not fraud and deceit. Further, the court observed that the prescription of placebos “is, in appropriate cases, a recognized form of medical treatment.”⁸⁰ The court concluded that the plaintiff was not injured by the placebo by holding that “[t]here is not a scintilla of evidence in this record that by the dispensing of placebos to him his back injuries were worsened nor that any new injuries resulted. He simply obtained no relief from his pain.”⁸¹ The court viewed the use of a placebo as proper under certain circumstances, and the issue in the case was the medical standard of care.⁸²

B. Fraudulent Advertising

Courts have strongly disfavored the promotion and advertising of over-the-counter placebos. The Federal Trade Commission filed an action against the promoter of a worthless hair loss product in *FTC v. Pantron I Corp.*⁸³ The defendant-promoter asserted that there was scientific evidence to support his claim of efficacy, but the court established that any benefit was placebo.⁸⁴ A seller may not claim that a product is effectual when its effectiveness is predicated solely on the placebo effect. That representation “constitutes a ‘false advertisement’ even though some consumers may experience positive results.”⁸⁵

The court in *FTC v. QT, Inc.* arrived at a similar conclusion.⁸⁶ The defendants used infomercials and print advertising to market the Q-Ray Ionized Bracelet® as a

⁷⁹ *Id.* at 600.

⁸⁰ *Id.*

⁸¹ *Id.* at 601.

⁸² Boozang, *supra* note 67, at 740.

⁸³ *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1088 (9th Cir. 1994).

⁸⁴ *See id.* at 1097.

⁸⁵ *Id.* at 1100.

⁸⁶ *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 908 (N.D. Ill. 2006).

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device that provided significant, immediate, and complete pain relief for conditions such as migraines and back pain by emitting an unspecified ionizing force. The court found no scientific evidence to substantiate the claims and held that the bracelet was advertised in a dishonest and materially misleading manner since any benefit from the product was based solely on the placebo effect.⁸⁷ The court quoted *United States v. An Article...ACU-DOT*, “[a] kiss from mother on the affected area would serve just as well to relieve pain, if mother’s kisses were marketed as effectively....”⁸⁸

C. Informed Consent

Under the professional standard of informed consent, a physician is required to make disclosures that a reasonable physician would make under the circumstances. The patient-oriented standard, on the other hand, “requires physicians to provide patients with that information which the ‘reasonably prudent person would find material to making a decision.’”⁸⁹ To establish a *prima facie* case against a physician for failure to obtain informed consent, the plaintiff must prove that:

1. the physician had a duty to disclose sufficient information about a proposed treatment to obtain the patient's informed consent;
2. the physician breached that duty;
3. the physician's failure to disclose adequate information was the proximate cause of the patient's decision to consent to a treatment to which the patient would have withheld consent if he or she had been adequately informed; and

⁸⁷ See *id.* at 965.

⁸⁸ *Id.* at 964 (citing *United States v. An Article...ACU-DOT*, 483 F. Supp. 1311, 1315 (N.D. Ohio 1980)).

⁸⁹ Boozang, *supra* note 67, at 739.

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4. a potential adverse consequence of the treatment materialized, resulting in a detriment to the patient.⁹⁰

Hospital organizations promote the concept of informed consent to their patients through brochures distributed at the time of admission. The American Hospital Association's brochure entitled, "The Patient Care Partnership," urges patients to be actively involved in their care:

INVOLVEMENT IN YOUR CARE

You and your doctor often make decisions about your care before you go to the hospital. Other times, especially in emergencies, those decisions are made during your hospital stay.

When decision-making takes place, it should include:

- *Discussing your medical condition and information about medically appropriate treatment choices.*

To make informed decisions with your doctor, you need to understand:

- *The benefits and risks of each treatment.*
- *Whether your treatment is experimental or part of a research study.*
- *What you can reasonably expect from your treatment and any long-term effects it might have on your quality of life.*
- *What you and your family will need to do after you leave the hospital.*

⁹⁰ Bennett v. Surgidev Corp., 710 A.2d 1023, 1026 (N.J. Super. Ct. App. Div. 1998) (citing Largey v. Rothman, 540 A.2d 504 (N.J. 1988); Caputa v. Antiles, 686 A.2d 356 (N.J. Super. Ct. App. Div. 1996)).

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- *The financial consequences of using uncovered services or out-of-network providers.*⁹¹

The use of placebos creates a number of problems with informed consent. In general, informed consent for placebo use is not sought for two reasons: (1) the usefulness of a placebo is abrogated when the patient knows what it is; and (2) placebos have been considered sufficiently harmless and beneficial to render disclosure unnecessary.⁹² Some legal professionals surmise that informed consent does not apply to the use of placebos. An intervention must be potentially hazardous for issues of informed consent to apply. Since placebos are prescribed in clinical practice solely for symptomatic relief and not for disease treatment, it has been argued that no ongoing harm will result from substituting a placebo in place of a prescription drug.⁹³

Several other reasons circumventing full disclosure have been articulated. First, one may construe a patient's initial consent to treatment as ongoing consent to all specific treatments that a physician employs, including the use of a pure placebo.⁹⁴ Second, under existing consent law, a patient does not need to be informed when a physician chooses Treatment A over Treatment B, because of the added placebo effect.⁹⁵ Third, when considering the explication of potential treatment side effects, it is the prerogative of the patient to decide whether he/she would like to hear about them. Both legal and ethical ideations of

⁹¹ *The Patient Care Partnership*, BROCHURE (AMER. HOSP. ASSOC. 2003).

⁹² Bok, *supra* note 2, at 19.

⁹³ DAN J. TENNENHOUSE, 3 ATTORNEYS MEDICAL DESKBOOK § 38:2.50 (4th ed. 2006 & Supp. 2010).

⁹⁴ Anup Malani, *Regulation with Placebo Effects*, 58 DUKE L.J. 411, 449 (2008).

⁹⁵ *See id.* at 450-51.

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informed consent should provide for patients who truly want to be deceived, or for whom the truth would be therapeutically counterproductive.⁹⁶ The physician may also take into account whether the side effects are material and whether current medical custom demands their disclosure.⁹⁷

When enough physicians use placebos for therapeutic purposes without disclosure, the lack of disclosure evolves into the professional standard of care and reframes notions of informed consent.⁹⁸ In other words, the absence of disclosure will be consistent with the “exercise [of] that degree of care, skill and learning expected of a reasonable, prudent health care provider in the profession or class to which he belongs within the state acting in the same or similar circumstances.”⁹⁹ Neither will physicians encounter legal hurdles under a patient-oriented standard. If, as previously argued, the reasonable patient would opt to experience the benefits of placebo therapy without having the truth revealed to her, then the legal standard of disclosure, as determined by the reasonable patient, would abide the deception.

D. Medical Malpractice

In Arizona, there are two elements of proof necessary to show that an injury resulted from the failure of a health care provider to follow the accepted standard of care:

1. The health care provider failed to exercise that degree of care, skill and learning expected of a reasonable, prudent health care provider in the

⁹⁶ Boozang, *supra* note 67, at 737.

⁹⁷ Malani, *supra* note 94, at 452.

⁹⁸ Boozang, *supra* note 67, at 739.

⁹⁹ ARIZ. REV. STAT. § 12-563 (LEXIS through 2011 legislation).

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profession or class to which he belongs within the state acting in the same or similar circumstances.

2. Such failure was a proximate cause of the injury.¹⁰⁰

Plaintiffs must present facts from which negligence and a causal relation between the injury and the defendant's acts may be reasonably inferred.¹⁰¹ The court "must find for the defendant unless [it] finds a probability that defendant's negligence was a cause of plaintiff's injury."¹⁰²

With regard to the use of placebos, the basic rules of medical malpractice hold. The issue in malpractice cases is whether a doctor's treatment of a patient was negligent. The answer hinges on whether the treatment works, not on how it works.¹⁰³ "The test for negligence is the same in all cases: does the treatment conform to medical custom, or, would a reasonable physician administer this treatment?"¹⁰⁴ There are three major considerations when a malpractice action is based on the use of a placebo: (1) when a patient suffers a negative placebo reaction reasonably foreseeable to a competent doctor; (2) when appropriate treatment is improperly impeded by the use of a placebo; and (3) when the doctor's treatment of the patient with a placebo deters the patient from obtaining effective treatment from another practitioner.¹⁰⁵

E. Defenses

There are four main defenses to a placebo-related claim. First, the patient suffered no harm; it is necessary to

¹⁰⁰ *See id.*

¹⁰¹ *Harvey v. Kellin*, 566 P.2d 297, 302 (Ariz. 1977).

¹⁰² *Thompson v. Sun City Community Hosp., Inc.*, 688 P.2d 605, 616 (Ariz. 1984).

¹⁰³ *Melani*, *supra* note 94, at 455.

¹⁰⁴ *Id.*

¹⁰⁵ *See Kapp*, *supra* note 8, at 395.

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prove injury caused by the placebo treatment itself.¹⁰⁶ Second, use of the placebo was not negligent; similarly trained professionals would also have prescribed a placebo under comparable circumstances, consistent with the accepted standard of care.¹⁰⁷ Third, treatment without informed consent and disclosure is conditionally permissible where there is a reasonable likelihood that exposing the nature of the treatment will cause psychological harm, hinder or complicate treatment, or impair the patient's ability to assent to treatment.¹⁰⁸ Thus, therapeutic privilege is a well-recognized exception to the objective standard of disclosure, and excuses the withholding of information where disclosure would be unhealthy to the patient. The privilege is applicable only if disclosure of the information would complicate or hinder treatment, cause such emotional distress as to preclude a rational decision, or cause psychological harm to the patient."¹⁰⁹

Fourth, while the patient has the right to know the risks, benefits and alternatives of a medical intervention, the patient similarly possesses "the prerogative to waive or relinquish that right."¹¹⁰ According to the California Supreme Court, "a medical doctor need not make disclosure of risks when the patient requests that he not be so informed...Such a disclosure need not be made if the procedure is simple and the danger remote and commonly appreciated to be remote."¹¹¹

¹⁰⁶ *See id.* at 396.

¹⁰⁷ *See id.*

¹⁰⁸ *See id.* at 397.

¹⁰⁹ *Canterbury v. Spence*, 464 F.2d 772, 789 (D.C. Cir. 1972).

¹¹⁰ *Kapp*, *supra* note 8, at 399.

¹¹¹ *Cobbs v. Grant*, 502 P.2d 1, 12 (Cal. 1972).

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VII. Recommendations

Each Monday, hundreds of thousands of doctors return to work, evaluate patients, and select the most effective treatment available under the circumstances. At some point in her professional practice, a doctor has to decide if and when a placebo might be appropriate. This section will look at possible uses of placebos that may be sanctioned by ethicists and legalists.

A. When Placebos May Not Be Used

There is a consensus against placebo therapy being used as a tool of convenience for the practitioner. Placebo therapy is not a tool of mollification for demanding patients or those with frustrating and complex medical problems.¹¹² It is not a profit center for dispensing physicians. It is not a substitute for practicing medicine.

Bona fide treatments that are safe and effective for the patient's condition are preferable to placebos. The use of a placebo is unwarranted before a careful history and physical exam is performed, a differential diagnosis is established, the appropriate laboratory and radiological investigation have been carried out, and necessary consultations have been obtained. No impure placebo should ever be used.

When the placebo treatment has been selected, it should only be used for a specific purpose. Therapeutic results must be carefully monitored and the duration of treatment must be strictly defined. Placebos should be dispensed or administered by a doctor's orders. There is no place for over-the-counter placebos.¹¹³ Healthcare facilities

¹¹² Kapp, *supra* note 8, at 381-82.

¹¹³ Christie Aschwanden, *Experts Question Placebo Pill for Children*, N.Y. TIMES, May 27, 2008, at F5 (Jennifer Buettner successfully treated her hypochondriacal niece with a placebo in order to avoid the

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need written policies governing their use.¹¹⁴ Outright lies are unacceptable and patient questions must be answered candidly.¹¹⁵ Placebos should not be dispensed to patients who specifically ask not to receive them.¹¹⁶

B. When Placebos May Be Used

Placebo treatment has been suggested in the following situations:

- (1) Patient shows no benefit from standard therapy;
- (2) Patient is dependent on morphine or other addictive narcotics or sedatives and needs to be gradually weaned off of them;
- (3) Patient has a mild condition and the risk-to-benefit ratio militates against the use of potent medications with significant risks of toxicity or addiction;
- (4) Patient is psychologically unable to deal rationally with candid evaluation of their medical condition;
- (5) Parents who insist that treatment must be prescribed for their children;
- (6) Patients who demand treatment preceding a thorough diagnostic evaluation;

potential side effects of unnecessary antibiotics or other medications. She started Efficacy Brands, a company that markets a supplement, Obecalp (placebo spelled backwards). It is a cherry-flavored sugar pill designed to simulate the texture and flavor of medication and is marketed as a dietary supplement with no active drug. The placebo was supposed to be available on the website, <http://www.inventedbyamother.com/>, at fifty tablets for \$5.95 or in liquid form at retail locations across the country. However, as of January 8, 2012, it is not. The only available placebo is "Placebo Pilules," sold by Universal Placebos, \$20 Australia for 700 small pills, available at <http://www.placebo.com.au>).

¹¹⁴ Kapp, *supra* note 8, at 402.

¹¹⁵ *See id.*

¹¹⁶ *See id.*; Bok, *supra* note 2, at 22.

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- (7) Patients who are terminally ill and require reduction in analgesic medication due to severe side effects; and
- (8) Patients who may benefit from an adjunct to standard therapy.¹¹⁷

For example, the following are circumstances where a placebo may prove exceedingly helpful:

- An overly anxious patient who recently sustained a myocardial infarction and is at risk for a fatal arrhythmia, but refuses tranquilizers to reduce her stress level.¹¹⁸
- A patient who presents with significant symptoms from a treatable condition but refuses medication because of potential side effects. An example is a post-menopausal woman with irritability and depression who refuses estrogen replacement.¹¹⁹
- A child with attention deficit hyperactivity disorder who requires progressively more medication with attendant side effects. The placebo is given to enhance the effect of smaller doses of the active drug.¹²⁰

¹¹⁷ Kapp, *supra* note 8, at 383-84.

¹¹⁸ *See id.* at 402.

¹¹⁹ *See id.* at 403.

¹²⁰ Adrian S. Sandler, Corrine E. Glesne, James W. Bodfish, *Conditioned Placebo Dose Reduction: A New Treatment in Attention-Deficit Hyperactivity Disorder?*, 31 J. DEV. & BEHAV. PEDIATRICS 369, 372-73 (2010) (Children with attention deficit hyperactivity disorder who took half their usual dosage of active medication in conjunction with an undisclosed placebo had the same therapeutic effect as their prior full dosage. Patients who took half their dose without placebo showed a reduced therapeutic effect).

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VIII. Conclusion

Placebos will always have a place in clinical medicine. They are useful for individuals who manifest a significant placebo effect, especially when their symptoms do not justify intervention with potent medications. But, there will never be a substitute for a competent and comprehensive diagnostic evaluation. The neuroscience of placebos shows activation and inhibition of the same anatomical pathways and receptors that are targeted by standard pharmaceuticals.

Most of the ethical objections focus on the issue of deception and its capacity to destroy both the doctor-patient relationship and the standing of physicians in society. Placebo law is not well developed, but placebo use does raise issues of fraud, lack of informed consent, and medical malpractice. Their use may be defended by their relative safety and efficacy. There are solutions to deception and informed consent problems, including the use of limited or full disclosure. In certain circumstances, where treatment is not warranted or not possible, the placebo effect can be utilized to make certain patients feel better. Any intervention in medicine is always a question of whether the benefits outweigh the risks. There are numerous cases in which placebos confer enormous benefits with minimal risk. They should be used sparingly and circumspectly, but they should be used.

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ARTICLE

JOINT AUTHORITY? THE CASE FOR STATE-BASED MARIJUANA REGULATION

*Matthew Shechtman*¹

Over the past several decades the United States government has cast an intimidating shadow over the states in the drug policy arena. Congress inaugurated the “War on Drugs” in 1970 through the Controlled Substances Act, banning the possession, consumption, and distribution of a host of narcotic substances, including marijuana. The past decade, however, brought a revolution in the form of state-based marijuana regulation. Ranging from decriminalization to medical licensing, more than a dozen states have enacted laws contradicting the blunt legalist strictures of the CSA.

Relying on the tenets of public choice theory and jurisdictional competition for law, this article addresses a range of regulatory frameworks for marijuana regulation, concluding that decentralization in favor of the states provides the most efficient and pragmatic mechanism for marijuana policy. Though relatively uncommented on, the incoherent federal-state stance on drug policy leaves citizens and enforcement agencies in a troubling predicament regarding the legality of marijuana use and possession. After covering traditional externalities and “Race to the Bottom” scholarship, this article hypothesizes a possible “Race to Nowhere” conundrum wherein states contemplating drug policy may be faced with an all-or-nothing dilemma, forced to choose between a complete ban and outright legalization. While analogy to Prohibition and alcohol regulation gives some insight that this race exists,

¹ Matthew Shechtman is currently serving as a judicial law clerk for the United States Court of Appeals for the Fifth Circuit.

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federal oversight is a poor regulatory mechanism when accounting for a variety of balanced incentives and extensive interest group influence.

Ultimately, America's "War on Drugs" has left its populace confused and disenfranchised, unable to employ their preferences to foster innovative and effective social policies. Decentralized regulation, on the other hand, provides states the ability to liberalize marijuana policy or maintain the status quo, leaving the choice over tax revenues, drug crime, prison overpopulation, and interest group lobbying to state lawmakers and their constituents.

The United States' ongoing "War on Drugs" has reached a new level of confusion as several states have deviated from the unremitting federal policy against marijuana use and sale.² Contributing to the confusion are the co-extensive, yet sometimes conflicting Constitutional tenets of interstate commerce,³ Tenth Amendment state sovereignty,⁴ and historic principles of federalism in state criminal enforcement.⁵ While there is no apparent end in sight for this overarching battle of federal versus state control, this article focuses on the highly controversial issue of what level of government should take responsibility for the formation of marijuana policy. Though much attention has been paid to the constitutionality and wisdom of drug enforcement,

² See *infra* Part III.

³ U.S. CONST. art. I, § 8.

⁴ U.S. CONST. amend. X.

⁵ See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.") (citations omitted).

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relatively little “has been paid to [the] level-of-government issues [present] in current drug policy discussions.”⁶

This article begins with a brief overview of the current regulatory background in the drug enforcement landscape, followed by a description of the regulatory dynamic at work from a jurisdictional competition perspective. Part II of this article discusses the currently established federal regulatory framework and ultimately argues that federal authority should be disbanded and decentralized in favor of state policymaking and enforcement authority. Part II thus suggests a state-based regulatory framework, arguing that competition between jurisdictions will benefit the market for marijuana policy and should result in state authority akin to alcohol regulation following the enactment of the Twenty-First Amendment. Part III presents a critique of the state consolidation posited by Michael O’Hear and his “Competitive Alternative” regulatory framework found in *Federalism and Drug Control*.⁷ Part III also rebuts O’Hear’s criticisms, arguing that the market for marijuana law is not conducive to the market failures he posits. Finally, Part IV sets forth a previously undeveloped theory of state-based market failure, discussing a hypothetical “Race to Nowhere,” in which jurisdictions may be faced with an all-or-nothing choice between legalization and a complete ban on marijuana. Though ultimately concluding that the assumptions necessary to engender the “Race to Nowhere” are unlikely to be found in a market for marijuana policy, Part IV concludes by noting the possibility for such a polarizing problem and the need for informed regulatory decision making.

⁶ FRANKLIN ZIMRING & GORDON HAWKINS, *THE SEARCH FOR RATIONAL DRUG CONTROL* 159 (1992).

⁷ Michael M. O’Hear, *Federalism and Drug Control*, 57 *VAND. L. REV.* 783 (2004).

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I. The Federal Government's "War on Drugs" and State Divergence in Marijuana Policymaking

The origin of today's "War on Drugs" emanated from Richard Nixon's 1968 presidential campaign, where he cited growing drug use as the next great problem facing the nation.⁸ Just a few years later, the Nixon Administration created the federal Drug Enforcement Administration ("DEA") and increased the drug enforcement budget to nearly \$800 million.⁹ Though Nixon was primarily concerned with the more potent and destructive heroin epidemic,¹⁰ marijuana use was easily subsumed into the United States' drug war following three decades of haphazardly implemented anti-marijuana criminal and tax laws.¹¹

The "War on Drugs" fire was stoked once again by a republican presidential campaign in 1980.¹² Backed by the powerful "parents' movement,"¹³ Ronald Reagan re-established the "War on Drugs" through the "Just Say No" campaign and increased the federal drug-enforcement budget to nearly \$6 billion within the next three years.¹⁴ The anti-drug establishment continued to escalate through the 1990s, enlisting almost \$20 billion in federal anti-drug

⁸ See TED GEST, *CRIME & POLITICS: BIG GOVERNMENT'S ERRATIC CAMPAIGN FOR LAW AND ORDER* 110 (2001).

⁹ See SAM STALEY, *DRUG POLICY AND THE DECLINE OF AMERICAN CITIES* 188 (1992).

¹⁰ CAROLINE JEAN ACKER, *CREATING THE AMERICAN JUNKIE: ADDICTION RESEARCH IN THE CLASSIC ERA OF NARCOTIC CONTROL* 217-18 (2002).

¹¹ See O'Hear, *supra* note 7, at 796-97.

¹² GEST, *supra* note 8, at 113.

¹³ ERIC SCHLOSSER, *REEFER MADNESS: SEX, DRUGS, AND CHEAP LABOR IN THE AMERICAN BLACK MARKET* 23-24 (2003).

¹⁴ GEST, *supra* note 8, at 115. Without turning the "War on Drugs" into a partisan political manifesto, it is interesting to note that President Jimmy Carter publicly endorsed the decriminalization of marijuana. *Id.* at 111.

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coffers by 1998.¹⁵ The 21st century has seen little retreat from the legalist regime of the past three decades as the political ante continues to intensify. A modern example is exemplified by the Bush Administration's National Drug Control Strategy, aimed at "healing America's drug users."¹⁶

Most relevant to today's marijuana legalization debate is the Controlled Substances Act ("CSA"), which incorporates marijuana among its many listed illicit substances.¹⁷ Maximum penalties for marijuana possession, cultivation, and distribution range from one year to life in prison, with maximum fines from one thousand to eight million dollars depending on the amount of marijuana at issue and the circumstances underlying the conviction.¹⁸ The CSA is undoubtedly one of the most salient consequences of current Supreme Court jurisprudence regarding Congress' interstate commerce power. Notably, the Court found in *Gonzales v. Raich* that Congress did not overstep its Constitutional authority by regulating the trade of illicit substances, including marijuana.¹⁹ Relying on *Wickard v. Filburn*,²⁰ the Court held that even purely intrastate cultivation and distribution of marijuana is subject to federal regulation under the interstate commerce

¹⁵ GEST, *supra* note 8, at 115.

¹⁶ THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY (2003); *see also* O'Hear, *supra* note 7, at 802.

¹⁷ 21 U.S.C. § 841(b)(1)(A)(vii) (2006).

¹⁸ 21 U.S.C. §§ 841(b)(1)(A), 844(a) (2006); *see* Vijay Sekhon, Comment, *Highly Uncertain Times: An Analysis of the Executive Branch's Decision to not Investigate or Prosecute Individuals in Compliance with State Medical Marijuana Laws*, 37 HASTINGS CONST. L.Q. 553, 553-54 (2010).

¹⁹ *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

²⁰ *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (establishing that Congress has the power to regulate purely local activities that make up an economic class of activities that have a substantial effect on interstate commerce).

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clause—and hence constitutionally controlled under the CSA.²¹

Even before Supreme Court jurisprudence dramatically extended Congress' ability to regulate illicit substances in interstate commerce, several commentators decried a federal "monopoly" over drug policy.²² Though the federal government has always possessed "an impressive array of tools to influence policymaking at lower levels of government,"²³ recent developments in academia and state-based drug policies, suggest that state authority and policy innovation has established a solid footing in the marijuana law paradigm, ranging from medical-use licensing to decriminalization.²⁴ While recognizing the federal government's oversight role in drug enforcement policy, this article ultimately argues for horizontal competition—at the expense of federal supremacy²⁵—in marijuana policy for several reasons.

²¹ *Gonzales*, 545 U.S. at 18, 33.

²² See DANIEL K. BENJAMIN & ROGER LEROY MILLER, UNDOING DRUGS: BEYOND LEGALIZATION 97, 217, 219 (1991); Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1192 (1995) ("In the fight against drugs . . . the federal government is effectively the only government.").

²³ See O'Hear, *supra* note 7, at 806.

²⁴ See O'Hear, *supra* note 7, at 806-20 (noting that the federal government maintains considerable media control and sway over the citizenry, formidable direct enforcement capabilities, conditional monetary spending, control over forfeiture and equitable sharing laws, and multi-jurisdictional task forces).

²⁵ Even if the federal government can utilize its preemptive power to force states to institute marijuana enforcement laws, there is good reason to argue that it should not. As discussed *infra*, unlike other crimes with no clear societal benefit, marijuana legalization arguably provides significant societal benefits. In contrast to the "Race to the Bottom" proposed by Teichman in the market for penal laws aimed at sex crimes, marijuana laws provide a wide array of consequences, both positive and negative, to lead to an arguably efficient market for marijuana laws. Doron Teichman, *The Market for Criminal Justice*:

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First, it is not clear that the federal government has constitutional authority to mandate state drug policy.²⁶ Though preemption, through properly enacted federal law, plays an important role in drug enforcement, the federal government cannot require a state to enforce federal laws.²⁷ Second, though the mere presence of federal enforcement undoubtedly affects state policymaking, the lack of federal enforcement resources strongly limits the feasibility of effective wide-scale federal enforcement. To be sure, drug laws are almost exclusively implemented and policed by

Federalism, Crime Control, and Jurisdictional Competition, 103 MICH. L. REV. 1831, 1867 (2005). Given the small likelihood of a “Race to the Bottom” effect, federal preemption and the necessity for centralization to pursue optimality is reduced, if not eliminated. *Cf.* William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201, 217 (1997). Though the supplemental argument to the preemption point is aimed at legal uniformity and avoiding the added informational costs, this consequence of disuniformity may be limited given the publicity of marijuana laws and extensive consumer knowledge in a unique area of consumer lifestyle choice. *Cf. id.* at 273.

²⁶ Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1422 (2009) (“Contrary to conventional wisdom, state laws legalizing conduct banned by Congress remain in force and, in many instances, may even constitute the de facto governing law of the land.”). In an interesting preemption caveat, carved by the Tenth Amendment, a congressional attempt to preempt state “inaction”—state failure to enact laws banning the use of marijuana—would be an effective command for the states to take an action to proscribe medical marijuana, in violation of the Supreme Court’s anti-commandeering rule established in *New York v. United States*, 505 U.S. 144, 188 (1992). *Id.* at 1424. This article does note, however, the likely counterargument that state enactment of medical marijuana laws may conflict with the CSA, thereby invoking established conflict preemption principles. But for the purposes of this limited foray into jurisdictional competition, this article presumes that Congress cannot force the states to enact drug laws, nor preempt states’ medical marijuana regulatory mechanisms.

²⁷ *New York*, 505 U.S. at 188.

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state and local governments.²⁸ As such, the likelihood of vertical competition from the federal government is reduced.²⁹ Lastly, federal regulation is inefficient and burdensome, diminishing citizen autonomy, while hindering innovation and consumer choice.³⁰

Regardless of the federal government's involvement in drug policy, current state innovation in marijuana legislation is undoubtedly significant. Presently, sixteen

²⁸ The Obama administration has indicated through Executive Order that it no longer wishes to prosecute users or dispensaries unless they violate both federal and state law, effectively leaving the legalization choice up to states, while their citizens can feel comfortable they will not be prosecuted by the federal government. Josh Meyer & Scott Glover, *Medical Marijuana Dispensaries Will no Longer be Prosecuted, U.S. Attorney General Says*, L.A. TIMES, (Mar. 19, 2009), <http://articles.latimes.com/2009/mar/19/local/me-medpot19>; see also Devlin Barrett, *Attorney General Signals Marijuana Policy Shift*, MSNBC.COM, (Mar. 18, 2009), http://www.msnbc.msn.com/id/29760656/ns/politics-white_house/t/attorney-general-signals-marijuana-policy-shift/#.TrC5g3EYfYY; Memorandum from David W. Odgen, Deputy Att'y Gen., to Selected United States Attorneys (Oct. 19, 2009), <http://www.justice.gov/opa/documents/medical-marijuana.pdf>. Though the federal government governs enormous resources, it only manages one percent of the nearly 800,000 marijuana cases generated each year. Mikos, *supra* note 26, at 1424. As such, most regular users under a state-enabled medical marijuana regime are very unlikely to be prosecuted by the federal government. *Id.*

²⁹ Harvard Professor, Mark Roe, has recognized that vertical competition in the corporate legal model may disrupt the traditional theory of corporate law rules in a jurisdictional competitive framework. Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 635 (2003). In this vertical competition model, Delaware's real competition for corporate legal rules comes not from sister states, but from the federal government where "Delaware corporate law can be displaced by, and is often influenced by, federal authorities, thereby rendering any pure race . . . impossible, however attractive it might be in theory." *Id.* Realistically, Roe's vertical competition argument is fundamentally viable outside of the corporate framework. Given the two aforementioned federal regulatory limitations, however, it seems less likely to apply to the marijuana debate.

³⁰ See *infra* Part III.

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states as well as the District of Columbia have enacted legislation legalizing the possession, cultivation, and use of marijuana for the treatment of certain illnesses.³¹ Against this state regulatory backdrop loom the CSA and the potential for DEA and FBI enforcement. As previously mentioned, however, the federal government plays a very small role in the enforcement and prosecution of marijuana users, growers, and dispensaries—the United States Attorney only manages about one percent of all marijuana cases, leaving the rest to state enforcement.³² Given that federal resources are unable to manage the overwhelming drug caseload, and that many states have already shown their unwillingness to cede power over drug regulation and enforcement, there is significant room for states to implement and experiment with new marijuana laws. With state experimentation comes the possibility for competition between states in the enactment of innovative marijuana regulatory schemes and legalization policies. This dynamic is known as jurisdictional competition, or more simply, the market for laws.³³ The basic premise of the jurisdictional competition paradigm is that governments compete to supply laws in order to support the influx of business and economic benefits, taxes, and citizenry.³⁴ This legal market

³¹ These states include Alaska, Arizona, California, Colorado, Delaware, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Washington, and Vermont, in addition to the District of Columbia. Nat'l Org. for the Reform of Marijuana Laws, *Medical Marijuana*, NORML.ORG, (last visited Nov. 1, 2011), <http://norml.org/legal/medical-marijuana-2>. Maryland has decriminalized the possession of less than one ounce of marijuana by individuals who can demonstrate, as an affirmative defense, that their use of marijuana is out of medical necessity. Nat'l Org. for the Reform of Marijuana Laws, *Maryland Medical Marijuana*, NORML.ORG, (last visited Nov. 1, 2011), http://norml.org/legal/item/maryland-medical-marijuana?category_id=835; see also Sekhon, *supra* note 18, at 553.

³² See Mikos, *supra* note 26.

³³ See Teichman, *supra* note 25, at 1833.

³⁴ See *id.*

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concept has been applied most extensively in the corporate law context, focusing on Delaware's market dominance. The market concept has, however, found a receptive audience in the fields of environmental law, tax, bankruptcy, trusts, and family law.³⁵

This article embarks on an analysis of the competitive framework over drug lawmaking authority and enforcement. While recognizing the historic dominance of federal authority in the field,³⁶ it argues against the efficacy of federal authority and in favor of decentralized regulation over marijuana policy. Using alcohol regulation as a guiding example, this article argues for state authority over marijuana regulation, with localized enforcement and state discretion over local policymaking authority.

Notwithstanding the ban on possession, cultivation, distribution, and use, there are a number of regulatory mechanisms states can implement outside of absolute illegality. For instance, states can institute penalty schemes, by varying sentencing guidelines or establishing statutory penalty frameworks that differentiate between

³⁵ *Id.* (citing, *inter alia*, Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); Louis Kaplow, *Fiscal Federalism and the Deductibility of State and Local Taxes Under the Federal Income Tax*, 82 VA. L. REV. 413 (1996); Lynn M. LoPucki & Sara D. Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a "Race to the Bottom,"* 54 VAND L. REV. 231 (2001); Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035 (2000); Jennifer G. Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745 (1995)).

³⁶ See Roe, *supra* note 29, and accompanying text (while the CSA is technically the supreme law of the land regarding drug possession, use, and distribution, it is rarely enforced, though recognizably could be with the proper resources).

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misdemeanor and felony violations.³⁷ In addition, some states have employed alternative sentencing schemes, experimenting with drug treatment courts and probation dependent upon the successful completion of a rehabilitation program.³⁸ Outside of varying penalties, states have an array of legalization options, ranging from full legalization³⁹ to marijuana licenses for medical use.⁴⁰ Not to mention, several states have instituted decriminalization laws wherein possession and use is either legal or considered a misdemeanor, while distribution and trafficking remains criminal.⁴¹

Enhanced forfeiture is also an interesting option for reform that has potential incentive effects not only for

³⁷ For example, the famous 1973 Rockefeller drug laws included very strict mandatory minimum sentences. GEST, *supra* note 8, at 199. Even as early as the 1970s, however, many states decriminalized marijuana possession to some extent, providing minimal fines for first offenders. Albert DiChiara & John F. Galliher, *Dissonance and Contradictions in the Origins of Marijuana Decriminalizations*, 28 LAW & SOC'Y REV. 41, 48 (1994). This trend has continued today in California, which makes marijuana possession a misdemeanor. CAL. HEALTH & SAFETY CODE § 11357 (LEXIS through 2011 legislation). Possession of less than one ounce is punishable by a maximum \$100 fine. *Id.*

³⁸ Both Miami's Dade County and the city of Denver implemented specific drug courts for the purpose of expediting drug case management and instituting alternative treatment paradigms in an effort to reduce the caseload and burgeoning prison populations. O'Hear, *supra* note 7, at 823-28. These programs met with mixed success and general federal hostility. *Id.*

³⁹ No state has completely decriminalized marijuana, though there have been initiatives in Alaska, Nevada, Arizona, and South Dakota. O'Hear, *supra* note 7, at 836-37.

⁴⁰ The most visible medical marijuana law is undoubtedly California's Proposition 215, which legalizes the possession or cultivation of marijuana for any patient or primary caregiver who has "the written or oral recommendation or approval of a physician." CAL. HEALTH & SAFETY CODE § 11362.5 (LEXIS through 2011 legislation).

⁴¹ Nat'l Org. for the Reform of Marijuana Laws, *Marijuana Decriminalization and Its Impact on Use*, NORML.ORG, (last visited Nov. 1, 2011), http://norml.org/index.cfm?Group_ID=3383.

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criminal possessors but for state coffers.⁴² As most state laws currently stand, asset forfeiture “provides a significant incentive for state and local governments both to allocate substantial resources to drug enforcement and to cooperate with federal agencies.”⁴³ On the other hand, from a marijuana user’s perspective, reform initiatives aimed at limiting state and federal ability to confiscate property in conjunction with drug seizures may be a considerable incentive to relocate.⁴⁴

Given the myriad of potential decentralized alternatives for marijuana regulation, there is significant room for jurisdictional competition among state and municipal governments for citizens, businesses, tax revenues, and reduced violent crime. On the other hand, the drug debate is never quite so clear-cut; there are significant political⁴⁵ and moral considerations—*e.g.* addiction, rehabilitation, and health care expenditures, as well as the potential for decreased economic productivity in the wake

⁴² See O’Hear, *supra* note 7, at 834-35.

⁴³ *Id.* at 834.

⁴⁴ Oregon and Utah have both proposed laws aimed at limiting asset forfeiture laws in an effort to reduce the potential for abuses and conflicts of interest “that arise when police get to keep the proceeds of their own drug busts.” O’Hear, *supra* note 7, at 835. “Imagine if IRS auditors were paid a commission for every deduction they threw out.” Libertarian Party of Or., *Argument in Favor of Oregon’s Measure 3*, STATE.OR.US, (last visited Nov. 1, 2011), <http://www.sos.state.or.us/elections/pages/history/archive/nov72000/guide/mea/m3/3fa.htm>.

⁴⁵ Though outside the scope of this article, the underground drug trade is a hotly debated political issue, both domestically and abroad. United States’ demand for drugs has drastic effects on both Central and South American countries, including El Salvador, Nicaragua, Mexico, Panama, and Columbia. *The Drug War Hits Central America*, THE ECONOMIST, Apr. 14, 2011, available at <http://www.economist.com/node/18560287> (noting that despite efforts to stem the tide of violence in countries south of the border, United States drug policy has an enormous effect on the underground influence of organized drug crime, making many Central American provinces “deadlier . . . than most conventional war zones”).

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of potentially rampant drug abuse. Given the complex considerations involved, the next Part will introduce a new theory of decentralized marijuana regulation modeled partly after state alcohol regulation, while accounting for possible spillover effects, interest group influence, and political incentives unique to the market for marijuana.

II. Invigorating the Market for Marijuana Laws – Embracing a Decentralized Role for Regulation

With fundamentally different individual and political viewpoints in the marijuana debate, citizen autonomy should be at the forefront of the regulatory policymaking agenda, providing an avenue for increased individual choice and more efficient and innovative lawmaking. Accordingly, the core argument in this article promotes the redistribution of marijuana regulatory authority away from the federal government and into the hands of the states and local authorities.

After first outlining the current regulatory framework, this Part argues for the rejection of federal control over marijuana policymaking. Noting the federal government's failure to account for state innovation and autonomy, the first section utilizes public choice theory to establish a state-based framework akin to alcohol regulation following the Twenty-First Amendment. The following section explains criticisms of such a position, but ultimately dispels these analyses in favor of the state as central decision-maker. The following section, however, points out, and expands upon, two well-founded critiques of consolidated state control so as to build on the decentralization framework; placing state and local politics at the forefront of the marijuana regulatory regime.

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A. Federal Involvement in Drug Policy

Ironically, current drug policy can best be described by the “Cooperative Federalism” framework. This regulatory depiction is “a combination of federal policy mandates and inducements (such as conditional grants) that require or provide strong financial incentives for states to implement the federal policy.”⁴⁶ National policy issues that are not only resource intensive, but also respond to hypothetical state-to-state externalities further buoy the federally dominated regulatory regime.⁴⁷ Sparked by states enacting reactive policies to a particular problem, the federal government responds at the behest of states and interest groups most invested in the issue.⁴⁸

On one hand, states concerned about the capacity to fund these programs and the ability to successfully implement the program if other states do not conform push the federal government to enact a national program.⁴⁹ On the other hand, federal politicians can garner the political support of vocal interest groups,⁵⁰ while only paying for part of the overarching program.⁵¹ In the context of drug policy, “Cooperative Federalism” is illustrated by the pioneer states that first prohibited marijuana, and the resulting federal program, implemented through the CSA and the “War on Drugs.” As the “Cooperative Federalism” framework predicts, the drug regulation dynamic balances

⁴⁶ O’Hear, *supra* note 7, at 843-44.

⁴⁷ *Id.* at 844-45.

⁴⁸ See Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 558 (2000).

⁴⁹ *Id.*

⁵⁰ ZIMRING & HAWKINS, *supra* note 6, at 167. This framework is undoubtedly played out in the drug policy arena, where federal enforcement accounts for roughly one percent of marijuana prosecution, and the “War on Drugs” has been a steadfast political soapbox.

⁵¹ *Id.* (estimating that the federal government pays somewhere between thirty-five and fifty percent of the total cost of the “War on Drugs”).

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“federal desires for control (and hence political support) and . . . engagement of state and local law enforcement in the war on drugs (and hence minimization of costs to the federal budget).”⁵²

Extensive federal involvement, however, does not leave adequate room for state innovation in the drug policy arena.⁵³ Rather, this paradigm is only responsive to the dynamic wherein states and the federal government express views that are in agreement, or at the very least, that can be squared through political compromise.⁵⁴ As a result, states are left to either venture on their own, in defiance of federal policy initiatives, or maintain some complicity with the “War on Drugs.”

B. Federal Drug Regulation is Hampering the Market for Marijuana Policy

Amidst the federal drug policy debate, there are abundant theories for optimal policymaking and response to population preferences. These theories are based on principles of federalism, public choice, and efficient competition, and range from strong federal control to variations of hybrid state-federal policymaking that either attempt to explain the current dynamic or argue for a shift in regulatory policy to better engender efficient drug policy.

This article advocates for decentralized drug policymaking in an effort to promote democracy, autonomy, and efficiency. The federal government has instituted a “War on Drugs,” stemming from political and moral opposition that predominantly began in the 1970s. Out of political necessity and increasing violence attributed to drug trafficking, the federal executive branch invested

⁵² O’Hear, *supra* note 7, at 848.

⁵³ *See id.* at 853.

⁵⁴ *See id.*

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ever-increasing resources into drug regulation and enforcement.⁵⁵ Rather than promoting uniformity, curing hypothetical negative externalities, or stemming drug-use, the federal drug regime led to divergent state drug policies⁵⁶ and an Executive Order that retreats from the strictures of the CSA.⁵⁷ This drug regime also confuses the citizenry and retail merchants as to how the federal government will react to marijuana use, possession, and distribution.⁵⁸

In contrast to federal marijuana laws, alcohol policy covering use and distribution is largely left to the states.⁵⁹ Given the similarities between these two substances,⁶⁰ it is relevant, if not absolutely necessary, to compare the maladies documented from alcohol prohibition in the 1920s in an effort to engender a new era of efficient and autonomous marijuana policymaking in the hands of state and local governments.

1. The Pitfalls of Prohibition

The federal government has three basic positions it can take in response to a given state policy: active support,

⁵⁵ See GEST, *supra* note 8, and accompanying text.

⁵⁶ See Nat'l Org. for the Reform of Marijuana Laws, *supra* note 29 and accompanying text.

⁵⁷ See Memorandum from David W. Odgen, *supra* note 28 and accompanying text.

⁵⁸ See, e.g., *Marijuana USA* (CNBC television broadcast Dec. 8, 2010); *Marijuana Bill in Congress: Barney Frank, Ron Paul Legislation Would End Federal Ban on Pot*, HUFFINGTON POST, (June 22, 2011) http://www.huffingtonpost.com/2011/06/22/marijuana-bill-barney-frank-ron-paul_n_882707.html (noting several prominent federal drug raids despite an Executive Order purportedly ending enforcement of the CSA).

⁵⁹ BENJAMIN & MILLER, *supra* note 22, at 187.

⁶⁰ *Id.* at 15 (“The enactment of the Eighteenth Amendment in 1920 began the era known as Prohibition, whose parallels to the present are simply too compelling to ignore.”).

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neutrality, or active discouragement.⁶¹ In the drug regulation arena, the federal government's traditional stance has been based almost entirely on how closely state policy resembles the "War on Drugs" paradigm.⁶² In contrast, the federal government's role in the alcohol arena strongly supports state efforts at policymaking,⁶³ where the only independent roles for the federal government lie in labeling,⁶⁴ taxation,⁶⁵ and interstate distribution.⁶⁶

Current United States alcohol policy is hardly surprising given Prohibition's sordid past. On January 16, 1920, the Eighteenth Amendment to the Constitution went into effect and prohibited "the manufacture, sale, or transportation of intoxicating liquors . . . for beverage purposes. . . ."⁶⁷ Within a few short years, alcohol use once again became rampant, but was now unregulated, dangerous, and controlled by organized crime; prisons were overpopulated, and corruption in public officials was unprecedented.⁶⁸ Prohibition's failure is distinctly ironic,

⁶¹ O'Hear, *supra* note 7, at 853.

⁶² *Id.*

⁶³ U.S. CONST. amend. XXI, § 2; see BENJAMIN & MILLER, *supra* note 22, at 187 ("[P]rohibition was not repealed in 1933; only *federal* prohibition was repealed. The states and their local jurisdictions were free to exercise whatever degree of regulation, control, or prohibition of alcohol they felt appropriate. Indeed, the Twenty-first Amendment went one step further to reaffirm and strengthen the states' power to control alcoholic beverages: Section 2 of the amendment expressly prohibits the transportation or importation of alcohol into any state whenever and wherever such actions violate state and local laws.").

⁶⁴ See The Federal Alcohol Administration Act ("FAAA"), 27 U.S.C. § 205 (2006).

⁶⁵ BENJAMIN & MILLER, *supra* note 22, at 188.

⁶⁶ See FAAA, 27 U.S.C. §§ 201 - 219a. The federal government has, however, used financial incentives over highway funding to establish what amounts to a national minimum drinking age. See 23 U.S.C. § 158 (2006).

⁶⁷ U.S. CONST. amend. XVIII.

⁶⁸ Mark Thornton, *Alcohol Prohibition Was a Failure*, CATO INSTITUTE POLICY ANALYSIS NO. 157, 1 (July 17, 1991).

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given its lofty social and public health goals. Indeed, the “noble experiment” as it came to be known, “was undertaken to reduce crime and corruption, solve social problems, reduce the tax burden created by prisons and poorhouses, and improve health and hygiene in America.”⁶⁹ These goals are similarly idealized by the CSA,⁷⁰ which has been espoused as no less than the protector of the nation’s health and public welfare.⁷¹

Ignoring the pitfalls of Prohibition and the social ills befalling blind adherence to rigid moral high ground not only ignores potential economic boons due to product taxation and retail sale, but also leaves “controlled” substances to be bartered for in the underground market, adulterated by drug dealers, and subject only to regulation through the criminal underworld.⁷² To be sure, despite the noble ideals pushed by Prohibitionists in an effort to rid society of the social ills created by alcohol, the homicide

⁶⁹ *Id.*

⁷⁰ CSA, 21 U.S.C. § 801(2) (2006) (“The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.”).

⁷¹ David E. Joranson & Aaron Gilson, *Controlled Substances, Medical Practice, and the Law*, in *PSYCHIATRIC PRACTICE UNDER FIRE: THE INFLUENCE OF GOVERNMENT, THE MEDIA, AND SPECIAL INTERESTS ON SOMATIC THERAPIES* 173-187 (Harold I. Schwartz ed., 1994) (“Today’s war on drugs is distinguished by intense media coverage of drug-related crime, new antidrug laws, and efforts to educate schoolchildren and the public to ‘just say no’ to drugs. The message is clear: Drugs are dangerous and must be avoided.”).

⁷² The theory known as the “Iron Law of Prohibition” posits that as drug and alcohol enforcement increases so does the potency, variability, and adulteration of the substances. See Richard Cowan, *How the Narcs Created Crack*, *NATIONAL REVIEW*, Dec. 5, 1986, at 30-31. Further, the drugs will not be produced or consumed under normal market constraints, potentially destroying any possible benefits attributed to the decrease in consumption ascribed to the law in the first instance. See MARK THORNTON, *THE ECONOMICS OF PROHIBITION* 176-79 (1991).

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rate increased by seventy-eight percent during Prohibition, all other crimes increased by twenty-four percent, and arrests for drunkenness and disorderly conduct increased by forty-one percent.⁷³ In essence, “[m]ore crimes were committed because [P]rohibition destroy[ed] legal jobs, create[d] black-market violence, divert[ed] resources from enforcement of other laws, and greatly increase[d] the prices people ha[d] to pay for the prohibited goods.”⁷⁴ The analogy to marijuana is striking considering the enormous rate of violent crime attributed to drug *trafficking*, yet the exorbitant number of inmates in United States prisons are incarcerated as a result of simple drug *possession*.⁷⁵

2. A State-Based Solution to Federal Marijuana Prohibition

In response to the historically apt analogy to Prohibition and the arguable shortcomings inherent in the current federal drug regime, some commentators argue for adoption of the “Constitutional Alternative.”⁷⁶ Finding support in basic public choice theory, supporters of the “Constitutional Alternative” argue for a basic reversion of authority to the states, wherein “the power to control the manufacture, distribution, and consumption of all psychoactives” would be under state control.⁷⁷ Strongly resembling the current federal-state dynamic over alcohol distribution,⁷⁸ this dynamic, however, would leave the regulation of interstate drug distribution to the federal government.⁷⁹ Rather than purporting to legalize marijuana distribution, this power-shift is “intended to provide states

⁷³ Thornton, *supra* note 68, at 6.

⁷⁴ *Id.*

⁷⁵ See Ahdieh, *infra* note 187 and accompanying text.

⁷⁶ BENJAMIN & MILLER, *supra* note 22, at 186-249.

⁷⁷ *Id.* at 194.

⁷⁸ See U.S. CONST. amend. XXI, § 2.

⁷⁹ BENJAMIN & MILLER, *supra* note 22, at 194.

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with greater autonomy by ‘permitting the states to choose drug-control strategies more in line with the preferences and circumstances of their citizens.’”⁸⁰

This state-based framework is supported by two overarching policy rationales: 1) citizen choice; and 2) policy innovation.⁸¹ Decentralization would promote more autonomy among the United States population to choose the laws and regulations that fit their lifestyle preferences so that if a “resident of one state does not like the rules imposed by the majority there, he is free to move to a state whose laws better suit his preferences or circumstances.”⁸² For example, if a nation consisted of one hundred people, forty of whom want marijuana to be legalized and sixty who would opt to retain the status quo, the ban on marijuana possession will remain in place—as it is in the CSA—leaving forty citizens unhappy with the law.⁸³ If, however, the nation were divided into separate states, each with the power to enforce its own laws, then more citizens would be content with the nation’s regulatory policy.⁸⁴ For instance, if one state contains fifty residents who favor the status quo and ten residents who would opt for legalization, while another state contains ten residents favoring continued illegality, and thirty who would opt for legalization, then one state will opt to maintain marijuana’s illegal status, while the other will opt for some form of legalization.⁸⁵ Simple arithmetic provides that eighty of the nation’s citizenry will be satisfied, while twenty are still

⁸⁰ O’Hear, *supra* note 7, at 854 (quoting BENJAMIN & MILLER, *supra* note 22, at 196).

⁸¹ BENJAMIN & MILLER, *supra* note 22, at 192-93.

⁸² *Id.* at 193.

⁸³ This example is analogized from O’Hear, *supra* note 7, at 857 (adapted from Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court’s “Unsteady Path”*: A theory of Judicial Enforcement of Federalism, 68 S. CAL. L. REV. 1447, 1467-68 (1995)).

⁸⁴ See O’Hear, *supra* note 7, at 857.

⁸⁵ See *id.*

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unhappy with the policy.⁸⁶ Adding in the option for citizen mobility and minimal transactions costs, the net benefits could be even greater.⁸⁷

Decentralization also promotes policy innovation where states with divergent political considerations experiment with new—and possibly more optimal—regulatory policy.⁸⁸ In stark contrast, a purely unitary federal policy only gives the political process one shot to respond to social needs.⁸⁹ As Justice Brandeis' famous dissent points out, “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁹⁰ The simplistic example above shows us how the policy innovation rationale easily fits into the public choice model wherein two states adopting different policies can adapt, amend, or reject their own policies in response to the consequences—both positive and negative—displayed by their peer state’s policy choices.⁹¹

Policymakers should take heed; just as Prohibition failed to cure, and even exacerbated, the social ills it attempted to curtail, the federal reign over marijuana law could do the same; it has already created an enormous taxpayer burden while leading to increased violent crime and addiction.⁹² Though federal legislators may lose the political soapbox federal regulation so conveniently provides, repeal of the CSA (as it relates to marijuana) will lead to the same benefits we saw following enactment of

⁸⁶ *See id.*

⁸⁷ *See id.*

⁸⁸ *See* BENJAMIN & MILLER, *supra* note 22, at 193.

⁸⁹ *See id.* at 193.

⁹⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁹¹ O’Hear, *supra* note 7, at 858.

⁹² Thornton, *supra* note 68, at 8-9.

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the Twenty-First Amendment:⁹³ reduced corruption and organized crime, job creation, and invigorated addiction support programs.⁹⁴

III. Spillover Effects and Negative Externalities: Evaluating the Criticisms of Consolidated State Control

Commentators have not unanimously rejoiced at the prospect of bolstering state power in drug policymaking. Rejecting the “Constitutional Alternative” approach to United States drug policy, Michael O’Hear argues that the federal government must “adopt a clear, coherent policy towards state innovation,”⁹⁵ through the adoption of a theory of government control he labels the “Competitive Alternative.”⁹⁶ O’Hear critiques the purely state-based policymaking approach, arguing that it may actually “reduce the degree of decentralization in national drug policy by consolidating state control, and . . . [producing] perverse incentives that warrant federal intervention.”⁹⁷ The first section to this Part outlines O’Hear’s concerns with an outright reversion of federal power to state regulatory authority. The following section attempts to rebut O’Hear’s most salient critiques by utilizing traditional theory in the field of jurisdictional competition. The next section follows with an analysis of the focal points of O’Hear’s “Competitive Alternative,” evaluating the federal media machine and asset forfeiture laws. Finally, this Part attempts to reconcile and incorporate some of O’Hear’s most salient and practical points with this article’s approach to state control over marijuana regulatory policy.

⁹³ U.S. CONST. amend. XXI; *see also* Thornton, *supra* note 68, at 1 (“The evidence affirms sound economic theory, which predicts that prohibition of mutually beneficial exchanges is doomed to failure.”).

⁹⁴ Thornton, *supra* note 68, at 8-9.

⁹⁵ O’Hear, *supra* note 7, at 853.

⁹⁶ *Id.* at 873.

⁹⁷ *Id.* at 859.

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A. O'Hear's Critique

Perhaps counter-intuitively, O'Hear argues that *carte blanche* state control could lead to less local autonomy than under the "Cooperative Federalist" regime.⁹⁸ This is so because much of the support for federal drug control goes directly to localities—*e.g.* monetary grants, referral for federal prosecution, and equitable sharing statutes that allow local enforcement to keep some of the proceeds of drug confiscations.⁹⁹ Local autonomy may be engendered due to federal prosecutorial incentives as well, where United States Attorneys are subject to political pressures and must address local needs.¹⁰⁰ At the very least, O'Hear argues that state regulatory control would not clearly do a better job of regulatory policymaking than the current regime by stating that, "[n]otwithstanding the benefits of decentralization, federal control may still be justified on the basis of 'Race to the Bottom' pressures or spillover effects."¹⁰¹ He argues that dominant state regulatory authority may create a "Race to the Bottom" market failure wherein states will create continually relaxed marijuana regulation laws in an effort to garner tax revenues from legalized sale and distribution.¹⁰²

The critique further predicts that "spillover effects" may undermine the workability of such a decentralization framework because states that relax their drug policy may create problematic negative externalities in "neighboring get-tough states."¹⁰³ O'Hear points out that a significant

⁹⁸ *Id.* at 862.

⁹⁹ *Id.*

¹⁰⁰ See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 790 (1999).

¹⁰¹ See O'Hear, *supra* note 7, at 866.

¹⁰² See *id.* at 866-67.

¹⁰³ See *id.* at 867.

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part of the cost of marijuana lies in the risk and subterfuge involved in the illegal trafficking regime, which inflates the price.¹⁰⁴ Consequently, when states legalize the process, prices will deflate, attracting potential users in neighboring states—states that maintain the illegality of marijuana use, possession, and distribution.¹⁰⁵

In response to the alleged failings of state regulatory dominance, O’Hear argues for implementation of his own “Competitive Alternative.” Though still grounded in a presumption of decentralized policymaking, O’Hear additionally focuses on reducing federal distortion of drug policy information, increasing local political control over federal drug enforcement decisions, and increasing local law enforcement accountability.¹⁰⁶

B. Countering the Critique

Despite O’Hear’s reasoned criticisms, state-based regulatory authority is in many ways hard to dispute. Moreover, hypothetical fears can be assuaged, and state-based authority validated, by analogy to the current alcohol regulation framework, which would take nothing more than repeal of the CSA as it relates to marijuana control. Further, the main argument for federalization¹⁰⁷—and one

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *See id.* at 873-74.

¹⁰⁷ Another argument for federal regulation in a given area is economies of scale in regulatory policy. Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1211 (1977). While the DEA certainly centralizes the economies of interstate enforcement and drug trafficking, more than ninety-five percent of enforcement is done at the state and local level as it stands now. As such, the economies of scale argument is largely inapplicable in the Cooperative Federalism framework. Not to mention, the argument posited in this article would maintain federal enforcement of

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recognized by O’Hear¹⁰⁸—often lies in an attempt to curtail negative externalities and potential “races to the bottom” among states.¹⁰⁹ It is unclear, however, that federal regulation would be the answer, even if these market failures existed. More relevant to this discussion is the uncertainty that state-based marijuana policy is likely to lead to the problems highlighted in O’Hear’s critique.

1. Federal Regulation May Not be the Answer to a Race to the Bottom for Marijuana Laws

As previously discussed, O’Hear points out the likelihood of a “Race to the Bottom,” and potential spillover effects resulting from the decentralization of drug policy.¹¹⁰ A common solution to these state-based market failures is preemptive federal regulatory authority.¹¹¹ Picking up, however, on Richard Revesz’s work in the environmental market for laws, federal regulation is not always the quick fix to market failure that it is presumed to be.¹¹² The typical argument for federal authority is simple; where federal regulation preempts state policymaking in

interstate trafficking and international crime, maintaining the existing economies of scale where they are utilized most effectively.

¹⁰⁸ See *supra* Part III. A.; O’Hear, *supra* note 7, at 866-67.

¹⁰⁹ The “Race to the Bottom” has even been utilized to justify overarching federal regulation on mobile capital. See Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1194 (1988). Preeminent legal scholars have even cited the “Race to the Bottom” as the impetus behind The New Deal. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 505 (1987).

¹¹⁰ See O’Hear, *supra* note 7, at 866

¹¹¹ See, e.g., *id.*

¹¹² Outside the environmental realm, and quite applicable to the market for criminal laws, many commentators have simply noted that the federal government is a poor conduit for creating and maintaining efficient penal laws. See, e.g., Wayne A. Logan, *Crime, Criminals, and Competitive Crime Control*, 104 MICH. L. REV. 1733 (2006).

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the field, states will no longer be able to engage in an inefficient policy battle with negative social utility.¹¹³ Revesz used federal authority in environmental policy to rebut the preemption rationale:

[F]ederal environmental standards can have adverse effects on other state programs. Such secondary effects must be considered in evaluating the desirability of federal environmental regulation. Most importantly, the presence of such effects suggests that federal regulation will not be able to eliminate the negative effects of interstate competition. Recall that the central tenet of race-to-the-bottom claims is that competition will lead to the reduction of social welfare; the assertion that states enact suboptimally lax environmental standards is simply a consequence of this more basic problem. In the face of federal environmental regulation, however, states will continue to compete for industry by adjusting the incentive structure of other state programs. Federal regulation thus will not solve the prisoner's dilemma.¹¹⁴

¹¹³ See Revesz, *supra* note 35, at 1211-12. *But see* Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996). It is also interesting to point out another claim about the necessity of federal law based on public choice theory: "state political process[es] systematically undervalue the benefits of environmental protection or overvalue the corresponding costs, whereas at the federal level the calculus is more accurate." See Revesz, *supra* note 35 at 1212. Revesz rebuts this claim by pointing out that rather than a failure in the market for industrial locational decisions, this rationale is really about failures in the political process and proper information. *Id.* at 1223-24.

¹¹⁴ Revesz, *supra* note 35, at 1246.

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Revesz simply points out that regulation and social welfare are not created in a vacuum. The government should, and does, regulate in a complex matrix of policies involving a number of different variables that all impact each other. To take one of the variables that suffers from market failure and impose a uniform federal standard upon it does not necessarily lead to increased social welfare on the whole. In essence, desirable regulation is too complex to achieve through piecemeal centralization; it is akin to plugging the dam with a federal forefinger while watching the wall fissure just out of reach. Unfortunately for federalism and state autonomy, the theoretical result from such an approach is complete centralization in the federal government.¹¹⁵

So what is to be made of the environmental-marijuana analogy? Revesz points to competing regulatory variables in the environmental arena, like workers' rights and corporate taxation, which are inevitably tied to industry location decisions.¹¹⁶ Thus, when several variables play into corporate decision-making, one state-based regulatory change is unlikely to provide the incentives necessary to propagate a "Race to the Bottom."

A possible counterargument to the application of this analogy here may elucidate a number of distinctions in marijuana regulation. For example, political decisions in the environmental arena are often aimed at maintaining the status quo—keeping industry in place or simply combating more stringent environmental policies—while progressive marijuana regulation runs against the status quo. Thus, rather than Revesz's world of environmental regulations

¹¹⁵ *Id.* at 1247 ("The prisoner's dilemma will not be solved through federal environmental regulation alone, as the race-to-the-bottom argument posits. States will simply respond by competing over another variable. Thus, the only logical answer is to eliminate the possibility of any competition altogether. In essence, then, the race-to-the-bottom argument is an argument against federalism.").

¹¹⁶ *Id.* at 1245-47.

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playing a small factor in business incentives, marijuana regulation may play out differently. To be sure, political inertia is undoubtedly an important consideration when confronting change. Here, however, it is less than certain that the pivotal “status quo” distinction makes a difference in the theoretical argument; or practically speaking, whether it creates a barrier at all. Rather, it seems that the anti-drug status quo is less of a political fallback and more of a public perception and interest group driver that would be balanced in a jurisdictional competition framework. In fact, it is more likely that the complexities of regulatory dynamics would be more robust in the market for marijuana than contemplated in Revesz’s critique of federal oversight in the environmental arena.

Comparing the market for marijuana laws to the environmental law patchwork, there are several apparent variables in a complex regulatory scheme that would play against a centralization argument. Simply speaking, one such variable lies in economic growth itself. Much like pollution, if a state is not allowed to provide for legal marijuana sales—and hence benefit from economic growth and taxes—the state may loosen standards in other areas to compensate. Further, drug tourism is not an unheard of phenomenon; it is seen internationally, as well as in states that allow for purchase without local citizenship.¹¹⁷ Federalized drug prohibition could thus lead to overly lax enforcement in tourism related to other vice goods like gambling or prostitution. Furthermore, it is plausible that, given the extensive prison overpopulation and the overwhelming burden faced by enforcement authorities, policymakers will institute overly lenient penalties for non-

¹¹⁷ See Yaniv Belhassen, Carla Almeida Santos & Natan Uriely, *Cannabis Use in Tourism: A Sociological Perspective*, 26 LEISURE STUDIES 303-19 (2007); See also Avelardo Valdez & Stephen J. Sifaneck, *Drug Tourists and Drug Policy on the U.S.-Mexican Border: An Ethnographic Investigation of the Acquisition of Prescription Drugs*, 27 J. OF DRUG ISSUES 879-97 (1997).

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drug crimes or prosecutors may simply not enforce crimes to the extent of the law. In sum, just as Revesz argues that federal oversight is an unwise option for corrective regulation in the environmental arena, preemptive regulation in marijuana regulation is similarly disjunctive. Even if a “Race to the Bottom” does exist for marijuana laws, federal oversight may lead to inefficient regulation in other economic areas, especially tourism, in addition to penal laws and their enforcement.

2. It is Not Clear that Jurisdictional Competition for Marijuana Laws Will Lead to a Race to the Bottom Among States

The preceding discussion may be largely irrelevant, however, if marijuana policy is not conducive to “Race to the Bottom” or negative externality market failures. In fact, there are several reasons we would not expect to see these economic failures play out in the realm of marijuana policy.

In the criminal justice arena, scholars focus extensively on the effects of penalties on crime displacement and jurisdictional infighting that may lead to inefficient collective-action problems. This market failure contemplates peer jurisdictions “spending increasingly high resources on their criminal justice system[s] simply to deflect crime to their neighbors.”¹¹⁸ Indeed, “in recent decades [states] have shown increasing awareness of the criminal justice policies of their sister states.”¹¹⁹ Scholars utilizing this approach are apt to recognize the need for federal oversight to eliminate the state “race” to overly harsh criminal penalties.¹²⁰ As previously discussed, a similar argument has been heavily cited and remarked upon

¹¹⁸ Teichman, *supra* note 25, at 1835; *see also* Logan, *supra* note 112, at 1733 (arguing against a federal approach to criminal policymaking).

¹¹⁹ Logan, *supra* note 112, at 1735.

¹²⁰ *Id.*

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in the environmental field; noting the argument for federal regulation to circumvent a state-industrial “Race to the Bottom” over pollution standards.¹²¹ The clearly established “Race to the Bottom” argument in other areas can certainly be applied to criminal justice standards, wherein criminals are assumed to be rational actors and will commit crimes in the jurisdictions where the costs associated with illegal activity are the lowest.¹²² When one state implements stricter criminal laws or penalties, it is posited that criminals will at least consider relocating to a jurisdiction with more lenient standards.¹²³ In the face of criminal displacement, recipient states that presumably do not want the social ills associated with more criminals among its populace will respond in-kind and institute even harsher penalties in an effort to displace the criminal population within its borders.¹²⁴ This established model, however, only reasonably applies to criminal activities with little to no societal benefits; for instance, violent crimes, sex crimes, and larceny.

In contrast, regardless of the negative effects of drug-use itself, a large proportion of the negative societal consequences of criminal drug activity are due to the nature of illicitness itself. To be sure, while drug use may lead to community costs in the form of increased health care outlays, rehabilitation, and reduced economic productivity,

¹²¹ See, e.g., Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 747 (1977); Stewart, *supra* note 107, at 1212 (“Given the mobility of industry and commerce, any individual state or community may rationally decline unilaterally to adopt high environmental standards that entail substantial costs for industry and obstacles to economic development for fear that the resulting environmental gains will be more than offset by movement of capital to other areas with lower standards.”). *But see* Revesz, *supra* note 35.

¹²² See Teichman, *supra* note 25, at 1835.

¹²³ *Id.*

¹²⁴ *Id.*

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the overwhelming demand for drugs creates an enormous underground market,¹²⁵ policed by drug dealers, street gangs, organized crime syndicates, and drug cartels. Whereas government-sanctioned markets are transparent and regulated, underground “shadow economies”¹²⁶ lead to regulation by the hand of distribution, the criminal underworld and organized crime syndicates. The end result is a drug trade that leads to overwhelming violence, not just in manufacturing countries, but also in developed countries, which fuel the demand for these illicit substances.¹²⁷

On one hand, federal regulation of drug markets has led to remarkable societal consequences in the form of crime and violence. On the other hand, criminal justice theorists suggest a potential “Race to the Bottom,” leading to overly *harsh* criminal penalties. It is not clear, however, that a “Race to the Bottom” will occur in the marijuana market. Empirics and logic suggest a successful and societally beneficial market for drug legalization.¹²⁸ For

¹²⁵ U.N. OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT 2010, U.N. Sales No. E.10.XI.13 (2010), available at <http://www.unodc.org/unodc/en/data-and-analysis/WDR-2010.html> (estimating the world drug economy to be near \$400 billion, ranking alongside oil and arms as the world’s largest traded goods).

¹²⁶ See Friedrich Schneider & Dominik Enste, *Hiding in the Shadows: The Growth of the Underground Economy*, 30 ECON. ISSUES 1 (2002).

¹²⁷ The Federal Bureau of Investigation has estimated that roughly five percent of United States murders are drug-related. U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, NCJ-149286, FACT SHEET: DRUG-RELATED CRIME (Sept. 1994) available at bjs.ojp.usdoj.gov/content/pub/pdf/DRRC.PDF. Even more astoundingly, the violence fueled by Mexican drug cartels has been estimated to account for ninety percent of killings in Mexico. Traci Carl, *Progress in Mexico Drug War is Drenched in Blood*, ASSOCIATED PRESS, (Mar. 10, 2009, 6:28 PM), <http://msnbc.msn.com/id/29620369/ns/world-news-americas/t/progress-mexico-drug-war-blood-drenched/#.TpW6kHKyDaO>.

¹²⁸ As an example, Colorado alone generated 2.2 million dollars in tax revenue from marijuana sales directly, and another 2.2 million dollars from increased sales tax revenues. John Ingold, *Medical-Marijuana*

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example, in contrast to state exile of pedophiles and violent criminals, states stand to benefit from increased tax revenues,¹²⁹ less violent crime,¹³⁰ and significant economic growth by taking an already existing market aboveground.¹³¹ In order for the “Race to the Bottom” theory to attach, there must be negative externalities sufficiently realized to incentivize states to change their laws in an attempt to remedy those externalities.

First, consider Teichman’s theory of overly strict regulation to effectively exile criminals from within a jurisdiction. This is hardly a far-fetched theory. Rather, state and local policies regarding ex-convicts have shown just such an effort to exile criminals through bussing and relocation efforts.¹³² Taking the next step, altering penal laws to move criminals to other jurisdictions is also plausible. However, this theory’s application in the realm of marijuana laws is less than certain and seemingly far-

Sales Tax Nets \$2.2 Million for Colorado This Year, DENVERPOST.COM (Nov. 23, 2010, 6:36 AM), http://www.denverpost.com/news/marijuana/ci_16688199. Colorado Springs, a city with under 500,000 residents, received \$380,000 in sales tax attributed to marijuana dispensaries. *Id.*

¹²⁹ See Ingold, *supra* note 128; *Projected Marijuana Tax Revenues*, CNN MONEY (last visited Nov. 1, 2011), http://money.cnn.com/pf/features/lists/taxes_marijuana/table.html (citing JEFFREY MIRON, BUDGETARY IMPLICATIONS OF MARIJUANA PROHIBITIONS (June 2005), available at <http://www.prohibitioncosts.org/mironreport.html>).

¹³⁰ See U.S. DEP’T. OF JUSTICE, *supra* note 127.

¹³¹ An independent financial analysis firm projected medical marijuana sales to reach 1.7 billion dollars in 2011. *The State of the Medical Marijuana Markets 2011: First Ever Investor-Grade Analysis Report of the Marijuana Marketplace in the United States*, FRESHNEWS.COM, (Mar. 24, 2011, 7:20 AM), <http://freshnews.com/news/470983/-the-state-medical-marijuana-markets-2011-first-ever-investor-grade-analysis-report-mar>. The report projects that medical marijuana sales will reach 8.9 billion dollars—nearly half the estimated illegal market for marijuana, if 20 more states allow its sale for medical use. *Id.*

¹³² See Roger Roots, *When the Past is a Prison: The Hardening Plight of the American Ex-Convict*, 3 JUSTICE POL. J. 1 (2004).

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fetched. The negative externalities associated with criminal activities seemingly stem mostly from violence and economic losses through theft. Though addiction, medical problems, homelessness and vagrancy undoubtedly contribute to the attacks against legalization, these factors exist whether marijuana is legal or illegal, as we have seen for decades. But if a jurisdiction legalizes marijuana, the violent crime variable will presumably be eliminated as the market moves out of the hands of organized crime and into retail outlets.¹³³

The more relevant question is whether marijuana use will increase with legalization; and if it does, whether the negative impacts of citizen use will outweigh the benefits, such that the jurisdiction will seek to move users outside its boundaries. Even assuming that most of the populace will begin to use, or even *abuse*, marijuana, it does not necessarily follow that there will be far-reaching negative public impacts. Though it is certainly possible that worker productivity may decrease, while accidents, DUIs, and addiction rehabilitation needs increase.

It is also necessary to consider moral stigma and negative externalities associated with inter-jurisdictional trafficking.¹³⁴ Policymakers must balance these negative implications with the possible benefits of taxation, reduced prison populations, increased citizen autonomy and happiness, and reduced violent crime through elimination of the drug underworld. In contrast to the unsavory criminal activities noted by Teichman, where the criminal element moves from one jurisdiction to another, unwanted by all, marijuana users and would-be distributors would bring both benefits and possible detriments to a jurisdiction, leaving

¹³³ See Schneider & Enste, *supra* note 126, at 1.

¹³⁴ Assume that State A legalizes marijuana and State B maintains the status quo of illegal use, possession, and distribution. While citizens of State B could move to State A to reap the benefits of legal marijuana use, many will choose not to if the costs of transporting marijuana back to their home State remain low enough.

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state and local government to make the decisions jurisdictional competition theorists argue should be made by decentralized government in order to further efficient and innovative lawmaking.

Even if Teichman's "Race to the Bottom" for overregulation does not apply to the market for marijuana laws, an argument could be made that the opposite may be true—under-regulation incited by jurisdictions competing for tax revenues, drug tourism, and economic growth. But just as liquor laws faced the Teetotalers in the early 20th century, progressive drug policy faces a strong check through opposition in the religious right and parent advocacy groups, among many others. The marijuana policy battlefield offers a multitude of variables for policymakers to balance as they attempt to appease and attract a presumably mobile populace. As they have been in the federal regulatory framework, interest groups will be at the forefront of marijuana policymaking instituted by the states, with constituencies influenced by a variety of considerations including corporate, retail, and direct taxation; citizen autonomy and happiness; economic growth; and reduced crime and prison populations.¹³⁵

¹³⁵ "No more than 25 percent of Americans arrested for drugs are involved in "trafficking," and almost all of those are petty, small-time dealers. The remaining 75 percent of the arrests are for simple possession, often for marijuana." BENJAMIN & MILLER, *supra* note 22, at 3. It should be noted that traditionally tough-on-crime states—also generally conservative—like "hang-em-high Texas," have led the way in drug sentencing reform in an effort to reduce the size of their prison populations. See *Right and Proper: With a Record of Being Tough on Crime, The Political Right Can Afford to Start Being Clever About It*, THE ECONOMIST, (May 26, 2011), <http://www.economist.com/node/18744617> (noting that the experimentation with alternative forms of punishment for drug crimes has emanated from the fact that "[m]ore people have been jailed for more crimes—particularly non-violent drug-related crimes—and kept there longer"). Texas, for instance, has instituted mandatory probation for first-time, low level

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Driving anti-marijuana legislation are various interest groups intent on entrenching the status quo. For example, the biggest contributors to Partnership for a Drug-Free America are the Prison Industrial Complex, Big Pharmaceutical, Big Tobacco, and the alcohol manufacturing industry.¹³⁶ If under-regulation is the concerning factor in a “Race to the Bottom” analysis, these major interest groups will play a strong role in combating increasingly lenient marijuana policy. Considering a “Race to the Bottom” may end in overly restrictive or overly lenient lawmaking depending on the interests, the aforementioned competing interests should be robust enough to avoid a “race” in either direction. Given the extent of politically salient variables in play, state autonomy in policymaking would seem particularly apt in the context of marijuana policy. Indeed, principles of federalism suggest that states be able to choose the laws most applicable to the characteristics of the jurisdiction “thereby giving mobile citizens many different regulatory regimes from which to choose when selecting a place to live.”¹³⁷

Stepping outside the realm of theory, reality has similarly not played out the way an under-regulating “Race to the Bottom” would dictate. Only sixteen states¹³⁸ have made progressive marijuana regulation in the face of the

offenders, and devoted more than \$200 million to drug treatment programs in lieu of traditional prison sentences. *Id.*

¹³⁶ The main contributors to Partnership for a Drug-Free America included Proctor and Gamble, Bristol-Myers Squibb, Johnson & Johnson, Merck, Philip Morris, RJ Reynolds, and Anheuser-Busch. *Partnership for a Drug Free America, Sources of Funding 1988-1991*, SCHAFFER LIBRARY OF DRUG POLICY, (Dec. 31, 1991), <http://www.druglibrary.org/schaffer/library/pdfa1.htm>.

¹³⁷ Todd E. Pettys, *The Mobility Paradox*, 92 GEO. L.J. 481, 481 (2004).

¹³⁸ See Nat’l Org. for the Reform of Marijuana Laws, *Medical Marijuana*, *supra* note 31 and accompanying text.

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current administration's tolerant Executive Order¹³⁹ and general federal reliance on state enforcement.¹⁴⁰ Though this article's proposed solution would remove the supposed federal barrier, possibly giving hesitant states the last push necessary to enter the "race" to legalization, a map of current drug laws indicates that the impetus for progressive marijuana laws is likely more strongly tied to geographical ideologies and preferences than fear of the federal government's stance on drug laws.¹⁴¹ For instance, the most progressive laws tend to be on the West Coast: California, Nevada, Oregon, Washington, Hawaii, Alaska, Montana, and Colorado.¹⁴² In contrast, southern "bible belt" states have the strictest stance on marijuana with essentially zero-tolerance laws in Texas, Louisiana, Alabama, South Carolina, Georgia, Florida, Arkansas, Oklahoma, and Tennessee.¹⁴³ While hardly conclusive evidence of ideological preference influencing marijuana policymaking, the religious, tobacco, and prison industrial interest groups' stranglehold over the Southeast may well keep states in this region from entertaining progressive legalization laws, even if the federal government leaves the picture. This is not surprising given that analogous alcohol bans in counties and municipalities lie almost exclusively in the Southeast.¹⁴⁴

¹³⁹ See Meyer & Glover, *Medical Marijuana Dispensaries Will no Longer be Prosecuted*, U.S. Attorney General Say, *supra* note 28.

¹⁴⁰ See Mikos, *supra* note 28 and accompanying text.

¹⁴¹ Nat'l Org. for the Reform of Marijuana Laws, *Marijuana Law Reform in the United States: April 2010*, NORML.ORG, (last visited Nov. 1, 2011), <http://stash.norml.org/wp-content/uploads/medipot-states-2010-04.jpg>.

¹⁴² *Id.*

¹⁴³ The sole outlier in this southeastern geographic area is Mississippi, which has decriminalized marijuana use and possession. *Id.*

¹⁴⁴ Gary Schulte et al., *Consideration of Driver Home County Prohibition and Alcohol-Related Vehicle Crashes*, 35 ACCIDENT ANALYSIS AND PREVENTION 641-48 (2003).

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Despite the uncertainty inherent in jurisdictional competition for marijuana laws, state autonomy seems to be the best alternative in an effort to achieve the greatest public welfare. In the absence of over-burdensome negative externalities and a race to overly strict or overly lax marijuana laws, the federal government's role should be limited to international traffic cop and interstate referee.

Even if the aforementioned market failures do exist in a competitive framework for marijuana regulation, it is wholly unclear that the federal government's role as uniform legislator is the proper solution where states have other regulatory avenues to exploit in an effort to establish economic growth and constituent appeasement. Even Teichman concedes that "the U[nited] S[tates] government has a dismal track record when it comes to criminal justice, very often manifesting an irrational 'tough on crime' attitude irrespective of legislative context."¹⁴⁵ Prohibition's catastrophic failure should give policymakers keen background insight into marijuana's current federal regulatory future, opening the door for state and local authority with the repeal of the CSA's prohibition on marijuana use, possession, and distribution.

C. The Competitive Alternative's Practical Concerns

Though the market for marijuana policy likely includes the competing interests necessary to avoid the problems encountered in state-based market failures, O'Hear nonetheless makes several salient suggestions for creating an efficient model for decentralization of marijuana policy and enforcement, regardless of the federal government's ultimate policymaking role.

¹⁴⁵ Logan, *supra* note 112, at 1745 (quoting Teichman, *supra* note 25, at 1874).

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The “Competitive Alternative” first highlights federal policies and practices that distort the political debate over drug policy, hampering state and local efforts that conflict with the federal “War on Drugs.”¹⁴⁶ Federal control inhibits state-based policy on a number of fronts. For instance, the federal marketing machine places an overwhelmingly negative spin on marijuana and progressive drug enforcement policy.¹⁴⁷ This federal message stifles alternatives to the current status quo, including decriminalization or medical marijuana programs.¹⁴⁸ In response, the “Competitive Alternative” posits that federal funds for advertising and marketing might be decentralized and turned over to the states to use at their discretion, or at the very least, with minimal federal funding conditions attached.¹⁴⁹

In addition to revamping the federal media machine, O’Hear articulates a need for local oversight over federal enforcement.¹⁵⁰ This point harkens to the limited federal resources for drug policy implementation, yet acknowledges the overarching need for occasional federal enforcement and prosecution. O’Hear proposes a possible reform, requiring a local official, such as a District Attorney, to approve federal prosecutions within municipal boundaries so as to establish “systematic checks on federal enforcement discretion.”¹⁵¹

While O’Hear maintains some federal control, he does not discount the need for local policymaking and enforcement. The “Competitive Alternative” keenly looks to the incentives driving municipal actors who forge drug

¹⁴⁶ O’Hear, *supra* note 7, at 875.

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

¹⁴⁹ *Id.* at 875-76.

¹⁵⁰ *Id.* at 876.

¹⁵¹ *Id.* at 877. Though the example does include a federal “safety valve” for cases involving interstate commerce or those that are accompanied by unnecessary risks of substantial jurisdictional spillover concerns. *Id.*

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policy at the ground level, and points to the need for increased accountability of local law enforcement authorities.¹⁵² O’Hear cites the current dilemma over equitable sharing laws and the ability for local law enforcement to take property seized during drug transactions.¹⁵³ This scheme perversely incentivizes local law enforcement to over-enforce drug laws, while ignoring community preferences.¹⁵⁴ In response, the “Competitive Alternative” regime focuses on forfeiture law reform, redirecting the assets seized rather than simply eliminating equitable sharing laws.¹⁵⁵ Instead of pocketing forfeiture proceeds into local coffers, funds would be redirected to a state general fund, in which the state would have an incentive to redirect most of the funds back to the localities in an effort to reward enforcement, while maintaining a check on abuse of police authority.¹⁵⁶

Theories abound as to the best policy mechanism for drug policy; ranging most clearly from the recognizable regulatory framework invoked by today’s federal paradigm, to the sovereign-based proposal espoused herein. What today’s federally supreme drug law regime lacks, however, is the ability to adapt to, or account for, state innovation in drug policy. In response, this article calls for a public-choice mechanism of basic decentralization, empowering states at the expense of federal oversight. This type of argument has its potential critics, namely in Michael

¹⁵² O’Hear, *supra* note 7, at 879.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*; see also David W. Rasmussen & Bruce L. Benson, *Rationalizing Drug Policy Under Federalism*, 30 FLA. ST. U. L. REV. 679 (2003) (positing a similar argument). Note also that some states do already have these state general funds in place to direct equitable sharing forfeitures, but with federal involvement, local authorities can turn to the federal government who plays hand in hand with local forfeiture, possibly evading the checking measure sought by the fund redirection in the first instance.

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O’Hear and the “Competitive Alternative” model. Highlighting the danger of spillover effects or a potential “Race to the Bottom,” the “Competitive Alternative” calls for continued federal supremacy, with local control in the political and enforcement regimes, while systematically overhauling the federal media machine. In the end, there may be no perfect regulatory scheme, but if the past several decades of drug regulation have shown us anything, the United States fosters a vastly inefficient and over-budgeted federal drug regime imposed at the expense of state innovation. Recent state reforms have shown expansive state-based marijuana law reform and the federal government should respond in turn, ceding regulatory authority to the states and local governments.

D. The Give and Take – Putting the Competitive Alternative to Work

“[W]ithin our system of government, state control stands not as an endpoint on the decentralization spectrum, but as a midpoint between federal and local control.”¹⁵⁷ Indeed, O’Hear argues that the same tenets justifying decentralization to the states support further reversion to local governments.¹⁵⁸ For example, citizen mobility is greater at the local level than across state lines and, rather than fifty state-level policy innovators, localities would provide tens of thousands of opportunities for experimentation.¹⁵⁹ O’Hear’s “Competitive Alternative” makes local authorities the gatekeepers to federal enforcement authority.¹⁶⁰ Further, disassembling the federal media machine and eliminating the misaligned forfeiture

¹⁵⁷ O’Hear, *supra* note 7, at 860.

¹⁵⁸ *Id.* (citing Robert A. Dahl, *The City in the Future of Democracy*, 61 AM. POL. SCI. REV. 953, 968 (1967)).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

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laws are central propositions of the “Competitive Alternative.”¹⁶¹ While the previous section made the case for the “Constitutional Alternative,” supporting a strong decentralization framework, this section analyzes the applicability of O’Hear’s “Competitive Alternative” in an attempt to improve the state-based framework and respond to some of the likely shortcomings inherent in over-expansive decentralization.

1. Questioning the Localist Paradigm

The “Competitive Alternative” pushes strongly for extensive decentralization, past the state level and on to local authorities, while maintaining a co-extensive federal regime.¹⁶² Local governments, however, lack the financial resources of states and have insufficient economies of scale to justify expensive enforcement mechanisms.¹⁶³ In addition, while it is easier for criminals to cross municipality lines, local enforcement jurisdiction only extends to local boundaries.¹⁶⁴ Most importantly, local governments rely on the state to provide an overarching criminal code and prison system.¹⁶⁵ In O’Hear’s defense, he does acknowledge these problems, and notes a possible solution of state funding, while allowing for local implementation at municipalities’ discretion.¹⁶⁶ O’Hear argues that municipal decentralization accounts for local implementation instead of the state in the same way it does for state authority vis-à-vis the federal government; essentially the argument is that if some decentralization is good, then more is better.¹⁶⁷ The consequences, however,

¹⁶¹ *Id.*

¹⁶² O’Hear, *supra* note 7, at 861.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

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of policymaking authority may not affect local governments in the same way they do state governments. Indeed, citizen autonomy is undoubtedly benefited by even more localized policymaking, increasing the policy choices of United States citizens from fifty states to tens of thousands of counties or municipalities. But the ultimate answer may lie in the incentives already encountered by the entrenchment and proliferation of the federal “War on Drugs” in the first place; policymakers seek to gain political clout with their constituencies while paying for as little of the program as possible.¹⁶⁸ Just as federal legislators do not want to foot the bill for drug enforcement without the political windfall that comes with it, state legislators do not want to provide the implementation funds for policies that they may not agree with.

Given that the states currently enforce the majority of marijuana violations, implement and fund the penal institutions, and would be the main beneficiaries of state corporate, sales, and direct drug taxes, the lawmaking authority and implementation should remain with the states, rather than localities that do not have the means to implement their own policy choices. This is not to say that states could not relinquish exclusive control, leaving authority with the local government, just that they would not be forced to do so, as O’Hear seems to argue. Just as the Twenty-First Amendment places plenary control in the hands of the states, repeal of the CSA’s marijuana restrictions would leave authority and implementation solely to state discretion. While some states may pass policymaking authority down to localities, such an outcome would not be required, allowing state legislators to make the decision as to where state funds and the resulting political consequences go.

It is also unclear why O’Hear posits the need for local authorities to serve as gatekeepers to federal

¹⁶⁸ See *supra* Part II. A.

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enforcement authority¹⁶⁹ as opposed to a purely state-based mechanism, removing the need for federal enforcement in intrastate marijuana policy. While the local-federal cooperative would put more power in the hands of local authorities, the “Competitive Alternative” uses a roundabout mechanism for empowering local politicians, while still supporting federal entrenchment. Indeed, rather than bolstering extensive bureaucracy and the resulting squabble between state and federal officials—not to mention the looming threat of federal bullying of local District Attorneys—an alternative would be for states and local governments to maintain concurrent enforcement authority, keeping the federal government out of intrastate marijuana issues.¹⁷⁰

In sum, O’Hear’s localized enforcement regimes seem less responsive to the shortcomings of state-based regulatory authority, and more to amending some pitfalls in the federally dominated regulatory model. For instance, O’Hear argues for localization on one hand in making local law enforcement accountable to the local community, yet his framework notes that “local police would become answerable not only to federal law enforcement authorities, but also to local leaders who stand outside the law enforcement establishment.”¹⁷¹ Rather than decentralization and the workability of a state-local dichotomy in incentivizing efficient enforcement allocation, the “Competitive Alternative” seemingly adapts the current federal framework by instituting a more localized federal regime, appeasing decentralization advocates while tiptoeing around the status quo.

¹⁶⁹ O’Hear, *supra* note 7, at 860.

¹⁷⁰ This is not to say, however, that the federal government would not maintain an enforcement agency, like the DEA, to oversee interstate and international trafficking, or to enforce at the behest of the states as the need arises.

¹⁷¹ O’Hear, *supra* note 7, at 880.

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2. Learning From the Competitive Alternative

The “Competitive Alternative” does, however, make a good point about the perverse incentives generated by current forfeiture laws and articulates a very workable idea in the form of redirection to a state general fund.¹⁷² Because municipal actors respond to drug policies at the ground level, forfeiture and sharing laws incentivize local enforcement personnel to over-enforce drug laws in an effort to boost local coffers with the proceeds from drug busts. Rather than redirecting all *enforcement* to the state, O’Hear smartly recognizes the ability to redirect *assets* to the state level.¹⁷³

The “Competitive Alternative” also cogently points to the problems inherent in the federal framing of the drug issue to the American public.¹⁷⁴ The federal propaganda machine and its “War on Drugs” distorts the issues surrounding marijuana legislation and pits reform groups against politicians responding to the federal anti-drug stance. O’Hear sensibly argues for federal advertising funding to be directed instead to state marketing budgets or to Congressional spending bills.¹⁷⁵ The importance of this directive, however, may be limited under a “Constitutional Alternative” framework, as the federal government plays such a limited role in marijuana enforcement that continued federal advertising spending would be unlikely. Unlike the alcohol regulatory context, however, there are still many other drugs that would fall under the guise of the CSA, maintaining the federal government’s incentive to continue its campaign against illegal drugs. Thus, it does appear that some control over the federal media machine is necessary, and directing at least a portion of its funds as it relates to

¹⁷² See *supra* Part III. C.

¹⁷³ O’Hear, *supra* note 7, at 870.

¹⁷⁴ See *id.* at 875.

¹⁷⁵ See *id.* at 875-76.

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marijuana is imperative. In addition, stipulations as to the federal content and the overarching “War on Drugs” message would be essential to fostering state innovation and adoption of progressive marijuana policies.

Ultimately, O’Hear’s “Competitive Alternative” argument, while putting forth strong ideas for specific reforms, is seemingly unresponsive to any purported shortcomings of state-based regulatory authority. Instead of elucidating the decentralization regime he purports to stand behind, O’Hear makes adjustments to much of the federally entrenched framework we see in place today, without accounting for the reality, and necessity of, state innovation and competition in the market for marijuana. Nonetheless, O’Hear makes cogent points about the federal role in enforcement, incentives, and media content. Accordingly, this article recognizes the need to adopt reformed forfeiture laws, asset redirection, and redistributed government media funding so as to properly set the stage for state-based jurisdiction over marijuana laws.

IV. A Final Concern Raised by Decentralization: The “Race to Nowhere”

The previous Part set out to raise, and refute, some of the most salient concerns surrounding state consolidation of marijuana policy. Among the most prominent arguments against divergent state-based policymaking is the “Race to the Bottom” effect garnered by individualized competition for (or against) an identifiable social policy repercussion. As discussed previously, the variety of interests inherent in the market for marijuana do not lend it to a race to overly stringent or lenient regulation and increasingly inefficient outcomes inherent in one-upping neighboring states. Interestingly though, is the possibility not for a “Race to the Bottom,” but simply to one extreme or the other, giving a jurisdiction an all-or-nothing choice, legalization or a complete ban. This Part will first explain a previously

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undeveloped theory of market failure and inefficiency in state policymaking. The following section will outline the assumptions necessary for this market failure to come to fruition, ultimately concluding that the marijuana marketplace is not conducive to establishing a “Race to Nowhere.”

A. The “Race to Nowhere”

This hypothetical “Race to Nowhere” can best be envisioned through a basic example. Take, for instance, a state (State A) that chooses to maintain the status quo, keeping marijuana use, possession, and distribution illegal; presumably incentivizing users and illegal distributors to leave the jurisdiction. In contrast, another state (State B) legalizes and taxes marijuana, garnering the benefit of reduced crime and increased tax revenues. Both states will get what they want from their policy choices. But there still may be a middle jurisdiction; lest we forget, there are more than two options for marijuana regulation. For instance, a third state (State C) may simply decriminalize marijuana (make possession and use legal, but not distribution or trafficking) or institute misdemeanor possession laws, attracting users who no longer face criminal penalties. But in a regulatory framework where State A disincentivizes users and State B eliminates the market for criminal distribution, the organized criminal aspect of marijuana distribution will be faced with one option to stay in business—State C. All the marijuana users will be in State B or State C and the market for illegal distribution will be curbed in State B by legalized retail outlets.

Given this dilemma, a centrist state will reap few benefits of decriminalization, while attracting much of the unwanted criminal activity displaced by the other states. In this situation, centrist states may enter their own race, but not to the bottom or the top; rather to full legalization or

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illegalization in an effort to avoid the criminal element entrenched in illegal drug distribution.

B. Undercutting the Assumptions Necessary to Effectuate a “Race to Nowhere”

Clearly, the aforementioned result is not optimal for a state that, all else being equal, chooses decriminalization, medical marijuana, or drug treatment programs over full legalization or a complete ban. Policymakers faced with an all or nothing choice will opt for the lesser of two evils, whatever that choice might be, but inefficient regardless. This hypothetical, however, rests on several assumptions, none of which can be fully realized in a world of bundled laws and complex regulatory frameworks. For the “Race to Nowhere” to occur there must be citizen mobility, full information, and unrealized benefits from the centrist choice.

First, consider the ability and willingness of citizens to move from one jurisdiction to another based on the marijuana policies within the state. With more than fourteen million marijuana users in the United States, this is hardly a trifling variable.¹⁷⁶ But of those fourteen million users, it is entirely unclear how many would choose to move based on the legality of their marijuana use when all they have ever known is a complete ban. Moreover, it is questionable how many would choose to relocate at the expense of families, jobs, and geographic ties. Assuming that many users choose to remain in a total-ban jurisdiction, State A, criminal distributors would have a market in both State A and State C, the intermediate, decriminalized, jurisdiction. Given this counterargument to full mobility, we can expect a viable criminal distribution market spread across both abolitionist and intermediate jurisdictions. One

¹⁷⁶ *Overview of Drug Use in the United States*, INFOPLEASE.COM, (last visited Nov. 1, 2011) <http://www.infoplease.com/ipa/A0880105.html>.

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part of the hypothetical should remain true, however, in that the criminal element would remain displaced in State B, where distribution is legal, because the criminal distribution chain would be overwhelmed by regulated retail sales.

Unlike mobility, full information is more likely to come to fruition in this hypothetical. With the overwhelming use of the Internet and the salience of the marijuana policy debate, both consumers and distributors are likely fully aware of the relevant policies in place. On the demand side, any consumer making a decision to move jurisdictions based on the marijuana policy is undoubtedly informed of the law when making such a decision. Even if not making a mobility decision based on another jurisdiction's marijuana laws, it seems likely that a drug user, accustomed to illicit substance use and avoiding enforcement, will be aware of current policy and upcoming changes to policy. On the supply side, just as we would expect a businessman to know the regulations and laws that apply to the business, drug dealers or legal dispensaries will know the law, how to avoid or comply with it, and surely be abreast of changes in policy. The true uncertainty in full information is more likely to be through the lens of the policymaker. A legislator faced with battling interest groups may be more informed on highly specific issues and less apprised of the indirect criminal costs associated with marijuana distribution and displacement from other jurisdictions.

The costs and benefits of proposed intermediate policy is probably most difficult to project and account for in a hypothetical "Race to Nowhere." For such a race to occur, the hypothetical assumes that the benefits associated with a centrist marijuana policy choice would be outweighed by criminal activity within its borders based on the policy actions of State A and State B. However, given uncertain citizen mobility and possible criminal disbursement between State C and State B, the costs

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associated with such a choice may be limited. Further, state policymakers may not have full information on the consequences of their decisions relative to increased criminal distributor influx into the jurisdiction. Moreover, even if these two factors are fully realized, legislators may find that the benefits of an intermediate policy outweigh the costs of any criminal influx. For instance, reduced enforcement costs on minor possession may be redistributed to enforcement on distributors and trafficking or simply used for drug treatment. The intermediate policy itself may be focused on public health, instituting drug courts, or rehabilitation,¹⁷⁷ rather than turning a blind eye to addiction as many abolitionist states do, or simply promoting use as a legalization state does.

The “Race to Nowhere” is likely not a foregone conclusion, albeit relying on several assumptions that are almost impossible to predict. Focusing on the analogy to alcohol regulation leads to the conclusion that the race is at least plausible, though limited. While states are free to implement their own alcohol policies, none has kept alcohol completely illegal; some states, however, maintained prohibition for several years following enactment of the Twenty-First Amendment.¹⁷⁸ But some states do allow counties and municipalities to enact their own alcohol restrictions, and many have done so, opting for complete bans within county lines; restricted alcohol sales on certain days of the week; or requiring distribution through government suppliers.¹⁷⁹ While some of these limitations are less than a complete ban, and clearly not full legalization, neither are they akin to decriminalization where one side of the economic chain, consumption, is legalized and the other side, distribution, is criminal. Centrist alcohol ordinances, such as Sunday sales and

¹⁷⁷ See O’Hear, *supra* note 7, and accompanying text.

¹⁷⁸ BENJAMIN & MILLER, *supra* note 22, at 190.

¹⁷⁹ *Id.*

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government distribution, would not be expected to garner a bootlegging criminal element. Criminals are unlikely to move to take advantage of a one-day black market or to attempt to circumvent government distribution when consumers can easily accommodate the law and still consume alcohol. Liquor law regulation in this context has not progressed toward decriminalization or substance abuse programs in lieu of criminal punishment. Rather, alcohol policies reflect complete bans or legalization with retail restrictions. The alcohol analogy, though not perfectly aligned to marijuana regulation, seems to support a “Race to Nowhere.”

Even if a “Race to Nowhere” exists, the cure is not federal regulation. The Prohibition and its aftermath tells us that much. Beyond the alcohol regulatory analogy, the past generations of over-enforcement; billions of dollars of federal taxpayer money; seeming absence of a “Race to the Bottom” or substantial negative externalities; exceedingly high violent crime rates associated with illicit drugs; and unclear federal enforcement policy lead to the conclusion that decentralization is the best regulatory stance for marijuana laws.

IV. Conclusion

Currently, more than 24.8 million people are eligible to receive medical marijuana licenses under state laws, and approximately 730,000 people actually do.¹⁸⁰ Medical marijuana markets exist in seven states: California, Colorado, Michigan, Montana, Oregon, Washington and New Mexico and five more will open this year in Arizona, Maine, New Jersey, Rhode Island and the District of

¹⁸⁰ Teresa Novellino, *Will Pot Sell Better Than Sex?*, PORTFOLIO.COM, (Mar. 23, 2011), <http://www.portfolio.com/views/blogs/heavy-doses/2011/03/23/medical-marijuana-market-to-total-1-7-billion-in-2011-report-says>.

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Columbia.¹⁸¹ Economically speaking, the marijuana marketplace is projected to more than double within the next five years.¹⁸² Outside of the capitalist retail market for marijuana, the question remains whether there is a viable market for innovative state laws. As addressed in Part II.A.-B., the federal regime over marijuana laws is hampering innovation and efficient policymaking, leaving overly harsh federal laws that go largely unenforced in practice and by Executive Order. State legislators and enforcement authorities are left in the dark, and United States citizens are faced with an unclear state-federal dichotomy by which distribution may be illegal but consumption is decriminalized. Even more striking, dispensary operators may be legally licensed by the state and yet subject to federal enforcement for violation of the Controlled Substances Act.¹⁸³ Even outside the lack of clarity and poor suitability of federal authority, we should expect a fairly robust “market” for marijuana laws where there are competing interests, an informed and reactive populace, and a primed state-to-state competition for economic growth and citizenry.¹⁸⁴ Further, as discussed in Part III.B, there does not seem to be reason to expect marijuana policies to be ill-suited for efficient competition, by promoting a “Race to the Bottom”¹⁸⁵ through imperfect

¹⁸¹ *Id.* Note that of the sixteen states enacting progressive marijuana laws, not all support medical marijuana licensing.

¹⁸² *Id.*

¹⁸³ MARIJUANA USA (CNBC television broadcast Dec. 8, 2010).

¹⁸⁴ See generally Roberta Romano, *Is Regulatory Competition a Problem or Irrelevant for Corporate Governance?*, 21 OXFORD REV. ECON. POL'Y 212 (2005) (arguing against Mark Roe's characterization of a vertical competitive dynamic prompted by federal oversight and the threat of preemption).

¹⁸⁵ See generally William Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L. J. 663 (1974) (arguing that Delaware corporate law promotes a “Race to the Bottom” due to the cozy relationship between the judiciary, legislature, and Delaware Bar, leading to minimal shareholder protections and poor relations between

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information, negative externalities, or power inequalities between suppliers and consumers of laws.¹⁸⁶ In addition, federalization as a remedy to an unclear problem stifles innovation and experimentation, replacing jurisdictional competition with regulatory oversight and unwavering rules.¹⁸⁷ Most simply, a given legal system would prefer state laws if the “market” has the ability to produce efficient laws and will not inflict market failures leading to overly stringent or lax regulation.¹⁸⁸ In the market for marijuana laws, one would expect to encounter less need for consistency, uniformity, and correction of market failure because jurisdictional “markets” in the drug trade will presumably be transparent and consumers will have relatively full information, while states will have appropriate incentives to optimize laws.¹⁸⁹

The legalization, decriminalization, and medicalization of marijuana undoubtedly comprise a story

shareholders and corporate managers). *But see* Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEG. STUD. 251 (1977) (arguing against Cary’s theory of a “Race to the Bottom” to the extent that corporate managers respond not just to law, but to market pressures—in particular product markets, corporate control, and capital markets—and these pressures direct managers to provide efficient shareholder protections to the extent they produce profits through the securities exchanges).

¹⁸⁶ ERIN A. O’HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 33-36 (2009).

¹⁸⁷ Robert B. Ahdieh, *From “Federalization” to “Mixed Governance” in Corporate Law: A Defense of Sarbanes-Oxley*, 53 BUFF. L. REV. 721, 736-37 (2005) (“State corporate law permits state regulators to pursue new legal technologies they deem likely to offer competitive advantage. If they are right, such innovations can be expected to take hold, both in the state of innovation and among its competitors. If undesirable, they can promptly be discarded. Even if flawed rules persist, they do minimum harm. Universally applicable federal rules, by contrast, stifle experimentation and innovation—the hallmarks of an efficient market.”).

¹⁸⁸ *See generally id.*

¹⁸⁹ *See* Thorton, *supra* note 68 and accompanying text.

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in its early chapters. As states continue to adopt progressive marijuana laws, the legal marijuana industry continues to grow, and the executive branch ignores the strictures of the CSA, the structure of marijuana policy will begin to crystallize. Until then, United States citizens are at a crossroads of conflicting state and federal law and are waiting to see how the policymaking game will play out. Interest groups and lobbyists are no strangers to this game, pitting Big Tobacco, Big Pharma, the Prison Industrial Complex, and the Religious Right against a progressive populace and state legislators looking to fill their recession-ragged coffers while cutting back on drug-induced violence.

The federal regulatory regime and the politically motivated and maintained “War on Drugs” costs American taxpayers billions of dollars a year in a seemingly fruitless attempt to rid the American populace of the social and moral hazards of drug use. Yet the social ills of marijuana use stem almost entirely from its illicitness,¹⁹⁰ inducing violent organized crime but causing fewer deaths each year than alcohol¹⁹¹ or tobacco use;¹⁹² marijuana’s addiction rate

¹⁹⁰ In fact, commentators on the international organized crime syndicate have opined, “that as long as drugs that people want to consume are prohibited, and therefore provided by criminals, driving the trade out of one bloodstained area will only push it into some other godforsaken place. But unless and until drugs are legalized, that is the best Central America can hope to do.” See *The Drug War Hits Central America*, *supra* note 45.

¹⁹¹ See *By the Numbers: Deaths Caused by Alcohol*, SCIENTIFIC AMERICAN (December 1996). Alcohol causes more than 100,000 deaths a year. *Id.* While cannabis use is not documented according to indirect death rates, there are no documented direct deaths due to marijuana use. *Id.* *Facts on Cannabis and Alcohol*, SAFERCHOICE.ORG, (last visited Nov. 2, 2011), <http://www.saferchoice.org/content/view/24/53/> (noting that marijuana is less detrimental than tobacco in terms of long term use, aggressive behavior and violence, domestic attacks, sexual assault, and reckless behavior); *Visualizing the Guardian Datablog: “Deadliest Drugs,”* INFORMATION IS

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is also a mere pittance compared to nicotine addiction.¹⁹³ The United States system of federalism is premised on extensive state autonomy, leading to experimentation and innovation in policymaking, concurrent with the citizenry's ability to choose the laws they want applied by locating in a jurisdiction with the bundle of laws they find most appealing. In accordance with this paradigm, we have already seen the bulwark of progressive marijuana laws enacted on the West Coast,¹⁹⁴ and almost no innovation in the Southeast, seemingly in line with population ideologies in those respective locales.¹⁹⁵

Cutting the federal government entirely out of marijuana regulation and enforcement is neither plausible, nor advisable. The drug trade is too international to limit federal involvement and states rely on federal enforcement where distribution and trafficking crosses state lines. Economies of scale also empower the federal government to utilize powerful resources in an effort to keep pace with well-funded drug syndicates. Further, federal legislators have too much at stake in the drug debate to let it go

BEAUTIFUL.NET, (Nov. 6, 2009), <http://www.informationisbeautiful.net/2009/visualising-the-guardian-datablog/>.

¹⁹² See U.N. W.H.O., *Report on the Global Tobacco Epidemic, 2009: Implementing Smoke-Free Environments*, World Health Organization (2009), available at whqlibdoc.who.int/publications/2009/9789241563918_eng_full.pdf (noting that tobacco is responsible for approximately five million deaths a year worldwide).

¹⁹³ See U.S. DEP'T OF HEALTH AND HUMAN SERVICES, U.S. ATT'Y GEN., *The Health Consequences of Smoking: Nicotine Addiction: A Report of the Surgeon General*, (1988), available at <http://profiles.nlm.nih.gov/NN/B/B/Z/D/>; Bill Urell, *Am I Stupid, Or is This List of the 18 Most Addictive Drugs All Mixed Up?*, ADDICTION RECOVERY BASICS.COM, (last visited Nov. 2, 2011), <http://addictionrecoverybasics.com/am-i-stupid-or-is-this-list-of-the-18-most-addictive-drugs-all-mixed-up/> (noting that marijuana falls thirteenth on the list of eighteen most addictive substances, while nicotine lies first).

¹⁹⁴ See Nat'l Org. for the Reform of Marijuana Laws, *supra* note 141 and accompanying text.

¹⁹⁵ See *id.*; see also note 143 and accompanying text.

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entirely. As seen in the alcohol regulatory scheme, we can expect to see Congress utilize its spending power to incentivize states to act in accordance with federal objectives.¹⁹⁶ That being said, two central arguments from the “Competitive Alternative” give informed guidance to Congress, arguing to reign back on forfeiture laws and simultaneously cut spending on federal media campaigns against marijuana use.¹⁹⁷

Ultimately, it seems the marijuana train has left the station and has the momentum necessary to establish its legitimacy in the United States. The million-dollar question then is how it will be regulated. From the standpoint of history and logic, state authority is the best vehicle for public welfare, citizen autonomy, and efficient regulation.

¹⁹⁶ See 23 U.S.C. § 158 (2006).

¹⁹⁷ See *supra* Part III.D.2.

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ARTICLE

**REDEFINING SUMMARY JUDGMENT BY STATUTE:
THE LEGISLATIVE HISTORY OF TENNESSEE
CODE ANNOTATED SECTION 20-16-101***

*Judy M. Cornett*¹
*Matthew R. Lyon*²

I. Introduction

In its 2011 session, the Tennessee General Assembly purported to overrule a landmark decision of the Tennessee Supreme Court that had clarified the burden of production on summary judgment motions.³ The stage was set for this legislation by the November 2010 election, in which Republicans won majorities of twenty to thirteen in the State Senate and sixty-four to thirty-four (plus one GOP-leaning independent)⁴ in the House of Representatives.⁵ In addition, Bill Haslam, the Republican Mayor of Knoxville, won the election for Governor

*For a transcript of the legislative history of the Bill discussed in this Article, see the Appendix that begins on Page 206.

¹ Professor, University of Tennessee College of Law. I wish to thank my research assistants, Amanda Morse and Mitchell Panter, Class of 2013, for their outstanding research assistance.

² Assistant Professor, Lincoln Memorial University - Duncan School of Law. Thank you to my research assistant, Danielle Goins, for her timely and diligent work.

³ *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1 (Tenn. 2008).

⁴ That independent state representative is Kent Williams (I-Elizabethton), who served as Speaker of the Tennessee House of Representatives during the 106th General Assembly from 2009 to 2011.

⁵ Richard Locker, *Republican-Led Tennessee Legislature Gets Ready to Launch Tuesday*, THE COM. APPEAL, Jan. 10, 2011, available at <http://www.commercialappeal.com/news/2011/jan/10/gop-led-legislature-launches-tuesday/>.

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handily, leaving Republicans “large and in charge” and in control of the executive branch and both houses of the legislature in Tennessee for the first time since 1869.⁶ Republicans took control of power in Nashville vowing that they would govern responsibly,⁷ despite hard feelings resulting from years of Democratic control,⁸ not to mention the surprise, last-minute denial of the Speaker of the House position to the Republican leader in the 106th General Assembly.⁹ The Republican leadership stated at the outset

⁶ Andy Sher, *Tennessee Republicans 'Large and in Charge' of Legislature*, CHATTANOOGA TIMES FREE PRESS, Feb. 14, 2011, available at <http://timesfreepress.com/news/2011/feb/14/tennessee-republicans-large-and-in-charge-of/>; see also Tom Humphrey, *With Haslam's Election, GOP Power Greatest Since 1869*, KNOXVILLE NEWS SENTINEL, Nov. 3, 2010, available at <http://www.knoxnews.com/news/2010/nov/03/with-haslams-election-gop-power-greatest-since-186/>.

⁷ Andy Sher, *Tennessee's First Female State House Speaker, Beth Harwell, Says GOP Can Shine*, CHATTANOOGA TIMES FREE PRESS, Jan. 4, 2011, available at <http://www.timesfreepress.com/news/2011/jan/04/harwell-says-gop-can-shine/>.

⁸ See, e.g., Jeff Woods, *Republican Majority Members Tout Haslam's Jobs Agenda as Top Priority; Revenge Might be No. 2*, NASHVILLE CITY PAPER, Dec. 26, 2010, available at <http://nashvillecitypaper.com/content/city-news/republican-majority-members-tout-haslams-jobs-agenda-top-priority-revenge-might-b>.

⁹ The election of Rep. Williams as Speaker was a bizarre turn of events that illustrates the fiercely partisan environment of the modern Tennessee legislature. In the 2008 legislative elections, Tennessee Republicans had bucked the national Democratic trend and secured a fifty to forty-nine majority in the House, their first in decades. All fifty of the GOP legislators, including Williams, signed a pledge to back Rep. Jason Mumpower (R-Bristol) as Speaker. However, on January 13, 2009, the date of the leadership elections, Williams voted for himself for Speaker and was elected with the votes of all 49 Democrats, who had previously agreed to the arrangement. See generally Tom Humphrey, *Williams Elected as House Speaker*, KNOXVILLE NEWS SENTINEL, Jan. 14, 2009, available at <http://www.knoxnews.com/news/2009/jan/14/williams-elected-as-house-speaker/>; Andy Sher, *Williams Elected Speaker in Upset; Mumpower Loses*, CHATTANOOGA TIMES FREE PRESS, Jan. 13, 2011, available at <http://>

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that its top priority at the beginning of the legislative session was “job creation,”¹⁰ and this goal translated into the passage of a slew of legislative proposals friendly to the business community, many of which had stalled under the previous Democratic regime.¹¹ The most notable of these was a “tort reform” package that limited non-economic damages to \$750,000, and capped punitive damages at two times the amount of compensatory damages awarded or \$500,000, whichever is greater.¹² While this initiative and others, such as the abolition of collective bargaining for teachers, received greater public attention, the new legislative majority also set its sights on overruling certain Tennessee Supreme Court decisions that the business community had interpreted as unfriendly to its interests.¹³

northgeorgia.timesfreepress.com/news/2009/jan/13/williams-elected-speaker-upset-mumpower-loses/. Then-Speaker Williams was subsequently stripped of his membership in the Republican party. Shaila Dewan, *Tennessee House Member Wins Top Job, but Loses Party*, N.Y. TIMES, Feb. 11, 2009, at A16, available at <http://www.nytimes.com/2009/02/11/us/11tennessee.html>. Rep. Williams now refers to himself as a member of the “Carter County Republican Party.” See TENNESSEE GENERAL ASSEMBLY, <http://www.capitol.tn.gov/house/members/h4.html>, (last visited Jan. 2, 2012).

¹⁰ Sher, *supra* note 7. Speaker-to-be Harwell’s top three priorities at the outset of the 2011 legislative session were: (1) “job creation . . . looking forward to supporting Gov. Haslam and what he has in store for really creating an environment that’s conducive for job creation in this state”; (2) “the budget . . . pass[ing] a balanced budget without raising taxes”; and (3) “keep[ing the state] moving forward on education reform.” *Id.*

¹¹ See, e.g., Tom Humphrey, *Business Interests had Only Each Other to Fight*, KNOXVILLE NEWS SENTINEL, June 6, 2011, available at <http://www.knoxnews.com/news/2011/jun/06/business-interests-only-had-each-other-to-fight/> (“In many cases, the business lobby found it could simply sit on the sidelines and cheer for Haslam and the Legislature’s Republican super-majority.”).

¹² Tennessee Civil Justice Act of 2011, 2011 Tenn. Pub. Acts 510.

¹³ Brandon Gee, *Turf Battle between Legislature, Judiciary Lies on Horizon in Tenn.*, THE TENNESSEAN, Jan. 2, 2012, available at <http://www.tennessean.com/article/20120103/NEWS02/301030023/Tur>

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II. Background

In 2008, the Tennessee Supreme Court explicitly rejected the federal *Celotex* summary judgment standard¹⁴ in *Hannan v. Alltel Publishing Co.*¹⁵ Some members of the bench and bar reacted with dismay. Critics claimed that the Tennessee Supreme Court's requirement that the movant either "negate an essential element of the nonmovant's claim" or "show that the nonmoving party cannot prove an essential element of the claim at trial"¹⁶ made it unreasonably difficult for defendants to obtain summary judgment.¹⁷ According to the critics of *Hannan*, only the *Celotex* standard, which permits the movant to carry its initial burden by demonstrating that the nonmovant lacks evidence of an essential element of its claim at the summary judgment stage, is effective in weeding out nonmeritorious claims prior to trial.¹⁸

Apparently persuaded by the critics' arguments, the Tennessee General Assembly, on the last day of the 2011 regular session, May 20, 2011, passed Public Chapter No. 498, which purported to overrule *Hannan* by adopting the

f-battle-between-legislature-judiciary-lies-horizon-Tenn ("Two bills that easily passed the General Assembly in 2011 go so far as to tell the courts how to interpret their own procedural rules for resolving disputes").

¹⁴ *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

¹⁵ 270 S.W.3d at 1.

¹⁶ *Id.* at 9.

¹⁷ See, e.g., Edward G. Phillips, 'Gossett' Eschews Employers' Reliance on 'McDonnell Douglas' in Summary Judgment, 47 TENN. B. J. 24, 25 (Feb. 2011); Andrée Sophia Blumstein, *Bye, Bye Byrd? Summary Judgment After Hannan and Martin: Which Way to Go?*, 45 TENN. B. J. 23, 23 (Feb. 2009).

¹⁸ See, e.g., Andrée Sophia Blumstein, *Bye Bye Hannan? What a Difference Two Little Words, at Trial, Can Make in the Formulation of Tennessee's Summary Judgment Standard*, 47 TENN. B. J. 14, 14 (Aug. 2011).

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Celotex standard for summary judgment. The operative section of the Act creates a new section of the Tennessee Code Annotated, which reads as follows:

20-16-101. In motions for summary judgment in any civil action in Tennessee, the moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it:

- (1) Submits affirmative evidence that negates an essential element of the nonmoving party's claim; or
- (2) Demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.¹⁹

The enacted bill contained findings that expressed the legislature's purpose to overrule *Hannan* on the basis of its conflict with federal law and the unsupported finding that "this higher *Hannan* standard results in fewer cases being resolved by summary judgment in state court, increasing the litigation costs of litigants in Tennessee state courts and encouraging forum shopping."²⁰ The enacted bill also provided that "[e]xcept as set forth herein, Rule 56 of the Tennessee Rules of Civil Procedure remains unchanged."²¹

¹⁹ 2011 Tenn. Pub. Acts 498.

²⁰ *Id.* at Preamble. One commentator has mistakenly asserted that "[t]he preamble did not make it into the final version of the law." Blumstein, *supra* note 18, at 19 n.14.

²¹ 2011 Tenn. Pub. Acts 498.

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III. *Celotex* in Tennessee: The History behind *Hannan*

In 1993, the Tennessee Supreme Court addressed the *Celotex* trilogy for the first time in *Byrd v. Hall*²²—an opinion that would later be recognized as Tennessee’s “departure from the federal [summary judgment] standard.”²³ Although the *Byrd* court set out to “establish a clearer and more coherent summary judgment jurisprudence,” the court’s treatment of *Celotex* was ambiguous.²⁴ On the one hand, the court “embrace[d]” the *Celotex* trilogy;²⁵ however, the court went on to declare that in Tennessee “[a] conclusory assertion that the nonmoving party has no evidence is clearly insufficient.”²⁶ Further, the court held that a moving party in summary judgment may meet its burden of production in one of two ways: (1) by “affirmatively negat[ing] an essential element of the nonmoving party’s claim,” or (2) by “conclusively establish[ing] an affirmative defense that defeats the nonmoving party’s claim.”²⁷ Thus, despite the Tennessee Supreme Court’s self-professed goal of clarity, the *Byrd* decision left many doubts about whether a *Celotex*-type motion could succeed in Tennessee.²⁸

Any ambiguity that remained about Tennessee’s embrace of the *Celotex* standard was erased five years later

²² *Byrd v. Hall*, 847 S.W.2d 208 (Tenn. 1993).

²³ *Hannan*, 270 S.W.3d at 7.

²⁴ See Blumstein, *supra* note 18, at 23 (noting *Byrd*’s ““schizophrenic” approach to *Celotex*). See generally Judy M. Cornett, *The Legacy of Byrd v. Hall: Gossiping about Summary Judgment in Tennessee*, 69 TENN. L. REV. 175 (2001).

²⁵ *Byrd*, 847 S.W.2d at 214.

²⁶ *Id.* at 215.

²⁷ *Id.* at 215 n.5.

²⁸ See generally Blumstein, *supra* note 18, at 23. Cf. *Hannan*, 270 S.W.3d at 5 (stating that apparently conflicting statements in *Byrd* “have led to some confusion among Tennessee courts as to the proof required for the moving party to meet its burden of production.”).

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when the Tennessee Supreme Court issued its decision in *McCarley v. West Quality Food Service*.²⁹ In *McCarley*, the plaintiff alleged that he became ill after eating Kentucky Fried Chicken sold by one of the defendant's K.F.C. franchises.³⁰ He was diagnosed with food poisoning caused by campylobacter. During discovery, it was revealed that the plaintiff had also eaten bacon the morning before consuming the allegedly tainted chicken.³¹ No sample of either food had been saved. The plaintiff's treating physician testified that either the chicken or the bacon could have caused plaintiff's illness, but that the chicken "was at the top of the list."³² With the expert testimony in this state of near-equipose, the defendant moved for summary judgment, alleging that the plaintiff could not "carry his burden of proof to prove by a preponderance of the evidence that the chicken caused the food poisoning."³³ The trial court granted summary judgment, and the court of appeals, citing *Byrd*, affirmed.³⁴ The supreme court reversed, concluding that, although the defendant's assertions "may cause doubt as to whether the chicken or the bacon caused [the plaintiff's] illness . . . [t]his evidence, however, does not negate the chicken from the list of possible causes."³⁵ Because the defendant had not negated an essential element of the plaintiff's claim, the plaintiff's burden of production was not triggered, and summary judgment was improperly granted.

In the ten years between *McCarley* and *Hannan*, the Tennessee Supreme Court continued to insist that a movant must negate an essential element of the nonmovant's claim

²⁹ *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585 (Tenn. 1998).

³⁰ *Id.* at 587.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 587-88.

³⁵ *McCarley*, 960 S.W.2d at 588.

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in order to trigger the nonmovant's burden of production.³⁶ Despite this consistent line of decisions over a ten-year period, the Tennessee bench and bar still occasionally cited *Byrd* for the proposition that a movant could carry its burden of production by demonstrating that the nonmovant could not prove an essential element of its claim—essentially, by complying with the *Celotex* standard.³⁷

Finally, the Tennessee Court of Appeals in *Hannan* invited the Tennessee Supreme Court to grant permission to appeal in order to “address (1) the issue of exactly what is meant by ‘negating’ an element of a plaintiff’s claim, and (2) whether Tennessee follows the Sixth Circuit’s ‘put up or shut up’ interpretation of *Celotex*.”³⁸

In *Hannan*, Mr. and Mrs. Hannan owned two businesses in a small town in East Tennessee: (1) a real estate company, and (2) a bed and breakfast.³⁹ In 2003, the plaintiffs contracted with the defendant to advertise their businesses in the local saffron-colored pages.⁴⁰ The advertisement for the real estate firm, however, was never published, so the plaintiffs filed an action for lost profits.⁴¹ Interestingly, the plaintiffs’ income tax returns actually revealed an *increase* in income for 2003.⁴² Furthermore,

³⁶ See *Staples v. CBL & Assoc.*, 15 S.W.3d 83 (Tenn. 2000); *Blair v. West Town Mall*, 130 S.W.3d 761 (Tenn. 2004).

³⁷ See Blumstein, *supra* note 18, at 15 (asserting that “*Byrd* was . . . widely – but by no means universally – read to have articulated a ‘put-up-or-shut-up’ standard just like the *Celotex* standard.”). *But see* Judy M. Cornett, *Trick or Treat? Summary Judgment in Tennessee After Hannan v. Alltel Publishing Co.*, 77 TENN. L. REV. 305, 317 n.80 (2010) (demonstrating that in the fifteen-year interval between *Byrd* and *Hannan*, courts rarely misread *Byrd* as adopting *Celotex* standard).

³⁸ *Hannan v. Alltel Publ’g Co.*, No. E2006-01353-COA-R3-CV, 2007 WL 208430, at *8 (Tenn. Ct. App. Jan. 26, 2007), *aff’d*, 270 S.W.3d 1 (Tenn. 2008).

³⁹ *Hannan*, 270 S.W.3d at 3.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

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neither of the plaintiffs could explain the increase in income, nor could either quantify the lost profits they alleged they had suffered.⁴³ Accordingly, Alltel moved for summary judgment on the ground that the plaintiffs could not prove that they suffered lost profits—an essential element of their claim.⁴⁴ The trial court granted summary judgment for Alltel, but the court of appeals reversed.⁴⁵

Affirming the court of appeals, the Tennessee Supreme Court unequivocally rejected *Celotex* and reaffirmed a modified version of the *Byrd* standard.⁴⁶ Noting that “[d]ecisions within the federal circuits vary, but most seem either to follow the [Sixth Circuit’s] ‘put up or shut up’ approach or to require the moving party merely to point to deficiencies in the nonmoving party’s evidence,” the court reiterated its departure from the federal standard.⁴⁷ The court affirmed the *Byrd* standard, modifying the second prong to eliminate any reference to “conclusively establish[ing] an affirmative defense”:

In summary, in Tennessee, a moving party who seeks to shift the burden of production to the non-moving party who bears the burden of proof at trial must either: (1) affirmatively negate an essential element of the nonmoving party’s claim; or (2) show

⁴³ *Id.* at 4. Indeed, during her deposition, Mrs. Hannan was asked, “Do you have any way of [quantifying in dollars the amount of loss]?” She replied, “I have absolutely no way of doing that. And neither does anyone else.” *Hannan*, 270 S.W.3d at 4.

⁴⁴ *Id.* at 3. The Tennessee Supreme Court clarified that the existence of lost profits was an essential element of the Hannans’ claim, while the amount of any lost profits was a matter for proof at trial, as long as they could “lay[] a sufficient foundation to allow the trier of fact to make a fair and reasonable assessment of damages.” *Id.* at 10.

⁴⁵ *Id.* at 4-5.

⁴⁶ *Id.* at 6.

⁴⁷ *Id.* at 5-6.

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that the nonmoving party cannot prove an essential element of the claim at trial.⁴⁸

Justice William C. Koch, Jr. dissented. Consistent with his assertion that “[t]he Court’s decision in this case brushes aside fifteen years of post- *Byrd v. Hall* decisions . . . ,”⁴⁹ the dissenting opinion utilized a vocabulary of metamorphosis. For example, Justice Koch accused the majority of “*dramatically changing* the moving party’s burden of production.”⁵⁰ He declared that movants “will *no longer* be able to shift the burden of production” as easily as they could pre-*Hannan*.⁵¹ He questioned the “*change in direction*” supposedly signaled by *Hannan*.⁵² Given his assertion that *Hannan* changed Tennessee law, Justice Koch looked to the future: “What practical effect will this decision have on litigation in Tennessee’s courts? The answer is that its effects will be *significant and far-reaching*.”⁵³ Finally, Justice Koch made a prediction that

⁴⁸ Thus, the difference between the Tennessee standard and the federal *Celotex* standard is essentially one of timing. The federal standard permits summary judgment if the non-movant cannot prove an essential element of its case at the summary judgment stage. The Tennessee standard permits summary judgment only if the non-movant cannot prove an essential element of its case at trial. *See generally* Blumstein, *supra* note 18, at 14 (noting importance of two words “at trial”); Cornett, *supra* note 37, at 334 (noting that in *Hannan* “the Tennessee Supreme Court rejected the federal approach to summary judgment as a way of testing the sufficiency of the nonmovant’s evidence pre-trial.”).

⁴⁹ *Hannan*, 270 S.W.3d at 17 (Koch, J., dissenting). Justice Koch’s assertion was refuted by the majority, who pointed out that the interpretation of Rule 56 applied in *Hannan* is identical to that adopted in *McCarley v. West Quality Food Services*, 960 S.W.2d 585 (Tenn. 1998).

⁵⁰ *Hannan*, 270 S.W.3d at 11 (emphasis added). *Accord id.* at 17 (“Such a *dramatic change* in established summary judgment practice prompts several questions.”)

⁵¹ *Id.* at 11 (emphasis added).

⁵² *Id.* at 12 (emphasis added).

⁵³ *Id.* at 19 (emphasis added).

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was echoed in later criticism of *Hannan* and in Public Chapter No. 498 itself: “The Court's decision will undermine, rather than enhance, the utility of summary judgment proceedings as opportunities to weed out frivolous lawsuits and to avoid the time and expense of unnecessary trials.”⁵⁴

Taking their cue from Justice Koch’s dissent, some members of the Tennessee bar, especially the defense bar, expressed alarm at the *Hannan* decision.⁵⁵ Indeed, one prominent Tennessee law firm asserted that “*Hannan* had placed such a heavier burden [sic] on parties seeking a summary judgment that summary judgment was, in effect, relegated to the spectator seats and no longer a viable alternative to trial.”⁵⁶ Although the court in *Hannan* merely reaffirmed and clarified its fifteen-year-old approach to summary judgment,⁵⁷ the defense bar, echoing the *Hannan* dissent, insisted on viewing *Hannan* as something new and different.⁵⁸ Consternation at the decision was undoubtedly heightened by the bad facts of *Hannan*, which presented a worst case scenario in which the plaintiffs admitted that they lacked proof of the amount of their lost profits – perceived as an essential element of their claim at the summary judgment stage. Under *Hannan*, such plaintiffs can escape summary judgment and proceed to the trial

⁵⁴ *Id.* at 12.

⁵⁵ See, e.g., Blumstein, *supra* note 18, at 14; Cornett, *supra* note 37, at 330 n.169, 334 n.196 (citing reactions from the bench and bar).

⁵⁶ Press Release, Miller & Martin PLLC, Tennessee General Assembly Changes Standard for Summary Judgment (May 24, 2011) (on file with author). Although this assertion found its way into the preamble of Public Chapter No. 498, there has never been any empirical study supporting a finding that fewer summary judgments were granted after *Hannan* than before it, or that summary judgment was granted less often in Tennessee than in federal court.

⁵⁷ See Cornett, *supra* note 37, at 332.

⁵⁸ E.g., David E. Long, “I Understand TRCP 56”: *The Evolving Tennessee Summary Judgment Standard*, DICTA (Nov. 2010) at 14.

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stage, thereby inducing defendants to settle potentially nonmeritorious cases.⁵⁹

Almost two years elapsed between the *Hannan* decision and the introduction of the bill that became Public Chapter No. 498. In the interval came another controversial court decision deemed unfriendly to business, *Gossett v. Tractor Supply Co.*,⁶⁰ a common-law retaliatory discharge case in which the Tennessee Supreme Court jettisoned the *McDonnell Douglas*⁶¹ framework in favor of the general summary judgment burden-shifting analysis. The Court noted two main problems with applying the *McDonnell Douglas* framework at the summary judgment stage. First,

⁵⁹ The *Hannan* case ended in a confidential settlement. See generally Cornett, *supra* note 37, at 337 nn.219-20.

⁶⁰ *Gossett v. Tractor Supply Co.*, 320 S.W.3d 777 (Tenn. 2010).

⁶¹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). As described in *Gossett*, the *McDonnell Douglas* framework is as follows:

Pursuant to *McDonnell Douglas*, if an employee proves a prima facie case of discrimination or retaliation, the employee creates a rebuttable presumption that the employer unlawfully discriminated or retaliated against him or her. The burden of production shifts to the employer to articulate a legitimate and nondiscriminatory or nonretaliatory reason for the action. If the employer satisfies its burden, the presumption of discrimination or retaliation “drops from the case,” which sets the stage for the factfinder to decide whether the adverse employment action was discriminatory or retaliatory. The employee, however, “must ... have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the [employer] were not its true reasons, but were a pretext for discrimination.” Tennessee courts have applied this evidentiary framework to statutory employment discrimination and retaliation claims.

Gossett, 320 S.W.3d at 780-81 (citations omitted).

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“evidence of a legitimate reason for discharge does not necessarily show that there is no genuine issue of material fact” because the articulated reason “is not always mutually exclusive of a discriminatory or retaliatory motive”⁶² Thus, the Court implied, the mere articulation of a legitimate, nondiscriminatory reason should not necessarily shift the burden of production to the plaintiff. Second, under the *McDonnell Douglas* framework, once the defendant articulates its legitimate reason, the “presumption of discrimination or retaliation” established by the plaintiff’s prima facie case “drops from the case.”⁶³ This aspect of the *McDonnell Douglas* framework means that “[i]n addressing the issue of pretext, a court may fail to consider the facts alleged by the employee to show a prima facie case.”⁶⁴ Indeed, the Court found an example of this defect in its earlier decision, *Allen v. McPhee*,⁶⁵ which the Court implicitly overruled in *Gossett*.⁶⁶

⁶² *Id.* at 782. The common-law tort of retaliatory discharge requires only that the employee’s protected action or inaction be a “substantial factor” in the employer’s decision. *Id.* at 781.

⁶³ *Id.* at 780.

⁶⁴ *Id.* at 783.

⁶⁵ *Allen v. McPhee*, 240 S.W.3d 803 (Tenn. 2007), cited in *Gossett*, 320 S.W.3d at 783-84.

⁶⁶ *Gossett*, 320 S.W.3d at 784. Regarding *Allen*, the Court stated, “Without the *McDonnell Douglas* framework, our summary judgment analysis in *Allen* would have reached a different outcome. . . . Our reaffirmation of longstanding Tennessee law on summary judgment . . . convinces us that our application of the *McDonnell Douglas* framework in *Allen* skewed our summary judgment analysis in favor of the employer.” *Id.* at 784. Although the Court did not explicitly overrule *Allen*, most commentators have read *Gossett* as doing so. Edward G. Phillips, *The Law at Work: “Gossett” Eschews Employers’ Reliance on “McDonnell Douglas” in Summary Judgment*, 47 TENN. B.J. 24, 24 (Feb. 2011) (“[T]he upshot of the *Gossett* majority’s criticism of *Allen* is that if a plaintiff can establish temporal proximity between the protected activity and the termination, without more, the plaintiff prevails at summary judgment.”); see also *West v. Genuine Parts Co.*,

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Like *Hannan*, *Gossett* caused consternation among members of the defense bar. The following excerpt is representative:

In a surprise split decision, the Tennessee Supreme Court potentially has made life more expensive for companies sued by current or former employees for discrimination.

The 3-2 decision in *Gossett v. Tractor Supply Inc.* is a sharp departure from a decades-long precedent that puts the burden on employees to prove their firing was discrimination or retaliation (as opposed to legitimate reasons) before a case can go to trial. The *Gossett* decision forces employers to do the heavy lifting and prove a worker's allegation is false.

“The initial reaction from some folks in our community is this is egregious,” Jim Brown, Tennessee director for the National Federation of Independent Business, told the *Insurance Journal*. “Big businesses will likely settle, but many small businesses will likely go out of business. The consequences of this will be significant.”⁶⁷

Even the Associated Press report on *Gossett* misstated its holding and overstated its implications. According to the Associated Press, *Gossett* held “that employers must prove that workers’ claims of discrimination or retaliation are

2011 WL 4356361, at *4 (E.D. Tenn. Sept. 16, 2011) (observing that *Gossett* “abrogated” *Allen*).

⁶⁷ Courtney Rubin, *Tennessee Ruling Makes Discrimination Cases Harder for Businesses*, INC., Sept. 29, 2010, available at <http://www.inc.com/news/articles/2010/09/in-discrimination-cases-tennessee-puts-burden-on-employers.html>.

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false or else face a trial.”⁶⁸ Consequently, *Gossett* “made it easier for workers to sue their employers.”⁶⁹ The perceived extension of *Hannan* into the employment discrimination arena, combined with Republican domination of the General Assembly, set the stage for Public Chapter No. 498.

IV. The Legislative History

In February of 2011, legislation was introduced in both the House and Senate to overrule *Hannan* and adopt a standard for courts to apply at the summary judgment stage of litigation that purported to more closely match the federal standard. After House Bill 1358 and Senate Bill 1114 were introduced in their respective chambers in mid-February, they were referred to their respective Judiciary Committees. The House version of the summary judgment legislation, House Bill 1358, was introduced by Rep. Vance Dennis on February 16, 2011.⁷⁰ Rep. Dennis is a thirty-five-year-old Republican from Savannah, in Hardin County in West Tennessee.⁷¹ He is a University of Tennessee College of Law graduate who was first elected to the House of Representatives in 2008.⁷² The Senate companion

⁶⁸ *Court Sides with Fired Employees*, KNOXVILLE NEWS SENTINEL, Sept. 27, 2010, at A12, available at <http://olive.knoxnews.com/olive/ODE/Knoxville/LandingPage/LandingPage.aspx?href=S05TLzIwMTAvMDkvMjc.&pageno=MTI.&entity=QXIwMTIwMQ..&view=ZW50aXR5>.

⁶⁹ *Id.* Accord Pamela Reeves, *Certain Firings Made More Difficult*, KNOXVILLE NEWS SENTINEL, October 17, 2010, at C2 (“it will be much more difficult for employers to get cases dismissed on motions for summary judgment. . . .”); Phillips, *supra* note 17, at 25 (“*Gossett* largely eviscerates a Tennessee employer’s ability to obtain summary judgment in employment discrimination and retaliation [cases] . . .”).

⁷⁰ H.B. 1358, 107th Gen. Assem., Reg. Sess. (Tenn. 2011).

⁷¹ Tennessee General Assembly, <http://www.capitol.tn.gov/house/members/H71.html> (last visited Jan. 2, 2012).

⁷² *Id.*

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legislation, Senate Bill 1114, was introduced by Sen. Brian Kelsey.⁷³ Sen. Kelsey is a thirty-three-year-old Georgetown University Law Center graduate, also a Republican, who has served in both the House and Senate and hails from Germantown, an affluent Memphis suburb.⁷⁴ Rep. Dennis and Sen. Kelsey sponsored other successful business-friendly pieces of legislation in 2011, including the tort reform bill⁷⁵ and the legislation to overrule *Gossett*.⁷⁶

A. *The House*

The summary judgment legislation sat dormant for months in both chambers, but moved first in the House when the Judiciary Subcommittee considered it on April 12, 2011. When asked by Rep. Janis Baird Sontony (D-Nashville) to explain the legislation, Rep. Dennis stated

⁷³ S.B. 1114, 107th Gen. Assem., Reg. Sess. (Tenn. 2011).

⁷⁴ Tennessee General Assembly, <http://www.capitol.tn.gov/senate/members/S31.html> (last visited Jan. 2, 2012).

⁷⁵ The version of the Civil Justice Act that Rep. Dennis introduced in the House varied slightly from the version that Gov. Haslam signed into law in June 2011. Opponents of the bill were successful in adding an amendment in the Judiciary Committee to remove the damage cap awards when the tort upon which the defendant is sued results in a felony conviction of the defendant. Richard Locker, *Tennessee House Panel OKs Limits on Liability: Haslam Says Curbs will Improve Tenn. Business Prospects*, THE COM. APPEAL, Apr. 20, 2011, available at <http://www.commercialappeal.com/news/2011/apr/20/house-panel-oks-limits-on-liability/?partner=RSS>. Although Rep. Dennis initially resisted the amendment, he later vowed to restore the provision excluding felons from the cap during a future legislative session. Andy Sher, *Lawsuit Caps Legislation Goes to Tennessee Governor*, CHATTANOOGA TIMES FREE PRESS, May 20, 2011, available at <http://www.timesfreepress.com/news/2011/may/20/lawsuit-caps-legislation-goes-tennessee-governor/> (“Rep. Vance Dennis, R-Savannah, the House bill’s sponsor, said while he disagrees with the Senate version, it was important to get the bill to Haslam. He said senators have agreed to work him on separate legislation to restore the House version, although that will likely to occur next year.”).

⁷⁶ H.B. 1641, 107th Gen. Assem., Reg. Sess. (Tenn. 2011).

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that he was “not an expert on it but” would do the best he could to explain it.⁷⁷ His explanation as to why it is necessary to overrule *Hannan* is somewhat difficult to understand, but appears to rely upon two assertions that he and other supporters of the bill repeated throughout the legislative process: (1) *Hannan* fundamentally changed the summary judgment practice in Tennessee from the standard that existed prior to that case; and (2) the standard in Tennessee prior to *Hannan* was the same as the federal *Celotex* standard, and it is preferable for Tennessee to conform to the federal standard.⁷⁸ As discussed,⁷⁹ the first of these assertions was made by Justice Koch in his *Hannan* dissent and formed the basis for much of the hand-wringing over *Hannan* among the business community and defense bar from late 2008 until 2011. The premise that *Hannan* changed, rather than simply clarified, the burden shifting test on a summary judgment motion is at least arguable, although likely inaccurate. The second rationale that Rep. Dennis provides for the legislation – that the standard for summary judgment in Tennessee that existed prior to *Hannan*, under *Byrd v. Hall*, was the same as the federal standard – is clearly incorrect. While the standard

⁷⁷ Statement of Rep. Dennis, House Judiciary Subcommittee, Apr. 12, 2011, available at http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=41700. Rep. Dennis, who as the sponsor presumably drafted the legislation, went on to state that he would prefer “to get somebody that is more fluent on summary judgment practice and civil practice to explain [the bill] much better than [he] could.” *Id.*

⁷⁸ “Basically, the gist of [the legislation] is, I think last year or the year before the Supreme Court made a decision that changed the way the standard they had historically applied the summary judgment decisions. And they did it in such a way that it makes it almost impossible for the court to award summary judgment. . . . [The bill] shifts the standard from what the court adopted, it shifts it back to what it was prior to that decision and what it had been in Tennessee for the last, I don’t know, twenty to thirty years, and it mirrors the federal standard for decisions on summary judgment.” *Id.*

⁷⁹ *Supra*, section III.

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the Tennessee Supreme Court adopted in *Byrd* may not have been completely transparent, there is no doubt that the Court declined to adopt the *Celotex* standard. At any rate, Rep. Dennis agreed to “roll” – that is, hold over – the bill until a future meeting of the Judiciary Subcommittee.⁸⁰

The Subcommittee next considered the bill on April 27, 2011. At this hearing, the rationale for the bill was challenged by Rep. Karen Camper (D-Memphis), a non-lawyer whose understandable lack of familiarity with the highly technical summary judgment process provided Rep. Dennis with an opportunity to educate the Subcommittee as to why the bill was necessary. Although Rep. Dennis’s explanation of the summary judgment process to the Subcommittee was somewhat more cogent than it had been a couple of weeks earlier, the justification for the bill remained essentially unchanged: it was necessary to overrule *Hannan* because that case changed summary judgment practice in Tennessee for the worse⁸¹ and because it would be preferable to return to *Celotex*, which was the standard in Tennessee for years under *Byrd v. Hall*.⁸² At

⁸⁰ Statement of Rep. Jim Coley, House Judiciary Subcommittee, Apr. 12, 2011, available at http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=4170.

⁸¹ “[T]here is a particular Tennessee Supreme Court case called *Hannan* versus Alltel Publishing where the court kind of changed how they look at and apply Rule 56 of the Rules of Civil Procedure dealing with summary judgments and made a really, at least in my opinion, made a wrong incorrect decision . . . they established a standard that makes it almost impossible for a court to grant summary judgment So, it basically goes back to what the standard was in Tennessee for several years prior to 2008 when the Supreme Court changed that.” Statement of Rep. Dennis, House Judiciary Subcommittee, Apr. 27, 2011, available at http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=4170.

⁸² “[T]his would go back to the standard that was in place for a number of years before, under the *Byrd* case essentially which is a several year old Tennessee case. This would codify the standard under the *Byrd* case and effectively reverse the standard that the Supreme Court put in place under the *Hannan* case.” *Id.*

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this hearing, Rep. Dennis came prepared with “a more skilled guest . . . that might can explain [the bill] a little better”⁸³ – namely, Benjamin Sanders from Farmers Bureau Insurance of Tennessee (“Farmers”). The Subcommittee went out of session and Rep. Dennis called upon Mr. Sanders to address the Subcommittee directly.⁸⁴

Mr. Sanders began his statement to the Subcommittee with the caveat that, although the summary judgment bill was not Farmers’ bill,⁸⁵ the organization had

⁸³ *Id.*

⁸⁴ This practice of having lobbyists address the members of the legislature directly on a pending bill was described by then-Tennessee Governor Phil Bredesen during a 2007 interview with the Associated Press. The Governor observed that “[b]ecause lawmakers spend only part of the year in session and have a limited support staff, they depend on lobbyists for help developing - and sometimes debating and killing - complex legislation.” Beth Rucker, *Ethics Reforms Didn’t Take Away Lobbyists’ Power, Bredesen Says*, MEMPHIS DAILY NEWS, July 31, 2007, available at <http://www.memphisdailynews.com/editorial/Article.aspx?id=33447>. In this role, “[l]obbyists are often called on during legislative committee meetings to explain the merits of a bill or answer lawmakers’ questions.” *Id.*

⁸⁵ Despite this caveat, Rep. Dennis himself privately referred to the bill as “Farmers’ bill” and referred questions about the bill to lobbyists for Farmers’ Insurance. Telephone interview with John Day, Brentwood, Tennessee (Jan. 23, 2012). In a “State Capital Bulletin” dated May 23, 2011, the Property Casualty Insurers Association of America took credit for the *Hannan* legislation: “[I]n the wee hours of the last day of the legislative session, PCI was successful in amending the summary judgment law back to the pre-Hannon [sic] decision. This was another major win for PCI in Tennessee!” Property Casualty Insurers Association of America, *State Capital Bulletin* (May 23, 2011). The Bulletin went on to explain, “The purpose of the bill was to addresses [sic] the Supreme Court’s 2008 decision in *Hannan v. Alltel Pub* where the Tennessee Supreme Court decision which makes it almost impossible for a court to grant summary judgment by requiring a party to essentially prove a negative.” *Id.* (syntax as in original). On its website, PCI boasts that it has “1000+ members – the broadest cross section of insurance companies of any national trade group.” Property Casualty Insurers Association of America, <http://www.pciaa.net/web/sitehome.nsf/main> (last visited Jan. 2, 2012). Under the tab “Member

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“adopted it because it’s just such a good idea.”⁸⁶ Mr. Sanders then explained the need for the legislation in more detailed, but similar, terms to those that Rep. Dennis had used:

Summary judgment is a judicial tool that determines whether a case should go to trial or not. In other words, if Representative Dennis sues me then I can challenge under our old standard of summary judgment...I can move for summary judgment and challenge the sufficiency of evidence. And essentially saying if you don’t have enough evidence to go to trial we need to stop it right here. Under the old standard, the court could grant that. They could say, if he doesn’t prove evidence now we’re not going through the time and expense of going to trial. Under the standard that they adopted in 2008 they changed that. Instead of granting summary judgment by me challenging his evidence, they put the burden on the defendant and said we now have to prove that he can’t prove his case. So, in other words, if I move for summary judgment now, under the new standard, all Representative Dennis has to say is I’ll prove it at trial and doesn’t have to show at that point that he has any evidence. So what

Benefits,” PCI makes the following pitch: “The value of joining PCI is clear from your first day of membership. It starts with having the most respected, persuasive voice on Capitol Hill and in 50 statehouses representing you and our industry.” *Id.*

⁸⁶ Statement of Benjamin Sanders, Farmers’ Bureau Insurance of Tennessee, to House Judiciary Subcommittee, Apr. 27, 2011, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=4170.

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we are seeing is a lot cases that have no disputed facts that are going to trial and that probably shouldn't go to trial.⁸⁷

This description by Mr. Sanders adds a new justification for the legislation: the claim that *Hannan* has led to an increase in the number of cases that have no disputed issue of material fact but nevertheless survive summary judgment and proceed to trial. Mr. Sanders provided no empirical or even anecdotal proof in support of this assertion, nor did the Subcommittee hold a hearing to take such evidence.⁸⁸ Mr. Sanders provided yet another reason for the bill in response to Rep. Camper's question as to whether the Tennessee Supreme Court was simply acting within its rights to interpret the Rules of Civil Procedure when it decided *Hannan*. While he conceded to Rep. Camper "that the Supreme Court certainly had the authority to make a different interpretation of [Tennessee Rule of Civil Procedure 56] . . . this bill says it is the public policy of Tennessee that if you don't have enough evidence to go to trial for your case that you shouldn't move past the summary judgment stage."⁸⁹ This justification addresses an important separation of powers concern, because the legislature generally has the power to articulate public

⁸⁷ *Id.*

⁸⁸ The Fiscal Note prepared by the General Assembly's Fiscal Review Committee on March 1, 2011, estimated the fiscal impact of HB 1358/SB 1114 to be "Not Significant," and assumed that "[c]odifying a standard for granting summary judgment will have no significant impact on the case load of trial or appellate courts." <http://www.capitol.tn.gov/Bills/107/Fiscal/HB1358.pdf>. In fact, Brentwood trial lawyer John Day has suggested the new legislation could "cost millions of dollars in attorneys' time to try to figure out what this law means." Gee, *supra* note 13.

⁸⁹ Statement of Benjamin Sanders, Farmers' Bureau Insurance of Tennessee, to House Judiciary Subcommittee, Apr. 27, 2011, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=4170.

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policy, whereas reversing the judicial branch's interpretation of a procedural rule is more questionable. Unlike Mr. Sanders' earlier rationale regarding the increased number of cases surviving summary judgment, however, this legislative purpose was not included in the legislation.

After Mr. Sanders finished speaking, Rep. Sontany (D-Nashville) called upon another outside speaker, Doug Janney of the Tennessee Employment Lawyers' Association, to speak against the bill.⁹⁰ Mr. Janney remarked on what he viewed to be weaknesses in the bill, focusing in particular on the provision that the party who does not bear the burden of proof at trial "shall prevail" if it either affirmatively negates an essential element of the non-moving party's claim or shows that there is insufficient evidence to prove an element of the non-moving party's claim.⁹¹ He then engaged in an extended colloquy with Rep. Dennis on the subject, with Rep. Dennis stating that it

⁹⁰ Statement of Rep. Sontany, House Judiciary Subcommittee, Apr. 27, 2011, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=41700. According to their website, the Tennessee Employment Lawyers Association is an "authorized affiliate of the National Employment Lawyers Association, the largest group of plaintiff employment lawyers in the country. We are a group of attorneys dedicated to eradicating employment discrimination in all its forms from the workplace, and are constantly seeking to influence the law to better protect workers' rights." The Tennessee Employment Lawyers Association, <https://www.tennela.org/index.php> (last visited Jan. 3, 2012). Unlike Benjamin Sanders, Doug Janney is not a registered lobbyist.

⁹¹ "If [the moving party] submits an affidavit that saying well the nonmoving party's evidence is insufficient to the courts satisfaction, than the nonmoving party may not get any opportunity to respond and have the lawsuit dismissed. And that's inconsistent with summary judgment practice in federal and in state courts and in the way it's always been done. You have to give the nonmoving party opportunity to respond." Statement of Doug Janney to the House Judiciary Subcommittee, Apr. 27, 2011, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=41700.

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was not the intent of the bill to permit a court to grant summary judgment without allowing the non-moving party the opportunity to be heard,⁹² and Mr. Janney responding that “it may not be the intent but that’s the effect it could have.”⁹³ Rep. Dennis reminded Mr. Janney that he had asked him for language to insert into the statute a few weeks earlier, but had not received any.⁹⁴ The back-and-forth between the two men continued with Mr. Janney expressing concern that the bill would codify a separate standard for plaintiffs who move for summary judgment than for defendants who do so. Finally, Rep. Eric Watson (R-Cleveland) asked Rep. Dennis if, prior to the bill’s discussion by the full Judiciary Committee, he would meet with representatives of the trial lawyers’ lobby to “just straighten some of this out” and “[m]aybe . . . write something different.”⁹⁵ Rep. Dennis indicated that he was willing to do so, but that he had already made changes to the legislation suggested by John Day of the Tennessee Association for Justice, an organization representing Tennessee’s trial lawyers.⁹⁶ With this understanding, the bill was passed through to full committee.

⁹² Statement of Rep. Dennis, House Judiciary Subcommittee, Apr. 27, 2011, available at http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=4170.

⁹³ Statement of Mr. Janney, House Judiciary Subcommittee, Apr. 27, 2011, available at http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=4170.

⁹⁴ Statement of Rep. Dennis, House Judiciary Subcommittee, Apr. 27, 2011, available at http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=4170.

⁹⁵ Statement of Rep. Watson, House Judiciary Subcommittee, Apr. 27, 2011, available at http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=4170.

⁹⁶ Statement of Rep. Dennis, House Judiciary Subcommittee, Apr. 27, 2011, available at http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=41700. *But see* Telephone interview with John Day, *supra* note 85 (noting that he never suggested specific changes to the language of the bill but instead questioned the lobbyists for Farmers’ Insurance about the purposes of the bill and merely suggested that those

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The full House Judiciary Committee considered HB 1358 on May 3, 2011. Rep. Dennis stressed that the bill “would codify the court’s previous status prior to a Supreme Court decision in 2008 and take us back to the way the law was on summary judgment before 2008.”⁹⁷ In fact, he repeated several times in response to questioning from Rep. Camper that the purpose of the bill was to move the summary judgment standard “back to what the state standard was prior to 2008 and what the federal standard has always been . . . the plaintiff has got to ‘put up or shut up.’”⁹⁸ Following up on the charge he was given at the end of the Subcommittee’s meeting, Rep. Dennis stated that he had “worked with the trial bar, the Trial Lawyers’ Association, in drafting this language,” and it was his “understanding they don’t have any intent to oppose this bill. Although there was an attorney here last week who had some issues but he was not representing the Trial Bar

purposes be set forth more clearly). According to its website, the Tennessee Association for Justice “works to protect the civil justice system and advocates for accountability and the rights of all citizens.” <http://www.tnaj.org/>. In the brochure for its 2010 Annual Convention, the Tennessee Association for Justice identifies John Day as a “past president.” https://www.tnaj.org/temp/ts_2FEC6BFC-BDB9-505C-1D647EEE78013B1F2FEC6C2B-BDB9-505C-176165F3D961C5C5/Brochure10.pdf.

⁹⁷ Statement of Rep. Dennis, House Judiciary Committee, May 3, 2011, available at http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=419.

⁹⁸ *Id.* Rep. Dennis went so far as to provide an example of a hypothetical lawsuit in an effort to explain the meaning of summary judgment and the potential effects of the legislation to Rep. Camper. Significantly, throughout this hypothetical, Rep. Dennis implied that the bill would change the burdens of *proof*, not the burdens of *production*, at the summary judgment stage. The implications of this hypothetical could be misleading in that *Hannan* dealt only with the parties’ burden of production and the bill was represented as merely changing the result in *Hannan*.

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Association.”⁹⁹ With regard to his views on the *Hannan* decision, Rep. Dennis stated:

The court got it wrong. The court changed its standard. The court changed its standard that it had always applied. The court changed the standard away from what the federal courts applied. And we’re saying yes, we do it all the time, that if the court makes a decision wrong, incorrectly, if the people think it was done incorrectly, we change the law to rein that in unless it’s a constitutional issue which has constitutional protections that are greater than normal. But yes, the court adopted a standard that was too far to one side. If we codify this, we will be bring that standard back in line with what it was prior to 2008 and what the federal standard is now.¹⁰⁰

During the Judiciary Committee meeting, Rep. Mike Stewart (D-Nashville) asked Rep. Dennis whether the legislation might violate separation of powers principles. He was the only member of either the House or the Senate to voice this concern that the legislation might violate separation of powers. Specifically, Rep. Stewart said:

⁹⁹ *Id.* Rep. Dennis was apparently referring to Doug Janney of the Tennessee Employment Lawyers Association. *See also* Telephone Interview with John Day, *supra* note 85 (indicating that the Tennessee Association for Justice did not actively oppose the bill but also did not support the bill or express approval of it).

¹⁰⁰ *Id.* When asked by Rep. Mike Stewart (D-Nashville) whether this bill represented his personal feelings, Rep. Dennis responded that “there’s a lot of concern within the business community that we’ve gotten to the point that cases with no merit are getting to juries because of *Hannan* – but it is my personal view that we should be using the *Celotex* standard, and the *Byrd* standard, which adopted *Celotex*.”

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I guess my concern is on a rules case, do we really want to . . . you know . . . it's different from creating an environmental law or a law where a person can carry a gun. That's our job, we can make that decision, okay. But I'm worried that this seems like a bad precedent because the courts ultimately create these rules. We have a hand in it, but aren't we really encroaching upon an independent branch of government? You know, the reason I say that is if you think back, you know, where [Franklin] Roosevelt, a very popular president, ran into trouble with his own Democrats is when he tried to pack the Supreme Court and the Democratic senate said no because they respected, even though they had respect for the president, they respected even more this separate branch of government. Seems to me what we're doing here . . . I mean if every time the Supreme Court has said something about a rule we don't like, if we're going to start getting in the business of rewriting the rules every time a case is lost, it seems like we're stepping into their house and I think that is not . . . do you really think that's smart when it comes to rules? I mean rules about how a court works as opposed to the underlying policies that the people sent us up here to do, to implement.¹⁰¹

¹⁰¹ Statement by Rep. Stewart, House Judiciary Committee, May 3, 2011, available at http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=419.

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Rep. Dennis responded that he did not believe the bill raised constitutional concerns, because the bill neither changed the language of Rule 56 nor was in direct contravention to it; rather, the legislation would simply be establishing a burden of proof, something the General Assembly had done in many other contexts, both civil and criminal.¹⁰² To Rep. Dennis, the constitutionality of the legislation seems to turn on whether the legislature actually changed the language of the rule itself, although he added the caveat that if the Supreme Court disagreed, it was their prerogative to find the bill unconstitutional sometime in the future.¹⁰³ Rep. Stewart responded that he would be voting against the bill because although the legislation did not literally change the words of Rule 56, it changed their meaning, which, to a litigant, was the same thing.¹⁰⁴ Rep. Stewart did vote against the bill, but it passed easily out of the Judiciary Committee, and then passed the full House, after no discussion, by an eighty-five to four vote on May 20.¹⁰⁵

¹⁰² Statement of Rep. Dennis, House Judiciary Committee, May 3, 2011, available at http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=419.

¹⁰³ *Id.*

¹⁰⁴ Statement by Rep. Stewart, House Judiciary Committee, May 3, 2011, available at http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=419. Rep. Stewart added that “[t]he Tennessee Supreme Court . . . is a pretty pro-business court and I think we should leave it to the courts to decide what the rules mean.” *Id.*

¹⁰⁵ Although there was no discussion on the House floor about HB 1358, there was relevant discussion during the House’s consideration of HB 1641, companion legislation also sponsored by Rep. Dennis that overruled the Supreme Court’s 2010 *Gossett* decision. During this debate, Rep. Stewart stated: “I don’t think this body should routinely overturn decisions by our high court whether or not it’s to an advantage of one particular group or another just because I think separation of powers suggest that we should be very deferential to them.” Statement of Rep. Stewart, House Floor, May 20, 2011, available at http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=438. Rep. Dennis reiterated, “the intent of the legislation is to take us back to

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B. The Senate

The legislation's trip through the Senate was even less eventful than its companion bill's journey through the House. Only one question was raised when Senate Bill 1114 was brought before the Judiciary Committee on May 17,¹⁰⁶ and it quickly passed out of committee by a six-to-two vote. Unlike in the House, however, there was some debate over the bill on the floor of the Senate. Sen. Tim Barnes (D-Adams), who had raised the lone question in the Judiciary Committee, stated that the American Association for Retired Persons ("AARP") was opposing the bill because it "would make it all but impossible for victims of employment discrimination or of any other employment law violation to be able to prove their case and get their rightful day in court."¹⁰⁷ Sen. Barnes further stated that he would be voting against the bill because he did not agree with jettisoning the Tennessee summary judgment standard

the standard that was applied before that case and the standard that is applied in our federal courts." Statement of Rep. Dennis, House Floor, May 20, 2011, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=438. Rep. Dennis also opined, in response to questioning from Rep. Brenda Gilmore (D-Nashville), that the bill "clarifies" rather than "reverses" the Supreme Court's opinion in *Gossett* and makes it no harder for an employee to receive restitution through an employment discrimination suit. *Id.*

¹⁰⁶ The question from Sen. Tim Barnes (D-Adams) was whether the proposed legislation applies equally to defendants and plaintiffs. *See* Statement of Sen. Barnes, Senate Judiciary Committee, May 17, 2011. Sen. Kelsey clarified that the bill refers not to defendants and plaintiffs, but "speaks in terms of the party that . . . bears the burden of proof at trial." Statement of Sen. Kelsey, Senate Judiciary Committee, May 17, 2011, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=428.

¹⁰⁷ Statement by Sen. Barnes, Senate Floor, May 20, 2011, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=4328.

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in favor of the federal standard.”¹⁰⁸ Another member, Sen. Jim Kyle (D-Memphis), expressed concern that the General Assembly was “blindly overturn[ing] the Supreme Court decision” in *Hannan*.¹⁰⁹

Sen. Lowe Finney (D-Jackson) raised specific concerns that the bill was not sent to the Rules Commission prior to consideration by the General Assembly.¹¹⁰ He asked Sen. Kelsey if he would consider sending the proposal to the Rules Commission and allowing them to consider it, as it is generally standard for the courts to promulgate their own rules of procedure.¹¹¹ Sen. Kelsey

¹⁰⁸ Specifically, Sen. Barnes stated that “[s]ummary judgment is something that is developed in Tennessee with Tennessee body of law, the law that’s unique to Tennessee, and I think it a wrong direction to go to abrogate Tennessee law and try to impose legislatively a body of law that is applied in federal courts.” *Id.*

¹⁰⁹ Statement by Sen. Kyle, Senate Floor, May 20, 2011, available at http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=43288.

¹¹⁰ Under a statutory procedure in Tennessee, the Supreme Court’s Advisory Commission drafts and vets amendments to the Tennessee Rules of Civil or Criminal Procedure or Rules of Evidence. The Supreme Court sends them in a package to the General Assembly, which (unlike the process for the Federal Rules) must approve them by joint resolution before they have the force of law. See TENN. CODE ANN. §§ 16-3-401 to -403 (2011). Ironically, during the pendency of the *Hannan* legislation, the General Assembly approved amendments to the Tennessee Rules of Civil Procedure promulgated by the Tennessee Supreme Court. H.R. 0034 (signed by House Speaker May 2, 2011); S.R. 0012 (signed by Speaker of Senate April 6, 2011).

¹¹¹ Statement of Sen. Finney, Senate Floor, May 20, 2011, available at http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=43288. Sen. Finney went on to express concern that the Senate had not fully deliberated over the bill, and stated a preference that “when we start telling the courts how to expedite dockets, how to get cases moving along, that we let those rules, that we let those courts decide how to do it rather than doing it by statute because it’s very specialized.” *Id.* Nashville plaintiff’s attorney Mark Chalos recently opined that “[t]he Tennessee Constitution and Tennessee law is clear that that it is exclusively in the courts’ purview to make rules for resolving disputes.

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responded that the bill had been on the Rules Commission agenda,¹¹² and that the Tennessee Bar Association or any other interested party had ample opportunity to take the legislation before the Rules Committee after it was introduced in February, but had not done so.¹¹³ He also believed that, at any rate, it was unnecessary for the Rules Committee to consider the legislation because the bill did not change Rule 56, but rather overruled the Court's interpretation of it.¹¹⁴ After this brief debate, the bill passed the Senate by a nineteen-to-nine vote.

There is a concern that this legislature is ignoring the constitutional limits on its powers." Gee, *supra* note 13.

¹¹² In fact, the bill was never on the Commission's agenda and was never considered by the Commission. See Agenda, Advisory Commission to the Supreme Court on Rules of Practice and Procedure (Feb. 18, 2011); Minutes, Advisory Commission to the Supreme Court on Rules of Practice and Procedure (Feb. 18, 2011); Agenda, Advisory Commission to the Supreme Court on Rules of Practice and Procedure (May 13, 2011); Minutes, Advisory Commission to the Supreme Court on Rules of Practice and Procedure (May 13, 2011) (on file with authors).

¹¹³ Statement of Sen. Kelsey, Senate Floor, May 20, 2011, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=4328. Sen. Finney responded that he served on the Commission and had the agenda, and the issue was never raised. Statement of Sen. Finney, Senate Floor, May 20, 2011, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=43288.

¹¹⁴ "I think the bigger issue is that the rule didn't change. It's been the rule, it's been there for a number of years. It's the same rule that was in place before the 2008 decision. It's the same rule in place after the 2008 decision. And it will be the same rule that will be in place after the passage of this bill. So we're really not looking to change the rule. We're simply looking to change the law on the burdens of production and how that is interpreted." Statement of Sen. Kelsey, Senate Floor, May 20, 2011, *available at* http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=43288.

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V. The “Stealth” Bill

The bills that became Public Chapter No. 498, House Bill 1358 and Senate Bill 1114, were both introduced on February 16, 2011. The bills were passed by their respective chambers on May 20, 2011.¹¹⁵ The Senate then substituted House Bill 1358 for Senate Bill 1114, and the final bill, House Bill 1358, was signed by the Speaker of the House on May 24, 2011 and by the Speaker Pro Tempore of the Senate on May 25, 2011. The legislation was signed as enacted by Governor Haslam on June 16, 2011.

Between February 16, 2011 and June 16, 2011, there is not a single mention of either the House or Senate bill, or the Act as passed, in the media, either legal or popular. Much media attention was given to the tort reform legislation that was ultimately passed, but even in this coverage, the bills attempting to overrule *Hannan* were not mentioned.¹¹⁶ The “stealth” nature of the *Hannan* bills may explain why they were part of the flood of bills—154 in all—that were passed during the final three days of the legislative session.¹¹⁷ Because of the end-of-session rush, “some [bills] are going to need to be redone in the next session because they contained mistakes.”¹¹⁸

The combination of stealth and rush to passage may explain the most glaring error in Public Chapter No. 498: its purported directive that a movant “shall prevail” upon

¹¹⁵ *Supra* Part IV.

¹¹⁶ This lack of linkage between the tort reform legislation and the *Hannan* legislation appears to negate the suggestion made by one commentator that Public Chapter 498 could be seen as part of the tort reform package. See Blumstein, *supra* note 18, at 17.

¹¹⁷ See Lucas L. Johnson II, *Tennessee General Assembly Passed 154 Bills in 3 Days*, THE COM. APPEAL, July 17, 2011, available at <http://www.commercialappeal.com/news/2011/jul/17/tennessees-general-assembly-passed-154-bills-in-3-days>.

¹¹⁸ *Id.*

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making the specified showing. If read literally, this language totally changes the current standard for summary judgment stated in Tennessee Rule of Civil Procedure 56.04:

Subject to the moving party's compliance with Rule 56.03, the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.¹¹⁹

Under Public Chapter No. 498, to prevail on a motion for summary judgment, the movant need no longer prove that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."¹²⁰ Instead, all the movant must do is either "[s]ubmit[] affirmative evidence that negates an essential element of the nonmoving party's claim; or . . . [d]emonstrate[] to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim."¹²¹

VI. Context and Implications

A. Context

This legislation can be viewed through a few different lenses. Perhaps the sponsors had a personal belief, or believed that their constituents would feel, that *Hannan*

¹¹⁹ TENN. R. CIV. P. 56.04 (2011).

¹²⁰ *Id.*

¹²¹ 2011 Tenn. Pub. Acts 498.

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was wrongly decided and that it was necessary for the legislature to step in and require courts adjudicating summary judgment motions in Tennessee to apply the *Celotex* standard. This seems unlikely given the inability of Rep. Dennis, in particular, to elucidate the precise meaning and effect of the bill, and his decision to call on Mr. Sanders from Farmers to describe it to the Judiciary Committee for him. Another explanation is that the Republican majorities were determined to pass a business-friendly agenda during the 2011 session after years in the political wilderness, and that overturning *Hannan* was simply something that their business constituencies wanted and they had the votes to accomplish. This is a more reasonable possibility. A third prism looks at the issue more broadly and tries to place it in context of the ongoing power struggle between the conservative legislature and the judicial branch, which the legislature arguably views as the last check on its complete control of state government.¹²² Some of the most significant issues causing this rift between the legislature and judiciary in Tennessee are: (1) the method by which Attorney General is selected; (2) the make-up of the Court of Judiciary; and (3) the Tennessee Plan, which determines the method of selection of appellate judges in Tennessee.¹²³ Any of these could form the basis for its own article, but a brief survey of the issues helps to place the summary judgment legislation in context.

¹²² Indeed, the attempts of legislatures to extend their power at the expense of the judiciary have become an epidemic nationwide. See generally John Gilbeaut, *Co-Equal Opportunity: Legislators are Out to Take Over Their State Judiciary Systems*, ABA JOURNAL (Jan. 2012), at 45.

¹²³ For a detailed analysis of the current dynamic in Tennessee regarding the threat of contested judicial elections – and how Public Chapter No. 498 contributes to that dynamic – see Judy M. Cornett & Matthew R. Lyon, *Contested Elections as Secret Weapon: Legislative Control over Judicial Decisionmaking*, __ ALBANY L. REV. __ (2012) (forthcoming).

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i. Appointment of the Attorney General

Tennessee's method of selecting its Attorney General is unique among the fifty states. Rather than selecting the office through popular election, or even through appointment by the Governor, the Attorney General is appointed by the Tennessee Supreme Court for a term of eight years.¹²⁴ Some have referred to the Attorney General, both positively¹²⁵ and derogatively,¹²⁶ as the "fourth branch of government" in Tennessee. Over the past several years, there have been several attempts, primarily among conservatives, to amend the Constitution to allow for popular election of the Attorney General.¹²⁷ This movement gained steam when Tennessee's current Attorney General, Robert Cooper, declined to join with a group of other state attorneys general who were challenging the constitutionality of the federal Patient Protection and Affordable Care Act that passed in 2009.¹²⁸ Popular

¹²⁴ TENN. CONST. art. VI, § 5.

¹²⁵ See generally Paul Summers, *Attorney General Impartiality is an Asset for Tennesseans*, THE TENNESSEAN, Oct. 18, 2011, available at <http://www.tennessean.com/article/20111018/OPINION03/310180004/Attorney-general-impartiality-an-asset-Tennesseans?odyssey=mod%7Cnewswell%7Ctext%7CFRONTPAGE%7Cp>.

¹²⁶ See Andrea Zelinski, *Multiple Proposals Filed to Reform How TN Picks a Chief Attorney*, THE TENNESSEE REP., Jan. 31, 2011, available at <http://www.tnreport.com/2011/01/multiple-proposals-filed-for-reforming-how-tn-picks-a-chief-attorney/> (statement by Rep. Joe Carr (R-Lascassas)).

¹²⁷ See, e.g., Bonna de la Cruz, *104th General Assembly*, THE TENNESSEAN, January 17, 2005, available at 2005 WLNR 26776267; *Proposal Would Add 5 Office to Statewide Elections*, ASSOCIATED PRESS, Apr. 3, 2007, available at <http://www.wate.com/story/6324679/proposal-would-add-5-offices-to-statewide-elections?clienttype=printable&redirected=true>; *Tennessee Senate Delays Vote on Plan to Elect Attorney General*, THE TENNESSEAN, Apr. 20, 2010, available at 2010 WLNR 8142261.

¹²⁸ See, e.g., Mark Todd Engler, *Guv to Pressure AG Cooper on ObamaCare?*, THE TENNESSEE REP., Jan. 22, 2011, available at

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election of the Attorney General has become a major priority of the Tennessee Tea Party, and Sen. Brian Kelsey, the sponsor of the summary judgment legislation, has been one of the lead proponents.¹²⁹ Due to the difficulty of amending the state constitution, an alternative proposal has been made to create a Solicitor General's office that will take on many of the functions that the critics of the Attorney General wish his office would embrace.¹³⁰

ii. Court of the Judiciary

Established by statute,¹³¹ the Court of the Judiciary investigates allegations of misconduct by Tennessee judges and imposes discipline. Currently, the Court is made up of sixteen members: ten judges appointed by the Tennessee Supreme Court, three members appointed by the Tennessee Bar Association, and one member each appointed by the Governor, the House Speaker, and the Senate Speaker Pro Tempore.¹³² Recently, the Court of the Judiciary has been criticized by Republicans for failing to effectively police the judiciary, with critics pointing to the fact that few complaints result in discipline, and much of the discipline

<http://www.tnreport.com/2011/01/guv-to-pressure-ag-cooper-to-fight-obamacare/>; Greg Johnson, *AG Cooper Should Fight Health Care Law or Resign*, KNOXVILLE NEWS SENTINEL, Dec. 17, 2010, available at <http://www.knoxnews.com/news/2010/dec/17/ag-cooper-should-fight-health-care-law-or-resign/>.

¹²⁹ Andrea Zelinski, *Tea Party Wants People's Choice for Top State Litigator*, THE TENNESSEE REP., Jan. 13, 2011, available at <http://www.tnreport.com/2011/01/tea-party-wants-peoples-choice-for-top-state-litigator/>.

¹³⁰ See, e.g., H.B. 1073, 107th Gen. Assem., Reg. Sess. (Tenn. 2011); Chas Sisk, *Lawmakers Target AG Office*, THE TENNESSEAN, Mar. 26, 2011, available at 2011 WLNR 5909301.

¹³¹ TENN. CODE ANN. § 17-5-101 (2011).

¹³² *Id.*

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is issued in the form of private reprimands.¹³³ In response, a Republican legislator introduced a bill this past session to shrink membership on the Court of the Judiciary to twelve, all of them appointed by either the House Speaker or the Senate Pro Tempore.¹³⁴ Although the legislation failed in the 2011 session, it is an additional example of the tension between the legislative and judicial branches, and represents “a fairly straightforward assault on the independence of the judicial branch.”¹³⁵ Most recently, an ad hoc committee of legislators appointed by the House Speaker and Lieutenant Governor held hearings on the

¹³³ Tom Humphrey, *Tennessee Leaders Struggle Over Who Judges the Judges*, KNOXVILLE NEWS SENTINEL, Aug. 28, 2011, available at <http://www.knoxnews.com/news/2011/aug/28/tennessee-leaders-struggle-over-who-judges-the/>; see also Press Release, Tennessee Senate Republican Caucus, Senator Mae Beavers: Judges Judging Judges is Not Sufficient (Sept. 23, 2011), available at http://www.tnsenate.com/blog/Newsroom/post/Senator_Mae_Beavers_Judges_Judging_Judges_is_not_Sufficient/.

¹³⁴ *Id.*

¹³⁵ *Id.* An even more straightforward assault on the judiciary was made by Senator Mae Beavers on January 13, 2012, when she introduced S.B. 2348, which would have abolished the Tennessee Supreme Court’s power of judicial review of legislation. S.B. 2348, 107th Gen. Assembly, 2d Sess. (2012) (“The supreme court shall have no jurisdiction to determine the constitutionality of a statute which has been properly enacted by the general assembly and become law in accordance with Article II, § 18 and Article III, § 18 of the Tennessee constitution.”). See generally Bill Raftery, *Tennessee Bill Would End Judicial Review of All Statutes*, GAVEL TO GAVEL (Jan. 13, 2012) available at <http://gaveltogavel.us/site/2012/01/13/tennessee-bill-would-end-judicial-review-of-all-statutes> (noting that bill attempts to strip judicial review by statute rather than by constitutional amendment as is being attempted in New Hampshire). Sen. Beavers later withdrew her bill under pressure from legislators in both parties. Erik Schelzig, *Sen. Mae Beavers Withdraws Bill to Ban Judicial Review*, THE TENNESSEAN (Jan. 24, 2012), available at <http://www.tennessean.com/article/20120124/NEWS0201/301240029/Sen-Mae-Beavers-withdraws-bill-ban-judicial-review?odyssey=mod|newswell|text|News|s>.

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Court of the Judiciary, with one lawmaker suggesting that the legislature do away with the body entirely and have the members of the judiciary investigated exclusively by members of the legislature.¹³⁶

iii. Tennessee Plan

Probably the greatest source of tension between the legislature and the judiciary in Tennessee is the constant threat of revising the method of selecting appellate judges in Tennessee, known as the Tennessee Plan.¹³⁷ The Tennessee Constitution provides that “[t]he Judges of the Supreme Court shall be elected by the qualified voters of the State.”¹³⁸ In 1993, the legislature enacted the Tennessee Plan, under which vacancies on appellate courts in Tennessee are filled by gubernatorial appointment, with that appointee being called up for a retention vote at the next biennial election.¹³⁹ A number of different proposals have circulated to change the Tennessee Plan, including popular election and, most recently, adoption of a system similar to the federal model (appointment by the Governor with confirmation by the Senate).¹⁴⁰ Most recently,

¹³⁶ Brandon Gee, *Lawmakers Grill Courts' Disciplinary Body*, THE TENNESSEAN, Sept. 21, 2011, available at 2011 WLNR 18857433 (statement of Sen. Mike Bell (R-Riceville)). The testimony taken by legislators at the hearing included John Jay Hooker, a long-time, outspoken critic of the Tennessee Plan and the Court of the Judiciary, and individuals “telling tales of judicial misconduct, including that of a judge who ordered a Hispanic woman to learn English and use birth control or he would take away her kids.” *Legislature Aims Scrutiny at Court of the Judiciary*, TENN. ATTORNEYS MEMO, Oct. 3, 2011, at 1.

¹³⁷ See Cornett & Lyon, *supra* note 123.

¹³⁸ TENN. CONST. art. VI, § 3.

¹³⁹ See TENN. CODE ANN. § 17-4-115 (2011).

¹⁴⁰ Sen. Kelsey plans to propose this option in the 2012 legislative session. Brandon Gee, *New Way to Pick TN Judges Proposed*, THE TENNESSEAN, Oct. 11, 2011, at 1B, available at <http://www.tennessean.com/article/20111019/NEWS/310190132/New-way-pick->

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Governor Bill Haslam, House Speaker Beth Harwell, and Senate Speaker and Lieutenant Governor Ron Ramsey have joined in supporting a constitutional amendment that would explicitly authorize the Tennessee Plan.¹⁴¹ Because the Tennessee Plan expires in 2012, judicial selection is expected to be a major focus of the 2012 legislative session.¹⁴²

B. Implications

This fascinating attempt to legislatively overrule the Tennessee Supreme Court's interpretation of Tennessee Rule of Civil Procedure 56 (or, alternatively, to legislatively amend Rule 56) raises many questions – among them, whether the Act violates the separation of powers provision of the Tennessee Constitution.¹⁴³ Our examination of the legislative history reveals a number of concerns. First, the legislative history provides no support for any of the legislative findings in the Act. The General Assembly held no hearings on the legislation. No data was presented to demonstrate the validity of the assertions that *Hannan* had made summary judgment more difficult to

TN-judges-proposed. Proponents of popular elections have suggested that they might be able to support the plan, *id.*; however the judiciary has reacted skeptically, at least initially. Brandon Gee, *Nomination Plan Draws Skepticism Among TN Judges*, THE TENNESSEAN, Oct. 21, 2011, at 4B, available at 2011 WLNR 21625761.

¹⁴¹ Chas Sisk & Brandon Gee, *Gov. Bill Haslam Wants TN Constitutional Amendment on Merit Selection of Judges*, THE TENNESSEAN (Jan. 26, 2012) available at <http://www.tennessean.com/article/20120126/NEWS0201/301250149/Gov-Bill-Haslam-wants-TN-constitutional-amendment-merit-selection-judges>. Gov. Haslam stated that “the amendment is needed to settle once and for all the long dispute over how Tennessee’s judges are named and elected.” *Id.*

¹⁴² Brandon Gee, *Nomination Plan Draws Skepticism Among TN Judges*, THE TENNESSEAN, Oct. 21, 2011, at 4B, available at 2011 WLNR 21625761.

¹⁴³ See Cornett & Lyon, *supra* note 123.

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obtain and, concomitantly, that the courts were being overburdened by trials of nonmeritorious cases. Instead, the reiteration of this unsupported assertion simply echoed the doom-saying by the defense bar in the wake of *Hannan*.¹⁴⁴ Principled lawmaking – especially lawmaking that purports to overrule a decision of the Tennessee Supreme Court on a procedural matter – should be based on more than mere speculation and doom-saying.

Second, the bills' sponsors provided inaccurate descriptions of the Tennessee law of summary judgment both pre- and post-*Hannan*. The bills' sponsors, both lawyers, consistently represented to the other legislators, some of them laypersons, that the bill would return Tennessee law to its pre-*Hannan* state, *which was identical to the federal Celotex standard*. As shown above, the assertion that Tennessee summary judgment law was ever identical to the federal standard is simply wrong. The erroneous representations about the effect of the bills served to mislead other legislators, who undoubtedly had even less of a grasp of the fine points of Tennessee's summary judgment law than did the lawyer-sponsors.

Exacerbating the sponsors' inability to accurately depict either the state of Tennessee summary judgment law or the effect of the proposed legislation is the fact that third parties had to be called upon to explain the bill. In the House, Benjamin Sanders, a registered lobbyist for Tennessee Farmers Insurance Company, who was apparently standing by, was called upon to "clarify" the bill, but he also inaccurately described the pre-*Hannan* law.¹⁴⁵ Also apparently standing by was Doug Janney,

¹⁴⁴ See Phillips, *supra* n. 17, Blumstein, *supra* n. 18.

¹⁴⁵ Statement of Mr. Sanders, House Judiciary Subcommittee, Apr. 27, 2011, available at http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=41700. ("[U]nder our old standard of summary judgment I can move for summary judgment and challenge the sufficiency of evidence. And essentially saying if you don't have enough evidence to

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President of the Tennessee Employment Lawyers Association,¹⁴⁶ who accurately pointed out the error discussed above by noting that the bill “give[s] the defendant the opportunity to prevail on the motion of summary judgment without ever giving the plaintiff the opportunity to respond in some circumstances.”¹⁴⁷ While the legislative history does not reveal the precise role played by lobbyists in drafting the bill and briefing its sponsors, the need for third parties to participate in explaining the bill demonstrates how poorly understood the bill actually was.

Third, the General Assembly failed to utilize procedures designed to ensure careful consideration of such changes to court practice and procedure by not submitting the bills to the Tennessee Supreme Court Advisory Commission on the Rules of Practice and Procedure (the “Rules Commission”), as has been customary. In the Senate debate, Senator Lowe Finney, a member of the Rules Commission,¹⁴⁸ stated, “I think [Senate bill 1114] would be appropriate for the Rules Commission to look at.” When Senator Kelsey asserted “the Rules Commission already had a chance to take a look at it last week,” Senator Finney responded, “I have the agenda from the Rules Committee and it wasn’t on the agenda of the Rules Commission Committee [sic].” Senator Kelsey then replied, “Well the Tennessee Bar Association had the ability to take it to the

go to trial we need to stop it right here. Under the old standard, the court could grant that.”)

¹⁴⁶ See *supra*, note 90.

¹⁴⁷ Statement of Mr. Janney, House Judiciary Subcommittee, Apr. 27, 2011, available at http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=41700.

¹⁴⁸ See TENN. CODE ANN. § 16-3-601 (2011) (establishing the Advisory Commission on the Rules of Practice and Procedure); <http://www.tncourts.gov/boards-commissions/boards-commissions/advisory-commission-rules-practice-procedure> (listing current members of the Commission).

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rules committee and at least somebody on there was aware of this particular bill and this particular issue.” Although it is unclear why someone from the Tennessee Bar Association would have known about the bill given the complete lack of publicity it received, what is obvious from this colloquy is that the bill’s sponsors did not present the bill to the Rules Commission.¹⁴⁹ The General Assembly thereby lost the opportunity to receive a variety of perspectives and expert advice about the state of Tennessee summary judgment law and the potential effect of the bill.

VII. Conclusion

Taken together, these concerns reflect an overall lack of public attention and significant debate among legislators. The old canard that “you wouldn’t want to know how the sausage is made” seems to apply here. A citizen or a court looking to the legislative history to discover the logic and policy underlying Public Chapter No. 498 would be frustrated, at best. The oft-repeated mantra that the bill returns Tennessee law to an edenic state that existed prior to *Hannan* is simply wrong; the reports of decreased grants of summary judgments and increased numbers of trials post-*Hannan* is unsupported; and, in addition to constitutional concerns, the legislature’s failure to follow customary procedures to secure expert advice and to demonstrate respect for a coordinate branch of government casts doubt on the wisdom, as well as the validity, of the legislation.

¹⁴⁹ The Commission met twice while the bill was pending. In neither meeting was the bill considered. *See supra* note 112 (citing sources).

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COMMENT

TENNESSEE TUSSLE: THE STRUGGLE OVER TENNESSEE'S COLLECTIVE BARGAINING CURTAILMENT AND ITS POTENTIAL FUTURE IMPACT

*William Gibbons*¹

I. Introduction

One representative referred to Tennessee's teacher collective bargaining bill as "...the tail wagging the dog."² Another said it signified a fight against "socialistic bargaining."³ A lobbyist for the Tennessee Education Association (TEA) said it "...turn[ed] back the clock 35 years."⁴ The bill's sponsor declared that the legislation would reverse the state teachers' union's "strangle [on] the hope of education reform."⁵ Without a doubt, the Tennessee 107th General Assembly's most contentious debate brought out hostile language from both sides. The final result, the Professional Educators Collaborative

¹ William Gibbons is a second-year law student the University of Tennessee College of Law.

² Andrea Zelinski, *Amid Political Uncertainty, Collective Bargaining Bill Headed to House Floor*, TNREPORT (May 12, 2011), <http://www.tnreport.com/2011/05/amid-political-uncertainty-collective-bargaining-bill-headed-to-house-floor/> (statement of Rep. Gary Odom).

³ Richard Locker, *Teacher Bargaining Hinges on GOP*, COMMERCIAL APPEAL, May 20, 2011, at B1 (statement of Rep. Glen Casada) (hereinafter "Locker, "Bargaining Hinges").

⁴ Andrea Zelinski, *House Collective Bargaining Bill Clears Education Committee*, TNREPORT (March 23, 2011), <http://www.tnreport.com/2011/03/house-collective-bargaining-bill-clears-education-committee/> (statement of TEA lobbyist Jerry Winters).

⁵ *Ramsey Proud of Senate's Teacher Collective Bargaining Repeal Vote*, TNREPORT (May 2, 2011), <http://www.tnreport.com/2011/05/ramsey-proud-of-senates-teacher-collective-bargaining-repeal-vote/> (statement of Sen. Jack Johnson).

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Conferencing Act of 2011 (PECCA), formalized collective bargaining's replacement with "collaborative conferencing," in which education employees and administrators discuss proposals through "interest-based collaborative problem-solving."⁶

Opponents questioned the motives of the bill's sponsors, viewing it as an attack on teachers and the unions' previous political stances.⁷ Regardless of the truth of such convictions, detractors chafed while supporters hailed victory.⁸ This comment will explore the different versions of PECCA, how it became new law in Tennessee, and its possible impact on education in the state. It will also seek to demonstrate that although the bill's passage revealed the sometimes unpleasant nature of making law, PECCA could bring a potentially meaningful and positive policy change on Tennessee's education system.

II. Tennessee Collective Bargaining before PECCA

Tennessee teachers first won the right to bargain collectively in 1978 with the passage of the Education Professional Negotiations Act (EPNA).⁹ The legislation was part of a growing national trend favoring workers' rights.¹⁰ The baby-boomer generation had increased student enrollment, which spawned higher demand for teachers and increased their "babysitting" duties, such as monitoring

⁶ Professional Educators Collaborative Conferencing Act of 2011, TENN. CODE ANN. § 49-5-602(2) (2011).

⁷ *Teachers Lose PAC Deduction, Will Now Bargain "Collaboratively,"* TENN. J., May 27, 2011 (hereinafter "Teachers Lose").

⁸ *Id.*

⁹ TENN. CODE ANN. §§ 49-5-601 to -613 (1978) (repealed 2011); see *Teachers Lose*, *supra* note 7.

¹⁰ Jesse Fox Mayshark, *The War on Teachers*, METROPULSE (March 2, 2011), <http://www.metropulse.com/news/2011/mar/02/war-teachers/?print=1>.

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lunchrooms.¹¹ With greater responsibility, teachers wanted more in return.¹² Supported by then-Governor Ray Blanton, a Democrat, the EPNA granted professional employees' organizations exclusive negotiating authority with local school boards.¹³ Blanton praised the bill as "elevating government employees from being second-class citizens," and the TEA cheered at his surprise appearance at its convention.¹⁴ Teacher associations in 92 of 136 school districts used the law to bargain collectively.¹⁵

As the 1978 law stated, the purpose was "...to protect the rights of individual employees in their relations with boards of education, and to protect the rights of the boards of education and the public in connection with employer-employee disputes affecting education."¹⁶ To find that balance, the bill put forth a two-step system of elections leading to recognition of an "organization," which would then negotiate exclusively with local school boards.¹⁷ To be able to negotiate, the bill's first step called for thirty percent or more of professional employees to agree to request an election that would decide whether to bargain.¹⁸ After securing the thirty percent vote, the second step required a majority of those eligible to vote affirmatively to secure representation by the organization.¹⁹

¹¹ *Capitol Hill Conversation: History of Teachers' Collective Bargaining*, NASHVILLE PUBLIC RADIO (Feb. 28, 2011), <http://wpln.org/?p=24553>.

¹² *Id.*

¹³ *That Was Then, This Is Now*, TNREPORT (May 16, 2011), <http://www.tnreport.com/2011/05/that-was-then-this-is-now/>.

¹⁴ *House Collective Bargaining Bill Clears Education Committee*, *supra* note 4.

¹⁵ *Teachers Lose*, *supra* note 7.

¹⁶ TENN. CODE ANN. § 49-5-601(b)(3) (2009) (repealed 2011).

¹⁷ *See id.* § 49-5-605 (b)(8).

¹⁸ *See id.* § 49-5-605(a).

¹⁹ *See id.* § 49-5-605(b)(4).

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Once it gained a majority, an organization procured exclusive bargaining rights for the next two years.²⁰

Mandatory negotiation topics included salaries, grievance procedures, insurance, fringe benefits, working conditions, leave, student discipline, and payroll deductions.²¹ When disagreements arose, the law provided for mediation and conciliation that would extend indeterminately if the parties reached no resolution.²² With ninety-two school districts engaging in collective bargaining, the issue of overturning the practice did not reach serious levels, even during the 2010 election season.²³ Thus, when the legislature introduced PECCA, one had to wonder what brought about its unanticipated emergence.

III. Triggers of Change

Local school boards, organized through the Tennessee School Boards Association, opposed collective bargaining and officially favored its repeal beginning in 1982.²⁴ The Association's attempts to turn back the law, though, typically rose to no more than token efforts.²⁵ However, once Republicans across Tennessee triumphed in the 2010 elections, claiming significant majorities in both the Senate and the House, the Association saw opportunity in the altered political climate.²⁶ Perhaps adding to the Association's sense of opportunity was Tennessee's passage of several reforms as it sought funds in the federal

²⁰ See *id.* § 49-5-605(b)(8).

²¹ See *id.* § 49-5-611(a).

²² See TENN. CODE ANN. § 49-5-613.

²³ *Teachers Lose*, *supra* note 7.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

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Race to the Top competition.²⁷ Further, Tennessee's State Collaborative on Reforming Education (SCORE), under former Senate Majority Leader Bill Frist, brought various educational reform ideas into the public sphere.²⁸ Some of SCORE's proposals, such as tenure reform, have become policy in the state.²⁹ Taken together, education policy had entered the public dialogue, and perhaps the Association saw a climate of change taking hold in Tennessee. Indeed, when the Boards Association presented the idea to Senate Republicans, it caught their interest, setting the wheels in motion towards its eventual adoption.³⁰

IV. Evolution of Collective Bargaining's Repeal

A. *The Original Bill and its First Major Amendment*

Introduced on January 18, 2011, in the House and January 24, 2011, in the Senate, the initial PECCA bill proposed the complete repeal of the 1978 EPNA, outlawing negotiation between professional employees' organizations or teachers' unions and local school boards.³¹ While the changes would not have taken effect immediately, once the

²⁷ See J.E. STONE, EDUCATION CONSUMERS FOUNDATION, POLICY HIGHLIGHTS FROM TENNESSEE'S RACE TO THE TOP APPLICATION 2 (2010).

²⁸ See TENN. SCORE, A ROADMAP TO SUCCESS 14 (2010), available at <http://www.tnscore.org/wp-content/uploads/2010/06/SCORE-Roadmap-to-Success.pdf>.

²⁹ See TENN. SCORE, TENURE REFORM (SB 1528/HB 2010) TALKING POINTS (2011), available at <http://www.tnscore.org/wp-content/uploads/2011/03/TENURE-TALKING-POINTS.pdf>.

³⁰ *Teachers Lose*, *supra* note 7.

³¹ S.B. 113, 107th Gen. Assemb., Reg. Sess. § 2(a) (Tenn. 2011). See BILL INFORMATION, S.B. 113, 107th Gen. Assemb. (Tenn. 2011), <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0113>; see also Eric Schelzig, *TN Teachers Collective Bargaining Targeted*, ASSOCIATED PRESS, <http://www.businessweek.com/ap/financialnews/D9KVF2K01.htm#fadetoblack>.

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active collective bargaining contracts ran their course, school boards would have had full policymaking authority, with no obligation to discuss ideas with employees' organizations.³²

Some viewed the first draft as going too far, and thus the Senate worked to revise it.³³ The amendment, Senate Amendment No. 5, rewrote the original bill and once again called for the repeal of the EPNA while setting forth a system of "collaboration" between professional employees or their representatives and local boards.³⁴ It also required local boards to develop manuals with procedures for creating employment policies.³⁵ Local boards were to receive "input" from professional employees and the general public in creating local manuals.³⁶ Further, the amendment required the Tennessee Organization of School Superintendents (TOSS), in conjunction with employee representative organizations and the Boards Association, to develop a separate training system manual for collaborative problem solving.³⁷ For use by local boards, this training manual would include procedures on discussing terms and conditions of contracts.³⁸ Employees could submit written input to local boards during a 45-day period following their local manual's release.³⁹ The board, however, possessed final authority under the amendment for the specification of terms and conditions.⁴⁰

³² S.B. 113, *supra* note 31, § 2(b).

³³ *Teachers Lose*, *supra* note 7; Joe White, *New Collective Bargaining Proposal Gives Management Job of Crafting Teacher Provisions*, NASHVILLE PUBLIC RADIO (Apr. 28, 2011), <http://wpln.org/?p=26447>.

³⁴ S. Amend. No. 5 to S.B. 113, 107th Gen. Assemb., Reg. Sess. §§ 1, 49-5-603 (Tenn. 2011).

³⁵ *Id.* § 49-5-610.

³⁶ *Id.* § 49-5-610(a)(2).

³⁷ *Id.* § 49-5-601(c).

³⁸ *Id.* § 49-6-608(a).

³⁹ *Id.* § 49-6-610(c)(3)(a).

⁴⁰ S. Amend. No. 5 to S.B. 113 § 49-6-608(a).

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The amendment required local boards to collaborate with professional employees or their representatives with regard to salaries or wages, grievance procedures, insurance, working conditions, leave, payroll deductions, and fringe benefits.⁴¹ As mentioned, though, the boards were to retain final authority on all of these topic areas.⁴² Further, the amendment prohibited collaboration on differentiated pay and incentive programs, expenditures of grants from such entities as the federal government and private foundations, evaluation standards, staffing decisions related to “innovative” programs, and personnel decisions concerning assignment of employees.⁴³ The amended version of the bill passed in the Senate on May 2, 2011, along a largely party-line vote of eighteen to fourteen.⁴⁴

B. Survival in the House and the House’s Revisions

With the amended bill having passed in the Senate, the remaining hurdles to its enactment resided in the House. Those hurdles proved to be more difficult than expected, however. The House initially voted to refer the Senate’s bill to its Education Committee, which, given the short time remaining in the session, seemed to indicate the House was tabling the bill.⁴⁵ The Education Committee, however, voted affirmatively on the bill.⁴⁶ Then, in a legislative oddity, Republican Speaker of the House Beth Harwell

⁴¹ *Id.* § 49-6-608(a)(1)-(7).

⁴² *Id.* § 49-6-608(a).

⁴³ *Id.* § 49-6-608(b)(1)-(5).

⁴⁴ Tom Humphrey, *Senate Votes to Abolish Bargaining for Teachers*, KNOX NEWS (May 3, 2011), <http://www.knoxnews.com/news/2011/may/03/senate-votes-to-abolish-bargaining-for-teachers/?print=1>.

⁴⁵ Richard Locker, *Collective Bargaining Bill Hits Snag*, COMMERCIAL APPEAL, May 4, 2011, at B2.

⁴⁶ Andrea Zelinski, *House Reverts to Scaled Back Collective Bargaining Plan*, TNREPORT (May 11, 2011), <http://www.tnreport.com/2011/05/house-reverts-to-scaled-back-collective-bargaining-plan/>.

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kept the bill alive in the Finance, Ways, and Means Committee by breaking a tie vote, using her right as speaker to vote in any committee.⁴⁷

With new life for the legislation, some members of the House sought to advance their own amendment, which was less comprehensive than the Senate's draft.⁴⁸ The amendment was also a rewrite of the original bill, but its distinction from the Senate Amendment meant the two bodies would have to develop a final version of the bill once the House made its changes.⁴⁹ Most fundamentally different was that the House version did not completely repeal the EPNA.⁵⁰ The amendment required local boards to negotiate with recognized professional employees' organizations only on conditions of employment for which performance requires the employee to have a license—essentially base salaries and benefits, among other issues.⁵¹ Like the Senate version, however, the House proposal specified that issues such as differentiated pay and incentives, expenditure of governmental and private grants, evaluation standards, salary and staffing issues relating to innovative educational programs, and personnel decisions regarding assignment would be off limits in negotiation.⁵²

⁴⁷ Tom Humphrey, *Harwell Casts Vote to Save Collective Bargaining Bill from Defeat*, HUMPHREY ON THE HILL (May 11, 2011, 6:39 PM), <http://blogs.knoxnews.com/humphrey/2011/05/harwell-casts-vote-to-save-col.html>

⁴⁸ Richard Locker, *Tennessee House Amends Bill to Limit Collective Bargaining by Teachers*, COMMERCIAL APPEAL, May 16, 2011, <http://www.commercialappeal.com/news/2011/may/16/tennessee-house-amends-bill-limit-collective-bargal/> (hereinafter “Locker, *House Amends*”); see also Joe White, *Collective Bargaining Vote Delayed, Another Union Bill Marches Forward*, NASHVILLE PUBLIC RADIO (May 16, 2011), <http://wpln.org/?26949>.

⁴⁹ Locker, *House Amends*, *supra* note 48.

⁵⁰ *Id.*

⁵¹ H. Amend. No. 1 to H.B. 130, 107th Gen. Assemb., Reg. Sess. § 12 (Tenn. 2011); see also Locker, *House Amends*, *supra* note 48.

⁵² H. Amend. No. 1 to H.B. 130, *supra* note 51, § 4(c)(1)-(5).

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After extensive debate on the House floor and several proposed amendments containing “opt-out” provisions for local systems, the House amendment passed fifty-nine to thirty-nine, necessitating synchronization between the two bodies.⁵³

C. Reaching a Compromise

The Senate, led by Senator Jack Johnson and Lieutenant Governor Ron Ramsey, both Republicans, refused to concur with the amended House bill, which they perceived as too weak.⁵⁴ To avoid a stalemate, the two bodies formed a conference committee charged with forming a compromise version of the bill.⁵⁵ After deliberating, the compromise banned collective bargaining, but kept much of the framework for its replacement, “collaborative conferencing,” the same as under EPNA.⁵⁶ The new bill retained the EPNA’s two-step voting structure for recognition of teacher organizations, although it lowered the percentage vote necessary to recognize an organization’s request to conference from thirty percent to fifteen percent.⁵⁷ In one significant departure from previous law, the conference committee took away the exclusive negotiating rights of a professional group, meaning multiple organizations could approach local boards.⁵⁸ Like the original statute, the compromise allowed conferencing only on salaries and wages, grievance procedures, working conditions, leave, payroll deductions of dues, and insurance

⁵³ Tom Humphrey, *House Passes Collective Bargaining Bill*, 59-39, HUMPHREY ON THE HILL (May 19, 2011, 5:01 PM), <http://blogs.knoxnews.com/humphrey/2011/05/house-passes-collective-bargai.html>.

⁵⁴ *Teachers Lose*, *supra* note 7.

⁵⁵ Locker, *Bargaining Hinges*, *supra* note 3.

⁵⁶ *See* TENN. CODE ANN. § 49-5-602(2).

⁵⁷ *See id* § 49-5-605(b)(1)-(6).

⁵⁸ *See id* § 49-5-605(c).

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and benefits, including retirement and pension.⁵⁹ Collective bargaining had mandated talks on each of these, as well as student discipline measures, meaning the new legislation kept the major topics of negotiation largely the same, but only suggested them while limiting the scope of talks beyond those topics.⁶⁰

Collaborative conferencing also called for collaboration to take place between even teams of seven to eleven representatives each between the local school system and teacher organizations, a change from EPNA's variation of team sizes based on school district size.⁶¹ Finally, a memorandum of understanding following collaboration would memorialize agreements the two sides could make, although the local school boards would possess ultimate power to decide unresolved matters.⁶² The compromise passed both legislative bodies along largely party-line votes, and Governor Bill Haslam signed the bill into law on June 1, 2011.⁶³

V. Criticism of the Bill

The bill received aggressive legislative commentary inside and outside of the legislature. Following the House's approval of the compromise, TEA members shouted "Shame on you" and "2012"—the year of the next set of

⁵⁹ See *id.* § 49-5-608(a).

⁶⁰ Senator Dolores Gresham, *Comparison of the Educational Professional Negotiations Act of 1978 and the Professional Educators Collaborative Conferencing Act of 2011*, available at <http://senatordoloresgresham.com/pdf/CollBarg%20vs%20CollabConferencing.pdf>.

⁶¹ See TENN. CODE ANN. § 49-5-605(b)(4); see also Gresham, *supra* note 60.

⁶² See TENN. CODE ANN. § 49-5-609(a)-(d).

⁶³ See TENN. CODE ANN.; Richard Locker, *Teacher Rights to Negotiate Repealed*, COMMERCIAL APPEAL, May 21, 2011, at A1.

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elections in Tennessee.⁶⁴ Democrats in opposition to the bill suggested that the primary reason for the bill's passage was revenge for the TEA's historical support of Democratic candidates.⁶⁵ "I have to say that it's not easy to give the benefit of the doubt any more. In fact, this process seems more and more to be a political vendetta," said Senator Andy Berke, a Democrat.⁶⁶

Republicans, however, denied that accusation, and some indicated that the TEA's reduced influence would in fact remove politics from education policy.⁶⁷ "We are not trying to punish the teachers, absolutely not. For too long, we have allowed the TEA to make education a political battleground in this state. We need to make education about education," said Representative Jim Gotto.⁶⁸ Other Republicans hailed the bill's passage as a major education breakthrough.⁶⁹ "For years upon years, one union has thwarted the progress of education in Tennessee," said Lieutenant Governor Ramsey. "The barrier that has prevented us from putting the best possible teacher in every classroom will soon be removed."⁷⁰

Outside the legislature, education association advocates have taken issue with the bill, mostly regarding

⁶⁴ *Lawmakers Vote to Repeal 1970s Era Collective Bargaining Law*, TNREPORT (May 21, 2011), <http://www.tnreport.com/2011/05/lawmakers-vote-to-repeal-1970s-era-collective-bargaining-law/>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Jeff Woods, *State House Ok's Compromise Version of Proposal to Curtail Teachers' Collective Bargaining*, CITY PAPER, May 19, 2011, available at <http://nashvillecitypaper.com/content/city-news/state-house-oks-compromise-version-proposal-curtail-teachers-collective-bargaining>.

⁶⁸ *Id.*

⁶⁹ Tim Ghianni, *Tennessee Limits Collective Bargaining Rights for Teachers*, REUTERS, June 1, 2011, available at <http://www.reuters.com/article/2011/06/01/us-unions-states-tennessee-idUSTRE75071I20110601>.

⁷⁰ *Id.*

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its fairness but also concerning its legality. Tennessee courts have recognized public employees' right to join unions, but state and federal courts have not found a constitutional right to bargain collectively under Tennessee law.⁷¹

Still, challenges in Tennessee have emerged, focusing on PECCA's constitutionality in other respects.⁷² Three challenges have commenced in Blount, Dickson, and Sumner Counties in which local education associations have sued local boards, with the TEA general counsel serving in each.⁷³ While there are some differences in what the suits allege, they each proffer two fundamental arguments regarding PECCA's constitutionality—that it retrospectively removes powers education associations once possessed and that PECCA's content extends beyond its caption.⁷⁴

The education associations' first argument was that PECCA “retrospectively impairs” the rights of teachers'

⁷¹ Catherine E. Shuck, *Bargaining Power: Understanding the Rights of Public Sector Workers in Tennessee*, TENN. BAR J. 12-14 (2011).

⁷² Tom Humphrey, *Dickson Teachers' Lawsuit Contends Anti-Collective Bargaining Law Violates State Constitution*, HUMPHREY ON THE HILL (July 21, 2011, 2:37 PM), <http://blogs.knoxnews.com/humphrey/2011/07/dickson-teachers-lawsuit-conte.html>.

⁷³ Tennessee Education Association, *Locals Allege Violation of First Amendment Rights*, TEACH, Jan. 2012, at 3 (hereinafter “TEA, *Locals Allege*”).

⁷⁴ See Tennessee Memorandum of Law in Defense of the Constitutionality of 2011 Tenn. Pub. Ch. No. 378 at 2,4, Blount Cnty. Educ. Ass'n v. Blount Cnty. Bd. Of Educ., No. 2010-140 (Ch. Ct. of Blount Cnty. filed Oct. 28, 2011) (hereinafter “Blount Memo”); Tennessee Memorandum of Law in Defense of the Constitutionality of 2011 Tenn. Pub. Ch. No. 378 at 2,4, Dickson Cnty. Educ. Ass'n v. Dickson Cnty. Bd. Of Educ., No. 2011-CV-288 (Ch. Ct. Dickson Cnty. July 13, 2011) (hereinafter “Dickson Memo”); Tennessee Memorandum of Law in Defense of the Constitutionality of 2011 Tenn. Pub. Ch. No. 378 at 2,7, Sumner Cnty. Educ. Ass'n v. Sumner Cnty. Bd. of Educ., No. 2011 C-26 (Ch. Ct. Sumner Cnty. June 30, 2011) (hereinafter “Sumner Memo”) (all on file with author).

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unions formed under the EPNA in violation of Article I, Section 20 of the Tennessee Constitution,⁷⁵ which states that “no retrospective law, or law impairing the obligations of contracts, shall be made.”⁷⁶ Under Tennessee law, “retrospective statutes” are those that “operate forward but look backward” in attaching new consequences or legal significance in the future to past acts or facts that existed before the statute went into effect.⁷⁷ In response, the State Attorney General’s office has intervened by submitting memoranda in each case, arguing in favor of its constitutionality.⁷⁸ The memoranda maintained that PECCA is a prospective statute that does not apply to already existing contracts.⁷⁹ Instead, they point out that PECCA suspends bargaining between unions and school boards so that the two sides can develop new discussion procedures.⁸⁰ In other words, the suspension of negotiations was merely procedural, not substantive.⁸¹ The office points out that, under the logic of the plaintiff’s challenge, amending any state law could face the same constitutional difficulty.⁸² Further, the Attorney General’s office argues that no violation of Article I, Section 20 occurred because PECCA did not strip teachers of any “vested” rights even if

⁷⁵Blount Memo, *supra* note 74, at 2; Dickson Memo, *supra* note 74, at 2; Sumner Memo, *supra* note 74, at 7.

⁷⁶Tenn. Const. art. I, § 20.

⁷⁷Blount Memo, *supra* note 74, at 5; Dickson Memo, *supra* note 74, at 5; Sumner Memo, *supra* note 74, at 3.

⁷⁸See, e.g., Blount Memo, *supra* note 74.

⁷⁹Blount Memo, *supra* note 74, at 4; Dickson Memo, *supra* note 74, at 4; Sumner Memo, *supra* note 74, at 2.

⁸⁰Blount Memo, *supra* note 74, at 6-7; Dickson Memo, *supra* note 74, at 6; Sumner Memo, *supra* note 74, at 4.

⁸¹Blount Memo, *supra* note 74, at 7; Dickson Memo, *supra* note 74, at 7; Sumner Memo, *supra* note 74, at 5.

⁸²Blount Memo, *supra* note 74, at 5; Dickson Memo, *supra* note 74, at 5; Sumner Memo, *supra* note 74, at 3.

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the law was in fact retrospective.⁸³ Citing case law, the memoranda state that the Tennessee Constitution only prohibits retrospective laws that take away vested rights under existing law.⁸⁴ They argue that because teachers retained their right to form a union and to engage in negotiations, they kept their vested rights.⁸⁵

Second, the teachers' unions argue that PECCA extended beyond its caption, a violation of Article II, Section 17 of the Tennessee Constitution.⁸⁶ That section states that bills are to have just one subject and recite in the caption which law the bill may be amending, repealing, or reviving.⁸⁷ The unions argued that confusion arose from deleting the words "any locally negotiated agreement" in certain statutes PECCA amended and that the deletions broaden the meaning of the legislation beyond its caption, which reads "AN Act to amend Tennessee Code Annotated, Section 5-23-107 and Title 49, relative to the Education Professional Negotiations Act."⁸⁸ The Attorney General's office, however, has argued that the point of the Tennessee Constitution's caption provision is to evoke the overall purpose of the legislation.⁸⁹ It contended that the

⁸³ Blount Memo, *supra* note 74, at 6-8; Dickson Memo, *supra* note 74, at 6-8; Sumner Memo, *supra* note 74, at 4-6.

⁸⁴ Blount Memo, *supra* note 74, at 5-6; Dickson Memo, *supra* note 74, at 5; Sumner Memo, *supra* note 74, at 3.

⁸⁵ Blount Memo, *supra* note 74, at 6; Dickson Memo, *supra* note 74, at 6; Sumner Memo, *supra* note 74, at 4.

⁸⁶ Blount Memo, *supra* note 74, at 2; Dickson Memo, *supra* note 74, at 2; Sumner Memo, *supra* note 74, at 7.

⁸⁷ Blount Memo, *supra* note 74, at 3; Dickson Memo, *supra* note 74, at 2; Sumner Memo, *supra* note 74, at 7.

⁸⁸ Blount Memo, *supra* note 74, at 2-3; Dickson Memo, *supra* note 74, at 2; Sumner Memo, *supra* note 74, at 7.

⁸⁹ Blount Memo, *supra* note 74, at 3; Dickson Memo, *supra* note 74, at 3; Sumner Memo, *supra* note 74, at 7.

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bill's caption fulfills that goal and does not extend beyond what was in the EPNA.⁹⁰

In making their arguments, the unions hoped to enjoin the new legislation from taking effect, thereby forcing negotiations to take place using the EPNA, as well as a declaratory judgment stating that PECCA was unconstitutional.⁹¹ To this point, none of the suits has been successful, although none yet has reached a final judgment.⁹² In Dickson County, a judge denied the injunction, citing a lack of irreparable harm to the Dickson County Education Association.⁹³ Currently, the Dickson County Board of Education and the Dickson County Education Association are scheduling depositions in hopes of resolving the matter.⁹⁴

In Blount County, the local education association similarly argued for an injunction.⁹⁵ In particular, the union argued that the PECCA provisions on transfers, dismissals due to staff reduction, and director of school's responsibilities exceeded the limits of PECCA's caption.⁹⁶ Meanwhile, the Blount County Board of Education argued that it was too early to judge the lawsuit, maintaining an injunction was not necessary.⁹⁷ Additionally, the Blount County Board of Education argued that even if PECCA is

⁹⁰ Blount Memo, *supra* note 74, at 4; Dickson Memo, *supra* note 74, at 4; Sumner Memo, *supra* note 74, at 9.

⁹¹ Pierce Greenberg, *Union's Injunction Request Denied*, A COLLECTION FROM THE LONG ROAD, Oct. 2, 2011, available at <http://www.piercegreenberg.com/?p=340>; see TEA, *Locals Allege*, *supra* note 73.

⁹² Greenberg, *supra* note 91.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Matthew Stewart, *Judge Hears Blount Teachers' Union Claim*, DAILY TIMES, http://www.thedailytimes.com/Local_News/story/Judge-hears-Blount-teachers-union-claim-id-016822 (last visited Jan. 22, 2012).

⁹⁶ *Id.*

⁹⁷ *Id.*

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unconstitutional, that alone would not necessitate a return to collective bargaining, asserting that the General Assembly could have theoretically repealed collective bargaining and replaced it with nothing.⁹⁸

In Sumner County, additional First Amendment arguments regarding the local education association's freedom of speech and freedom of association placed the suit in federal district court.⁹⁹ The Sumner County Board of Education, however, argued that the Sumner County Education Association was a non-entity and that the Tennessee Education Association was acting on its behalf.¹⁰⁰ Because of that, the school board maintained, there was no legal basis for dealing with the Sumner County Education Association.¹⁰¹ That case is set for trial on October 23, 2012.¹⁰²

Despite these legal challenges, however, most of the legislation's criticisms pertained to its fairness. Teachers' unions across the state voiced their opposition because, in their view, it silenced their input on district policies.¹⁰³ "It's an attack on the rights of teachers to have a voice regarding their working conditions, which are also the learning conditions of students," said TEA spokesperson Alexei Smirnov shortly after the bill was introduced.¹⁰⁴ Democrats characterized the leeway given to local school boards as unjust.¹⁰⁵ "The biggest difference between this amendment

⁹⁸ *Id.*

⁹⁹ See TEA, *Locals Allege*, *supra* note 73.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See Tim Ghianni, *Tennessee Teachers Fight Bill to End Collective Bargaining*, REUTERS, (Feb. 21, 2011, 12:35 PM) <http://www.reuters.com/article/2011/02/21/us-tennessee-unions-idUSTRE71K46T20110221/>.

¹⁰⁴ *Id.*

¹⁰⁵ See Andrea Zelinski, *Collective Bargaining Bill Clears Senate*, TNREPORT (May 3, 2011), <http://www.tnreport.com/2011/05/collective-bargaining-bill-clears-senate/>.

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and the law today is... they have to meet but they don't have to consider their opinion," Senator Jim Kyle said shortly before the bill passed.¹⁰⁶

In essence, teachers' unions and their supporters appeared to be fearful of the possibility that their contracts could become overly one-sided. Under the old law, items reaching an impasse required continued negotiation; however, the new law gives school boards the power to make a final decision free of outside input.¹⁰⁷ As the Tennessee Education Department stated, "The PECCA...[makes] it clear the board may address terms and conditions of employment through policy if an agreement has not or cannot be reached."¹⁰⁸

As a result of school boards' increased negotiating power, combined with concerns about the issues prohibited from entering negotiations, opponents have expressed unease about what possibilities the law allows. For example, teachers' unions across the country have opposed merit-based pay schemes and bonuses for higher tests scores, two items that the law specifically stated are non-negotiable.¹⁰⁹

Opponents also viewed the state government as overstepping its bounds to pass a bill that they opposed and over which the General Assembly and the general public were divided.¹¹⁰ Proposed "opt-out" provisions spoke to the sentiment that the decision on collective bargaining take

¹⁰⁶ *Id.*

¹⁰⁷ *Blount Cnty. Educ. Ass'n. v. Blount Cnty. Bd. of Educ.*, 78 S.W.3d 307, 322 (Tenn. Ct. App. 2002); Tennessee Department of Education, *Professional Educators Collaborative Conferencing Act of 2011 Frequently Asked Questions*, available at http://www.state.tn.us/education/doc/PECCAFAQ_June17.pdf (hereinafter "PECCA FAQs").

¹⁰⁸ PECCA FAQs, *supra* note 107.

¹⁰⁹ Andrew J. Coulson, *The Effects of Teachers Unions on American Education*, 30 CATO J. 155-156, available at <http://www.cato.org/pubs/journal/cj30n1/cj30n1-8.pdf>.

¹¹⁰ *Teachers Lose*, *supra* note 7.

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place locally, where local education leaders could perhaps better gauge community needs.¹¹¹

VI. Potential Impact of the Bill

Because there are several stark contrasts between the EPNA and its replacement, the potential impact of the bill could be dramatic. Most fundamentally, the replacement of collective bargaining with collaborative conferencing provides more widespread access for teachers through nonexclusive negotiating rights and a reduced number of required votes to gain the right to conference.¹¹² This increased access could be positive for teachers, but it could also result in a more fragmented, less unified message to local school boards. With the new law's allowance of unilateral resolution of disputed issues, a more disjointed message from teachers could result from greater use of the board's ultimate power.

Additionally, local boards' newfound power to resolve unsettled discussions could have a significant impact in other ways.¹¹³ Among the topics for collaborative conferencing are teachers' pay, fringe benefits, insurance, leave policies, and improving working conditions.¹¹⁴ While EPNA ordered negotiation on these matters until the two sides reached an agreement, under the new law, a local school board may now alter one of these topic areas without the endorsement of its employees.¹¹⁵ If school boards chose to use their authority to act independently to its fullest extent, the effects could be considerable.

Even more, the new law's inclusion of explicit nonnegotiable items opens the door for other significant

¹¹¹ Richard Locker, *Senate Ends Bargaining by Teachers*, COMMERCIAL APPEAL, May 2, 2011, at B1; Humphrey, *supra* note 53.

¹¹² See TENN. CODE ANN. § 49-5-605(a)-(b).

¹¹³ See *id* § 49-5-609(d).

¹¹⁴ See *id* §§ 49-5-608(a) & 609(d).

¹¹⁵ *Id.*

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education reforms in Tennessee without input from teachers. The previous law had allowed negotiation of topics outside of the ones specifically mandated, such as differentiated merit pay and evaluation standards, but gave both parties the opportunity to refuse to negotiate, while allowing the other side to seek a court order demanding a meeting on that issue.¹¹⁶ While the topics of negotiation remained largely the same as under the EPNA, the new law was unequivocal in its opposition to discussions outside of its listed items for collaboration; and it barred discussion on differentiated pay, expenditure of grants or awards, evaluations, staffing decisions, assignment of employees, and payroll deductions for political activities.¹¹⁷ These all represent trendy areas of education reform discussion, but only evaluation procedures have seen change in Tennessee.¹¹⁸ School boards independently implementing such changes could face controversy because of the lack of outside input, and it could impact education statewide.

It is unclear what influence merit pay, for example, has on the teaching force or students, although teachers' unions have opposed the measures.¹¹⁹ In one instance, a study performed on three hundred teachers in the Nashville Metro School District showed little increase in student performance among those whose teachers had participated in the program.¹²⁰ However, most studies on the effects of merit pay are too recent to determine the long-term effects

¹¹⁶ TENN. CODE ANN. § 49-5-611(a) (2009) (repealed 2011).

¹¹⁷ TENN. CODE ANN. § 49-5-608(a)(5).

¹¹⁸ See *Tenure Reform (SB 1528/HB 2010) – Talking Points*, SCORE (Mar. 3, 2011), <http://www.tnscore.org/wp-content/uploads/2011/03/TENURE-TALKING-POINTS.pdf>.

¹¹⁹ Fredrick M. Hess & Martin R. West, *A Better Bargain: Overhauling Teacher Collective Bargaining for the 21st Century* (2006), available at www.hks.harvard.edu/pepg/PDF/Papers/BetterBargain.pdf.

¹²⁰ Michael Podgursky & Matthew Springer, *Teacher Compensation Systems in the United States K-12 Public School System*, 64 NAT'L TAX J. 165, 182 (2011). Similar studies in Chicago, New York, and Round Rock, Texas also revealed only marginal increase.

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of such legislation.¹²¹ Another form of differentiated pay involves paying more to teachers of a subject area in short supply. For example, nationally, schools lack qualified math and science teachers.¹²² Collective bargaining measures often leave administrators unable to take those shortages into account when offering salaries, as has been the case with Memphis City Schools.¹²³ Now, school boards can enact these changes without union support.

Personnel decisions, another nonnegotiable item, also allow potentially significant leeway to local school boards. For example, seniority determines which teachers avoid layoffs pursuant to the collectively bargained contract in Memphis City Schools.¹²⁴ In July 2011, the system laid off 150 teachers in compliance with the contract.¹²⁵ Among those laid off were four Teach for America teachers and one who had taught for 27 years in Johnson City, but for just one year in Memphis.¹²⁶ Each teacher's principal could attest to the talent of those teachers who faced dismissal, but seniority rules prevailed.¹²⁷ Under the new law, those teachers could have possibly averted layoffs, had administrators decided to change the system and deemed those teachers too talented to dismiss.¹²⁸

¹²¹ *Id.* at 186.

¹²² *See Hess, supra* note 119, at 24.

¹²³ *Id.*; *see* Agreement Between the Board of Education of the Memphis City Schools and the Memphis Education Association, an Affiliate of the Tennessee Education Association and the National Education Association Effective July 1, 2009 through June 30, 2012, *available at* <http://www.nctq.org/docs/17-07.pdf> (hereinafter "Memphis Agreement").

¹²⁴ Memphis Agreement, *supra* note 123.

¹²⁵ Jane Roberts, *Schools Caught in Seniority Quandary*, COMMERCIAL APPEAL, July 15, 2011, at A1.

¹²⁶ *Id.*

¹²⁷ *See id.*

¹²⁸ TENN. CODE ANN. § 49-5-608(a)(5).

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On the other hand, some believe the new law may have little impact. In school districts where relations between teaching organizations and school administrators are cordial, it is possible, even likely, that the difference between collective bargaining and collaborative conferencing may be mere terminology. Dickson Schools Director Jimmy Chandler said as much following the law's enactment, stating, "It didn't bother us because we've always worked well with our teachers. It's never been a big issue for us. We try to do everything we can as far as benefits and salaries [for our teachers]."¹²⁹ Though somewhat concerned with the law's potential impact if relations deteriorate between educators and administrators, Dickson's lead teachers' union negotiator agreed.¹³⁰ However, Dickson County has emerged as a site of a legal challenge to PECCA, and perhaps the initial optimism there and in other counties could wane.

At any rate, it is likely that this issue will remain a part of the public discourse. The year 2012 is an election year, and in the years ahead various collective bargaining contracts will expire. This means educators and system administrators will have to begin new negotiations under the new law. As future rounds of negotiation unfold, the practicability of this law will become apparent, and more lawsuits may arise.

As Tennessee's SCORE notes and other studies show, the most important factor in a child's educational development is quality teaching.¹³¹ If these studies are

¹²⁹ Pierce Greenberg, *Dickson Educators Respond to New Law*, DICKSON HERALD, (June 15, 2011), <http://www.tennessean.com/article/20110616/DICKSON01/110615050/Dickson-educators-respond-new-union-law>.

¹³⁰ *Id.*

¹³¹ *Improving Teacher Effectiveness: Tennessee's Recent Progress and Future Opportunities*, SCORE, Feb. 2011, available at <http://www.tnscore.org/wp-content/uploads/2010/12/SCORE-Teacher-Effectiveness.pdf>.

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accurate, educational policies should work towards having the best teachers possible in every classroom. Many of the reform ideas such as differentiated pay and altered layoff policy are somewhat unproven but offer intriguing possibility. Giving school system leaders the opportunity to implement those policies, and to some degree the opportunity to experiment with them, has positive potential for Tennessee, which is currently ranked among the nation's worst in student achievement metrics such as national assessment tests and percentage of citizens over twenty-five years old with a bachelor's degree.¹³² Increased system flexibility can allow school administrators to be more innovative. Collaborative conferencing achieves that mission while still providing educators a voice in local policies. While an outright bar to negotiations would have given school boards too much power and represented the state's acquiescence to the Tennessee School Boards Association's wishes without compromise, the allowance of collaborative conferencing strikes a balance, and arguably makes the process of running an entire school system easier.¹³³ In tandem with Tennessee's revised teacher tenure law, the new policies reduce the friction teachers' unions have generated and can lead to smoother operations, which in turn can give rise to greater innovation. While paying careful attention to the morale and desires of the teaching corps, administrators should seek to use their newly found opportunity to be bold, as students stand to benefit.

¹³² The State of Education-2010, SCORE, *available at* <http://www.tnscore.org/wp-content/uploads/2010/06/Score-2010-Annual-Report-Full.pdf>.

¹³³ *See Teachers Lose, supra* note 7.

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VII. A Final Thought

Before the passage of the PECCA, forty-four districts in Tennessee did not collectively bargain.¹³⁴ The Maryville Education Association, for example, an organization through which teachers and administrators formulate local school policies, operates without a contract.¹³⁵ Still, teachers say the relationship is cohesive.¹³⁶ “When we have really shown that we needed additional funds, additional increases in taxes and those types of things that have to happen in order to fund education, they’ve always been supportive of us,” Maryville teacher Stephanie Thompson said.¹³⁷ A similar system exists in Alcoa, Tennessee.¹³⁸ Both superintendents state that relations are pleasant, and the common goal of education rises above pettiness.¹³⁹ At the same time, nearby Blount County Schools collectively bargained peacefully before the new bill took effect, which demonstrates that both systems can work effectively.¹⁴⁰ All three districts typically register positive student achievement results.¹⁴¹ While different dynamics play a role in different school districts, the fact that both systems can work successfully should remind those on both sides of the debate that if school employees and administrators share the common goal of student achievement, positive solutions can surface.

¹³⁴ Christine Jessel, *Collective Bargaining in East Tennessee*, Southern Educ. Desk (Apr. 9, 2011, 7:00 AM), <http://www.southerneducationdesk.org/article/collective-bargaining-in-east-tennessee>.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *See id.*

¹⁴⁰ Jessel, *supra* note 134.

¹⁴¹ *Id.*

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TRANSCRIPT

THE UNIVERSITY OF TENNESSEE COLLEGE OF LAW
SUMMERS-WYATT LECTURE
SEPTEMBER 27, 2010

**THE INTERSECTION OF RACE AND POVERTY
IN CRIMINAL JUSTICE**

Stephen B. Bright

PENNY WHITE: Well, welcome. We are grateful that you have joined us today for the Summers-Wyatt Lecture, sponsored by the Center for Advocacy & Dispute Resolution. As is our tradition, our guest speaker will be introduced by a student in the Advocacy Concentration.

The introducer today is Sarah Graham-McGee, who is one of the two Summers-Wyatt Trial Advocacy Scholars. She is also a student in the Innocence Clinic, and for the past two summers has worked as the clinical assistant to the Innocence Clinic project. She is also a student member of the Tennessee Association of Criminal Defense Lawyers (TACDL) and a founder of the UT chapter of TACDL. So, Sarah, if you would.

SARAH MCGEE: There is an old adage that says, "Let your life speak." Professor Stephen Bright has dedicated his life to standing up for people, who either could not speak up for themselves or whose voices were not being heard. For over thirty years, Professor Bright has fought a system that is content with injustice, where budgets speak louder than guarantees to life and liberty, and where politics are favored over due process. But he does not do it for the money or for the acclaim. Since 1979, he has been speaking up for indigent people facing the death penalty at the trial, appeal, and post-conviction stages of the capital process.

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Much of his time has been spent at the Southern Center for Human Rights, a public interest legal program that provides representation to people facing the death penalty, but he also represents prisoners in challenges to cruel and unusual conditions of confinement, advocates implementation of the constitutional rights of counsel, and encourages judicial independence and alternatives to incarceration. Professor Bright served as the Director of the Southern Center from 1982 to 2011, and he currently serves as its President and Senior Counsel. Before his career at the Southern Center, Professor Bright earned a bachelor's degree from the University of Kentucky, majoring in political science, and went on from there to earn his law degree from that state institution in 1976.

In fact, Professor Bright was born on a little farm and raised in Kentucky, and he got his first job out of law school at the Appalachian Research & Defense Fund in Lexington where he fought for livable jail conditions and the welfare and rights of the indigent. From there, Professor Bright spent several years as a trial attorney at the Public Defender Service in Washington, DC. A few years later, his career path led him to capital work. Professor Bright has twice argued and won cases before the United States Supreme Court, including *Snyder v. Louisiana*¹ and *Amadeo v. Zant*.² Both cases involved racial discrimination in the composition of the juries. Both clients' convictions and death sentences were reversed.³

And even as we sit here this afternoon, the current justices of the United States Supreme Court are considering whether they will hear Professor Bright's next case⁴, that of Jamie Weis, who faces charges of a capital crime in

¹ *Snyder v. Louisiana*, 552 U.S. 472 (2008).

² *Amadeo v. Zant*, 486 U.S. 214 (1988).

³ See generally *Snyder*, 552 U.S. 472; *Amadeo*, 486 U.S. 214.

⁴ *Weis v. State*, 694 S.E.2d 350 (Ga. 2010), *petition for cert. filed* (U.S. May 2010) (No. 09- 715), *cert. denied*, 131 S. Ct. 100 (2010).

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Georgia, yet sat in jail for more than two years without any lawyers to defend him.

This continued dedication shows that Professor Bright's life continues to speak. He speaks for those in unenviable positions, for the mentally ill, for the innocent, and for the guilty. His words breathe life into the constitutional promises we are familiar with, not the least of which is the right to counsel.

I could probably spend the next forty-five minutes continuing to list accomplishments and accolades from a career that has spoken for justice, but no introduction would be complete without mentioning a few of the many awards he has received for his service to others. In addition to the ACLU's Roger Baldwin Medal of Liberty and the American Bar Association's Thurgood Marshall Award, he's received honorary doctorates from six universities, the Lifetime Achievement Award from the National Association of Criminal Defense Lawyers, and the Kutak-Dodds Prize presented by the National Legal Aid & Defender Association.

Last but not least, Professor Bright has written a number of law review articles, given testimony before legislative committees at the highest levels on numerous occasions, serves on countless advisory boards, and teaches at prestigious universities like Harvard, Yale, Georgetown, Emory, and now at the University of Tennessee's College of Law, where we are so fortunate to have him co-teach the Innocence & Wrongful Convictions Clinic.

In closing, and perhaps most amazing to me, we're also talking about a teacher and a mentor who is truly humble. On our very first day of class in the Innocence Clinic this semester, this legend of indigent capital defense walked into class, shook everyone's hand, looked every one of us in the eye, and told us what a privilege it was for him to be here. You will not find a person whose life speaks with more dedication, brilliance, and humility, so please join me in welcoming the University Of Tennessee College

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Of Law's first advocate in residence, Professor Stephen Bright. (Applause.)

STEPHEN BRIGHT: Thank you, Sarah. Sarah McGee is going to be a great public defender. Sarah, thank you very much.

It has been a great honor for me to teach at this law school, and it has been a great honor to have Sarah and her other students in my class. I am a product of a very similar law school a little north of here—it does not have quite as good a football team—but I benefited from it as many of you have from this law school. Although back in those days, it was a little better than it is today. My law school tuition was \$250 a semester. I understand it has gone up a little since then.

The purpose of the land-grant colleges (most of which became universities) was to make education broadly available by giving federally-controlled land to the states to develop or sell to raise funds for colleges. It provided opportunities for people in states like Kentucky and Tennessee to go to college and learn about agriculture, science, engineering, law, and other subjects. One could get an education and go out in the world and strike a lick or two for justice. It was a wonderful thing. I am grateful for them. It is unfortunate that education has become so expensive and graduates at saddled with enormous debt.

I have had a great relationship with this law school and many people who are part of it. Dean Blaze had me here years ago to celebrate the anniversary of the clinics. I know what great work Jerry Black and other people do in the clinics. I started practice at the Appalachian Research and Defense Fund, a legal services program that serves the coalfields of Appalachian Eastern Kentucky. Next door to me in my office was Dean Hill Rivkin, who taught me so much, who prevented the Army Corps of Engineers from damming the Red River Gorge, and who stood up for poor people in Eastern Kentucky in so many different ways, and

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who continues today with Brenda McGee, his wife, to stand up for children.

I was with the Dean yesterday. He picked me up, and we had to stop by the housing projects so that he could meet with a client whose case was in court today. It is marvelous that students here are involved in representing children in truancy cases, representing children who are being thrown out of school and protecting the rights of children.

I recently was told about a child in Clarksville, Tennessee, who is being held in the jail there and whose family can only visit him by closed-circuit television. His mother cannot touch her fifteen-year-old child. He is not receiving any education. If the parents were doing to this child what that jail is doing to him, they would be guilty of child abuse or neglect. And yet that is what this public institution, the jail, is doing. Which is why the work on behalf of children by Dean Rivkin, Brenda McGee, and students here is so important.

And also, of course, my great, wonderful friend here, is Justice Penny White. I wrote about Justice White after her retention election when she was on the Tennessee Supreme Court, because I was interested in the pressures on elected judges with regard to enforcing the Constitution.⁵ I have learned from knowing her over many years and having her speak to my classes at Harvard and Yale that regardless of what the voters may have been tricked into doing on that August day when only a few people showed up to vote, the words “Justice” and “White” always go together. You are extraordinarily fortunate to have her as well as so many other great faculty members.

⁵ See Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?* 72 N.Y.U. L. REV. 308 (1997) (describing the campaign against Justice White which led to her defeat in a retention election and including some of the mailings attacking her).

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I do not really co-teach a class at the law school. I just visit occasionally Dwight Aarons's class on wrongful convictions. I am honored to be able to do so and make a small contribution to Professor Aarons's class.

Many good friends are part of your legal community. Steve Johnson, who was a student here and an outstanding intern at the Southern Center for Human Rights, is a great lawyer in Knoxville. Mark Stephens, the public defender, is a national leader in the representation of poor people accused of crimes. The Community Law Office of Knoxville is a model for the whole country.

The legal community and all of Knox County should be proud that Mark Stephens is running the public defender office. He will stand up for his clients, even if it means filing a lawsuit and saying the office does not have the resources it needs or the lawyers to do the job. Some public defenders around the country are doing that and some are not. Some are acquiescing to overwhelming caseloads and a lack of resources that deny their clients their constitutional right to counsel. But that is not happening here because Mark Stephens stands up for his clients and for the Constitution.

I admire the public defenders and other lawyers that represent poor people accused of crimes. They face an overwhelming task, as do the criminal courts. In the 1970s, there were about 200,000 people in prisons and jails in the United States.⁶ That number had held, relative to the population, pretty steady throughout our history.⁷ Then over the next forty years there was an increase of 800 percent,⁸ so that today there are 2.3 million men, women,

⁶ Steven B. Duke, *Mass Imprisonment, Crime Rates, and the Drug War: A Penological and Humanitarian Disgrace*, 9 CONN. PUB. INT. L.J. 17, 17 (2009).

⁷ *Id.*

⁸ *Id.*

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and children in our prisons and jails.⁹ The United States now has the highest incarceration rate of any country in the world.¹⁰

The United States is one of a handful of countries that carries out ninety percent of all the executions in the world along with China, Iran, North Korea, and Yemen.¹¹ The United States has become extraordinarily punitive. There has been a tremendous increase in the number of people coming through the courts and being sent to prison. The courts are also taking on the enormous – and probably impossible – task of deciding who should live and who should die. It has put a tremendous, crushing load on all of the criminal courts.

Most of these people going to prisons and death rows come through the state courts.¹² Many state courts have failed in their responsibility under the Sixth Amendment to provide capable lawyers and fair and reliable trials. The legislatures have failed to adequately fund these programs. There is a great imbalance between the resources for prosecutors and those for the defense of

⁹ *Rough Justice*, ECONOMIST, July 22, 2010, www.economist.com/node/16640389; The Pew Ctr. on the States, ONE IN 100: BEHIND BARS IN AMERICA 2008 at 5 (2008) (reporting that, at the start of 2008, American prisons and jails held more than 2.3 million adults, while China had 1.5 million inmates and Russia had 890,000).

¹⁰ *Too Many Laws, Too Many Prisoners*, ECONOMIST, July 22, 2010, www.economist.com/node/16636027 (reporting that one in every 100 adults in America is in prison, which, as a proportion of total population, is five times more than in Britain, nine times more than in Germany, and twelve times more than in Japan).

¹¹ See Amnesty International, DEATH SENTENCES AND EXECUTIONS 2010 (2011).

¹² See Paul Guerino, Paige M. Harrison, & William J. Sabol, PRISONERS IN 2010 (December 2011) (a publication of the Bureau of Justice Statistics of the U.S. Department of Justice) (reporting that state correctional authorities had jurisdiction over 1,395,356 prisoners at the end of 2010, while the federal prison population was 209,771. There are additional prisoners in jails).

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the accused. The federal government has contributed to this by providing millions and millions of dollars to state law enforcement agencies, prosecution offices, crime laboratories, and other state crime control agencies while providing, with only a few exceptions, nothing for the defense of those accused of crimes.

The right to a lawyer is the most fundamental right a person has. The people who are making that a reality are public defenders. They are working long hours, taking on huge responsibilities – the life of another human being – carrying caseloads that make them say every now and then that surely this cup can be passed. And yet, they go on. They keep going to work. They mentor young lawyers. They work nights and weekends. I want to express my appreciation to public defenders for the work that they do. I know how incredibly difficult it is.

The New Yorker carried a cartoon which showed a lawyer sitting across from his client and saying, “You’ve got a pretty good case How much justice can you afford?”¹³ Of course, a poor person accused of a crime cannot afford any justice at all. And so the question is how much justice is society going to give that person? Tennessee can afford it. There is no question that every government – state or federal – can afford to provide representation. The question is whether they will provide what the Constitution requires.

Robert Kennedy, the Attorney General of the United States in the early 1960s, once said that the poor person accused of a crime has no lobby.¹⁴ Legislators respond to moneyed interests. The U.S. Supreme Court, as the President has pointed out, has only made that worse with its decision in *Citizens United v. Federal Election Commission*.¹⁵ The faint voices of the poor are seldom

¹³ J.B. Handelsman, Cartoon, *THE NEW YORKER*, Dec. 24, 1973.

¹⁴ Anthony Lewis, *GIDEON’S TRUMPET* 211 (1964).

¹⁵ 130 S. Ct. 876 (2010).

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heard in legislative bodies seeking to please the rich and powerful. Beyond that, governments that are trying to deprive people of their liberty or even their lives are not enthusiastic about providing lawyers for the poor who may to defeat those purposes.

The states and localities are generous in giving money to prosecute cases, but not to defend them. State and local governments give money to law enforcement. The federal government gives huge grants to law enforcement and prosecutors' offices for all sorts of things from drug task forces to dealing with domestic violence. And that means more money for police, more money for prosecution, more people being arrested, and more people being charged with crimes. But the state and local governments are very stingy when it comes to funding the defense of those accused. And the federal government seldom makes grants for the defense of the accused.

The Supreme Court said the states were required to provide counsel in the case of Clarence Gideon, who was convicted of breaking into a pool hall in Florida, denied a lawyer at his trial, and then wrote a five-page petition to the Court saying he had been denied his right to a lawyer.¹⁶ And, of course, the rest is history. *Gideon v. Wainwright* said that every person accused of a felony has a right to a lawyer.¹⁷ A few years later, the Court extended the right to counsel to children in delinquency proceedings¹⁸ and to any person facing a loss of liberty.¹⁹

Anthony Lewis wrote a wonderful book about Clarence Earl Gideon's case, *Gideon's Trumpet*. In it, he says:

¹⁶ See generally *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁷ *Id.* at 342.

¹⁸ *In re Gault*, 387 U.S. 1 (1967).

¹⁹ *Argersinger v. Hamlin*, 407 U.S. 25, 37-38 (1972).

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It will be an enormous social task to bring to life the dream of *Gideon v. Wainwright* – the dream of a vast, diverse country in which every man charged with crime will be capably defended, no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense.²⁰

Of course, *Gideon v. Wainwright* is not a dream. It is a constitutional requirement. The Supreme Court did not say in *Gideon* that it would be a good idea to give people lawyers. It said states were constitutionally required to give people lawyers. It said the “guiding hand of counsel” is required at every stage of the process.²¹ But *Gideon* is an unfunded mandate. No federal agency was established and no federal dollars were allocated implement *Gideon* in all of the states. Many state and local governments were unwilling or reluctant to provide funds to implement *Gideon*. It would be enormously costly if done right.

The Florida governor and legislature responded promptly to *Gideon*. Within two months of the decision, the Florida legislature created a public defender system in every judicial circuit. Colorado created a state-wide program in 1970. Missouri established its public defender system in 1972 and had 14 public defender offices in the state of the following year. Connecticut’s legislature created its public defender program in 1975. Tennessee did not establish a public defender system until 1989.²² Other

²⁰ Lewis, *GIDEON’S TRUMPET*, supra note 14, at 205.

²¹ *Gideon*, 372 U.S. at 342 (quoting Justice Sutherland in *Powell v. Alabama*, 287 U.S. 45 (1932)).

²² The Tennessee General Assembly created the statewide system of public defenders in 1989. See District Public Defenders Conference,

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states took even longer. Georgia created a public defender system in 2003 that became operative in 2005. Montana established a public defender system in 2006.

Some states, such as Alabama, Michigan and Texas have not created public defender offices to this day. In some states, judges appoint lawyers. A judge in Houston has claimed that he has a great system – four lawyers who represent all the people accused of crimes that come before his court. But who are the four lawyers loyal to? Their responsibility to zealously represent their clients may take a back seat to the need to please the judge in order to keep their jobs.

The availability and quality of lawyers for poor people accused of crimes varies from state to state and even from county to county within a state. While there is good, even exemplary representation in some places, most states and counties are more concerned with limiting costs than providing quality representation and insuring fairness in their courts.

At the Southern Center for Human Rights, we decided in the 1990s that the representation provided to the poor in Georgia was so bad, we would just keep pointing it out and challenging it in court and see if anything changed. People had been sentenced to death in Georgia in cases in which their lawyers were parking their cars and then cross-examining witnesses even though they missed the prosecutor's direct examination. Three lawyers referred to their clients in capital cases with a racial slur. One lawyer did not even know there was a Fourth Amendment to the Constitution of the United States. He missed that day in criminal procedure, and he never made up for it while he was in practice.

In another case, it was discovered on the third day of trial that the person sitting at counsel table next to the

available at <http://www.state.tn.us/sos/bluebook/07-08/36-District%20Public%20Defenders%20Conference.pdf>.

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court-appointed lawyer was not the defendant whose case was being tried. The court-appointed lawyer said, “Well, he kept saying it's not me, it's not me. I thought he meant he was not guilty.” He did not even realize that the man sitting next to him was not his client. We documented what was happening and issued reports.²³ We filed lawsuits challenging the deficiencies in representation in different counties and judicial circuits.

The chief justice of the Georgia Supreme Court appointed a commission to investigate how bad it was and what could be done about it. The commission did not have much of a problem with the first part: determining how bad it was. The District Attorney in Atlanta, Paul Howard, told the commission that when he was in private practice after graduating from law school, he learned right away how to avoid being appointed to cases by the judges. He found that if he did a good job for his client, the judges would not bother him again about taking a court-appointed case.

The commission also heard from a lawyer who contracted to take all the indigent cases in several courts. He was known for meeting his clients and entering guilty pleas a few minutes later. He told the commission that he presumed that all his clients were guilty. Clients, mothers, and others who had either been accused or their loved ones had been accused also testified before the Commission. It recommended the creation of a public defender system.

²³ See Southern Center For Human Rights, “IF YOU CANNOT AFFORD A LAWYER . . .” (2003), available at www.schr.org/files/resources/indigent_rpt.pdf (last visited Feb. 5, 2012); Southern Center for Human Rights, PROMISES TO KEEP: ACHIEVING FAIRNESS AND EQUAL JUSTICE FOR THE POOR IN CRIMINAL CASES (2000) available at www.schr.org/files/resources/indigent_rpt.pdf (last visited Feb. 5, 2012). See also Stephen B. Bright & Lauren Sudeall Lucas, OVERCOMING DEFIANCE OF THE CONSTITUTION: THE NEED FOR A FEDERAL ROLE IN PROTECTING THE RIGHT TO COUNSEL IN GEORGIA (American Constitution Society Issue Brief, September 2010) available at www.acslaw.org/files/Bright%20and%20Lucas%20-%20Right%20to%20Counsel.pdf (last visited Feb. 5, 2010).

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The criminal courts are a foreign land, and people accused of crimes need lawyers from the moment they are arrested to guide them, answer their questions, explain their choices to them, investigate their cases and give them advice about the decisions they must make.

No case in the criminal justice system is a small case. A woman was arrested in New York in 2007, and bail was set at \$10,000.²⁴ No lawyer represented her at the bail hearing, and the woman, who was the sole caretaker of her husband, could not reach her court-appointed lawyer to seek a bail reduction in order to care for her husband, who needed transportation to dialysis treatment several times per week.²⁵ Days later, her husband died.²⁶ She was also unsuccessful in trying to reach the lawyer to obtain a bail reduction or even a temporary release from jail to attend his funeral.

Eventually, she contacted a prisoners' rights organization that secured her release on her own recognizance.²⁷ Ultimately, the charge against her – possession of a firearm found in the family car – was dismissed.²⁸ As this case illustrates, the process of arrest and pre-trial incarceration may be a severe punishment, regardless of guilt or innocence. A person who stays in jail for two weeks after being arrested may lose his or her job and home as a result. People may go from being right on the margins of making it in society to being homeless.

Atteeyah Hollie, who is now a lawyer with the Southern Center for Human Rights, was an intern from Dartmouth College when she found a man, Samuel Moore, who had been in a jail in Georgia for thirteen months. He

²⁴ *Hurrell-Harring v. State*, 883 N.Y.S.2d 349, 360 n.3 (N.Y. App. Div. 2009) (Peters, J., dissenting), *aff'd as modified*, 930 N.E.2d 217 (N.Y. 2010).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

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had never seen a lawyer, never seen a judge. He had been arrested for loitering—just standing around. Atteeyah checked and it turned out the charges against Mr. Moore had been dismissed four months earlier. There was no legal basis for the jail holding him, but no one had bothered to call the jail and tell the people there that they had to release him. He had just been lost. He was just a throwaway person who was lost in the jail. A student intern from Dartmouth got him out by letting the clerk's office know that he was still in jail four months after the charges had been dismissed.

Several of us have launched a website called Second Class Justice.²⁹ We collect on the site information regarding the lawyers provided to poor people accused of crimes, racial discrimination in the criminal courts and other information regarding the plight of the poor accused of crimes. It includes historical developments like the case of the Scottsboro Boys in Alabama which established the right to counsel in capital cases³⁰ and Clarence Earl Gideon's case that established the right to counsel.³¹

It also includes examples of the racial discrimination that takes place today in the criminal courts, which is the part of our society that has been least affected by the Civil Rights Movement. Outside of the courts, there have been some significant changes: African Americans are no longer denied the vote or barred from public schools, lunch counters and public accommodations as they were before the Civil Rights Acts of the 1960s. Nevertheless, many people continue, consciously or unconsciously, to have a bias against racial minorities. The decision-makers in the criminal courts – predominantly white men – may be

²⁹ Second Class Justice, www.secondclassjustice.com (last visited Feb. 5, 2012).

³⁰ See *Powell v. Alabama*, 287 U.S. 45 (1932); Dan Carter, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (LSU Press, revised edition, 2007)

³¹ *Gideon*, 372 U.S. 335.

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affected by those biases in areas such as charging, bail decisions, plea bargaining, and the severity of sentence.

Even in communities with substantial African American and Hispanic populations, things often look no different than they did in the 1940s and 1950s. The prosecutor is white, the judge is white, the court-appointed defense lawyers are white, and the clerks and court reporters are white. When the defendants are brought in, the overwhelming majority are African American men wearing orange jumpsuits handcuffed together. It looks like a slave ship has docked outside the courthouse.

On the few occasions when trials are conducted, the jury may also be all-white, even in communities with very substantial African American or Hispanic populations. They may be underrepresented in the jury pools. Some may not receive jury summons. The ones that are notified and appear in court may be struck for any number of reasons, but if they survive the strikes for cause – the inability to be fair and impartial – the prosecutor may exclude them from service with peremptory strikes despite the Supreme Court’s decision in *Batson v. Kentucky*,³² which purportedly prevents such discrimination. As one observer noted, “Even as segregationist barriers to equal opportunity and achievement have crumbled in the free world, we have fortified the racial divide in criminal justice. Denied a place in society at large, Jim Crow has moved behind bars.”³³

Our website includes an important article about how state and federal prosecutors decide where to prosecute cases in order to minimize the number of racial minorities on juries. For example, if the death penalty is sought for a murder in New Orleans which has any kind of federal

³² 476 U.S. 79 (1986).

³³ Robert Perkinson, TEXAS TOUGH: THE RISE OF AMERICA’S PRISON EMPIRE 9 (2010). *Id.* at 366 (“Although the ghosts of the Confederacy have been, to a considerable extent, chased out of schools, lunch counters and city buses, they continue to prowl Texas’s cell blocks with relentless fury.”).

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connection, the prosecution will probably not be in the state court in Orleans Parish, which is 62% African American. Instead, the United States Attorney there has prosecuted 10 black and Hispanic men in the Eastern District of Louisiana, where the venire is only 31.4% African American.³⁴ But if same crime occurs in neighboring Jefferson Parish, which is 23% African American or other Parishes where there are even fewer blacks,³⁵ it will be prosecuted in the state courts.

The same is true in Richmond, St. Louis, and Prince George's County, Maryland, where African Americans make up the majority of the population in the state jury pools.³⁶ As a result, more death sentences have been imposed in the U.S. District Courts for the Eastern District of Louisiana, the Eastern District of Virginia, the Eastern District of Missouri and the District of Maryland than in federal districts that include New York, Chicago, California, and Florida, where far more murders occur.³⁷

The website includes summaries of the cases of people who because of their poverty are not getting the justice that is promised by what is etched over the entrance to the Supreme Court Building, "equal justice under law." As Hugo Black said in *Griffin v. Illinois*, "there can be no equal justice where the kind of trial a man gets depends upon the amount of money he has."³⁸

³⁴ G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 Wash. L. Rev. 425, 445-49 (2010), also available at www.secondclassjustice.com/?p=57 (last visited Feb. 5, 2012).

³⁵ African Americans made up 22.9% of the population of Jefferson Parish in 2000. See U.S. Census Bureau, State & County Quick Facts Alabama, available at <http://QuickFacts.census.gov> (last visited December 30, 2011) [hereinafter "Census Bureau"]; see also Cohen & Smith, *supra* note 34, at 443-45.

³⁶ Cohen & Smith, *supra* note 34, at 450-61.

³⁷ *Id.* at 436-37.

³⁸ *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

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That is certainly true, but we know that the kind of justice one gets depends very much on the amount of money one has. For example, Jamie Ryan Weis was charged with capital murder, and was assigned two lawyers.³⁹ Six months later, the lawyers were told that the state indigent defense agency could not fund the case.⁴⁰ There was no money for an investigator or any expert witnesses. Jamie Weis suffers from schizophrenia; he is delusional.⁴¹

The jail, to save money, took Weis off his prescribed medication and put him on Thorazine, because it is cheaper. The next day, he slit his wrists and hung himself and almost died.⁴² It was his third suicide attempt.⁴³ A lawyer representing someone like that needs mental health experts. But the lawyers were unable to investigate, to consult with experts, and to develop any evidence in mitigation of punishment. Eventually, there was not enough money even to pay the lawyers.

The lawyers filed a motion for a continuance on the grounds that they did not have funds to prepare for trial. Jamie Weis is from West Virginia and to do an adequate job preparing for the penalty phase of his trial, where a jury was going to decide if he will live or die, the lawyers needed to go to West Virginia and interview his parents, other family members, school teachers, and others.⁴⁴

³⁹ Weis v. State, 694 S.E.2d 350, 353 (Ga. 2010), *cert. denied*, Weis v. Georgia, 131 S. Ct. 100 (2010).

⁴⁰ *Id.*

⁴¹ *Id.* at 358.

⁴² Brief for Petitioner at 16, Weis v. State, 694 S.E.2d 350 (Ga. 2010).

⁴³ Weis, 694 S.E.2d at 362.

⁴⁴ See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that anything about the life and background of the offender may be considered in mitigation); *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (recognizing experts as one of the “the basic tools of an adequate defense” and holding that states must fund experts for indigent defense with regard to any issue that is a significant factor at trial).

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At a hearing, the defense lawyers introduced evidence to show they had no funds to defend the case. The prosecutor responded not to the motion for a continuance, but by making his own motion – with no notice to Jamie Weis or to his lawyers – to replace the lawyers appoint the local public defenders.⁴⁵ He did not tell Weis, the defense lawyers or the local public defenders he was going to do this.

Jamie Weis and his lawyers were caught completely by surprise. This illustrates the importance of the notice requirement of the due process clause. It is essential to fairness to know before a hearing what issues are to be addressed at it. In a fair system that provides due process of law, opposing counsel is not allowed to spring something like this on a defendant and his lawyers. It denies them a meaningful opportunity to be heard – for example, to find the cases that say that once there is an attorney-client relationship, it cannot be casually tossed aside by a judge and new lawyers substituted.⁴⁶ The Tennessee Supreme Court, like many other state supreme courts that have addressed the question, has recognized the right to continuity of counsel in a case where a judge removed an appointed lawyer.⁴⁷

⁴⁵ *Weis*, 694 S.E.2d at 359.

⁴⁶ There were a number of such cases in Georgia. *See Grant v. State*, 607 S.E.2d 586 (Ga. 2005) (reversing where trial judge removed counsel who was familiar with the case and had an established attorney-client relationship with the defendant); *Williams v. State*, 611 S.E.2d 51 (Ga. 2005) (same); *Roberts v. State*, 438 S.E.2d 905 (Ga. 1994) (same); *Davis v. State*, 403 S.E.2d 800 (Ga. 1991) (same); and *Amadeo v. State*, 384 S.E.2d 181 (Ga. 1989) (same).

⁴⁷ *State v. Huskey*, 82 S.W.3d 297 (Tenn. 2002) (holding that “any meaningful distinction between indigent and non-indigent defendants’ right to representation by counsel ends once a valid appointment of counsel has been made”). *See also, e.g., Smith v. Superior Court of Los Angeles County*, 440 P.2d 65, 74 (Cal. 1968) (holding that “once counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into

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But the trial judge granted the motion as soon as it was made. It was apparent that he knew it was coming. In orally ruling on the motion, he cited cases, even giving the volume and page number of the reporters in which they appeared. It turned out it had all been rigged.

One of the public defenders appointed to represent Weis was not certified to handle capital cases, was lead counsel in 103 felony cases, and part of a defense team in over 400 cases.⁴⁸ The other was the administrator of a four-county circuit public defender office and represented clients in 91 felony cases.⁴⁹ They filed three motions to withdraw, describing their workloads and lack of resources and stating, “counsel cannot, *under the current state of affairs, perform adequately in representing the Defendant, no matter how good our intentions or diligent our efforts.*”⁵⁰ Because of their workloads, the public defenders were ethically prohibited from taking Weis’s case.⁵¹

an attorney-client relationship which is no less inviolable than if counsel had been retained”); *McKinnon v. State*, 526 P.2d 18, 22-23 (Aka. 1974) (same); *State v. Madrid*; 468 P.2d 561, 563 (Ariz. 1970) (same); *Clements v. State*, 817 S.W.2d 194, 200 (Ark. 1991) (reversing removal of counsel in interlocutory pretrial appeal); *Harling v. United States*, 387 A.2d 1101, 1105 (D.C. App. 1978) (reversing conviction because of substitution of counsel over defendant’s objection); *People v. Davis*, 449 N.E.2d 237, 241 (Ill. 1983) (finding that defense counsel was improperly removed and holding “for purposes of removal by the trial court, a court-appointed attorney may not be treated differently than privately retained counsel”).

⁴⁸ Motion for Reconsideration [filed by public defenders] at 22, *Weis v. State*, 694 S.E.2d 350 (Ga. 2010).

⁴⁹ *Id.* at 25.

⁵⁰ Supplement to Renewed Motion to Withdraw at 3, *Weis v. State*, No. 06R-097 (Pike County Super. Ct. Jan. 8, 2008) (emphasis added).

⁵¹ See GA. RULES OF PROF’L CONDUCT R. 1.1 (2001) (prohibiting lawyers from handling a matter unless they can do so competently), available at http://gabar.org/handbook/part_iv_after_january_1_2001_georgia_rules_of_professional_conduct/rule_11_competence. Rule 6.2 states that “[f]or good cause a lawyer may seek to avoid appointment by a tribunal to represent a person.” *Id.* at R. 6.2. The

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Nevertheless, the first motion was promptly denied,⁵² and the trial judge never ruled on the second and supplemental motions.

This was going to be a legal lynching. The judge was giving Weis a couple of public defenders who would do their best, but they could not possibly represent Weis competently with their caseloads and without resources for investigation and expert witnesses. This did not matter to the judge or perhaps it was the point – to give Weis a perfunctory trial at which he would be sentenced to death, check off the box that said he had a lawyer, and send him to death row.

Weis moved to dismiss the indictment based on denial of his rights to counsel and a speedy trial.⁵³ The trial judge summarily denied the motions.⁵⁴ Weis appealed. His argument was straightforward: If the State is going to seek the death penalty, it must meet its constitutional obligations to provide counsel and resources necessary for a fair trial.⁵⁵ If the State lacks the resources to do this, then it should not be allowed to seek the death penalty.

The Georgia Supreme Court affirmed by a vote of 4-3.⁵⁶ The four justices in the majority said the delay in the case was the fault of Weis and his lawyers because they did not “cooperate” with the appointment of the public defenders, the same public defenders who protested their

comment to the rule clarifies that “[g]ood cause exists if the lawyer could not handle the matter competently.” *Id.* at R. 6.2 cmt. 2 (2001).

⁵² Transcript of Hearing at 25-27, *State v. Weis*, No. 2006R-097 (Pike County Super. Ct. Dec. 7, 2007) (trial judge states to public defenders: “the two of you are going to represent him until I get told differently by somebody” and notes the objection of the public defenders).

⁵³ *Weis*, 694 S.E.2d at 354.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 358.

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appointment and asserted that it was impossible for them to represent Weis.⁵⁷

However, the Georgia Supreme Court majority found their ethical responsibility was not to reject the case because they could not handle it competently, but to do the best they could.⁵⁸ In short, Weis was penalized for asserting his right to counsel and refusing to go along with lawyers who admitted they could not represent him competently. As a result of a mandamus action that Weis filed against the judge he was ultimately able to get his original lawyers back, assisted by counsel from the Southern Center for Human Rights. At a trial in July 2011, he was sentenced to life imprisonment without possibility of parole.⁵⁹

A couple of Louisiana cases illustrate how judges can influence the outcome of cases by their appointment of lawyers to defend the poor. The first is described in a remarkable book, *In the Place of Justice: A Story of Punishment and Deliverance* (2010), by Wilbert Rideau, who spent 44 years at the Louisiana State Penitentiary, usually called Angola. Rideau was sentenced to death three times. His first conviction was reversed in an important Supreme Court case for failure to grant a change of venue.⁶⁰ But he was sentenced to death a second and third time. He was not executed only because of the Supreme Court's decision in *Furman v. Georgia*,⁶¹ which prevented the execution of all of those under death sentence at the time. Rideau was the publisher of the prison's award-winning magazine, *The Angolite*, which was allowed to publish without censorship for many years.

⁵⁷ *Id.* at 356.

⁵⁸ *Weis*, 694 S.E.2d at 357 (citing GA. RULES OF PROF'L CONDUCT R. 1.3 for the proposition that the public defenders should have acted with "reasonable diligence" even though they never represented Weis).

⁵⁹ Bill Rankin, *Life Without Parole for Killer Who Had Been Denied Counsel*, ATLANTA JOURNAL-CONSTITUTION, July 14, 2011.

⁶⁰ *Rideau v. Louisiana*, 373 U.S. 723 (1963).

⁶¹ 408 U.S. 238 (1972),

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Rideau won a new trial in 2005. As he describes in the book, the first issues at his retrial in Lake Charles, Calcasieu Parish, was whether he would be represented by the two lawyers who had successfully won him a new trial and were thoroughly familiar with his case or, by two lawyers the judge appointed, the local public defender and another lawyer who had recently lost a capital case there. The public defender protested being appointed because he had four capital cases among the 400 felony cases he was defending.

There was a long battle over who would represent Rideau, which is described in the book. Eventually the two lawyers who knew his case and had won the new trial represented Rideau at the retrial. For the first time, Rideau was represented by real lawyers who investigated the case and presented a defense. The jury returned a verdict of manslaughter and Rideau, who had served far beyond the maximum sentence for that crime walked out of court that day and he spent the next year writing his book

Five years later, another man, Jason Manuel Reeves, faced the death penalty before the same judge in the same place, Lake Charles, Calcasieu Parish, Louisiana.⁶² Reeves was tried twice. At his first trial he was represented by lawyers from the Capital Defense Project of Southeast Louisiana who specialized in the defense of capital cases.⁶³ At that trial, the jury was unable to agree on the issue of guilt and a mistrial was declared.⁶⁴ One would think that the same lawyers, being thoroughly familiar with the case and specializing in defending death penalty cases, would represent Reeves at his retrial.

However, as in *Weis* and as often occurs in Louisiana, the government claimed that there was not sufficient funding for the defense. The trial judge could

⁶² State v. Reeves, 11 So.3d 1031 (La. 2009).

⁶³ *Id.* at 1047.

⁶⁴ *Id.* at 1047-48.

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have ordered the State or the Parish to either provide funding for a proper defense or forgo seeking the death penalty. Instead, the judge removed Reeves's lawyers and appointed the local public defender – the same public defender that the same judge tried to foist on Rideau – would represent Reeves.⁶⁵ Once again, the public defender protested, arguing that he could not represent Reeves because of his excessive caseload.

This time, the judge prevailed. Reeves, represented by the public defender and another lawyer was, as expected, convicted and dispatched to death row. The Louisiana Supreme Court affirmed the conviction and death sentence, holding that poor defendants have no right to continuity of counsel.⁶⁶

In each of these three cases, the trial judges sought to bring about a certain result through the appointment of counsel. When judges appoint lawyers that are not up to the task of defending the cases, it determines the outcome. Rideau and Weis would not have had an adequate defense and any chance at their trials if they had been represented by the overworked public defenders that the judges tried to impose upon them. Reeves did not have a chance because the judge assigned his case to a public defender with an overwhelming caseload. What the trial judges did in these cases is highly improper, but not at all that uncommon in many jurisdictions. The American Bar Association calls for the independence of counsel from the judiciary as the first of its *Ten Principles for Indigent Defense*.⁶⁷ These cases illustrate why that principle is so important.

⁶⁵ *Id.* at 1053.

⁶⁶ *Id.* at 1065-66.

⁶⁷ See American Bar Association, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, at 1, 2 (2002), available at www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.authcheckdam.pdf (last visited Feb. 5, 2011).

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The Georgia Supreme Court relied on *Reeves* in upholding the substitution of counsel in *Weis*.⁶⁸ Then it applied its decision in *Weis* to do even greater violence to the constitutional right to counsel in *Phan v. State*.⁶⁹ The capital case against Khanh Dinh Phan had been pending for over *five years* without trial because the Georgia public defender agency was again unable to provide funds for attorneys, investigators, and expert witnesses.⁷⁰ The agency originally agreed to pay Phan's lawyers \$125 per hour, but reduced the amount to \$95 per hour and then did not pay them at all after August 30, 2008.⁷¹ It also refused to fund an investigation that was recognized as constitutionally required.⁷²

On a pretrial appeal, the Georgia Supreme Court, in another 4-3 decision, remanded the case to the trial court to *consider appointing other counsel*.⁷³ The majority went beyond its decision in *Weis*, in which it approved a judge's replacement of defense counsel, and placed *an affirmative duty* on trial courts to interrupt and disregard ongoing attorney-client relationships instead of enforcing the Sixth Amendment right to counsel. On remand, the trial court in *Phan* – which had already found that there is no funding available for defense representation from any source – is to shop for lawyers who will work for little or nothing yet somehow represent Phan in accordance with recognized performance standards, even without resources for necessary expert and investigative assistance.⁷⁴

⁶⁸ *Weis*, 694 S.E.2d at 355.

⁶⁹ *Phan v. State*, 699 S.E.2d 9 (Ga. 2010).

⁷⁰ Bill Rankin, *5-Year Delay Kills Case, Suspect's Lawyers Argue*, ATLANTA JOURNAL-CONSTITUTION, Mar. 10, 2010, at B8.

⁷¹ *Phan*, 699 S.E.2d at 703 n.1 (Thompson, J., dissenting).

⁷² *Id.* at 698.

⁷³ *Id.* at 699.

⁷⁴ *See, e.g.*, Welsh S. White, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES (2006) (describing the demands upon defense lawyers in capital cases); American Bar

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The witnesses with regard to both guilt-innocence and mitigation are in Vietnam. The survivor of the murders with which Phan is charged fled to Vietnam and all of Phan's family lives there.⁷⁵ The majority in *Phan* said the investigation might be accomplished in the most superficial manner – “such as phone or internet interviews of witnesses.”⁷⁶ However, a thorough investigation requires following leads, surveying the physical environment in which the client developed,⁷⁷ talking to people who may not be available by telephone or internet, conducting repeated in-person interviews,⁷⁸ assessing the impact that witnesses will have on the jury, and preparing the witnesses for direct examination and cross examination.

Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, reprinted in 31 HOFSTRA L. REV. 913 (2003) (setting out detailed guidelines which constitute the standard of care required for the proper defense of capital cases).

⁷⁵ *Phan*, 699 S.E.2d at 697.

⁷⁶ *Id.* at 699.

⁷⁷ See Gregory J. Kuykendall et al., *Mitigation Abroad: Preparing a Successful Case for Life for the Foreign National Client*, 36 HOFSTRA L. REV. 989, 1009-11 (2008) (describing the need to survey the physical environment where the client has lived, particularly in the case of those who have lived in foreign countries).

⁷⁸ See *Porter v. McCollum*, 130 S. Ct. 447, 453 (2009) (finding counsel ineffective for “not even” taking the first step of “interviewing witnesses” or requesting records); William M. Bowen, Jr., *A Former Alabama Appellate Judge's Perspective on the Mitigation Function in Capital Cases*, 36 HOFSTRA L. REV. 805, 814 (2008) (describing the importance of “in-person, face-to-face, one-on-one interviews with . . . the client's family, and other witnesses who are familiar with the client's life, history, or family history” and the need for “multiple interviews” with some witnesses “to establish trust, elicit sensitive information”); American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 10.7 – Investigation & Commentary to Guideline 10.7, reprinted in 31 HOFSTRA L. REV. 913, 1015-26 (2003) (discussing need for interviews of client and various witnesses by defense counsel, the investigator, the mitigation specialist, and other members of the defense team).

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For poor people accused of crimes in Georgia and Louisiana – even those facing the death penalty – lawyers are now fungible and subject to replacement based on cost considerations at any time. Even worse, minimizing costs is recognized as a legitimate reason to replace counsel. The state is rewarded for not funding indigent defense by leaving the person accused virtually defenseless.

A defense lawyer who suggests that an investigation is needed can be swapped for a lawyer who will not investigate or will conduct only a superficial investigation. The poor are left with lawyers who may be overwhelmed with other work, who may not be qualified to handle their cases, and who, even if they cannot competently represent them, do not have the same ability as other lawyers to invoke their ethical obligation to decline representation. This is not “equal justice for all.” It is not even second class justice; it is no justice at all.

A judge played an even more sinister role in assigning counsel to represent Gregory Wilson, who was facing the death penalty in Kentucky. Wilson protested repeatedly about being represented by a lawyer who had given Wilson his phone number and when Wilson called it, it was answered “Kelly’s Keg.”⁷⁹ The lawyer practiced out of that bar, which was right across the street from the courthouse in Covington, Kentucky. All of Wilson’s pleas for a new lawyer were rejected by the judge. He was sentenced to death in a trial that was a farce.⁸⁰

However, when Wilson raised on appeal the denial of his right to a lawyer, the Kentucky Supreme Court said it

⁷⁹ *Wilson v. Commonwealth*, 836 S.W.2d 872, 878 (Ky. 1992); see also Stephen B. Bright, *Death Trials That are a “Charade” and a Farce Do Not Deter Kentucky’s Efforts to Execute*, SECOND CLASS JUSTICE (2010), www.secondclassjustice.com/?p=164.

⁸⁰ See *Wilson v. Rees*, 624 F.3d 737, 739 (6th Cir. 2010) (Martin, J., dissenting from denial of rehearing en banc) (“Wilson’s defense counsel failed him and the principles of our legal system. From the very beginning of the case, Wilson’s defense was clearly a charade.”).

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was Wilson's fault – that he should have cooperated with the lawyer.⁸¹ Wilson loses either way. If he cooperates with the lawyer, he is not going to be properly defended by a lawyer who works out of a bar and is not capable of defending a capital case. If he complains and tries to get competent counsel, which is what the Constitution guarantees, the courts hold that he did not cooperate.

Jeffrey Leonard, a twenty-year-old, brain-damaged, African American man was sentenced to death by a Kentucky jury that did not even know his name or anything else about him.⁸² He was tried under the name "James Slaughter."⁸³ His lawyer conducted no investigation and never learned his client's name or that he was brain damaged.⁸⁴ The lawyer testified that he had tried four death penalty cases, which was not true.⁸⁵ He also testified that he headed an organized crime prosecution unit in New York, which was also not true.⁸⁶ The Sixth Circuit Court of Appeals nevertheless upheld Leonard's sentence, holding that the outcome would not have been any different even if Leonard had been competently represented.⁸⁷

Race

Holly Wood was a victim of both the Alabama education system and its second class system of justice. Wood shot and killed his girlfriend. There is no question about his guilt. But at the penalty phase of his trial – where the question was life or death – the sentencing decision is

⁸¹ *Wilson*, 836 S.W.2d at 879.

⁸² *Slaughter v. Parker*, 450 F.3d 224 (6th Cir. 2006).

⁸³ *Id.* at 228.

⁸⁴ *Id.* at 234.

⁸⁵ *Id.* at 229-30 n.1; Andrew Wolfson, *Lawyer Radolovich to Give Up License*, COURIER-JOURNAL, Feb. 6, 2007, at 1A.

⁸⁶ *Id.* The lawyer was later indicted for perjury. *Id.* The charges were dismissed in exchange for him resigning from the bar. *Id.*

⁸⁷ *Slaughter*, 450 F.3d at 234, 242.

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to be a “reasonable *moral* response” to this crime.⁸⁸ The life and background of Holly Wood was essential to deciding that issue. But the jury did not learn anything about Holly Wood because his court-appointed lawyers did not even obtain school records and interview special education teachers in the same community where they practiced.

As a result, the lawyers did not present testimony by the teachers “that Wood’s IQ was probably ‘low to mid 60s,’ that Wood was ‘educable mentally retarded or trainable mentally retarded,’” “that all of the special education students, regardless of age or grade level, were placed in one room in a basement; the lighting was barely adequate; the room would flood when it rained a lot; and the students were known around school as the ‘moles’ that ‘lived in a mole hole,’” and “that Wood – even today – can read only at the third grade level and can ‘not use abstraction skills much beyond the low average range of intellect.’”⁸⁹

James T. Fisher, Jr. spent 26 ½ years in the custody of Oklahoma – most of it under sentence of death – without ever having a competent lawyer and, as a result, without ever having a fair and reliable determination of whether he was guilty of any crime. Fisher, a black man, was convicted in 1983 of the murder of a white man based on the dubious testimony of the man originally charged with the murder. The lawyer assigned to represent him tried Fisher’s case and twenty-four others during September of 1983,

⁸⁸ *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (“Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a ‘reasoned *moral* response to the defendant’s background, character, and crime.’”).

⁸⁹ *Wood v. Allen*, 542 F.3d 1281, 1324 (11th Cir. 2008) (Barkett, J., dissenting), *aff’d*, 130 S. Ct. 841 (2010).

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including another capital murder case the week before Fisher's trial.⁹⁰

The lawyer called no witnesses at either the guilt or penalty phases of Fisher's trial other than Fisher. He made no opening statement or closing argument at either phase. The lawyer said *only nine words* during the entire sentencing phase of the trial.⁹¹ Four of the words were "the equivalent of judicial pleasantries" and the other five "formed an ill-founded, unsupported and ultimately rejected objection to one portion of the prosecutor's closing argument."⁹² The nine words contained no advocacy on behalf of Fisher.

On appeal, the Oklahoma Court of Criminal Appeals pronounced itself "deeply disturbed by defense counsel's lack of participation and advocacy during the sentencing stage," but it was not disturbed enough to reverse the conviction or sentence.⁹³ It held that the outcome would not have been different even without the incompetent representation.⁹⁴

Nineteen years after Fisher's trial, a federal court of appeals set aside the conviction, finding that Fisher's lawyer was "grossly inept," and disloyal to his client by "exhibiting actual doubt and hostility toward his client's case."⁹⁵ It found that he lawyer "destroyed his own client's credibility and bolstered the credibility of the star witness for the prosecution," and "sabotaged his client's defense by repeatedly reiterating the state's version of events and the damaging evidence he had elicited himself."⁹⁶ The Court observed that the prosecution's case against Mr. Fisher "was not overwhelming" but "in essence a swearing match

⁹⁰ Fisher v. Gibson, 282 F.3d 1283, 1293 (10th Cir. 2002).

⁹¹ *Id.* at 1289.

⁹² *Id.* (quoting the district court).

⁹³ Fisher v. State, 739 P.2d 523, 525 (Okla. Crim. App. 1987).

⁹⁴ *Id.*

⁹⁵ Fisher v. Gibson, 282 F.3d at 1298.

⁹⁶ *Id.* at 1308.

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between Mr. Fisher and [the state's witness], either of whom could have committed the murder."⁹⁷

Oklahoma gave Fisher a second trial in 2005 and a lawyer who was drinking heavily, abusing cocaine and neglecting his cases.⁹⁸ The lawyer physically threatened Fisher at a pre-trial hearing and, as a result, Fisher refused to attend his trial.⁹⁹ He was convicted and sentenced to death again. This time, the Oklahoma Court of Criminal Appeals recognized that Fisher had again been denied his right to counsel and that it made a difference.¹⁰⁰ His conviction was reversed again. Instead of trying Fisher a third time, prosecutors agreed to Fisher's release in July, 2010, provided that he be banished from Oklahoma forever.¹⁰¹ Fisher may not have been guilty of any crime – he never had a constitutional trial – but he spent 26 ½ years in custody.

The consequences of inadequate representation are enormous. Todd Willingham, was convicted of arson in Texas after his house burned down and his three children died in the fire.¹⁰² An assistant fire chief and a deputy fire marshal testified that in their opinion the fire was arson. Another man, Ernest Ray Willis, also was sentenced to death in an almost identical arson case. But Willis was fortunate – a law firm from New York represented him in post-conviction proceedings. The firm devoted more than a

⁹⁷ *Id.*

⁹⁸ *Fisher v. State*, 206 P.3d 607, 610-11 (Okla. Crim. App. 2009).

⁹⁹ *Id.* at 610.

¹⁰⁰ *Id.* at 612-13.

¹⁰¹ See Dan Barry, *In the Rearview Mirror, Oklahoma and Death Row*, N.Y. TIMES, August 10, 2010. For additional discussion of James T. Fisher's case, see *Man Spends 26 years on Oklahoma's Death Row Without Ever Receiving Effective Counsel*, available at www.secondclassjustice.com/?p=198.

¹⁰² David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER, Sept. 7, 2009 at 42, available at http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann (last visited Dec. 30, 2011).

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dozen years to the case and spent millions of dollars on fire consultants, private investigators, and forensic experts to analyze the evidence in his case and point out that the expert testimony at his trial was based on theories and assumptions that had been completely discredited.¹⁰³

Those same theories were the basis for the opinions in Willingham's case that the cause of the fire was arson. For example, an expert told the jury that intricate patterns of cracks on glass – “crazed glass” – recovered from the scene was proof that an accelerant had been used to start the fire.¹⁰⁴ However, studies have found that crazed glass results from cold water hitting hot glass, such as when a fire department sprays streams of water on a fire, trying to put it out.¹⁰⁵ There were similar explanations for other testimony given in both the Willis and Willingham cases.¹⁰⁶

When the law firm took its evidence to the prosecutor in Willis' case, the prosecutor consulted his own expert and concluded that there had not been arson.¹⁰⁷ Willis was released. An expert who examined the evidence in Willingham's case reached the same conclusion – that there had been no arson. Willingham did not kill his one-year-old twin girls and his two-year-old girl when he had no motive to do so. But Willingham's case had already been through the courts. Texas executed Willingham on February 14, 2004. A switch of the lawyers in the two cases could have changed the outcomes. It is likely that if the New York law firm had taken Willingham's case, he would be alive today, and Willis would be dead.

Judge Alvin Rubin of the United States Court of Appeals for the Fifth Circuit, observed that “the Constitution, as interpreted by the courts, does not require

¹⁰³ *Id.* at 56.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 58-59.

¹⁰⁶ *Id.* at 59-62.

¹⁰⁷ *Id.* at 62.

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that the accused, even in a capital case, be represented by able or effective counsel.”¹⁰⁸ The courts have lost sight of justice in a tangle of procedural rules, pretenses and administrative concerns so that finality – not justice – has become the ultimate goal of the criminal courts. Judges are concerned about moving dockets, not competent representation for the accused. Politicians talk about lawyers getting people off on technicalities. However, the Bill of Rights is not a collection of technicalities. People are getting killed on technicalities – procedural rules created not by James Madison and Thomas Jefferson, but by William Rehnquist and others on the Supreme Court and by the Congress.

Nevertheless, the system has its advocates, and Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit is one of them. He wrote, “I can confirm from my own experience as a judge that indigent defendants are generally rather poorly represented.”¹⁰⁹ He and I are in agreement with regard to that. But Judge Posner went on to say:

But if we are to be hardheaded we must recognize that this may not be entirely a bad thing. The lawyers who represent indigent criminal defendants seem to be good enough to reduce the probability of convicting an innocent person to a very low level. If they were much better, either many guilty people would be acquitted or society would have to devote much greater resources to the prosecution of criminal cases. A bare-bones

¹⁰⁸ *Riles v. McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).

¹⁰⁹ Richard Posner, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 163-64 (1999).

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system for defense of indigent criminal defendants may be optimal.¹¹⁰

Notice what he missed. He said that if the lawyers were any better, more *guilty people* might be acquitted. He missed the point that if the lawyers were any better, more *innocent people* would be acquitted. That apparently did not even occur to him. And, of course, this bare-bones system is only for poor people. It is not for commercial cases or cases that rearrange the assets of the upper one percent of people in society. It is only for poor people.

The question of what kind of system of justice we have for poor people accused of crimes is not about being tough on crime or soft on crime. It is about equal justice. It is about whether we have a fair and reliable system for deciding guilt or innocence and, for the guilty, the proper sentence. But as fundamental as the right to counsel is and as much as it may be celebrated in the abstract, governors and legislators throughout the country have convinced themselves that they cannot afford anything but justice on the cheap.

Officials all over America say with regard to indigent defense programs, “We don’t want a Cadillac, we just want a Chevy” or that poor defendants are not entitled to *zealous* representation; they are only entitled to *adequate* representation. Harold Clark, when he was chief justice of Georgia, pointed out to the legislature:

We set our sights on the embarrassing target of mediocrity. I guess that means about halfway. And that raises a question. Are we willing to put up with halfway justice? To my way of thinking, one-half justice must

¹¹⁰ *Id.* at 164.

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mean one-half injustice, and one-half injustice is no justice at all.¹¹¹

We need to overcome this poverty of vision. We are talking about life and liberty, so why wouldn't we want a Cadillac? If we can spend over a trillion dollars to fight wars in Iraq and Afghanistan and \$64 billion every year to keep people in prisons and jails,¹¹² surely we can spend a fraction of that to make sure the courts are convicting only guilty people, making a fully informed decisions with regard to sentences, and treating people fairly.

There is going to be a reckoning at some point. It may be while you are lawyers, those of you who are students. Because the day will come when it becomes necessary to sandblast the phrase "equal justice under law" off the Supreme Court building and acknowledge that we are never going to have it. Maybe the Court will replace it with something like, "Your American Express card welcome here."

I want to end by asking you to do something about the quality of representation for poor people accused of crimes. No matter what kind of lawyer you are when you graduate from this law school – or what kind of lawyer you are now – whether you are a wealthy commercial lawyer, a prosecutor, a leader of the bar, a public official, a business person or any other kind of lawyer – you have a responsibility to see that poor people accused of crimes are

¹¹¹ Chief Justice Harold G. Clarke, Annual State of the Judiciary Address, *reprinted in* FULTON COUNTY DAILY REP., Jan. 14, 1993, at 5.

¹¹² There are various ways to calculate the cost of the wars, but it is clear that they are in excess of a trillion dollars. The Watson Institute at Brown University found that a conservative estimate was \$3.2 trillion in constant dollars and a more reasonable estimate puts the cost at nearly \$4 trillion. *See* <http://costsofwar.org/article/economic-cost-summary> (last visited February 3, 2012). "Every year America spends close to \$66 billion to keep people behind bars." Shima Baradaran, *The Right Way to Shrink Prisons*, N.Y. TIMES, May 30, 2011.

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capably represented. Lawyers have a monopoly on legal services. Lawyers get very rich because of that monopoly. But that monopoly is more than a get-rich-quick scheme. It comes with responsibility for the integrity of the system. Lawyers are trustees of the system of justice.

If you are a prosecutor or attorney general, you can provide the kind of leadership that Walter Mondale, the Attorney General of Minnesota and later Vice President of the United States, provided when Clarence Earl Gideon's case was before the Supreme Court. Florida asked other states to file *amicus curiae* briefs in support of its position that there was no right to a lawyer. Mondale joined with attorneys general of 23 states to file an *amicus* brief *in support* of Gideon and the right to counsel.¹¹³ He and his fellow attorneys general recognized that if we are going to have a fair system, those accused of crimes must have lawyers. That kind of leadership from public officials is missing today. Instead, some prosecutors have opposed efforts to improve indigent defense as a strategy for gaining advantage and winning cases.

You must provide the leadership that is urgently needed if the criminal courts are going to be legitimate and credible. If we are going to have a fair system, public defender programs and other lawyers who represent the poor must have adequate resources, reasonable caseloads, investigators, and access to experts. That is essential for a properly working adversary system. But in Tennessee and other states, the legislatures are not providing the resources needed and are threatening to cut them.

No matter what kind of practice or business you are in, you can help change that. Go to the criminal courts in your jurisdiction and see how they operate. What can of representation is being provided? The criminal courts are out of sight and out of mind for most people because they deal with poor people and a grossly disproportionate

¹¹³ Gideon v. Wainwright, 372 U.S. 335 (1963).

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number of people of color. It is important for *all* lawyers to see what is happening in those courts. In many jurisdictions, you will be shocked by the demeaning way the accused are treated, the careless attitude many court-appointed lawyers have toward their clients, the arrogance and rudeness of the judges and prosecutors, the lack of advocacy for defendants, and the arbitrary way in which cases are resolved.

Once you have knowledge, you can use it. You can convince legislators, most of whom know nothing about indigent defense, of the importance of lawyers for the poor. You can get other members of the bar and bar organizations involved. You can explain why representation by counsel is essential to the proper working of the adversary system. You can point out that when innocent people are convicted because of poor legal representation, the actual perpetrator of the crime remains free to commit other crimes. You can educate people that the Bill of Rights is not a collection of technicalities, but the most precious part of our Constitution. You can support your local public defender office by providing some *pro bono* assistance on some cases.

The representation of people accused of crimes is an issue constantly exploited by demagogues, who say that society should not waste money defending people who have done terrible things. They play on fear and ignorance. Lawyers must stand up to them. Lawyers must explain that the days of the lynch mob – and the perfunctory trial known as a “legal lynching” – are behind us. Today, every person accused of a crime, no matter how heinous, is entitled to a capable lawyer with the resources needed to defend that person in the adversary system. Every American should be proud of it when it works and ashamed when it does not. Everyone must understand that it will not work unless the legislatures provide the resources necessary for public defenders to do the job.

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I hope that some of you will be that capable lawyer for some of the poor accused of crimes. You can work as public defenders, representing your clients with care and diligence. Just as with the Underground Railroad at the time of slavery, you may not be able to change the whole system, but you can help one person at a time. Legislatures may fail. Courts may fail. The executive branch may fail. But individual lawyers can take cases, counsel clients, investigate their cases, be their advocate, and tell their stories. It will make a difference. It will make the right to counsel a reality for that person and that person's family. And you will find it a very fulfilling and important way to spend a life in the law.

I was fortunate to grow up during the Martin Luther King, Jr. era in American history – the time between the Montgomery Bus Boycott and the assassination of Dr. King in 1968. The essential lessons that Dr. King taught us during his thirty nine years of life were that nothing was more important than ending racism and poverty and nothing was less important than how much money one made doing it. Our society did not follow those lessons, but we as individuals can. We need to make a sustained commitment to equal justice and to providing high quality representation for poor people whose lives and liberty are at stake.

Dr. King often said we stand on the shoulders of others so that someday others can stand on our shoulders. When you are working to improve representation of the poor and to end race discrimination in the criminal courts, you are standing on the shoulders of Thurgood Marshall who just a few years after graduating from the law school at Howard University, went by train from Baltimore to Oklahoma City, and then took a bus to Hugo, Oklahoma, to defend a man in a death penalty case.¹¹⁴

¹¹⁴JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 113-19 (1998).

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You stand on the shoulders of Clarence Darrow, who, late in his career, tried a case to an all-white, all-male jury on behalf of African-Americans who had the audacity to move into an all-white neighborhood in Detroit and were on trial for murder.¹¹⁵ He stood before the jury and said that the case was about race.¹¹⁶ He asked the jurors to deal with the reality of race relations in Detroit and their own attitudes about race.¹¹⁷ The first trial ended in a mistrial. At the second and final trial, before another all-white, all-male jury, after again talking frankly about race, Darrow won an acquittal for Henry Sweet.¹¹⁸

And you are standing on the shoulders of two African American lawyers who were practicing law in Chattanooga in the early 1900s, Noah Parden and Styles Hutchins. They were asked to take the case of Ed Johnson, an innocent man, who had been convicted of rape and sentenced to death.¹¹⁹ Johnson's father met with Parden and asked him to take the case. He was unable to pay a fee.¹²⁰ After discussing the consequences of taking the case, including the possibility of a lynch mob coming after them if they took it, Parden and Hutchins took the case.¹²¹ While working on the case, there was an attempt to burn down their offices and shots were fired into Parden's house.¹²² Parden took a train to Washington and argued for a stay

¹¹⁵ For a full account of the trials, see Douglas A. Linder, *The Sweet Trials: An Account*, www.law.umkc.edu/faculty/projects/ftrials/sweet/sweetaccount.htm (last visited May 17, 2010); see also KEVIN BOYLE, *ARC OF JUSTICE: A SAGA OF RACE, RIGHTS, AND MURDER IN THE JAZZ AGE* (2004).

¹¹⁶ Linder, *supra* note 115; BOYLE, *supra* note 115, at 292-95.

¹¹⁷ BOYLE, *supra* note 115, at 292-95.

¹¹⁸ *Id.* at 299, 336.

¹¹⁹ The case is described in Mark Curriden & Leroy Phillips, Jr., *CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED A HUNDRED YEARS OF FEDERALISM* (2001).

¹²⁰ *Id.* at 133.

¹²¹ *Id.* at 139.

¹²² *Id.* at 178.

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before Justice John Marshall Harlan.¹²³ After conferring with other members of the Court, who decided to accept the case for review, Justice Harlan granted the stay.¹²⁴

When word of the stay got back to Chattanooga, a mob stormed the jail and took Ed Johnson to the bridge that goes over the Tennessee River in Chattanooga. They shot him and hung him off the bridge.¹²⁵ Noah Parden and Styles Hutchins experienced constant threats against their lives and rocks were thrown through the windows of their homes and office.¹²⁶ The Sunday after the lynching a minister preached a sermon against lynching. His house was set on fire.¹²⁷ A short time later, Noah Parden and Styles Hutchins left Chattanooga and never returned.¹²⁸

Noah Parden and Styles Hutchins set a remarkable example for us to follow. When they were decided whether to take the case of Ed Johnson, they knew that if they took it, nothing would ever be the same again. They knew they would put at risk the law practice they had built in the segregated South and their ability to remain in the community that was their home. They even considered the possibility that they might be lynched if they took the case. And yet, Noah Parden and Styles Hutchins said, yes, we will take the case. “‘Much has been given to us by God and Man,’ Hutchins said. ‘Now much is expected.’”¹²⁹

You will not be called upon not to make decisions like the one they made. However, the question of whether our society will provide representation to the poor and achieve equal justice is ever present. Our answers as lawyers must be the same as Noah Parden and Styles Hutchins: yes, we will take the case. Much has been given

¹²³ *Id.* at 12-17, 179-80, 188-89.

¹²⁴ *Id.* at 192-96.

¹²⁵ Curriden & Phillips, Jr., *supra* note 119, at 200-214.

¹²⁶ *Id.* at 234.

¹²⁷ *Id.* at 235.

¹²⁸ *Id.* at 234, 348-49.

¹²⁹ *Id.* at 139. *See* Luke 12:48.

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to you – you are exceptionally fortunate. Much is expected from you. I urge you to take on the case of fairness, equal justice, and the right to counsel. I urge you to become public defenders and make the right to counsel a reality. I urge you to dedicate yourselves to overcoming the nightmare of hostility and fear mongering that is going on in this country and to being a part of making good on the promise of equal justice under the law.

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APPENDIX

TRANSCRIPT OF VIDEO LEGISLATIVE HISTORY OF PUBLIC CHAPTER NO. 4981

HOUSE BILL 1358

April 12, 2011: House Judiciary Subcommittee

Rep. Vance Dennis (R-Savannah, District 71): Thank you, Mr. Chairman. This is a bill that corrects a problem that has arisen as a result of a court proceeding in regards to motions for summary judgment and the standard for determining those. I have an amendment that corrects some of the language to basically revert back to the existing standard prior to that court decision being made. And with that I'd move passage of the bill.

Chairman (Rep. Jim Coley, R-Bartlett, District 97): There's a motion on the bill. Second.

Rep. Dennis: And I would also move passage of the amendment 557077.

Chairman: There's a motion and a second. Representative Dennis, you're recognized on the amendment.

Rep. Dennis: Without any questions, I'll just renew my motion on the amendment.

Chairman: Representative Sontany?

Rep. Janis Baird Sontany (D-Nashville, District 53): Could you explain this just a little bit?

Rep. Dennis: Sure, the court--briefly, I'm not an expert on it but I'll do the best I can. We could go out of session here if an expert--but basically, the gist of it is, I think last year or the year before, the Supreme Court made a decision that changed the way they'd historically applied-- the standard they'd historically applied to summary judgment decisions. And they did it in such a way that it makes it almost impossible for the court to award summary judgment. They potentially shifted the burden of proof to the plaintiff that's

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almost--it's basically created almost an impossible standard to achieve summary judgment. So the intent of the bill is to--so that if there is no genuine, no real disputed issue of fact, and it's just a matter of law to enable the court to go back to making that decision in granting a summary judgment motion. And it shifts the standard from what—the standard that the court adopted, it shifts it back to what it was prior to that decision and what it had been in Tennessee for the last, I don't know, twenty, thirty years, and it mirrors the federal standard for decisions on summary judgment.

Rep. Sontany: So tell me what summary judgment is and we're talking about the moving party what are we talking about there?

Rep. Dennis: Well, summary judgment-- going back to--well, let's start at the beginning. You file a lawsuit, you've been wronged, or for whatever reason you file a lawsuit, alleging somebody has harmed you or somebody owes you something. The other side files a response to that. Then you do discovery, you share all your information. Once you've shared all your information, if there is no real disputed issue of fact then either side can move the court to grant them summary judgment. Which basically means you're filing a motion with the court saying there is no issue of fact, everybody's stipulated that these are the relevant facts, and once you're at that point it's a matter of law based on those facts that the person who's claiming that they're entitled to something is not entitled to it purely as a matter of law. And the judge has the power at that time to make a decision on that motion for summary judgment. But to get to that point you've got to have everybody agreeing there are no issues of – no disputed issues of material fact. So once you get to that point, the judge makes a decision. And the court shifted its standard of proof to the extent that the person moving for summary judgment has to essentially prove a negative in what they did. And I'd have to get somebody that's more fluent on summary judgment

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practice and civil practice to explain it much better than that. But that's generally-- when you have a motion for summary judgment, your movant is moving the court to give them judgment before you get to a trial because there are no disputed issues of fact. It's purely a matter of law that the judge has to decide under the law. It's not something that a jury has to make a decision about which facts are right or you're contesting those issues of fact in order to be able to grant summary judgment.

Chairman: Representative Coley, you're recognized. Representative Dennis, would you consider rolling this bill to next Wednesday's calendar?

Rep. Dennis: I'll be glad to.

Chairman: Thank you. Wednesday the 20th. If there is no objection it's rolled.

April 27, 2011: House Judiciary Subcommittee

Chairman: Representative Dennis, you're recognized on House Bill 1358.

Rep. Dennis: Thank you, Mr. Chairman. House Bill 1358 as amended will basically change the current standard for obtaining summary judgment in response to a 2008 Supreme Court decision that fundamentally changed how you look at the Supreme Court—summary judgment issues. So for the purpose of bringing up the amendment, I move passage on the bill.

Chairman: It's been moved and properly seconded. Any questions? We have an amendment. Everybody have—it's the drafting code. Representative Dennis.

Rep. Dennis: Mr. Chairman, the drafting code on the amendment—there may be one or two amendments in your packages resulting—reflecting on various revisions over the course of the last few weeks. But the one I intend on moving today is the last four of the drafting code, 8296, which I hope is in your package.

Chairman: Is there a motion on the amendment?

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Rep. Dennis: I move the amendment.

Chairman: Seconded. All those in favor of amendment number one, say aye. Those opposed. The ayes have it.

Rep. Karen Camper (D-Memphis, District 87):
[Inaudible]

Chairman: I'm sorry. I apologize.

Rep. Camper: [Inaudible]

Chairman: You don't have one?

Rep. Camper: [Inaudible]

Chairman: We are. You want to talk—we are.

Rep. Camper: Thank you, Mr. Chairman. I was hoping that he was going to give us an explanation of the amendment before we took it to a vote.

Chairman: Okay. All right. Well, that's fine. I withdraw—I made the second, and withdraw the motion and so we're back on the bill unamended. So go ahead and ask your question.

Rep. Camper: Well, you moved and seconded to bring it—the actual motion and second so that we could discuss it. So that's the posture I thought we were in before you were going to a vote. So I want us to be in a posture of discussing so that he can tell us what this--thank you, Mr. Chairman.

Chairman: I understand, so we are—we're on the amendment. Okay. And the motion's been made and properly seconded. All right. Okay. All right. Discussion. Representative Camper.

Rep. Camper: I hope he's going to tell me what this do. [Laughter from Chairman and others]. Because the amendment is so different than what I was looking at, so I had a great expectation that he was going to outline for us what all of these “whereases” meant so we can know what we're about to vote on.

Chairman: By the way, your comment is going to be one of the comments that we have on the Best of the 107th

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General Assembly CD, which will be available in August this year. Representative Dennis, you're recognized.

Rep. Dennis: Thank you, Mr. Chairman. The substance of the bill is pretty similar on both sides. The "whereases," as you refer to them, are kind of the explanations of what has happened in our courts giving rise to the need for this change. Basically, it just addresses, if you want to follow along with the amendment, that there's a particular Tennessee Supreme Court case called Hannan versus Alltel Publishing where the court kind of changed how they look at and apply Rule 56 of the Rules of Civil Procedure dealing with summary judgments and made a really, at least in my opinion, made a wrong-- an incorrect decision. They made it--they established a standard that makes it almost impossible for a court to grant summary judgment because it requires the nonmoving party-- or the moving party to essentially prove a negative. So basically, the intent of this bill and the language in this bill as far as what it actually does in establishing the review on a motion for summary judgment simply states that the person--a party who moves for summary judgment who does not bear the burden of proof at trial shall prevail in their motion for summary judgment if it either: submits affirmative evidence that negates an essential element of the non-moving party's claim or demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. So that's-- basically it goes back to what the standard was in Tennessee for several years prior to 2008 when the Supreme Court changed that.

Chairman: Representative Camper, you're recognized whether I've got the microphone or not.

Rep. Camper: Thank you, sir. And so what you said was that in the Supreme Court decision they made a change of something. So what was this change that you're talking about and was it outside of the--you have here Rule 56 of

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Tennessee Rules of Civil Procedure. What is it that was different about what they did that got us to here?

Chairman: Representative Dennis, you're recognized.

Rep. Dennis: Thank you, Mr. Chairman. Basically, and I'm--this is not an area that I'm completely an expert. We have, I think, a more skilled guest with us that might can explain it a little better than I can but I can tell you basically and if you want further explanation, certainly we can go out of session to do that. Basically, they changed the standard to make it-- they put an additional burden on the party who moves for summary judgment. Who's moving to show the court that their--that the case should stop here and not go to jury because the person who's on the other side is not entitled to the relief that they're requesting. Basically requiring--this would go back to the standard that was in place for a number of years before, under the Byrd case essentially, which is a several-year-old Tennessee case. This would codify the standard under the Byrd case and effectively reverse the standard that the Supreme Court put in place under the Hannan case. And if that doesn't explain it any better I'll be glad to go out of session to let somebody explain it that's a little better than I.

Rep. Camper: I think that would be good, if it's possible.

Chairman: If there is no objection we will stand in recess. Who is it that needs to speak?

Rep. Dennis: I know we have a, there's an individual here who can clarify a little better. Certainly if you wouldn't mind coming up and introducing yourself.

Benjamin Sanders (Farm Bureau Insurance): Thank you Representative. I'm Benjamin Sanders with Farm Bureau Insurance. Representative Camper, this bill is not our bill but I think we've adopted it because it's just such a good idea in our opinion. So let me explain my understanding of what Representative Dennis' bill does. Summary judgment is a judicial tool that determines whether a case should go to trial or not. In other words, if Representative Dennis sues me then I can challenge under our old standard of summary

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judgment, I can move for summary judgment and challenge the sufficiency of evidence. And essentially saying if you don't have enough evidence to go to trial we need to stop it right here. Under the old standard, the court could grant that. They could say, if he doesn't prove evidence now we're not going to the time and expense of going to trial. Under the standard that they adopted in 2008, they changed that. Instead of granting summary judgment by me challenging his evidence, they put the burden on the defendant and said that I-- that we now have to prove that he can't prove his case. So, in other words, if I move for summary judgment now, under the new standard, all Representative Dennis has to say is, I'll prove it at trial and doesn't have to show at that point that he has any evidence. So what we are seeing is a lot of cases that have no dispute of facts that are going to trial that probably shouldn't go to trial. Does that help explain it?

Rep. Camper: It does to some degree but I'm trying to see--if this practice has been successfully working, you're saying that in this one case--I guess we've adopted this and it has been working for, how long?

Mr. Sanders: The—Rule 56 of the Rules of Civil Procedure is what governs summary judgment. And that's been in place, I don't know when exactly it was rewritten, I'm going to say twenty or thirty years ago, and it was adopted to also be in line with the federal rule and the reason for that is to make sure that you can't pick and choose what jurisdictions you file in to go to the most favorable court. The rule hasn't changed. But in 2008, the Supreme Court changed their interpretation of that rule.

Rep. Camper: Which, that's what Supreme Courts kind of do in a way, they interpret the rule and apply it based on the evidence presented before them.

Mr. Sanders: That's correct. And when they made the ruling on that case, all the lower courts had to follow their new standard that they adopted.

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Rep. Camper: So what that would say to me, then, is that there was something about that case that the rule allowed them reasonable leeway to adopt--

Mr. Sanders: That's correct.

Rep. Camper: So I see the rule as being flexible in that way so now we're going to do what, say they can't do that, is that what this is going to say, that they could not have made that determination based on the rule that they were looking at, at that moment in time?

Mr. Sanders: I think, what I'm hearing, Representative, is that you're correct in that the court had the leeway to make that interpretation in 2008. I think what this bill says is that it is public policy that summary judgment should be able to be granted if you can't prove your case.

Rep. Camper: What? I'm sorry.

Mr. Sanders: I think--I think you're correct in that the Supreme Court certainly had the authority to make a different interpretation of that rule. What this bill says is that it's the public policy of Tennessee that if you don't have enough evidence to go to trial for your case that you shouldn't move past the summary judgment stage.

Rep. Camper: Oooh, I think that's tying the hands of the Supreme--Thank you. I appreciate that.

Chairman: Any other discussion? Representative Sontany, you're recognized, ma'am.

Rep. Sontany: Thank you, Mr. Chairman. I believe that we have someone else here that would like to speak on that issue as well, so if we can continue in recess and hear from Mr. Janney.

Chairman: Just approach the podium and just tell us who you are for the record, please. Go ahead, sir.

Doug Janney (President of the Tennessee Employment Lawyers Association): Good afternoon Mr. Chairman and members of the committee. I'm Doug Janney, President of the Tennessee Employment Lawyers Association. Actually here to speak on another bill this afternoon but I wanted to address some of the points on this summary judgment bill.

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This proposed bill actually goes farther than the Byrd case which was the case that governed summary judgment motions in Tennessee before Hannan versus Alltel, and it goes farther than the standard in Federal Rule of Civil Procedure 56. And the way that it goes farther is by giving the defendant the opportunity to prevail on a motion for summary judgment without ever giving the plaintiff the opportunity to respond in some circumstances. It says that the moving party shall prevail on its motion if it submits affirmative evidence that negates an essential element of the nonmoving party's claim or demonstrates that the nonmoving party's evidence is insufficient. If it submits an affidavit saying, well, the nonmoving party's evidence is insufficient to the court's satisfaction, then the nonmoving party may not get any opportunity to respond and have the lawsuit dismissed. And that's inconsistent with summary judgment practice in federal courts and in state courts and the way it's always been done. You have to give the nonmoving party an opportunity to respond. Additionally, this amendment says it applies only to defendants and not to plaintiffs. And from our perspective, it doesn't happen very often in personal injury cases, but in employment cases sometimes the plaintiff files a motion for summary judgment even though the plaintiff bears the burden of proof at trial. This amendment carves out plaintiffs and says that if you file a motion for summary judgment, plaintiff, we're not treating you the same way; because you bear the burden of proof at trial, you still have to go submit additional evidence. But, so, this amendment is treating defendants and plaintiffs different. That's what that language that says "if they bear the burden proof at trial"--it should be at the very least, it should be the same standard under Rule 56 for both plaintiffs and defendants. Rule 56 in the Federal Rules of Civil Procedure and rule 56 in the state Rules of Civil Procedure don't make any distinction between a plaintiff and a defendant; it doesn't say anything about whether you bear the burden of proof at trial. It only

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says you have to create a genuine issue of material fact. And that's the issue here. It was stated earlier that the plaintiff can throw up his hands up and say, I'll prove it at trial. That's not correct. The plaintiff still bears the burden of producing evidence demonstrating a genuine issue of material fact to the trial court's satisfaction. They can't just bring a frivolous lawsuit and say I'll prove it at trial. Under Rule 56 they still must demonstrate a genuine issue of material fact. And so we would encourage you to go with the text of the rule. Go with the text of Rule 56. Don't codify this amendment. At least pass it to 2012. Thank you.

Chairman: Any questions? Yeah, Representative Dennis, you're recognized.

Rep. Dennis: Just briefly I guess I take exception to your first point that the summary judgment motion could be granted simply on--by the moving party submitting an affidavit, as under Rule 56 as it is, the nonmoving party certainly at the hearing on the motion for summary judgment will certainly have the opportunity to put on proof that the--that it is not--that the evidence is not appropriate and that there is a genuine issue of material fact. So the assertion that the nonmoving party is not going to have the opportunity to present proof to the contrary at the motion for summary judgment is not quite correct. What am I missing when you say they are not going to be able to present that proof?

Mr. Janney: What if the trial court gets your--you're the defendant, you move for summary judgment, the trial court gets your affidavit, cancels the hearing, and grants summary judgment for you?

Rep. Dennis: I don't think that the court can do that. Can the court do that now without hearing from the other side, an opportunity to be heard? I don't think that's—I don't think this bill changes the interpretation of Rule 56 and I don't think the court would go anywhere near allowing and approving that kind of interpretation. That's not the intent of the bill at all. I don't think that's what it does.

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Mr. Janney: Well, that's--it may not be the intent but that's the effect it could have. It may not have that effect but under this, under this rule if you submit affirmative evidence that negates an essential element of my claim, then I don't have a—I don't necessarily have an opportunity to respond. The court can cancel the hearing, not have a hearing on it, and grant summary judgment without giving me an opportunity to respond.

Rep. Dennis: There are other rules outside of just this particular statute that apply to those hearings and would allow you to have that hearing. Just because it doesn't specifically say in this statute that you would be entitled to have a hearing and put on proof to the contrary doesn't mean it's not so and it's not covered in other sections of the code or in other parts of the rules. So, to say that just because the statute doesn't—just because this statute says—doesn't specifically say that you have the right to have a hearing on that summary judgment motion doesn't mean it's not covered in other sections of the rules, to do that. So I still—I disagree strongly with your assertion that the nonmoving party wouldn't be able to put on proof. I just don't see where you're getting that, other than just because the statute doesn't specifically say it. My response is it doesn't have to; it's covered by other sections of the rules of procedure.

Mr. Janney: Well, there are local rules that say that a party can get a hearing in some courts not in all courts. But if you read this language in this statute a defendant can argue that we've submitted this evidence, there's no need to have a hearing on it. We've submitted an affidavit evidence that negates an essential element of their claim or that their evidence is insufficient. And, this is mainly directed at subsection one that says "submits affirmative evidence that negates an essential element of the nonmoving party's claim." What if you submit affidavits and depositions and evidence with your motion that negate an essential element

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of the claim? Could the trial court not in its discretion grant the motion?

Rep. Dennis: I don't believe so because both sides are going to have the right to have an opportunity to be heard on that motion just like any other motion that's filed. You file a motion, you have a hearing on that motion, the court hears both sides and it makes a decision after that. And that's well settled and established in law and every other motion I've ever seen unless there's specific authority to enter an ex parte order, only hearing one side, and I've never had a case where we didn't have a hearing really quick after the court entered an ex parte order. You don't file a motion and get it granted without having a hearing and the opportunity for both sides to present whatever evidence they have and the reasons why. That's a misstatement of the actual practice, not this particular section of the code. And I really don't-- wouldn't have a problem with putting that specific language in there if it made you happy. But I talked to you about this a few weeks ago and I never got any language from you that I recall to try to fix it to put anything in there to specifically say that. So to come into here and assert that this is going to be a great departure from existing state and federal standards simply because it doesn't specifically outline the rights to that hearing that are provided for in other sections of the law and code, is not accurate in my opinion. But I'm certainly opened to being convinced otherwise.

Mr. Janney: Well, Rule 56--under Rule 56, the nonmoving party should have the opportunity to respond and maybe this amendment could insert something in there that says in all--any time a motion for summary judgment is filed, the nonmoving party shall have an opportunity to respond. But the other thing that I'm concerned about is why is this applicable only to defendants and not to plaintiffs? What if I file a motion for summary judgment in a family medical leave act case where you've interfered with my rights to medical leave and fired me while I'm on

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medical leave instead of returning me to my job? And then because I bear the burden of proof on that at trial, I don't enjoy the benefits of your amendment. Why is that?

Rep. Dennis: I believe the intent is not--and that's why it doesn't specifically say plaintiffs or defendant, the standard should be different in my opinion as to when you're moving for summary judgment as to the person who bears the burden of proof. If you've got to put on proof at trial and convince a jury that something has happened, if you have that burden of proof, then to get to that trial you need to be able to show that you've got some proof to do that. You need to be able to "put up or shut up" at that summary judgment stage, which is the federal standard, essentially. And that is the intent of the bill. I think that is the language of the bill. And that is what, at least in my opinion, should be the standard.

Mr. Janney: The standard should be uniform. It should apply to--irrespective of whether you're the plaintiff or the defendant, whether you bear the burden of proof at trial or whether you don't bear the burden of proof at trial, Rule 56 is the same for all parties in all courts. And this saying that if you're moving for summary judgment and you still bear the burden of proof at trial that you can't get summary judgment on a case where you're entitled to it, say if you're the plaintiff moving for summary judgment, it's just not--it's not drafted evenhandedly for both plaintiffs and defendants. It's only giving defendants the opportunity to make use of this amendment. And that is not in accordance with the spirit and intent of Rule 56 of either the federal or the state Rules of Civil Procedure.

Rep. Dennis: Well, I guess we'll just have to agree to disagree, I guess, because that is the only functional way that I see that it would be able to work. You have to distinguish between the--I mean from the practical aspect between the entity who has the burden of proving something to the jury and the party who has no obligation to prove anything at all to the jury.

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Mr. Janney: So it applies--

Rep. Dennis: That's the difference.

Mr. Janney: In a case where a plaintiff files a motion for summary judgment, they don't-- they can't follow your amendment because they still bear the burden of proof at trial. So what does that mean in those cases? How are those motions addressed--to be addressed by the courts in light of this amendment?

Rep. Dennis: Under the existing standard.

Mr. Janney: Well, this is codifying a different standard. And it--we ought to just go with the text of Rule 56 rather than trying to codify something that is not applicable to every situation.

Rep. Dennis: The problem with going with the language of Rule 56 is we're not attempting to change the language of Rule 56. We are attempting to change how it's interpreted because the Rule--the language of Rule 56 has not changed. The court interpreted it one way under the Byrd case and the court interpreted--changed their interpretation significantly in 2008 under the Hannan case. So codifying the existing rule language doesn't do anything because if you don't get to the underlying elements of how that rule is interpreted, then it's pointless to codify the rule because the rule is already essentially codified in that it is adopted as Rule 56 of the rules of court. So to do what you're proposing and codify the language of the rule does nothing.

Mr. Janney: Right. Yeah, I'm not suggesting codifying anything. I don't think you should codify anything. I think you should let the courts—let the--the section of T.C.A. 16-3-402 says that the Tennessee Supreme Court prescribes the Rules of Civil Procedure and the way in which motions for summary judgment are handled. And so perhaps the 16-3-402 ought to apply and let the courts say how pretrial motions to dismiss lawsuits are handled.

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Chairman: Time out. Representative Watson, you're recognized.

Rep. Eric Watson (R-Cleveland, District 22): Just making a motion to go back into session, I want to make a comment. Granted? Thank you, Mr. Chairman.

Chairman: No objection? We go back in session.

Rep. Watson: Representative Dennis, would you agree to maybe sit down with John Day and Jimmy Bilbo between now and the full committee and just straighten some of this out? Maybe if we've got to write something different.

Rep. Dennis: I will be most certainly glad to do that between now and then. I know some of my friends with the Trial Lawyers' Association have looked at that specifically. Mr. Day, I believe, has looked at this amendment and we made some changes specifically after recommendations from Mr. Day in particular, I believe. So I will be more than glad between now and full to talk to all interested parties.

Rep. Watson: Now, Mr. Bilbo, is that okay? Wave your hand there. Y'all get together before next week then. Thank you, sir.

Chairman: OK. We're back on the amendment. It's been - -the motion's been made and is properly seconded. All in favor of the amendment say aye. Aye. Those opposed? The ayes have it. Those who want to be listed as "no," please raise your hand, and we'll record you as "no." Now, we're back on the bill as amended. Question? The question's been called. No objection to the question? Seeing none, all in favor of sending 1358 to the full committee say aye. Aye. Those opposed no. Moves to the full committee. This also will be one of the highlights on the best of the 107th General Assembly.

***HB 1358 sent to full committee.

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Rep. Dennis: Thank you, Mr. Chairman. This bill establishes a standard procedure for establishing who has the burden of proof in a motion of summary judgment, and it would codify the court's previous status prior to a Supreme Court decision in 2008 and take us back to the way the law was on summary judgment before 2008. There is an amendment, drafting code 8296, and I move passage of the amendment.

Chairman (Rep. Watson): Motion second on the bill. Motion second on the amendment. Does everyone have the amendment? 8296. Any discussion? Representative Moore, you're recognized sir.

Rep. Gary Moore (D-Joelton, District 50): Thank you, Mr. Chairman. Representative Dennis, I'm looking at the amendment which is quite substantially--does it substantially change the original language?

Rep. Dennis: No, it doesn't. The original language is very similar to the bill. The amendment added several paragraphs on--talking to other folks on both sides of the issue involved with the case, they thought it would be best to put into the bill some of the history leading up to the reason to help clarify what our intent was and that's the reason for that. The actual statutory language is at the very bottom and it's only the last one, two, three, four, five, six, the last seven pages-- last seven lines on page one.

Rep. Moore: Thank you.

Chairman: Representative Camper.

Rep. Camper: Thank you, Mr. Chairman. Representative Dennis, if I remember last week we were in the middle of some said discussion about this. And this dealt with the Rule 56, right? That's what we're talking about.

Rep. Dennis: That's correct.

Rep. Camper: And based on how the Supreme Court is interpreting that rule, is what this goes to address.

Rep. Dennis: Yes.

Rep. Camper: So would this piece of legislation then, because this was a concern I had last week--and I know we

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had to leave because of the storms--going to in some way tie the hands of the courts because right now the rule allows them, based on the evidence presented before them, to make a decision? So, to me, it appears now we're going to go back and say to them, there was something wrong in your decision making process so we're going to now do something with that rule that would allow you to only look at it and see it this way. Is that what this is doing?

Rep. Dennis: Well--

Rep. Camper: What are we doing? Because I think the rule gives them some latitude to look at the evidence and make a decision. But we want to go back and overturn it, it appears.

Rep. Dennis: The issue is not being able to look at the evidence and make a decision. The judge--the court still has the power to do that. You're not changing that at all. The only thing you're changing is who has the burden of proof on a motion for a summary judgment. Motion for summary judgment is when you finish your discovery issues, everybody's shared all their information, if there is some legal reason or some factual reason why you're not entitled to the relief that you're asking for. Or why the person who's filed the suit is not entitled to that, then the defendant can file a motion for summary judgment asking the court to dismiss the case because as a matter of law this should never be decided by a jury because there is a clear cut reason that this case can't be--this person can't get the relief they're asking for. And this deals specifically with who has the burden of proof on that motion as far as establishing that there is no real issue in contention here and which side has to prove what to--either that there is a problem or there's not a problem that the jury should hear.

Rep. Camper: So in the decision that we are citing here, who had that burden of proof and how does this change or get at that? In the case that's in the first whereas clause.

Rep. Dennis: The Hannan versus Alltel Publishing case was a case that the Supreme Court decided in 2008 where

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they basically reversed what they had been—what had been the standard in Tennessee for many years and what the federal standard was and still is. They kind of reversed that and required the party who was moving for summary judgment to--they shifted it from the person who was bringing the claim to be able to show that there was a real issue to be decided by a jury. They kind of reversed that and said the person who's being sued has the burden of proving to the court that there's no way that the plaintiff can win this case. And that's not what the state standard had been ever before and it's not what the federal standard is at all. So the purpose of this bill is to move it back to what the state standard was for--prior to 2008 and to what the federal standard still is. That the moving party has to show to the judge that there is some—there is an issue here that a jury needs to decide, and once they show that, then the judge has to let it go to the jury. But this is just dealing with when there's an issue that there is no dispute, the plaintiff has got to “put up or shut up” under this bill. Right now the court's taken that away and that's not the prior standard for Tennessee and that's not the federal standard as it is now.

Rep. Camper: And how's--

Rep. Dennis: So we're codifying--

Rep. Camper: So how're they going to achieve that? I need to see practically how they're going to achieve that with this language you've put here at the bottom. Tell--make me see how that's going to work. Can you? Like, how is this going to achieve what you just said? You perceived that there was a problem. Does this solve that problem, and how is this solving that problem, is what I'm trying to get at.

Rep. Dennis: The person who's being sued, if they file a motion for summary judgment saying, judge, there's no way the plaintiff can win this case as a matter of law or based on all the facts that are here, there's no way that the plaintiff can win this case. And if they can show the court

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that that's true—the case—if they allege that there's a specific reason why they can't prove their case, then that shifts the burden of proof to the plaintiff. The plaintiff has got to show at that motion for summary judgment that there actually is an issue here for the judge to be decided.

Rep. Camper: All right, I think I understand what you're saying. Okay, also, Mr. Chairman, last week there were some people to speak and I'm wondering are these people still here or did they show up? Did anybody want to speak on this and would be ok with you? Because we were in the middle of the tornadoes and all this stuff last week, so I don't know if they are or if they come back.

Chairman: Representative Camper, also the legal counsel can advise you of some of that stuff, too, because we've been told it might affect Mallard in a sense. I believe some of your question--she can address that also if you need her to. Is anyone here to speak? No one. Okay. Chancellor Bryant, you can speak if you need to. Okay. Jimmy Matlock? Representative Dennis, do you care to just roll this down just a notch or two?

Rep. Dennis: Be glad to.

Chairman: Thank you, thank you, sir.

Rep. Dennis: I would add, Mr. Chairman, that we've worked with the—I guess, the trial bar, the Trial Lawyers' Association, in drafting this language. It's my understanding they're not--they don't have any intent to oppose this bill. Although there was an attorney here last week who had some issues but he is not with—he was not representing the Trial Bar Association.

Chairman: Sounds good. Without objection we'll just go ahead and go back to item number one.

House Judiciary Committee moves on to two other bills but Representative Camper raises further questions about HB 1358.

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Chairman: That takes us back to item 26, HB 1355, Representative Dennis, you're recognized, sir.

Rep. Dennis: Thank you Mr. Chairman, I think we had already moved 26 but if we hadn't approved it, I'd renew my motion on item 26.

Chairman: Representative Camper, you are recognized.

Rep. Camper: Thank you, Mr. Chairman. I was--I actually was trying to get to legal to get that question answered but 1920 came up and it was so important I was trying to hear it too. So I wasn't really able to get to you because we got into 1920. So I was trying to figure out in a case like I am a--Karen Camper is a citizen who is trying to file a suit against some said corporation, big corporation, let's say AT&T, and we go before, for summary judgment, I guess. How would this bill impact that process? So, I'm this just regular person. I believe there's been an employment problem, I feel like they've done something wrong to me and I want to file a lawsuit. How is that--this bill going to impact that?

Chairman: Counsel, item 28, House Bill 1358.

Counsel (unidentified woman): This bill would change the standard by which the court uses to determine when the burden would shift to the nonmoving party as it reads.

Rep. Camper: Okay. I guess the nonmoving party is, in this case was AT&T, the company that I cited. Who--what do you mean--I'm sorry, make me, I'm like just a citizen. I don't get it. Tell me. You're trying to explain this to somebody that don't understand. Thank you.

Counsel: You make a motion for summary judgment if you don't believe that the evidence that's been presented establishes--a movant for summary judgment would move for summary judgment if they feel that the evidence that the other side has presented does not establish a particular claim, that it has not met its--the elements of a particular claim--am I talking legal?

Rep. Camper: Well no, that's okay. So I file a said lawsuit against this company. The company wants this

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summary judgment. Is that what you're saying? Okay, so now that they want this summary judgment, there are rules in place on how that works today. Is that what you're saying?

Counsel: There are rules to govern the procedure and the interpretation of that procedure would be affected by this statute.

Rep. Camper: Okay, so how then is that—how—what is that effect that this has on it?

Counsel: Currently, the Supreme Court, the Tennessee Supreme Court, has made a declaration in the case Hannan, and that was in 2008, and this would--

Rep. Camper: What did they say in Hannan? Because what you're basically saying is that's going to be the law of the land right now if nothing happens.

Counsel: In Tennessee, I'm quoting from the case—

Rep. Camper: That's fine.

Counsel: A moving party who seeks to shift the burden of production to the nonmoving party, who bears the burden of proof at trial, must either, one, affirmatively negate an essential element of the nonmoving party's claim, or two, show that the nonmoving party cannot prove an essential element of the claim at trial.

Rep. Camper: So, this bill now is going to--

Counsel: Change that standard.

Rep. Camper: Change that standard. Okay, thank you. So what you're saying, Representative Dennis, is that with the decision they made, that was somehow a change. Is that what you're saying?

Rep. Dennis: Let me kind of use your hypothetical. You work for AT&T. AT&T fired you. You think they fired you wrongly. You sued them. They file a motion for summary judgment that says you never worked for me—you're alleging that—you sued the wrong person. You never actually worked for me. You've got the wrong person sued. The question is whose burden--who's got the burden of proof on that summary judgment motion, who's got the

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burden of proof to prove whether or not you worked for them to the judge in order to move that case forward. Under the old standard, and under the federal standard, they would have to—they would raise the allegation that, no, you never worked—this person never worked for me, and then you would have to prove to the judge before this goes to a jury that, yes, you actually did. In 2008, the court reversed that and said no the employee, just because you've alleged they fired you wrongfully, they've got to prove-- this case is going to a jury unless they can prove beforehand that you didn't work for them. The issue is who has the burden of proof on that motion for summary judgment at that proceeding after you've shared all your information, you're there just on a motion for summary judgment, who's got to prove that there's an actual claim there that needs to go to the jury. You as the plaintiff or the defendant--does the defendant have to prove a negative, prove that you don't have a claim? It's kind of technical but that's about as good as I can do to summarize the issue. But the standard that we're codifying, attempting to codify here, is the standard that we used prior to 2008 and the standard that the federal law--if the suit's filed in federal court, it's the standard that the federal courts use still to this day.

Rep. Camper: And so there--I'm sorry, Mr. Chairman, to keep going on. So, okay, so then this particular case that we're using as a basis for this decision made it from the lowest all the way up to the Supreme Court level. And now what we want to do is put in statute that says, we don't need to do it that way when it went through the various levels. So everybody got a chance in that process, each of the court levels got a chance to make a decision and it was appealed and it went higher and the decision was the same, and then it was appealed and it went higher. And what you're saying now is, hey, you got it wrong so let's--

Rep. Dennis: Yes, that's exactly it. The court got it wrong. The court changed its standard. The court changed its

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standard that it had always applied. The court changed the standard away from what the federal courts apply. And we're saying yes, we do that all the time. If the court makes a decision wrong, incorrectly, if the people think it was done incorrectly, we change the law to rein that in unless it's a constitutional issue which has constitutional protections that are greater than normal. But yes, the court adopted a standard that was too far to one side. If we codify this, we will be bringing that standard back in line with what it was prior to 2008 and what the federal standard is now.

Chairman: Go ahead. Representative Stewart.

Rep. Mike Stewart (D-Nashville, District 52): Here's my question. You know, I understand what you're saying about policy. You know, we set the policies and courts apply the policies. So it makes sense for us to-- if we say X, that's the policy. My question is, though, aren't we here just talking about a rule? I mean, Hannan versus Alltel, what you're trying to do is reverse what the Supreme Court said about how Rule of Civil Procedure 56 is applied, right?

Rep. Dennis: Essentially, sort of. Who has the burden of proof to prove that particular motion for summary judgment in--under Rule 56 should be granted.

Rep. Stewart: Well, I guess, is this just--all your bills are your bills but is this your own personal view? I mean, I'm just curious what brings you to select this particular ruling by the Supreme Court out of hundreds of rulings about the Rules of Civil Procedure over the years to reverse this one?

Rep. Dennis: Well, I think there's a lot of concern within the business community in particular that we've gotten to a point where cases with no real merit are getting--are going to juries because of this particular decision. And that's kind of the issue that it's trying to address. It is my personal belief that this is the appropriate standard, the standard under the Celotex case under federal law and the Byrd standard as it basically adopted the Celotex standard.

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It was the--is the appropriate standard that we should be using in determining whether or not summary judgments should be granted. But, so, it is my personal position that this is the correct standard, but in addition I believe a great deal of the business community, small and large, and those who are concerned about getting rid of frivolous complaints, frivolous lawsuits before it gets to a jury, the time and expense of a jury trial if there is no real issue of fact to be decided by a trier of fact. This is the appropriate standard to use when determining that so that you avoid the unnecessary time and expense of a full blown jury trial if there is no real issue of fact, if there is no real issue of fact.

Rep. Stewart: Well, I guess my concern is on a rules case, do we really want to--you know, it's different from creating an environmental law or a law about where someone can carry a gun. You know, those are our--that's our job, we can make that decision, okay. But I'm worried—it seems like this is a bad precedent because the courts ultimately create these rules. We have a hand in it, but aren't we really encroaching upon an independent branch of government? You know, the reason I say that-- you think back, you know, where Roosevelt, a very popular President, ran into trouble with his own Democrats is when he tried to pack the Supreme Court and the Democratic Senate said no because they respected--even though they had respect for the President, they respected even more this separate branch of government. Seems to me what we're doing here--set aside, I'm not an employment lawyer so I don't deal with this issue--but I mean if every time the Supreme Court says something about a rule that we don't like, if we're going to start getting in the business of rewriting the rules every time a case is lost, it seems like we're stepping into—we're stepping into their house and I think that's not—is that really, do you really think that's smart when it comes to rules? I mean rules about how courts work as opposed to the underlying policies that the people have sent us up here to do, to implement.

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Rep. Dennis: If it was an issue where we were actually rewriting a Rule of Civil Procedure or changing the language of the rule or passing a statute that was in direct contravention to that rule, then yes, I would have—I would share those concerns. But I don't in this case because all we're dealing with is who has the burden of proof, of proving these elements. We established who has the burden of proof to prove particular elements one way or another in a number of cases. In criminal law, for example, the state has the burden of proving beyond a reasonable doubt that a crime was committed. If we legislatively establish an affirmative defense, the defendant has the burden of proof of proving that affirmative defense to the court by a preponderance of the evidence. We always, I mean legislatively, we establish who has the burden of proof to prove certain elements of any type of offense, be it civil, be it criminal, what have you. So I don't think we're delving too far away from that. It's specific to the application of this Rule 56, but it's not rewriting the rule. The court didn't change Rule 56. The language of Rule 56 has not changed at all. The court simply dealt with who has the burden of proof in whether or not a court grants that motion, and so that's my argument in support of that. If it was directly in contravention to Rule 56, if Rule 56 said this, and we passed a law that said no you're not going to do it that way, you're going to do it a different way, then yes, I think we would run into some constitutional issues. However, I don't think this statute does it. If the court disagrees, then obviously they can find the statute to be unconstitutional as far as encroaching on their powers. If that happens in the future then so be it. I don't think it goes that far as to contravene an existing rule because, like I said, the rule has not changed. Rule 56 is still the same.

Rep. Stewart: Well, I appreciate that explanation because I think this is something we're going to revisit over time and based on past experience I have an inkling that there's a possibility you may get this bill out of committee whether

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or not I think it's a good idea. But I think that--I'm going to vote against the bill just because I think that we have to proceed with great caution when we start telling the Supreme Court, when we start reversing their decisions about the rules. And to me, I understand your explanation, yes we are not literally changing the words in this rule, but, you know, we are changing their meaning, which to me is the same thing to a litigant. And just to explain why I'm focused on this, you know, Rule 56 is not just any old Rule of Civil Procedure. This is the gate that you have to get through to get to a jury. So this is the rule that says when you're some employee, this is what you've got, this is the hump you've got to get over to have your right to a jury given to you. You know, and this is not Europe. I mean, we don't--we live in a country still where juries, our peers, make the big decisions. We keep pushing power down. I think you'd agree with me that this imposes a more restrictive standard for a litigant than the Tennessee Supreme Court has assigned and so to me I think we should leave it to their wisdom. The Tennessee Supreme Court, I think, is a pretty pro-business court and I think we should leave it to the courts to decide what the rules mean. And because of that I'm going to vote against your bill.

Chairman: Any other discussion? We're on the amendment 8296. Any discussion on the amendment? If not, you're voting on the amendment. All in favor of amendment one say aye. Aye. All opposed, say no. On the bill as amended. Representative Dennis, anything else? Any other discussion? If not, you're voting on 1358 to go to calendar rules. All in favor, say aye. All opposed, say no. Let's record it with the clerk, please. Mr. Clerk.

May 20, 2011: House Session, 38th Legislative Day

Clerk: House Bill 1358 by Representative Dennis relative to summary judgment.

Speaker: Rep. Dennis you are recognized.

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Rep. Dennis: Thank you, Madam Speaker. I move passage of House Bill 1358 on third and final consideration.

Speaker: Representative Dennis moves passage. Properly seconded. Mr. Clerk, call the first amendment.

Clerk: House Judiciary Committee Amendment Number One. Spread on the members' desks in Regular Calendar Number Two Amendment Pack.

Speaker: Representative Watson, you're recognized.

Rep. Watson: Thank you, Madam Speaker. This amendment rewrites the bill and overrules the holding in Hannan versus Alltel Publishing Company regarding the standard for summary judgment in Tennessee. Madam Speaker, I move to adopt the House Judiciary Amendment Number One and yield to the sponsor for any further explanation.

Speaker: Representative Watson moves adoption of Amendment Number One. Properly seconded. Discussion on the amendment? All those in favor of Amendment Number One say aye. All those opposed say no. You adopt. Next amendment, Mr. Clerk.

Clerk: No further amendments, Madam Speaker.

Speaker: Representative Dennis, you are recognized.

Rep. Dennis: Thank you, Madam Speaker. As was described in regards to the amendment, this bill will codify the standard of proof for summary judgment on cases in civil courts in Tennessee. I renew my motion.

Speaker: Representative Dennis renews his motion. Any discussion on the bill? Is there objection to the question? Seeing none, all those in favor of House Bill 1358 vote aye when the bell rings. Those opposed vote no. Has every member voted? Does any member wish to change their vote? Take the vote, Mr. Clerk.

[H.B. 1358 passes by a vote of 85-4. The next bill, H.B. 1641, relative to claims for employment discrimination and retaliatory discharge, is then taken up. The House Judiciary

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Amendment Number One is adopted. The floor discussion on the amended H.B. 1641 is transcribed below.]

Rep. Dennis: Thank you, Madam Speaker. This bill [H.B. 1641] in conjunction with the previous bill specifically codifies the standard of proof for summary judgment in cases involving employment discrimination and retaliation. With that I renew my motion.

Speaker: Representative Dennis renews his motion. Discussion on the bill? Representative Miller?

Rep. Larry Miller (D-Memphis, District 88): Thank you, Madam Speaker. Will the sponsor yield?

Rep. Dennis: Yes.

Rep. Miller: Representative Dennis, you were speaking pretty fast. I couldn't hear you actually. I heard discrimination and retaliation. So what are we doing with the bill as amended?

Rep. Dennis: The bill as amended codifies the specific burden of proof on a motion for summary judgment in a civil case involving employment discrimination or retaliatory discharge. It codifies the standard of proof that the court uses when it's applying under the Rules of Civil Procedure Rule 56 a motion for summary judgment who has the burden of proof in proving that a case has an existing issue of material fact sufficient to get it to a jury to be heard.

Rep. Miller: Okay, thank you.

Speaker: Representative Stewart.

Rep. Stewart: Thank you, Madam Speaker. Will the sponsor yield?

Rep. Dennis: Yes, sir.

Rep. Stewart: Just to make clear, this is one of the bills you brought—am I remembering correctly-- to essentially reverse a decision by the Tennessee Supreme Court?

Rep. Dennis: Yes. It would. It would reverse--this bill would reverse the 2010 decision in a case that's called Gossett versus Tractor Supply that changed the standard of proof in Tennessee on summary judgment in these types of

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cases away from what had been the existing law in Tennessee for about thirty years and what is the federal standard –what it was and still is. It takes us back to what the federal standard is in these types of cases.

Rep. Stewart: And I don't want to take too much of the chamber's time. But I will say I am going to vote against it just because, as we've discussed, I don't think this body should routinely overturn decisions by our high court whether or not it's to the advantage of one particular group or another just because I think separation of powers suggests that we should be very deferential to them. And I just thought I'd make that point. Thank you.

Speaker: Representative Hardaway.

Rep. G.A. Hardaway (D-Memphis, District 92): Thank you, Madam Speaker. Will the sponsor yield?

Rep. Dennis: Yes, sir.

Rep. Hardaway: Would you say that the bill now is more friendly to the plaintiff or to the defendant?

Rep. Dennis: I wouldn't say that it's more friendly to either one. When you file a motion for summary judgment on either side, you're asserting to the court that given all the facts that are there, after you—after both sides have shared all their facts, there is no issue of material fact and the person who's on the other side is not entitled to what they are requesting. And if the court makes that determination, that there is no way a jury could—legally—that a jury could allow this person to win this case, then the court dismisses the case before it ever gets to the time and expense of going to a jury. So I would not say it is particularly preferential one way or the other.

Rep. Hardaway: All right. Then let me ask if—because sometimes we seek to legislate in order to codify case law. But in this case, we're trying to, in essence, overturn case law.

Rep. Dennis: Yes. The court—the Tennessee Supreme Court, in a three-to-two decision, changed the standard of proof that had been previously applied in our state for about

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thirty years and the standard that's applied in federal court on these types of actions, and this is changing it back to what it was before the court took it on its own initiative to make that change.

Rep. Hardaway: So everything that was in place before that federal court decision--excuse me, before they, was it a state court decision?

Rep. Dennis: State Supreme Court decision in 2010. Yes.

Rep. Hardaway: All right, so, we are postured now exactly as we would have been before that decision.

Rep. Dennis: Yes.

Rep. Hardaway: No extras in here?

Rep. Dennis: That is the intent of the legislation is to take us back to the standard that was applied before that case and the standard that is applied in our federal courts.

Rep. Hardaway: All right. Thank you, sir. Thank you, Madam Speaker.

Speaker: Representative Gilmore.

Rep. Brenda Gilmore (D-Nashville, District 54): Thank you, Madam Speaker. Will the sponsor yield?

Rep. Dennis: Yes, Ma'am.

Rep. Gilmore: So, can you tell me the difference between before this legislation and if this legislation passed, how it effects?

Rep. Dennis: Sure. As the law was before, in these types of cases, and under the federal law now, the person who's bringing the lawsuit--the person who is suing claiming unlawful termination of their employment or retaliation, has the burden to show that there is an actual issue of fact that a jury needs to decide. The Supreme Court reversed the burden of proof last year and said that, no, the employer has to prove a negative, has to prove to the court--in order to avoid going to a jury trial, the employer has to prove that the plaintiff can't possibly win their case instead of the plaintiff having to prove that there is an actual case there. It's kind of technical, but that's the difference and that's

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what we're going back to is the plaintiff having to show that there is an issue of fact that a jury needs to decide.

Rep. Gilmore: So, in what year was this again?

Rep. Dennis: It was 2010. It was the Gossett versus Tractor Supply case.

Rep. Gilmore: So, does this--does this legislation reverse that decision that was made then?

Rep. Dennis: I would say that it better--more that it clarifies. In a sense it reverses, but it clarifies our standard of proof and what we're going to use in Tennessee in a motion for summary judgment to be consistent with the federal law and the law that we used to apply.

Rep. Gilmore: Okay, and if someone feels like they've been discriminated on their jobs, does it now make it more challenging for them to receive some kind of retribution?

Rep. Dennis: I wouldn't say that it's more challenging. They are going to have to show--in order to get that case to a jury, they're going to have to show proof to a judge by a preponderance of the evidence that there is an actual issue here. There is something that a jury needs to be decided. If the court looks at the case and there is an actual dispute and they are entitled to what they are claiming if everything they say is proven to the judge—to the jury.

Rep. Gilmore: So the standards are being raised now?

Rep. Dennis: It's not really being raised. It's being shifted back to what it was before 2010 and to what our federal standard is right now.

Rep. Gilmore: Thank you.

[The previous question is called. H.B. 1641, as amended, passes by a vote of 67-24, with 4 voting "present, not voting."]

SENATE BILL 1114

May 17, 2011: Senate Judiciary Committee

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Chairman (Sen. Mae Beavers, R-Mt. Juliet, District 17): You're recognized on Senate Bill 1114.

Sen. Brian Kelsey (R-Germantown, District 31): Thank you. That's number thirty-one in your packets, Senate Bill 1114. And this bill would return us to the federal summary judgment standard and it would overturn the Hannan case. It prevents a rush on the federal court for summary judgment. The--there is an amendment to the bill, which is drafting code 00718296, which clarifies that it applies only to defendants who are filing for summary judgment and so I would move adoption of amendment--well, I guess I'll move passage of the bill first.

Sen. Mike Bell (R-Riceville, District 9): Second.

Chairman: Seconded by Senator Bell on the bill.

Sen. Kelsey: And then I'll move adoption of the amendment as well.

Sen. Bell: Second.

Chairman: Okay, motion on the amendment. Seconded by Senator Bell. And I believe you've already explained what the amendment does?

Sen. Kelsey: Yes.

Chairman: Okay. Any questions on the amendment? Senator Barnes.

Sen. Tim Barnes (D-Adams, District 22): I have a question, and I don't know that much about this, but when you say that it only applies to defendants, why would it not apply equally to plaintiffs and defendants?

Sen. Kelsey: Well, because of the particulars of how you receive summary judgment in the--let me pull up the amendment, if you don't mind, for one second. It's--what we're dealing with here is when a defendant files for summary judgment and then the plaintiff comes back and responds and then the question is what is the burden on the defendant at that point. Can you use the "put up or shut up" rule. And so that's why that is not an issue on the plaintiff's side when the plaintiff is filing summary judgment.

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Sen. Barnes: Well, yeah, it seems to me that if the other side, for example, has got a counter complaint, they may be seeking a summary judgment in their counter complaint. It seems to me that it would be the same rule should apply rather than create that disparate treatment, in a way, that in that circumstance if you got a counter complaint versus a complaint, it doesn't seem there would be a rational basis for that different treatment.

Sen. Kelsey: And that is a very valid point and I misspoke when I spoke in terms of defendant and plaintiff. Actually, now that I have the amendment pulled up in front of me, it says--it speaks in terms of the party that has the burden--that bears the burden of proof at trial.

Chairman: Any other questions on amendment number one? If not, all in favor of amendment one, say aye. Opposed? We're back on the bill as amended. Questions on the bill? If there are no further questions, we're voting on Senate Bill 1114 and the motion would be to calendar committee. Madam Secretary would you call the roll?

Secretary: Senator Barnes? Senator Barnes votes no. Senator Bell? Senator Bell votes aye. Senator Campfield? Senator Campfield votes aye. Senator Ford? Senator Kelsey? Senator Kelsey votes aye. Senator Marrero? Senator Marrero votes no. Senator Overbey? Senator Overbey votes aye. Senator Yager? Senator Yager votes aye. Chairman Beavers?

Chairman: Aye.

Secretary: Chairman Beavers votes aye. Six ayes and two nays.

Chairman: Senate Bill 1114 goes to calendar committee.

May 20, 2011: Senate Session, 38th Legislative Day

Sen. Kelsey: Thank you, Mr. Speaker. I believe we're on House Bill 1358, and this is the bill on the burdens of production, and with that I renew my motion to passage on third and final consideration.

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Speaker: Senator Kelsey moves for passage on House Bill 1358. Is that seconded? Discussion on House Bill 1358. Senator Barnes, you're recognized.

Sen. Barnes: Thank you, Mr. Speaker, members. I have distributed to the members a letter from AARP that sets out their opposition to not only Senate Bill 1114, which is House Bill 1358, but also the Senate Bill 940. And it sets forth their belief that these bills would make it all but impossible for victims of employment discrimination or of any other employment law violation to be able to prove their case and get their rightful day in court. I'm concerned about what this does with the burden of proof in summary judgment. Summary judgment is something that is developed in Tennessee with Tennessee body of law, the law that's unique to Tennessee, and I think it's the wrong direction to go to abrogate Tennessee law and try to impose legislatively a body of law that is applied in federal courts. And that's why I oppose this bill. Thank you.

Speaker: Further discussion on House Bill 1358. Senator Kyle, you are recognized.

Sen. Jim Kyle (D-Memphis, District 28): Sponsor will you yield? Is this the bill we had up earlier on summary judgment, Senator Kelsey? If it is, then I heard that debate but is this a different bill on summary judgment?

Speaker: Senator Kelsey.

Sen. Kelsey: This is the same bill.

Speaker: Senator Kyle.

Sen. Kyle: This is the repeal of the Supreme Court decision of 2008, is that correct?

Speaker: Senator Kelsey.

Sen. Kelsey: That's correct.

Speaker: Senator Kyle.

Sen. Kyle: Thank you.

Speaker: Further discussion on House Bill 1358? Senator Finney.

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Sen. Lowe Finney (D-Jackson, District 27): I just want to ask the sponsor if he would give any more thought to letting the Rules Commission see this?

Speaker: Senator Kelsey.

Sen. Kelsey: Mr. Speaker, I believe the Rules Commission already had a chance to take a look at it last week. That's what I was told earlier today and they certainly have had chances since January, or February I should say, back when the bill was filed and they had--I believe it literally was on the Judiciary Calendar, I believe, six weeks in a row.

Speaker: Senator Finney.

Sen. Finney: Mr. Speaker, I have the agenda from the Rules Committee and it wasn't on the agenda of the Rules Commission Committee. And the way the Rules Commission works is at the request of any lawyer, or anybody, the Rules Commission will take something up. And as a member of the Rules Commission I can assure you that it will be taken up. I don't know why it wasn't, but it's not on the agenda. I can assure you that it would at least be dealt with one way or the other.

Speaker: Senator Kelsey.

Sen. Kelsey: Well the Tennessee Bar Association had the ability to take it to the Rules Committee, and at least somebody on there was aware of this particular bill and this particular issue. But I think the bigger issue is that the rule didn't change. It's been the rule, it's been there for a number of years. It's the same rule that was in place before the 2008 decision. It's the same rule that's in place after the 2008 decision. And it will be the same rule that's in place after the passage of this bill. So we're really not looking to change the rule. We're simply looking to change the law on the burdens of production and how that is interpreted.

Speaker: Senator Finney.

Sen. Finney: This will be my last statement, Mr. Speaker, and I apologize and I appreciate the patience. It's my understanding that the bill is actually a broader rule than

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what the previous-- the old law was under Celotex, and that this would actually be a broader interpretation for summary judgment, which is why I think it would be appropriate for the Rules Commission to look at. And I would just submit that when we start looking at rules of the court it is not unusual, in fact it is the standard, to allow the courts to look at their own rules and then figure out exactly how to go forward within that body. Rather than us do it by statute, do it by rule, and then those rules actually come before the Judiciary Committee, if I'm not mistaken. So you would actually see whatever the Rules Commission promulgates. They actually have to come before the body and I think we pass that in January or February--like, right away. So, it's just my preference when we start telling the courts how to expedite dockets, how to get cases moving along, that we let those rules--that we let those courts decide how to do it rather than doing it by statute because it's very specialized. And if it--indeed this statute is bigger than the old rule, then that gives me great pause, because I'm not sure if that was fully deliberated in the Judiciary Committee, I don't think it's been fully deliberated here, and that's why it's appropriate to submit things like that to the Rules Commission.

Speaker: Senator Kyle.

Sen. Kyle: Well, I have every belief that we're going to blindly overturn the Supreme Court decision tonight, so I guess I need to ask a couple of questions. Senator Kelsey, based upon your reading of your bill that you're sponsoring, if a lawyer has been denied summary judgment in the last three years, can they then now go back and re-file for summary judgment based upon the change of our law? Or do they--or is the summary judgment motion that was denied *res judicata* and can't be revisited? There needs to be some clarity on that, because I truly believe how you apply the change of the standard for summary judgment needs to be uniform in all thirty-one judicial districts. So, I don't think the bill addresses it, but perhaps maybe it

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should, maybe it shouldn't, I don't know. But it is but a rule but I'm sure, as you have indicated, that people have lost summary judgment motions because of the standard of the court, and now we're changing that again. The question is, is how are we going to administer this particular change now that we are changing the law back?

Speaker: Senator Kelsey.

Sen. Kelsey: No. It will only apply to summary judgment motions going forward filed after July 1, 2011.

Speaker: Senator Kyle.

Sen. Kyle: Are you saying that a litigant who filed for summary judgment on an issue and was denied cannot re-file again after the effective date of this statute with the new standard?

Speaker: Senator Kelsey.

Sen. Kelsey: Not on that same particular issue. Correct.

Speaker: Senator Kyle.

Sen. Kyle: Is that your interpretation or does that statute say that?

Speaker: Senator Kelsey.

Sen. Kelsey: That's what the bill says.

Speaker: Further discussion on House Bill 1358?

[The bill passes by a vote of 19-9.]

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