

# THE CONTINUING VITALITY OF RAVIN V. STATE: ALASKANS STILL HAVE A CONSTITUTIONAL RIGHT TO POSSESS MARIJUANA IN THE PRIVACY OF THEIR HOMES

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## INTRODUCTION

Alaska has a unique personal-use marijuana law that has sparked legal debate for nearly forty years. In 1975, in *Ravin v. State*,<sup>1</sup> the Alaska Supreme Court held that the Alaska Constitution's right to privacy protects an adult's ability to use and possess a small amount of marijuana in the home for personal use.<sup>2</sup> The Alaska Supreme Court thereby became the first—and remains the only—state or federal court to announce a constitutional privacy right that protects some level of marijuana use and possession.<sup>3</sup> With that landmark decision, the court

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1. 537 P.2d 494 (Alaska 1975).

2. See *id.* at 511. (holding that “possession of marijuana by adults at home for personal use is constitutionally protected”).

3. Andrew S. Winters, *Ravin Revisited: Do Alaskans Still Have a Constitutional Right to Possess Marijuana in the Privacy of Their Homes?*, 15 ALASKA L. REV. 315, 319–20 (1998). Many state courts have declined to follow or have outright rejected *Ravin*. See, e.g., *State v. Mallan*, 950 P.2d 178, 184 (Haw. 1998) (“[T]he purported right to possess and use marijuana is not a fundamental right and a compelling state interest is not required.”); *Hennessey v. Coastal Eagle Point Oil Co.*, 589 A.2d 170, 176 (N.J. Super. Ct. App. Div. 1991) (“There is no right in New Jersey to the private use of controlled dangerous substances by adults in their homes.”); *People v. Shepard*, 409 N.E.2d 840, 843 (N.Y. 1980) (per curiam) (“Nothing would be more inappropriate than for us to prematurely remove marihuana from the Legislature’s consideration by classifying its personal possession as a constitutionally protected right.”); *State v. Beecraft*, No.

planted the seeds of a jurisprudential philosophy that would grow to place a primacy on individual privacy rights and would forever wed the concepts of privacy and marijuana in Alaska constitutional lore.

Now in the fourth decade since *Ravin* was issued, the legal status of marijuana<sup>4</sup> in Alaska sits in an odd position. Personal use and possession of marijuana in the privacy of the home remain protected by *Ravin* and its progeny, but the current Alaska criminal code prohibits possession of any amount of marijuana,<sup>5</sup> as does the federal Controlled Substances Act (CSA).<sup>6</sup> Despite these statutory bans, Alaska courts continue to recognize that “not all marijuana possession is a crime in Alaska.”<sup>7</sup> This tension between state court decisions and state and federal statutes continues to raise questions as to the rights of the individual, the responsibilities of law enforcement, and the continuing vitality of the *Ravin* decision.

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2006AP982-CR, 2006 WL 3842171, at \*2 (Wis. Ct. App. Dec. 28, 2006) (“Beecraft does not explain why the Alaska court’s construction of that provision would be relevant in Wisconsin.”). A number of other state and federal courts have held that there is no privacy interest in marijuana use. *E.g.*, Nat’l Org. for the Reform of Marijuana Laws v. Bell, 488 F. Supp. 123, 132 (D.D.C. 1980) (holding that the prohibition of the possession of marijuana does not infringe an individual’s constitutionally protected right to privacy under the U.S. Constitution); *see also* Winters, *supra* note 3, at 320 (“[C]ourts in states other than Alaska have considered whether their state constitutions protect marijuana possession, but none has come to the same conclusion as *Ravin*”); *Kuromiya v. United States*, 37 F. Supp.2d 717, 726–28 (E.D. Pa. 1999) (discussing the rejection of any federal right to marijuana possession).

4. “Marijuana” is defined by Alaska statute as:

[T]he seeds, and leaves, buds, and flowers of the plant (genus) *Cannabis*, whether growing or not; it does not include the resin or oil extracted from any part of the plants, or any compound, manufacture, salt, derivative, mixture, or preparation from the resin or oil, including hashish, hashish oil, and natural or synthetic tetrahydrocannabinol; it does not include the stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the stalks, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination.

ALASKA STAT. § 11.71.900(14) (2012).

5. §§ 11.71.040–11.71.060. However, Alaska law provides an affirmative defense for medical marijuana use that complies with the requirements of the state medical marijuana act. *See* § 17.37.030 (“A patient, primary caregiver, or alternate caregiver registered with the department under this chapter has an affirmative defense to a criminal prosecution related to marijuana to the extent provided in AS 11.71.090.”); § 11.71.090 (2010) (A defendant maintains an affirmative defense so long as the patient was registered under AS 17.37 and the use complied with the requirements of AS 17.37”).

6. 21 U.S.C. § 812 (2012).

7. *State v. Crocker*, 97 P.3d 93, 94 (Alaska Ct. App. 2004).

Such confusion is not new or unexpected. In a 1998 Alaska Law Review note, Andrew S. Winters asked “Do Alaskans still have a constitutional right to possess marijuana in the privacy of their homes?”<sup>8</sup> Winters correctly concluded that *Ravin* “should be respected as good law.”<sup>9</sup> Much happened since that note was written: Alaska voters approved a medical marijuana law,<sup>10</sup> Alaska courts issued several opinions concerning personal marijuana use,<sup>11</sup> and the state legislature attempted to recriminalize all marijuana possession,<sup>12</sup> resulting in high-profile litigation<sup>13</sup> and leaving statutes on the books that run directly counter to *Ravin*.<sup>14</sup> Additionally, the recent uptick in the number of other jurisdictions that have passed medical marijuana laws,<sup>15</sup> or have otherwise decriminalized or legalized marijuana,<sup>16</sup> has renewed interest

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8. See Winters, *supra* note 3, at 315 (identifying the purpose of the article as reviewing *Ravin* and determining whether it remains good law in Alaska).

9. See *id.* at 316 (stating that the factual premises set out in *Ravin* “are in fact still valid and . . . should still be respected as good law.”).

10. Food and Drugs—Medical Use of Marijuana § 4, 1999, Alaska Sess. Laws Ch. 37, 8–10.

11. See, e.g., Walker v. State, 991 P.2d 799, 803 (Alaska Ct. App. 1999) (construing *Ravin* to apply only to small amounts of marijuana and holding that the legislature could validly prohibit possession of eight ounces of marijuana); Noy v. State, 83 P.3d 538, 544–45 (Alaska Ct. App. 2003), *reh’g denied*, 83 P.3d 545 (Alaska Ct. App. 2003) (holding that adults may possess less than four ounces of marijuana in the home and for personal use); Crocker, 97 P.3d at 98 (holding a warrant to search a person’s home for evidence of marijuana possession is inappropriate unless the State’s warrant application establishes probable cause to believe that the person’s possession of marijuana exceeds the scope of the possession that is constitutionally protected under *Ravin*).

12. H.B. 149, 24th Leg., 2nd Sess. (Alaska 2006).

13. See, e.g., State v. ACLU of Alaska, 204 P.3d 364, 373 (Alaska 2009) (Carpeneti, J., dissenting) (referring to the case as “high-profile”).

14. See, e.g., ALASKA STAT. § 11.71.060 (2012) (criminalizing the possession of any amount of marijuana).

15. Eighteen states and the District of Columbia now permit medical marijuana use. 18 *Legal Medical Marijuana States and DC*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated Nov. 16, 2012). Six of those medical marijuana laws were enacted in 2010 or later. *Id.* Four other states have pending legislation or upcoming ballot initiatives to legalize medical marijuana. 4 *States with Pending Legislation to Legalize Medical Marijuana*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=002481> (last updated Nov. 7, 2012).

16. In November 2012, voters in Colorado and Washington approved ballot initiatives legalizing recreational marijuana use in those states. See Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES, Nov. 8, 2012, at P15, available at <http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html>. Fourteen other states and a number of municipalities have decriminalized the possession of marijuana for non-medical purposes. See *Places That Have Decriminalized Non-Medical Cannabis In The United States*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Places\\_that\\_have\\_decriminalized\\_non-medical\\_cannabis\\_in\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Places_that_have_decriminalized_non-medical_cannabis_in_the_United_States)

in the relationship between state laws that permit some marijuana use and the CSA, which still completely bans it.<sup>17</sup> It is therefore time to ask, and answer, that question again.

This Article seeks to clarify the current status of Alaska law governing personal use and possession of marijuana and to identify the future precedential value of *Ravin*. The Article is broken into four main parts. Part I briefly chronicles the history and development of Alaska's personal-use marijuana law, focusing on major court decisions and key pieces of legislation involving the intersection of the right of privacy and marijuana. Part II explains how ripeness, prosecutorial discretion, and stare decisis combine to insulate *Ravin* from being easily overturned. Part III discusses ongoing issues related to administering and implementing *Ravin*, including the roles the state courts and legislature continue to play in defining the scope of personal use of marijuana, the ability of law enforcement officials to investigate suspected marijuana grow operations based on the perception of marijuana odor, and the importance of ensuring objective review of the science underlying marijuana policy in Alaska. Part IV examines how the rights protected under *Ravin* lawfully exist in light of the CSA's marijuana ban. The Article concludes that *Ravin* retains its vitality and should be respected as good law unless and until the Alaska Supreme Court rules otherwise.

## I. THE HISTORY AND DEVELOPMENT OF ALASKA'S PERSONAL-USE MARIJUANA LAW

### A. The 1970s and 1980s: *Ravin* and the Legislative Response

In August 1972 the Alaska Constitution was amended to include an explicit right of privacy.<sup>18</sup> That December, Irwin Ravin was arrested and charged with violating an Alaska statute prohibiting possession of

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(last modified Nov. 20, 2012).

17. See generally Robert A. Mikos, *The Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1423 (2009) ("I argue that states retain both de jure and de facto power to exempt medical marijuana from criminal sanctions in spite of Congress's uncompromising—and clearly constitutional—ban on the drug."); Robert A. Mikos, *Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 634-35 (2011) ("The question now is whether the federal government will allow the states to construct a sensible regulatory regime free of federal interference or whether it will instead wage an ongoing guerilla-style campaign against medical marijuana—one with many casualties, but with no real victory possible.").

18. "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section." ALASKA CONST. art. 1, § 22.

marijuana.<sup>19</sup>

Ravin challenged the constitutionality of the law, arguing that his conduct was protected by both the state and federal right of privacy.<sup>20</sup> Ravin's challenge asserted that the available scientific evidence showed that marijuana was "a relatively innocuous substance" and if marijuana was not all that harmful, the state could not prove that it had a sufficient interest in prohibiting its use and possession.<sup>21</sup> The Alaska Supreme Court agreed with him to a certain extent. In *Ravin v. State*, the court identified a limited right to possess marijuana within the sphere of the Alaska Constitution's broader right to privacy.<sup>22</sup> The court held that "possession of marijuana by adults at home for personal use is constitutionally protected"<sup>23</sup> because the state could not "meet its substantial burden and show that the proscription of marijuana in the home is supportable by achievement of a legitimate state interest."<sup>24</sup>

The court did not reach this conclusion lightly. The justices pored through scientific evidence on marijuana use and its health and social effects and found "no firm evidence that marijuana, as presently used in this country, is generally a danger to the user or to others."<sup>25</sup> Weighing "the relative insignificance of marijuana consumption as a health problem[,]"<sup>26</sup> the importance of respecting the sanctity of the home,<sup>27</sup>

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19. *Ravin v. State*, 537 P.2d 494, 496 (Alaska 1975).

20. *Id.* The court dismissed Ravin's arguments that the statute also violated the state and federal equal protection guarantees. *Id.* at 512.

21. *Id.* at 497.

22. *See id.* at 504 (protecting the possession of a substance like marijuana in a "purely personal, non-commercial context in the home"). The Alaska Supreme Court rejected Ravin's federal privacy claim. *Id.* at 500.

23. *Id.* at 511. The court spoke only of possession of marijuana in amounts indicative of non-commercial "personal use," but did not elaborate on what constituted a personal amount. *Id.* It has since become common practice for Alaska courts to refer to a non-commercial personal amount of marijuana as a "small" quantity of marijuana. *See, e.g., State v. Native Vill. of Tanana*, 249 P.3d 734, 748 (Alaska 2011) ("The plaintiffs . . . had challenged a newly enacted statute criminalizing the possession of small amounts of marijuana, arguing the statute was unconstitutional under *Ravin v. State*."); *State v. ACLU of Alaska*, 204 P.3d 364, 366 n.4 (Alaska 2009) ("Alaskans have a fundamental right to privacy in their homes and protecting the possession by adults of small amounts of marijuana in the home for personal use."); *Hotrum v. State*, 130 P.3d 965, 967 (Alaska Ct. App. 2006) ("the right of an adult to possess a small amount of marijuana in his home for personal use"); *Walker v. State*, 991 P.2d 799, 801 (Alaska Ct. App. 1999) (Coats, C.J., concurring) (discussing the right to possess "small quantities of marijuana in the home" for "personal use"); *Cleland v. State*, 759 P.2d 553, 557 (Alaska Ct. App. 1988) ("Alaska's residents enjoy a right of privacy which extends to protect their right to possess small quantities of marijuana for personal use in their homes . . .").

24. *Ravin*, 537 P.2d at 504.

25. *Id.* at 508.

26. *Id.* at 511.

and the fact that personal autonomy is uniquely prized in Alaska,<sup>28</sup> the court did not see the requisite “close and substantial relationship” between the state’s asserted interest (protecting the public from the ills of marijuana use) and the means chosen to advance that interest (a state law prohibiting all possession and use of marijuana).<sup>29</sup> A blanket marijuana prohibition simply went too far—the available scientific evidence did not “justify intrusions into the rights of adults in the privacy of their homes.”<sup>30</sup> The state’s marijuana ban was also out of line with what the court described as a basic tenet of a free society: “the authority of the state to exert control over the individual extends only to activities of the individual which affect others or the public at large.”<sup>31</sup>

The court did, however, recognize that marijuana use was not completely harmless or without risk.<sup>32</sup> The state had a legitimate, achievable interest in proscribing marijuana use among drivers, whose ability to safely operate a vehicle would be lowered, and among “adolescents who may not be equipped with the maturity to handle the experience prudently. . . .”<sup>33</sup> Those factors, combined with the narrow scope of the decision itself, meant that the state could still regulate and prohibit most types of marijuana activity without running afoul of the right to privacy. *Ravin* did not extend to protect possession or use of marijuana in public, driving under the influence of marijuana, buying or

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27. See *id.* at 503–04 (identifying the home as a place where “privacy receives special protection” and noting that the privacy amendment to the Alaska Constitution “was intended to give recognition and protection to the home”). An odd twist to *Ravin* is that Irwin Ravin’s case began when he was arrested in his car during a traffic stop, not in the privacy of his home. Susan Orlansky & Jeffrey M. Feldman, *Justice Rabinowitz and Personal Freedom: Evolving A Constitutional Framework*, 15 ALASKA L. REV. 1, 10 n.53 (1998). But neither the opinion nor the record before the Alaska Supreme Court “disclose[d] any facts as to the situs of Ravin’s arrest and his alleged possession of marijuana.” *Ravin*, 537 P.2d at 513. The court ultimately remanded the case so those facts could be developed. *Id.*

28. See *id.* at 504 (noting Alaska’s unique legacy of individuality and self-reliance).

29. See *id.* at 511 (“[W]e do not believe that the potential harm generated by drivers under the influence of marijuana, standing alone, creates a close and substantial relationship between the public welfare and control of or ingestion of marijuana or possession of it in the home for personal use.”).

30. *Id.*

31. *Id.* This respect for individual rights, and the belief that individuals should be trusted to make their own decisions, is all the more impressive considering the court’s feelings about drug use in general. The *Ravin* court was very candid with its anti-drug message. *Id.* at 511.

32. See *id.* at 508 (“The one significant risk in use of marijuana which we do find established to a reasonable degree of certainty is the effect of marijuana intoxication on driving.”).

33. *Id.* at 511.

selling marijuana, possession of marijuana in an amount indicative of an intent to sell, or any marijuana activity involving minors.<sup>34</sup>

More importantly than its distinctive approach to marijuana possession, *Ravin* was a historic decision because it was the first Alaska Supreme Court opinion to meaningfully define the scope of the Alaska Constitution's right to privacy.<sup>35</sup> *Ravin* established the principle that the Alaska Constitution provides greater protection for individual privacy rights than does the United States Constitution, a principle that has become a cornerstone of Alaska jurisprudence.<sup>36</sup>

Simultaneous with *Ravin*, the Alaska Legislature decriminalized marijuana.<sup>37</sup> The new law allowed adults to possess one ounce or less of

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34. *Id.*

35. The Alaska Supreme Court previously discussed the privacy amendment in *Gray v. State*, which also involved a challenge to the state's marijuana laws. 525 P.2d 524, 528 (Alaska 1974) (holding that the right to privacy "clearly . . . shields the ingestion of food, beverages, or other substances" from legislative interference). However, the court remanded for an evidentiary hearing on the health effects of marijuana. *Id.* The court also noted that the pending *Ravin* opinion could control Gray's case. *Id.* at 528 n.16.

36. See, e.g., *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 581 (Alaska 2007) ("Because this right to privacy is explicit, its protections are necessarily more robust and 'broader in scope' than those of the implied federal right to privacy."); *Anchorage Police Dep't Employees Ass'n v. Municipality of Anchorage*, 24 P.3d 547, 550 (Alaska 2001) ("We have held that both of these provisions afford broader protection than their federal counterparts."); *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 968 (Alaska 1997) ("[The Alaska Constitution] provides more protection of individual privacy rights than the United States Constitution."); see also Erwin Chemerinsky, *Privacy and the Alaska Constitution: Failing to Fulfill the Promise*, 20 ALASKA L. REV. 29, 31 (2003) ("The Alaska Supreme Court continues, at times, to provide greater protection for privacy rights under the Alaska Constitution than under the United States Constitution."); Orlansky & Feldman, *supra* note 27, at 26 ("Justice Rabinowitz treated the adoption of article I, section 22 as underscoring the importance of the right of privacy in Alaska and supporting adoption of stricter controls on warrantless government action than is required under the federal Constitution."); Michael Schwaiger, *Understanding the Unoriginal: Indeterminant Originalism and Independent Interpretation of the Alaska Constitution*, 22 ALASKA L. REV. 293, 295-96 (2005) ("Because the Federal Constitution provides a sturdy floor for civil rights, the Alaska Supreme Court's independent interpretation of the Alaska Constitution based on Alaska's local constitutional heritage can serve to safeguard rights beyond federal constitutional protections.").

37. This legislation first became law on June 5, 1975, about a week after *Ravin* was issued on May 27, 1975. See Act of 1975 § 1, 1975 Alaska Sess. Law Ch. 110, 2 ("Actual effective date: September 2, 1975"). However, the legislature first submitted the bill on May 16, 1975, 11 days before the *Ravin* decision was announced. ALASKA S. JOURNAL, 9th Leg., 1st Sess. 1122 (May 16, 1975); ALASKA H. JOURNAL, 9th Leg., 1st Sess. 1235 (May 16, 1975). Thus the legislature could not have taken the final *Ravin* ruling into account when it revised the state's marijuana laws—in fact, the *Ravin* court even pointed out that the act had recently passed through the state legislature when it was drafting its opinion.

marijuana in public and any amount of marijuana for personal use in private with no criminal penalty.<sup>38</sup> Such possession would only subject the offender to a “civil fine of not more than \$100.”<sup>39</sup> But this still presented a constitutional conflict as conduct that *Ravin* declared as shielded from government intrusion remained subject to state-sanctioned consequences through imposition of a civil fine.<sup>40</sup>

In 1982, the Legislature resolved the conflict by revising the state criminal code to omit any civil or criminal penalty for an adult’s possession of less than four ounces of marijuana for personal use in the home.<sup>41</sup> This revision fully embraced and codified the *Ravin* decision.<sup>42</sup>

### **B. The 1990s: Ballot Initiatives, Recriminalization, and Medical Marijuana**

The statutory decriminalization of marijuana in Alaska lasted only eight years. At the November 6, 1990 statewide general election, Alaska voters faced a ballot initiative that would make all marijuana possession in Alaska illegal.<sup>43</sup> The language of the initiative was explicit and “in no

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*Ravin*, 537 P.2d at 513 n.75 (“The Alaska legislature have also recently passed a bill which would decriminalize possession of marijuana in certain contexts.”). The 1975 legislation therefore should not be viewed solely as a reaction to *Ravin*, but rather as evidence that the legislature and the courts were proceeding along similar tracks with respect to their views on privacy and marijuana.

38. See *Noy v. State*, 83 P.3d 538, 541 (Alaska Ct. App. 2003) (outlining the specific parameters of the legislation).

39. See *id.*

40. Governor Jay Hammond explained that the new state statutes “were more restrictive than the law articulated by the Supreme Court” in his decision to allow the bill to become law without his signature. ALASKA S. JOURNAL, 9th Leg., 1st Sess. 1463–64 (May 16, 1975). Regardless of the conflict with *Ravin*, Governor Hammond was still not a supporter of the Bill; he did not believe that it was in the public’s best interest to expand the use of marijuana. *Id.* at 1463 .

41. See *Noy*, 83 P.3d at 542 (“[F]ollowing the legislature’s 1982 revision of the marijuana laws, there was no penalty (whether criminal or civil) for possessing less than four ounces of marijuana in one’s home for personal use.”). Under the 1982 legislation, criminal penalties were reinstated for most other types of marijuana possession. See *id.* at 541–42 (“Under the newly enacted AS 11.71.050(a)(3)(E), possession of eight ounces of marijuana was made a class A misdemeanor. Under the newly enacted AS 11.71.060(a)(4), possession of four ounces or more of marijuana was made a class B misdemeanor. The legislature also made it a violation to possess any amount of marijuana in a public place.”).

42. See *Brown v. Ely*, 14 P.3d 257, 260 (Alaska 2000) (“In 1982 the Alaska legislature codified *Ravin* by amending AS 11.71.060 to legalize possession of up to four ounces of marijuana in a private place.”); *Walker v. State*, 991 P.2d 799, 802–03 (Alaska Ct. App. 1999) (specifying the purpose of the law was to codify the amount indicative of personal use so that citizens would know the amount protected by *Ravin*).

43. *Initiatives Appearing on the Ballot in Alaska*, STATE OF ALASKA DIV. OF



uncertain terms” meant to wipe out the rights provided under *Ravin*.<sup>44</sup> This highly-contested political issue, strongly supported by the federal government, garnered “a good deal of publicity” in the months leading up to the election.<sup>45</sup>

The 1990 Initiative passed by a comfortable margin and the Alaska Statutes were amended to once again criminalize all marijuana possession.<sup>46</sup> Under the revised statutes, any possession of less than eight ounces of marijuana was a Class B misdemeanor.<sup>47</sup> The exception for possession of less than four ounces of marijuana was eliminated. Penalties for possession of larger quantities of marijuana remained unchanged.

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ELECTIONS, 2 (2012), <http://www.elections.alaska.gov/doc/forms/H26.pdf> (last revised May 2, 2012) (Initiative number 88MARI, “Relating to the Recriminalization of Marijuana”); *Alaska Marijuana Criminalization Initiative (1990)*, BALLOTPEDIA, [http://ballotpedia.org/wiki/index.php/Alaska\\_Marijuana\\_Criminalization\\_Initiative\\_\(1990\)](http://ballotpedia.org/wiki/index.php/Alaska_Marijuana_Criminalization_Initiative_(1990)) (last updated July 12, 2012).

44. Winters, *supra* note 3, at 326.

45. *Id.* at 326 n.71; Richard Mauer, *Recriminalization - Drug War, Right To Privacy Face Off*, ANCHORAGE DAILY NEWS, Oct. 28, 1990, at M17 (“the War on Drugs has come to Alaska”); *Bennett Urges Alaska Voters to Ban Marijuana*, L.A. TIMES, October 27, 1990, available at [http://articles.latimes.com/1990-10-27/news/mn-2912\\_1\\_alaska-constitution](http://articles.latimes.com/1990-10-27/news/mn-2912_1_alaska-constitution) (“Drug policy director William J. Bennett wrapped up his two-day anti-marijuana campaign in Alaska’s two biggest cities Friday, beseeching Alaskans to ban cannabis in the Last Frontier.”).

46. *See Initiatives Appearing on the Ballot in Alaska*, STATE OF ALASKA DIVISION OF ELECTIONS, 2 (2012), <http://www.elections.alaska.gov/doc/forms/H26.pdf> (last revised May 2, 2012) (105,263 Alaska voters (54.3%) voted “yes” and only 88,644 (45.7%) opposed it).

47. *Noy v. State*, 83 P.3d 538, 542 (Alaska Ct. App. 2003).

*Statutory Criminal Penalties For Simple Marijuana Possession In Alaska (1982 and 1991)*<sup>48</sup>

<b>Quantity of Marijuana</b>	<b>1982 Penalty</b>	<b>1991 Penalty</b>
<b>Less Than 4 Ounces</b>	No penalty if possession is non-public <sup>49</sup>	Class B Misdemeanor <sup>53</sup>
<b>Less Than 8 Ounces</b>	Class B Misdemeanor <sup>50</sup>	Class B Misdemeanor <sup>54</sup>
<b>Less Than 1 Pound</b>	Class A Misdemeanor <sup>51</sup>	Class A Misdemeanor <sup>55</sup>
<b>1 Pound or More</b>	Class C Felony <sup>52</sup>	Class C Felony <sup>56</sup>

Despite this seemingly conclusive election, the constitutionality of the 1990 Initiative was “questioned widely” because it purported to eliminate the limited right of personal marijuana possession protected under *Ravin*.<sup>57</sup> This set up a legal question that would remain formally unanswered for over a decade: did the 1990 Initiative actually “overrule” the *Ravin* decision?<sup>58</sup>

An initiative regarding marijuana appeared on the ballot again in

48. This table is not inclusive of all marijuana-related crimes; it lists only penalties applicable to simple possession under state law.

49. See *Noy*, 83 P.3d at 542 (summarizing the parameters of the 1982 legislation).

50. ALASKA STAT. § 11.71.060(a)(4) (1982) (current version at ALASKA STAT. § 11.71.060 (2012)).

51. § 11.71.050(a)(3)(E) (1982) (current version at ALASKA STAT. § 11.71.050 (2012)).

52. § 11.71.040(a)(3)(F) (1982) (current version at ALASKA STAT. § 11.71.040 (2012)).

53. § 11.71.060(a)(1) (1992) (current version at ALASKA STAT. § 11.71.060 (2012)).

54. § 11.71.060(a)(1), (2) (1992) (current version at ALASKA STAT. § 11.71.060 (2012)).

55. § 11.71.050(a)(3)(E) (1992) (current version at ALASKA STAT. § 11.71.050 (2012)).

56. § 11.71.040(a)(3)(F) (1992) (current version at ALASKA STAT. § 11.71.040 (2012)).

57. See Orlansky & Feldman, *supra* note 27, at 11 n.68 (“The constitutionality of the initiative has been questioned widely, but the Alaska Supreme Court has not had occasion to rule on the issue.”).

58. See *Brown v. Ely*, 14 P.3d 257, 260 (Alaska 2000) (“We have yet to address any conflict between *Ravin* and AS 11.71.060.”); see also Eric A. Johnson, *Harm to the “Fabric of Society” as a Basis for Regulating Otherwise Harmless Conduct: Notes on a Theme from Ravin v. State*, 27 SEATTLE U. L. REV. 41, 41 n.3 (2003) (noting that as of 2003 the constitutionality of the 1990 Voter Initiative “has not been tested in Alaska’s appellate courts, probably because the Attorney General has declined to enforce it”).

1998.<sup>59</sup> That year, voters approved an initiative that made Alaska one of the first states to decriminalize marijuana for medical use.<sup>60</sup> The 1998 Initiative (and subsequent legislative revisions) established strict procedures for Alaskans to use marijuana for medical purposes.<sup>61</sup> The Alaska Medical Marijuana Law is distinct from the personal use law established by *Ravin*.<sup>62</sup> Use of medical marijuana is conditioned upon a physician's certification that the patient suffers from a "debilitating medical condition"<sup>63</sup> and that the patient might benefit from the medical use of marijuana.<sup>64</sup> The patient must also register with the state, which will issue an identification card and maintain a registry of all authorized users.<sup>65</sup> Registered patients may then possess up to one ounce of marijuana and six plants (of which only three can be flowering and

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59. See *Initiatives Appearing on the Ballot in Alaska*, STATE OF ALASKA DIV. OF ELECTIONS, 1 (2012), <http://www.elections.alaska.gov/doc/forms/H26.pdf> (last revised May 2, 2012) (under the Initiative No. 97PSDM).

60. See *id.* (The final vote tally was 131,586 (58.67%) in favor of decriminalization to 92,701 (41.33%) opposed). California voters passed a medical marijuana law in 1996; Oregon and Washington voters also approved medical marijuana ballot initiatives in 1998. See Michael Berkey, *Mary Jane's New Dance: The Medical Marijuana Legal Tango*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 417, 428-30 (2011) ("Passing with 56% of the vote, Proposition 215 made California the first state to legalize medical marijuana.... In 1998, the Oregonians for Medical Rights-sponsored 'Measure 67' ballot passed, making Oregon the first state to incorporate a registration identification card system for medical marijuana users. Washington and Alaska voter initiatives also passed in 1998.").

61. See ALASKA STAT. §§ 17.37.010-17.37.080 (2012) (codifying the "Medical Uses of Marijuana for Persons Suffering from Debilitating Medical Conditions Act." These statutes included a process for joining the registry of patients entitled to receive a registry identification card, affirmative defenses to a criminal prosecution, and restrictions on medical use of marijuana.).

62. See *Rollins v. Ulmer*, 15 P.3d 749, 750 (Alaska 2001) ("*Ravin* is inapposite to the case at hand."); ALASKA STAT. § 17.37.030(d) ("A person, including a patient, primary caregiver, or alternate caregiver, is not entitled to the protection of this chapter for the person's acquisition, possession, cultivation, use, sale, distribution, or transportation of marijuana for nonmedical use."). Individuals are not required to choose one type of use or the other. There are those who use marijuana for medicinal purposes at home but who are not registered patients with the state. See, e.g., *State v. ACLU of Alaska*, 204 P.3d 364, 370-71 (Alaska 2009) ("Jane Doe declares that she uses marijuana for medicinal purposes, though she did not register as a medical marijuana user.").

63. See ALASKA STAT. § 17.37.070(a)-(c) (broadly defining "debilitating medical condition" as including "cancer, glaucoma, positive status for immunodeficiency virus, or acquired immune deficiency syndrome" or any other chronic diseases, or treatment for such diseases, which produce "cachexia; severe pain; severe nausea; seizures, including those that are characteristic of epilepsy; or persistent muscle spasms, including those that are characteristic of multiple sclerosis.").

64. § 17.37.010(c).

65. § 17.37.010.

producing usable marijuana at any time).<sup>66</sup> They may not smoke marijuana in public, but may possess it in public under certain conditions: the marijuana must be in a sealed container, the marijuana must be concealed, and the individual must be transporting it to a location where it is permissible to use it.<sup>67</sup> A medical marijuana patient may also designate a “primary caregiver” and an “alternative caregiver.”<sup>68</sup> The caregiver designation means patients with debilitating illnesses do not have to be responsible for cultivating their own marijuana.<sup>69</sup> The medical marijuana law does not authorize patients or caregivers to buy or sell marijuana.<sup>70</sup> Registered medical marijuana patients and their caregivers have an affirmative defense to prosecution for certain marijuana-related crimes.<sup>71</sup>

### C. 2000–2005: *Noy and Crocker Breathe New Life Into Ravin*

The constitutional issue raised by the passage of the 1990 Initiative was not addressed by an appellate court until 2003.<sup>72</sup> In *Noy v. State*,<sup>73</sup>

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66. § 17.37.040(a)(4)(A)–(B).

67. § 17.37.040(a)(2)(A)–(C).

68. § 17.37.010(a).

69. See § 17.37.040(a)(3) (“a patient may deliver marijuana to the patient’s primary caregiver and a primary caregiver may deliver marijuana to the patient for whom the caregiver is listed”). Neither the Act nor the Alaska Administrative Code specifically defines the duties of a primary or alternative caregiver. See §§ 17.37.010–17.37.080 (omitting a definition of a primary or alternative caregiver). But the Act does explain that if the medicinal marijuana patient is a minor, the minor’s parent or guardian must serve as the primary caregiver and “control the acquisition, possession, dosage, and frequency of use of marijuana by the patient.” § 17.37.010(c)(3). It follows that the caregiver for an adult patient would serve in a similar role.

70. Alaska law only permits the primary caregiver to “deliver” marijuana to his or her patient, and vice versa. § 17.37.040(a)(3). “Deliver” means the “actual, constructive, or attempted transfer from one person to another of a controlled substance whether or not there is an agency relationship.” § 11.71.900(6). Conversely, such a noncommercial transfer is not permissible under *Ravin*. See *Wright v. State*, 651 P.2d 846, 849 (Alaska Ct. App. 1982) (“We conclude that non-commercial transfers of small quantities of marijuana must be deemed to fall within the ambit of the prohibition against distribution which is contained in AS 17.12.010.”).

71. § 17.37.030(a).

72. Prior to *Noy*, two superior court cases addressed the conflict between *Ravin* and the 1990 Initiative. In *Alaskans for Privacy v. State of Alaska*, filed shortly after the new law went into effect, plaintiffs sought summary judgment on the grounds that the Initiative was invalid because it sought to impermissibly overturn a Supreme Court decision by popular vote. Complaint for Declaratory and Injunctive Relief at 4, *Alaskans for Privacy v. State*, No. 3AN-91-1746 (D. Alaska March 4, 1991); see also *Winters, supra* note 3, at 326–27 (“The passage of the Initiative created an interesting constitutional issue—whether such an initiative actually had the legal power to ‘overrule’ *Ravin* . . . . In contrast the

the Alaska Court of Appeals restricted the enforcement of the statutes amended by the 1990 Initiative and held that “Alaska citizens have the right to possess less than four ounces of marijuana in their homes for personal use.”<sup>74</sup>

The case began when North Pole, Alaska police officers smelled growing marijuana at David S. Noy’s home. The police searched Noy’s home and seized approximately 11 ounces of harvested marijuana and five immature marijuana plants.<sup>75</sup> They did not discover any scales, packaging materials, nor any other evidence of commercial marijuana activity.<sup>76</sup> Noy was charged with possession of more than eight ounces of marijuana, a violation of then-AS 11.71.050(a).<sup>77</sup> At trial, the State did not offer the actual marijuana into evidence, relying instead on witness testimony and photographs.<sup>78</sup> Absent that physical evidence, the jury could not determine the exact amount of marijuana Noy possessed and acquitted him of the charge of possessing more than eight ounces of marijuana.<sup>79</sup> But it was clear that Noy possessed *some* amount of marijuana, so the jury found him guilty of violating AS 11.71.060(a), which prohibited possession of up to eight ounces of marijuana.<sup>80</sup> Noy appealed, “arguing that he was convicted for engaging in conduct ([i.e.,] possession of marijuana for personal use in one’s home) that is protected

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Initiative merely altered the general Alaska Criminal Code, not the Alaska Constitution itself.”). The lawsuit was dropped before a final decision on the merits because Alaskans for Privacy did not have the funding to continue the litigation through a hearing. *Id.* at 328. In *State v. McNeil*, discussed *infra*, the defendant was arrested for conduct that was permitted under *Ravin* but banned by the Initiative. Memorandum of Decision, *State of Alaska v. McNeil*, No. 1KE-93-947CR 1-2 (D. Alaska October 29, 1993). The Superior Court dismissed the charges and ruled that *Ravin* remained the controlling law on the issue of personal marijuana possession in the home. *See id.* at 6 (“Accordingly, with no basis to overrule or even qualify the *Ravin* decision, it must be applied.”). The reasoning espoused by Alaskans for Privacy and employed by the judge in *McNeil* was also referenced by the Alaska Court of Appeals in *Walker v. State*. *See* 991 P.2d 799, 803 (Alaska Ct. App. 1999) (“To resolve Walker’s case, we need only hold—and we do hold—that eight ounces or more of marijuana is an amount large enough to fall within the *Ravin* court’s category of ‘indicative of intent to sell.’”). Both the majority and concurring opinions noted that the constitutionality of the statute amended by the Initiative was “questionable” because of its conflict with *Ravin*. *Id.* at 801, 804.

73. 83 P.3d 538 (Alaska Ct. App. 2003).

74. *Id.* at 540.

75. *Id.* The plants were not tested for THC and did not form part of the state’s case. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *See id.* at 540.

80. *See id.* at 543.

by the privacy provision of the Alaska Constitution.”<sup>81</sup>

The discrete question presented to the Court of Appeals was whether AS 11.71.060(a), the statute under which Noy was convicted, was constitutional to the extent that it prohibited possession of marijuana by adults in their homes for personal use.<sup>82</sup> “To make the statute conform to the constitution again,” the court returned it to its pre-1990 interpretation, which included a “presumptively constitutional” four-ounce limit on marijuana possession in the home by adults for personal use.<sup>83</sup> In the court’s words, “with respect to possession of marijuana by adults in their home for personal use (conduct that is protected under the *Ravin* decision), AS 11.71.060(a)(1) remains constitutional to the extent that it prohibits possession of four ounces or more of marijuana. Restricted in this fashion, AS 11.71.060(a)(1) remains enforceable.”<sup>84</sup>

The State requested rehearing before the Court of Appeals but was denied.<sup>85</sup> The State then petitioned the Alaska Supreme Court to exercise its discretionary review of court of appeals cases.<sup>86</sup> In its petition for hearing, the State added an argument that *Ravin* should be overturned because new studies demonstrated that marijuana was now more dangerous than suggested by the scientific evidence presented in

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81. *Id.* at 540.

82. *Id.* at 542.

83. *Id.* at 543.

84. *Id.* For Noy, this meant that his conviction would be overturned. The jury was never asked to determine the precise amount of marijuana Noy possessed; it only found that it was *some amount* under eight ounces. *Id.* It was possible that the jury could have believed that Noy possessed less than four ounces, which would have fallen within the scope of what was protected under *Ravin*. *Id.* The court therefore reversed the conviction, but would allow Noy to be retried if the State believed he possessed at least four but less than eight ounces of marijuana. *Id.* at 540, 543–44.

85. *Noy v. State*, 83 P.3d 545, 549 (Alaska Ct. App. 2003) [hereinafter *Noy II*]. In its petition, the State identified “some half-dozen” ways in which the court erred. *Id.* at 546. The court summarily dismissed the State’s argument that *Ravin* only created an affirmative defense for individuals who were prosecuted for possessing marijuana. *Id.* at 548. The court explained that in the nearly thirty years since *Ravin* had been decided, there had been absolutely no suggestion that *Ravin* was anything other “than normal constitutional litigation” in which the Supreme Court restricted the state’s power to legislate in a particular area. *Id.* at 547. The court of appeals rejected this exact same argument a few years later. *See State v. Crocker*, 97 P.3d 93, 95 (Alaska Ct. App. 2004) (“We addressed and rejected this same argument in our opinion on rehearing in *Noy* . . .”). The court also was not swayed by the State’s belief that the *Noy* decision would unfairly block the State’s ability to show the need to overturn *Ravin* or to prohibit marijuana possession in the future, stating, “The State remains free in the future to challenge the continuing vitality of *Ravin*.” *Id.* at 549.

86. Petition For Hearing at 15, *State v. Noy*, Supreme Court No. S-11297 (Jan. 5, 2004).

*Ravin*.<sup>87</sup> Despite this new evidence, the court declined to hear the case.<sup>88</sup> That left *Noy*, and the Legislature's four-ounce dividing line from 1982, in place as the controlling law of the state.

*Noy* remains one of the most significant post-*Ravin* appellate rulings to date. *Noy* made it very clear that conduct protected by a constitutional right could not be criminalized by statute.<sup>89</sup> Neither the legislature nor the voters could overturn a judicial interpretation of the constitutional right to privacy.<sup>90</sup>

By clarifying the legal status of marijuana in Alaska, *Noy* also created a unique scenario for law enforcement officials seeking to establish probable cause to search a residence for evidence of a marijuana-related crime.<sup>91</sup> Unlike most other contraband or illegal narcotics, marijuana (whether burning, growing, or harvested) carries a distinct odor.<sup>92</sup> Thus, one could establish the presence of marijuana in a residence by smell alone.<sup>93</sup> In other jurisdictions where all marijuana use and possession is illegal, the odor of marijuana alone is sufficient probable cause for a search warrant.<sup>94</sup> But in Alaska, where personal

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87. *Id.* at 4–11.

88. Order, *State v. Noy*, Supreme Court No. S-11297 (Sept. 7, 2004).

89. *Noy II*, 83 P.3d at 542.

90. *Id.*

91. See *Van Buren v. State*, 823 P.2d 1258, 1261 (Alaska Ct. App. 1992) (quoting *Badoino v. State*, 785 P.2d 39, 41 (Alaska Ct. App. 1990)) (“Probable cause to issue a search warrant exists when ‘reliable information is set forth in sufficient detail to warrant a reasonably prudent [person] in believing that a crime has been or was being committed.’”) (alteration in original).

92. See, e.g., *United States v. Ventresca*, 380 U.S. 102, 111 (1965) (“A qualified officer’s detection of the smell of hash has often been held a very strong factor in determining that probable cause exists so as to allow issuance of a warrant.”); *Johnson v. United States*, 333 U.S. 10, 12–13 (1948) (observing that “a strong odor of burning opium which . . . was distinctive and unmistakable” was sufficient evidence for probable cause); *Taylor v. United States*, 286 U.S. 1, 6 (1932) (noting that the mere odor of illegal whiskey can provide probable cause sufficient for a warrant to search private property); cf. *United States v. Tate*, 694 F.2d 1217, 1221 (9th Cir. 1982) (finding that because ether has legitimate uses, its odor, absent additional evidence, does not establish probable cause to issue a search warrant).

93. Many cases show that police officers “find it easy” to detect the presence of marijuana by smelling burned or burning marijuana, unburned marijuana, and the odor of marijuana on clothing. See Susan F. Mandiberg, *Marijuana Prohibition and the Shrinking of the Fourth Amendment*, 43 MCGEORGE L. REV. 23, 39–42 (2012) (noting many instances where police officers used plain smell to identify marijuana).

94. See *United States v. Kerr*, 876 F.2d 1440, 1445 (9th Cir. 1989) (“[T]he presence of the odor of contraband may itself be sufficient to establish probable cause.”); see also *United States v. Ramos*, 443 F.3d 304, 308 (3d Cir. 2006) (“It is well settled that the smell of marijuana alone, if articulable and particularized, may establish not merely reasonable suspicion, but probable cause.”); *United States v. Humphries*, 372 F.3d 653, 659 (4th Cir. 2004) (“[I]f an officer smells the

marijuana possession in the home is permitted under state law, the odor of marijuana emanating from a residence would establish only the presence of some unspecified amount of marijuana. It would not automatically establish the existence of an illegal amount of marijuana.

In *State v. Crocker*<sup>95</sup> the Alaska Court of Appeals addressed this key practical aspect of implementing the right to privacy and revised the probable cause standard that must be met before a search warrant could be issued to search a home for evidence of marijuana-related activity.<sup>96</sup> The court held that “a judicial officer should not issue a warrant to search a person’s home for evidence of marijuana possession unless the State’s warrant application establishes probable cause to believe that the person’s possession of marijuana exceeds the scope of the possession that is constitutionally protected under *Ravin*.”<sup>97</sup> In other words, there must be “good reason to believe that the law has been broken (and that evidence of that illegality can be found on the premises to be searched).”<sup>98</sup>

The search warrant issued in *Crocker* did not meet this standard. The warrant application contained an assertion that the arresting officers perceived “a strong odor of growing marijuana” when they stood at the front door of the residence to be searched.<sup>99</sup> But the warrant application did not indicate that the strength of the marijuana odor gave the officers any indication as to the amount of marijuana that might be growing inside the home.<sup>100</sup> Lacking that connection between odor and amount, the court of appeals ruled that the officers could not establish probable cause to believe that anyone inside the house was breaking the law.<sup>101</sup>

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odor of marijuana in circumstances where the officer can localize its source to a person, the officer has probable cause . . . .”); *United States v. Pierre*, 958 F.2d 1304, 1310 (5th Cir. 1992) (en banc) (“The smell of burned contraband [created] probable cause to search the vehicle for suspected contraband.”).

95. 97 P.3d 93 (Alaska Ct. App. 2004).

96. *Id.* at 94. Prior to *Noy*, the Alaska Court of Appeals held that an officer who smelled growing marijuana from a defendant’s home had probable cause to obtain a search warrant. *Lustig v. State*, 36 P.3d 731, 733 (Alaska Ct. App. 2001).

97. *Crocker*, 97 P.3d at 94; see also *Starkey v. State*, 272 P.3d 347, 353 n.8 (Alaska Ct. App. 2012) (forbidding search warrants in the absence of probable cause that the type of marijuana possession at issue is something other than the type of possession protected by *Ravin*).

98. *Crocker*, 97 P.3d at 96.

99. *Id.* at 97. The search warrant application in *Crocker* also included evidence of “higher than average” electricity usage. *Id.* at 98. The court did not consider this persuasive evidence of a commercial marijuana grow. *Id.* Furthermore, the court had previously ruled that “utility records showing unusual electrical consumption have no inherent incriminatory value.” *Carter v. State*, 910 P.2d 619, 625 (Alaska Ct. App. 1996).

100. *Crocker*, 97 P.3d at 97.

101. *Id.* at 96–97. Judge Coats authored a dissenting opinion, arguing that this



Simply smelling the odor of marijuana from outside a residence was not persuasive evidence that the amount of marijuana being grown inside exceeded four ounces or was possessed for commercial purposes.<sup>102</sup>

Following the court of appeals ruling, the State petitioned the Alaska Supreme Court for review.<sup>103</sup> The court again declined to hear a case implicating *Ravin*.<sup>104</sup>

During this time period the Alaska courts formally reaffirmed the vitality of *Ravin* and the right to privacy over the statutory changes made in 1990.<sup>105</sup> However, Alaska voters were not interested in further decriminalization efforts as they rejected ballot initiatives that included broad marijuana decriminalization plans in both 2000 and 2004.<sup>106</sup>

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holding was a departure from prior cases where the court of appeals found that an officer who smelled growing marijuana from a defendant's home had probable cause to obtain a search warrant. *Id.* at 99 (Coats, J., dissenting) (citing *Lustig v. State*, 36 P.3d 731 (Alaska Ct. App. 2001); *Wallace v. State*, 933 P.2d 1157 (Alaska Ct. App. 1997); *McClelland v. State*, 928 P.2d 1224 (Alaska Ct. App. 1996); *Landers v. State*, 809 P.2d 424 (Alaska Ct. App. 1991)). The majority distinguished these cases on the grounds that they were issued before the court's ruling in *Noy* and did not directly implicate *Ravin*. *Id.* at 96.

102. *See id.* at 96 (noting that the probable cause standard requires an officer to suspect the amount, not merely the presence of marijuana). Courts in other jurisdictions have reached similar conclusions following marijuana decriminalization. *See Commonwealth v. Cruz*, 945 N.E.2d 899, 910 (Mass. 2011) (finding that after criminal marijuana statute was amended to make possession of one ounce or less a civil offense, smell alone no longer constituted probable cause that a criminal offense had occurred).

103. Petition For Hearing at 8, *State v. Crocker*, Supreme Court No. S-11651 (Dec. 30, 2004).

104. Order, *State v. Crocker*, Supreme Court No. S-11651 (Dec. 30, 2004).

105. *See Noy v. State*, 83 P.3d 538, 543 (Alaska Ct. App. 2003) (restricting section 11.71.060(a)(1) of the Alaska Statutes from applying to amounts of marijuana less than four ounces inside the home for personal use); *see also Crocker*, 97 P.3d at 97 (holding that law enforcement officers cannot presume the presence of a prohibited amount of marijuana inside the home by smell alone).

106. *See 2000 General Election Ballot Measures*, STATE OF ALASKA DIVISION OF ELECTIONS, <http://www.elections.alaska.gov/doc/oep/2000/bm00.htm#99hempsum> (last visited Oct. 5, 2012) (outlining pros and cons of ballot measure to re-legalize hemp); *Alaska Marijuana Decriminalization Initiative, Measure 5 (2000)*, BALLOTPEDIA, [http://ballotpedia.org/wiki/index.php/Alaska\\_Marijuana\\_Decriminalization\\_Initiative\\_Measure\\_5\\_\(2000\)](http://ballotpedia.org/wiki/index.php/Alaska_Marijuana_Decriminalization_Initiative_Measure_5_(2000)) (last updated Apr. 20, 2012) (explaining details of initiative to re-legalize hemp); *Alaska Legalize Marijuana Act, Measure 2 (2004)*, BALLOTPEDIA, [http://ballotpedia.org/wiki/index.php/Alaska\\_Legalize\\_Marijuana\\_Act\\_Measure\\_2\\_\(2004\)](http://ballotpedia.org/wiki/index.php/Alaska_Legalize_Marijuana_Act_Measure_2_(2004)) (last updated Apr. 20, 2012) (providing overview of the Legalize Marijuana Act); *Ballot Measure 2 - Initiative to Legalize Marijuana*, 2004 STATE OF ALASKA OFFICIAL ELECTION PAMPHLET 90-91, available at [http://www.elections.alaska.gov/doc/oep/2004/2004\\_oep\\_reg\\_1.pdf](http://www.elections.alaska.gov/doc/oep/2004/2004_oep_reg_1.pdf) (last visited Oct. 5, 2012) (reprinting statements in support and opposition of ballot measure to legalize marijuana).

#### D. 2006–2009: The Effort to Overturn *Ravin*

In 2006 the Alaska Legislature passed House Bill 149, which amended the state's criminal marijuana statutes so as to prohibit all marijuana use and possession in Alaska, even by adults in the privacy of the home.<sup>107</sup> This legislation began as two proposed bills presented by Governor Frank Murkowski during the previous legislative session.<sup>108</sup> The impetus behind the Governor's recriminalization push was that marijuana had become very potent and dangerous and the Alaska Supreme Court had shown an "unwillingness to reconsider the latest scientific evidence on the harmful effects of marijuana."<sup>109</sup> It was

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107. See H.B. 149, 24th Leg., 2d Sess. (Alaska 2006); Act effective June 3, 2006, §§ 7–10, 2006 Alaska Sess. Laws ch. 53 (detailing language of H.B. 149).

108. In January 2005 Governor Frank Murkowski introduced Senate Bill 74 and House Bill 96 to the 24th Alaska Legislature. S.B. 74, 24th Leg., 1st Sess. (Alaska 2005); ALASKA S. JOURNAL, 24th Leg., 1st Sess. 0112–15 (Jan. 21, 2005) (reprinting Governor Murkowski's transmittal letter); H.B. 96, 24th Leg., 1st Sess. (Alaska 2005) (text of House Bill); ALASKA H. JOURNAL, 24th Leg., 1st Sess. 0126–30 (Jan. 21, 2005) (reprinting Governor Murkowski's transmittal letter). Neither bill garnered enough support to pass that session. See Sean Cockerham, *Pot Bill Is Out of Time*, ANCHORAGE DAILY NEWS, May 8, 2005, at A1 (detailing the expected failure of the bill). The following year the Senate added Governor Murkowski's marijuana provisions to House Bill 149, a bill concerning methamphetamine already approved by the House of Representatives. See ALASKA H. JOURNAL, 24th Leg., 1st Sess. 1029–30 (Apr. 13, 2005) (outlining in transmittal letter Governor's proposed revisions); ALASKA S. JOURNAL, 24th Leg., 2d Sess. 2792–94 (Apr. 18, 2006) (adopting H.B. 149). The House, however, refused to accept the changes and voted down the Senate's version of the Bill. ALASKA H. JOURNAL, 24th Leg., 2d Sess. 3212–13 (Apr. 19, 2006) (voting not to adopt H.B. 149). Governor Murkowski was frustrated by the House's decision, and some speculated that he levied intense political pressure on House members to reconsider their vote. See Matt Volz, *House Passes Merged Drug Bill - REVERSAL: Measure Restricts Access to Meth Ingredients, Makes Possession of Marijuana Illegal*, ANCHORAGE DAILY NEWS, May 6, 2006, at A1 ("House Minority Leader Ethan Berkowitz, D-Anchorage, said he believed the only reason the vote was reversed was because of pressure on lawmakers by the governor's office for Murkowski's priority bill."). In an unusual move, the House did indeed rescind its previous vote, then re-voted and approved the marijuana amendments as an add-on to the methamphetamine legislation. ALASKA H. JOURNAL, 24th Leg., 2d Sess. 3696–98 (May 5, 2006) (voting to rescind previous action). See H.B. 149, 24th Leg., 2d Sess. (Alaska 2006) (adding marijuana provisions to methamphetamine language). The final version of the bill, Conference Committee Substitute for H.B. 149, was signed into law by the Governor as Alaska Session Law chapter 53, and went into effect the next day. ALASKA H. JOURNAL, 24th Leg., 2d Sess. 4152 (June 6, 2006) (reprinting message that bill was signed into law); Act effective June 3, 2006, §§ 7–10, 2006 Alaska Sess. Laws ch. 53 (session law language of new bill).

109. ALASKA S. JOURNAL, 24th Leg., 1st Sess. 0112–13 (Jan. 21, 2005); ALASKA H. JOURNAL, 24th Leg., 1st Sess. 0127–28; see *Order, State v. Noy*, Supreme Court No. S-11297 (Sept. 7, 2004) (denying request to reconsider the reasoning in *Ravin*).

therefore incumbent upon the Legislature to “take a stand” to protect the health and safety of Alaskans.<sup>110</sup>

The final bill lowered the thresholds for each marijuana offense, thereby increasing the criminal penalties for possession of smaller quantities of marijuana.<sup>111</sup> From 1990 to 2006, sections 11.71.060(a)(1) and (a)(2) of the Alaska Statutes established two overlapping crimes: possession of any amount of marijuana and possession of less than eight ounces of marijuana were each class B misdemeanors. House Bill 149 changed the law by making possession of less than one ounce a class B misdemeanor,<sup>112</sup> possession of one to four ounces a class A misdemeanor,<sup>113</sup> and possession of four or more ounces a class C felony.<sup>114</sup> And similar to the statutory changes mandated by the 1990 ballot initiative, there was no exception for personal use or possession in the home.<sup>115</sup> Thus, given the court of appeals’ prior ruling in *Noy*, the 2006 amendments “effectively re-criminalized possession of small amounts of marijuana by adults in the privacy of their homes.”<sup>116</sup> A summary of the changes is contained in the following table:

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110. ALASKA S. JOURNAL, 24th Leg., 1st Sess. 0112 (Jan. 21, 2005) (“I believe it is time for the Alaska Legislature to take a stand and debunk the myth that marijuana is a harmless recreational drug.”); accord ALASKA H. JOURNAL, 24th Leg., 1st Sess. 0127 (Jan. 21, 2005) (“I believe it is time for the Alaska Legislature to take a stand and debunk the myth that marijuana is a harmless recreational drug.”).

111. See Act effective June 3, 2006, §§ 7-9, 2006 Alaska Sess. Laws ch. 53 (criminalizing all possession of marijuana). The bill also changed the method for determining the weight of marijuana contained in growing plants: “For purposes of calculating the aggregate weight of a live marijuana plant, the aggregate weight shall be one-sixth of the measured weight of the marijuana plant after the roots of the marijuana plant have been removed.” *Id.* § 10 (amending section 11.71.080 of the Alaska Statutes).

112. ALASKA STAT. § 11.71.060(a)(2) (2012) (possessing less than one ounce of marijuana is a class B misdemeanor).

113. § 11.71.050(a)(2)(E).

114. § 11.71.040(a)(3)(F) (possessing four ounces or more of marijuana is a class C felony).

115. House Bill 149 did make one concession for personal use in the home. The bill amended the state sentencing guidelines for misdemeanor marijuana possession. Act effective June 3, 2006, § 16, 2006 Alaska Sess. Laws ch. 53. Under the amended section 12.55.135(j) of the Alaska Statutes, a person convicted of possession of less than one ounce of marijuana in the home for personal use only faces incarceration if compounding conditions are met, such as if the person had one or more prior convictions or if the person was on parole or probation. Otherwise, the maximum penalty for a first offense is a \$500 fine, and a \$1,000 fine for a second offense. See *State v. ACLU of Alaska*, 204 P.3d 364, 370 n.32 (Alaska 2009).

116. Zoha Barkeshli, *Right of Privacy – Citizens’ Right to Fly High Not Yet Ripe for Review According to Alaska Supreme Court*, 41 RUTGERS L.J. 993, 999 (2010).

*Statutory Criminal Penalties for Simple Marijuana Possession in Alaska (1991 and 2006)*<sup>117</sup>

Quantity of Marijuana	1991 Penalty	2006 Penalty
<b>Less than 1 Ounce</b>	Class B Misdemeanor <sup>118</sup>	Class B Misdemeanor <sup>123</sup>
<b>1 to 4 Ounces</b>	Class B Misdemeanor <sup>119</sup>	Class A Misdemeanor <sup>124</sup>
<b>4 to 8 Ounces</b>	Class B Misdemeanor <sup>120</sup>	Class C Felony <sup>125</sup>
<b>8 Ounces to 1 Pound</b>	Class A Misdemeanor <sup>121</sup>	Class C Felony <sup>126</sup>
<b>1 Pound or More</b>	Class C Felony <sup>122</sup>	Class C Felony <sup>127</sup>

The 2006 amendments left the state marijuana laws identical in effect to the laws ruled unconstitutional in both *Ravin* and *Noy*.<sup>128</sup> This

117. This table is not inclusive of all marijuana-related crimes or any applicable affirmative defenses; it lists only penalties applicable to simple possession under state law.

118. ALASKA STAT. § 11.71.060(a)(1), (b) (1992) (outlining penalties for less than eight ounces) (current version ALASKA STAT. § 11.71.060 (2012)).

119. *Id.*

120. *Id.*

121. § 11.71.050(a)(3)(E), (b) (1992) (current version ALASKA STAT. § 11.71.050 (2012)) (outlining penalties for eight ounces or more).

122. § 11.71.040(a)(3)(F), (b) (1992) (current version ALASKA STAT. § 11.71.060 (2012)) (outlining penalties for one pound or more).

123. § 11.71.060(a)(2), (b) (2012) (outlining penalties for less than one ounce). A class B misdemeanor is punishable by up to 90 days in prison and a \$2,000 fine. § 12.55.135(b) (listing 90 day law); § 12.55.035(b)(6) (listing \$2,000 fine). Possession of any amount of marijuana remained a default Class B misdemeanor. § 11.71.060(a)(1) (listing penalty for someone who “uses or displays any amount of a schedule VIA controlled substance”).

124. § 11.71.050(a)(2)(E), (b) (listing penalty for one ounce or more). A Class A misdemeanor is punishable by up to one year in prison and a \$10,000 fine. § 12.55.135(a); § 12.55.035(b)(5). There is no statute that specifically addresses possession of between one and four ounces of marijuana, but the new section 11.71.040(a)(3)(F) of the Alaska Statutes (amended by Act effective June 3, 2006, § 7, 2006 Alaska Sess. Laws ch. 53) made possession of four ounces or more a Class C felony, effectively making section 11.71.050(a)(2)(E) of the Alaska Statutes applicable only to possession of amounts more than one ounce but less than four. § 11.71.040(a)(2)(E) (2012).

125. § 11.71.040(a)(3)(F), (d) (2012) (listing penalty for four ounces or more). A class C felony is punishable by a prison sentence of up to five years and a \$50,000 fine. § 12.55.125(e); § 12.55.035(b)(3).

126. § 11.71.040(a)(3)(F), (d) (listing penalty for four ounces or more).

127. *Id.*

128. *See* § 11.71.050; § 11.71.060 (possessing any amount of a schedule VIA controlled substance is at least a Class B misdemeanor).

was the first time since *Ravin* was issued that the Alaska Legislature passed laws that directly conflicted with *Ravin*. The Legislature was aware of this conflict, and acknowledged that a court challenge would probably follow. The final bill included a series of findings on the health and social effects of marijuana in order “[t]o assist the courts in considering these issues.”<sup>129</sup> The findings alleged that marijuana usage rates were higher and modern marijuana was much more potent than the marijuana commonly used in 1975 when *Ravin* was decided.<sup>130</sup> According to the bill, this increase in potency and usage led directly to significant negative health and social consequences.<sup>131</sup>

A thorough critique of the scientific validity of the Legislature’s findings is beyond the scope of this article.<sup>132</sup> However, it should be noted that the public hearings<sup>133</sup> on this legislation called the accuracy

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129. Act effective June 3, 2006, § 2, 2006 Alaska Sess. Laws ch. 53.

130. For the complete legislative findings contained in House Bill 149, see Act effective June 3, 2006, § 2, 2006 Alaska Sess. Laws ch. 53. The Alaska Supreme Court summarized the findings: “(1) Marijuana potency has increased dramatically in the last 30 years, particularly in Alaska, and corresponds to an increase in rehabilitative and hospital treatment related to marijuana use. (2) Hundreds of Alaskans are treated for marijuana abuse each year, more than half being children; pregnant women in Alaska use marijuana at a higher rate than the national average. (3) Many users become psychologically dependent on marijuana under recognized clinical standards. (4) Early exposure to marijuana increases the likelihood of health and social problems, including mental health problems. (5) Many people treated for alcoholism also abuse marijuana, and alcoholism treatment is more difficult when marijuana is used. (6) Marijuana affects many body and brain functions; it often contains bacteria and fungi harmful to humans. (7) A higher percentage of adults and juveniles arrested in Alaska have marijuana in their systems at the time of arrest. (8) If a parent uses marijuana, then their children are much more likely to become marijuana users; studies have shown that criminal penalties increase the perception among teenagers of the risks of using marijuana, thus reducing use.” *State v. ACLU of Alaska*, 204 P.3d 364, 367 (Alaska 2009).

131. See Act effective June 3, 2006, § 2, 2006 Alaska Sess. Laws ch. 53 (outlining negative health findings for §§ 7-10).

132. For a review of scientific literature detailing recent findings on marijuana, see generally Itai Danovitch, *Sorting Through the Science on Marijuana: Facts, Fallacies, and Implications for Legalization*, 43 MCGEORGE L. REV. 91 (2012).

133. In March, April, and May 2005, the Alaska Senate and House of Representatives held a number of public hearings and received documentary and testimonial evidence from proponents and opponents of marijuana decriminalization. See *S.B. 74, ALASKA S. HEALTH, EDUC. & SOCIAL SERVS. COMM. MINUTES*, 24th Leg. (Mar. 21, 2005, Mar. 23, 2005, Apr. 1, 2005) (detailing proceedings from hearings on Senate Bill 74); *S.B. 74, ALASKA S. JUDIC. COMM. MINUTES*, 24th Leg. (Apr. 11, 2005, Apr. 20, 2005, Apr. 23, 2005, May 3, 2005 (no public testimony), May 5, 2005) (detailing proceedings from hearings on Senate Bill 74); *H.B. 96, ALASKA H. JUDIC. COMM. MINUTES*, 24th Leg. (Apr. 8, 2005, Apr. 12, 2005) (detailing proceedings from hearings on House Bill 96). Additional hearings were held in early 2006. See *S.B. 74, ALASKA S. FINANCE COMM. MINUTES*, 24th Leg. (Jan. 10, 2006, Jan. 12, 2006) (listing proceedings from hearings on

and objectiveness of the legislature's findings into question.<sup>134</sup> The findings appeared to be predetermined—they were nearly identical to the proposed findings the Governor submitted prior to any testimony being heard and consisted of largely the same evidence the state had previously submitted to the Alaska Supreme Court in support of its petitions for hearing in *Noy*.<sup>135</sup> And for each point raised by the Legislature, or proposed by the witnesses who testified in support of the legislation, scientific experts presented testimony containing opposing evidence.<sup>136</sup>

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Senate Bill 74).

134. Some senators were very critical of the findings. Senator Hollis French proposed removing the findings from the bill. The Senator explained that many experts refuted the findings, "which weren't proven beyond a reasonable doubt. 'Science should be in the laboratory and not in the . . . statute.'" *H.B. 149, ALASKA S. CONF. COMM. 24th Leg. (Apr. 12, 2006)* (statement of Senator Hollis French at 6:37:54 PM) (alteration in original). The Senator was also concerned that the House had not had the opportunity to fully analyze and debate the marijuana issues addressed in the bill. *Id.* at 6:41:10 PM (expressing concern that not enough research had been done).

135. Compare *S.B. 74 § 2, 24th Leg., 1st Sess. (Alaska 2005)*, and *H.B. 96 § 2, 24th Leg., 1st Sess. (Alaska 2005)*, with *Petition For Hearing at 6, State v. Noy, Supreme Court No. S-11297 (Jan. 5, 2004)*.

136. See *S.B. 74 – Crimes Involving Marijuana/Other Drugs, ALASKA S. HEALTH, EDUC. & SOCIAL SERVS. COMM. MINUTES, 24th Leg. (Apr. 1, 2005)* (statement of Dr. Lester Grinspoon, M.D., Associate Professor of Psychiatry at the Harvard Medical School at 2:21:19 PM) ("[M]arijuana is no more harmful today than it was in 1975 when I testified in the Ravin Court."); *S.B. 74 – Crimes Involving Marijuana/Other Drugs, ALASKA S. JUDIC. COMM. MINUTES, 24th Leg. (Apr. 11, 2005)* (statement of Dr. Grinspoon at 10:06:04 AM, 10:08:17 AM) ("Most of what people are led to believe about the dangers of marijuana is mythical. . . . Street marijuana is more potent but does not impose increased risk. A user simply uses less."); *S.B. 74 – Crimes Involving Marijuana/Other Drugs, ALASKA S. HEALTH, EDUC. & SOCIAL SERVS. COMM. MINUTES, 24th Leg. (Apr. 1, 2005)* (statement of Dr. Mitch Earleywine, Ph.D., Associate Professor of Psychology, University of Southern California at 2:40:31 PM) ("[T]his substance is not completely harmless, but certainly nowhere as dangerous as the way it's been depicted by some of the physicians that have testified on this bill."); *S.B. 74 – Crimes Involving Marijuana/Other Drugs, ALASKA S. JUDIC. COMM. MINUTES, 24th Leg. (Apr. 11, 2005)* (statement of Dr. Earleywine at 10:43:50 AM) ("Previous testimony regarding higher levels of marijuana potency has been exaggerated."); *ALASKA S. FINANCE COMM. MINUTES, 24th Leg. (Jan. 12, 2006)*; *H.B. 96, ALASKA H. JUDIC. COMM. MINUTES, 24th Leg. (Apr. 12, 2005)*; *S.B. 74, ALASKA S. FINANCE COMM. MINUTES, 24th Leg. (Jan. 12, 2006)*; *S.B. 74 – Crimes Involving Marijuana/Other Drugs, ALASKA S. HEALTH, EDUC. & SOCIAL SERVS. COMM. MINUTES, 24th Leg. (Apr. 1, 2005)* (statement of Dr. Kelly Drew, Associate Professor of Chemistry and Biochemistry at University of Alaska Fairbanks at 2:51:06 PM) ("[T]he bottom line of the evidence does not support the assertion that marijuana poses a threat to public health that justifies prohibiting its use and possession in the state."); *S.B. 74, ALASKA S. FINANCE COMM. MINUTES, 24th Leg. (Jan. 10, 2006)*; *S.B. 74 – Crimes Involving Marijuana/Other Drugs, ALASKA S. HEALTH, EDUC. & SOCIAL SERVS. COMM. MINUTES, 24th Leg. (Apr. 1, 2005)* (statement of Dr. Less Iverson,

Shortly after House Bill 149 was signed into law, a lawsuit was filed that challenged the constitutionality of the blanket marijuana prohibition imposed by the 2006 amendments.<sup>137</sup> In *ACLU of Alaska v. State*,<sup>138</sup> the plaintiffs argued that by outlawing possession of all marijuana, including possession of small amounts in the home for personal use by adults, the new laws violated the privacy clause of the Alaska Constitution as interpreted by *Ravin*.<sup>139</sup> Superior Court Judge Patricia Collins agreed, declaring the challenged legislation unconstitutional to the extent it conflicted with *Ravin* and “criminalize[d] possession of small amounts of marijuana in the home by consenting adults for purely personal, non-commercial use.”<sup>140</sup> Judge Collins ruled that stare decisis commanded that *Ravin* remained the law “[u]nless and until the supreme court directs otherwise.”<sup>141</sup> The judge did not address the thousands of pages of scientific journals, books, testimony, and other evidence the parties submitted, nor did she reach the issue of whether the State’s “new, although disputed, data justifies revisiting *Ravin*.”<sup>142</sup> That decision was “uniquely within the province of the Alaska Supreme Court.”<sup>143</sup> The State appealed to the Alaska

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Professor of Pharmacology at the University at Oxford, England at 3:16:35 PM) (“[T]he statements in SB 74 give an inaccurate picture of the scientific data about marijuana . . . . In my view marijuana is a relatively safe drug and its use does less medical and social harm than alcohol or tobacco.”); *S.B. 74 – Crimes Involving Marijuana/Other Drugs*, ALASKA S. JUDIC. COMM. MINUTES, 24th Leg. (Apr. 11, 2005) (statement of Dr. Tim Hinterberger, Ph.D., Associate Professor of Biomedicine, University of Alaska Anchorage at 10:38:45 AM) (“SB 74 disregards existing scientific consensus of the health, social, and economic effects of our current marijuana policy.”); *S.B. 74 – Crimes Involving Marijuana/Other Drugs*, ALASKA S. JUDIC. COMM. MINUTES, 24th Leg. (May 5, 2005) (statement of Dr. Hinterberger at 8:58:55 AM, 9:02:41 AM) (“Marijuana is a relatively benign drug.”); *S.B. 74 – Crimes Involving Marijuana/Other Drugs*, ALASKA S. JUDIC. COMM. MINUTES, 24th Leg. (Apr. 11, 2005) (statement of Dr. Robert Malamede, Ph.D., Professor of Biology, University of Colorado at Colorado Springs at 10:33:33 AM) (“[M]arijuana has a tremendous amount of positive uses.”).

137. Complaint for Declaratory and Injunctive Relief at 2, *ACLU of Alaska v. State*, No. IJU-06-793CI (Alaska Super. Ct. June 5, 2006), 2006 WL 6457041.

138. No. IJU-06-793 CI, 2006 WL 6457870 (Alaska Super. Ct. July 10, 2006).

139. *Id.* at \*2.

140. *Id.* at \*1. Judge Collins’ order was limited to the constitutionality of section 11.71.060(a) of the Alaska Statutes as it criminalized possession of less than one ounce of marijuana. *Id.* at \*3 (“This decision is limited to the narrow issue presented.”). The judge found that plaintiffs had not sufficiently alleged that any plaintiff or ACLU member actually possessed more than one ounce of marijuana in the home. *Id.* at \*3-4. Accordingly, Plaintiffs’ challenge to section 11.71.050(a)(2)(E) of the Alaska Statutes, which recriminalized possession of more than one ounce of marijuana, was not considered. *Id.* at \*3-4.

141. *Id.* at \*9, \*11-12.

142. *Id.* at \*11.

143. *Id.* at \*11-12.

Supreme Court.

On appeal, in *State v. ACLU of Alaska*,<sup>144</sup> the state argued that *Ravin* should no longer control and that a blanket prohibition on personal marijuana use was justified.<sup>145</sup> Relying on the Legislature's findings, the state identified numerous factors that had changed since *Ravin* was decided: marijuana was much more potent and intoxicating, more people were using marijuana and were starting to use marijuana at younger ages, and the adverse consequences of marijuana use were better understood.<sup>146</sup> Conversely, Plaintiffs argued that there were no grounds to overturn *Ravin* because marijuana was still a relatively harmless substance, as it was when *Ravin* was decided.<sup>147</sup> Plaintiffs also argued that if the supreme court was inclined to reconsider *Ravin*, the court should remand the case for an evidentiary hearing to assess the nature and effects of marijuana use and not blindly defer to the Legislature's findings.<sup>148</sup>

The Alaska Supreme Court did not address any of these arguments. In a 3-2 opinion, the Court held that the matter was not ripe for review, vacated the superior court's decision, and dismissed the case without reaching the merits of the constitutional issues.<sup>149</sup> The court ruled that any challenge to the constitutionality of the 2006 amendments must "arise from an actual prosecution brought under the amended statute."<sup>150</sup>

*State v. ACLU of Alaska* was not decided the way any of the parties anticipated. The court raised the ripeness issue *sua sponte* a year after the initial briefing was completed.<sup>151</sup> The parties were united in agreement that the case was ripe and "asked—indeed, implored" the court to

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144. 204 P.3d 364 (Alaska 2009).

145. *Id.* at 367.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 373–74. See Barkeshli, *supra* note 116, at 1007 ("The question of whether the new amendments encroach upon Alaska citizens' constitutional right to privacy remains unresolved.").

150. *ACLU of Alaska*, 204 P.3d at 367. Justice Matthews' majority opinion explained, "[t]he relaxed approach to ripeness sometimes taken with respect to pre-enforcement challenges to criminal laws is not appropriate here because plaintiffs already face a risk of prosecution for home use of marijuana under federal drug statutes." *Id.* In dissent, Justice Carpeneti (joined by Justice Winfree) disagreed with the risk of federal prosecution and was concerned that the decision ran counter to long-established Alaska law which reflects a "deep-seated commitment to the idea that the doors of Alaska's courts should be open to its citizens to the greatest extent possible." *Id.* at 374–75 (Carpeneti, J., dissenting). For a more detailed discussion of the court's opinion, see Barkeshli, *supra* note 116.

151. *ACLU of Alaska*, 204 P.3d at 367.



decide on the merits, as this was “a high-profile case in which the general public as well as the executive and legislative branches of government [were] interested.”<sup>152</sup> The intentional lack of guidance on the constitutionality of *Ravin* was particularly troubling to Justice Carpeneti who argued in dissent that the court should have reached the merits because “[t]he state needs to know whether the new statute is constitutional or whether, conversely, *Ravin* retains vitality. The plaintiffs need to have the same question answered, or face the difficult and unfair choice of foregoing possibly constitutionally protected activity or risking criminal penalties.”<sup>153</sup> However, by dismissing the matter on procedural grounds, the majority tacitly preserved the continuing vitality of *Ravin v. State*.

### E. Post-*State v. ACLU of Alaska: Ravin and Noy* Still Control

*State v. ACLU of Alaska* did not upset *Ravin*'s interpretation of the right of privacy, nor did it limit an adult's ability to engage in private, personal marijuana possession and use in any way. It left the law just as it was after the 2006 marijuana prohibition amendments were passed and before the litigation challenging those amendments began: the Alaska criminal marijuana statutes on the books facially conflicted with a longstanding Alaska Supreme Court decision. Thus, following *State v. ACLU of Alaska*, and without any subsequent reported decisions on point, the legal landscape regarding marijuana in Alaska was, and remains, identical to how it looked to the court in *Noy v. State*. It follows that the same legal analysis employed in *Noy* applies with respect to the 2006 amendments: “[w]hen a statute conflicts with a provision of [the] state constitution, the statute must give way . . . a statute which purports to attach criminal penalties to constitutionally protected conduct is void.”<sup>154</sup> As was the case in *Noy*, Alaska's current criminal marijuana statutes are unconstitutional and unenforceable to the extent they prohibit conduct protected by *Ravin*.<sup>155</sup>

That these statutes remain “on the books” does not bear on the

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152. *Id.* at 373–74, 381 (Carpeneti, J., dissenting).

153. *Id.* at 380 (citations omitted).

154. *Noy v. State*, 83 P.3d 538, 542 (Alaska Ct. App. 2003) (internal citations omitted); see also *Bonjour v. Bonjour*, 592 P.2d 1233, 1237 (Alaska 1979) (citing *Marbury v. Madison*, 1 Cranch 137 (1803)) (finding legislative enactment may not authorize infringement of constitutional rights); *Macaulay v. Hildebrand*, 491 P.2d 120, 122 (Alaska 1971) (blocking enforcement of Juneau ordinance that conflicted with state education statute because ordinance conflicted with state law on matter of statewide concern).

155. *Noy*, 83 P.3d at 542.

protections afforded by the right to privacy. A judicial decision limiting the enforcement and applicability of a statute does not automatically wipe the statute off the books or require the legislature to revise the statute. In both *Ravin* and *Noy*, the courts ruled that the statutes at issue were unconstitutional as applied to certain conduct. Following *Ravin* the legislature amended the statutes to codify the decision, but following *Noy* the text of the Alaska Statutes remained unchanged from the 1990 Initiative and continued to contain a blanket prohibition on marijuana use.<sup>156</sup> The statutes were not revised until 2006 when they were amended to enhance the penalties for all marijuana use and possession. Despite the protections afforded by *Ravin* and *Noy*, the Alaska Statutes have stood as an empty prohibition against all personal use and possession of marijuana since 1991.

This situation is not entirely out of the ordinary. There are many examples of statutes that are not in line with judicial opinions. Such “dead letter” statutes have remained on the books long after they were struck down or were recognized as unenforceable.<sup>157</sup> The difference between the current Alaska marijuana laws and such dead letter statutes is that the Alaska laws were passed *after* the courts had ruled that laws criminalizing personal, private marijuana use were unconstitutional.<sup>158</sup>

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156. *E.g.*, ALASKA STAT. § 11.71.060 (2004) (current version ALASKA STAT. § 11.71.060 (2012)).

157. Alabama’s anti-miscegenation statute, rendered unconstitutional by the United States Supreme Court in *Loving v. Virginia*, 388 U.S. 1, 12 (1967), remained on the books until it was repealed by voter initiative in 2000. ALA. CONST. art. IV, § 102 (annulled by Amendment 667 (2000)). Twenty-one states still have adultery laws on the books. Jessica Feinberg, *Exposing the Traditional Marriage Agenda*, 7 NW. J. L. & SOC. POL’Y 301, 329 (2012) (“In the twenty-one states that still have the crime of adultery on the books, enforcement of these statutes has become exceedingly rare.”). In *Lawrence v. Texas*, the Court struck down a Texas sodomy statute, though the statute itself remains on the books with the annotation: “This section was declared unconstitutional.” 539 U.S. 558, 578 (2003); TEX. PENAL CODE ANN. § 21.06 (West 2011). A Colorado law making it a crime to deface the American flag also remains on the books over 30 years after it was struck down. COLO. REV. STAT. ANN. § 18-11-204 (West 2012); *see* *People v. Vaughn*, 514 P.2d 1318, 1324 (Colo. 1973) (striking down law criminalizing flag desecration as unconstitutional).

158. A similarity can be drawn to the unsuccessful attempts to ban abortion through legislation that directly conflicts with *Roe v. Wade*, 410 U.S. 113 (1973). The South Dakota legislature passed a bill in 2006 that banned all abortion in the state. H.B. 1215, 81st Leg. (S.D. 2006) (concluding that life begins at conception and thus banning abortions in South Dakota). This bill never became law; it was overturned by the voters through a veto referendum. *South Dakota Referred Law 6 (2006)*, BALLOTPEDIA, [http://ballotpedia.org/wiki/index.php/South\\_Dakota\\_Abortion\\_Ban\\_Referendum\\_\(2006\)](http://ballotpedia.org/wiki/index.php/South_Dakota_Abortion_Ban_Referendum_(2006)). In 2008, South Dakota voters were once again asked to vote on a bill that would ban all abortion in the state. *See South Dakota Initiative Measure 11 (2008)*, BALLOTPEDIA, [http://ballotpedia.org/wiki/index.php/South\\_Dakota\\_Abortion\\_Ban\\_Initiated\\_Measure\\_11\\_\(2008\)](http://ballotpedia.org/wiki/index.php/South_Dakota_Abortion_Ban_Initiated_Measure_11_(2008)). The

Regardless, this legislative action does not diminish the value of the judicial decisions previously issued on nearly identical statutes. Under these rulings, adults may possess less than four ounces of marijuana in their homes for purely personal, non-commercial use.<sup>159</sup> Under the current laws, the following are illegal: transporting marijuana out of the home;<sup>160</sup> driving under the influence of marijuana;<sup>161</sup> buying or selling any amount of marijuana;<sup>162</sup> possessing marijuana in an amount indicative of an intent to sell;<sup>163</sup> cooperatively growing and distributing marijuana, even if the growing operation was intended only for the personal use of those involved;<sup>164</sup> giving away marijuana;<sup>165</sup> and possessing marijuana if the possessor is a minor.<sup>166</sup>

## II. THE CONTINUING VITALITY OF *RAVIN v. STATE*

Several layers of legal protection secure the continuing vitality of *Ravin v. State*. Current Alaska Department of Law policy suggests that no one should be arrested (or subsequently prosecuted) for conduct protected by *Ravin*.<sup>167</sup> If followed, that policy will make it impossible for

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purpose of these measures was to overturn *Roe v. Wade*. See Nicholas Riccardi, *Initiatives to Curb Abortion Defeated*, L.A. TIMES, Nov. 5, 2008, at A18, available at <http://articles.latimes.com/2008/nov/05/nation/na-states5> (“The most prominent initiative was a measure put on the ballot in South Dakota to outlaw most abortions in hope of triggering a Supreme Court showdown over the landmark 1973 case *Roe vs. Wade*.”); Evelyn Nieves, *S.D. Abortion Bill Takes Aim at ‘Roe,’* WASH. POST, Feb. 23, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/22/AR2006022202424.html> (“South Dakota lawmakers yesterday approved the nation’s most far-reaching ban on abortion, setting the stage for new legal challenges that its supporters say they hope lead to an overturning of *Roe v. Wade*.”). That the statutes to be created by these ballot measures would be facially unconstitutional is almost irrelevant to those who supported the measures—the purpose was to get the issue in front of judges who might now be inclined to overturn *Roe*. *Id.*

159. *Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975); *Noy*, 83 P.3d at 543.

160. *Belgarde v. State*, 543 P.2d 206, 207 (Alaska 1975) (clarifying that *Ravin* does not protect possession of marijuana in a public place).

161. *Ravin*, 537 P.2d at 511.

162. *Id.*

163. *Id.*; see also *Brown v. State*, 565 P.2d 179, 180 (Alaska 1977) (reaffirming that *Ravin* offers no constitutional protection regarding the buying or selling of marijuana).

164. *Garhart v. State*, 147 P.3d 751, 751 (Alaska Ct. App. 2006).

165. *Wright v. State*, 651 P.2d 846, 849 (Alaska Ct. App. 1982) (finding the noncommercial transfer of marijuana falls within the statutory prohibition against distribution of marijuana).

166. See *Allam v. State*, 830 P.2d 435, 441 (Alaska Ct. App. 1992) (finding the Alaska legislature acted constitutionally when it established a minimum age for possession and use of marijuana).

167. *New Marijuana Laws*, ALASKA DEP’T OF LAW (May 12, 2006),

a court to consider a challenge to *Ravin* because *State v. ACLU of Alaska* requires prosecution under the new marijuana prohibition statutes as a condition of justiciability for a *Ravin*-based claim. Should a court eventually have occasion to revisit *Ravin*, *stare decisis* would then stand in and preserve the decision because all lower court judges must abide by *Ravin*. Further, *stare decisis* establishes a very high threshold that would have to be met before the Alaska Supreme Court could change course and deviate from its now thirty-seven year-old precedent. The court would have to be convinced that marijuana use has become such a threat to public health and welfare that the state has no choice but to completely proscribe it, even if that means reaching into the home and regulating private conduct. This standard would be difficult to meet as the scientific community is far from being in agreement about the dangers of marijuana use.

Considering all of these factors, there is currently very little room for a court to take up this matter, let alone for the Alaska Supreme Court to overturn *Ravin*.

#### **A. Ripeness and Prosecutorial Discretion Insulate *Ravin* from Future Challenges**

Following *State v. ACLU of Alaska*, any challenge to the constitutionality of Alaska's new criminal marijuana statute, and thereby an opportunity for a court to consider *Ravin*, must await an actual prosecution under that statute.<sup>168</sup> Such a case will not easily present itself. The Alaska Supreme Court notes that arrests and prosecutions for misdemeanor marijuana possession in Alaska are historically rare.<sup>169</sup> Even if an activist was willing to be subject to arrest

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<http://law.alaska.gov/press/releases/2006/051206-Marijuana.html>.

168. *State v. ACLU of Alaska*, 204 P.3d 364, 367 (Alaska 2009). The language contemplates any reconsideration of *Ravin* arising in the criminal context, which does not provide a direct path back to the Alaska Supreme Court. Under Alaska's Appellate Procedure Rules, the Alaska Court of Appeals hears all appeals from final decisions by the superior court or the district court in criminal cases. ALASKA R. APP. P. 202(b) (2012); ALASKA STAT. § 22.07.020 (2012). The Alaska Supreme Court maintains discretionary review of court of appeals decisions. As explained, the Alaska Supreme Court could continue to decline to consider any *Ravin*-related issues.

169. See *ACLU of Alaska*, 204 P.3d at 371 (“[P]rosecutors and police departments generally are not interested in pursuing individuals who merely possess small quantities of marijuana in their home for personal use.”). From 2006 to 2008 the State filed just over 3,000 cases alleging violation of section 11.71.060 of Alaska Statutes (Misconduct Involving a Controlled Substance in the Sixth Degree—Possession of Marijuana). *Id.* at 377. This information does not identify the number of cases, if any, that included conduct protected under

in order to mount a constitutional challenge as Irwin Ravin did,<sup>170</sup> that would not guarantee judicial review. “[P]rosecutors and police departments generally are not interested in pursuing individuals who merely possess small quantities of marijuana in their home for personal use.”<sup>171</sup> To the extent that individuals are arrested for such conduct, it is often incident to investigation of other crimes<sup>172</sup> and the charges are typically dropped before trial.<sup>173</sup> This practice is consistent with the fact

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*Ravin*. At this time there are no comprehensive empirical studies identifying the number of arrests or prosecutions for misdemeanor marijuana possession that stemmed from personal use and possession of less than four ounces of marijuana in the home by adults.

170. See Richard Mauer, *Recriminalization – Drug War, Right To Privacy Face Off*, ANCHORAGE DAILY NEWS, Oct. 28, 1990, at M17 (discussing libertarian activists willing to undergo arrest in order to challenge the statute on constitutional grounds); Jill Burke, *Irwin Ravin, Alaska Marijuana Rights Activist, Dies*, ALASKA DISPATCH (Apr. 12, 2010), <http://www.alaskadispatch.com/article/irwin-ravin-alaska-marijuana-rights-activist-dies> (reporting the death of Irwin Ravin and discussing his life as a marijuana activist); James Halpin, *Attorney Who Forced Marijuana Issue, Dies in Anchorage*, ANCHORAGE DAILY NEWS (Apr. 13, 2010, 11:37 AM), <http://www.adn.com/2010/04/12/1223213/attorney-who-forced-marijuana.html> (reporting the death of Irwin Ravin and discussing his life as a marijuana activist); *Marijuana Lawyer Irwin Ravin Dies in Anchorage*, JUNEAU EMPIRE (Apr. 14, 2010), [http://juneauempire.com/stories/041410/sta\\_608718010.shtml](http://juneauempire.com/stories/041410/sta_608718010.shtml) (reporting the death of Irwin Ravin and discussing his life as a marijuana activist).

171. *State v. ACLU of Alaska*, 204 P.3d at 371 (citing *Ravin*, 537 P.2d at 511 n.70).

172. See *Ravin*, 537 P.2d at 511 n.70 (“Statistics indicate that few arrests for simple possession occur in the home except when other crimes are simultaneously being investigated. The trend in general in law enforcement seems to be toward minimal effort against simple users of marijuana, and concentration of efforts against dealers and users of more dangerous substances.”).

173. The recent case of Eva Anniskett of Point Lay, Alaska is illustrative: “After getting a tip on March 28, [2011,] North Slope Borough police arrived at Anniskett’s house and ‘obtained consent to search her home,’ according to a press release from the department. Police found 1 gram of marijuana . . . . They forwarded a charge of sixth-degree misconduct involving a controlled substance to the district attorney’s office in Barrow, a class B misdemeanor.” Alex DeMarban, *Small Marijuana Bust on North Slope Raises Eyebrows at ACLU*, THE ARCTIC SOUNDER (Apr. 1, 2011, 3:55 PM), [http://www.thearcticsounder.com/article/1113small\\_marijuana\\_bust\\_on\\_north\\_slope\\_raises](http://www.thearcticsounder.com/article/1113small_marijuana_bust_on_north_slope_raises). Ms. Anniskett was not prosecuted – the state declined to charge her with a crime – and even if Ms. Anniskett were tried, the charges could not have survived a dismissal motion in light of the controlling *Ravin* and *Noy* decisions. See also Jill Burke, *New Alaska Medical Marijuana Clinic Banks on Hazy Enforcement Policies*, ALASKA DISPATCH (July 13, 2012), <http://www.alaskadispatch.com/article/new-alaska-medical-marijuana-clinic-banks-hazy-enforcement-policies> (noting that “[a]t least three Alaskans busted on pot charges have had their court cases tossed based on *Ravin*’s precedent”). However, following *State v. ACLU of Alaska*, there remains an open question as to whether the facts of Ms. Anniskett’s situation would create a justiciable civil case challenging the constitutionality of the 2006

that Alaskans have had the right to private personal marijuana use under state law since 1975.

Just before the 2006 amendments to Alaska's criminal marijuana statutes were signed into law by the Governor, the Alaska Attorney General instructed all law enforcement officers in the state to continue to respect an adult's right to "nonpublic possession of less than four ounces of marijuana by adults."<sup>174</sup> Under this non-enforcement policy, no one was to be arrested for conduct protected by *Ravin* and *Noy* but prohibited by "[t]he new marijuana law."<sup>175</sup> This directive was to remain in place until the courts had an opportunity to address the constitutionality of the new law.<sup>176</sup> There is no record of the non-enforcement policy being repealed, and its existence places another barrier between *Ravin* and the courts.<sup>177</sup>

The non-enforcement policy acknowledged respect for the separation of powers and the proper roles of the executive and legislature vis-à-vis the judiciary.<sup>178</sup> Authorities intended for the policy

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amendments.

174. *New Marijuana Laws*, ALASKA DEP'T OF LAW (May 12, 2006), <http://law.alaska.gov/press/releases/2006/051206-Marijuana.html>; see also *State v. ACLU of Alaska*, 204 P.3d at 380 n.40 (Carpeneti, J., dissenting) (stating that "[i]ndeed, today's opinion may put enforcement of the new laws on hold indefinitely. Following enactment of the current law, the attorney general issued a law enforcement bulletin" and quoting the bulletin at length).

175. *New Marijuana Laws*, *supra* note 174 ("The new marijuana laws created by House Bill 149, which will soon be signed by Governor Murkowski, will immediately affect those who possess four ounces or more, but will make no immediate change in police authority regarding personal possession of under four ounces by adults in homes.").

176. See *id.* ("The state will vigorously litigate all these legal issues because it's important that the courts overrule these prior decisions. . . . [But, w]e live under the rule of law, and full implementation of the marijuana law is ultimately up to the courts.").

177. A search of Department of Law Press Releases shows that no further public statements regarding marijuana prosecution have been issued. See *Press Releases*, ALASKA DEP'T OF LAW, <http://www.law.alaska.gov/press/news.html> (providing searchable database of press releases and containing no further public statements regarding marijuana prosecution). Further, in 2011, the Alaska Department of Law's spokesman was unaware "of anyone who's been prosecuted by the state for possessing small amounts" of marijuana. DeMarban, *supra* note 173. That statement is consistent with the non-enforcement policy. However, whether the directive is strictly followed in practice throughout the state is uncertain. Two recent comments indicate that it is not. The Anchorage Police Department spokesperson stated unequivocally that anyone found with any marijuana in their homes would be arrested unless they were a registered medical marijuana user. An Alaska State Assistant District Attorney confirmed this view of the law, but explained that decisions to prosecute would be made "case by case." Burke, *supra* note 173.

178. No Alaska Attorney General opinion addressing the 2006 Amendments has been issued, but the May 2006 policy directive follows the logic of a 1989

to shield individuals from the risk of prosecution for conduct that was still constitutionally protected, which was necessary during a confusing time. Indeed, this may have initially saved Alaska's strong privacy protections from becoming lost in a constitutional Twilight Zone—a limbo where no citizen could be truly sure what the law meant or what his or her rights are. But the policy did not contemplate the Alaska Supreme Court's eventual ruling on ripeness in *State v. ACLU of Alaska*. It now couples with that decision to block any clear path for a court to review Alaska's personal use marijuana laws. It creates a legal Catch-22: Alaska courts cannot address the constitutionality of the 2006 amendments as they apply to conduct protected by *Ravin* until law enforcement starts arresting people for possession of small amounts of marijuana in their homes. Under current policy, law enforcement should not arrest anyone for possession of small amounts of marijuana in their homes until the courts have addressed the constitutionality of the 2006 amendments. As Justice Carpeneti noted in his dissent in *State v. ACLU of Alaska*, "today's opinion may put enforcement of the new laws on hold indefinitely."<sup>179</sup>

The executive branch of the Alaska government is now squarely in the middle of the *Ravin* debate. It is not difficult to imagine a scenario in which a state or local law enforcement officer completes an arrest and triggers *Ravin* litigation, regardless of the Alaska Attorney General's policy directive.<sup>180</sup> And the Attorney General could certainly revise the non-enforcement policy and encourage prosecution of low-level marijuana offenses. This would open the door for a court to potentially reconsider *Ravin*, but making such a change solely to provide a distant opportunity for a court to review the 2006 amendments would come at a great cost. First, it could significantly shift the Department of Law's practice away from what it was before the directive, when simple possession of small amounts of marijuana in private was a nonexistent prosecutorial priority.<sup>181</sup> This would be a poor use of investigative and

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Alaska Attorney General opinion discussing the 1990 Initiative. Winters, *supra* note 3, at 342 (citing ALASKA OP. ATT'Y GEN. 227 (1989)). In that opinion the Attorney General did not state whether or not the Initiative was constitutional because "a review of the substantive constitutionality of a bill . . . must await post-enactment litigation." *Id.* (internal quotation marks omitted).

179. *ACLU of Alaska*, 204 P.3d at 380 n.40 (Carpeneti, J., dissenting).

180. See DeMarban *supra* note 173; Burke *supra* note 173.

181. See *Ravin v. State*, 537 P.2d 494, 511 n.70 (Alaska 1975) ("Statistics indicate that few arrests for simple possession occur in the home except when other crimes are simultaneously being investigated. The trend in general in law enforcement seems to be toward minimal effort against simple users of marijuana, and concentration of efforts against dealers and users of more dangerous substances.").

prosecutorial resources.<sup>182</sup> Second, it would charge Alaska's law enforcement agencies with the awkward task of having to enforce what are in effect dead letter statutes that compromise individual privacy rights. Third, and most importantly, it would chill the right of privacy by placing Alaskans in fear of prosecution for engaging in what is still constitutionally protected conduct.<sup>183</sup> Ultimately, such a decision would create more problems than it would solve, especially in light of the very high threshold that must be met before the Alaska Supreme Court could even consider overturning *Ravin*, as discussed in detail below. A more prudent course would be for the Attorney General to confer with other state law enforcement officials and announce either continued respect for the 2006 policy directive or a revised marijuana enforcement policy.<sup>184</sup> But if the Attorney General were to formally dissolve the non-enforcement policy, he or she should do so with great caution and clear

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182. See SCOTT W. BATES, *THE ECONOMIC IMPLICATIONS OF MARIJUANA LEGALIZATION IN ALASKA* 27 (2004) (“[M]arijuana prohibition costs the State of Alaska well over \$24 million annually in direct and indirect costs of enforcement.”); see also Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAP. L. REV. 555, 575 (2010) (“the federal effort to block state medical marijuana laws has . . . drained federal drug enforcement resources from other priorities”); Andrew J. LeVay, Note, *Urgent Compassion: Medical Marijuana, Prosecutorial Discretion and the Medical Necessity Defense*, 41 B.C. L. REV. 699, 744 (2000) (“precious law enforcement resources should be used to prevent violent crimes that endanger the safety of [the state’s] citizens”); Jesse Norris, *THE EARNED RELEASE REVOLUTION: EARLY ASSESSMENTS AND STATE-LEVEL STRATEGIES*, 95 Marq. L. Rev. (2012) 1551, 1627 (“Several cities and states have recently decriminalized or are currently considering decriminalizing marijuana, often motivated by the potential budgetary savings.”)

183. See, e.g., *ACLU of Alaska*, 204 P.3d at 378 (Carpeneti, J., dissenting) (“Consider the individual who comes home one evening to find a window broken in his home and the door slightly ajar. The individual knows that he left a small container of marijuana in the open on his coffee table. He must now decide whether he should call the police and expose himself to prosecution for possession of less than one ounce of marijuana in his home, or enter the house by himself and risk encountering an intruder. . . . [The individual] currently engaging in activities that this court has previously declared [in *Ravin* and *Noy*] as protected under the Alaska Constitution will be chilled in the exercise of those activities by the very real risk of a state prosecution.”).

184. It has been six years since the non-enforcement policy was implemented in 2006. During that time Alaska has had three Governors, five different Attorneys General, and numerous new prosecutors and police officers. The policy was implemented under Attorney General Marquez and Governor Frank Murkowski. See *List of Governors of Alaska*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_Governors\\_of\\_Alaska](http://en.wikipedia.org/wiki/List_of_Governors_of_Alaska) (last visited Sept. 3, 2012) (listing all Governors of Alaska); see also *Attorneys General of Alaska*, STATE OF ALASKA DEP’T OF LAW, [http://www.law.state.ak.us/departments/ag\\_past.html](http://www.law.state.ak.us/departments/ag_past.html) (last visited Nov. 13, 2012) (listing all Attorneys General of Alaska).



guidance as to what he or she expects from law enforcement in order to minimize inconsistent application of the state's criminal marijuana laws.

### B. Alaska Lower Courts Remain Duty-Bound to Abide By *Ravin*

The principle of *stare decisis* mandates that prior “decisions of higher courts take preceden[t] over the decisions of lower courts.”<sup>185</sup> Thus *Ravin* still controls every Alaska court's review of a statute that penalizes private personal marijuana use.<sup>186</sup> Though these decisions are not binding,<sup>187</sup> several prior superior court cases have addressed conflicts with *Ravin* and guide how trial court judges should respond if the Alaska Department of Law were to rescind its directive requiring law enforcement agencies to respect *Ravin* and *Noy* and begin prosecuting individuals for possession of small amounts of marijuana in their homes.

In 1992, Patrick McNeil was arrested for conduct that was banned by the 1990 Initiative but permitted under *Ravin*: he was an adult (22 years old) in possession of a small amount of marijuana (0.21 grams, or 0.0074 ounces) in his home for personal use.<sup>188</sup> McNeil moved to suppress the evidence and dismiss the charges under *Ravin*.<sup>189</sup> Superior Court Judge Michael A. Thompson agreed and dismissed the case, ruling that the statutes amended by the initiative that conflicted with *Ravin* were essentially legally irrelevant in light of *stare decisis*.<sup>190</sup> Though the judge did consider the possibility that conditions had changed and a

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185. *Klumb v. State*, 712 P.2d 909, 913 (Alaska Ct. App. 1986) (“This follows the general rule that decisions of higher courts take precedence over the decisions of lower courts.”).

186. See *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1373 (E.D. Pa. 1990), *rev'd on other grounds*, 947 F.2d 682 (3d Cir. 1991), *rev'd on other grounds*, 505 U.S. 833 (1992) (citations omitted) (internal quotation marks omitted) (“[O]nly [the Supreme] Court may overrule one of its precedents . . .”).

187. See *Ostrosky v. Alaska*, 913 F.2d 590, 596 (9th Cir. 1990) (“Alaska superior court decisions are not binding on other Alaska superior courts.”).

188. *State v. McNeil*, No. 1KE-93-947 CR, at \*1 (Alaska Super. Ct. Oct. 29, 1993).

189. *Id.* at \*2 (“Defendant has moved to suppress the evidence taken under the warrant on the grounds that there was insufficient probably [sic] cause for the issue of the warrant; the search exceeded the scope of the warrant; and, finally, that AS 11.71.060(a)(1) violates article I, Section 22 of the State Constitution (the right to privacy) inasmuch as it criminalizes the personal possession of marijuana by adults for use in one's home.”).

190. *Id.* at \*6; see also *Winters*, *supra* note 3, at 329 (“[T]he prosecution in *McNeil* presented no evidence to suggest that new scientific data regarding the effects of marijuana invalidated the basis for the *Ravin* decision. Therefore, Judge Thompson felt he had ‘no basis to overrule or even qualify the *Ravin* decision’ and he dismissed the charges against *McNeil*.”).

departure from *Ravin* was justified: “[s]cience marches on. Perhaps there is now in existence sufficient evidence in the scientific community to persuade [the supreme court] that the State does have an adequate justification to intrude on individual privacy in the manner sought by [the statute].”<sup>191</sup> The State did not present any such evidence, nor make any argument on this point.<sup>192</sup> Accordingly, the judge had “no basis to overrule or even qualify the *Ravin* decision.”<sup>193</sup>

Scientific evidence regarding the health and social effects of marijuana later played a role in *State v. Mahle*.<sup>194</sup> Mahle was indicted on numerous weapons and controlled substance charges in 2000.<sup>195</sup> In 2006, while awaiting sentencing, he moved to suppress evidence under the *Crocker* rule.<sup>196</sup> In response the State sought to present scientific evidence that marijuana was a greater public health concern than it was when *Ravin* was decided.<sup>197</sup> The State asserted that it could establish that marijuana was now so dangerous that Alaska law should be changed to criminalize even possession of small amounts of marijuana in the home for personal use.<sup>198</sup> The State’s rationale was that if it could establish that *Ravin* was no longer good law, then the subsequent decisions in *Noy* and *Crocker* would no longer be binding and there would be no legal justification to grant Mahle’s suppression motion.<sup>199</sup> Judge Volland denied the State’s request for a “*Ravin* Hearing.”<sup>200</sup> The judge declared that stare decisis left him without authority to overrule *Ravin* and that even if the state’s new research was well founded, it did “not somehow

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191. *McNeil*, No. 1KE-93-947 CR, at \*6.

192. *Id.*

193. *Id.*

194. No. 3:06-cv-00255 JWS, 2007 WL 2021814 (D. Alaska July 10, 2007).

195. *See id.* at \*1 (“The charges were based on evidence seized after a series of four search warrants were executed at his home . . . [And] Mahle was convicted of most of the charges.”).

196. *Id.*; *see also* *State v. Crocker*, 97 P.3d 93, 94 (Alaska Ct. App. 2004) (“[A] judicial officer should not issue a warrant to search a person’s home for evidence of marijuana possession unless the State’s warrant application establishes probable cause to believe that the person’s possession of marijuana exceeds the scope of the possession that is constitutionally protected under *Ravin*.”).

197. Mahle requested a hearing in order to establish that the warrant was issued absent sufficient probable cause to believe that he was engaged in illegal conduct. The state opposed Mahle’s motion to suppress and joined his request for an evidentiary hearing. However, in its request, the state took the extraordinary step of requesting its own evidentiary hearing on an issue Mahle did not even raise. The State “requested an evidentiary hearing to show sufficient justification for the criminalization of the possession [of] any amount of marijuana, regardless of where it occurs.” Order Denying *Ravin* Hearing at 1, *State v. Mahle*, Case No. 3AN-S00-8212 CR, at \*1 (Mar. 29, 2006).

198. *Id.*

199. *Id.*

200. *Id.* at \*3.

empower this court to ignore legal precedent.”<sup>201</sup> Judge Volland also noted that the scientific studies the State wanted him to consider were the same studies the State put before the supreme court in its unsuccessful Petition for Hearing in *Noy*.<sup>202</sup> Judge Volland saw “no compelling reason to do that which the Alaska Supreme Court has expressly declined to do.”<sup>203</sup> This ruling was consistent with a lower court’s obligation to apply precedent even in light of new evidence that might impact the decision, as trial courts may not circumvent stare decisis by speculating on how such evidence might be viewed by the Alaska Supreme Court.<sup>204</sup>

Similarly, Judge Collins’ ruling in *ACLU of Alaska v. State* provides a roadmap for how a trial court should handle a ripe challenge to the state’s criminal marijuana statutes: the challenged statutes should be declared unconstitutional to the extent they conflict with *Ravin* and its progeny.<sup>205</sup> The court should not defer to legislative findings and should not acquiesce to a request for an evidentiary hearing absent specific direction from the Supreme Court.<sup>206</sup> *Ravin* does not provide a framework for trial courts to determine, on a case-by-case basis, whether current data about marijuana establishes that the government has a sufficient interest in prohibiting possession of small amounts of

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201. *Id.*

202. *Id.* at \*2.

203. *Id.*

204. See *United States v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir. 2000) (“[S]peculation does not permit us to ignore controlling Supreme Court authority.”); see also *Agostini v. Felton*, 521 U.S. 203, 238 (1997) (“The trial court acted within its discretion in entertaining the motion with supporting allegations, but it was also correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent.”); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”); *United States v. Ameline*, 376 F.3d 967, 986 (9th Cir. 2004) (“[W]e cannot properly overrule this course of precedent in anticipation of a new directive that the Court has not yet issued.”); but see *PNC Bank Corp. v. W.C.A.B. (Stamos)*, 831 A.2d 1269, 1282 (Pa. Commw. Ct. 2003) (“[M]any authorities have suggested that in an appropriate case ‘anticipatory overruling’ may be not only permissible, but an obligation . . . . We believe that the best view is that such action should be taken only in the extraordinary circumstance in which there can be no serious question as to our Supreme Court’s intention.”).

205. See generally *ACLU of Alaska v. State*, No. IJU-06-793 CI, 2006 WL 6457870 (Alaska Super. Ct. July 10, 2006).

206. See *id.* at \*12 (“[*Ravin*] is the law until and unless the supreme court takes contrary action.”).

marijuana by adults in their homes.<sup>207</sup> Thus, while “[t]he State remains free to challenge the continuing vitality of *Ravin*,”<sup>208</sup> trial courts are not required to hold an evidentiary hearing whenever the State argues it has new scientific evidence, nor must the courts blindly defer to legislative findings on this point. It is up to the Alaska Supreme Court alone to determine if the state has met the factual burden to warrant revisiting *Ravin*.<sup>209</sup> Trial courts remain “duty bound” to follow *Ravin* “[u]nless and until the supreme court directs otherwise.”<sup>210</sup>

### C. The Circumstances Under Which The Alaska Supreme Court Can Overturn *Ravin* Are Closely Circumscribed

The Alaska Supreme Court must employ a stringent analysis before it can deviate from one of its previous rulings. *Stare decisis* cautions the court to not “lightly overrule [its] past decisions.”<sup>211</sup> But this doctrine is not a rigid paradigm or an “inexorable command.”<sup>212</sup> It allows for legal

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207. *Id.*; see also *Noy II*, 83 P.3d 545, 546–47 (Alaska Ct. App. 2003) (“The *Ravin* decision does not speak of an affirmative defense of the type proposed by the State in its petition for rehearing, nor does the *Ravin* opinion describe itself as establishing case-specific limits on the State’s enforcement of marijuana statutes.”); but see *Agostini*, 521 U.S. at 238 (“The trial court acted within its discretion in entertaining the motion with supporting allegations, but it was also correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent.”). In the interests of judicial economy, it would be unwise to hold a lengthy evidentiary hearing on the science of the health and social effects of marijuana without prior direction from the Supreme Court.

208. *Noy II*, 83 P.3d at 549.

209. *Brown v. Board of Education* underscores the proper role of lower courts vis-à-vis the Supreme Court. 347 U.S. 483, 486–88 (1954) (asserting that lower courts are bound by U.S. Supreme Court precedent). *Brown* was actually a consolidated opinion covering four class action cases. *Id.* In three of the cases, federal district courts denied relief to the plaintiffs and upheld the “separate but equal” doctrine announced in *Plessy v. Ferguson*, 163 U.S. 537 (1896), even though there was social science evidence establishing that “[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children.” *Brown*, 347 U.S. at 494 (internal quotation marks omitted); see also *id.* at 494 n.10 (stating that a state supreme court likewise held that it must adhere to *Plessy*, but ordered relief for the plaintiffs on other grounds). The decision in *Brown* overruled longstanding precedent, but it was the Supreme Court – and not a lower court – that issued the ruling; the lower courts were bound by the Supreme Court’s decision in *Plessy*. The same respect for the Alaska Supreme Court’s role should be in place here: it is the only court with the power to overrule *Ravin* or to order a hearing to consider facts related to whether it should be overruled.

210. *ACLU of Alaska v. State*, No. IJU-06-793 CI, 2006 WL 6457870, at \*9 (Alaska Super. Ct. July 10, 2006).

211. *State v. Dunlop*, 721 P.2d 604, 610 (Alaska 1986).

212. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“Although adherence to

theory to evolve as society does: courts are free to reinterpret their own holdings in light of changed facts, circumstances, norms, and social conditions.<sup>213</sup> “[S]tare decisis is a practical, flexible command that balances our community’s competing interests in the stability of legal norms and the need to adapt those norms to society’s changing demands.”<sup>214</sup> Still, the circumstances under which a prior decision can be invalidated are closely circumscribed. The Alaska Supreme Court “will overrule a decision only when convinced: (1) ‘that the rule was originally erroneous or is no longer sound because of changed conditions,’ and (2) ‘that more good than harm would result from a departure from precedent.’”<sup>215</sup> Moreover, the Court will not reverse its precedent unless it is “clearly convinced” that both prongs of the standard have been met.<sup>216</sup>

Here, there is no support for the argument that *Ravin* was “originally erroneous.”<sup>217</sup> A number of trial courts, the Alaska Court of Appeals, and the Alaska Supreme Court have consistently affirmed *Ravin*’s interpretation of the Alaska Constitution’s right of privacy<sup>218</sup> and

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the doctrine of *stare decisis* is usually the best policy, the doctrine is not an inexorable command. This Court has never felt constrained to follow precedent when governing decisions are unworkable or badly reasoned.”); *see also* *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (“[*Stare decisis*] is a principle of policy and not a mechanical formula of adherence to the latest decision.”); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting) (“*Stare decisis* is usually the wise policy . . . [However,] in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions.”).

213. *See, e.g., Brown*, 347 U.S. at 493.

214. *Pratt & Whitney Canada, Inc. v. Sheehan*, 852 P.2d 1173, 1175 (Alaska 1993); *see also State v. United Cook Inlet Drift Ass’n*, 895 P.2d 947, 953 (Alaska 1995) (“[T]he judicial doctrine of *stare decisis* accords the prior holdings of the highest courts of this State precedential value while still permitting the reconsideration of legal issues when conditions warrant.”).

215. *State v. Carlin*, 249 P.3d 752, 757–58 (Alaska 2011) (quoting *Sheehan*, 852 P.2d at 1176) (citation omitted).

216. *See Dunlop*, 721 P.2d at 610 (quoting *State v. Souter*, 606 P.3d 399, 400 (Alaska 1980)) (internal quotation marks omitted); *see also Lawson v. Lawson*, 108 P.3d 883, 887–88 (Alaska 2005) (applying both prongs of the *stare decisis* standard to a prior opinion permitting judicial promulgation of child-support rules and declining to overrule that decision).

217. *Cf. Lawrence v. Texas*, 539 U.S. 558 (1993) *overturning Bowers v. Hardwick*, 478 U.S. 186 (1986) (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent.”).

218. *See, e.g., Brown v. Ely*, 14 P.3d 257, 260 (Alaska 2000) (“We have not overruled *Ravin*.”); *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1135 (Alaska 1989) (recognizing the “fundamental right” of privacy protects the personal use of marijuana by adults in the home) (quoting *Ravin*, 537 P.2d at 502) (internal quotation marks omitted); *Noy v. State*, 83 P.3d 538, 544 (Alaska Ct. App. 2003) (invalidating a statute that purported to criminalize any and all

the balancing analysis employed in *Ravin* “has become the trademark of Alaska’s constitutional cases.”<sup>219</sup> The recent challenges to the continuing vitality of *Ravin* have instead focused on the “changed conditions” prong of the stare decisis test. “Changed conditions” exist when “related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, [or] facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application.”<sup>220</sup> With this in mind, the argument for overturning *Ravin* follows this logic: (1) marijuana is much more potent and dangerous now than it was when *Ravin* was decided; (2) increased use of such higher potency marijuana has led to significant negative health and social consequences; (3) these negative health and social effects give the state an interest sufficient to justify restricting all personal marijuana use and possession, even that by adults in the privacy of their homes.<sup>221</sup>

This theory was explicit in *Ravin* itself. The court’s decision was based on analysis of contemporaneous scientific evidence concerning the social and health effects of marijuana use. The court found that the effects of the lower-potency marijuana that was commonly consumed in the United States at the time were “not serious enough to justify widespread concern.”<sup>222</sup> The court did not see “any great likelihood of a significant shift in use to the more potent” forms of marijuana available

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marijuana possession); *Noy II*, 83 P.3d 545, 549 (Alaska Ct. App. 2003) (declining rehearing *Noy* because that case rightfully “implement[ed] the supreme court’s constitutional ruling in *Ravin*”); Order, *State v. Noy*, Supreme Court No. S-11297 (Sept. 7, 2004); *State v. Crocker*, 97 P.3d 93, 95 (Alaska Ct. App. 2004) (“Not all marijuana possession is a crime in Alaska.”); *State v. McNeil*, No. 1KE-93-947 CR, at \*6 (Alaska Super. Ct. Oct. 29, 1993) (rejecting application of section 11.71.060 of the Alaska Statutes that criminalized all possession of marijuana); see also, *Fraternal Order of Eagles v. City & Borough of Juneau*, 254 P.3d 348, 357 (Alaska 2011) (finding that a local smoking ordinance that prohibited smoking cigarettes in private clubs that offered food and alcohol for sale did not run afoul of the right to privacy as interpreted in *Ravin* “because [a private club] is not a home.”).

219. Orlansky & Feldman, *supra* note 27, at 10–11 (“In the balancing analysis that has become the trademark of Alaska’s constitutional cases, justice Rabinowitz declared that personal privacy may be restricted by the state only if the state can meet its substantial burden by demonstrating a legitimate state interest in proscribing the private use of marijuana.”).

220. *Pratt & Whitney Canada, Inc. v. Sheehan*, 852 P.2d 1173, 1176 (Alaska 1993) (alteration in original) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992)) (internal quotation marks omitted).

221. *State v. ACLU of Alaska*, 204 P.3d 364, 367 (Alaska 2009) (setting out findings asserted by the State supporting the argument to overturn *Ravin* based on factual findings and developments).

222. *Ravin v. State*, 537 P.2d 494, 590–91 (Alaska 1975).

in other countries.<sup>223</sup> But the court cautioned, “[i]f such a shift were to occur, then marijuana use could be characterized as a serious health problem.”<sup>224</sup> Yet a mere shift alone will not be sufficient. The *Ravin* decision adds another demanding level of inquiry that must be met before the changed conditions prong of the *stare decisis* test can be satisfied: “The state must demonstrate a need based on proof that the public health or welfare *will in fact suffer* if the [marijuana] controls are not applied.”<sup>225</sup>

Expert opinions continue to vary greatly on whether such a conclusive link exists.<sup>226</sup> In *Ravin*, the court found the evidence of potential danger from marijuana use “contradictory and inconclusive” – not nearly strong enough to outweigh the heightened privacy interests respected in Alaska.<sup>227</sup> A review of the legislative record for the 2006 amendments reveals a similar split.<sup>228</sup> Despite the Legislature’s position that marijuana is more potent and harmful than it was in 1975, there is hardly a scientific consensus as to whether marijuana poses significant danger to the user or others.<sup>229</sup> Yet this is precisely what must be proven

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223. *Id.* at 510 n.64.

224. *Id.*

225. *Id.* at 511 (emphasis added).

226. See Danovitch, *supra* note 132, at 92 (“Data on marijuana related arrests and incarceration is inconsistent, but many experts suggest that the adverse consequences of criminal sanctions are greater than the adverse consequences of marijuana.”).

227. Orlansky & Feldman, *supra* note 27, at 11.

228. In March, April, and May 2005, the Alaska Senate and House of Representatives held a number of public hearings and received documentary and testimonial evidence from proponents and opponents of marijuana decriminalization. See *supra* notes 133–36 and accompanying text (summarizing legislative testimony regarding the 2006 amendments).

229. The Alaska legislature itself is inconsistent on this point. Marijuana is still classified as a Schedule VIA drug in Alaska, a substance with “the lowest danger or probable danger to a person or the public.” Compare ALASKA STAT. § 11.71.190 (a), (b) (2012), with § 11.71.160 (a), (f) (placing some marijuana compounds such as hashish and hashish oil in schedule IIIA with more dangerous substances). Despite the alleged dangers posed by the more potent modern forms of marijuana available, the Legislature did not reschedule marijuana when it amended the criminal penalties for marijuana use in 2006. Since the justification for recriminalizing all marijuana use was due to the increased dangers posed by marijuana use, rescheduling the drug at that time would have been logical. Similarly, the Legislature has made no effort to amend the constitution to prohibit personal marijuana use and possession. Given the unsuccessful ballot initiatives aimed at decriminalizing marijuana in 2000 and 2004, the possibility that such an amendment would ultimately pass cannot be dismissed. However, recent polling indicates that voters nationwide favor legalizing and regulating marijuana. 56% Favor Legalizing, Regulating Marijuana, RASMUSSEN REPORTS (May 17, 2012), [http://www.rasmussenreports.com/public\\_content/lifestyle/general\\_lifestyle/may\\_2012/56\\_favor\\_legalizing\\_regul](http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/may_2012/56_favor_legalizing_regul)

to overturn *Ravin*. Conversely, to uphold the decision, the court does not need to find that marijuana is less harmful than it was in 1975, or that it is even exactly the same as it was in 1975. Marijuana may be more potent now, and may involve other concerns that were not present in 1975, but those facts alone will not automatically justify a blanket marijuana prohibition that extends to restrict an adult's private choices in the home. Respect for the *Ravin* precedent means the ruling must stand unless there is proof that permitting adults to use small amounts of marijuana in the privacy of their homes creates a significant risk to public health and welfare.<sup>230</sup>

To date, the "increased potency" theory for overturning *Ravin* has not been well received. Three times in the very recent past the Alaska Supreme Court has declined the chance to revisit *Ravin*, even when presented with new research purporting to show the increased health effects of marijuana.<sup>231</sup> As Judge Volland wrote in *State v. Mahle*:

[I]f there ever was an opportunity for the Supreme Court to reconsider its holding in *Ravin*, it was when faced with the State's Petition [for Hearing in *Noy*]. Yet when presented with the most recent information the State has compiled regarding marijuana, and a direct opportunity to revisit *Ravin v. State*, the Alaska Supreme Court declined to do so.<sup>232</sup>

Courts typically only reconsider past precedents in light of significantly changed social conditions, shifting values, better-informed legal analysis, or a combination thereof. These factors take on greater significance when the precedent at issue has been weakened by subsequent decisions.<sup>233</sup> This is not the case with *Ravin*, however, as no

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ating marijuana (finding that 56% of voters nationwide favor legalizing and regulating marijuana similar to the way alcohol and tobacco cigarettes are currently regulated).

230. See *Ravin*, 537 P.2d at 511 ("The state must demonstrate a need based on proof that the public health or welfare will in fact suffer if the controls are not applied.").

231. Order, *State v. Noy*, Supreme Court No. S-11297 (Sept. 7, 2004); Order, *State v. Crocker*, Supreme Court No. S-11651 (Dec. 30, 2004); *State v. ACLU of Alaska*, 204 P.3d 364, 373-74 (Alaska 2009) (relying on the supremacy of the CSA and the risk of federal prosecution to justify its decision to abstain from ruling on the merits of the parties' claims).

232. Order Denying *Ravin* Hearing at 2, *State v. Mahle*, Case No. 3AN-S00-8212 CR, at 1 (Mar. 29, 2006).

233. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896) (overturning the "separate but equal" doctrine). In all of the cases that involved the "separate but equal" doctrine in the field of public graduate education after *Plessy* but prior to *Brown*, "inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications." *Id.* at 492 (citing *Missouri ex*



subsequent cases have weakened its holding.<sup>234</sup> The continuing vitality of *Ravin* thus turns on the degree to which accepted views on the public health and social effects of marijuana have changed.

The second prong of the stare decisis test, analyzing whether more good than harm would result from a departure from precedent, is also tied to changes in marijuana potency and usage patterns. As with *Ravin* itself, this question rests on a balance between privacy and public welfare, and if the scientific evidence is not convincing enough to satisfy the first prong of the test, then by definition the second prong cannot be met either.

The second prong also requires the court to “balance the benefits of adopting a new rule against the benefits of *stare decisis*: providing guidance for the conduct of individuals, creating efficiency in litigation by avoiding the relitigation of decided issues, and maintaining public faith in the judiciary.”<sup>235</sup> As the United States Supreme Court explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>236</sup> where it

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rel. *Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Ok. St. Regents for Higher Educ.*, 339 U.S. 637 (1950)) The Court was on its way toward overturning *Plessy* when it considered *Brown*. See also *Lawrence v. Texas*, 539 U.S. 558 (2003), *overruling Bowers v. Hardwick* 478 U.S. 176, 559 (1986) (noting that “[t]he 25 States with laws prohibiting the conduct referenced in *Bowers* [were] reduced now to 13, of which 4 enforce their laws only against homosexual conduct.”).

234. See, e.g., *Brown v. Ely*, 14 P.3d 257, 260 (Alaska 2000) (“We have not overruled *Ravin*.”); *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1135 (Alaska 1989) (the “fundamental right” of privacy protects the personal use of marijuana by adults in the home) (internal quotation marks omitted) (quoting *Ravin*, 537 P.2d at 502); *Noy v. State*, 83 P.3d 538, 544 (Alaska Ct. App. 2003) (invalidating a statute that purported to criminalize any and all marijuana possession); *Noy II*, 83 P.3d 545, 549 (Alaska Ct. App. 2003) (declining to rehear *Noy* because that case rightfully “implement[ed] the supreme court’s constitutional ruling in *Ravin*”); *Order, State v. Noy*, Supreme Court No. S-11297 (Sept. 7, 2004); *Crocker*, 97 P.3d at 95 (“Not all marijuana possession is a crime in Alaska.”); *Order, State v. Crocker*, Supreme Court No. S-11651 (Dec. 30, 2004); *State v. McNeil*, No. 1KE-93-947 CR, at \*6 (Alaska Super. Ct. Oct. 29, 1993). (rejecting application of section 11.71.060 of the Alaska Statutes that criminalized all possession of marijuana); see also, *Fraternal Order of Eagles v. City & Borough of Juneau*, 254 P.3d 348, 357 (Alaska 2011) (finding that a local smoking ordinance that prohibited smoking cigarettes in private clubs that offered food and alcohol for sale did not run afoul of the right to privacy as interpreted in *Ravin* “because [a private club] is not a home.”).

235. *State v. Carlin*, 249 P.3d 752, 761–62 (Alaska 2011); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 853 (1992) (“The reservations any of us may have in reaffirming the central holding of *Roe v. Wade* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*”).

236. 505 U.S. 833 (1992).

was asked to consider overruling its landmark decision in *Roe v. Wade*:<sup>237</sup>

[W]hatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.<sup>238</sup>

The historical value of *Ravin* is certainly a factor the court must consider. *Ravin* was the watershed decision in Alaska privacy rights jurisprudence. It established the cornerstone principle that the Alaska Constitution provides greater protection for individual privacy than the U.S. Constitution.<sup>239</sup> This is not to say that *Ravin* should be upheld simply because of its place in history—that is antithetical to the stare decisis analysis. But given its prominence, the court should be very cautious when considering deviating from such an entrenched holding.

### III. ADMINISTERING AND IMPLEMENTING RAVIN

The current legal landscape in Alaska insulates *Ravin* from being easily overturned, but issues related to *Ravin* are still present. Implementing the decision remains subject to legislative oversight and requires continued judicial guidance. This Part explains that a full and objective review of the health and social effects of marijuana use should occur outside of the political arena. The Alaska courts should not blindly defer to legislative findings on this matter. However, the Legislature still plays an important role in regulating marijuana use by adults in the privacy of their homes. For instance, the four-ounce personal use ceiling is not a constitutional imperative. It was a legislative determination and the Alaska Legislature retains the ability to further define the contours of personal marijuana use in the home. Additionally, the ability of state law enforcement officers to investigate activity that falls outside the scope of *Ravin* continues to evolve, particularly with respect to search warrants involving the perception of marijuana odor. The smell of marijuana alone will not establish probable cause to search a home, but

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237. 410 U.S. 113 (1973) (declaring Texas criminal statutes prohibiting abortions at any stage of pregnancy except to save the life of the mother are unconstitutional).

238. *Casey*, 505 U.S. at 867.

239. *See supra* Part I.1.

the courts have yet to determine the precise weight to accord data on the correlation between marijuana odor and the quantity of marijuana present within a residence.

#### A. The Alaska Legislature Can Determine What Constitutes A Small Amount of Marijuana

The Alaska Constitution does not confer a fundamental right to smoke marijuana.<sup>240</sup> Rather, Alaskans “have a heightened expectation of privacy with respect to their personal activities within their home,” which encompasses the ability to possess marijuana for personal use.<sup>241</sup> That expectation of privacy is not absolute—it just limits the extent to which the State can regulate private conduct in the home. The source of that expectation, the Alaska Constitution’s privacy clause, directly grants the Legislature the power to “implement” the right of privacy.<sup>242</sup> If the Legislature is going to regulate on a far end of the spectrum and ban all marijuana use, including use by adults in the home, it must meet a very demanding standard. However, if it is simply applying *Ravin* and attempting to define the contours of personal marijuana use, the standard is much more lenient. In *Walker v. State*,<sup>243</sup> the Alaska Court of Appeals recognized that “the legislature . . . has the power to set reasonable limits on the amount of marijuana that people can possess for personal use in their homes.”<sup>244</sup> This includes determining the quantity of marijuana that is indicative of commercial activity and prohibiting the corresponding possession of such an amount.<sup>245</sup>

Even though what constitutes a “reasonable” limit on personal marijuana use does not have a precise judicial definition, so long as *Ravin* retains its vitality, the legislature cannot ban all personal marijuana possession—it cannot set a bright-line limit at “none.” There

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240. See *Ravin v. State*, 537 P.2d 494, 502 (Alaska 1975) (“Few would believe they have been deprived of something of critical importance if deprived of marijuana.”).

241. *Walker v. State*, 991 P.2d 799, 801 (Alaska Ct. App. 1999).

242. ALASKA CONST. art. 1, § 22.

243. 991 P.2d 799 (Alaska Ct. App. 1999).

244. *Id.* at 802.

245. See *id.* at 803 (“The *Ravin* decision itself does not elaborate on what amount of marijuana might constitute an ‘amount . . . indicative of intent to sell.’ That is, the court did not specify the dividing line where, because of the amount of marijuana involved, the legislature can reasonably regulate personal possession of marijuana in the home, even in the absence of an intent to sell. We need not establish a precise dividing line either.”); *Noy v. State*, 83 P.3d 538, 542–43 (Alaska Ct. App. 2003) (noting *Ravin*’s acknowledgement that the legislature could prohibit amounts indicative of an intent to sell rather than possession for personal use).

must be some allowance for personal marijuana possession in the home by adults. This principle is borne out by several cases in which Alaska appellate courts have upheld legislatively-imposed restrictions on private marijuana possession that fell short of an outright ban. In *Brown v. State*,<sup>246</sup> the Alaska Supreme Court confirmed that *Ravin* offered no constitutional protection against the buying or selling of marijuana and that the legislature could make such activity a crime.<sup>247</sup> In *Garhart v. State*,<sup>248</sup> the court further held that this was true even if the purchaser intended to take the marijuana home and use it for personal purposes.<sup>249</sup> In *Walker v. State*,<sup>250</sup> the Alaska Court of Appeals held that a statute that prohibited all possession of eight ounces or more of marijuana was constitutional, as that amount was indicative of intent to sell.<sup>251</sup> In *Noy*, the Court of Appeals struck down a blanket marijuana prohibition, but upheld the Legislature's previous determination that possession of four ounces or more of marijuana could be prohibited because that amount was presumptively indicative of commercial use.<sup>252</sup> In *Hotrum v. State*,<sup>253</sup> the court of appeals determined that the Legislature could prohibit possession of 25 or more marijuana plants, regardless of their size or weight.<sup>254</sup>

These decisions respect the Legislature's role in implementing the right of privacy and are consistent with the notion that the courts must pay deference to the decision of a co-equal branch of government.<sup>255</sup>

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246. 565 P.2d 179 (Alaska 1977).

247. *Id.* at 180 (quoting *Ravin's* assertion that the Alaska constitution does not protect an individual's right to sell or distribute marijuana).

248. 147 P.3d 746 (Alaska Ct. App. 2006).

249. *Id.* at 751 (rejecting the argument that the Alaska constitution protects the cooperative growing and distribution of marijuana if the marijuana is intended solely for the personal use of the people involved in the growing and distribution activities under *Ravin*).

250. 991 P.2d 799 (Alaska Ct. App. 1999).

251. *Id.* at 803 ("eight ounces or more of marijuana is an amount large enough to fall within the *Ravin* court's category of 'indicative of intent to sell.'").

252. *Noy*, 83 P.3d at 543 ("we conclude that the legislature's four-ounce dividing line is presumptively constitutional under *Ravin*.").

253. 130 P.3d 965 (Alaska Ct. App. 2006).

254. *See id.* at 970 (the legislature adopted the reasoning that "[twenty-five] small [marijuana] plants had the potential of growing into much larger plants, and therefore" possession could be prohibited.); *see also* *Pease v. State*, 27 P.3d 788, 790 (Alaska Ct. App. 2001) (noting that state statutes "prohibit possession of 25 or more plants of the genus *cannabis*.").

255. *See, e.g., Noy*, 83 P.3d at 543 ("We note, moreover, that article I, section 22 [of the Alaska constitution] entrusts the legislature with the duty of implementing the constitutional right of privacy. Given the language of article I, section 22, and given the deference that we should pay to the decision of a co-equal branch of government, we conclude that the legislature's four-ounce dividing line is presumptively constitutional under *Ravin*.").

Such respect remains so long as any restrictions imposed by the Legislature adhere to the spirit of *Ravin*.

## **B. Review Of The Scientific Evidence Underpinning *Ravin* Should Occur Before A Neutral Decision-Maker**

When it passed the 2006 marijuana prohibition legislation, the Alaska Legislature adopted one-sided findings that disregarded any evidence that was inconsistent with its predetermined position that marijuana use had become a significant public health threat in the time since *Ravin* was decided.<sup>256</sup> These findings were hardly the result of scientific consensus. Expert witnesses testified against the legislation and submitted documentary evidence refuting many, if not all, of the state's conclusions.<sup>257</sup> This highlights one of the most important aspects of the *Ravin* decision: that the courts may be better suited than the legislature to accurately appraise marijuana's characteristics. Accurate appraisal "is vital for ensuring that determinations on marijuana policy are informed by fact rather than ideology."<sup>258</sup> In *Ravin*, the district court, a neutral body without a political agenda, oversaw the initial presentation of evidence.<sup>259</sup> The court conducted a "full evidentiary hearing concerning the effects of marijuana," at which "much expert testimony was presented."<sup>260</sup> The Alaska Supreme Court then thoroughly reviewed the scientific evidence presented by the parties, including expert witness testimony on the health and social effects of marijuana use and numerous books and reports.<sup>261</sup>

The hearings that took place in the Alaska Legislature prior to the

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256. The findings appeared to be predetermined – they were nearly identical to the proposed findings the Governor submitted prior to any testimony being heard and consisted of largely the same evidence the state had previously submitted to the Alaska Supreme Court in support of its petition for hearing in *Noy*. Compare S.B. 74 § 2, 24th Leg., 1st Sess. (Alaska 2005), and H.B. 96 § 2, 24th Leg., 1st Sess. (Alaska 2005), with Petition For Hearing at 6, *State v. Noy*, Supreme Court No. S-11297 (Jan. 5, 2004).

257. See *supra* note 136 (summarizing legislative testimony on the 2006 amendments).

258. Danovitch, *supra* note 132, at 108.

259. See *Gray v. State*, 525 P.2d 524, 528 n.16 (Alaska 1974) (stating that *Ravin* had recently been granted petition for review by the Alaska Supreme Court following a full evidentiary hearing and presentation of expert testimony on the effects of marijuana at the lower court).

260. *Id.*

261. See *Ravin v. State*, 537 P.2d 494, 504–10 (Alaska 1975) (summarizing in detail the expert testimony and written reports and books introduced into evidence at the district court); see also *id.* at 504 n.43 (listing a representative sampling of works examined by the court in addition to testimony from the district court).

passage of the 2006 amendments presented the opposite situation. The legislature conducted the hearings and the testimony occurred in a highly-politicized environment.<sup>262</sup> Senator French complained about the lack of time available to testify, present evidence, and thoroughly discuss the Legislature's findings, given the complex nature of the scientific evidence at issue.<sup>263</sup> The precise setting in which decisions impacting constitutional law and civil liberties should not be finalized, as these types of decisions often involve unpopular and politically-sensitive issues. Indeed, there may often be significant political motivation for a legislature to sacrifice constitutional principles in order to appease the electorate. Certainly the legislature is not precluded from considering evidence that impacts constitutional rights. But when laws impacting constitutional rights are based on legislative fact-finding, it is incumbent upon the judiciary to engage in a searching review of the evidence and not blindly defer to the legislature.<sup>264</sup> That is why there is an established standard for judicial review of legislation that implicates fundamental rights. Though courts will generally defer to the determinations of the legislature, full deference to legislative fact-finding is improper where legislative action concerns a constitutional right.<sup>265</sup>

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262. See Cockerham, *supra* note 108, at A1 (describing the political environment and sense of time pressure surrounding the marijuana bill).

263. See H.B. 149, ALASKA S. CONF. COMM. 24th Leg. (Apr. 12, 2006) (statement of Senator Hollis French at 6:41:10 PM) (criticizing the time allotted to analyze and debate the marijuana issues addressed in the bill); see also Testimony of Doctor Lester Grinspoon, M.D., Associate Professor of Psychiatry at the Harvard Medical School, *supra* note 137; Testimony of Dr. Mitch Earleywine, Ph.D., Associate Professor of Psychology, University of Southern California, *supra* note 137 ("I think that if this legislative body is as meticulous and comprehensive in collecting and assessing the data as these commissions were, it will have a better chance of arriving at a sound judgment about whether the harmfulness of marijuana is sufficient to enact such a restrictive bill.").

264. See *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997) (holding Congress has been given the power to "enforce," not the power to determine what constitutes a constitutional violation); *Bonjour v. Bonjour*, 592 P.2d 1233, 1237 (citing *Marbury v. Madison*, 1 Cranch 137, 177 (1803)) ("It is . . . the province and duty of the judicial department to say what the law is.").

265. *Valley Hosp. Assoc., Inc., v. Mat-Su Coal. for Choice*, 948 P.2d 963, 972 (Alaska 1997); see also *State v. Erickson*, 574 P.2d 1, 4 (Alaska 1978) (holding that appellate courts may look outside the record "where the validity of legislation having major social consequences is at stake"); *City of Boerne*, 521 U.S. at 536 ("When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them."); *Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supersede our [constitutional] decisions."); *Cleland v. State*, 759 P.2d 553, 557 (Alaska Ct. App. 1988) (stating that *Ravin* was about protecting the sanctity of the home under the privacy

This practice was evident in *Ravin* itself. Even though the court specified that it would not “reassess the scientific evidence in the manner of a legislature,” it still took a very close look at the evidence and did not defer to the presumption in favor of public health measures.<sup>266</sup> Typically, “when there is substantial doubt as to the safety of a given substance or situation for the public health, controls intended to obviate the danger will usually be up-held.”<sup>267</sup> Yet, with respect to the state’s control of marijuana use in the home, the court held the state to a much higher standard because of the privacy rights involved.<sup>268</sup>

In the future, if the Alaska Supreme Court is presented with a ripe challenge to the continuing vitality of *Ravin*, the court should make a similar searching inquiry into the full record and review the evidence independently before it considers the factors of *stare decisis* and determines the continuing vitality of the *Ravin* decision. The court’s first step should be to determine whether there is sufficient evidence in the record developed below to even consider whether or not to overturn *Ravin*.<sup>269</sup> If the court believes the record is insufficient, it can remand the matter to the trial court for an evidentiary hearing. Alternatively, the court could limit the proceedings below by remanding with instructions for the trial court judge to appoint a discovery master to oversee the submission of evidence on specific questions relating to the social and health effects of marijuana.<sup>270</sup> The court may also choose to forgo an evidentiary hearing entirely, especially if there was extensive documentary evidence submitted in the lower court. In such a case,

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clause and not about the use of marijuana).

266. *Ravin*, 537 P.2d at 505 n.44.

267. *Id.* at 510.

268. *Id.* at 511 (“[M]ere scientific doubts will not suffice. The state must demonstrate a need based on proof that the public health or welfare will in fact suffer if the controls are not applied.”).

269. For example, in *ACLU of Alaska v. State*, the court considered scientific journals, books, testimony, expert declarations, statements of disputed facts, and numerous expert declarations. No. IJU-06-793 CI, 2006 WL 6457870, at \*11-12 (Alaska Super. Ct. July 10, 2006).

270. See ALASKA R. CIV. P. 53 (discussing generally the procedural rules regarding the appointment, powers, and proceedings for masters); *Peter v. Progressive Corp.*, 986 P.2d 865, 870 (Alaska 1999) (“[A]ppointment of a discovery master should generally be reserved for cases (1) where the issues are unusually complex or specialized; (2) where discovery is particularly document intensive; (3) where resolving discovery disputes will be especially time consuming; (4) where the parties are particularly contentious or obstructionist; or (5) where a master will facilitate a more speedy and economical determination of the case.”); *McRae v. State*, 909 P.2d 1079, 1082 (Alaska Ct. App. 1996) (“[T]he appellate courts often remand factual issues to the trial courts, and the trial courts often appoint masters to make factual determinations necessary to the courts’ ultimate legal rulings.”).

where there will be “literally hundreds of scientific articles and numerous experts . . . it is questionable whether such an expanded hearing would reveal more reliable or higher quality information than is available by referring to authorities submitted in briefs by both sides, and, in appropriate cases, by additional research at the appellate level.”<sup>271</sup>

A challenge to the constitutionality of the state’s criminal marijuana laws would also deal mainly with “legislative facts” as opposed to “adjudicative facts.”<sup>272</sup> Legislative facts do not relate directly to the happenings in a particular case—to the parties or their actions—but to more general matters that influence policy decisions, such as social, political, economic, or scientific knowledge.<sup>273</sup> When legislative facts are at the fore, it may be appropriate for the court to conduct its own research and consider sources outside the record.<sup>274</sup> This would be an unusual step, but a court may be compelled to do so in order to adequately understand the background issues at play in cases “where the validity of legislation having major social consequences is at stake.”<sup>275</sup>

### C. Benchmarks for Gauging the State’s Interest in Restricting Private Marijuana Use

To gauge the state’s interest required to justify restrictions on an adult’s private activities in the home, it is helpful to review how Alaska courts have addressed laws that restrict other intoxicating substances. Indeed, that is precisely what the *Ravin* court did. The court did not view the social and health effects of marijuana in a vacuum, but rather as compared to the harms posed by other substances. The court found that the “effects of marijuana on the individual are not serious enough to justify widespread concern, at least as compared with the far more dangerous effects of alcohol, barbiturates and amphetamines.”<sup>276</sup> Tellingly, several years later, Alaska appellate courts would rule that the state constitution did not protect personal use and possession of cocaine, alcohol, or tobacco.<sup>277</sup>

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271. *State v. Erickson*, 574 P.2d 1, 6 (Alaska 1978).

272. *Erickson*, 574 P.2d at 5.

273. *Id.* at 5–6.

274. *See id.* at 4–6 (discussing generally the expanded scope of appellate review beyond the record when legislative facts are at issue).

275. *Id.* at 4.

276. *Ravin v. State*, 537 P.2d 494, 509–10 (Alaska 1975).

277. *See Fraternal Order of Eagles v. City and Borough of Juneau*, 254 P.3d 348, 358 (Alaska 2011) (holding a city and borough’s ordinance prohibiting



In *State v. Erickson*,<sup>278</sup> the Alaska Supreme Court applied the *Ravin* standard to cocaine use and found that “criminalization of the personal use and possession of cocaine in the home does not constitute an invalid infringement on the right to privacy.”<sup>279</sup> The Court relied on well-documented evidence that the nature and effects of cocaine made it “substantially more of a threat to health and welfare” than marijuana because “cocaine can cause death as a direct effect of the pharmacological action of the drug” and “cocaine certainly has some potential for producing crime and violence.”<sup>280</sup> Similarly in *Harrison v. State*,<sup>281</sup> the Court of Appeals addressed the constitutionality of Alaska’s Local Option laws that allow jurisdictions to prohibit the importation of alcohol.<sup>282</sup> The court upheld the local option law at issue because “the evidence showing the harmful effects of [alcohol] consumption is undisputed” and “[t]he threat posed to society by widespread alcohol use is enormous.”<sup>283</sup> And more recently, in *Fraternal Order of Eagles v. City and Borough of Juneau*,<sup>284</sup> the Alaska Supreme Court found a close and substantial relationship between protecting the public from the harmful effects of tobacco smoke and banning smoking in a private club because “[t]he toll of death and injury caused by consumption of tobacco is not subject to serious dispute.”<sup>285</sup>

To the courts in *Erickson*, *Harrison*, and *Fraternal Order of Eagles*, the harm to public health and welfare was well-documented and largely undisputed. In light of the standard established in *Ravin* and those subsequent rulings, the Alaska Supreme Court should not sustain a law proscribing all marijuana use and possession unless it finds that marijuana is now as harmful to both individual health and society in

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smoking in private clubs did not violate right to privacy under the State Constitution); *Erickson*, 574 P.2d at 5; *Harrison v. State*, 687 P.2d 332, 339 (Alaska Ct. App. 1984) (holding local option law prohibiting sale and importation of alcohol did not violate State Constitution where the enactment bore a close and substantial relationship to the goal of protecting the public health and welfare).

278. 574 P.2d 1 (Alaska 1978).

279. *Id.* at 23.

280. *Id.* at 16–18, 21–22.

281. 687 P.2d 332 (Alaska Ct. App. 1984).

282. *See id.* at 335 (stating that *Harrison* is challenging the constitutionality of Alaska’s local option law). The right to consume alcohol was not directly at issue; the challenged law did not prohibit the use of alcoholic beverages in the home. *Id.* at 338.

283. *Id.* at 339.

284. 254 P.3d 348 (Alaska 2011).

285. *Id.* at 358. Although the case did not deal with tobacco use in the home, in 2011 the Alaska Supreme Court found that the City and Borough of Juneau had “a legitimate interest in protecting the public, non-smokers and smokers alike, from the well-established dangers of second-hand tobacco smoke.” *Id.* at 359.

ways similar to alcohol, cocaine, or tobacco.<sup>286</sup> But determining exactly how marijuana compares to other substances is complicated; each carries its own unique harms, both to the user and the public at large. Application of a method such as multicriteria decision analysis (MCDA), a holistic approach to measuring the appropriateness or effectiveness of a system, could simplify this process and provide for a more quantitative-based comparison between substances.<sup>287</sup> Such an approach is especially useful when analyzing controlled substances because of “the wide range in ways that drugs can cause harm.”<sup>288</sup>

Without describing it as such, the courts in *Ravin*, *Erickson*, and *Harrison* essentially followed a MCDA-like approach by considering a variety of harm factors related to marijuana, cocaine, and alcohol. In each of those cases the courts weighed some combination of the following criteria:

- Number of users and rate of consumption among various populations
- Short and long term physical effects on the user
- Short and long term psychological effects on the user
- Mortality rate due to usage
- Level of physical addictiveness
- Level of psychological dependency
- Potential for abuse
- Correlation between use and criminal behavior
- Correlation between use and domestic violence and child abuse
- Propensity for use to incite violent, aggressive behavior
- Effect on adolescents
- Effect on driving an automobile
- Economic cost of abuse and addiction<sup>289</sup>

These criteria were included among those used in a 2010 study by Nutt, et al., that employed MCDA to assess 20 different substances along 16 different harm criteria, distinguishing between specifically-identified harms to the user and harms to others.<sup>290</sup> That study provides an easy-to-follow framework for a court to use to consider the relative harms to

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286. See *Harrison*, 687 P.2d at 338 (stating that the court in *Erickson* expressly found that alcohol is a more dangerous drug than both marijuana and cocaine).

287. See Jennifer Kuzma, Pouya Najmaie & Joel Larson, *Evaluating Oversight Systems for Emerging Technologies: A Case Study of Genetically Engineered Organisms*, 37 J.L. MED. & ETHICS 546, 551 (2009) (“MCDA relies on the notion that no single outcome metric can capture the appropriateness or effectiveness of a system, allows for integrating heterogeneous information, and enables incorporation of expert and stakeholder judgments.”).

288. David Nutt et al., *Drug Harms in the UK: A Multicriteria Decision Analysis*, 376 LANCET 1558, 1558 (2010).

289. *Erickson*, 574 P.2d at 8–11; *Ravin v. State*, 537 P.2d 494, 506–11 (Alaska 1975); *Harrison*, 687 P.2d at 335–38.

290. Nutt et al., *supra* note 288, at 1558.

both individuals and society from use of any drug.<sup>291</sup> And like the Alaska courts,<sup>292</sup> Nutt ultimately found that marijuana was less harmful overall than alcohol, cocaine, or tobacco, though still not completely benign.<sup>293</sup>

A key aspect of the MCDA approach used in the 2010 study was that it carefully distinguished the harms to the individual user from the harms to society as a whole. This is particularly relevant with respect to marijuana regulation in Alaska because of the strong individual privacy rights at stake. The *Ravin* court was quite frustrated with the State's "assumption that [it] has the authority to protect the individual from his own folly, that is, that the State can control activities which present no harm to anyone except those enjoying them."<sup>294</sup> Notwithstanding the accuracy of Nutt, et al.'s finding, or its applicability to drug usage patterns in Alaska, the MCDA approach used yielded a direct quantitative comparison of drugs based on their harm to users versus their harm to others, as well as based on their overall weighted scores for each of the identified harm criteria.<sup>295</sup> Such a formalized MCDA approach would be very useful for the Alaska Supreme Court should it have occasion to revisit *Ravin*, or to review restrictions on any other controlled substance.<sup>296</sup> It would allow the court to more accurately refine the spectrum of drug restrictions under Alaska law.

#### **D. The Relationship Between Marijuana Odor And Probable Cause Remains Contested**

In *State v. Crocker*, the Alaska Court of Appeals ruled that the smell of marijuana alone was not sufficient probable cause to search a home

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291. *Id.* at 1559 fig.1; *see id.* at 1560 for definitions of the criteria.

292. *See, e.g., State v. Erickson*, 574 P.2d 1, 9 (Alaska 1978) ("Unlike marijuana, cocaine can cause death as a direct effect of its pharmacological action.").

293. *See Nutt et al., supra* note 288, at 1561 fig.2 (assigning alcohol, cocaine, and tobacco overall harm scores of 72, 27, and 26, respectively while cannabis received an overall harm score of 20).

294. *Ravin*, 537 P.2d at 508.

295. Nutt et al., *supra* note 288, at 1561.

296. For example, the Municipality of Anchorage recently banned synthetic cannabinoid drugs, commonly known as "K2" or "Spice." Rosemary Shinohara, *Assembly Outlaws Chemical Known as 'Synthetic Marijuana,' ANCHORAGE DAILY NEWS*, Dec. 18, 2010, available at <http://www.adn.com/2010/12/08/v-printer/1594268/assembly-outlaws-street-chemical.html>. Though it is often referred to as "synthetic marijuana," these substances do not contain any THC, the active ingredient in marijuana, but both are considered cannabinoids because they both attach themselves to the cannabinoid receptors in the brain. Roland Macher et al., *Synthetic Marijuana*, FBI LAW ENFORCEMENT BULLETIN, May 2012, available at <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/may-2012/synthetic-marijuana>.

for evidence of illegal marijuana-related activity.<sup>297</sup> The court did not disregard the possibility that there was a correlation between the strength of marijuana odor and the amount of marijuana giving rise to that odor, but it would “not simply assume that there is a direct proportionality” in the absence of any supporting evidence.<sup>298</sup> Following *Crocker*, Alaska law enforcement officials began making an effort to document that correlation and to establish that the smell of growing marijuana outside of a structure is evidence that there is an illegal amount of marijuana inside the structure. In affidavits submitted in support of search warrants in several cases, officers have stated that “just smelling the odor of cultivating marijuana on the outside air is indicative of a commercial grow operation”<sup>299</sup> and that they cannot smell “personal-use quantities of marijuana in the air outside a residence because there is not enough plant material to generate the odor.”<sup>300</sup> They have also presented statistical evidence to support this “smell test” theory: eighty-one of the marijuana grows seized by the Alaska State Trooper’s Matanuska-Susitna Drug Enforcement Unit (AST Mat-Su Drug Unit) from 2000 to 2004 were discovered by officers smelling growing marijuana, and in 96% of those seizures, a “felony level grow operation was discovered.”<sup>301</sup>

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297. 97 P.3d 93, 96–97; see generally *supra* notes 95–106 and accompanying text (discussing *Crocker* decision).

298. *Id.* at 97.

299. *United States v. Thoms*, 788 F. Supp. 2d 1001, 1005 (D. Alaska 2011), *vacated on other grounds and remanded*, 684 F.3d 893 (9th Cir. 2012). According to these affidavits, “the ability to smell the odor of cultivating marijuana outside a building is, by itself, indicative of a commercial grow operation because it typically indicates the use of an installed air venting system.” *State v. Smith*, 182 P.3d 651, 654 (Alaska Ct. App. 2008); see also *Cavitt v. State*, No. A-10480, 2011 WL 5428968, at \*2 (Alaska Ct. App. Nov. 9, 2011) (relying in part on testimony that personal grow operations do not need to vent excessive heat and thus the odor of growing marijuana is not transferred outside); *Nelson v. State*, No. A-10113, 2009 WL 2092450, at \*6 (Alaska Ct. App. July 15, 2009) (considering trooper’s observation of a vent hole as a factor when determining if the grow operation was commercial or personal).

300. *Rofkar v. State*, No. A-10383, 2011 WL 746439, at \*1 (Alaska Ct. App. Mar. 2, 2011), *vacated on other grounds and remanded*, 273 P.3d 1140 (Alaska 2012).

301. *Smith*, 182 P.3d at 654; *Nelson*, 2009 WL 2092450, at \*6 (officer reported smelling strong odor of freshly grown marijuana); *Rofkar*, 2011 WL 746439, at \*1 (relying on affidavits from officer explaining that in the previous four years his drug unit had eighty-one cases arising from officers smelling the odor of cultivating marijuana and that of these, ninety-six percent involved felony-level grow operations); *Thoms*, 788 F. Supp. 2d. at 1004 (relying on affidavits from officer who smelled a “strong odor of cultivating marijuana while driving”); *Starkey v. State*, 272 P.3d 347, 348 (Alaska Ct. App. 2012) (relying, in addition to other indicia, on odor of growing marijuana while standing in the yard). A “felony level grow operation” refers to a grow consisting of more than four ounces of marijuana or more than 25 plants. ALASKA STAT. § 11.71.040(a)(3)(G)

Three published opinions have discussed these data. In *State v. Smith*,<sup>302</sup> the Alaska Court of Appeals found that these statistics, along with the investigator's assertion of a "moderate odor" of growing marijuana coming from inside the structure and information about the officer's experience in smelling felony-level marijuana grow operations, established probable cause because when combined they "linked his ability to smell marijuana from the driveway of Smith's property to a probability that the mobile home contained evidence of a commercial grow of marijuana."<sup>303</sup> But the defendant challenged the validity of the statistical analysis, arguing that the statistics cited were "unreliable because the data consists only of those instances in which the police ultimately *seized* the marijuana they smelled" and the data did "not specify whether and how many times [the investigator's] unit smelled cultivating marijuana but did *not* seize it because the grows were not commercial grows."<sup>304</sup> The Court of Appeals did not address the validity of the data, but did note that at trial the defendant had not had a formal opportunity to review the data or to determine the extent to which the data influenced the magistrate's decision to issue the warrant.<sup>305</sup> The court remanded the case in order to give the defendant an opportunity to discover if there were flaws in the statistical analysis or misstatements that would undercut the finding of probable cause.<sup>306</sup> The subsequent proceedings did not produce any reported findings on the quality of that statistical analysis.<sup>307</sup>

The same analysis was debated three years later in *United States v. Thoms*.<sup>308</sup> In that case the data was presented as a study that purported to prove that "96% of the time, when an officer smells marijuana on the outside air, there is more than four ounces of marijuana present."<sup>309</sup> The court was not convinced by this evidence and found the study "statistically flawed."<sup>310</sup> One year later, in *Starkey v. State*,<sup>311</sup> the Court of

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(2012).

302. 182 P.3d 651 (Alaska Ct. App. 2008).

303. *Id.* at 652-54.

304. *Id.*

305. *Id.* at 655.

306. *Id.*

307. *State v. Fucci*, No. A-9863, 2008 WL 5025423, at \*1-2 (Alaska Ct. App. Nov. 26, 2008).

308. 788 F. Supp. 2d 1001, 1015 (D. Alaska 2011) *vacated on other grounds and remanded*, 684 F.3d 893 (9th Cir. 2012).

309. *Id.* at 1005.

310. *Id.* The study was ultimately irrelevant to the outcome as the court identified numerous other problems with the facts upon which the search warrants were based. *See id.* at 1005-16. For example, the court expressed disbelief as to whether the officer could have smelled marijuana at all under the circumstances: "[Investigator] Young claimed to smell a strong odor of

Appeals held that these statistics were not “scientific” evidence subject to the *Coons/Daubert* standard for evaluating the admissibility of scientific evidence.<sup>312</sup> The statistical analysis was viewed as “a report or summary of information accumulated by the Mat-Su drug unit through actual experience” and “rested on fairly straightforward mathematics – and some implicit or unarticulated assumptions about the facts of the 81 underlying cases.”<sup>313</sup> This determination did not weigh on the ultimate outcome of the case. The court found that there was probable cause to believe Starkey was using his residence to grow marijuana in criminal quantities even without considering the statistical analysis.<sup>314</sup>

It remains to be seen how much weight an Alaska court would place on such data if a scientifically and statistically valid study on marijuana odor was submitted as the only evidence in support of a search warrant application. In *Smith* the Court of Appeals found that the study helped cure the search warrant deficiencies that were present in *Crocker*, but the court ultimately remanded the case so the defendant could review (and potentially challenge) the accuracy of the data and determine the extent to which the issuing magistrate relied on it.<sup>315</sup> There is no other indication in the line of post-*Crocker* cases that statistical information alone would establish probable cause in this context. Rather, courts have been willing to accept the State’s data as part of the overall picture of probable cause regarding unlawful marijuana activity in the home – so long as additional factors evincing marijuana possession that exceeds the scope of what is protected under *Ravin* (none of which would necessarily establish probable cause on their own) are also present.<sup>316</sup>

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marijuana that could have only emanated from an enclosed building approximately 450 feet away. The building was equipped with a carbon filtration system. There was a two-story residence atop a hill and substantial vegetation obstructing the only possible source of odor. Young was in a moving vehicle with his driver’s side window partially down in February.” *Id.* at 1007.

311. 272 P.3d 347 (Alaska Ct. App. 2012).

312. *Id.* at 353.

313. *Id.*

314. *Id.* (“even if this statistical analysis . . . were removed . . . the application would still provide probable cause for the search warrant.”); see also *id.* at 354 (finding probable cause where (1) authorities received a tip from a confidential informant about a large number of marijuana plants growing in Starkey’s residence; (2) officers smelled growing marijuana at the residence; (3) officers heard noise from inside the house indicating the presence of electrical ballasts and/or ventilating fans; (4) the house was using an unusual amount of electricity; (5) a large number of buckets of the type used by marijuana growers were present; and (6) a 30-pound bag of growing medium was found).

315. *State v. Smith*, 182 P.3d 651, 654 (Alaska Ct. App. 2008).

316. See, e.g., *Nelson v. State*, No. A-10113, 2009 WL 2092450, \*6 (Alaska Ct. App. July 15, 2009) (upholding search where officer smelled marijuana odor in

A recent report lends credence to the decision to consider marijuana odor as but one of many markers a judicial officer may consider when reviewing the “totality of circumstances” surrounding a search warrant application.<sup>317</sup> In 2011 the Alaska State Troopers commissioned a more thorough and detailed review of its data on searches and the smell of marijuana on the open air.<sup>318</sup> The report concluded that there is a positive correlation between the strength of marijuana odor emanating from a residence and the presence of large quantities (defined in the study as four or more ounces or 25 or more plants) of marijuana contained therein.<sup>319</sup> In other words, based on these data, the detection of the odor of growing marijuana increased the likelihood that relatively large quantities of marijuana would be discovered. However, the report also found that the so-called “smell test” was a “suboptimal” means for detecting illegal quantities of marijuana.<sup>320</sup> The “smell test” has a significant risk of producing false positives (conducting searches based on smell when large quantities are not present) and a high rate of false negatives (discovering large quantities of marijuana in the absence of odor detection).<sup>321</sup> The report also cautioned that the “smell test” alone cannot be relied upon to accurately determine the precise amount of marijuana present within a structure.<sup>322</sup>

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addition to seeing a grow-light system, heard an electric humming consistent with electrical ballasts and fans, and excessive electricity usage). Other factors courts have considered include: a strong odor of marijuana during the nighttime (suggesting the type of venting that is involved with larger-scale marijuana grow operations), heavy foot traffic in and out of the residence, high use of electricity, evidence that the occupant of the residence was unemployed but had made several large purchases. *See Rofkar v. State*, No. A-10383, 2011 WL 746439, at \*1 (Alaska Ct. App. Mar. 2, 2011), *vacated on other grounds and remanded*, 273 P.3d 1140 (Alaska 2012) (considering higher than normal electrical usage despite house being uninhabited as one indicia of a commercial grow operation).

317. *Burrece v. State*, 976 P.2d 241, 243 (Alaska Ct. App. 1999) (stating that the test is flexible and considers the totality of circumstances).

318. *See generally* BRAD A. MYSTROL & JASON BRANDEIS, THE PREDICTIVE VALIDITY OF MARIJUANA ODOR DETECTION: AN EXAMINATION OF ALASKA STATE TROOPER CASE REPORTS 2006–2010 (2012), *available at* [justice.uaa.alaska.edu/research/2010/1110.02.ast.marijuana/1110.02.marijuana.pdf](http://justice.uaa.alaska.edu/research/2010/1110.02.ast.marijuana/1110.02.marijuana.pdf).

319. *Id.* at 51–52.

320. *Id.* at 41.

321. *See id.* at 41–42 (finding the false positive rate for the smell test to be 51.5% and the false negative rate to be 83.1%).

322. *Id.* at 51–52. The study identified several other limitations. First, the scope of the study was limited to the marijuana grow searches conducted by AST investigators from 2006–2010. *Id.* at 52. Inferences to other jurisdictions, different time periods, or another sampling universe cannot be made from these data. *Id.* Second, this was not a study of searches conducted solely because

#### IV: RAVIN CONTINUES TO PEACEFULLY COEXIST WITH THE CSA

Many wonder about the relationship between *Ravin* and the federal Controlled Substances Act (CSA). This is not surprising considering the contrast between *Ravin* and the CSA has always been stark: personal use and possession of any amount of marijuana were illegal under the CSA when *Ravin* was decided and remain so today.<sup>323</sup> Despite what appears at first blush to be a significant conflict—a federal law that conflicts with a state law will generally preempt the state law and render it “without effect”<sup>324</sup>—the right to personal use of marijuana created by *Ravin* is not

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investigators smelled marijuana. It was a study of the overall searches conducted, which included situations where officers smelled marijuana during those searches. This is important because the factors that gave rise to the search in the first place—other than marijuana odor—were always present in addition to the marijuana odor. Next, the source of the data for this study was archival—it consisted of 333 case records written and submitted by AST investigators. *Id.* Any information not recorded, or ambiguities in the case reports, could not be clarified and were not included in the study. *Id.* at 52–53. Finally, the study was not inclusive of all factors that could influence search outcomes. For instance, the study did not account for attributes of the officers themselves, such as training and experience, or prior criminal history of suspected offenders. *Id.* at 53. In short, these findings are specific to a unique set of facts (a snapshot of a certain time and place) and should not be generalized to include all situations where law enforcement officers might smell marijuana.

323. See The Controlled Substances Act, 21 U.S.C. § 844(a) (2012) (“CSA”). The CSA contains a limited exception for marijuana possession for government-approved and registered scientific research. §§ 822, 823. Federal marijuana crimes carry maximum prison sentences ranging from one year to life in prison and maximum fines ranging from one thousand dollars to eight million dollars, depending upon the amount of marijuana involved and the circumstances surrounding the conviction. §§ 841(b), 844(a).

324. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992). There is also a strong presumption against federal preemption of state laws in areas traditionally regulated by the states, such as the police power. *Burts v. Burts*, 266 P.3d 337, 343 (Alaska 2011) (courts “start with the assumption that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”); *Allen v. State, Dep’t of Health & Soc. Servs.*, 203 P.3d 1155, 1160 (Alaska 2009) (“There is a presumption against federal preemption of state law. . . .”); *Roman v. State*, 570 P.2d 1235, 1245 (Alaska 1977) (“There can be no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs. . . .”); *Belgarde v. State*, 543 P.2d 206, 208 (Alaska 1975) (holding that a state prohibition on possession of marijuana in the home is a valid exercise of the state’s police power for the public welfare); *State v. Dupier*, 118 P.3d 1039, 1049 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); see also *Native Vill. of Ėklutna v. Alaska R.R. Corp.*, 87 P.3d 41, 56 (Alaska 2004) (“In determining the scope of federal preemption, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of



preempted by the CSA and is consistent with longstanding notions of state sovereignty.<sup>325</sup>

Two overarching principles of federalism frame the relationship between *Ravin* and the CSA. First, states are never preempted from decriminalizing an activity just because it is prohibited by federal law. States have the sovereign right to determine the extent to which they will punish or not punish certain types of conduct. Second, it is well established that state constitutions can provide greater protection for individual rights than the United States Constitution.<sup>326</sup> *Ravin*, which decriminalized a very thin slice of marijuana possession under the Alaska Constitution's more robust right to privacy, fits squarely within this framework—so squarely that the opinion did not even mention preemption or the CSA.<sup>327</sup> The federal preemption doctrine is simply not implicated by *Ravin*. Indeed, following *Ravin*, state courts have adhered to that view, never issuing an opinion on federal preemption of Alaska's personal-use marijuana laws.<sup>328</sup> As far as the courts are concerned, *Ravin*

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Congress.") (internal quotations omitted).

325. This Section discusses marijuana possession in Alaska as permitted by *Ravin* and the right to privacy only, and not use permitted by Alaska's medical marijuana law. ALASKA STAT. §§ 17.37.010–17.37.080 (2012). For a discussion on the applicability of the CSA to state medical marijuana laws, see D. Douglas Metcalf, *Federal Supremacy and Arizona's Medical Marijuana Act*, 47 ARIZ. ATT'Y 22, 23 (2011) ("Arizona's new Medical Marijuana Act, which legalizes the distribution and use of marijuana for medical use in certain situations, has no bearing on whether such activities remain illegal under federal law."); M. Wesley Clark, *Can State "Medical" Marijuana Statutes Survive the Sovereign's Federal Drug Laws? A Toke Too Far*, 35 U. BALT. L. REV. 1, 8 (2005) ("It is clear that Congress views any state drug legalization attempts to be in conflict with and preempted by the CSA.").

326. Stephen McAllister, *Individual Rights Under a System of Dual Sovereignty: The Right to Keep and Bear Arms*, 59 U. KAN. L. REV. 8, 71 (2011); See also *Oregon v. Haas*, 420 U.S. 714, 719 (1975) ("[A] State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards."); *Cooper v. California*, 386 U.S. 58, 62 (1967) (discussing a "State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so"); *State v. Batts*, 195 P.3d 144, 152 (Alaska Ct. App. 2008) ("[T]he Alaska Constitution's privilege against self-incrimination has been interpreted to impose greater restrictions on the government than the federal Fifth Amendment.").

327. See generally *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

328. There are only two reported Alaska decisions where the CSA has even come up. In *Brown v. Ely*, the Court held that a violation of the right to possess marijuana under state law could not form the basis of a federal civil rights claim because the activity was prohibited by federal law "regardless of whether Alaska law provides additional protections." 14 P.3d 257, 261 (Alaska 2000). See generally *State v. ACLU of Alaska*, 204 P.3d 364 (Alaska 2009) (relying on the supremacy of the CSA and the risk of federal prosecution to justify its decision to abstain from ruling on the merits of the parties' claims). Federal courts also

and the CSA can peacefully coexist. A closer look at state sovereignty and the Tenth Amendment bears out why this is so.

States are not obligated to regulate and penalize drug use at all, but they can, and do, craft laws consistent with their own “social norms and personal preferences.”<sup>329</sup> The Tenth Amendment’s anti-commandeering rule precludes the federal government from forcing states to pass coexistent, or even complimentary, controlled substance laws, or from forcing states to enforce federal drug laws.<sup>330</sup> These states’ rights are very clear in Alaska, where the state and the federal government diverge significantly in how they view the hazards of marijuana use and how they choose to punish it. Alaska has historically rated marijuana offenses as among the least serious of all drug offenses and continues to classify it as a Schedule VIA substance—a drug with the lowest degree of danger to a person or the public.<sup>331</sup> Conversely, under the CSA marijuana is listed as a Schedule I controlled substance because it has “a high potential for abuse,” “no currently accepted medical use in treatment,” and “a lack of accepted safety for use of the drug or other substance under medical supervision.”<sup>332</sup> Penalties for simple possession under state law are also lower than under federal law.<sup>333</sup> Finally, of course, there is *Ravin*, which prohibits the State of Alaska

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appear to be silent on the issue of preemption with regard to *Ravin*.

329. Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAP. L. REV. 555, 571 (2010).

330. *New York v. United States*, 505 U.S. 144, 162 (1992) (“[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions”); *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress cannot compel states to enact or enforce a federal regulatory program); Robert A. Mikos, *On The Limits Of Supremacy: Medical Marijuana And The States’ Overlooked Power To Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1446 (2009) (“The preemption power is constrained by the Supreme Court’s anti-commandeering rule. That rule stipulates that Congress may not command state legislatures to enact laws nor order state officials to administer them.”). State officials and local police officers may, however, enforce federal drug laws on their own volition. *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) (holding that concurrent enforcement activity is authorized where state enforcement does not impair federal regulatory interests).

331. *Waters v. State*, 483 P.2d 199, 201 (Alaska 1971) (finding an absence of foundation for characterization of marijuana offender as the worst type of drug offender for sentencing purposes); ALASKA STAT. § 11.71.190(a), (b) (2012).

332. 21 U.S.C. § 812, (b)(1)(A)–(C), (c) (2012).

333. Compare ALASKA STAT. § 11.71.040 (2012) (making simple possession of four ounces or more a Class C Felony), and § 12.55.125(e) (limiting punishment for a Class C Felony to five years), with 21 U.S.C. § 841(b) (2012) (providing for penalties of life in prison and fines of eight million dollars depending upon the amount of marijuana involved and the circumstances surrounding the conviction).

from penalizing adults who possess a small amount of marijuana in their homes for personal use, a protection that does not exist under federal law. However, application of the CSA in Alaska is actually consistent with *Ravin*: federal prosecutors are not concerned with possession of small amounts of marijuana in private residences.<sup>334</sup> The risk of federal prosecution for conduct protected by *Ravin* is therefore extremely low.<sup>335</sup>

The existence of different state and federal rubrics for regulating and punishing (or not punishing) marijuana-related activity is not unusual or problematic. In approximately sixteen states (as well as a number of municipalities), simple possession of a small amount of marijuana leaves one subject to, at most, a minor civil fine,<sup>336</sup> whereas

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334. The Criminal Division of the United States Attorney's Office for the District of Alaska does not include simple marijuana possession among its prosecutorial priorities. See *State v. ACLU of Alaska*, 204 P.3d 364, 377 n.19 (Alaska 2009) (enumerating ten priorities: (1) protecting the United States from terrorist attack; (2) protecting this country from foreign intelligence operations and espionage; (3) protecting this country from cyber-based attacks and high-technology crimes; (4) combating public corruption; (5) protecting civil rights; (6) combating transnational and national criminal organizations and enterprises; (7) combating major white-collar crime; (8) combating significant violent crime; (9) supporting federal, state, local, and international partners; and (10) upgrading technology to succeed in the FBI mission); *Criminal, THE UNITED STATES ATTORNEY'S OFFICE, DISTRICT OF ALASKA*, <http://www.justice.gov/usao/ak/criminal.html> (last visited Sept. 20, 2012). The Division prosecutes mainly felony offenses and its misdemeanor docket consists of "cases involving more minor offense[s] and violations occurring in Alaska's many amazing federal parks, national forests and federal lands." *ACLU of Alaska*, 204 P.3d at 377 n.19. This would exclude prosecution of adults who possessed small amounts of marijuana in their homes for personal use; simple possession of marijuana is a misdemeanor under the CSA. *State v. ACLU of Alaska*, 204 P.3d at 377 n.19 ("Prosecutions of persons in their homes for misdemeanor marijuana possession would appear not to fall within the described activities.").

335. In his dissent in *State v. ACLU of Alaska*, Justice Carpeneti noted that "the United States brought zero misdemeanor drug possession cases in Alaska in fiscal year 2005 and less than ten cases each year in fiscal year 2006 and fiscal year 2007." 204 P.3d at 376-77 (Carpeneti, J. dissenting) (citations omitted).

336. Fourteen states (Alaska, California, Connecticut, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, and Rhode Island) have decriminalized recreational marijuana use. See *Places that Have Decriminalized Non-Medical Cannabis in the United States*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Places\\_that\\_have\\_decriminalized\\_non-medical\\_cannabis\\_in\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Places_that_have_decriminalized_non-medical_cannabis_in_the_United_States) (last modified Nov. 20, 2012); Jennifer R. Donnelly, Commentary, *The Need for Ibogaine in Drug and Alcohol Addiction Treatment*, 32 J. LEGAL MED. 93, 112 (2011) (identifying twelve states that have decriminalized marijuana). Two other states, Colorado and Washington, have legalized such activity. Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES, Nov. 8, 2012, at P15, available at <http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html>.

federal law allows for a prison term for the same offense.<sup>337</sup> There are many other examples of state laws that permit conduct proscribed by the federal government.<sup>338</sup> These laws may not be perfectly in sync with federal law, but neither are they preempted solely because of their more restrictive federal counterparts. To find otherwise would upend the Tenth Amendment by nullifying sovereign state decisions that are inconsistent with federal objectives. It would be a backdoor way of forcing states to enact laws that mimicked federal statutes.

Alaska's personal use marijuana law was created through independent judicial interpretation of the Alaska Constitution's right to privacy. The State of Alaska, whether via its legislative, executive, or judicial branch, is not required to march in lockstep with federal drug policy. *Ravin* and the CSA continue to peacefully coexist: *Ravin* merely limits the ability of the State of Alaska to criminalize certain marijuana-related conduct that occurs within the privacy of the home. It does nothing to impact federal enforcement of the CSA on Alaskan soil.<sup>339</sup> It does not abrogate the ability of federal officials to enforce the CSA, nor does it shield Alaskans from federal criminal charges.<sup>340</sup>

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337. 21 U.S.C. § 844 (2012).

338. *Gonzales v. Oregon*, 546 U.S. 241, 290 (Scalia, J., dissenting) (noting that "countless . . . federal criminal provisions . . . [prohibit] conduct that happens to not be forbidden under state law"); *see also* *Hyland v. Fukuda*, 580 F.2d 977, 980-81 (9th Cir. 1978) (holding that Hawaii law exempting state employees from Hawaii law prohibiting possession of a firearm by certain felons was not preempted by federal law with no such exemption); N.M. STAT. ANN. § 30-31-27.1 (2012) (exempting from state criminal prohibition the possession of a controlled substance by an individual who needs medical assistance due to a drug overdose, as well as by an individual who seeks medical assistance for a person experiencing an overdose); IDAHO CODE ANN. § 18-3302A (2012) (not criminalizing the purchase of handguns to individuals ages eighteen through twenty-one even though federal law proscribes handgun purchases for individuals aged eighteen through twenty-one, 18 U.S.C. § 922(b)(1) (2012)); ARK. CODE ANN. § 5-14-110(a) (2012); CONN. GEN. STAT. § 53a-90a(a) (2012); DEL. CODE ANN. tit. 11 § 1112A(a)(3) (2012); ME. REV. STAT. ANN. tit. 17-A, § 259 (2012); MO. REV. STAT. § 21.750(2) (2012); NEB. REV. STAT. § 28-320.02 (2012); N.C. GEN. STAT. § 14-202.3 (2012); TEX. PENAL CODE ANN. § 46.06 (a)(2) (West 2012); WIS. STAT. § 948.075 (2012).

339. *ACLU of Alaska*, 204 P.3d at 370 (noting that the U.S. Supreme Court upheld the supremacy of the federal drug laws over state medical marijuana laws in *Gonzales v. Raich*, 545 U.S. 1, 10 (2005)); *Brown v. Ely*, 14 P.3d 257, 260-61 (Alaska 2000) (holding that additional protections under state law are subordinate to federal law where the right protected by state law is expressly prohibited by federal law).

340. *Howlett v. Rose*, 496 U.S. 356, 375 ("The elements of, and the defenses to, a federal cause of action are defined by federal law."). However, *Ravin* could be seen as fostering uncooperative behavior with federal drug policy: that "roughly 99% of all marijuana arrests are made by state and local officials" indicates that "federal anti-drug policy is meant to be a joint undertaking

## CONCLUSION

The debate over the legality of marijuana in Alaska continues, and *Ravin v. State* remains at its center. During the past thirty-seven years, the Alaska Legislature has partially embraced (in 1975), fully embraced (in 1982), and then completely rejected (in 2006), *Ravin's* core holding. Voters of the state have been similarly inconsistent, choosing to recriminalize all marijuana possession (in 1990), then to decriminalize possession for medical use (in 1998), then to reject further decriminalization efforts (in 2000 and 2004). The courts, however, have remained steadfast, never veering from the landmark precedent established in 1975. This is not surprising. Political winds shift and the opinions of voters change, but *stare decisis*, a court's duty to abide by and adhere to prior decisions, remains the backbone of our legal system.

It is against that backdrop that *Ravin* retains its vitality. No subsequent Alaska Supreme Court decision has weakened its holding, nor indicated that the court would overrule itself. Rather, a number of trial courts, the Alaska Court of Appeals, and the Alaska Supreme Court have consistently affirmed *Ravin's* interpretation of the Alaska Constitution's right to privacy: that the interest of the State of Alaska in regulating the personal use of marijuana in the home by adults was not sufficient to overcome the fundamental right to privacy.

*Ravin* and its progeny remain intact as the controlling precedents in the state. Accordingly, Alaskans can currently lawfully possess up to four ounces of marijuana in their homes for personal use, but still risk prosecution under existing state and federal statutes. Though that risk is mitigated by the policies currently employed by both the Alaska Department of Law and the United States Department of Justice: the state has a policy in place against prosecuting conduct that falls within the scope of *Ravin* and small, non-commercial marijuana cases are not a priority for the federal government.

If the state does shift course and begins enforcing the new statutes, *stare decisis* commands that any state trial court that considers the statutes is bound to declare them unconstitutional and unenforceable to the extent they conflict with *Ravin*. Should the Alaska Supreme Court have occasion to revisit *Ravin*, there is a very high threshold that must be met before the Court could overturn the ruling, even in light of

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between federal and state officials . . . . Hence, states that have legalized marijuana are acting uncooperatively in what is supposed to be a cooperative task, i.e., the enforcement of marijuana laws in violation of federal law." Berkley, *supra* note 60, at 436-37 (quoting Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *YALE L.J.* 1256, 1283-84 (2009)).

current marijuana potency and usage patterns; there must be clear scientific proof that public health and welfare will in fact suffer if private marijuana use by adults is not prohibited. Unless and until that is proven to the Alaska Supreme Court, *Ravin* retains its vitality and Alaskans can continue to maintain a high level of privacy in their homes.