LEGALIZATION CONFLICTS AND RELIANCE DEFENSES

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ABSTRACT

This Article addresses an open question of pressing practical import—whether people and businesses operating in the shadow of a legalization conflict have a reliance defense. A legalization conflict arises when conduct is decriminalized by one authority while remaining criminalized under another legal regime. For example, drugs, guns, undocumented immigrants, and giving legal advice or financial support for certain activities, may be both illegal and legal under conflicting regimes. People plan their lives, hopes, and financial affairs around legalization laws and decrees. If people take actions now in reliance, will they face sanctions later? The question is of great import for many people and businesses, as well as the lawyers who advise them.

The Article argues that reliance defenses should be available when governmental actors in charge of enforcing the criminal regime expressly acquiesce in the competing legalization. In such cases, reliance is reasonable and estoppel is required lest people or businesses be lulled by the statements of actors charged with administering the law into a snare of sanctions. Potential objections regarding privileging governmental lawlessness and the danger of giving people a normative choice of law that enables strategic gamesmanship are addressed.

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INTRODUCTION

Legalization conflicts are proliferating. Drugs, guns, undocumented immigrants, giving legal advice or financial support to facilitate certain activities, and more may be both illegal and legal within the same space.[1]

1. *See, e.g.*, Montana Firearms Freedom Act, MONT. CODE ANN. § 30-20-104 (2009) (nullifying federal firearms laws in Montana), *invalidated by* Mont. Shooting Sports Ass'n v. Holder, 727 F.3d 975, 982-83 (9th Cir. 2013); *State and Federal Marijuana Laws Before the S. Comm. on the Judiciary*, 113th Cong. 1 (2013) (opening statement of Sen. Patrick Leahy, Chairman, S. Comm. on Judiciary) (stating that new recreational marijuana legalization laws "are just the latest examples of the growing tension between Federal and state marijuana laws, and they underscore the persistent uncertainty about how such conflicts will be resolved"); Julia Preston & John H. Cushman, Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, June 16, 2012, at A1 (reporting on President Obama's executive action permitting more than 800,000 "young illegal immigrants to come out of the shadows, work legally and obtain driver's licenses and many other documents they have lacked" and "remain in the country without fear of deportation"); Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES, Nov. 20, 2014, at A1 (reporting on President's Obama use of an executive order to allow an estimated 4 million undocumented immigrants who are parents of U.S. citizens or lawful permanent residents to work with executive authorization); Ashley Southall, *Answers Sought for When Marijuana Laws Collide*, N.Y. TIMES, Sept. 11, 2013, at A18 (detailing uncertainty faced by financial institutions, landlords, security providers, and other individuals and entities due to the conflict in marijuana legalization and criminalization laws).

The clashing permissions and prohibitions can arise from overlapping governing authorities and laws with competing normative visions of what should be criminalized or authorized.[2] These legalization-criminalization conflicts create a jungle gym structure of laws that can allow for strategic maneuvering by the savvy—and traps for the unwary or confused.[3] The conflicts also create a welter of questions for the courts, law enforcers, and people subject to the laws.

Consider, for example, some of these puzzles. If you grow or smoke marijuana in a legalization state, do you have a defense based on reliance on state legalization and licensing if prosecuted by federal authorities?[4] If banks lend to state-licensed marijuana businesses or law firms provide legal services to such start-ups, is there a safe harbor against federal sanctions for facilitating unlawful activity because of state legalization and licensing?[5] If a presidential administration states it will not prosecute conduct legal under state law, do people or entities acting in reliance have a defense in a criminal prosecution by that administration or a subsequent one?[6]

If you are in one of the nine states thus far to pass laws nullifying federal firearms law, do you have a reliance defense if prosecuted for possession, distribution, or manufacturing of firearms in violation of federal law?[7] Should it make a legal difference when it comes to reliance-

2. *See infra* Part II for a taxonomy.

3. *See infra* Part I for a discussion of illustrations.

4. *See, e.g.*, Brady Dennis, *Obama Administration Will Not Block State Marijuana Laws if Distribution Is Regulated*, WASH. POST (Aug. 29, 2013), http://www.washingtonpost.com/national/health-science/obama-administration-will-not-preempt-state-marijuana-laws--for-now/2013/08/29/b725bfd8-10bd-11e3-8cdd-bcdc09410972_story.html, *archived at* http://perma.cc/W68P-THL7 (discussing legalization and prosecution questions); *Will DOJ Fight Marijuana Law?*, NBC NEWS (Dec. 6, 2012), http://www.nbcnews.com/video/nightly-news/50110375#50110375 (discussing open questions after the passage of recreational marijuana legalization).

5. *See, e.g.*, Southall, *supra* note 1 (discussing questions facing banks).

6. *See, e.g.*, United States v. Washington, 887 F. Supp. 2d 1077, 1084, 1090–1100 (D. Mont. 2012) (grappling with the question); Dennis, *supra* note 4 (discussing acquiescence under Obama administration); Serge F. Kovaleski, *Banks Say No to Marijuana Money, Legal or Not*, N.Y. TIMES, Jan. 12, 2014, at A1, A4 (reporting on banks' concerns over prosecution for aiding and abetting a criminal enterprise); Pete Williams, *Out of the 'Shadows': Pot Sellers Can Now Do Business with Banks*, NBC NEWS (Feb. 14, 2014), http://www.nbcnews.com/news/us-news/out-shadows-pot-sellers-can-now-do-business-banks-n30661 (discussing Attorney General's guidance to banks to give greater confidence to lend to state-legalized marijuana businesses). *See also* United States v. Schafer, 625 F.3d 629, 637 (9th Cir. 2010) (noting defendants' argument that law enforcement agents lulled them into believing their medical marijuana grow operation was legal was a question for the jury).

7. ALASKA STAT. § 44.99.500 (2012); ARIZ. REV. STAT. ANN. § 13-3114 (2014) (West); Idaho Firearms Freedom Act, IDAHO CODE ANN. § 18-3315A (2014); Kansas Second Amendment Protection Act, KAN. STAT. ANN. §§ 50-1201 to 50-1211 (2013); Montana Firearms Freedom Act, MONT. CODE ANN. § 30-20-104 (2009), *invalidated by* Mont. Shooting Sports Ass'n v. Holder, 727 F.3d 975, 982-83 (9th Cir. 2013); S.D. CODIFIED LAWS § 37-35-2 (2014); Tennessee Firearms Freedom Act, TENN.

based defenses that federal authorities have refused to acquiesce in firearms legalization regimes conflicting with federal law?[8]

What happens to all the undocumented youths dubbed DREAMers who revealed their identities and locations when applying for President Obama's grant of deferred action on deportation?[9] When the presidential administration changes or if Congress overrides the nonenforcement policy, can the information applicants supplied in their application be used to hunt them down for deportation—or even prosecution for illegal entry?[10] Similarly, if undocumented parents of U.S. citizens step out of the shadows to apply for work authorization under President Obama's executive order, can the information revealed in their applications later be used against them if the political administration changes? [11]

These questions from different areas of human and commercial activity share a common core—a legalization conflict. A legalization conflict arises when conduct is decriminalized or permitted by one authority while

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CODE ANN. §§ 4-54-102 to 4-54-106 (2014); Utah State-Made Firearms Protection Act, UTAH CODE ANN. §§ 53-5b-101 to 53-5b-202 (LexisNexis 2014); Wyoming Firearms Freedom Act, WYO. STAT. ANN. §§ 6-8-401 to 6-8-406 (2014).

8. *E.g.*, Open Letter from U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives to All Kan. Fed. Firearms Licensees (July 8, 2013), *available at* https://www.atf.gov/sites/default/files/assets/pdf-files/open-letter-to-all-kansas-federal-firearms-licensees-provides-guidance-regarding-the-kansas-second-amendment-protection-act.pdf, *archived at* http://perma. cc/AVM9-447R; Open Letter from U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives to All Wyo. Fed. Firearms Licensees (May 28, 2010), *available at* http://www.atf.gov/press/releases/2010/05/052810-openletter-ffl-wyoming-legislation.html, *archived at* http://perma.cc/ QZ4H-6LUC; Open Letter from U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives to All Tennessee Federal Firearms Licensees (July 16, 2009), *available at* http://www.atf.gov/files/press/releases/2009/07/071609-openletter-ffl-tennessee-legislation.pdf, *archived at* http://perma.cc/G2YY-B34L; Open Letter from U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives to All Montana Federal Firearms Licensees (July 16, 2009) [hereinafter ATF Letter to Mont.], *available at* http://www.atf.gov/files/press/releases/2009/07/071609-openletter-ffl-montana-legislation.pdf, *archived at* http://perma.cc/72E-UA5K.

9. Memorandum from Janet Napolitano, Sec'y of U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, Customs & Border Prot., et al. (June 15, 2012) [hereinafter Napolitano Letter], *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf, *archived at* http://perma.cc/YJ3M-FNZU; *I-821D, Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 25, 2013) [hereinafter USCIS DACA Consideration], http://www.uscis.gov/i-821d, *archived at* http://perma.cc/8HVY-KKJN.

10. *See, e.g.*, *Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 5, 2014) [hereinafter USCIS FAQs], http://www.uscis.gov/humanitarian/consideration-deferred-action-child hood-arrivals-process/frequently-asked-questions, *archived at* http://perma.cc/EY32-9RGS (discussing the frequently asked question about whether information revealed by people applying for deferred action can be used again the petitioner and the petitioner's family).

11. *See* U.S. Citizenship & Immigration Servs., Executive Actions on Immigration (Dec. 5, 2014), *available at* http://www.uscis.gov/immigrationaction#2 (discussing President Obama's November 2014 deferred action for parents of U.S. citizens and permanent residents).

remaining criminalized under another concurrent legal regime.[12] The conflicts can arise from contradictory permissions and prohibitions issued by countries, states, counties, cities, and other governing authorities.[13] Within the same level of government, different branches and actors can send clashing messages about legality and enforcement policy. While scholars are drawn to the federalism and preemption issues that can arise from clashing laws,[14] people living under these laws have more immediate concerns—when can reliance on legalization be a defense against criminal liability under a competing regime? This question is increasingly important as more legalization conflicts are arising—sometimes even with the acquiescence of entities in charge of the competing criminalization regime.[15] Even at this early stage, some of the people lulled by legalization into acting in reliance are already facing prosecution and courts must decide whether they have a defense.[16]

Legalization conflicts are different than those covered by traditional conflicts of law. Traditionally, conflicts of laws dealt with choice of law or recognition of judgment questions involving events or persons with ties to more than one state.[17] For example, when citizens of different states sue each other for events happening in a third state, which state's law should control?[18] Much of conflicts analysis is focused on civil procedure, jurisdiction, and private-law issues such as contract enforcement and

12. This Article will also refer to legalization conflicts as decriminalization conflicts and legalization-criminalization conflicts.

13. *See, e.g.*, Kirk Johnson, *Cannabis Legal, Localities Begin to Just Say No*, N.Y. TIMES, Jan. 27, 2014, at A1 (discussing conflicting local ordinances enacted in opposition to state legalization of recreational marijuana possession and licensed growing and retailing); *Seattle and Pierce County Draw Restrictions on Pot Use, Businesses*, OREGONIAN, Dec. 25, 2013, at E1 (reporting about possible legal challenges arising from a conflict between a county ordinance barring state-licensed marijuana operations and a city law imposing a fine for public marijuana use and state law legalizing recreational marijuana possession and licensing marijuana retailers).

14. *E.g.*, Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 43 MCGEORGE L. REV. 147, 158–65 (2012); Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 7–31 (2013); David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567, 569–88 (2013).

15. *See* discussion *infra* Parts I.B.1–3, II.

16. *E.g.*, United States v. Washington, 887 F. Supp. 2d 1077, 1084, 1090–100 (D. Mont. 2012); Mont. Caregivers Ass'n v. United States, 841 F.Supp. 2d 1147, 1148–49 (D. Mont. 2012); United States v. Janetski, No. 11-37-M-DWM, Doc. No. 45, at 6 (D. Mont. Sept. 1, 2011).

17. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1 (1971); ROBERT L. FELIX & RALPH U. WHITTEN, AMERICAN CONFLICTS LAW §§ 2, 7 (6th ed. 2011).

18. 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS §§ 1.1–1.2 (1935).

torts.[19] To the extent criminal law issues are considered at all, the focus is generally on the classic questions of what happens when a crime or criminal crosses state lines.[20] By contrast, at stake in legalization conflicts is not choice of law but rather reliance on the law.

This Article tackles the question of reliance defenses that are arising because of the welter of contemporary legalization conflicts. In addition to these criminal law questions, the Article also addresses conflicts between immigration-related legal sanctions and executive enforcement clemency because of the rise in criminal sanctions for immigration offenses.[21] The Article argues that reliance defenses should be available when the entity charged with enforcing the criminalization regime acquiesces in the competing legalization regime. If enforcers of the controlling criminal regime expressly acquiesce to a rebellious legalization scheme they may not later spring upon hapless people simply relying on the laws on the books or executive decrees. This Article also argues that the reliance defense for conduct during the period of acquiescence survives a change in the law enforcement administration.

The Article proceeds in three parts. Part I discusses how contemporary decriminalization conflicts are a challenge for traditional mistake-of-law doctrine and highlights the need for guidance in this uncertain terrain. This Part discusses three examples of contemporary conflicts involving marijuana, guns, and immigration that are raising an array of questions for courts, law enforcement, and people and businesses. The three case studies also illustrate the factors that can make a reliance case stronger or untenable. The marijuana example illustrates a situation of express state decriminalization coupled with acquiescence by the enforcers of the federal criminal regime.[22] State nullification laws on firearms are an

19. *E.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 cmt. a (1971). *Cf.* BEALE, *supra* note 18, § 1.9 (noting debate whether criminal law should even be included in conflicts analysis because criminal law is part of public rather than private law).

20. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 85 cmt. b, illus. 3 (1971); BEALE, *supra* note 18, § 1.9; FELIX & WHITTEN, *supra* note 17, §§ 2, 7. *See also* John Bernard Corr, *Criminal Procedure and the Conflict of Laws*, 73 GEO. L.J. 1217, 1217–21 (1985) (focusing on *People v. Douglas*, 123 Misc. 2d 75 (N.Y. Sup. Ct. 1984), and the question of what happens when the law enforcement agency capturing a fleeing suspect is in a jurisdiction with different rules about *Miranda* advisals and interrogations without an attorney than the place of the crime and trial).

21. The increasing entanglement of formally civil immigration law and criminal law has given rise to a new term for the odd beast—crimmigration. For a discussion, see, e.g., Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1574 (2010); Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 80–81, 116–132 (2013); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 372–73, 376 (2006).

22. *See* discussion *infra* Part I.B.1.

example of federal enforcers vigorously refusing to acquiesce in rebellious state decriminalization. [23] The dilemma facing DREAMers in the immigration context illustrates the harder case where no legislature has expressly decriminalized conduct and people are instead seeking to claim reliance on an executive decree of nonenforcement.[24]

Part II argues that reliance on legalization should be a defense in cases of acquiescence by entities charged with enforcing the competing criminalization regime. The defense for conduct during the period of law enforcement acquiescence must outlast a change in administration. Law enforcers cannot lull people or businesses into reasonable reliance only to later attack, citing a regime change.

Part III addresses potential objections regarding privileging governmental lawlessness or giving people and businesses a normative choice of law that enables strategic gamesmanship.

I. REBELLIOUS DECRIMINALIZATION AND RELIANCE DILEMMAS

For people and businesses operating in the shadow of a legalization conflict, the dilemma is whether one can rely on the decriminalization.[25] Of course, if a superior authority invalidates a criminal law and a recalcitrant jurisdiction keeps the criminal law on the books, then people cannot reasonably rely on the legalization. For example, when the Supreme Court ruled anti-sodomy criminal statutes unconstitutional in *Lawrence v. Texas*,[26] prosecutors in Louisiana rejected police attempts to initiate cases for same-sex "carnal copulation" under state criminal laws still on the books because the criminalization was invalid.[27] The more difficulty question typically arises when the legalization is by an entity that does not have authority to override the competing criminalization.[28] The legalization law or decree that conflicts with the criminalization regime remains in place unless and until challenged and invalidated.

Such legalization-criminalization conflicts generate a conundrum: when can you rely on the decriminalization law on the books? In particular, when the authority charged with enforcing the competing

23. *See* discussion *infra* Part I.B.2.
24. *See* discussion *infra* Part I.B.3.
25. *See, e.g.*, sources and discussion *supra* notes 4–10 and *infra* Part I.B.1–3.
26. 539 U.S. 558, 577–79 (2003).
27. Jim Mustian, *Gays in Baton Rouge Arrested Under Invalid Sodomy Law*, BATON ROUGE ADVOCATE (July 28, 2013), http://theadvocate.com/news/6580728-123/gays-in-baton-rouge-arrested, *archived at* http://perma.cc/7XWF-KLK3.
28. *See* discussion of examples *infra* Part I.B.1–3.

criminalization law acquiesces in the decriminalization by the formally subordinate regime, can people claim reasonable reliance? This section explains how traditional positions on mistake-of-law doctrine and its reasonable reliance exception need to be updated for contemporary challenges. There is a need to systematically address when reliance defenses should be available. Three contemporary legalization-criminalization conflicts are detailed to illustrate the dilemmas.

A. Not Grandpa's Mistake-of-Law

Until a conflicting legalization law or decision is overruled—or at least challenged—can people rely on the decriminalization? The venerable old rule is that ignorance of the law is no excuse, minted in the Latin maxim *ignorantia legis neminem excusat*.[29] A.T.H. Smith wryly noted that this maxim has an "almost mystical power . . . over the judicial imagination."[30] People bear the burden of knowing what the law is despite the increasing mass of criminal statutes on the books regulating increasingly minute aspects of existence and conduct.[31] Justice Joseph Story explained the formal rationales for the hard-line stance in *Barlow v. United States*, a tax fraud and forfeiture case.[32] Ignorance or mistake of law is ordinarily no defense because of: (1) the practical challenge in determining whether someone is genuinely ignorant or simply trying to evade liability; (2) "the extreme danger of allowing such excuses to be set up for illegal acts to the detriment of the public;" and (3) the need to put people "upon extreme vigilance" against violation of the law.[33]

When it comes to decriminalization dilemmas, however, ignorance of the law is not the problem. People know very well what the law states and are in fact relying on it.[34] Indeed, laws or administrative decisions clashing with the status quo are often trumpeted with fanfare because protest is part

29. For a history see, e.g., Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 76–83 (1908). For a comparative perspective, see ANNEMIEKE VAN VERSEVELD, MISTAKE OF LAW: EXCUSING PERPETRATORS OF INTERNATIONAL CRIME 10 (2012).

30. A. T. H. Smith, *Error and Mistake of Law in Anglo-American Criminal Law*, 14 ANGLO-AM. L. REV. 3, 16 (1985).

31. For a legal-realist critique of the patent fiction of the presumption under modern conditions of a proliferation of statutes, see, e.g., JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 376–78 (2d ed. 1960).

32. 32 U.S. (7 Pet.) 404 (1833).

33. *Id*. at 411.

34. *See* discussion of examples *infra* Part I.B.1–3.

of the point.[35] The clash is meant to send a message, such as telling the federal government to keep its "hands off" people's firearms.[36] A rebellious state may vocally aim to lead the "push to repeal federal prohibition" of marijuana.[37] A rebellious President may use executive law enforcement discretion to achieve results stymied in Congress in protest over legislative deadlock.[38]

In legal doctrine and scholarship, ignorance of the law and mistake of the law are often used interchangeably.[39] Formally, however, there is a difference between ignorance and mistake of law—one implies lack of knowledge of the law while the other entails some knowledge, albeit incorrect.[40] The notion of mistake might at first blush seem to be a better fit for people faced with a decriminalization conflict. But mistaken understandings of what the law commands in the traditional sense are not at issue. People living in decriminalization conflict zones are correct about what the law is saying—they are just caught between two laws speaking simultaneously.

Customarily, mistake-of-law claims involve defendants wrong about the scope of the criminalization.[41] The classic mistake-of-law case *People v. Marrero*,[42] taught in classrooms around the country, is often used to illustrate this point.[43] *Marrero* involved a prison guard who carried his unlicensed firearm in a nightclub believing he fell under the "peace

35. *E.g.*, Dan Turner, *Marijuana Legalization: States Send Message, Feds Aren't Listening*, L.A. TIMES (Nov. 13, 2012), http://articles.latimes.com/2012/nov/13/news/la-ol-marijuana-legalization-20121112, *archived at* http://perma.cc/AL8A-3J4T.

36. Ron Barnett, *More States Look for Ways to Control Gun Laws*, USA TODAY (Jan. 11, 2013), http://www.usatoday.com/story/news/nation/2013/01/11/in-state-gun-laws/1825943/, *archived at* http://perma.cc/V542-QD4X; Luige del Puerto, *Five Reasons Arizona Is Picking a Fight with the Feds*, ARIZ. CAPITOL TIMES, May 3, 2010, *available at* 2010 WLNR 9632551.

37. Editorial, *The Washington Legislature Should Legalize Marijuana*, SEATTLE TIMES, Feb. 18, 2011, *available at* 2011 WLNR 3562878.

38. President Barack Obama, Statement from the White House (June 15, 2012) [hereinafter President Obama Statement] (transcript available at http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration), *archived at* http://perma.cc/J7XE-LUZ4).

39. *See, e.g.*, Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35, 35–36 (1939) (collecting cases).

40. *Id.*

41. For a helpful overview of the doctrine as customarily taught, see, e.g., Kenneth W. Simons, *Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact*, 9 OHIO ST. J. CRIM. L. 487 493–496 (2012).

42. 507 N.E.2d 1068 (N.Y. 1987).

43. *Marrero* is a main staple of criminal law casebooks. *See, e.g.*, JOSHUA DRESSLER & STEPHEN P. GARVEY, CASES AND MATERIALS ON CRIMINAL LAW 197–205 (6th ed. 2012); PHILLIP E. JOHNSON & MORGAN CLOUD, CRIMINAL LAW 79–84 (7th ed. 2002); SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 304–09 (9th ed. 2012); JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS (7th ed. 2012); CYNTHIA LEE & ANGELA HARRIS, CRIMINAL LAW 243–49 (2d ed. 2009).

officer" exception to the bar against such conduct.[44] He had sought advice from fellow law enforcement officers and firearms instructors and they concurred with his reading of the exemption.[45] His reading was so plausible that the trial court agreed that he fell under the "peace officer" exemption and dismissed the indictment.[46] Even two of the five intermediate appellate division judges to consider his appeal agreed with his reading.[47] New York's highest court affirmed his conviction, however, based on a contrary legal interpretation of the statute.[48] Marrero was not caught between two conflicting laws on the books. Rather, he was mistaken in his reading of one exceptionally unclear statute.[49]

Dan Kahan has argued that the court was really condemning Marrero's painstaking search for a loophole to get around the law.[50] Marrero subjected the law to close reading to find a basis for his otherwise prohibited conduct.[51] He was denied a mistake-of-law defense despite his reasonable reading of the unclear law because the very nature of his exacting search for a loophole showed a moral defect.[52] Marrero was punished for trying to get around the societal norms embedded in the law.[53]

A major distinction when it comes to legalization conflicts is that the very existence of the clashing permission and prohibition shows society's morality in conflict. One is not trying to subvert societal morality embedded in the criminal law. Rather one agrees with the vision embedded in the legalization rather than the criminalization law. When society's legislatures and elected enforcement officials are fractured on what normative vision to promulgate, people subject to mixed legal messages should not be casualties of the conflict.

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44. *See* N.Y. PENAL LAW § 265.20(a)(1)(c) (McKinney 1987) (exempting "peace officers"); N.Y. CRIM. PRO. L. § 1.20(33) (McKinney 1987) (defining "peace officers" as "[a]n attendant, or an official, or guard of any state prison or of any penal correctional institution").

45. *Marrero*, 507 N.E.2d at 1069.

46. People v. Marrero, 404 N.Y.S.2d 832, 833 (Sup. Ct. 1978), *rev'd*, 422 N.Y.S.2d 384 (App. Div. 1979).

47. People v. Marrero, 422 N.Y.S.2d 384, 388 (App. Div. 1979) (Lynch, J., dissenting, joined by Fein, J. P.).

48. *Marrero*, 507 N.E.2d at 1068.

49. For critiques, see, e.g., David De Gregorio, Comment, People v. Marrero *and Mistake of Law*, 54 BROOK. L. REV. 229, 231 (1988); Dan M. Kahan, Essay, *Ignorance of Law* Is *an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 133–137 (1997) [hereinafter Kahan, *Ignorance of Law*].

50. Kahan, *Ignorance of Law*, *supra* note 49, at 150–51.

51. *Id*. at 133.

52. *Id*. at 151.

53. *Id*.

So should people faced with the question of which law to follow have a defense—at least when enforcers of the criminalization regime acquiesce in decriminalization? There are exceptions to the denial of a mistake of law defense. Yet like the traditional general rule, the customary exceptions were made for a different configuration of a reliance problem. Model Penal Code § 2.04(3), adopted in varying forms in many jurisdictions, codifies the exception thus:

> (3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:
>
> (a) the statute or other enactment defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or
>
> (b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.[54]

The difficulty for people hoping to rely on the exception is that it typically involves reliance on interpretations of the offense or exceptions to the criminalization—not outright conflict between a law clearly authorizing the conduct and another law clearly prohibiting it. Under the exception, some courts have held that though people are presumed to know the law, they are not required to judge the constitutionality of the law or licenses on which they rely.[55] In such cases, however, there was no reason to know of the infirmity of the permission on which they relied.[56] Indeed, courts have sometimes explicitly noted that the defendants did not intend to violate any penal laws and thus were free from "vice."[57]

Courts have been less charitable where the defendant had good reason to know of the illegality of their conduct or the invalidity of the permission

54. MODEL PENAL CODE § 2.04(3) (Official Draft 1985).

55. *E.g.*, Brent v. State, 43 Ala. 297, 302 (1869); State v. Godwin, 31 S.E. 221, 222 (N.C. 1898).

56. *Brent*, 43 Ala. at 302; *Godwin*, 31 S.E. at 222.

57. *E.g.*, Levy v. Kansas City, 168 F. 524, 528 (8th Cir. 1909) (distinguishing case allowing the defendant a mistake-of-law defense based on unconstitutionally granted state license as inapplicable because the defendant who was allowed a defense was free of "vice" whereas the petitioner was not).

on which they claim reliance.[58] The older cases tend to involve gambling businesses.[59] The Eighth Circuit's decision in *Levy v. Kansas City* illustrates this point.[60] *Levy* involved a conviction under state criminal law, which proscribed gambling businesses based on pool-selling and bookmaking.[61] The defendant protested that he had duly purchased a license under a Kansas City council ordinance that authorized any person to conduct a bookmaking and pool-selling business if he paid an annual license fee of $5,000.[62] The defendant argued that he properly paid his fee and should not have to parse whether the local licensing ordinance in conflict with controlling state law was preempted.[63] The Eighth Circuit rejected the argument, explaining that the state law prohibiting his activity was not new—indeed it was a well-known embodiment of the public policy of the state against gambling businesses.[64]

Despite getting duly licensed and paying his fee to the city, Levy was prosecuted and convicted.[65] The case should send chills down the financial spine of marijuana businesses seeking licenses under state law. It also stands as a warning to would-be banks or law firms hoping to capitalize on the potentially lucrative marijuana start-up business market. The open questions facing businesses deciding whether to enter the burgeoning marijuana industry involve just one example of the need to clarify when people may rely on the law on the books. The next part discusses three contemporary areas rife with contemporary decriminalization conflict dilemmas.

B. Three Contemporary Reliance Dilemmas

Legalization-criminalization conflicts are increasing in complexity because of two phenomena: (1) rebellious legalization or criminalization in defiance of existing federal law[66] and (2) partial or complete

58. *Id.*; People v. Sullivan, 141 P.2d 230, 234–35 (Cal. Dist. Ct. App. 1943); State *ex rel.* Dawson v. Anthony Fair Ass'n, 131 P. 626, 628–29 (Kan. 1913).

59. *E.g.*, *Sullivan*, 141 P.2d at 234–35; *Anthony Fair Ass'n*, 131 P. at 628.

60. *Levy*, 168 F. at 528.

61. *Id*. at 525–26.

62. *Id*.

63. *Id*. at 528.

64. *Id*.

65. *Id*.

66. *See, e.g.*, ALASKA STAT. § 44.99.500 (2012) (declaring Alaskans' firearms free from federal regulation); Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, 2010 Ariz. Sess. Laws 450 (codified in scattered sections of ARIZ. REV. STAT. ANN. tits. 11, 13, 23, 28, and 41 (2012)) (also known as S.B. 1070) (criminalizing failure to carry immigration documents; attempts by unlawful aliens to find jobs; transportation of aliens in "reckless[] disregard[]" that the alien is

enforcement amnesties despite the formal laws on the books.[67] Underlying the trend are normative and cultural competitions in a pluralistic nation sharply split over issues such as drugs, guns, immigration, and decriminalization generally.[68] Criminalization is much easier to achieve than decriminalization.[69] Politicians take a big risk of looking soft on crime or soft on illegal aliens in pursuing legalization initiatives.[70] No politician wants to be accused of putting public safety or border security at risk.[71] Criminal laws that are a product of past fears and regulatory paradigms linger on the books even as culture and social norms begin to change.[72]

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unlawfully present among other provisions), *partially invalidated*, Arizona v. United States, 132 S. Ct. 2492, 2510 (2012); Beason-Hammon Alabama Taxpayer and Citizen Protection Act, H.B. 56, 2011 Ala. Acts 535 §§ 4–5, 12–18, 28 (codified as amended at ALA. CODE § 31-13-1 to § 31-13-30 (2012)) (criminalizing failure to carry immigration documents, harboring and transporting aliens while "recklessly disregarding" alienage, among other provisions), *partially preempted*, United States v. Alabama, 691 F.3d 1269 (11th Cir. 2012); Hispanic Interest Coal. of Ala. v. Governor of Ala., 691 F.3d 1236, 1244–50 (11th Cir. 2012); Montana Firearms Freedom Act, MONT. CODE ANN. § 30-20-104 (2009) (declaring Montanans' firearms free from federal regulation), *invalidated by* Mont. Shooting Sports Ass'n v. Holder, 727 F.3d 975, 982–83 (9th Cir. 2013); Tennessee Firearms Freedom Act, TENN. CODE ANN. §§ 4-54-102 to 4-54-106 (2014) (declaring firearms in Tennessee not subject to federal gun laws).

67. *See, e.g.*, DEP'T OF THE TREASURY FIN. CRIMES ENFORCEMENT NETWORK, GUIDANCE: BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES 2–6 (Feb. 14, 2014), *available at* http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf (providing guidance on "how financial institutions can provide services to marijuana-related businesses" and declaring criminal enforcement priorities); Serge F. Kovaleski, *U.S. Issues Marijuana Guidelines for Banks*, N.Y. TIMES, Feb. 14, 2014, at A10 (reporting on Attorney General Eric Holder's issuance of guidelines to banks "intended to give banks confidence that they will not be punished if they provide services to legitimate marijuana businesses in states that have legalized the medical or recreational use of the drug"); Preston & Cushman, *supra* note 1at A1 (reporting on President Obama's grant of Deferred Action for Early Child Arrivals (DACA) program permitting more than 800,000 "young illegal immigrants to come out of the shadows, work legally and obtain driver's licenses and many other documents they have lacked" and "remain in the country without fear of deportation").

68. *See* discussion *infra* Parts I.B.1–3.

69. For a discussion, see, e.g., Erwin Chemerinsky, *The Essential but Inherently Limited Role of the Courts in Prison Reform*, 13 BERKELEY J. CRIM. L. 307, 310 (2008); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509–12, 529–39 (2001); Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 100–03 (2009).

70. Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 321 (2013); Sara Sun Beale, Essay, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 773–75 (2005); Roger A. Fairfax, Jr., *From "Overcriminalization" to "Smart on Crime": American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL'Y 597, 611 (2011).

71. For a discussion, see, e.g., Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 626–30 (2012); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 435–36 (2013).

72. For striking examples, see, e.g., Beale, *supra* note 70, at 750–52.

Distrust of national legislators to pass a unified solution also creates fertile conditions for rebellious state legalization. Anger at the federal government—particularly Congress—is at an all-time high.[73] Trust is near an all-time low.[74] Bickering and deadlock in Congress led to the second-longest government shutdown in late 2013 costing the country an estimated $2 billion and dampening economic growth.[75] During the shutdown, thirty percent of people surveyed indicated they were angry at the government.[76] An additional fifty-five percent of people surveyed indicated they were frustrated at the federal government.[77] While a growing proportion of people distrust the Obama presidential administration,[78] a major focus of frustration is Congress.[79] Congress has increasingly become a place where legislation and ideas go to die.[80]

In rebellion, states and even the president are sidestepping Congress.[81] On some of the most fiercely debated—and stalled—topics in Congress, such as drugs, guns, and undocumented immigrants, the states and the president are finding alternative routes to realize competing normative visions, generating decriminalization conflicts.[82] Three examples—a main

73. During the federal government shutdown in October 2013, public anger at the federal government reached an all-time high since surveys began including the question in 1997. *Trust in Government Nears Record Low, But Most Federal Agencies Are Viewed Favorably*, PEW. RES. (Oct. 18, 2013), http://www.people-press.org/2013/10/18/trust-in-government-nears-record-low-but-most-federal-agencies-are-viewed-favorably/, *archived at* http://perma.cc/A36W-EKRJ.

74. Trust in the federal government to "do what is right just about always or most of the time" neared the lowest point since surveys began inquiring about government trust in 1958. *Id*.

75. OFFICE OF MGMT. & BUDGET, IMPACTS AND COSTS OF THE OCTOBER 2013 FEDERAL GOVERNMENT SHUTDOWN 2–8 (2013).

76. PEW RES., *supra* note 73.

77. *Id*.

78. *E.g.*, Michael Barone, *In Big Government, We Distrust*, NAT'L REV. ONLINE (Dec. 20, 2013), http://www.nationalreview.com/article/366798/big-government-we-distrust-michael-barone, *archived at* http://perma.cc/D67E-MEN9; Press Release, Quinnipiac University, Obama Job Approval Drops to Lowest Point Ever, Quinnipiac University National Poll Finds; Health Care Act Won't Improve Health Care, Voters Say (Nov. 12, 2013) (available at http://www.quinnipiac.edu/images/polling/us/us11122013_rgf543.pdf); Sheryl Gay Stolberg, *For 'Millennials,' a Tide of Cynicism and a Partisan Gap*, N.Y. TIMES, Apr. 30, 2013, at A11.

79. *See* sources cited *supra* note 78. *See also, e.g.*, Jeff Zeleny & Megan Thee-Brenan, *New Poll Finds a Deep Distrust of Government*, N.Y. TIMES, Oct. 25, 2011, at A1 (reporting that 84 percent of Americans surveyed disapprove of Congress).

80. For commentary and studies regarding gridlock in a polarized Congress and the disappearance of moderation, see, e.g., STANLEY B. GREENBERG, THE TWO AMERICAS: OUR CURRENT POLITICAL DEADLOCK AND HOW TO BREAK IT 2–5, 26–28 (rev'd ed. 2005); Sarah A. Binder, *Going Nowhere: A Gridlocked Congress*, BROOKINGS REV., Jan. 2000, at 16–18; Richard Fleisher & John R. Bond, *The Shrinking Middle in the US Congress*, 34 BRIT. J. POL. SCI. 429, 429–45 (2004); Symposium, *The American Congress: Legal Implications of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2065–2120 (2013).

81. *See* discussion of examples *infra* Part I.B.1–3.

82. *Id*.

example and two secondary ones for contrast—are discussed below to show how these intergovernmental clashes pose unanswered questions and risks for people and businesses subject to the competing legal regimes. Two examples arise from state rebellions over federal criminalization rousing markedly different federal responses. The third example stems from a presidential uprising over congressional inaction over immigration reform legislation.

1. The Perilous Boom Industry of Marijuana Legalization

From its earliest days, marijuana regulation involved culture clashes over race and health and safety impact.[83] Today, the culture clashes have led to legal conflicts that pose open questions for people and businesses wondering whether they may rely on state laws licensing marijuana production and retail despite federal criminalization.

a. Culture Clash

Since 1937, the federal government has regulated marijuana, also referred to as cannabis.[84] Anti-cannabis campaigning arose during the Great Depression, fueled by popular associations of marijuana smoking with Mexican workers and rising anti-immigrant sentiment in Western states.[85] Initially, federal authorities responded to the states' urging for marijuana regulation by recommending that the states adopt uniform state narcotics regulations.[86] Frustrated with the slow federal response, California became the first state to outlaw marijuana in 1915.[87] The early anti-marijuana law was then used to target Mexicans, just as earlier anti-opium legislation in the state had been used against the Chinese.[88]

The battle over the claimed medicinal benefits of marijuana and its health and safety risks familiar today also raged during the 1930s.[89] Campaigners argued that marijuana posed risks of insanity, suicide, and

83. *See* sources and discussion *infra* at notes 85–92.

84. Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551 (repealed 1970).

85. DRUGS IN AMERICA: A DOCUMENTARY HISTORY 189–90 (David F. Musto ed., 2002).

86. *Id*. at 190.

87. MARTIN A. LEE, SMOKE SIGNALS: A SOCIAL HISTORY OF MARIJUANA—MEDICAL, RECREATIONAL, AND SCIENTIFIC 42 (2012).

88. *Id*.

89. LESTER GRINSPOON & JAMES B. BAKALAR, MARIHUANA: THE FORBIDDEN MEDICINE 8–12 (1993); DRUGS IN AMERICA, *supra* note 85, at 189–90.

addiction.[90] Many also argued that marijuana "incited criminal behavior"—including larceny, assault, rape, robbery and murder.[91] Yet doctors also prescribed marijuana to treat medical issues such as migraine attacks, insomnia, and pain from menstruation, childbirth, or rheumatoid arthritis.[92]

Federal authorities became more confident in their ability to regulate marijuana in 1937 after the Supreme Court upheld the National Firearms Act, which regulated machine guns by imposing a tax on their transfer.[93] The same year, legislators passed the Marihuana Tax Act, which effectively curbed the marijuana trade through a combination of prohibitively high transfer taxes, burdensome regulations for doctors prescribing marijuana, and severe federal penalties for noncompliance.[94]

Portions of the Marihuana Tax Act were struck down by the Supreme Court in 1969, in *Leary v. United States*.[95] *Leary* involved a doctor indicted for smuggling marijuana from Mexico into the United States and for failing to pay the transfer tax.[96] He successfully argued that compliance with the Marihuana Tax Act violated his privilege against self-incrimination because the act compelled him to file a form self-reporting that he violated the law.[97] The Court concluded that the statute perversely "on its face permitted him to acquire the drug legally, provided he paid the $100 per ounce transfer tax and gave incriminating information, and simultaneously with a system of regulations . . . prohibited him from acquiring marihuana under any conditions."[98]

The invalidation of indirect regulation through burdensome administrative and tax requirements came at a turning point for narcotics criminalization. In 1969, amid a national sense of urgency over rising drug use, crime, and social unrest, President Richard Nixon declared a "war on drugs."[99] Marijuana became one of many drugs directly criminalized under

90. Walter Bromberg, *Marihuana: A Psychiatric Study*, *in* DRUGS IN AMERICA, *supra* note 85, 441, 443.

91. *Id*. at 441–442; OFFICE OF NAT'L DRUG CONTROL POL'Y, WHAT AMERICANS NEED TO KNOW ABOUT MARIJUANA 5 (2011).

92. GRINSPOON & BAKALAR, *supra* note 89, at 4–8.

93. Sonzinsky v. United States, 300 U.S. 506, 511–14 (1937).

94. For a concise history see, e.g., Gonzales v. Raich, 545 U.S. 1, 11 (2005); H.R. REP. NO. 75-792, at 1–3 (1937); S. REP. NO. 75-900, at 2–3 (1937).

95. 395 U.S. 6 (1969).

96. *Id*. at 10–11.

97. *Id*. at 16–26.

98. *Id*. at 26.

99. For histories, see, e.g., DAVID F. MUSTO & PAMELA KORSMEYER, THE QUEST FOR DRUG CONTROL: POLITICS AND FEDERAL POLICY IN A PERIOD OF INCREASING SUBSTANCE ABUSE, 1963–

the federal Controlled Substances Act, which was enacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970.[100]

The Controlled Substances Act, which is the main form of federal criminalization today, classifies illicit drugs into five categories based on medicinal uses and health and safety risks.[101] Marijuana is listed among Schedule I controlled substances, which are deemed to have a high risk of adverse effects and lack of accepted medicinal use.[102] Classification as a Schedule I controlled substance means marijuana manufacturing, distribution, or possession are criminal offenses and there is no federal medical marijuana exception.[103]

Designation of marijuana as a Schedule I controlled substance without recognized medical uses is highly controversial.[104] In 2010, the American Medical Association (AMA) adopted a resolution supporting rescheduling marijuana out of Schedule I to facilitate research and development of cannabis-based treatments.[105] While believing cannabis to be a dangerous drug and a public health concern, the AMA concluded that federal drug policies over the past 40 years have been ineffective and it argued for "public health based strategies, rather than incarceration" to deal with cannabis use.[106]

Marijuana criminalization also is intensely controversial because of the disparate impact of prosecution.[107] There has been a wide and growing

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1981, at 60 (2002); Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 785 n.1 (2004).

100. Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C. §§ 812–844 (2012)).

101. 21 U.S.C. § 812 (2012).

102. *Id.* § 812(b), (c).

103. 21 U.S.C. § 841(a)(1) (2012) (criminalizing conduct); *id.* at § 844(a) (penalties for possession); United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 490–91 (2001) (discussing the lack of medical exception for marijuana).

104. *See, e.g.*, Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1133–36 (D.C. Cir. 1994) (discussing and rejecting petition to reschedule marijuana); Letter from Rep. Earl Blumenauer, D-Ore., to President Barack Obama (Feb. 14, 2014), *quoted in* Kovaleski, *supra* note 67, at A10 (letter on behalf of 18 members of Congress) ("Classifying marijuana as Schedule 1 [sic] at the federal level perpetuates an unjust and irrational system. . . . Schedule 1 recognizes no medical use, disregarding both medical evidence and the laws of nearly half of the states that have legalized medical marijuana."); Eric A. Voth, *A Peek into Pandora's Box: The Medical Excuse Marijuana Controversy*, 22 J. ADDICTIVE DISEASES 27, 28–30 (2004) (giving history of attempts to reschedule marijuana).

105. AM. MED. ASS'N, REPORT 3 OF THE COUNCIL ON SCIENCE AND PUBLIC HEALTH (I-09), USE OF CANNABIS FOR MEDICINAL PURPOSES (2010) (Resolutions 910, I-08; 921, I-08; and 229, A-09); Diane E. Hoffman & Ellen Weber, *Medical Marijuana and the Law*, 362 NEW ENG. J. MED. 1453, 1453–55 (2010).

106. AM. MED. ASS'N, REPORT 2 OF THE COUNCIL ON SCIENCE AND PUBLIC HEALTH (I-13): A CONTEMPORARY VIEW OF NATIONAL DRUG CONTROL POLICY (2013) (Resolutions 520-A-11, 511-A-12, 512-A-13) [hereinafter AMA REPORT 2].

107. *See, e.g.*, ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE 17–22 (2013); Andrew

disparity in the arrest rates of blacks compared to whites for marijuana possession in 38 out of 50 states.[108] Blacks are 2.5 times more likely to be arrested for marijuana possession than whites, though survey data indicates similar prevalence of usage between whites and blacks.[109] The disproportionate concentration of blacks in socioeconomically disadvantaged communities with familial breakdown due to poverty and high incarceration rates aggravates the disproportionality in arrests.[110]

Despite criminalization, marijuana is the most widely used illegal drug in the nation[111] and in the world today.[112] In a Gallup poll, thirty-eight percent of Americans admitted to having tried marijuana.[113] Among young adults surveyed in 2010, the estimated lifetime prevalence of marijuana use in 2010 was 25.4 percent.[114] Views on marijuana are also changing, with increasing numbers of Americans supporting legalization.[115] In 2013, for the first time since Gallup began surveying Americans about marijuana legalization in 1969, a bare majority of Americans—fifty-eight percent—supported legalization.[116]

Counterbalanced against shifting cultural attitudes are concerns over the health and safety risks of readily available marijuana. Some of the risks identified by researchers include cognitive impairments that worsen with heavy long-term use or juvenile use when the brain is still developing;[117] earlier onset and worsening of psychoses such as

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Golub et al., *The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City*, 6 CRIMINOLOGY & PUB. POL'Y 131, 132–55 (2007); Michael Tonry, *Racial Politics, Racial Disparities, and the War on Crime*, 40 CRIME & DELINQ. 475, 479–88 (1994).

108. ACLU, *supra* note 107, at 20–21.

109. Rajeev Ramchand et al., *Racial Differences in Marijuana-Users' Risk of Arrest in the United States*, 84 DRUG & ALCOHOL DEPENDENCE 264, 264–70 (2006).

110. David S. Kirk, *The Neighborhood Context of Racial and Ethnic Disparities in Arrest*, 45 DEMOGRAPHY 55, 62–70 (2008).

111. OFFICE OF NAT'L DRUG CONTROL POL'Y, *supra* note 91, at 1; SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., OFFICE OF APPLIED STUDIES, RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS (2014).

112. Wayne Hall & Louisa Degenhardt, *Prevalence and Correlates of Cannabis Use in Developed and Developing Countries*, 20 CURRENT OP. IN PSYCHIATRY 393, 393–95 (2007); T. Leggett, *A Review of the World Cannabis Situation*, 58 BULL. ON NARCOTICS 1, 1 (2006).

113. Lydia Saad, *In U.S., 38% Have Tried Marijuana, Little Changed Since '80s*, GALLUP (Aug. 2, 2013), http://www.gallup.com/poll/163835/tried-marijuana-little-changed-80s.aspx.

114. SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, *supra* note 111, at 11–4658, tbl.8.1.

115. Art Swift, *For First Time, Americans Favor Legalizing Marijuana*, GALLUP (Oct. 22, 2013), http://www.gallup.com/poll/165539/first-time-americans-favor-legalizing-marijuana.aspx.

116. *Id*.

117. Rebecca D. Crean et al., *An Evidence Based Review of Acute and Long-Term Effects of Cannabis Use on Executive Cognitive Functions*, 5 J. ADDICTION MED. 1, 4–6 (2011); Miriam Schneider, *Puberty as a Highly Vulnerable Developmental Period for the Consequences of Cannabis Exposure*, 13 ADDICTION BIOLOGY 253, 253–61 (2008); Nadia Solowij et al., *Cognitive Functioning*

schizophrenia;[118] intoxicated driving;[119] addiction;[120] and poor educational outcomes among young marijuana users.[121] It is therefore unsurprising that Americans are split. While a growing contingent supports decriminalization, another strong cohort remains concerned that legalization will legitimize marijuana use and have adverse health and safety impacts.[122]

b. Decriminalization Conflict

The fracturing of societal consensus over marijuana criminalization is manifesting in an increasing fragmentation of state laws legalizing aspects of marijuana use, cultivation, and retail. Once upon a time, not long ago, state law generally dutifully mirrored federal law in controlled substances regulation. All fifty states adopted variations of the Uniform Controlled Substances Act, modeled on the federal Controlled Substances Act.[123] The Uniform Controlled Substances Act provides for similar state designation and regulation of federal controlled substances unless an appropriately designated state agency objected.[124] Today, twenty-one states and the District of Columbia have legalized marijuana for medical purposes.[125] By popular vote, four states—Washington, Colorado, Oregon, and Alaska—

of Long-Term Heavy Cannabis Users Seeking Treatment, 287 J. AM. MED. ASS'N 1123, 1129–30 (2002).

118. Cecile Henquet et al., *The Environment and Schizophrenia: The Role of Cannabis Use*, 31 SCHIZOPHRENIA BULL. 608, 608–10 (2005); E. Manrique-Garcia et al., *Cannabis, Schizophrenia and Other Non-Affective Psychoses: 35 Years of Follow-up of a Population-Based Cohort*, 42 PSYCHOL. MED. 1321, 1321–22, 1325–26 (2012).

119. Ralph Hingson et al., *Teenage Driving After Using Marijuana or Drinking and Traffic Accident Involvement*, 13 J. SAFETY RES. 33, 33–37 (1982); Isabelle Richer & Jacques Bergeron, *Driving Under the Influence of Cannabis: Links with Dangerous Driving, Psychological Predictors, and Accident Involvement*, 41 ACCIDENT ANALYSIS & PREVENTION 299, 304–05 (2009).

120. Alan J. Budney & Brent A. Moore, *Development and Consequences of Cannabis Dependence*, 42 J. CLINICAL PHARMACOLOGY 28S, 30S-31S (2002).

121. Michael Lynskey & Wayne Hall, *The Effects of Adolescent Cannabis Use on Educational Attainment: A Review*, 95 ADDICTION 1621, 1622–28 (2000).

122. *See, e.g.*, Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, 112 Stat. 2681, 2681–758 ("Efforts to legalize or otherwise legitimize drug use present a message to the youth of the United States that drug use is acceptable."); AMA REPORT 2, *supra* note 106 (opposing marijuana legalization though deploring the failure of federal drug policy).

123. *See, e.g.*, Seeley v. Washington, 940 P.2d 604, 611 (Wash. 1997) (en banc) (giving history).

124. UNIF. CONTROLLED SUBSTANCES ACT § 201(a) (1994).

125. For a map of state laws, see *State Marijuana Laws Map*, GOVERNING (2013), http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html, *archived at* http://perma.cc/GM39-YVRA (last visited Oct. 27, 2014). The jurisdictions include Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and Washington DC. *Id*.

have garnered national attention by taking the lead in legalizing, licensing, and taxing marijuana production and retail for recreational use.[126] The District of Columbia also legalized recreational marijuana possession and personal-use cultivation but Congress soon exercised its special authority over the District to block the measure.[127]

Marijuana law is an expanding legal field rife with questions. Marijuana has become a flourishing business in legalization states, with entrepreneurs searching for ways to store bricks of cash and law firms seeking to develop potentially lucrative marijuana law expertise.[128] For banks and law firms, however, a major stumbling block is the risk of being accused of aiding and abetting a federal crime.[129] Banks and law firms tend to be highly conservative institutions when it comes to legal compliance because certain forms of law breaking can mean a business death penalty—suspension of the license to operate or practice.[130] Even short of the most severe imaginable penalty, banks and firms may be concerned with financial and reputational censure from the perception of aiding and abetting federal lawbreakers that may injure their business standing.[131]

Both banks and lawyers operate under heightened duties. Anti-money laundering law makes it a crime for banks to conduct financial transactions with the proceeds of illegal activity, such as dealing in a controlled

126. Alaska Measure 2, An Act to Tax and Regulate the Production, Sale, and Use of Marijuana (passed Nov. 4, 2014), *codified at* ALASKA STAT. 17.38.010–900; Colo. Amend. 64 (passed Nov. 6, 2012), *codified at* COLO. CONST. art. XVIII, § 16; Ore. Measure 91, Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act (passed Nov. 4, 2014), *codified in scattered sections at* OR. REV. STAT. §§ 317.005–991, 475.005–295, 811.005–812; Wash. Initiative 502, (passed Nov. 6, 2012), *codified in scattered sections at* WASH. REV. CODE §§ 69.50.101, 69.50.401, 69.50.4013, 69.50.412, 69.50.4121, 69.50.500, 46.20.308, 46.61.502, 46.61.504, 46.61.50571, 46.61.506.

127. DC Initiative 71, Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Act of 2014 (passed Nov. 4, 2014); Aaron C. Davis & Ed O'Keefe, *Congressional Spending Deal Blocks Pot Legalization in D.C.*, WASH. POST, Dec. 9, 2014, *available at* http://www.washingtonpost.com/local/dc-politics/congressional-budget-deal-may-upend-marijuana-legalization-in-dc/2014/12/09/6dff94f6-7f2e-11e4-8882-03cf08410beb_story.html.

128. *See, e.g.*, Kovaleski, *supra* note 6, at A1 (describing marijuana entrepreneurs with large bricks of cash worrying about where to start such large quantities); Valerie Bauman, *A Legal High: Practicing Marijuana Business Law*, PUGET SOUND BUS. J. (Aug. 22, 2013, 9:00 PM), http://www.bizjournals.com/seattle/news/2013/08/23/a-legal-high-practicing-marijuana.html?page=all, *archived at* http://perma.cc/JW4L-BK8E (describing a law firm's early entry into the market and "profitab[ility] almost instantly").

129. *See, e.g.*, Southall, *supra* note 1, at A1 (discussing dilemmas).

130. *See, e.g.*, John A. Kelley et al., *International Banking and Finance*, 34 INT'L LAWYER 429, 430 (2000) (discussing the business "death penalty" of suspension of a bank charter).

131. *Cf.* Richard R. Cheatham & James W. Stevens, *Absent Regulatory Changes, Hispanic Immigrants Pose an Unbankable Risk*, 123 BANKING L.J. 195, 195–96 (2006) (discussing chilling effects of fear of reputational and financial censure that make banks reluctant to work with the Hispanic immigrant community).

substance.[132] Under the Bank Secrecy Law, banks also are required to file reports of suspicious activity by their customers.[133] Ethically, attorneys may not advise people or businesses about how to break the law or escape liability for law breaking.[134] Model Rule of Professional Conduct 1.2(d) states: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."[135] Thus, would-be marijuana lawyers are walking an ethical tightrope when clients seek help with everyday business matters such as setting up a business and dealing with employment and other operational matters. Facilitating marijuana businesses by drafting business documents, for example, would appear to aid in the distribution of marijuana in violation of federal criminal law.[136]

Some state bar associations have issued ethical opinions to try to help their lawyers navigate the complicated terrain—and fractured on what position to take.[137] After Maine legalized medical marijuana, its state bar ethics commission issued an opinion in 2010 advising that attorneys may not assist clients in violating federal law—whether the federal law is enforced or not and notwithstanding the state legalization.[138] An informal ethics opinion issued in Connecticut after the passage of medical marijuana legalization took a similar approach.[139] In contrast, after

132. Money Laundering Control Act of 1986, 18 U.S.C. §§ 195657 (2012). *See also* 18 U.S.C. § 1956(c)(7)(A) (2012) (including offenses listed at 18 U.S.C. § 1961 among covered offenses); 18 U.S.C. § 1961(1)(A) (2012) (including dealing in a controlled substance).

133. 31 U.S.C. § 5318(g) (2012).

134. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT preamble [9] (2013) (discussing a lawyer's dual responsibility "to the legal system" and "the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law"); Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641, 654 (2005) ("[I]f a client asks a lawyer how to break the law and escape liability, a good lawyer should not say, 'Here's how.' The lawyer's ethical duty is to say no.").

135. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2013).

136. *Cf., e.g.*, Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669, 683 (1981) (interpreting Model Code of Professional Responsibility to prohibit facilitative criminal conduct "by giving advice that encourages the client to pursue the conduct or indicates how to reduce the risks of detection, or by performing an act that substantially furthers the course of conduct").

137. *E.g.*, State Bar of Ariz., Ethics Op. 11-01 (Feb. 2011), http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710, archived at http://perma.cc/P7CB-ERDG (allowing lawyers to assist); Prof'l Ethics Comm'n, Me. State Bar, Op. 199 (July 7, 2010), http://www.mebaroverseers.org/attorney_services/opinion.html?id=110134, *archived at* http://perma.cc/UN4P-FHJN [hereinafter *Prof'l Ethics Comm'n of Me.*].

138. *Prof'l Ethics Comm'n of Me.*, *supra* note 137.

139. Conn. Bar Ass'n Prof'l Ethics Comm'n, Informal Op. 2013-02, Providing Legal Services to Clients Seeking Licenses Under the Connecticut Medical Marijuana Law (Jan. 16, 2013), http://c.ymcdn.com/sites/www.ctbar.org/resource/resmgr/Ethics_Opinions/Informal_Opinion_2013-02.pdf.

Arizona legalized medical marijuana, the state bar association in 2011 issued an ethics opinion permitting lawyers to assist clients whose conduct is in "'clear and unambiguous compliance with state law" so long as the clients are advised of the risks under federal law.[140] After Colorado legalized recreational marijuana in 2012, its Supreme Court amended its version of Rule 1.2 along the lines of Arizona's approach.[141] In Washington state—which also legalized recreational marijuana—the bench and bar are engaged in vigorous debate about whether and how to amend its ethical rules.[142] Thus, while the marijuana law boom fields may be exciting terrain for firms and banks to expand, the domain also is perilously uncertain.

While marijuana entrepreneurs and users may be less risk-averse than bankers and lawyers, the risk of federal prosecution is also a concern for them.[143] From the early days of medical marijuana legalization, beginning with California's Compassionate Use Act of 1996,[144] to today, users, growers, and retailers risk federal prosecution.[145] The Supreme Court in

140. *State Bar of Ariz.*, *supra* note 137 (quoting DOJ Memorandum).

141. After the 2014 revision to the Colorado Rules of Professional Conduct, a comment to Rule 1.2 now states:

> A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.

COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt. 14 (added Mar. 24, 2014), *available at* http://www.cobar.org/index.cfm/ID/22126, *archived at* http://perma.cc/9NK7-78V2.

142. *See, e.g.*, Letter from Anne M. Daly, President, King Cnty. Bar Ass'n, to the Honorable Barbara Madsen, Chief Justice & the Honorable Charles Johnson, Wash. State Supreme Court (Oct. 4, 2013) (on file with author) (proposing rule changes); King Cnty. Bar Ass'n, Ethics Advisory Op. on I-502 & Rules of Prof'l Conduct (Oct. 16, 2013) (on file with author) (advising bar members while waiting on decision on request to amend the rules); Letter from Douglas J. Ende, Chief Disciplinary Counsel, to Assoc. Chief Justice Charles W. Johnson, Chair, Wash. Supreme Court Rules Comm'n (Oct. 24, 2013) (on file with author) (opposing proposed rule changes).

143. *See, e.g.*, Sunil Kumar Aggarwal et al., *Distress, Coping and Drug Law Enforcement in a Series of Patients Using Medical Cannabis*, 45 J. NERVOUS & MENTAL DISEASE 292, 292–300 (2013) (discussing survey findings of distress over the risk of law enforcement surveillance and prosecution among medical marijuana patients); Erik Eckholm, *Medical Marijuana Industry Is Unnerved by U.S. Crackdown*, N.Y. TIMES, Nov. 24, 2011, at A22 (detailing concerns of billion-dollar medical marijuana industry over federal crackdowns on growers and sellers).

144. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007).

145. *See, e.g.*, Kristina Davis, *Feds Expand Medical Pot Crackdown to Delivery Services*, SAN DIEGO UNION-TRIB. (Feb. 27, 2013), http://www.utsandiego.com/news/2013/feb/27/tp-feds-expand-medical-pot-crackdown-to-delivery/, *archived at* http://perma.cc/BT6-VCBD (discussing federal raids on medical marijuana storefront and mobile delivery services); Oren Dorell, *Trapped Between State and Nation: Conflicting Laws Can Spell Trouble for Patients Using Medical Marijuana*, USA TODAY, Nov. 9, 2010, at 3A (detailing medical marijuana patient concerns).

Gonzales v. Raich affirmed the power of the federal government to enact the Controlled Substances Act under its power to regulate commerce, rejecting a challenge by Californian medical marijuana users and growers.[146] Medical marijuana users and growers have been raided and prosecuted—including cancer and HIV patients using marijuana to treat severe pain.[147] In the past, some defendants were barred from even mentioning medical marijuana legalization in their defense, leading them to accept guilty pleas.[148]

Two important changes are giving reliance claims more force. First, states are no longer deciding just to refrain from criminalizing marijuana.[149] Among medical marijuana legalization states, the main paradigm was simply state inaction—carving out exceptions to state criminalization.[150] The emerging approach is for states to affirmatively license marijuana production and retail facilities.[151] The affirmative state imprimatur through the grant of licenses changes the nature of the argument. The fact that states decline to precisely mirror federal marijuana criminalization is not a grant of permission. In contrast, licensing and registration schemes complete with potentially hefty taxes look more like affirmative permission.

Second, rather than aggressively opposing the affirmative licensing schemes, federal enforcement officials have begun to declare acquiescence and even cautious encouragement. An early and heavily caveated move in the direction of acquiescence was an October 19, 2009 memorandum by

146. 545 U.S. 1, 17–32 (2005).

147. *See, e.g.*, *Los Angeles Drug Case Bars Medical Marijuana Defense*, N.Y. TIMES (Nov. 7, 1999), http://www.nytimes.com/1999/11/07/us/los-angeles-drug-case-bars-medical-marijuana-defense.html (discussing prosecution of people using marijuana for pain from cancer and HIV).

148. *Id.* (discussing preclusion of the defense in prosecution of defendants Todd McCormick and Peter McWilliams). *See also, e.g.*, United States v. McCormick, 52 F. App'x 75, 76 (9th Cir. 2002) (unreported) (relating subsequent guilty pleas).

149. *Compare, e.g.*, CAL. HEALTH & SAFETY CODE § 11362.5(d) (West 2007) (stating that state marijuana criminalization does not extend to a patient with a valid prescription), *with* COLO. CONST. art. XVIII, § 16(5) (providing for state licensing of marijuana retail establishments); WASH. REV. CODE § 69.50.325 (2014) (providing for the issuance of marijuana producers and retailers licenses).

150. For a discussion of the distinction between action in conflict with federal criminalization and state inaction, see, e.g., Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power To Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1423–424, 1428–32 (2009).

151. COLO. CONST. art. XVIII, § 16(5); WASH. REV. CODE § 69.50.325 (2014). *See also, e.g.*, Ed Stannard, *Connecticut's Medical Marijuana Prices to Be Set by 'Competitive Market'*, NEW HAVEN REG. (Feb. 2, 2014, 5:39 PM), http://www.nhregister.com/general-news/20140202/connecticuts-medical-marijuana-prices-to-be-set-by-competitive-market, *archived at* http://perma.cc/W2SK-VU67 (noting that only five states, including Connecticut, require state-regulated cultivation and dispensaries).

Deputy Attorney General David Ogden.[152] Ogden wrote that federal prosecutors should focus on "significant traffickers" of illegal drugs and trafficking networks and that "pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[153] Therefore, prosecution of "individuals with cancer or other serious illnesses" and their caregivers should not be a priority.[154] But "prosecution of commercial enterprises that unlawfully market and sell marijuana for profit" continues to be an enforcement priority.[155] The enforcement memorandum thus sent a signal of partial acquiescence in state legalization regimes insofar as they exempted medical marijuana users—but not insofar as they exempted dispensaries from prosecution.

After the passage of landmark state laws affirmatively licensing and taxing recreational marijuana distributors, the decision whether to intervene or acquiesce was even more starkly presented. Because of the state action—rather than mere inaction—in licensing marijuana growers and retailers, federal authorities had a stronger case of preemption by the Controlled Substances Act.[156] Indeed, the Obama Administration previously had reacted vigorously and successfully in challenging state immigration regulation conflicting with the federal enforcement scheme, obtaining partial injunctions against the state laws.[157]

Rather than similarly seeking injunctions, however, federal authorities signaled stronger acquiescence—and even tacit encouragement—to state marijuana decriminalization.[158] In a memorandum to all U.S. Attorneys, Deputy Attorney General James M. Cole signaled that the Justice Department would entrust the marijuana legalization states to "implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and

152. Memorandum from David W. Ogden, Deputy Attorney Gen., to Selected U.S. Attorneys (Oct. 19, 2009), *available at* http://blogs.justice.gov/main/archives/192, *archived at* http://perma.cc/36GK-TSZS.

153. *Id.*

154. *Id.*

155. *Id.*

156. *See, e.g.*, Arizona v. United States, 132 S. Ct. 2492, 2505 (2012) (invalidating state immigration regulation regime that conflicted with the enforcement mechanism under federal law). *Cf.* Mikos, *supra* note 150, at 1423–24 (distinguishing state inaction).

157. *See, e.g.*, *Arizona v. United States*, 132 S.Ct. at 2510; United States v. Alabama, 691 F.3d 1269 (11th Cir. 2012); United States v. Alabama, 443 F. App'x 411 (11th Cir. 2011).

158. Memorandum from James M. Cole, Deputy Attorney Gen., to All U.S. Attorneys (Aug. 29, 2013), *available at* http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf [hereinafter 2013 Cole Memorandum].

other law enforcement interests."[159] If states did so, the Cole memorandum indicated that "enforcement of state law by state and local law enforcement and regulatory bodies" would "remain the primary means of addressing marijuana-related activity."[160] To accommodate state-sanctioned grow and retail operations, the Cole Memorandum rescinded the distinction between users and commercial marijuana operations.[161]

President Obama followed the memorandum by telling the nation that the legalization schemes should "go forward because it's important for society not to have a situation in which a large portion of people have at one time or another broken the law and only a select few get punished."[162] The president expressed concern that the enforcement of marijuana criminalization laws disproportionately impacts the socioeconomically disadvantaged, particularly African-American and Latino youths.[163] He said the federal government would not stand in the way of state reforms in how to address marijuana use and had better things to do than go after recreational pot users.[164] To further facilitate state experimentation in changing the marijuana criminalization paradigm, the Obama administration issued guidance to reassure banks reluctant to work with marijuana businesses.[165]

The flurry of memoranda have made the current presidential administration the most friendly in history toward state marijuana legalization initiatives. Yet this receptive stance has not removed doubts and concerns over prosecution.[166] Indeed, even memoranda designed to remove some of the chill of doubt all bear versions of a standard disclaimer to the effect that the enforcement guidance "does not 'legalize' marijuana or provide a legal defense to a violation of federal law, nor is it

159. *Id*. at 2.

160. *Id*. at 3.

161. *Id*.

162. David Remnic, *Going the Distance*, NEW YORKER, Jan. 27, 2014, *available at* http://www.newyorker.com/reporting/2014/01/27/140127fa_fact_remnick, *archived at* http://perma.cc/TW4R-4ZYT.

163. *Id*.

164. Dennis, *supra* note 4.

165. Dep't of the Treasury *supra* note 67 (providing guidance on "how financial institutions can provide services to marijuana-related businesses" and declaring criminal enforcement priorities); Memorandum from James M. Cole, Deputy Attorney Gen., to All U.S. Attorneys (Feb. 14, 2014), *available at* http://www.dfi.wa.gov/banks/pdf/dept-of-justice-memo.pdf; Danielle Douglas, *Obama Administration Clears Banks to Accept Funds from Legal Marijuana Dealers*, WASH. POST (Feb. 14, 2014), http://www.washingtonpost.com/business/economy/obama-administration-clears-banks-to-accept-funds-from-legal-marijuana-dealers/2014/02/14/55127b04-9599-11e3-9616-d367fa6ea99b_story.html, *archived at* http://perma.cc/VUX5-QVTH.

166. *See, e.g.*, Kovaleski, *supra* note 6, at A1 (reporting on banks' concerns over prosecution for aiding and abetting a criminal enterprise).

intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party [sic] or witness in any administrative, civil, or criminal matter."[167] In currently pending prosecutions, courts are confronting attempts by marijuana business defendants to argue reliance on state legalization and federal receptivity toward legalization.[168] Guidance is needed.

2. State Firearms Nullification Laws

Firearms regulation is another area rife with culture wars over regulation and a flowering of rebellious state legislation.[169] The federal response to such state firearms regulation offers an informative contrast to the acquiescence and even receptivity toward marijuana regulation.

The rugged American romance with the right to bear arms is so strong that the right is enshrined in the U.S. Constitution.[170] Whether the Second Amendment was meant to preserve an individual's right to bear arms or whether the right is tied to militia service is heavily debated.[171] Though vigorously divided on the issue, the Supreme Court ruled in *District of Columbia v. Heller* that the right to bear arms is an individual one and handgun ownership may not be wholly banned.[172] But the right to bear arms is not absolute. Some regulation is permissible in the interest of preventing firearms violence.[173] Attempts at firearms restrictions, however, face fierce backlash as the nation witnessed most recently during

167. Ogden, *supra* note 152.

168. *See, e.g.*, United States v. Washington, 887 F. Supp. 2d 1077, 1084 (D. Mont. 2012) (noting that the defendant and many others "began cultivating and selling medical marijuana under the assumption that they could become legitimate providers under state law and not be selectively arrested and prosecuted under federal law" and the "choice has now proven very costly for these providers" whose businesses have been raided).

169. For a discussion of the conflict over gun regulation from a cultural cognition perspective see Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 134–36 (2007).

170. U.S. CONST. amend II.

171. *E.g.*, District of Columbia v. Heller, 554 U.S. 570, 581, 636 (2008) (Stevens, J., dissenting, joined by Justices Souter, Ginsburg, and Breyer); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1162–64 (1991); Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 5–8 (2000); Adam Winkler, Heller's *Catch-22*, 56 UCLA L. REV. 1551, 1573–74 (2009). *Cf.* Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 86 n.15 (2013) (describing the question of whether the Second Amendment protects an individual right to gun ownership unconnected to militia purposes as "long the central battle in Second Amendment law and scholarship").

172. *Heller*, 554 U.S. at 595 (majority opinion). *See also, e.g.*, McDonald v. City of Chicago, 561 U.S. 742 (2010) (applying the interpretation to states and localities). *Cf.* Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1321 (2009) (critiquing the majority's historical account as "more romance than real").

173. *Heller*, 554 U.S. at 636.

firearms regulation reform efforts after the Sandy Hook school shootings.[174]

The freedom to bear arms has a particular mystique for regions and groups with a strong, rugged, and individualist culture.[175] Opponents of gun control tend to prize individual self-sufficiency and generally oppose governmental control—especially centralized governmental control.[176] Attempts at federal firearms legislation therefore rouse particular ire.[177] Federal firearms legislation has been hard-won.[178] The most recently enacted major federal firearms legislation that still remains on the books today are the 1993 Brady Bill, which provides for background checks on gun purchasers,[179] and the 1996 Lautenberg Amendment, which prohibits domestic abusers convicted of misdemeanors from possessing firearms.[180]

Especially when it comes to firearms regulation, federal action has sparked powerful reactions. For example, the backlash against the Brady Bill led to an intense and successful campaign to punish legislators who voted in favor, shifting the balance of power between the parties in Congress.[181] In recent decades, because of the sharp cultural cleavages over whether and how to limit firearms availability, individual states have taken the lead in experimenting with firearms restrictions.[182] Creating sufficient cultural consensus for legislation is more attainable at the regional level than at the fractured national level. Of course, such cultural

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174. *See, e.g.*, Jack Healy, *Colorado Lawmakers Ousted in Recall Vote over Gun Law*, N.Y. TIMES, Sept. 11, 2013, at A1 (reporting on successful ouster of legislators who passed gun control laws); Philip Rucker & Sari Horwitz, *On Gun Control, Obama's Record Shows an Apparent Lack of Political Will—Until Now*, WASH. POST (Dec. 23, 2012), http://www.washingtonpost.com/politics/on-gun-control-obamas-record-shows-an-apparent-lack-of-political-will--until-now/2012/12/23/913a3626-4937-11e2-ad54-580638ede391_story.html, *archived at* http://perma.cc/5BVM-8C3A (discussing how the massacre of twenty schoolchildren in Newtown by a shooter who then committed suicide spurred President Obama to advocate for firearms regulation reform).

175. Dan M. Kahan, *The Gun Control Debate: A Culture-Theory Manifesto*, 60 WASH. & LEE L. REV. 3, 4 (2003).

176. *See id*. at 6.

177. *See, e.g.*, Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 227 (2008) (detailing fury after passage of the Brady Bill and the punishment of legislators who voted in favor).

178. *Id.*; Philip J. Cook, *The Great American Gun War: Notes from Four Decades in the Trenches*, 42 CRIME & JUST. 19, 26–27 (2013).

179. Brady Handgun Violence Protection Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–22 (2012)). The assault weapons ban of 1994 was allowed to sunset.

180. Pub. L. 104-208, §658, 110 Stat. 3009, 3009-371 to 3009-372 (codified at 18 U.S.C. §§ 921–22, 925 (2012)).

181. *See, e.g.*, Siegel, *supra* note 177, at 227 (detailing fury after passage of the Brady Bill and the punishment of legislators who voted in favor).

182. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1124–28 (2014); Cook, *supra* note 178, at 27.

views at the state level are not just limited to *regulating* guns and ratcheting *up* standards from the federal baseline. States are also challenging federal firearms regulations through competing state laws.

The state legal rebellion was sparked by fear of more firearms regulation and taxes after President Barack Obama was inaugurated in January 2009.[183] Since then, at least nine states have enacted laws aimed at nullifying federal firearms regulation.[184] Similar "Firearms Freedom Act" legislation has been introduced in twenty-six more states.[185] One state even prescribes criminal penalties for anyone who tries to enforce federal firearms laws in the state.[186] Legislation passed in Missouri that was later vetoed by the governor would not only make it a crime for federal agents to try to enforce federal gun laws in Missouri—but it also criminalized publishing the names of gun owners.[187] In all, state legislators have reportedly proposed more than 200 laws aiming to nullify federal firearms laws.[188]

Many of the laws are modeled on the Montana Firearms Freedom Act, the brainchild of firearms rights advocate and shooting range equipment manufacturer Gary Marbut.[189] Generally, the laws declare that firearms or ammunition manufactured within the state and remaining within state borders are not subject to federal regulation.[190] The theory is that such firearms and parts are out of the reach of federal power to regulate under the Commerce Clause.[191] The laws seek to suspend federal firearms registration and other regulations within state borders.[192] The laws, if

183. Barak Y. Orbach et al., *Arming States' Rights: Federalism, Private Lawmakers, and the Battering Ram Strategy*, 52 ARIZ. L. REV. 1161, 1171–76 (2010).

184. *See* sources cited *supra* note 7.

185. For a map of the legislative proposals see *State by State*, FIREARMS FREEDOM ACT (Apr. 27, 2014), http://firearmsfreedomact.com/state-by-state, *archived at* http://perma.cc/XS5W-YHYC.

186. WYO. STAT. ANN. § 6-8-405 (2014).

187. Press Release, Office of Mo. Governor Jay Nixon, Gov. Nixon Signs Legislation Expanding Gun Rights, Vetoes Unconstitutional Nullification Bill (July 5, 2013), *available at* https://governor.mo.gov/news/archive/gov-nixon-signs-legislation-expanding-gun-rights-vetoes-unconstitutional-nullification, archived at http://perma.cc/P5NF-LB63; Associated Press, Missouri Governor Vetoes Bill that Nullified Federal Gun Laws, FOX NEWS (July 5, 2013), http://www.foxnews.com/politics/2013/07/05/missouri-governor-vetoes-bill-that-nullified-fed-gun-laws/, *archived at* http://perma.cc/6ETK-2L97.

188. Justine McDaniel et al., *In States, a Legislative Rush to Nullify Federal Gun Laws*, WASH. POST (Aug. 29, 2014), http://www.washingtonpost.com/blogs/govbeat/wp/2014/08/29/in-states-a-legislative-rush-to-nullify-federal-gun-laws/, *archived at* http://perma.cc/JM6T-4U2W.

189. For more on Marbut see, e.g., Orbach et al., *supra* note 183, at 1176–78.

190. *See* sources cited *supra* note 7.

191. *See, e.g.*, Mont. Shooting Sports Ass'n v. Holder, 727 F.3d 975, 981-82 (9th Cir. 2013) (giving history).

192. *Id*.

followed, would flout requirements that firearms dealers be federally licensed and run background checks on unlicensed buyers.[193]

The Obama administration's response to the challenge to federal firearms regulation was markedly different to the hospitality shown to state marijuana legalization laws. After the passage of Firearms Freedom Laws in the various states, the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) distributed "Open Letter[s]" to all firearms licensees within each state.[194] The ATF letters warned that the state law "conflicts with Federal firearms laws and regulations" and that "Federal law supersedes the [state Firearms] Act."[195] Dealers were instructed to continue to follow federal law.[196] ATF agents also specifically warned Marbut, who was seeking to manufacture firearms free of federal regulation, that violations of federal law "could lead to . . . potential criminal prosecution."[197]

In response, Marbut, joined by the Montana Shooting Sports Association and the Second Amendment Foundation, sued Attorney General Eric Holder for declaratory judgment and injunctive relief.[198] The showdown in federal court rendered Montana's experiment with nullifying federal firearms law short-lived. Just a year after the Montana law was enacted, a district court judge ruled that the federal government's Commerce Clause authority extended to firearms regulation—even if the product did not cross state lines.[199] The Ninth Circuit affirmed the conclusion that Congress can validly regulate firearms, even within the borders of a single state, and thus held that the Montana Firearms Freedom Act was preempted by federal law.[200] Unlike in the recreational marijuana legalization context, the federal government's firm response to the rebellious state laws led to timely clarification and invalidation of the decriminalization conflict before reliance could develop. As will be discussed in Part II, this contrast has important ramifications for the availability of a reliance defense.

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193. For these federal requirements, see 18 U.S.C. §§ 921–22 (2012)).
194. *See, e.g.*, *supra* note 8.
195. *E.g.*, ATF Letter to Mont., *supra* note 8.
196. *Id*.
197. Mont. Shooting Sports Ass'n v. Holder, No. CV-09-147-DWM-JCL, 2010 WL 3926029, at *1 (D. Mont. Aug. 31, 2010).
198. *Id*.
199. *Id*. at *22.
200. Mont. Shooting Sports Ass'n v. Holder, 727 F.3d 975, 981–83 (9th Cir. 2013).

3. Deferred Action for Early Childhood Arrivals and Parents of U.S. Citizens or Permanent Residents

Immigration is a third area rife with clashing worldviews and rebellion from an unlikely suspect—the President of the United States.[201] A particularly divisive issue in immigration reform is whether to provide paths to legalization for undocumented immigrants—also termed amnesty.[202] An estimated 11 million undocumented people in the United States could potentially benefit.[203] The legalization/amnesty debate has sparked fights with opponents and proponents arguing in different moral registers.[204]

Opponents are concerned with rewarding lawbreakers who jump the lines and flout the laws necessary to defend the nation and its limited resources against being overrun.[205] Proponents argue there is a need to address the plight of a large underclass of undocumented people living in the United States with stunted prospects and dreams.[206] Political

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201. *See* Preston & Cushman, *supra* note 1, at A1 (reporting on President Obama's decision to stop deporting young Americans notwithstanding Congressional inability to pass legalization legislation).

202. *See, e.g.*, Bill Keller, Op-Ed., *Selling Amnesty*, N.Y. TIMES (Feb. 3, 2012), http://www.nytimes.com/2013/02/04/opinion/keller-selling-amnesty.html?pagewanted=all (discussing debate); Michael A. Memoli et al., *Senators Unveil Bipartisan Immigration Plan, but Opposition Looms*, L.A. TIMES (Jan. 28, 2013), http://articles.latimes.com/2013/jan/28/nation/la-na-immigration-20130129, *archived at* http://perma.cc/6JD9-JL6D (discussing cleavages); Karen Tumulty, *Missteps of 1986 Overhaul Haunt Immigration Debate*, WASH. POST, Feb. 4, 2013, at A1, A12 (discussing debate and concerns over repeating problems with the 1986 amnesty conferred by the Immigration Reform and Control Act).

203. Keller, *supra* note 202.

204. *See, e.g.*, *id.*; Rachel L. Swarns, *Senate, in Bipartisan Act, Passes an Immigration Bill; Tough Fight Is Ahead*, N.Y. TIMES, May 25, 2006, at A19 (discussing conflicts).

205. *See, e.g.*, Kris W. Kobach, Remarks, *Administrative Law: Immigration, Amnesty, and the Rule of Law, 2007 National Lawyers Convention of the Federalist Society*, 36 HOFSTRA L. REV. 1323, 1329–31 (2008) (arguing amnesty would encourage illegal immigration and strain the nation's financial resources); Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65, 141–43 (2009) (detailing arguments by immigration hardliners concerned about flooding by large masses of lawbreakers threatening stability and order); Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2087 (2008) (discussing how legalization opponents frame concerns in rule of law terms); Letter from Edward Tuffy II, President, Local 2544, Nat'l Border Patrol Council, to Senator Jon Kyl 1–2 (May 24, 2007) (on file with author) (expressing concern over rewarding lawlessness, encouraging more massive illegal immigration, threatening security, and overburdening taxpayers).

206. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 218–20 (1982) (Brennan, J.) (expressing concern over creation of a "'shadow population' of illegal migrants" and the "specter of a permanent caste of undocumented resident aliens"); Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of* Loving, 2007 WIS. L. REV. 345, 358–76 (discussing adverse impacts of immigration law on families); Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99, 134–35 (2007) (exploring shared experience of bearing caste-like burdens); Legomsky, *supra* note 205, at 141–42

controversy stymied attempts at immigration reform in 2005,[207] 2006,[208] 2007,[209] 2010,[210] and is threatening to derail the latest attempt begun in 2013.[211]

One of the bills that died in Congress, popularly known as the DREAM Act, attempted to put a child's hopeful face on the legalization/amnesty debate. A revival in 2009 of earlier legislation that had stalled, the DREAM Act focused on longtime residents of the United States who arrived as children before age sixteen.[212] Under the proposed legislation, aliens under the age of thirty-five who have continuously resided in the United States for at least five years, shown "good moral character," and completed high school, gotten a GED, or enrolled in college or the military can apply for conditional permanent residency status.[213]

The legislation was re-introduced again in 2010 with tighter restrictions. Some of the revised eligibility requirements included a lower maximum age cap of twenty-nine, a requirement to have arrived in the United States before age fifteen, and a two-year wait before conditional permanent residency status.[214] Again the bill stalled. Congress was battling over healthcare reform and was preoccupied with the midterm elections.[215] As President Obama acknowledged, there was little appetite for immigration reform in 2010.[216] An attempt to fast-track immigration

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(explaining how proponents of softer approaches on immigration tend to empathize with imagery of suffering people); Clara Long, Recent Development, *Crafting a Productive Debate on Immigration*, 47 HARV. J. ON LEGIS. 167, 168–72 (2010) (presenting narratives of people impacted by immigration law and policy).

207. *See* Comprehensive Enforcement and Immigration Reform Act of 2005, S. 1438, 109th Cong. (1st Sess. 2005) (co-sponsored by Sens. John Cornyn and Jon Kyl); Secure America and Orderly Immigration Act, S. 1033, 109th Cong. (1st Sess. 2005) (co-sponsored by Sens. John McCain, Ted Kennedy, and others).

208. Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2d Sess. 2006) (sponsored by Sen. Arlen Specter).

209. Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (1st Sess. 2007) (sponsored by Sen. Harry Reid).

210. Development, Relief, and Education for Alien Minors Act of 2011 (DREAM Act), S. 952, 112th Cong. (1st Sess. 2010) (sponsored by Sen. Dick Durbin).

211. David Nakamura & Ed O'Keefe, *Boehner: Immigration Reform Stalls Because GOP Has 'Widespread Doubt' About Obama*, WASH. POST (Feb. 6, 2014), http://www.washingtonpost.com/politics/boehner-immigration-reform-stalls-because-gop-has-widespread-doubt-about-obama/2014/02/06/233b497a-8f55-11e3-b46a-5a3d0d2130da_story.html, *archived at* http://perma.cc/6TPZ-5D3B.

212. Development, Relief, and Education for Alien Minors Act of 2009 (DREAM Act of 2009), S. 729, 111th Cong. (1st Sess. 2009).

213. *Id*. at § 4.

214. S. 952.

215. Rachel Weiner, *How Immigration Reform Failed, Over and Over*, WASH. POST (Jan. 30, 2013), http://www.washingtonpost.com/blogs/the-fix/wp/2013/01/30/how-immigration-reform-failed-over-and-over/, *archived at* http://perma.cc/46JQ-5JLV.

216. *Id*.

reform legislation was decried as a "cynical political ploy" to curry favor among Hispanic voters.[217]

When Senator Harry Reid reintroduced the bill in 2011, former crucial supporters such as Senators John McCain, Jon Kyl, John Cornyn, and Lindsey Graham withdrew support.[218] The senators stated that enforcement provisions were needed to counterbalance amnesty.[219] The timing was again sensitive. A presidential election was coming up in 2012 and President Obama was seeking reelection. Immigration reform is an incendiary and perilous issue during elections, with the power to attract some key groups and infuriate others.[220]

During the thick of campaign season, on June 15, 2012, President Obama announced that he was weary of waiting for Congress to act and that he would use executive action to achieve the DREAM Act's goals.[221] President Obama told the nation about the bill and its limbo in Congress.[222] He expressed frustration that a bipartisan bill was stonewalled when "the only thing that has changed, apparently, was the politics."[223] He told the nation that young undocumented people should not be punished "simply because of the actions of their parents—or because of the inaction of politicians."[224] He declared that "[i]n the absence of any action from Congress to fix our broken immigration system" he would use executive enforcement discretion to stop deporting the young people who would have been the beneficiaries of the DREAM Act.[225]

In a dramatic move that elicited tears of joy and cheers from beneficiaries—as well as shock and dismay among opponents—President Obama declared: "Effective immediately, the Department of Homeland Security is taking steps to lift the shadow of deportation from these young

217. *Id*.

218. Karoun Demirjian, *Harry Reid Reintroduces the DREAM Act*, LAS VEGAS SUN (May 11, 2011, 11:28 AM), http://www.lasvegassun.com/news/2011/may/11/harry-reid-reintroduces-dream-act/, *archived at* http://perma.cc/DQG4-HEUK.

219. *Id*.

220. *See, e.g.*, Shanto Iyengar & Adam F. Simon, *New Perspectives and Evidence on Political Communication and Campaign Effects*, 51 ANN. REV. PSYCHOL. 149, 160 (2000) (identifying illegal immigration as a Republican issue more likely to raise the interest of voters); Daniel J. Tichenor, *Navigating an American Minefield: The Politics of Illegal Immigration*, 7 FORUM 1 (2009) (analyzing the incendiary politics of immigration).

221. President Obama Statement, *supra* note 38; Preston & Cushman, *supra* note 1, at A1; Stephen Dinan, *Obama's Immigration Test Run Raises Cheers, Alarm*, WASH. TIMES (Aug. 14, 2013), http://www.washingtontimes.com/news/2013/aug/14/presidents-immigration-test-run-raises-cheers-alar/?page=all#pagebreak, *archived at* http://perma.cc/MHK7-AU5U.

222. President Obama Statement, *supra* note 38.

223. *Id*.

224. *Id*.

225. *Id*.

people."[226] President Obama told the nation—and DREAM Act hopefuls who had been waiting in limbo—that they could apply to the Department of Homeland Security to "request temporary relief from deportation proceedings and apply for work authorization."[227] The president's decree was followed by a memorandum from the Secretary of Homeland Security to law enforcement agencies directing them to implement the president's plan and defining eligibility criteria based on the DREAM Act as introduced in 2009.[228]

Under the President's program, called "Deferred Action for Childhood Arrivals (DACA)," applicants must apply to the Department of Homeland Security. The application requires disclosure of the undocumented person's location, list of addresses, schools, identity documents, and admissions regarding last prior entry and status at time of entry. [229] It takes great trust and hope to disclose such sensitive information, which might be used to hunt people down for deportation and could even be used as admissions in a criminal prosecution for unlawful entry.[230]

The danger is amplified by the disclaimers surrounding the program. Tucked at the end of President Obama's announcement, where disclaimers typically go, he warned the measure was "stopgap" and "temporary."[231] The Secretary of Homeland Security's memo contains a longer disclaimer at the end: "This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights."[232] Because of the required disclosures, risks, and uncertainty, some attorneys who offer legal aid to hopeful applicants struggle with a dilemma about whether to advise pursuing DACA relief.[233] Will hopeful applicants be paying application

226. *Id*. *See, e.g.*, Charles Krauthammer, *Can Obama Write His Own Laws?*, WASH. POST (Aug., 15, 2013), http://www.washingtonpost.com/opinions/charles-krauthammer-can-obama-write-his-own-laws/2013/08/15/81920842-05df-11e3-9259-e2aafe5a5f84_story.html, *archived at* http://perma.cc/L8SS-YMMT (describing critiques).

227. President Obama Statement, *supra* note 38.

228. Napolitano Letter, *supra* note 9; USCIS DACA Consideration, *supra* note 9.

229. *See, e.g.*, U.S. CITIZENSHIP & IMMIGRATION SERVS., HOW DO I REQUEST CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) (June 2014), *available at* http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Deferred%20Action%20for%20Childhood%20Arrivals/daca_hdi.pdf (advising on the requirements for applying for deferred action).

230. *See, e.g.*, 8 U.S.C. § 1325 (2012) (defining elements of crime of unlawful entry); FED. R. EVID. 801(d) (governing admissions by a declarant-witness and an opposing party's statement). *Cf.* FED. R. EVID. 804 (b)(3)–(4) (governing statements against interest and statements of personal or family history).

231. President Obama Statement, *supra* note 38.

232. Napolitano Letter, *supra* note 9, at 3.

233. Interview with Angelica Chazaro, Supervising Attorney, Northwest Immigrants' Rights Project (Jan. 15, 2014).

fees and neatly packaging their information on a platter for law enforcement officials who might later use the information against them?

Yet eligible applicants are dubbed "DREAMers" for a reason.[234] Applicants recall crying in joy and relief at the President's announcement thinking they finally had a chance to live a normal life.[235] As eighteen-year-old Xiomara Marin explained, "It's something that I've wanted for life so I could move forward."[236] Despite the risks, hundreds of thousands of applicants have applied.[237] As of February 16, 2014, more than 610,000 applications have been accepted.[238] For these DREAMers and more who are continuing to submit their sensitive personal information, the question of reasonable reliance is of critical importance.

The scope and import of the question of reliance is growing even more because of President Obama's November 2014 executive order extending deferred action to the parents of U.S. citizens or lawful permanent residents who have resided continuously in the United States since January 1, 2010.[239] The president's order would allow an estimated 4 million unauthorized immigrants to apply for executive authorization to work in the United States and de-prioritize them for deportation.[240] The executive order takes effect 180 days after November 20, 2014.[241]

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234. *See, e.g.*, Stephen Dinan, *High Rate of Approval for 'Dreamers' Vexes Critics of Immigration Reform*, WASH. TIMES (Feb. 16, 2014), http://www.washingtontimes.com/news/2014/feb/16/high-rate-of-approval-for-dreamers-vexes-critics-o/ *archived at* http://perma.cc/BB32-YV2U.

235. Jenna Carlsson, *My Word: Undocumented Immigrants Should Be Person of the Year*, OAKLAND TRIB. (Dec., 6, 2012, 4:00 PM), http://www.insidebayarea.com/editorial/ci_22138051/my-word-undocumented-immigrants-should-be-person-year, *archived at* http://perma.cc/DT5G-YLU7; Molly Young, *Oregon DREAMers, Others Applaud Planned Deportation Relief for Young Undocumented Workers, Students*, OREGONIAN (June 16, 2012, 6:38 AM), http://www.oregonlive.com/politics/index.ssf/2012/06/oregon_dreamers_others_applaud.html, *archived at* http://perma.cc/7M4B-WYEZ.

236. Young, *supra* note 235.

237. *Id*.

238. U.S. Citizenship & Immigration Servs., Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012–2014 First Quarter (Feb. 6, 2014), *available at* http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA-06-02-14.pdf

239. *See* U.S. Citizenship & Immigration Servs., Executive Actions on Immigration (Dec. 5, 2014), *available at* http://www.uscis.gov/immigrationaction#2 (discussing President Obama's November 2014 deferred action for parents of U.S. citizens and permanent residents).

240. U.S. White House, Fixing the System: President Obama Is Taking Action on Immigration (Nov. 20, 2014), *available at* http://www.whitehouse.gov/issues/immigration/immigration-action#; Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES, Nov. 20, 2014, at A1.

241. U.S. Citizenship & Immigration Servs., *supra* note 239.

II. PAIRED PRINCIPLES TO GUIDE WHEN RELIANCE DEFENSES SHOULD BE AVAILABLE

As the contemporary dilemmas discussed in Part I illustrate, people plan their lives, hopes, and businesses around legalization laws and decrees.[242] In the shadow of a decriminalization conflict, can people trust the law on the books or the promise of non-enforcement by the law enforcement officials charged with administering the laws? If people take actions now in reliance, will they face sanctions later? This question is of great import for many people and businesses, as well as the lawyers who advise them.[243] This section argues that the crucial answer to the question depends on whether the law enforcement official charged with administering the criminalization regime expressly acquiesces in the competing legalization law or decree.

A. Estoppel and Legality

People or businesses seeking to bind the government to its statements often raise claims of equitable estoppel, or a variation known as entrapment by estoppel in the criminal context.[244] Equitable estoppel against the government is a Loch Ness-like mythical creature, posited to exist and hunted by eager aspirants but rarely successfully glimpsed.[245] Estoppel claims typically involve erroneous advice given by the government officials, often in the civil context, such as advice on benefits eligibility.[246] Claimants argue they acted in reliance on the advice and the government should be bound by it.[247]

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242. *See* discussion of examples *supra* Part I.B.1–3.

243. *Id*.

244. *E.g.*, United States v. Pa. Indus. Chem. Co., 411 U.S. 655, 670–74 (1973); Raley v. Ohio, 360 U.S. 423, 437–40 (1959); United States v. Schafer, 625 F.3d 629, 637 (9th Cir. 2010); United States v. Ramirez-Valencia, 202 F.3d 1106, 1109 (9th Cir. 2000); San Pedro v. United States, 79 F.3d 1065, 1068–69 (11th Cir. 1996); United States v. Lane, No. CR-12-01419-DGC, 2013 WL 3199841, at *8–*9 (D. Ariz. June 24, 2013); United States v. Washington, 887 F. Supp. 2d 1077, 1085, 1090–100 (D. Mont. 2012).

245. *See* 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 13.1, at 1101 (5th ed. 2009) ("The Court has come close to saying that the government can never be equitably estopped based on a false or misleading statement of one of its agents no matter how much an individual has relied on that statement to her detriment or how reasonable her reliance.").

246. *E.g.*, Office Pers. Mgmt. v. Richmond, 496 U.S. 414, 419–24 (1990) (benefits); Schweiker v. Hansen, 450 U.S. 785, 788–89 (1981) (per curiam) (benefits); Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 382–86 (1947) (federal insurance). *See also, e.g.*, PIERCE, *supra* note 245, at 1101–02 (discussing the tax example).

247. *Richmond*, 496 U.S. at 419–20; *Fed. Crop Ins. Corp.*, 332 U.S. at 384–85.

In the civil context, the standards to secure equitable estoppel against the government are dauntingly exacting. The statements by the government agent must clearly be within the scope of the official's authority.[248] If the governmental official exceeds the scope of his powers, such as the Secretary of War issuing bills without statutory authority, people relying to their detriment do not get relief.[249] The Supreme Court has left open the possibility that "affirmative misconduct" by a government official may provide an exception allowing equitable estoppel.[250] But when lower courts enthusiastically seized this possibility, the Supreme Court vigorously and repeatedly summarily reversed.[251] Because of the Supreme Court's great reluctance to grant equitable estoppel—in the civil context, at least—lower courts have held that equitable estoppel against the government is an "extreme remedy" limited to the "extraordinary" or "extreme" cases where "justice and fair play require it."[252] In civil cases, the burden of establishing an equitable estoppel claim is so "daunting" and "heavy" that claimants sometimes do not even bother to bring them anymore.[253]

In the criminal context, however, equitable estoppel against the government is relatively more feasible to obtain. The leading Supreme Court case in the area is *United States v. Pennsylvania Industrial Chemical Corp.* (*PICCO*).[254] *PICCO* involved a criminal prosecution of a chemical corporation for discharging industrial refuse into the Monongahela River in violation of the Rivers and Harbors Act.[255] The trial court refused to allow PICCO to present the defense that it had relied on regulations promulgated by the Army Corps of Engineers, which

248. The Floyd Acceptances, 74 U.S. (7 Wall.) 666, 680–83 (1868); Lee v. Munroe, 11 U.S. (7 Cranch) 366, 368 (1813).

249. *The Floyd Acceptances*, 74 U.S. (7 Wall.) at 680–83.

250. *E.g.*, INS v. Miranda 459 U.S. 14, 19 (1982) (per curiam); INS v. Hibi, 414 U.S. 5, 8 (1973) (per curiam).

251. *See Richmond*, 496 U.S. at 422:

> Courts of Appeals have taken our statements as an invitation to search for an appropriate case in which to apply estoppel against the Government, yet we have reversed every finding of estoppel that we have reviewed. Indeed, no less than three of our most recent decisions in this area have been summary reversals of decisions upholding estoppel claims.

252. *E.g.*, Matamoros v. Grams, 706 F.3d 783, 794 (7th Cir. 2013); Guatay Christian Fellowship v. Cnty. of San Diego, 670 F.3d 957, 975–76 n.12 (9th Cir. 2011); Ellinger v. United States, 470 F.3d 1325, 1336 n.9 (11th Cir. 2006); Moses.Com Sec., Inc. v. Comprehensive Software Sys., Inc., 406 F.3d 1052, 1061 (8th Cir. 2005).

253. *See, e.g.*, *Ellinger*, 470 F.3d at 1336 n.9 (noting the claimant did not expressly argue equitable estoppel "presumably because the burden of establishing an equitable estoppel claim against the government is so daunting").

254. 411 U.S. 655 (1973).

255. *Id.* at 657–60.

interpreted the statutory prohibition on discharge as limited to deposits that would impede or obstruct navigation.[256] Writing for the Court, Justice Brennan reversed the conviction holding that the trial court erred in prohibiting PICCO from presenting evidence on the issue of reliance.[257] He reasoned that PICCO "had a right to look to the Corps of Engineers' regulations for guidance" because the Corps was the agency charged with administering the statute.[258] He concluded that "to the extent that the regulations deprived PICCO of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution."[259]

The rationale captures the fair notice and legality principles that make estoppel claims different in the criminal context. A fundamental principle of criminal law and due process is that people (or businesses) prosecuted must have fair warning of what is criminalized so they can conform their conduct to the law.[260] The fundamental principle that criminal prohibitions must be expressed clearly and precisely before people can be punished is known as legality.[261] Where governmental officials or criminal laws issue contradictory commands, people are deprived of fair notice.[262]

The paired principles of fair notice and reliance mean that people cannot be convicted for doing something that law enforcers told them they could do.[263] Another decision authored by Justice Brennan illustrates this point. In *Raley v. Ohio*, the Court reversed the contempt convictions of witnesses for refusing to testify before the Ohio Un-American Activities Commission.[264] The witnesses were told by the Chairman of the Un-American Activities Commission that they had a right to refuse to answer questions under the Fifth Amendment privilege against self-incrimination.[265] The witnesses actually no longer enjoyed a privilege against self-incrimination, however, because an Ohio statute gave

256. *Id*. at 659–60, 673–674.
257. *Id*. at 675.
258. *Id*. at 674.
259. *Id*.
260. Raley v. Ohio, 360 U.S. 423, 438 (1959); United States v. Cardiff, 344 U.S. 174, 176–77 (1952).
261. For a discussion of various manifestations of legality principles in criminal law see, e.g., Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 356–73 (2005).
262. Cox v. Louisiana 379 U.S. 559, 571 (1965); *Raley*, 360 U.S. at 426–31.
263. *Raley*, 360 U.S. at 426.
264. *Id*. at 425–26.
265. *Id*. at 427.

transactional immunity for testimony, thereby removing the risk of incrimination from the testimony.[266] The witnesses were therefore subsequently convicted for failing to answer the questions of the Commission.[267] The Court reversed on the ground that to allow conviction "would be to sanction the most indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State clearly had told him was available to him."[268] On the same principle, the Court has also reversed the conviction of a protester for holding a demonstration in front of a courthouse, where police affirmatively told protesters they could be.[269]

The principle that a state cannot convict someone for doing what officials said she could lawfully do is sometimes termed "entrapment by estoppel."[270] The term is misleading because the doctrine is different from the defense of entrapment, which is based on the principle that the job of law enforcement is to prevent crime and apprehend criminals, not "the manufacturing of crime" by "implant[ing] in the mind of an innocent person the disposition" to offend.[271] Entrapment is a defense often raised in undercover investigations, where defendants claim the government lured them into committing a crime.[272] Because entrapment is based on the notion that a defendant would not have committed a crime if the government had not induced him to do it, in many jurisdictions, a defendant predisposed to commit the crime is not entitled to an entrapment defense.[273]

In contrast, the concerns behind an entrapment-by-estoppel defense, also known as a "public authority" defense, are reliance on the representations of the law or government officials and lack of fair notice about criminality.[274] Entrapment by estoppel is "unintentional entrapment

266. *Id*. at 431–32.

267. *Id*. at 432.

268. *Id*. at 438.

269. *Cox*, 379 U.S. at 571–72.

270. *See, e.g.*, Keathley v. Holder, 696 F.3d 644, 646 (7th Cir. 2012) (noting misleading nature of term).

271. Sherman v. United States, 356 U.S. 369, 372 (1958) (quoting Sorrells v. United States, 287 U.S. 435, 442 (1932)).

272. For a discussion, see, e.g., Bruce Hay, *Sting Operations, Undercover Agents, and Entrapment*, 70 MO. L. REV. 387, 387–88 (2005).

273. *See, e.g.*, *Sorrells*, 287 U.S. at 451–52 (recognizing the defense of entrapment and explaining the predisposition test). For an overview, see, e.g., Paul Marcus, *Proving Entrapment Under the Predisposition Test*, 14 AM. J. CRIM. L. 53 (1987); Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163 (1976).

274. *Cox*, 379 U.S. at 5; *Raley*, 360 U.S. at 426–30; United States v. Stallworth, 656 F.3d 721, 725–27 (7th Cir. 2011).

by an official who mistakenly misleads a person into a violation of the law."[275] As fleshed out by lower courts since *Raley* and *Cox*, the entrapment-by-estoppel defense arises where a defendant reasonably relies on the active assurance of the lawfulness of her conduct by a government official with authority to interpret or enforce the law.[276] Defendants generally must prove there is (1) affirmative misleading or erroneous advice by a government agent; (2) the agent is charged with administering, interpreting, or enforcing the law defining the crime; and (3) they actually and reasonably relied on the official's statements.[277]

While courts have allowed an estoppel defense in criminal cases, reliance in the shadow of a decriminalization conflict presents a challenging open question. The representations and reliance come in a different configuration than in typical entrapment-by-estoppel cases. The situation is more complicated than a mistake by the officials charged with administering the criminal law at issue. People are relying on a legalization regime by a different governmental authority than the one charged with administering the criminalization regime. Moreover, showing the reasonableness of reliance is a more difficult question where there is a competing criminalization regime.

Indeed, even in the landmark *PICCO* case, Justice Brennan declined to opine on the reasonableness of the defendant corporation's reliance on the regulations of the Army Corps when contradictory authority should have put the defendant on notice that it was wrong to rely upon the Corps's guidance.[278] *PICCO* ruled that reasonable reliance *can* be a defense, not *whether* the reliance in the case was reasonable on the facts.[279] Justice Brennan left it to the district court to determine reasonableness in the first instance.[280] Justice Blackmun and Justice Rehnquist would have gone further and simply ruled that reliance was not reasonable because the

275. United States v. Schafer, 625 F.3d 629, 637 (9th Cir. 2010) (quoting United States v. Batterjee, 361 F.3d 1210, 1216 (9th Cir. 2004)).

276. United States v. Bader, 678 F.3d 858, 886 (10th Cir. 2012); United States v. Hale, 685 F.3d 522, 542 (5th Cir. 2012); *Stallworth*, 656 F.3d at 726–27; *Schafer*, 625 F.3d at 634–35.

277. *E.g.*, *Bader*, 678 F.3d at 886. Sometimes the elements are broken down further. For example, in the Ninth Circuit, the defendant must show: "(1) an authorized government official, empowered to render the claimed erroneous advice, (2) who has been made aware of all the relevant historical facts, (3) affirmatively told him the proscribed conduct was permissible, (4) that he relied on the false information, and (5) that his reliance was reasonable." *Batterjee*, 361 F.3d at 1216 (internal quotation marks and citations omitted).

278. 411 U.S. 655, 675 (1973).

279. *Id*.

280. *Id*.

Court had earlier clearly held that the scope of the criminal prohibition included any pollutants, not just those that obstructed the waterways.[281]

Defendants operating under a decriminalization conflict who have been prosecuted have not fared well thus far.[282] For example in *United States v. Schafer*, Marion Fry, a doctor with breast cancer who used marijuana to alleviate pain, and her husband, an attorney, were convicted for cultivating marijuana.[283] Their grow operation was in California, where it was legal to grow and possess marijuana to ease the pain of illness—under state, albeit not federal, law.[284] When the couple began growing marijuana plants to treat Fry's cancer pain, they contacted the sheriffs department to let them know and allowed the sheriffs to inspect their plants.[285] Ultimately, the grow operation expanded from producing marijuana just for Fry's pain to larger-scale production for sale.[286] The DEA investigated them and the pair were federally prosecuted and convicted for conspiring to manufacture and distribute marijuana plants.[287]

The couple wanted to assert an entrapment-by-estoppel defense and argue that they were lulled into believing their activity was legal.[288] The trial court barred them from presenting the defense. [289] The Ninth Circuit affirmed the preclusion, reasoning that the uncontradicted evidence showed that the defendants knew that marijuana was illegal under federal law.[290] The court reasoned that defendants who know that their conduct is illegal under federal law cannot be misled to believe their conduct was lawful by state law or the actions of government officials.[291] Therefore the court declined to determine whether the state law enforcement officials that the couple consulted could be viewed as working in cooperation with the federal government sufficiently to bind the federal government.[292]

A crucial argument that *Schafer* did not have occasion to consider is an increasingly important issue today: What happens if officials charged with

281. *Id*. at 675–76 (Blackmun and Rehnquist, JJ., concurring in part and dissenting in part) (citing United States v. Standard Oil Co., 384 U.S. 224 (1966)).

282. *E.g.*, United States v. Schafer, 625 F.3d 629, 637–39 (9th Cir. 2010); United States v. Washington, 887 F. Supp. 2d 1077, 1084, 1094–100 (D. Mont. 2012); Mont. Caregivers Ass'n v. United States, 841 F.Supp. 2d 1147, 1148–49 (D. Mont. 2012).

283. 625 F.3d at 633.

284. CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007).

285. *Schafer*, 625 F.3d at 633.

286. *Id*.

287. *Id*. at 633–35.

288. *Id*. at 637.

289. *Id*.

290. *Id*. at 638.

291. *Id*.

292. *Id*.

enforcing the criminalization regime acquiesce in the legalization of the proscribed conduct? At the time of the *Schafer* couple's marijuana-growing operation, the Ogden and Cole Memoranda and President Obama's concurrent statements regarding deference to state marijuana regimes had not been released yet.[293] The next section argues that this acquiescence by the governmental officials charged with enforcing the criminal law makes a crucial difference.

B. Acquiescence and Reasonable Reliance

Can reliance on legalization by rebellious state legislation or presidential decree ever be a defense if the criminalization regime remains in place? This question is more complicated than traditional estoppel-by-entrapment cases because reliance is based on authority conflicting with, rather than interpreting, the law defining the offense.[294]

On the one hand, people should be able to rely on legalization laws or decrees without having to parse their constitutionality like learned scholars versed in preemption and the separation of powers. As the Alabama Supreme Court memorably put it, to impose on people the burden of foreseeing how courts will construe a law's validity would stretch the fiction that people know the law so far as to be "odious to all right and just thinking men."[295] The North Carolina Supreme Court similarly dismissed the notion that people should be wiser than the legislature that passed a law as "opposed to every idea of justice."[296] Until a law is invalidated by a competent authority people "under every idea of justice and under our theory of government, ha[ve] a right to presume that the lawmaking power had acted within the bounds of the constitution."[297]

On the other hand, the existence of the criminalization and resulting risk of prosecution is no secret. How can reliance on legalization be reasonable if the criminalization is known and remains on the books?

Abstracting and applying venerable old principles to new challenges, the answer is that reliance should be deemed reasonable where the officials charged with enforcing the criminal regime give people reason to rely on the legalization.[298] When criminal statutes give "contradictory

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293. *See* discussion *supra* notes 152–66.

294. *Cf.* United States v. Pa. Indus. Chem. Corp. (PICCO), 411 U.S. 655, 675 (1973) (contradictory regulation erroneously interpreting the scope of criminalization).

295. *Cf.* Brent v. State, 43 Ala. 297, 302 (1869).

296. State v. Godwin, 31 S.E. 221, 222 (N.C. 1898).

297. *Id.*

298. *Cf.* Cox v. Louisiana 379 U.S. 559, 571 (1965); Raley v. Ohio, 360 U.S. 423, 426–30 (1959).

commands" they are "denied the force of criminal sanctions."[299] A criminal statute can on its face be explicit and clear—yet actions by the agency charged with its administration such as the promulgation of regulations suggesting a narrower scope of enforcement may mislead the defendant and give rise to a reliance defense.[300] Due process demands sufficiently clear notice that sanctions will attach to conduct before people may be prosecuted for it.[301]

Of course, passage of competing and subordinate legalization laws, such as the state marijuana or firearms nullification laws do not render pre-existing criminalization unclear. The mere existence of a decriminalization conflict is not a defense because reliance must be reasonable.[302] What makes reliance reasonable is the action of the officials or agency charged with enforcing the laws criminalizing the conduct.[303]

The first two contemporary decriminalization controversies discussed in Part I.B.1–2 show two ends of a spectrum of official responses to a legalization conflict. As discussed in Part I.B.1, in the case of state marijuana decriminalization, the current presidential administration has expressly acquiesced—and even facilitated—state legalization efforts notwithstanding federal criminalization. In a 2013 memorandum to all U.S. Attorneys, the administration stated it would entrust the marijuana legalization states to "implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests."[304] If states do so, then "enforcement of state law by state and local law enforcement and regulatory bodies" would "remain the primary means of addressing marijuana-related activity."[305]

Concurrently with the memorandum, President Obama told the nation that the state experiments in marijuana legalization should go forward.[306] Federal authorities have even issued guidance to facilitate access of

299. *Raley*, 360 U.S. at 438 (citing United States v. Cardiff, 344 U.S. 174 (1952)).

300. United States v. Pa. Indus. Chem. Corp. (PICCO), 411 U.S. 655, 659–60, 673–74 (1973).

301. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

302. *Cf.* United States v. Schafer, 625 F.3d 629, 638 (9th Cir. 2010) (holding there was no reasonable reliance where the defendants knew that federal law criminalized their marijuana cultivation and sales).

303. *Cf., e.g.*, *PICCO*, 411 U.S. at 675 (reliance defense may be possible despite clear statutory criminalization of defendant's conduct because of the regulations of the agency tasked with enforcing the law); United States v. Bader, 678 F.3d 858, 885–88 (10th Cir. 2012) (looking to the conduct of the agency or officials charged with enforcing the law defining the offense).

304. 2013 Cole Memorandum, *supra* note 158, at 2.

305. *Id.* at 3.

306. *Remnic*, *supra* note 162, at 26–27.

marijuana businesses to banks to store their profits.[307] Moreover, the emerging paradigm of state marijuana legalization is not mere exemption from criminalization. Rather, businesses have the affirmative imprimatur of licensing and taxation from the states.[308] The combination of federal acquiescence—even encouragement—and the active imprimatur of state licensing render reliance reasonable.

In contrast, reliance is not reasonable where federal authorities have refused to acquiesce in state legalization. This is illustrated by the swift federal reaction to the Firearms Freedom Acts passed or pending across the nation.[309] Because of the federal response, the state laws have been declared preempted by federal law and invalidated before people and businesses could rely to their detriment.[310] Reliance on nullification laws can hardly be reasonable where longstanding law clearly imposes contrary obligations and law enforcers give no reason to think that sanctions will not be forthcoming. States cannot by fiat render clear and controlling criminalization unclear—but the conduct of agencies and officials charged with administering the criminalization regime can change the equities.

The first two examples set the poles of the spectrum of when a reliance defense may or should not be available. The third example is the most vexing. As discussed in Part I.B.3, in just a short time, hundreds of thousands of young undocumented immigrants have emerged from the shadows and given sensitive information regarding their identity, location, and last unlawful entry in reliance on President Obama's grant of deferred action. Even more people are waiting to emerge in light of President Obama's recent announcement of deferred action for parents of U.S. citizens. The executive actions may impact the lives as many as 5 million people—almost double the amount of people who benefitted under the 1986 amnesty law.[311] Can the information given under a program designed to offer clemency later be used against people who emerge from the shadows in reliance if the political winds or presidential regime change?

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307. *See supra* note 165 and accompanying text.

308. *See supra* notes 126, 151 and accompanying text (discussing Colorado and Washington schemes). *See also* Stannard, *supra* note 151 (noting that only five states, including Connecticut, require state regulated cultivation and dispensaries).

309. *See supra* Part I.B.2.

310. Mont. Shooting Sports Ass'n v. Holder, 727 F.3d 975, 982–83 (9th Cir. 2013) (invalidating Montana's law on preemption grounds).

311. Julia Preston, *Obama Plan Could Grant Papers to Millions, at Least for Now*, N.Y. TIMES, Nov. 16, 2014, at A23.

The issue is particularly tough because there is no affirmative conferral of legalization by any democratically enacted law.[312] Rather DREAMers are relying on executive action taken because of legislative inaction.[313] Moreover, the context is immigration rather than criminal law, where heightened protections apply.[314] The more complicated configuration of the reliance dilemma should not obscure the fundamental principles at stake, however.

The chief enforcer of immigration law dramatically announced he was going "to lift the shadow of deportation from these young people"—at least temporarily.[315] Of course, one administration's decision on how to exercise enforcement discretion does not prevent a new enforcer-in-chief from wielding discretion differently—or even prevent the president from changing his mind. But can the information *elicited* from DREAMers lured by the promise to apply for the amnesty later be used against them in deportation or criminal proceedings?

It would offend fundamental principles of justice if the promises of the official charged with enforcing the law were the bait in a trap to secure information facilitating later sanctions.[316] The Supreme Court has recognized that the old distinction between civil deportation and criminal penalties is vanishingly thin.[317] As the landscape of immigration law has dramatically changed, deportation has become "intimately related to the criminal process" [318] and "an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specific crimes."[319] At bottom, when people disclose information to the official charged with enforcing the regime of sanctions, they are relying on the offer of clemency.

Indeed, U.S. Citizenship and Immigration Services advises applicants for deferred action that the information they disclose "is protected from disclosure"[320] to immigration enforcement agencies for removal purposes except in cases involving "public safety threats, criminals, and aliens

312. *See* President Obama Statement, *supra* note 38 (announcing executive action because of legislative inaction).

313. *Id*.

314. *See* discussion *supra* Part II.A.

315. President Obama Statement, *supra* note 38. *See, e.g.*, Young, *supra* note 235 (describing tears of joy); Krauthammer, *supra* note 226 (describing critiques).

316. *Cf., e.g.*, *Raley*, 360 U.S. at 437–40 (holding that officials cannot lull defendants into conduct and then use that conduct against them); Brent v. State, 43 Ala. 297, 301 (1869) (similar).

317. Padilla v. Kentucky, 559 U.S. 356, 360–66 (2010).

318. *Id*. at 365.

319. *Id*. at 364 (internal footnotes deleted).

320. USCIS FAQs, *supra* note 10 (answering question 19).

engaged in fraud."[321] Of course, this does not mean people coming forward cannot later be deported if found ineligible or if the regime changes.[322] Rather, principles of estoppel and reliance simply mean that information people disclosed in reliance on a program promising temporary clemency cannot be used to sanction them.

III. MAIN POTENTIAL OBJECTIONS AND ANSWERS

The prior sections sought to show how decriminalization conflicts require updating traditional doctrines on mistakes, estoppel, and reliance to tackle modern challenges. When governing authorities fracture over whether to permit or prohibit activity and give conflicting messages, the governed should not become casualties of the conflict. A limited reliance defense should be available when governmental actors in charge of the criminalization regime expressly acquiesce in the competing legalization. In such cases, reliance is reasonable and estoppel is required lest people or businesses be lulled by the statements of actors charged with administering the law into reliance only to be ensnared into a trap of sanctions.

Recognizing any reliance defense at all may seem objectionable. After all, as illustrated in Part I.B.1–3, decriminalization conflicts tend to arise from rebellious action in disagreement with the controlling criminalization status quo. Why should such rebellion confer the ability to do activity that is prohibited just because officials charged with enforcing the criminalization regime happen to think the rebellion might be a good idea? This section addresses two clusters of potential objections. One arises from concern over legitimizing and amplifying governmental lawlessness. Another arises from concern over the risks of giving the governed a normative choice of law—deciding whether to follow the norms embedded in criminal law or not—and the risk of strategic gamesmanship to get around controlling criminal law.

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321. Memorandum from the U.S. Citizenship & Immigration Servs. (Nov. 7, 2011), *available at* http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf.

322. *See* USCIS FAQs, *supra* note 10 ("This policy, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable by law by any party in any administrative, civil, or criminal matter.").

A. Governmental Lawlessness

A potential objection to recognizing a reliance defense is rewarding governmental lawlessness twice over. The first form of lawlessness is the legalization despite continuing criminalization. The second form of lawlessness is the seeming abdication by officials charged with enforcing the criminalization laws of their duties when they acquiesce to the legalization.[323]

The critique may have particular resonance with the growing number of people concerned with the use of executive action or nonenforcement to accomplish what Congress refuses to do.[324] As the illustrations in Part I.B.1–3 show, President Obama has been a major catalyst for the creation of reliance. His administration has been the most hospitable in history to state experiments at legalizing marijuana notwithstanding federal criminalization. When Congress declined to enact the DREAM Act, he used executive action to achieve the goals of the DREAM Act. The Deferred Action for Childhood Arrivals program has been accused of constituting presidential "nullification" of duly enacted immigration law and termed "lawless," "brazen Obama instant-amnesty."[325] The deferred action plan for parents of U.S. citizen children has sparked further furor, with Congressional opponents vowing to "fight the president tooth and nail" through legal challenges, funding measures and other strategies.[326] Seventeen states are suing the United States and federal immigration officials contending that the President's decisions to "unilaterally suspend the immigration laws as applied to 4 million of the 11 million

323. *Cf*., *e.g*., Crane v. Napolitano, 920 F. Supp. 2d 724, 728–31 (N.D. Tex. 2013) (discussing lawsuit by Immigrations and Customs Enforcement (ICE) agents challenging the memorandum ordering them to conform to the Deferred Action for Early Childhood Arrivals program arguing they are being directed to "violate federal law and to violate their oaths to uphold and support federal law").

324. Stephen Dinan, *Agents Weigh Appeal in Deportation Policy Fight*, WASH. TIMES (Aug. 2, 2013), http://www.washingtontimes.com/news/2013/aug/1/ice-agents-weigh-appeal-in-deportation-policy-figh/print/, *archived at* http://perma.cc/EW5U-G265; Krauthammer, *supra* note 226.

325. *See* Dinan, *supra* note 324 (quoting Kris Kobach, Kansas Secretary of State); D.A. King, *GOP-Run Legislature Should End State's Issuance of Driver's Licenses to Illegals and Put 'Official English' on Ballot*, MARIETTA DAILY J. (Jan. 5, 2014), http://www.mdjonline.com/view/full_story/24334187/article-GOP-run-legislature-should-end-state-s-issuance-of-driver-s-licenses-to-illegals-and-put--Official-English--on-ballot, *archived at* http://perma.cc/E65M-SLT9 (decrying "the lawless Obama regime"); David A. Martin, *A Lawful Step for the Immigration System*, WASH. POST (June 24, 2012), http://www.washingtonpost.com/opinions/a-lawful-step-for-the-immigration-system/2012/06/24/gJQAgT0O0V_story.html, *archived at* http://perma.cc/3KM5-XQL7 (summarizing and addressing critiques).

326. Preston, *supra* note 311, at A23.

undocumented immigrants in the United States" violates the Take Care Clause of the U.S. Constitution and the Administrative Procedure Act.[327]

To put the criticism in perspective, President Obama is certainly not alone in using presidential directives or enforcement discretion to accomplish policy objectives.[328] For example, the administration under President George W. Bush declined to regulate greenhouse gas emissions under the Clean Air Act and dramatically decreased the number of antidiscrimination law enforcement actions.[329] After the terrorist attacks of September 11, 2001, President Bush used presidential power to create a whole new legal system to try enemy combatants.[330] President Bill Clinton used presidential memoranda to lift limitations on hospitals receiving federal funding and nongovernmental organizations receiving U.S. aid from offering abortion counseling.[331]

The answer to the allegation of rewarding governmental lawlessness is that recognizing a reliance defense is about not punishing people for the conflicts of their lawmakers rather than rewarding officials. The political process punishes or rewards officials such as the presidents who "go rogue" or opt not to enforce the laws.[332] Public opinion and partisan politics serve as checks on the president and other law enforcers.[333] Opponents will decry nonenforcement or pursuit of new policy by executive fiat as "lawless" and voters can decide whether they agree.[334] Law enforcement agents may even sue the boss directing them not to enforce the law, as several Immigration and Customs Enforcement (ICE) agents have done by suing the Secretary of Homeland Security.[335] Media will amplify and broadcast the political theater into the living rooms of viewer-voters, who ultimately decide on the dispute at the voting booths.

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327. Complaint, Texas v. United States, Case No. 1:14-CV-00254 (S.D. Tex. Dec. 3, 2014).

328. For a discussion, see, e.g., Phillip J. Cooper, *The Law: Presidential Memoranda and Executive Orders: Of Patchwork Quilts, Trump Cards, and Shell Games*, 31 PRESIDENTIAL STUD. Q. 126 (2001); Parker Rider-Longmaid, Comment, *Take Care that the Laws Be Faithfully Litigated*, 161 U. PA. L. REV. 291, 297–302 (2012); Michael Sant'Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 355–56 (2014); Jessica M. Stricklin, Comment, *The Most Dangerous Directive: The Rise of Presidential Memoranda in the Twenty-First Century as a Legislative Shortcut*, 88 TULANE L. REV. 397, 404–07 (2013).

329. For a discussion, see, e.g., Sant'Ambrogio, *supra* note 328, at 355, 372–75.

330. *See, e.g.*, ANDREW RUDALEVIGE, THE NEW IMPERIAL PRESIDENCY 10–11 (2005); Jonathan Mahler, *After the Imperial Presidency*, N.Y. TIMES, Nov. 9, 2008 at MM42.

331. Cooper, *supra* note 328, at 126.

332. Krauthammer, *supra* note 226.

333. For a discussion in the foreign affairs context, see, e.g., Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1108–09, 1138 (2013).

334. *Id*. at 1138.

335. Crane v. Napolitano, 920 F. Supp. 2d 737 (N.D. Tex. 2013)..

Moreover, if sufficiently perturbed, Congress can use the power of the purse to counteract perceived lawless behavior. Indeed, congressional opponents to President Obama's deferred action program proposed an amendment aimed at blocking the program through forbidding funding.[336] The measure passed the House of Representatives by a vote of 234-201.[337] While the defunding amendment stalled in the Senate, legislators are introducing new measures protesting the President's nonenforcement actions.[338] The political process and the media mediate this check too. Though the defunding amendment was buried in appropriations legislation, some members of Congress who voted in favor of defunding the deferred action program found themselves subject to sit-ins by people in their home district.[339] Congressional opponents of the defunding bill also took their case to the people, publicizing the "poison pill" amendment to the appropriations bill.[340]

Offering a reliance defense does not affect these important checks on official behavior. Rather, a reliance defense simply ensures that ordinary people and businesses do not become cannon fodder in the crossfire. When policy battles spill into conflicting law, the burden should not be on the governed to predict or adjudicate which side should trump.[341] People may not be punished for commands rendered ambiguous by contradiction.[342] When it comes to levying criminal sanctions, the burden

336. *Lowey & Price Slam Poison Pill Amendment to HS Appropriations Act*, CONG. DOCS, June 6, 2013, *available at* 2013 WLNR 13955244 [hereinafter *Lowy & Price Slam Poison Pill*].

337. *Id.*

338. *See, e.g.*, Press Release, Congressman Veasey's Statement on House Republican Leadership's Continued Attack Against DREAMers, Mar. 12, 2014, http://veasey.house.gov/media-center/press-releases/congressman-veasey-s-statement-on-house-republican-leadership-s (noting that the "poison pill" amendment stalled in the Senate but new measures are pending).

339. Raul A. Reyes, *Our Star-Spangled Banner Waves for All of Us*, SAN ANTONIO EXPRESS-NEWS (June 25, 2013), http://www.mysanantonio.com/community/northeast/news/article/Our-Star-Spangled-Banner-waves-for-all-of-us-4621693.php, *archived at* http://perma.cc/DJ2-PDFT; Brian Slattery, *Immigration Reformers Sit in at McIntyre's Leland Office*, BRUNSWICK BEACON (July 24, 2013, 12:52 PM), http://www.brunswickbeacon.com/content/immigration-reformers-sit-mcintyre%E2%80%99s-leland-office, *archived at* http://perma.cc/49PZ-2LB8.

340. *Lowey & Price Slam Poison Pill*, *supra* note 336.

341. *See, e.g.*, State v. Godwin, 31 S.E. 221, 222 (N.C. 1898) (holding that to require people to be wiser than their legislature in predicting the constitutionality of laws is "opposed to every idea of justice").

342. *See* Raley v. Ohio, 360 U.S. 423, 438 (1959) ("A State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them. Inexplicably contradictory commands in statutes ordaining criminal penalties have, in the same fashion, judicially been denied the force of criminal sanctions.") (internal citations omitted).

is on the government to clearly express what the law is.[343] A fundamental principle of construction in the criminal context is that "ambiguity should be resolved in favor of lenity."[344]

More controversially, in a time of political paralysis, change from the status quo may sometimes be salutary. Rather than lawlessness, policy entrepreneurship pursued by states or the president may be a way to prevent stagnation due to legislative gridlock or to reflect popular sentiments about which laws are priorities for directing limited resources toward vigorous enforcement and which are not. As for rebellious state legalization, such acts may even jolt federal lawmakers into action and call attention to fresh alternatives to problematic paradigms. For example, amid state debates over marijuana decriminalization, Congress considered reforming federal marijuana law to conform to the state legislation.[345] Lawmakers have also pushed President Obama to consider reclassifying marijuana from its current status as a Schedule I controlled substance.[346] One need not subscribe to the view that a little rebellion is a good thing, however, to agree that people and business should not be casualties of the culture wars.

B. Giving the Governed a Normative Choice of Law

Another potential objection may be the risk of undermining the moral force of the criminal law by allowing people to choose whether they wish to obey the criminal prohibition or rely on the legalization. As illustrated by the decriminalization conflicts discussed in Part I.B.1–3, the dilemmas arise from cultures and social norms at war. When people follow a particular regime, they thus make a normative choice of law—they are choosing a side. Objectors may be concerned that allowing people to choose sides poses risks of both undermining the criminal law's expressive force and allowing strategic gamesmanship to get around controlling law.

Criminal law expresses society's normative values.[347] By signaling societal values and norms and expressing moral condemnation for certain

343. *See, e.g.*, Rewis v. United States, 401 U.S. 808, 812 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.").

344. Bell v. United States, 349 U.S. 81, 83 (1955).

345. Ending Federal Marijuana Prohibition Act of 2011, H.R. 2306, 112th Cong. (1st Sess. 2011). *See also, e.g.*, Liz Navratil, *Bill Would Give States Right to Regulate Pot*, DENV. POST, June 24, 2011, at B3 (discussing bill).

346. Kovaleski, *supra* note 67, at A10.

347. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 362

conduct, law shapes behavior.[348] People who search for clever ways to get around the societal norms embedded in criminal law are viewed as morally culpable actors and in the context of traditional reasonable mistake-of-law doctrine, courts have not been hospitable to granting excuses.[349] Because of the utility of law's expressive function in shaping behavior and communicating norms, people may be concerned about diluting the message by granting excuses based on a contradictory legalization regime. If criminal law becomes a choice rather than a command, why should anyone obey or respect the norms?

Moreover, offering a normative choice of law also poses the risk of strategic gamesmanship to get around controlling criminal law that one finds inconvenient to one's self-interest. Criminal law binds people to act in accord with a vision of societal good despite their own vices, self-interest, or personal predilections. Evasion of the law is a recurring challenge in criminal law.[350] Why give lawbreakers more avenues to dodge the normative vision of moral and social good embedded in the criminal law?

Gamesmanship to get around the law is an endemic problem throughout criminal law,[351] but the scope of risk also is narrowed by only recognizing a reliance defense if there is affirmative acquiescence. Governmental actors charged with administering the criminal law are unlikely to acquiesce in a conflicting legalization regime unless there is a good reason to do so, such as the criminalization regime no longer reflecting societal norms. For political actors to take the risk of expressly acquiescing, the norm erosion has already occurred. Recognizing a reliability defense simply ensures that in such compelling circumstances people will not be the casualties of the contradictory commands sent by conflicting laws and governmental actors in a time of normative transition.

Moreover, like rebellious legislation that triggers dialogue and introduces fresh ideas, a little norm entrepreneurship may be a good thing. The norms embedded in old criminal laws may no longer match societal values.[352] Yet the laws linger on the books not because people agree but

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(1997); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 340 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2031–36 (1996).

348. Kahan, *supra* note 347, at 362–65; McAdams, *supra* note 347, at 340–44.

349. Kahan, *Ignorance of Law*, *supra* note 49, at 153.

350. *See, e.g.*, Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. REV. 611, 618–40 (2011).

351. *Id.*

352. For striking examples, see, e.g., Beale, *supra* note 70, at 750–52.

because decriminalization is hard to achieve because of the risk to legislators of looking soft on crime.[353] The enactment of competing legalization laws may show popular frustration with stagnation.[354]

Of course, rebellious decriminalization may just be a narrowly shared regional view or attempt to get around controlling criminal law rather than the sign of a major norm shift. In that case, however, it is unlikely that governmental actors accountable to a national constituency would acquiesce in the competing legalization scheme. The swift response to the firearms freedom acts discussed in Part I.B.2 offers an example of states whose vision is not widespread enough to be reflected in the ideology of nationally elected law enforcers. Recognizing a reliance defense only in cases of affirmative acquiescence by the governmental actors tasked with enforcing the criminal laws thus limits the risks of norm entrepreneurship.

CONCLUSION

This Article addressed an open question of major pressing import for people and businesses operating in the shadow of decriminalization conflicts. Can reliance on legalization laws or decrees ever be a defense when criminalization laws remain on the books? The question is of great import in the era of rebellious decriminalization by states and even by the president.[355] Just to take a few examples, legalization conflicts have arisen in the context of marijuana, guns, and immigration.[356] People, businesses, banks, and the lawyers who advise them are all in search of answers about the risks they face if they rely on the legalization.[357]

This Article addressed the question of whether reliance defenses may be available based on a decriminalization conflict. The issue already is being litigated in the courts and more cases are likely to follow.[358] Under the rule elucidated in the Article, a defense should be available where the governmental actors with the duty to administer the criminalization regime acquiesce in the competing legalization regime.[359] The recent and explicit

353. *See supra* note 70.

354. *See, e.g.*, discussion *supra* Part I.B.1.a (discussing growing critiques regarding the consequences and disparate impact of marijuana criminalization).

355. *See, e.g.*, sources cited *supra* notes 7, 9, 126, 158.

356. *See* discussion of examples *supra* Part I.B.1–3.

357. *See, e.g.*, USCIS FAQs, *supra* note 10 (discussing the frequently asked question about whether information revealed by people applying for deferred action can be used against the petitioner and the petitioner's family); Southall, *supra* note 1, at A18 (detailing search for answers by financial institutions, businesses, landlords, security providers, and other individuals and entities).

358. *See* cases cited *supra* note 16.

359. *See* discussion *supra* Part II.

acquiescence by the federal law enforcers in state marijuana legalization is used to illustrate this point.[360] In contrast, the swift federal reaction challenging the validity of firearms regulation nullification laws provides an example of where no reliance defense would be available. The difficult question of whether the sensitive information disclosed by DREAMers applying for executive enforcement clemency may later be used against them in a removal or prosecution is a test of the bounds of the principle.[361]

The Article concludes that conduct engaged in, or information disclosed, during the period of the legalization and acquiescence cannot be the basis for a criminal prosecution. A reliance defense should be available. Of course, political regime changes may lead to suspension of acquiescence. After such a change, there can no longer be reasonable reliance because controlling criminal law governs and there is no longer acquiescence by the enforcers of the controlling criminal regime upon which people may rely. Unless and until there is such a change, however, people and businesses should be able to rely on decriminalization laws and acquiescence in such decriminalization by the enforcers of the competing criminalization laws.

Allowing a reliance defense may rouse concerns of legitimizing lawlessness and encouraging strategic gamesmanship to get around controlling criminal law.[362] But recognizing a reliability defense only in the compelling circumstances where the official administering the criminal law actively acquiesces to the legalization scheme limits the force of such concerns. Rebellious legalization coupled with acquiescence is only likely to arise in times of cultural change where the criminalization on the books no longer reflects the norms on the ground. Otherwise the risks of acquiescence will be too great and voters will punish the political actors accordingly. In such times of legal, cultural, and normative transition, people and businesses should not be punished for the mixed messages sent by the legalization conflict and the acquiescence of governmental actors.

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360. *See* discussion *supra* Part II.B.
361. *See* discussion *supra* Part II.B.
362. *See supra* Part III.