THE PROPER FUTURE OF THE PLAIN SMELL DOCTRINE IN ARIZONA: Concerns After *State v. Sisco*

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In State v. Sisco*, the Arizona Supreme Court held that, after the enactment of the Arizona Medical Marijuana Act ("AMMA"), the smell of marijuana is still sufficient to establish probable cause unless a reasonable person would conclude that the marijuana use or possession is authorized by AMMA. The decision is problematic because it can contribute to disparate enforcement of marijuana laws, frustrates voter intent to protect the privacy of medical marijuana cardholders, and treats medical marijuana wholly differently from other traditional medicine. The Arizona Legislature should act and ensure that police have marijuana enforcement standards that encourage equity, privacy, and respect for the voters' intent to treat marijuana as medicine.*

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I. INTRODUCTION

High court decisions often result in unintended consequences, many of which courts either never contemplated or failed to fully appreciate. This Comment highlights some of the unintended consequences of the Arizona Supreme Court decision *State v. Sisco*[1] and suggests several legislative solutions.

The United States Supreme Court decision *Terry v. Ohio*[2] is possibly the most instructive case on unintended consequences of a high court decision.[3] Although *Terry* originally appeared to provide police with reasonable measures to investigate suspicious activity, time has shown that Chief Justice Earl Warren failed to strike the appropriate balance between police authority and individual liberty,[4] and consequently, *Terry* and its progeny[5] have unwittingly tipped the balance in favor of police authority while simultaneously eroding individual liberty.[6]

The "War on Drugs" is yet another example of unintended consequences. The Drug War was intended to combat the scourge of drug use affecting communities, but as a consequence, minorities—and especially African

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1. 373 P.3d 549 (Ariz. 2016).

2. 392 U.S. 1 (1968).

3. *See* Lewis R. Katz, Terry v. Ohio *at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 423–24 (2004); Erik Luna, *Hydraulic Pressures and Slight Deviations*, 2008–2009 CATO SUP. CT. REV. 133, 140 (2009); Gregory Howard Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of* Terry v. Ohio, 34 HOW. L.J. 567, 576–84 (1991).

4. Katz, *supra* note 3, at 423–24. Even despite the fact that Chief Justice Warren was actually trying to alleviate problems of police intervention with African Americans, *Terry* still has had significant problems. *See* Williams, *supra* note 3, at 571–74. Warren believed that unregulated police interrogation of minorities could be curbed by at least placing those interactions within the confines of Fourth Amendment protections. *Id.*

5. *See* Adams v. Williams, 407 U.S. 143, 148–49 (1972) (holding that an officer's actions were constitutional when he reached inside a driver's car window to grab a gun from his person only on grounds of reasonable suspicion); United States v. Mendenhall, 446 U.S. 544, 555 (1980) (holding that no seizure occurred for Fourth Amendment purposes when officers stopped to question an individual matching the "drug courier profile" and she consented to accompany the officers and submit to a search); Michigan v. Long, 463 U.S. 1032, 1034–35 (1983) (holding that the *Terry* doctrine extended to "frisks" of vehicles); United States v. Place, 462 U.S. 696, 697–98 (1983) (holding that the *Terry* doctrine allows for the temporary seizure of property); Maryland v. Buie, 494 U.S. 325, 327 (1990) (holding that police may conduct a protective sweep of the home incident to arrest, and may also conduct a sweep of additional areas of the house if the police have a reasonable and articulable suspicion that another person may be in the home); Alabama v. White, 496 U.S. 325, 326–27 (1990) (holding that an anonymous tip, corroborated by independent police investigation, is sufficient to justify an investigatory stop by police); Illinois v. Wardlow, 528 U.S. 119, 125–26 (2000) (holding that flight plus a high-crime area was sufficient to justify a lawful stop and frisk by police).

6. Katz, *supra* note 3, at 424.

American men—have been arrested and incarcerated for drug possession at a significantly higher rate than their White counterparts, despite equal usage rates.[7]

Knowledge of unequal racial treatment in drug enforcement should lead high courts to take special precautions[8] not to exacerbate this inequality because inequality can erode public confidence in criminal justice,[9] which can further erode public confidence in the democratic system as a whole. Courts should ensure the law's fair application because a court implicitly condoning racism and classism is disturbing to America's commitment to equality under the law.

The 2016 Arizona Supreme Court decision *State v. Sisco*[10] may easily result in such unintended consequences. In *Sisco*, the court assessed the plain smell doctrine in light of the legalization of medical marijuana.[11] For years, Arizona courts had held that the "plain smell" of marijuana alone was sufficient to establish probable cause due to marijuana's distinctive odor and illegal status.[12] This original plain smell doctrine actually appeared to reduce the potential for disparate enforcement of marijuana laws because the smell

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7. NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 50, 60–61, 94–97, 118–21 (2014) (ebook). *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 97–100 (2011); NAT'L RESEARCH COUNCIL, *supra*, at 33–128; THE HOUSE I LIVE IN (BBC 2012); 13TH (Netflix 2016).

8. These precautions include those such as Justice Stone's "exacting judicial scrutiny" for issues affecting "discrete and insular minorities" in his famous footnote four to *Carolene Products*. *See* United States v. Carolene Prods., Co., 304 U.S. 144, 152 n.4 (1938).

9. For a discussion on the effect of low public confidence of fairness and equity in the criminal justice system, see generally Lawrence W. Sherman, *Trust and Confidence in Criminal Justice*, 248 NAT'L INST. JUST. J., Mar. 2002, at 22, https://www.ncjrs.gov/pdffiles1/jr000248e.pdf [https://perma.cc/4THY-A8SV] ("As democracies become more materially successful and better educated, the perceived need for governance declines and expectations of government for appropriate conduct increase.").

10. 373 P.3d 549 (Ariz. 2016).

11. *Id.* at 551. It is important to note that the Arizona Supreme Court took issue with the concept of the "plain smell doctrine" for its imprecision. *See id.* at 553 ("The parties have used the phrase 'plain smell doctrine' to refer to the proposition that marijuana's odor can alone provide probable cause. This terminology, however, is imprecise, partly reflecting that court opinions have used the phrase 'plain smell' in different contexts."). Throughout this Comment, the author will be using the term "plain smell doctrine" to refer to the concept that, because of marijuana's distinctive odor and past inherent illegality, the smell of marijuana alone established probable cause.

12. State v. Baggett, 306 P.3d 81, 85 (Ariz. Ct. App. 2013) ("To invoke the plain view/smell exception to the warrant requirement for a search, a police officer must lawfully be in a position to view/smell the object, its incriminating character must be immediately apparent, and the officer must have a lawful right of access to the object."); *see also* Minnesota v. Dickerson, 508 U.S. 366, 373–77 (1993); State v. Morrow, 625 P.2d 898, 902 (Ariz. 1981).

of marijuana automatically resulted in a finding of probable cause.[13] But in *State v. Sisco*, the court held that despite the enactment of the Arizona Medical Marijuana Act ("AMMA"),[14] the smell of marijuana is still sufficient to establish probable cause unless a reasonable person would conclude that the marijuana possession or use is authorized by AMMA.[15] As a result of this decision, *Sisco* could continue disparate enforcement of marijuana laws against minorities and the poor.

Under the original plain smell doctrine, there was no weighing—as is now required by *Sisco*—of the likelihood that a suspected individual was a medical marijuana cardholder, and accordingly, individual biases of a given police officer could have less effect on probable cause determinations. The new plain smell doctrine under *Sisco*, on the other hand, includes a reasonableness component—probable cause is dispelled if a reasonable person would conclude that the marijuana use is authorized by AMMA.[16] And because of this reasonableness component, Arizona's new plain smell doctrine may contribute to disparate drug enforcement and legitimize stereotyping. Is it reasonable for a police officer to conclude that the smell of marijuana emanating from an upscale nursing home in north Scottsdale indicates legal medical marijuana use? What about the smell of marijuana emanating from a high-crime, rundown apartment complex in central Phoenix? Might the officer be more likely to affirmatively seek information indicating legal marijuana use at the nursing home than he would be at the rundown apartment complex? These concerns exist after *Sisco* and are problematic to America's commitment to equality under the law.

Furthermore, *Sisco* is problematic because it frustrates voter intent by failing to protect cardholder privacy and treating medical marijuana as a second-class medicine.

To avoid these consequences, the Arizona Legislature should act. The Fourth Amendment only creates a floor; it does not create a ceiling. The Legislature can require more than the smell of marijuana to establish probable cause, minimize the weight given to marijuana smell in probable cause determinations, or even eliminate it all together, especially with the real possibility that the future of marijuana policy is recreational legalization. By implementing these increased protections, the Arizona Legislature could take

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13. *See* Reuben Goetzl, *Common Scents: The Intersection of the "Plain Smell" and "Common Enterprise" Doctrines*, 50 AM. CRIM. L. REV. 607, 607–08 (2013) (defining plain smell).

14. Arizona Medical Marijuana Act, ARIZ. REV. STAT. ANN. §§ 36-2801 to -2819 (2019).

15. *Sisco*, 373 P.3d at 551.

16. *Id.*

a positive stand for egalitarian law enforcement practices and limited government intervention.

Part II of this Comment begins by analyzing the history of drug laws and looks at research on implicit bias. The Comment then discusses AMMA and concludes with a discussion *State v. Sisco*.

Part III of this Comment begins by analyzing the unintended consequences of *Sisco*. It first addresses the potential for disparate enforcement of marijuana laws against the poor and minorities. Next, the analysis addresses the privacy implications of *Sisco* and then asserts that *Sisco* has made medical marijuana a "second class" medicine compared to other traditional forms of medical therapy. Finally, Part III concludes with legislative solutions and the proper future of the plain smell doctrine. The Comment concludes with Part IV.

II. BACKGROUND

The background section begins by analyzing the history of the War on Drugs and the movement toward harsh punishment for drug offenses. It then looks at disparities in drug enforcement and implicit bias. It concludes by discussing AMMA and the Arizona Supreme Court decision *State v. Sisco*.

A. The Drug War and Marijuana Enforcement

After previously emphasizing treatment, compassion, and rehabilitation, President Nixon first declared the War on Drugs in 1971.[17] New York State took the lead, enacting some of the toughest drug laws in the country, and other states followed suit, enacting similar lengthy sentences for drug offenses.[18] Leading African American activists were among those calling for stricter sentences and for increased policing in high-crime areas; they saw tougher enforcement as a means to address the scourge of drug use in their neighborhoods.[19]

The Reagan administration took the Drug War even further,[20] and public opinion polls showed support for these policies. In 1986, only two percent of the population thought drug use was one of the biggest problems facing the

17. NAT'L RESEARCH COUNCIL, *supra* note 7, at 119.
18. *Id.*
19. *Id.*
20. *Id.* at 119–20.

country.[21] Two years later, the majority of people thought drug use was one of the nation's biggest problems.[22]

The shift in public sentiment coincided with congressional enactment of harsh federal sentencing guidelines, which has resulted in unprecedented rates of imprisonment.[23] By the year 1997, "[p]eople convicted of drug offenses grew to make up about one-fifth of all state prison inmates and nearly two-thirds of all federal inmates,"[24] and since the Drug War began in the early 1970s, the overall United States prison population has more than quadrupled.[25] The prison population, including federal and state inmates and those in local jails, is over two million, and another four million individuals are on probation.[26]

Marijuana offenses make up the vast majority of drug crimes. In 2014, police arrested an individual for marijuana possession every fifty-one seconds,[27] and in 2015, arrests for possessing small amounts of marijuana outnumbered arrests for *all* violent crimes combined.[28]

These arrests not only dramatically overwhelm the entire court system, but they exacerbate inequality as well.[29] Despite near equal usage rates, African Americans are more than four times as likely to be arrested for marijuana possession as Whites,[30] and in states with the worst disparities, the ratio is six to one.[31] In addition, although some research does suggest higher usage rates

21. *Id.* at 120.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 1.
26. *Id.* at 33, 40.
27. Nick Wing, *Police Arrested Someone for Weed Possession Every 51 Seconds in 2014*, HUFFINGTON POST (Sept. 28, 2015, 6:34 PM), http://www.huffingtonpost.com/entry/marijuana-arrests-2014_us_560978a7e4b0768126fe6506 [https://perma.cc/75LB-2L6J].
28. Timothy Williams, *Marijuana Arrests Outnumber Those for Violent Crimes, Study Finds*, N.Y. TIMES (Oct. 12, 2016), http://www.nytimes.com/2016/10/13/us/marijuana-arrests.html?_r=0 [https://perma.cc/3RDJ-F8A4].
29. *Id.*
30. *Id.*
31. AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE 9 (2003), https://www.aclu.org/report/report-war-marijuana-black-and-white?redirect=criminal-law-reform/war-marijuana-black-and-white [https://perma.cc/DBL9-HVZA].

among the poor,[32] living in a poor neighborhood can dramatically increase an individual's chances of being arrested for a drug or marijuana offense.[33]

B. Implicit Bias

Many individuals have spoken recently about the role of implicit bias in the criminal justice system,[34] and Justice Anthony Kennedy even recently mentioned "unconscious prejudices" in a Supreme Court decision.[35] Implicit bias refers to associations based on "relatively unconscious and relatively automatic features of prejudiced judgment and social behavior."[36] These associations form from the direct and indirect messages received throughout one's lifetime and typically form about groups different from one's self.[37] Over time, this pairing between certain characteristics and specific groups leads to automatic and unconscious pairing of those traits with those groups, even if those associations cannot be factually supported.

For example, in the United States there is a strong implicit association between African Americans and crime.[38] The news often portrays African Americans as "lawbreakers" and depicts them in criminal roles more often than in positive roles.[39] These messages from the media lead to automatic and unconscious pairing between African Americans and the traits of criminality

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32. W. Gardner Selby, *Joe Deshotel Says There Is No Evidence Showing Poor People Use Drugs More Frequently than Members of Other Socio-Economic Groups*, POLITIFACT (Nov. 26, 2012, 6:00 AM), https://www.politifact.com/texas/statements/2012/nov/26/joseph-joe-deshotel/joe-deshotel-says-there-no-evidence-showing-poor-p/ [https://perma.cc/K3F8-N96Z].

33. German Lopez, *These Maps Show the War on Drugs Is Mostly Fought in Poor Neighborhoods*, VOX (Apr. 16, 2015, 2:10 PM), https://www.vox.com/2015/4/16/8431283/drug-war-poverty [https://perma.cc/P6T2-NXHL].

34. *E.g.*, Aaron Blake, *The First Trump-Clinton Presidential Debate Transcript, Annotated*, WASH. POST (Sept. 26, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/09/26/the-first-trump-clinton-presidential-debate-transcript-annotated/ [https://perma.cc/CM4F-XU6P]. Hillary Clinton addressed the issue after the topic of stop-and-frisk came up at a 2016 Presidential Debate. *Id.* ("Lester, I think implicit bias is a problem for everyone, not just police.").

35. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2512 (2015).

36. Michael Brownstein, *Implicit Bias*, STAN. ENCYCLOPEDIA PHIL. (Feb. 26, 2015), http://plato.stanford.edu/entries/implicit-bias/ [https://perma.cc/83RH-DA6L].

37. *Id.*

38. CHERYL STAATS ET AL., KIRWAN INST., STATE OF SCIENCE: IMPLICIT BIAS REVIEW 14 (4th ed. 2016). This is not to say that the association is incorrect or without any factual support. All that an implicit association means is that individuals associate a certain type of activity or trait with a particular group.

39. Robert M. Entman & Kimberly A. Gross, *Race to Judgment: Stereotyping Media and Criminal Defendants*, 71 LAW & CONTEMP. PROBS. 93, 97–99 (2008).

and guilt,[40] an association that ultimately may have contributed to the racial disparities seen in the American criminal justice system today.[41]

C. Arizona Medical Marijuana Act

AMMA legalized the medicinal use of marijuana for individuals with qualifying medical conditions.[42] This Comment only discusses sections of the Act that apply to possession and use of marijuana.

Under AMMA, qualifying patients may possess 2.5 ounces of usable marijuana.[43] To qualify as a patient under AMMA, a physician must have diagnosed the individual with a "debilitating medical condition."[44] Multiple medical conditions qualify, including: cancer, HIV, AIDS, ALS, Alzheimer's, or any other disease/medical condition that produces side effects such as chronic pain, nausea, seizures, and muscle spasms.[45]

To apply for a registration identification card, a qualifying patient must submit three items to the department: (1) A physician-issued written certification; (2) an application fee; and (3) an application, including information about the qualifying patient and his or her physician.[46] The entire process typically costs $300: Meeting with the physician costs around $150 and is not covered by insurance, and state fees range from $75 to $100.[47]

Throughout AMMA, multiple portions stress the importance of confidentiality. Any information obtained and "records kept by the department for purposes of administering this chapter are confidential . . . and not subject to disclosure to any individual or public or private entity, except as necessary for authorized employees of the

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40. *See id.* at 102. The Stanford Encyclopedia of Philosophy describes a classic example of implicit bias: Frank may believe that men and women should receive equal treatment in the workplace. Brownstein, *supra* note 36. Even though Frank holds this explicit egalitarian view, he may still hold implicit, unconscious associations about women and the home. *Id.* As a result of that implicit association, Frank may demonstrate overtly biased behavior toward women: He may be less trusting of positive feedback given by female workers and he also may be less likely to hire qualified women. *Id.*

41. *See* Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 CRIME & JUST. 273, 273–93 (2010).

42. Arizona Medical Marijuana Act, ARIZ. REV. STAT. ANN. §§ 36-2801 to 36-2819 (2019).

43. *Id.* § 36-2801(1)(a).

44. *Id.* § 36-2801(13).

45. *Id.* § 36-2801(3)(a)–(b).

46. *Id.* § 36-2804.02(A)(1)–(3).

47. Chitral Hays, *How to Get a Medical Marijuana Card in Arizona in 4 Easy Steps*, PHX. NEW TIMES (Sept. 10, 2013, 7:00 AM), http://www.phoenixnewtimes.com/arts/how-to-get-a-medical-marijuana-card-in-arizona-in-4-easy-steps-6583402 [https://perma.cc/9YBD-3RZJ].

department to perform official duties of the department."[48] Most importantly, the names of any cardholders must remain confidential unless otherwise specifically provided for by the chapter.[49] Dispensing information identifies cardholders only by their identification numbers and not by any other personally identifying information, such as name or birthday.

AMMA also protects medical marijuana cardholders from being denied rights based on their status as a cardholder and presumes legal use for medical cardholders. "A registered qualifying patient . . . is not subject to arrest, prosecution or penalty in any manner, or *denial of any right or privilege*, including any civil penalty or disciplinary action by a court . . . ."[50] The law presumes that a qualifying patient is lawfully using marijuana,[51] a presumption that exists if the cardholder: (1) possesses the registry identification card; and (2) possesses an amount of marijuana that does not exceed the allowable amount under AMMA.[52] Additionally, an individual cannot be subject to arrest, prosecution, penalty, or denied any right or privilege for simply being in the presence of medicinal marijuana use.[53]

Currently, there are over 197,000 qualifying patients under AMMA.[54] The vast majority of qualifying patients—eighty-eight percent—lists "chronic pain" as their medical condition.[55] Patients list other medical conditions as well, such as cancer, glaucoma, Post-Traumatic Stress Disorder, and seizures.[56] The largest patient age group is eighteen to thirty years old, encompassing one-fourth of all qualifying patients, followed next by individuals ages thirty-one to forty, encompassing one-fifth of all qualifying patients.[57] Over one-fifth of qualifying patients are ages sixty and older.[58]

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48. ARIZ. REV. STAT. ANN. § 36-2810(A) (2019).
49. *Id.* § 36-2810(A)(3).
50. *Id.* § 36-2811(B) (emphasis added).
51. *Id.* § 36-2811(A).
52. *Id.* § 36-2811(A)(1)(a)–(b).
53. *Id.* § 36-2811(D)(2).
54. ARIZ. DEP'T OF HEALTH SERVS., ARIZONA MEDICAL MARIJUANA PROGRAM: APRIL 2019 MONTHLY REPORT (2019) [hereinafter ARIZ. DEPT., Apr. 2019], https://www.azdhs.gov/documents/licensing/medical-marijuana/reports/2019/2019-apr-monthly-report.pdf [https://perma.cc/K55F-2YTJ].
55. *Id.* at 3 tbl.4.
56. *Id.*
57. *Id.* at 2 tbl.3.
58. *Id.*

Characteristics of Active Cardholders who are Qualified Patients	Totals (N =197,025)	Percent Total
Patient Age-groups		
Less than 18 years	188	0.10%
18 to 30 years	47,826	24.27%
31 to 40 years	41,281	20.95%
41 to 50 years	31,228	15.85%
51 to 60 years	31,318	15.90%
61 to 70 years	32,083	16.28%
71 to 80 years	11,033	5.60%
81 and older	2,068	1.05%
Patient Gender		
Male	116,985	59.38%
Female	80,040	40.62%

Figure 1. Characteristics of Active Cardholders[59]

Patient medical condition profile of Active Cardholders¶	Totals	Percent Total
Alzheimer's	100	0.05%
Cachexia	122	0.06%
Cancer	4,094	2.08%
Chronic Pain	173,657	88.14%
Crohn's Disease	650	0.33%
Glaucoma	1,113	0.56%
Hepatitis C	736	0.37%
HIV/AIDS	690	0.35%
Muscle Spasms	911	0.46%
Nausea	793	0.40%
Post-Traumatic Stress Disorder (PTSD)	2,402	1.22%
Sclerosis	31	0.02%
Seizures	1,207	0.61%
Two Or More Conditions	10,519	5.34%
TOTAL	**197,025**	**100.00%**

Figure 2. Qualifying Patient Medical Condition of Active Cardholders[60]

D. State v. Sisco

In the 2016 Arizona Supreme Court decision *State v. Sisco*, the court held that after the passage of AMMA, the plain smell of marijuana is still sufficient to establish probable cause unless other circumstances would suggest to a reasonable person that the marijuana use or possession is authorized by AMMA.[61]

In *Sisco*, Tucson police received a tip of a strong smell of marijuana emanating from a storage warehouse.[62] Police conducted a search of the entire

59. *Id.*
60. *Id.* at 3 tbl.4.
61. State v. Sisco, 373 P.3d 549, 551 (Ariz. 2016).
62. *Id.*

warehouse and determined that the marijuana was inside Unit 18.[63] The police applied for and were granted a search warrant of Unit 18, but upon a search of it, discovered no marijuana inside.[64] From inside Unit 18, the officers determined that the marijuana was in the adjacent storage Unit 20, and they applied for and were granted an amended warrant.[65] Upon entering Unit 20, the police officers discovered marijuana plants.[66]

Ronald Sisco rented Unit 20, and prosecutors charged him with multiple drug counts.[67] Sisco sought to suppress the evidence from the search, arguing that the mere smell of marijuana was insufficient to establish probable cause after AMMA.[68] The trial court denied the motion.[69] Sisco was found guilty on all counts and appealed.[70]

1. The Court of Appeals Decision

In a split decision, the Arizona Court of Appeals held that post-AMMA, the smell of marijuana alone is insufficient to establish probable cause unless "coupled with additional, commonly evident facts or contextual information suggesting a marijuana-related offense."[71] The court found that in Sisco's case, no such information was present, and the trial court erred in denying his suppression motion.[72]

The court discussed probable cause generally. To establish probable cause, courts must examine whether there is a "fair probability" of criminal activity,[73] and probable cause exists when "a reasonably prudent person, based upon the facts known by the officer, would be justified in concluding that the items sought are connected with criminal activity and that they would be found at the place to be searched."[74] Although probable cause is not a precise formula, the court emphasized that standards do exist. Case law has clearly distinguished between circumstances that suggest criminal activity has likely occurred (probable cause) with circumstances that only provide a

63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. State v. Sisco, 359 P.3d 1, 4 (Ariz. Ct. App. 2015).
72. *Id.*
73. *Id.* at 5 (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)).
74. *Id.* (quoting State v. Carter, 700 P.2d 488, 497 (Ariz. 1985)).

mere suspicion of criminal activity that requires additional investigation (reasonable suspicion).[75]

The court noted that before AMMA, Arizona law completely criminalized possession and use of marijuana, and because of the distinctive odor of marijuana and its inherent illegality, a line of cases held that the plain smell of marijuana provided probable cause to believe that criminal activity was occurring.[76] But AMMA upended the decades of case law on this issue and granted cardholders broad statutory protections.[77] Under *Illinois v. Gates*,[78] a seminal case on probable cause, courts must consider the "degree of suspicion" associated with the activity in question.[79] And in light of AMMA, the court reasoned that the degree of suspicion associated with the smell of marijuana was severely reduced and that this conclusion was not altered simply because marijuana had a long history of illegality.[80] The court emphasized that law enforcement officers attempting to demonstrate probable cause must be able to make a particularized showing that the circumstances are suggestive of criminal activity, not that there is just some mere possibility.[81]

Statutory analysis of AMMA further bolstered the court's conclusion that the smell of marijuana alone is insufficient to establish probable cause.[82] AMMA emphasizes the need to maintain the confidentiality of medical marijuana cardholders,[83] and the court noted that a "'registered qualifying patient . . . *is not subject to* arrest, prosecution or penalty in any manner, or *denial of any right or privilege*' for the use and possession of an allowable amount of marijuana under the AMMA."[84] One highly regarded right protected by the Arizona Constitution is to "not be disturbed in one's private affairs."[85] The court reasoned that all of these provisions taken together emphasize the intention of Arizona voters to preserve the confidentiality of medical marijuana cardholders and not subject them to diminished privacy.[86]

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75. *Id.* at 5–6.
76. *Id.* at 7.
77. *Id.* at 9.
78. 462 U.S. 213 (1983).
79. *Sisco*, 359 P.3d at 9 (quoting *Gates*, 462 U.S. at 243 n.13).
80. *Id.*
81. *Id.*
82. *Id.* at 13.
83. *Id.* at 14; *see* ARIZ. REV. STAT. ANN. §§ 36-2810, -2801(16), -2807(A)–(B), -2807(C)(1) (2019).
84. *Sisco*, 359 P.3d at 13 (quoting ARIZ. REV. STAT. ANN. § 36-2811(B)(1) (2019) (emphasis added)).
85. *Id.*
86. *Id.* at 14.

The court reversed the trial court's denial of Sisco's motion to suppress and vacated Sisco's convictions.[87]

2. Arizona Supreme Court Reverses

The Arizona Supreme Court reversed the Arizona Court of Appeals and held that the smell of marijuana is still sufficient to establish probable cause post-AMMA, unless additional circumstances suggest to a reasonable person that the marijuana use or possession is authorized by AMMA.[88]

AMMA made the possession and use of marijuana legal for medicinal purposes.[89] Citing *Illinois v. Gates*, the court noted that the innocence or guilt of a particular activity is not the turning point of a probable cause determination, but rather the "degree of suspicion" attached to a particular activity.[90] And even with the passage of AMMA, a reasonable person would still conclude that the smell of marijuana suggests a fair probability of criminal activity because "[t]his conclusion reflects that AMMA did not decriminalize the possession or use of marijuana generally."[91] Instead, the court reasoned, AMMA legalized marijuana in very limited circumstances.[92]

The court emphasized that the passage of AMMA did have some effect on probable cause determinations.[93] A police officer "cannot ignore indicia of AMMA-compliant marijuana possession or use that could dispel probable cause," and any exculpatory facts must be included in the affidavit completed in support of a search warrant.[94] The court noted that the presentation of a medical marijuana card to police officers could dispel the probable cause resulting from the smell of marijuana but that even presentation of a medical

87. *Id.* at 18.

88. State v. Sisco, 373 P.3d 549, 555 (Ariz. 2016). The Arizona Supreme Court released the decision *State v. Cheatham* as a concurrent opinion to *Sisco*. 375 P.3d 66, 67 (2016). In *Cheatham*, the court held that the smell of marijuana emanating from a vehicle is sufficient to establish probable cause to believe the vehicle contains contraband or criminal evidence, and the automobile exception allows for a subsequent search of that vehicle. *Id.* Unlike the *Sisco* decision, the court did not provide for an exception to this establishment of probable cause when circumstances exist to suggest that the individual in the vehicle is a registered medical marijuana cardholder. *See id.*

89. *Sisco*, 373 P.3d at 553.

90. *Id.* (citing Illinois v. Gates, 462 U.S. 213, 243 n.13 (1983)).

91. *Id.*

92. *Id.*

93. *Id.* at 554.

94. *Id.*

marijuana card could still be insufficient if other facts suggested the marijuana possession was not pursuant to AMMA.[95]

The Arizona Supreme Court viewed AMMA as "not broadly alter[ing] the legal status of marijuana in Arizona but instead specif[ying] particular rights, immunities, and obligations for qualifying patients."[96] The Arizona Supreme Court found that the Arizona Court of Appeals misinterpreted AMMA as providing broad immunity to cardholders. Instead, the supreme court viewed this language as indicating that AMMA cardholders enjoy no additional protections beyond that which the statute provides.[97]

The court concluded with these remarks:

> Given Arizona's general prohibition against marijuana possession and use, it is reasonable for officers to conclude that criminal activity is occurring when they see or smell marijuana, thereby satisfying probable cause. In this respect, registered qualifying patients are not denied Fourth Amendment rights or privileges based on their medical marijuana use; they are simply treated like the broader public. Moreover, as we have explained, probable cause can be dispelled by indicia of AMMA-compliant marijuana possession and use. Under the standard we adopt, registered qualifying patients are not denied Fourth Amendment rights or privileges, nor are they "subject to arrest, prosecution or penalty in any manner," for their medical use of marijuana.[98]

The supreme court affirmed the trial court's ruling denying Sisco's motion to suppress and vacated the decision of the court of appeals.[99]

3. Distinguishing Between the Standards in the *Sisco* Decisions

The core difference between the Arizona Court of Appeals decision and the Arizona Supreme Court decision is that the court of appeals held that the smell of marijuana alone is insufficient to establish probable cause[100] whereas the supreme court held that the smell of marijuana alone is sufficient to establish probable cause.[101] The Arizona Court of Appeals concluded that after AMMA, the "odor-plus"[102] standard applies to the plain smell of

95. *Id.*
96. *Id.*
97. *Id.* at 554–55.
98. *Id.* at 555 (quoting ARIZ. REV. STAT. ANN. § 36-2811 (2019)).
99. *Id.* at 556.
100. *See* State v. Sisco, 359 P.3d 1, 4 (Ariz. Ct. App. 2015).
101. *See Sisco*, 373 P.3d at 555.
102. *Sisco*, 359 P.3d at 10.

marijuana: marijuana odor *plus* additional circumstances indicative of criminal activity establish probable cause.[103] Conversely, the Arizona Supreme Court concluded that after AMMA, the "odor unless"[104] standard applies to the plain smell of marijuana: marijuana odor alone establishes probable *unless* additional circumstances suggest that the marijuana is possessed legally.[105]

III. ANALYSIS

This Comment argues that *Sisco* could continue disparate enforcement of marijuana laws and frustrates voter intent to protect the privacy of medical marijuana cardholders and treat marijuana as medicine. The Arizona Legislature can act and pass legislation aimed at curbing these unintended consequences.

A. Disparate Enforcement

Sisco could contribute to disparate enforcement of marijuana laws.[106] Imagine two individuals: one lives in a rundown apartment building in a high-crime neighborhood with a large minority population; the other lives in an upscale nursing home in north Scottsdale with a large White population. Both individuals are illegally smoking marijuana in their homes and are not legal medical marijuana cardholders. One day, a police officer finds himself conducting an unrelated investigation at a neighboring unit at the rundown apartment complex; the next day, he similarly finds himself at the nursing home conducting an unrelated investigation at a neighboring unit.

On the first day, the officer smells marijuana emanating from the unit at the apartment complex; on the second day, the officer smells marijuana emanating from the unit at the nursing home. As the officer tries to determine whether a reasonable person would conclude that the individual in the rundown apartment building is a legal medical marijuana cardholder or whether the individual in the nursing home is a legal medical marijuana cardholder, on what situational factors will the officer rely? *Sisco* failed to provide the answer, and accordingly, the biases and stereotypes of an individual officer may fill in the gaps.

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103. *Id.* at 4.
104. *Sisco*, 373 P.3d at 555.
105. *Id.*
106. *See* NAT'L RESEARCH COUNCIL, *supra* note 7.

Maybe that police officer, just like many other Americans, implicitly believes that African-Americans and the poor are more likely to commit crime.[107] The officer might also know that obtaining a medical marijuana card is expensive, costing upwards of $300,[108] and that those without resources may not be able to afford a card. Based on his career in law enforcement, he also knows that many minorities and the poor live at the rundown apartment complex he is investigating. Maybe that same officer also implicitly believes that Whites and the affluent are less likely to commit crime and the officer also knows that many White, upper-class individuals live at the nursing home he is investigating. Might that officer then assume that the marijuana smell emanating from the rundown apartment complex indicates to a reasonable person that criminal activity is occurring, but then assume the opposite about the marijuana smell emanating from the nursing home? The officer may thus ignore the marijuana smell in the nursing home, concluding that a reasonable person would believe a legal medical marijuana cardholder possessed the marijuana, but the officer may then go on to investigate and arrest the individual in the rundown apartment building. And thus, disparate drug enforcement against minorities and the poor continues.

These predictions are not meant in any way to vilify or admonish law enforcement. They merely acknowledge that given the current research on implicit bias, coupled with the strong evidence that minorities are arrested at significantly higher rates than their White counterparts for marijuana use, these are the expected results based on the current state of the case law. And these concerns present an imperative for the Arizona Legislature to act.

Sisco may also contribute to disparate enforcement of marijuana laws based on an individual's living conditions, which can often overlap with socioeconomic status. The smell of marijuana is readily observable in residences such as apartments because the units are concentrated closely together. Individuals living in apartment complexes may thus find themselves subject to higher rates of residence searches. As in the example provided above, police often find themselves at one apartment unit for an entirely different reason, smell marijuana emanating from another unit, and then conduct a search of that unit. Individuals living in large houses where smells are better contained, on the other hand, will likely never be disturbed by the police for their marijuana smoking, be it legal or not. Private homes typically have significant distance between neighboring homes where neither the neighbor nor the police officer next door would be close enough to smell.

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107. *See* STAATS ET AL., *supra* note 38; Robert M. Entman & Kimberly A. Gross, *Race to Judgment: Stereotyping Media and Criminal Defendants*, 71 LAW & CONTEMP. PROBS. 93, 97–99 (2008).

108. *See* Hays, *supra* note 47.

Thus, individuals smoking marijuana illegally in apartment complexes will find themselves subject to searches at a higher rate than individuals living in large homes.

Furthermore, the entire medical marijuana scheme raises major equity concerns. The vast majority of medical marijuana users are young adults and those suffering from "chronic pain," with eighty-seven percent of qualifying patients listing chronic pain as their medical condition.[109] Questions have been raised regarding the legitimacy of symptoms medical marijuana users claim to have.[110] If some individuals seeking a medical marijuana card are motivated by a desire to smoke marijuana with impunity, they may devise a plan that involves the exaggeration of symptoms, and the potential for disparate enforcement thus becomes even more significant. Individuals with the resources and knowledge to obtain a medical marijuana card even though they truly lack any medical symptoms are protected from prosecution. Given the money, planning, and time required to procure a medical marijuana card under false pretenses, individuals who do not pursue such a plan may be more likely to come from poor communities. Since money and time are always factors to be considered, economically disadvantaged individuals may have less opportunity to protect themselves from prosecution via the same mechanism utilized by those of higher socioeconomic status. As a result, the entire medical marijuana scheme as it exists could be further contributing to unequal treatment under the law.

B. Privacy Concerns

Arizona voters decriminalized marijuana for medical use, and in doing so, they intended to protect the privacy of medical marijuana users. *Sisco* directly contravenes this intention. Multiple sections of AMMA specifically address protecting cardholders' confidentiality,[111] but after *Sisco*, law enforcement can continue to search residences and vehicles upon the mere smell of marijuana.

Legal medical marijuana cardholders will have their privacy rights violated because of the *Sisco* decision. It is true that probable cause determinations will not always be correct—it only matters that the mistakes

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109. ARIZ. DEPT., Apr. 2019, *supra* note 54, at 2–3.

110. *See, e.g.*, Craig Reinarman et al., *Who Are Medical Marijuana Patients? Population Characteristics from Nine California Assessment Clinics*, 43 J. PSYCHOACTIVE DRUGS 128, 132 (2011), ("While it is true that the great majority of our respondents had used marijuana recreationally . . . over two-fifths . . . reported that they had not been using it recreationally prior to trying it for medicinal purposes.").

111. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2810 (2019).

be made on par with the mistakes made by a reasonable person. The question then becomes: Is it reasonable to conclude after AMMA that the smell of marijuana indicates the likely presence of criminal activity? According to statistical analysis and the potential error rate for determining which residence contains marijuana, the answer to that question is likely no.

In 2015, when there were less than 100,000 qualifying patients under AMMA, approximately thirty-five to forty percent of marijuana smoking was legal.[112] This number by itself is significant, and indicates that almost half the time, the smell of marijuana is from legal medicinal use. Consequently, when police smell marijuana emanating from a residence and receive a warrant to search the residence, there is a considerable chance that the police will be disturbing the privacy of a legal medical marijuana cardholder.

Moreover, the sense of smell is inherently subjective and imprecise,[113] and the figure did not consider that smell naturally pervades enclosed spaces, like apartments, such that police may search innocent people thinking that the smell emanated from their real property. Thus, even with the significant thirty-five to forty percent legal usage rate—which now is likely dramatically higher with over 197,000 qualifying AMMA patients as of April 2019—the police may end up accidentally searching a residence where nobody at all is using marijuana. This was the case in *Sisco*. Police applied for a search warrant to Unit 18, discovered that it did not contain marijuana, and then amended their search warrant to Unit 20. Therefore, not only can legal medical marijuana cardholders be routinely subject to privacy intrusions after *Sisco*, but wholly innocent individuals can be as well.

The court in *Sisco* did discuss how probable cause determinations can always disturb the innocent.[114] But in its consideration of the "innocent," however, the court only factored legal medical marijuana users into the equation. The court failed to consider the normal error rates of every search warrant. As a result, there is a significant chance that police will disturb both

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112. *See* Matthew P. Hoxsie, Note, *Probable Cause: Is the "Plain-Smell" Doctrine Still Valid in Arizona After the AMMA?*, 57 ARIZ. L. REV. 1139, 1156–57 (2015).

113. *See* Richard L. Doty et al., *Marijuana Odor Perception: Studies Modeled from Probable Cause Cases*, 28 LAW & HUM. BEHAV. 223, 223–24, 232 (2004); Olivia Khazam, *It's Right Under Your Nose! The Trial of the Senses and the "Plain Smell" Doctrine*, CTR. FOR SENSORY STUD. (Apr. 23, 2014), http://www.centreforsensorystudies.org/occasional-papers/its-right-under-your-nose-the-trial-of-the-senses-and-the-plain-smell-doctrine/ [https://perma.cc/AA3A-2SBK] (asserting that smell has been traditionally characterized as the lowest on the "hierarchy of the senses" since Ancient Greece); *see also* Carl M. Philpott et al., *Comparison of Subjective Perception with Objective Measurement of Olfaction*, 134 OTOLARYNGOLOGY–HEAD & NECK SURGERY 488, 488 (2006) (concluding that individuals' self-assessment of their olfactory abilities have no correlation with their actual olfactory abilities).

114. *See* State v. Sisco, 373 P.3d 549, 555 (Ariz. 2016); State v. Sisco, 359 P.3d 1, 6 (Ariz. Ct. App. 2015).

legal medical marijuana cardholders and non-marijuana users, just as they did to the owner of Unit 18 in *Sisco*.

C. The Treatment of Medical Marijuana as a Second-Class Medicine

It is possible that a belief about the validity of marijuana as medicine has relegated medical marijuana to the status of "second-class" medicine. Marijuana is a "second-class" medicine because its use can subject medical marijuana users to governmental intrusion. Individuals prescribed other medicine would likely never face a privacy invasion into their own home. Patients can use Prozac to treat their depression or Singulair to treat their asthma and be certain that law enforcement will not obtain a search warrant as a result. But individuals using marijuana to treat their medical conditions lack the assurance that they will be free from governmental intrusion.

Regardless of lawmakers' or judges' personal beliefs about the science of medical marijuana or the legitimacy of the claimed medical conditions of qualifying patients, Arizona citizens voted to classify marijuana as medicine and ensure that individuals with qualifying medical conditions could use marijuana to treat their symptoms.[115] Despite this vote and specific provisions of AMMA that protect the rights of medical marijuana cardholders, AMMA patients are subject to privacy intrusions to which no other medical patients are subject. They are subject to these intrusions because, according to the majority in *Sisco*, marijuana use is illegal when not confined to the strict provisions of AMMA.[116] But many prescription medicines have high rates of abuse and individuals are known to illegally possess and procure these medicines. The opiate epidemic is especially instructive on this issue.

The opiate epidemic has swept across the United States in recent years.[117] The number of opiate prescriptions filled each year has grown exponentially.[118] Health organizations and policymakers have begun

115. *See* ARIZ. REV. STAT. ANN. § 36-2801(3)(a)–(b) (2019).

116. *See Sisco*, 373 P.3d at 554–55.

117. *See Opioids*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (Feb. 23, 2016), https://www.samhsa.gov/atod/opioids [https://perma.cc/J64J-MX7K] [hereinafter SAMHSA *Opioids*] ("4.3 million Americans engaged in the non-medical use of prescription painkillers in the last month.").

118. *See America's Addiction to Opioids: Heroin and Prescription Drug Abuse Before the S. Caucus on Int'l Narcotics Control*, 113th Cong. 3 (2014) (statement of Nora D. Volkow, Director, National Inst. on Drug Abuse) ("The number of prescriptions for opioids . . . have escalated from around 76 million in 1991 to nearly 207 million in 2013 . . . .").

addressing this issue and are working to combat opiate addiction.[119] As a result of this epidemic, large swaths of the public illegally use and possess opiates.[120] They do not follow the strict provisions for legally possessing an opiate prescription.

With the substantial percentage of individuals illegally possessing opiates, combined with the reasoning of the *Sisco*, law enforcement could have probable cause to search an individual with an opiate "prescription." A prescription bottle for opiates, like the smell of marijuana, may indicate a strong possibility of criminal activity. Those indicators, coupled with the plain view and plain smell doctrines respectively, could give rise to probable cause, unless circumstances suggest that the individual legally possesses the substance.

This approach to the opiate epidemic would never be acceptable, given that for decades, prescription opiates have been medically regulated as appropriate medications for pain relief. They follow strict FDA regulations and have significant research attesting to their effectiveness. Marijuana does not. But regardless, the same essential logic applies. With the high rates of illegal opiate abuse, like the high rates of illegal marijuana use, the mere sight of an opiate prescription indicates a significant potential for criminal activity.

D. The Proper Future of the Plain Smell Doctrine

The Arizona Legislature can pass legislation to address the unintended consequences of *Sisco*. In addition to the smell of marijuana, the Arizona Legislature should require law enforcement to gather information about whether the suspected individual is a legal medical marijuana cardholder. Police should also be required to uncover particularized information suggestive of criminal activity. This approach mirrors the Arizona Court of Appeals *Sisco* decision. Before being approved for a search warrant, an officer would need to point to specific indicia of criminal activity and could not only rely on the smell of marijuana. Therefore, if implicit prejudices are leading an officer to believe illegal marijuana activity is occurring, the officer would likely only be able to point to generalized, stereotyped indicia of criminal activity that is insufficient to establish probable cause. A magistrate would thus be unable to approve a search warrant based on the information

119. *See, e.g.*, Press Release, John J. Flanagan, Senate Passes Legislative Package to Fight Heroin and Opiate Abuse, (June 17, 2016), https://www.nysenate.gov/newsroom/press-releases/john-j-flanagan/senate-passes-legislative-package-fight-heroin-and-opioid [https://perma.cc/L3T6-CUK3?type=image].

120. *See* SAMHSA *Opioids*, *supra* note 117.

provided. The officer would then be left with one of two options: Find more evidence, or end the investigation.

This solution does not risk political capital because it minimizes the negative consequences of *Sisco* without going so far as to legalize recreational marijuana. Additionally, the privacy rights of medical marijuana cardholders will be more protected. It is true that police will be limited in their ability to enforce marijuana laws, but courts have always weighed the competing interests between privacy and police authority. This legislative response will severely reduce privacy violations of medical marijuana cardholders and help ensure more equitable enforcement of marijuana laws.

IV. CONCLUSION

The Arizona Legislature should act to protect the privacy rights of medical marijuana cardholders. It can act by requiring law enforcement to secure information about whether the suspected individual is a legal medical marijuana cardholder and also additional circumstances indicating criminal activity. These requirements would serve as a check on police action, conform to the voters' intent in passing AMMA, and decrease the potential for disparate enforcement of marijuana laws. This is the proper future of the plain smell doctrine in a medical marijuana state. If Arizona were to legalize recreational marijuana, the Legislature would have to reevaluate the plain smell doctrine once again. Until then, these guidelines for probable cause determinations would provide law enforcement with effective standards, encourage equitable enforcement of marijuana laws, and protect privacy rights.