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Introduction

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INTRODUCTION

Hello, and welcome to the third and final issue of Volume 39 of the *New Mexico Law Review*! Before discussing the articles in this issue, we the Editorial Board and Staff would like to say a few words of thanks to those who helped make this year a success. First, we extend our gratitude to the authors who published with us this year. It has been a privilege working with each of them, and we appreciate their patience and assistance throughout the publication process. I would also like to personally thank my fellow journal members, along with Jessica Leary and Professor Michael Browde, for their efforts and support. A special word of thanks is in order to our new Publications Director, Lynne Arany, who took over a challenging position and simultaneously helped me through my tenure as editor-in-chief with her depth of experience, attention to detail, and quick wit. Finally, we would like to thank our readers—we hope that you have enjoyed Volume 39 as much as we have!

In this issue we feature eight articles authored by members of our staff on a diverse array of subjects, both local and national in scope. These articles represent the culmination of countless hours of independent research and writing, as well as collaboration with professors, practitioners, and members of the Editorial Board. We are proud to feature the work of our staff, and we congratulate them on the publication of their articles.

Aaron Baca's article, *State v. Padilla: An Aggravated Reading of the State's Aggravated Fleeing a Police Officer Statute*, provides an insightful critique of the statutory interpretation methods employed by the New Mexico Supreme Court in a recent opinion. Mr. Baca contends that the court strayed from traditional principles of statutory construction when it held that the crime of aggravated fleeing a police officer does not include as a substantive element the conduct of a law enforcement officer who initiates a high-speed pursuit of a suspect. After a thorough analysis of the aggravated fleeing a police officer statute and its interplay with the Law Enforcement Safe Pursuit Act, Mr. Baca concludes that the court misinterpreted the legislature's intent by "reading out" the conduct of the pursuing officer from the aggravated fleeing statute.

In *Is Your Bedroom a Private Place? Fornication and Fundamental Rights*, Amanda Connor explores the question of whether the right to engage in private, consensual sex—often referred to as fornication in criminal statutes—is protected under the Due Process Clause of the Fourteenth Amendment. Her article reviews U.S. Supreme Court precedent and concludes that the Tenth Circuit of the U.S. Court of Appeals erred when it recently held that fornication is not a fundamental right. Ms. Connor's article includes an appendix which catalogs the results of a fifty-state survey of fornication laws that she uses in her analysis.

The clash between Indian tribal development and State sovereignty takes center stage in *Texas v. United States: Mind the Gap*. Author Sean Cunniff critiques a recent decision by the Fifth Circuit of the U.S. Court of Appeals which invalidated certain administrative procedures created by the U.S. Secretary of the Interior to encourage good faith negotiations between states and tribes in developing casino-style gaming on tribal lands. Without these procedures, Mr. Cunniff concludes that Tribes and the Federal Government no longer have an effective mechanism for

compelling States to negotiate, thereby frustrating congressional intent as stated in the Indian Gaming and Regulatory Act.

Author David Ferrance takes on the question of how best to protect the rights of open source software authors in his article *Economic Interests and Jacobsen v. Katzer: Why Open Source Software Deserves Protection Under Copyright Law*. Using law and economics theory, Mr. Ferrance provides a much-needed rationale for applying copyright law, rather than contract law, to open source licenses. He concludes that the benefits to society of open source practices justify amending current copyright law to provide clear protection to open source authors.

In her article, *Raiding the American Workplace: Federal Preemption and States' Rights in Curbing Unlawful Alien Employment*, Hajra Malik searches for the boundaries of state authority to regulate employers who hire alien workers. After reviewing the relatively scant case law on the subject, Ms. Malik concludes that traditional preemption law may not be up to the task of dealing with this question. She advocates a more nuanced balancing approach to take into consideration the interests of individuals and of state and federal governments.

Corruption in New Mexico State Government is on display in Erin McSherry's article, *The Proposed State Ethics Commission Act: Reform for New Mexico's "Wild West" Politics, or Simply a Mirage?* Ms. McSherry recounts the events that have led to repeated legislative proposals to establish a State Ethics Commission and provides a comprehensive analysis of the 2009 bill that passed the House. She concludes that the commission created by the legislation, as written, not only fails to address the problems that led to its creation, but also violates the constitutional doctrine of separation of powers. Ms. McSherry ends her article with a series of recommendations designed to remedy the bill's shortcomings.

Maggie Murray tackles the often difficult issue of duty in New Mexico tort law in her article, *Determining a Psychiatrist's Liability When a Patient Commits Suicide: Haar v. Ulwelling*. Ms. Murray addresses the question left unanswered in a recent New Mexico Court of Appeals case—under what circumstances may a physician be liable for the death of a patient who commits suicide? After a thorough consideration of New Mexico case law relating to duty in general and to the duty of physicians in particular, she suggests that a physician can be liable for the suicidal death of a patient in certain circumstances. Ms. Murray also addresses the question of whether the defense of comparative negligence is appropriate in cases where a patient commits suicide and provides an approach for apportioning fault that is consistent with New Mexico's system of pure comparative fault.

Shannon Sherrell's article, *GPS, the Fourth Amendment, and the New Mexico Constitution*, offers an in-depth analysis of whether law enforcement's use of GPS technology to track the movements of criminal suspects requires a warrant under the Fourth Amendment of the U.S. Constitution or under article II, section 10 of the New Mexico Constitution. After reviewing the general consensus among state and federal courts that the use of GPS without a warrant does not violate the Fourth Amendment, Ms. Sherrell considers whether warrantless GPS tracking is an unreasonable search under the New Mexico Constitution. The article includes a full interstitial analysis of the issue and is sure to be a valuable resource when this question comes before New Mexico's appellate courts.

—Neil Bell, Editor-in-Chief