



NEW MEXICO LAW REVIEW

Volume 45
Issue 1 *Fall*

Fall 2014

Introduction

Matthew Zidovsky

Recommended Citation

Matthew Zidovsky, *Introduction*, 45 N.M. L. Rev. ix (2014).

Available at: <https://digitalrepository.unm.edu/nmlr/vol45/iss1/2>

This Front Matter is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the *New Mexico Law Review* website: www.lawschool.unm.edu/nmlr

Introduction

Welcome to the first issue of Volume 45 of the *New Mexico Law Review*. On behalf of the editorial board and staff, I am pleased to present a diverse body of work for your review. With an eye toward our narrowly focused Spring 2015 Special Issue, we have taken care in this issue to present a variety of legal topics of interest to New Mexico's bench, bar, and legal scholars alike. This year has seen change with respect to the leadership of the *Law Review*, and I would like to take this opportunity to thank Professor Carol Suzuki for her years of service as Faculty Advisor. Those of us who worked with Professor Suzuki appreciate her guidance and commitment to excellence in legal writing. At the same time, it is my distinct privilege to welcome Professor Dawinder "Dave" Sidhu as the new Faculty Advisor. It has been a pleasure to work with Professor Sidhu in an administrative capacity over the last year, and I believe that future students will greatly benefit from his tutelage and commitment to academic journals. Under his leadership, the *Law Review* has instituted a practice of compiling and briefing noteworthy federal cases arising in the State of New Mexico and all New Mexico appellate court cases. Those briefs can be found at <http://www.lawschool.unm.edu/nmlr>. We believe this new resource will benefit New Mexico's law students, legal practitioners, and scholars alike in their efforts to stay informed as to the status of, and updates to, the law in our state.

We begin this issue with Jennifer M. Kinsley's *First Amendment Sexual Privacy: Adult Sexting and Federal Age-Verification Legislation*. In this article Professor Kinsley analyzes the sexting phenomenon, and the potential First Amendment burdens placed on "speakers" by federal reporting requirements on pornographic images. Available evidence indicates that large portions of our population are participating in the transfer of sexual material through telecommunications networks. Following a discussion of the history and public policy reasoning behind the statutes, Professor Kinsley concludes that the affirmative duty placed on private communication by the existing statutory scheme would not survive a constitutional challenge, and that criminalizing the behavior of a substantial portion of our population is inherently dangerous.

In *Zombie Mortgages, Real Estate, and the Fallout for the Survivors*, Professor David P. Weber outlines the zombie mortgage phenomenon, including the motivations of homeowners and lenders, community impacts, treatment by courts, and current municipal approaches to mitigating the negative consequences. He then proposes various models designed to repair not only the financial damages, but also the associated neighborhood and municipal issues. Professor Weber concludes that only

a compromise solution involving borrowers, lenders, and municipalities will end this damaging cycle in our residential housing market.

Advantages of the One-Client Model in Insurance Defense by Professor Jean Fleming Powers explores the relationships and obligations that exist between attorneys, insurance companies, and their insureds in both one- and two-client models. Professor Powers argues that the one-client model is consistent with the obligations undertaken in the contract of insurance, better fosters the attorney's professional obligations, better protects the insured as a consumer of insurance and of legal services, and ultimately better protects the interests of the insurer and the attorney.

Next is Professor Layne S. Keele with *When the Mountain Goes to Mohammed: The Internet and Judicial Decision-Making*. Professor Keele first outlines the current climate of ambivalence towards independent judicial Internet fact gathering. He then examines the benefits and drawbacks of judicial Internet research with respect to both adjudicative and legislative facts and offers insight into mechanisms available to limit risks to the adversarial process.

Then we have an article by Leonard Sosnov entitled *Brady Reconstructed: An Overdue Expansion of Rights and Remedies*. Professor Sosnov argues that while *Brady* held great promise for defendants to receive fundamentally fair access to the government's evidence, its jurisprudence has stagnated for decades. In recent years both the Supreme Court and the scientific community have recognized the potential for error on the part of governmental forensic scientists, and the exculpatory power of DNA. Professor Sosnov contends that the Court has nevertheless made it nearly impossible to succeed on a due process challenge to the government's failure to preserve evidence, identifying the failures in its analysis. He specifies how due process rights should be expanded, argues that rights recognition should be divorced from remedies analysis, and finally concludes with a framework for determining appropriate remedies for rights violations.

In *It's Not Too Difficult: A Plea to Resurrect the Impossibility Defense*, Professor Ken Levy argues that courts and legislatures should restore the impossibility defense, which is designed to protect defendants against punishment for attempts that are not themselves illegal but which various parties in the criminal justice system might think should be illegal based on their extralegal, moral prejudices. As a means to this end, Professor Levy tries to clear up a good deal of conceptual confusion that permeates relevant cases and scholarship about the impossibility defense. Specifically, he explicates in the simplest possible terms (a) the difference between factual impossibility and legal impossibility, (b) why only legal impossibility qualifies as exculpatory, and (c) why hybrid impossibility simply does not exist.

Rounding out the offerings from professional legal scholars is an essay authored by Professor Richard Delgado and entitled *Delgado's Darkroom: Critical Reflections on Land Titles and Latino Legal Educa-*

tion. Professor Delgado delivered substantially the same comments at the University of New Mexico School of Law as part of the U.S. Senator Dennis Chavez Endowed Lectureship/Symposium on Civil Rights on April 22, 2014. Senator Chavez, a native New Mexican, was the first person of Hispanic descent elected to serve a full term in the United States Senate. Professor Delgado is a Pulitzer Prize nominated author and one of the nation's leading commentators on race. This essay offers his perspective on the overlap between the civil rights movement and legal education, and we are proud to present it in this forum.

We conclude this issue with three student articles. In *Have You Volunteered to Arbitrate Today?*, Lynne Canning provides analysis of the recent New Mexico Supreme Court case *Strausberg v. Laurel Healthcare Providers, LLC*. After outlining the history and use of arbitration in the United States, Ms. Canning argues that while the *Strausberg* court was bound to apply the Federal Arbitration Act to the facts of this case, that application has become unbalanced as the United States Supreme Court continues to expand the scope and intent of the FAA. Canning concludes that while states will continue to apply the equitable doctrine of unconscionability in an attempt to balance policies favoring arbitration with policies protecting consumers, a public policy solution should be sought to insure that voluntary arbitration clauses are truly voluntary. Next, in *When is a Rock a Rock? New Mexico's Abandonment of Property Rules in Mineral Conveyancing*, Gabe Long offers analysis of the New Mexico Supreme Court's most recent holding in the area of mineral right determinations. After outlining the historical application of both contract and property law principles in mineral right cases, Mr. Long examines the ongoing departure by New Mexico appellate courts from the application of property law principles in *Prather v. Lyons*. He concludes that while ambiguity in the original grant currently requires the application of contract law principles, the methods used to determine the intent of the original parties should not be unnecessarily limited. Finally, Ashley N. Minton examines the New Mexico Supreme Court's recent ruling related to water right adjudication procedures in *Tension in the Waters: How Tri-State Generation v. D'Antonio Creates Tension with the Takings Clause and the Prior Appropriation Doctrine*. After offering a historical overview of New Mexico water right adjudication, Ms. Minton outlines the new rule announced by the court in this case and analyzes potential conflicts between the elimination of an *inter se* adjudication of a water right claim and both the prior appropriations doctrine and the takings clause of the U.S. Constitution. She argues that the likely curtailment of valid rights in the absence of an *inter se* adjudication will lead to the inevitable erosion of the Takings Clause protections guaranteed by the Fifth Amendment.

We hope that you will enjoy this volume of the *New Mexico Law Review* as much as we have enjoyed working on it. Please return for our

Spring 2015 issue (Vol. 45, No. 2), dedicated to the intersection of the law and the Albuquerque based television series *Breaking Bad*. Enjoy!

—Matthew Zidovsky, Editor-in-Chief