PREVENTING ANTICOMPETITIVE SAFE-HARBORING IN PROFESSIONAL LICENSING

Devin G. Bost[1]

DRAFT PUBLICATION

1 Table of Contents

[1] I would like to thank Senator Elizabeth Steiner-Hayward, Paige Spence, and the members of the Oregon Legislative Counsel for their diligence in addressing this matter.

2 Outline

The issue to be addressed herein is a combinatorial problem of law; each part independently would be insufficient to safe-harbor[2] anticompetitive behavior in the marketplace, but when combined, the safeguards expected by the courts to exist to protect against antitrust violations are effectively subverted. The problem invokes several areas of law, including:

- **Antitrust** activities including, but not limited to, perjurious licensing-board investigatory complaints by market participants (e.g. against competitors)[3]

[2] A satisfactory definition of our use of the term "safe-harbor" is found in a California Supreme Court case, which stated, 'Courts may not simply impose their own notions of the day as to what is fair or unfair. Specific legislation may limit the judiciary's power to declare conduct unfair. If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination. When specific legislation provides a "safe harbor," plaintiffs may not use the general unfair competition law to assault that harbor' (*Cel-Tech Communications v. La Cellular*, 973 P.2d 527, 83 Cal. Rptr. 2d 548, 20 Cal. 4th 163 (1999), at 562).

[3] A recent documented case of this is Whittaker v. ?? See Oregon Court of Appeals docket # A160063

- **Confidentiality**[4] rules that prevent licensees from exposing perjurious claims made against them (e.g. by competitors)
- **Absolute Immunity** delegation to private market participants[5] (who may participate in filing false claims against competitors[6])
- **Evidentiary standards**[7] involving the "mere preponderance" evidentiary standard but without the requisite safeguards required to prevent false allegations from satisfying requirements for immediate disciplinary action (even in the case of innocence)
- **Due process** issues that allow false allegations to be sufficient for promiscuous search and seizure (e.g. of licensee patient records, personal health records, etc.) for creating new allegations that the licensee cannot defend against

2.1.1 Recent anecdote

In 2014, an audit of the North Carolina Physician Health Program (NCPHP), a program implemented by a state licensing board to monitor and evaluate licensees with *alleged* health and substance abuse conditions, detected financial conflicts of interest and reported that "abuse could occur and not be detected," among these six of its six key findings:

- "[A]buse could occur and not be detected because the Program lacks objective, impartial due process procedures for physicians who dispute its evaluations and directives.
- Abuse could occur and not be detected because the Program gave the CEO/Medical Director and the Clinical Director excessive influence over the process for reviewing physician complaints, and physicians were not allowed to effectively represent themselves when disputing evaluations.
- Abuse could occur and not be detected because the North Carolina Medical Board did not periodically evaluate the Program, and the North Carolina Medical Society did not provide adequate oversight.
- The Program created the appearance of conflicts of interest by allowing treatment centers that receive Program referrals to fund its retreats, paying scholarships for physicians who could not afford treatment directly to treatment centers, and allowing the centers to provide both patient evaluations and treatments.
- Program procedures did not ensure that physicians received quality evaluations and treatment because the Program had no documented criteria for selecting treatment centers and did not adequately monitor them.
- The Program's predominant use of out-of-state treatment centers created an undue burden on physicians"[8]

3 Preamble

3.1 Philosophy of our founding fathers

The following document presents an analysis of a multi-faceted problem pertaining to regulation of professional licensure in contemporary law, and it assimilates the jurisprudence of the courts – attempting to identify the best practices of law whereby the problems may be addressed. In the present matter, it could be argued that our government has evolved to where the rights and liberties of licensed professionals are disregarded in favor of "protecting the public good" and "protecting public safety." What is often overlooked, however, is that deprivation of those rights that are essential to a successful society gradually results in the greater destruction of the public good. In 1787, James Madison issued a prophetic warning:

> "The friend of popular governments never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any

[4] E.g. ORS 676.175
[5] E.g. for "competency evaluations" of licensees
[6] This becomes a mechanism for a continuous revenue stream where a market participant generates false claims against professionals for the purpose of generating business.
[7] E.g. The "mere preponderance" standard.
[8] http://www.ncauditor.net/EPSWeb/Reports/Performance/PER-2013-8141.pdf

> plan which, without violating the principles to which he is attached, provides a proper cure for it. The instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished; as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declamations. The valuable improvements made by the American constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality, to contend that they have as effectually obviated the danger on this side, as was wished and expected. Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority. However anxiously we may wish that these complaints had no foundation, the evidence, of known facts will not permit us to deny that they are in some degree true. It will be found, indeed, on a candid review of our situation, that some of the distresses under which we labor have been erroneously charged on the operation of our governments; but it will be found, at the same time, that other causes will not alone account for many of our heaviest misfortunes; and, particularly, for that prevailing and increasing distrust of public engagements, and alarm for private rights, which are echoed from one end of the continent to the other. These must be chiefly, if not wholly, effects of the unsteadiness and injustice with which a factious spirit has tainted our public administrations. . . . *Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.*"[9]

James Madison further conjectures to warn us that successful government cannot responsibly eliminate the *causes* of faction but instead must control the *effects* of faction. Every type of anticompetitive activity is inherently a form of faction because it is inherently opposed to the rights and privileges of persons. Determining how to best control the effects of private market anticompetitive activity in the market is the primary goal of this document. The secondary goal of this document is to illuminate the best solution (by deductive reasoning) for regulating professional licensure to prevent government intervention from creating anticompetitive safe-harbors.

3.2 Preservation of the public good

Courts have reached a point where the liberties of professional licensees have taken second priority to preservation of the "public good." This is a danger that our founding fathers warned us against. In truth, there are few perspectives more important in the establishment of effective government than addressing the consequences of deprivation of liberties pursuant to the "common good." Indeed, though perhaps well intended, the pursuit for the public interest has caused our courts to judge in favor of weakened evidentiary standards, greater immunity and confidentiality protections for complainants and prosecutors, and greater disregard for due process during investigatory and disciplinary proceedings involving professional licensure. Although surely it is obvious that the risk to society from an incompetent person practicing in a profession is not insignificant, we must remember that the risk to society is even greater when innocent people are revoked of their ability to support their families and that Tort law does still provide some protection of justice in cases of professional misconduct.

With this perspective in mind, this document comprises a comprehensive analysis of a multi-faceted anticompetitive system[10] exposed by the US Supreme Court's decision in *FTC vs. North Carolina Board of Dental*

---

[9] The Same Subject Continued: The Union as a Safeguard Against Domestic Faction and Insurrection. From the New York Packet. Friday, November 23, 1787. James Madison. Federalist Papers: No. 10

[10] i.e. combination of statutes and court rulings

Examiners. This document also assimilates key findings of the courts and presents a comprehensive, best-practice solution.

3.3 Problem summary

3.3.1 Immunity and confidentiality delegation by state licensing boards to private market participants

It should become apparent that the propensity for a board consultant to hide behind both the delegated immunity and the confidentiality of the complaint information to displace competitors in the marketplace is real and could conceivably result in a rather lucrative arrangement that is independent from the pricing rules that govern free markets. Because board consultants do not generate revenue (at least not through that market channel) unless the board refers licensees to them for services, board consultants have a legitimate fiscal incentive to generate complaints against licensees who are likely candidates for their services. To make this propensity clearer, board executive orders (which consequently delegate authority) are used to order licensees to undergo evaluations[11] from these consultants who have financial incentives to report the licensee as needing their services, regardless of whether or not the findings are backed by legitimate evidence. Moreover, because executive delegation carries the authority of the licensing board, these consultants are protected by the same confidentiality and immunity powers that protect both complainants and state officials, even though these consultants have clear private market financial incentives to report to the licensing boards that the licensees require additional "treatment" and services regardless of the truth – especially because the confidentiality prevents licensees from exposing fraudulent reports provided to the board by the consultants. Unfortunately, in such an environment, for the reasons set forth herein, licensees don't seem to have any possible mechanism for legal redress[12] in the case that the complainant or board consultant committed perjury. Much of this document evaluates the legal context underpinning these situations; because such a financial scheme seems almost too specious[13] to be possible, much of this document will assess the underlying case law to expose how such a problem actually does exist and may be adequately resolved by considering the opinions of the federal and state courts (herein as "Court").

3.3.2 Anticompetitive Factors Among Private Market Participants

It appears that there are two predominant factors of anticompetitive activity that current state policy makes possible in the current architecture of state licensing boards:

- Professionals who file false complaints against competitors and hide behind the protections granted from the confidentiality of their reports; and
- Board consultants who receive financial compensation for services rendered to licensees during the conduct of investigatory or disciplinary proceedings and subsequently hide behind the immunity delegated to them by executive board order (to act as representatives of the board) – in addition to the confidentiality granted by statute.

[11] E.g. OAR 847-010-0070(1)(d). See also 847-010-0070(2), 847-010-0070(6). Note also that OARs 847-010-0073(3)(a)(B) and 847-010-0073(3)(b)(A-C) do not define "standards of ethics" or "outmoded, unproved, or unscientific treatments" or "standard of care" or "treatment which is or may be considered unnecessary or inappropriate" by any formal written definition or standard. Notice also that OAR 847-010-0073(4) mandates these "evaluation[s]," even if the evaluations are completely fraudulent.

[12] Including both civil and criminal action, or as a defense against board disciplinary action

[13] "Good" in this context means financially lucrative for unethical private market participants.

4 Purposes of Active Supervision

4.1 Doctrines of immunity delegation

> "[I]n all cases where power is to be conferred, the point first to be decided is, whether such a power be necessary to the public good; as the next will be, in case of an affirmative decision, to guard as effectually as possible against a perversion of the power to the public detriment."[14]

In *FTC v. Phoebe Putney Health System, Inc*, it was determined that that state-action immunity (to antitrust liability) requires state policy to clearly express the intent to displace competition when delegating that immunity to private entities.

> "Following *Parker*, we have held that under certain circumstances, immunity from the federal antitrust laws may extend to nonstate actors carrying out the State's regulatory program. But given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state-action immunity is disfavored, much as are repeals by implication.' *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992). Consistent with this preference, we recognize state-action immunity only when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that '*is the State's own*.' Id., at 635, 112 S.Ct. 2169."[15]

This ruling emphases that when anticompetitive conduct is allowed in the marketplace (e.g. where professionals can complain against competitors), immunity is only preserved when the anticompetitive processes are each explicitly defined by the state. If any flexibility exists in the state policy, closer analysis is required.

> "Accordingly, '[c]loser analysis is required when the activity at issue is not directly that of' the State itself, but rather 'is carried out by others pursuant to state authorization.' *Hoover v. Ronwin*, 466 U.S. 558, 568, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984). When determining whether the anticompetitive acts of *private parties* are entitled to immunity, we employ a two-part test, requiring first that 'the challenged restraint ... be one clearly articulated and affirmatively expressed as state policy,' and second that 'the policy ... be actively supervised by the State.' *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980) (internal quotation marks omitted)." (Id.)

For example, if executive board orders may be used to order licensees to undergo treatment or evaluation services by private market participants, the underlying processes must be clearly defined by the state to satisfy the Midcal active supervision requirement. This interpretation was upheld in *FTC v. North Carolina Board of Dental Examiners*. It is important to note that the Midcal test was specifically used to assess anticompetitive acts of *private parties* – rather than that of a regulatory agency, such as a state licensing board. Let us note that there exists no state statute (ORS) or administrative rule (OAR) for governing the pricing or evidentiary standards of consultants used by state licensing boards to "evaluate" licensees for allegations of misconduct or "impairment". The reason that anticompetitive conduct must be "the State's own" is to ensure that State intervention that causes anticompetitive behavior (as policing businesses tends to) is adequately controlled. In *FTC v. Ticor Title Ins. Co.*, the Court states:

> "Our decisions make clear that the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised *sufficient independent judgment and control* so that the details of the rates or prices have been established as a product of *deliberate state intervention*, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own."[16]

---

[14] General View of the Powers Conferred by The Constitution For the Independent Journal. MADISON. Federalist Papers: No. 41

[15] *FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003, 568 U.S., 185 L. Ed. 2d 43 (2013). Emphasis added.

[16] *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992). Available at: https://scholar.google.com/scholar_case?case=12870927575357054090

By overreliance on executive delegation, the state has lost control over price and service agreements established between licensing boards (officially, or unofficially through the members individually), private market participants (i.e "consultants"), and other private market participants (i.e. "complainants"). (Let us recognize that the harm caused by permanent revocation of the career of one innocent person may substantially exceed the economic damage that may result from one single potentially serious act of professional incompetence, as long as the act of professional incompetence did not cause death.)

In *FTC v. Ticor*, the Court quoted a rationale for active supervision that was derived from *Patrick v. Burget*:

> "In *Patrick* it had been alleged that private physicians participated in the State's peer review system in order to injure or destroy competition by denying hospital privileges to a physician who had begun a competing clinic. We referred to the purpose of preserving the State's own administrative policies, as distinct from allowing private parties to foreclose competition, in the following passage:
>
> > 'The active supervision requirement stems from the recognition that where a private party is engaging in the anticompetitive activity, *there is a real danger that he is acting to further his own interests*, rather than the governmental interests of the State. . . .The requirement is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. To accomplish this purpose, the active supervision requirement *mandates that the State exercise ultimate control over the challenged anticompetitive conduct*. . . . *The mere presence of some state involvement or monitoring does not suffice*. . . . *The active supervision prong of the Midcal test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy*. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.' 486 U. S., at 100-101 (internal quotation marks and citations omitted).
>
> Because the particular anticompetitive conduct at issue in *Patrick* had not been supervised by governmental actors, we decided that the actions of the peer review committee were not entitled to state-action immunity. *Id.,* at 106." (Id.)

It is worth nothing that the Oregon confidentiality statutes appear to have been passed in 1997, after *Patrick* was decided. After those statutes were passed, it became notably more difficult for licensees to prevail in antitrust suits involving Sherman Act claims.

The mere pretense of control (especially under executive branch authority) should be considered insufficient to meet the requirements of Midcal active supervision. In *FTC vs NC Dental Board*, the dental board had "control" over the anticompetitive activities that they were directly participating in, but the process whereby the board engaged in the anticompetitive activity was not clearly defined by rule or statute. For this reason, the Court held that the State's *process* must be defined, not just the control and delegation of authority.

Before we assess the process of delegation, however, we first must ensure that we properly define "peer review."

4.1.1 Peer review

The phrase "peer review" has taken two different but similar meanings. In the first meaning, the Court has referred to the rigorous process undertaken by a scholarly community when reviewing claims published in a scholarly journal.

> "Citing *Frye* v. *United States,* 54 App. D. C. 46, 47, 293 F. 1013, 1014 (1923), the court stated that expert opinion based on a scientific technique is inadmissible unless the technique is 'generally accepted' as reliable in the relevant scientific community . . . Publication (which is but one element of peer review) is not a *sine qua non* of admissibility; it does not necessarily correlate with reliability. . . The fact of publication (or lack thereof)

> in a peer reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised."[17]

"Peer review," however, can also refer to expert witness testimony. To determine whether to admit or exclude an expert testimony on scientific matters, the court should apply an "abuse-of-discretion" standard when evaluating evidence.

> "The principal issue is the scope of a trial judge's discretion under Rule 403, which authorizes exclusion of relevant evidence when its 'probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.' Fed. Rule Evid. 403." [18]

So, to determine if evidence should be introduced, the Court has recognized that the material importance of the evidence must be significant enough to outweigh the risk of corrupting the case. This rule is especially important if the evidence is not actually directly related to the allegation that the defendant is charged with because it introduces "unfair prejudice," as explained:

> "The term "unfair prejudice," as to a criminal defendant, speaks to the capacity of some concededly relevant evidence *to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged*. See generally 1 J. Weinstein, M. Berger, & J. McLaughlin, Weinstein's Evidence ¶ 403[03] (1996) (discussing the meaning of "unfair prejudice" under Rule 403). So, the Committee Notes to Rule 403 explain, "`Unfair prejudice' within its context means *an undue tendency to suggest decision on an improper basis*, commonly, though not necessarily, an emotional one." Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U. S. C. App., p. 860." (Id. at 180.)

Similar to the reasons for due process, preventing unfair prejudice reduces false convictions, or convictions of innocent people. Because professional licensing boards (at least in the State of Oregon) do not currently have any such rules governing their evidentiary rules or investigative procedures, we address a situation herein to bring to light both an anticompetitive problem in the marketplace and a possible solution for the problem.

How are states implementing peer review?

"OAR **847-010-0095**

Peer Review

The Oregon Medical Board will participate in a peer review process to implement the provisions of ORS 441.055. . . "
ORS 411.055 states, in part, "(4) The Oregon Medical Board may appoint one or more physicians to conduct peer review for a health care facility upon request of such review by all of the following:

> (a)The physician whose practice is being reviewed.
> (b)The executive committee of the health care facilitys medical staff.
> (c)The governing body of the health care facility.

(5) The physicians appointed pursuant to subsection (4) of this section shall be deemed agents of the Oregon Medical Board, subject to the provisions of ORS 30.310 (Actions and suits by governmental units) to 30.400 (Actions by and against public officers in official capacity) and shall conduct peer review. Peer review shall be conducted pursuant to the bylaws of the requesting health care facility.
(6) Any person serving on or communicating information to a peer review committee *shall not be subject to an action for damages for action or communications or statements* made in good faith.

---

[17] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). P. 584,593-594. Available at: https://scholar.google.com/scholar_case?case=827109112258472814
[18] *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997). P. 180. Available at https://scholar.google.com/scholar_case?case=2711105174348004240

(7) All findings and conclusions, interviews, reports, studies, communications and statements procured by or furnished to the peer review committee in connection with a peer review are confidential pursuant to ORS 192.501 (Public records conditionally exempt from disclosure) to 192.505 (Exempt and nonexempt public record to be separated) and 192.690 (Exceptions to ORS 192.610 to 192.690) and all data is privileged pursuant to ORS 41.675 (Inadmissibility of certain data provided to peer review body of health care providers and health care groups).
(8) Notwithstanding subsection (7) of this section, a written report of the findings and conclusions of the peer review shall be provided to the governing body of the health care facility who shall abide by the privileged and confidential provisions set forth in subsection (7) of this section.
(9) Procedures for peer review established by subsections (4) to (8) of this section are *exempt* from ORS chapter 183." (emphasis added)[19]

Unfortunately, the court has provided little clarification on what exactly is meant by "good faith."

Although Oregon's Administrative Procedures Act (i.e. ORS chapter 183) do not provide much due process, , the state's not administrative procedures

Commented [DB1]: Harvard Law Review is likely more interested in examples of what to do, not what to not do…

4.1.1.1 Reviewing the basis for confidentiality

In *Jaffee v. Redmond*, the Court asked a question about when confidentiality is more important than the rules of evidence. This relates to the present matter because numerous state statutes, administrative rules, and court interpretations (as mentioned heretofore and subsequently) protect the confidentiality of various aspects of the investigatory process during professional licensing disciplinary proceedings. Indeed, the Court has stated:

> "Statements made before various administrative boards and commissions have been recognized as absolutely privileged. . . . The privilege is made applicable to proceedings before administrative bodies having the power to grant and revoke licenses. . . . Some courts have held that statements made to licensing agencies are entitled only to a qualified privilege. . . The proceedings may be regarded as quasi-judicial in character in spite of the fact that the body before whom the proceedings are conducted is not the creature of the legislature."[20]

When determining if the importance of confidentiality in psychotherapy, for example, was important enough to justify a prohibition of disclosure of evidence, the Court stated:

> "Effective psychotherapy undoubtedly is beneficial to individuals with mental problems, and surely serves some larger social interest in maintaining a mentally stable society. But merely mentioning these values does not answer the critical question: Are they of such importance, and is the contribution of psychotherapy to them so distinctive, and is the application of normal evidentiary rules so destructive to psychotherapy, as to justify making our federal courts occasional instruments of injustice? On that central question I find the Court's analysis insufficiently convincing to satisfy the high standard we have set for rules that "are in derogation of the search for truth." *Nixon,* 418 U. S., at 710."[21]

The purposes for confidentiality, and for most types of privilege, are clear: They are to allow information to be shared without fear of litigation. By the court gives a great example here that pertains very closely to the matter involving professional licensing disputes. Continuing in the analogy, the Court states:

---

[19] Note: ORS § 441.055 came from: 1965 c.352 §1; 1971 c.730 §13; 1973 c.837 §14; 1973 c.840 §9; 1977 c.261 §4; 1977 c.448 §10; 1977 c.751 §23a; 1987 c.428 §9; 1987 c.850 §2; 1993 c.269 §1; 1995 c.727 §38; 1995 c.763 §1; 1999 c.542 §1; 2001 c.900 §167; 2009 c.595 §726; 2009 c.792 §58]
[20] *Ramstead v. Morgan*, 347 P.2d 594, 219 Or. 383 (1959). Available at: **https://scholar.google.com/scholar_case?case=2082690108593935253**
[21] *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996). P. 22. Available at: https://scholar.google.com/scholar_case?case=365976032268433131

> "Even where it is certain that absence of the psychotherapist privilege will inhibit disclosure of the information, it is not clear to me that that is an unacceptable state of affairs. Let us assume the very worst in the circumstances of the present case: that to be truthful about what was troubling her, the police officer who sought counseling would have to confess that she shot without reason, and wounded an innocent man. If (again to assume the worst) such an act constituted the crime of negligent wounding under Illinois law, the officer would of course have the absolute right not to admit that she shot without reason in criminal court. But I see no reason why she should be enabled both not to admit it in criminal court (as a good citizen should), and to get the benefits of psychotherapy by admitting it to a therapist who cannot tell anyone else. And even less reason why she should be enabled to deny her guilt in the criminal trial—or in a civil trial for negligence—while yet obtaining the benefits of psychotherapy by confessing guilt to a social worker who cannot testify. It seems to me entirely fair to say that if she wishes the benefits of telling the truth she must also accept the adverse consequences. To be sure, in most cases the statements to the psychotherapist will be only marginally relevant, and one of the purposes of the privilege (though not one relied upon by the Court) may be simply to spare patients needless intrusion upon their privacy, and to spare psychotherapists needless expenditure of their time in deposition and trial. But surely this can be achieved by means short of excluding even evidence that is of the most direct and conclusive effect." (Id. at 23-24.)

In other words, if we consider the case involving psychotherapist privilege as an analogy, by parallel reasoning, we may infer that the Court reasons that a complainant should not be able to obtain the benefits of lying to a licensing board (e.g. when submitting a false complaint about a licensee to the licensing board) and then obtain the benefits of confidentiality when the licensee tries to sue the complainant for perjury and any related damages. By analogy, we see that the Court is essentially saying that even if confidentiality is warranted, there should be no reason for that confidentiality from preventing the Court from fulfilling the cause of justice. The Court then brings to light the fact that the services underlying the confidentiality must be of "such transcendent importance as to be purchased at the price of occasional injustice" to be considered as exempt from discovery from the Court, stating:

> "Of course this brief analysis. . . contains no explanation of why the psychotherapy provided by social workers is a public good of such transcendent importance as to be purchased at the price of occasional injustice" (Id. at 28)

Continuing from our analogy, we can raise this question: Is it of "a public good of such transcendent importance" to allow private market participants to submit allegations to the licensing boards against their competitors as to protect those private market participants from all forms of civil litigation that otherwise could result from their complaints? Perhaps if the safeguards are sufficient to ensure that the complainant hasn't willfully submitted false information to the licensing board for anticompetitive purposes, then a generalized extension of confidentiality would be merited. But even for such a high degree of general confidentiality, the Court stated in *Nixon*:

> "In *United States* v. *Reynolds,* 345 U. S. 1 (1953), dealing with a claimant's demand for evidence in a Tort Claims Act case against the Government, the Court said:
>
> > 'It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.' *Id.,* at 10.
>
> *No case of the Court, however, has extended this high degree of deference to a* President's *generalized interest in confidentiality*."[22]

So, if the Court would not extent that high degree of deference of confidentiality to the United States President's "*generalized interest* in confidentiality," is it unreasonable to assume that the Court would similarly wish to not extend

[22] *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). P. 711. Emphasis Added. Available at: https://scholar.google.com/scholar_case?case=5132513257326080850

such a high degree of deference to private market participants when a high-risk exists that anticompetitive activity will be safe-harbored by the confidentiality?

Interestingly, the case of *Patrick v. Burget* is an Oregon case involving professional licensure that reached the U.S. Federal Supreme Court. This particular case is a very good example of an anticompetitive process where the licensing board manufactured evidence to attempt to mislead the Court into judging against the licensee. It is worth mentioning that *Patrick v. Burget* was decided before Oregon passed the law that granted confidentiality.

4.1.2 Immunity delegation to private market participants

The delegated immunity that is conferred upon board consultants is explicitly barred by Section 20 of Bill of Rights of Oregon's constitution, which states:

> "**Section 20. Equality of privileges and immunities of citizens**. No law shall be passed granting to any citizen or class of citizens privileges, *or immunities, which, upon the same terms, shall not equally belong to all citizens*."

Though it is reasonable for us to expect that immunities would be granted to government entities involved in the peer review process, the Oregon Constitution indicates that this immunity should never be delegated to private market participants – neither under executive board order nor by any means, unless such immunity is granted to all other citizens – or at least all other citizens governed by that same licensing board. If we assume for the purpose of analysis that board consultants are always legitimately honest[23] industry experts, without a procedure explicitly governing the powers and mechanism of delegation whereby the licensing board would mandate a licensee to undergo services by the consultant, the board's executive orders would necessarily entail a delegation of the authority (along with its confidentiality and immunity powers). Of course, theoretically, the licensing board's executive director could promulgate administrative rules (under the current legislature) that restricted their own authority and power, but it would be an unwarranted partiality to contend that licensing board's executive directors would naturally decide to restrict their own power in good faith without the legislature explicitly mandating such restrictions by statute. This parallels with the comment by Justice Blackmun in *Franks v. Delaware*, who stated:

> "Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered."[24]

If a licensing board must delegate to private market participants, statutes must be promulgated to govern statutory limits of authority, scope and limitations of immunity, evidentiary requirements, operational standards; limits, scope, and exceptions of confidentiality, and anticompetitive review procedures – including mechanisms for discovery and redress of grievances when perjury has occurred. It should be obvious that this rulemaking process is best governed by a legislative body.

4.1.3 Private market delegation of due process

In *Haney v. Oregon Board of Medical Examiners*, one of the better documented cases of the questionable evaluation practices of a state licensing board, the Court accepted the following allegations as true:

> "Plaintiff Susan Theresa Haney, M.D., is a licensee of the Oregon Board of Medical Examiners (BME). On February 23, 2006, plaintiff began experiencing problems related to her chronic asthma. Pursuant to her physician's advice, plaintiff began treating her asthma with prednisone. Plaintiff was concerned that using prednisone could cause side effects, including hypomania, which is an undesirable mood state.

---

[23] "Honest" in this context means, among other things, that the consultant has no anticompetitive motivations and is purely interested in seeking the truth.

[24] *Wolf v. Colorado*, 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949). P. 42. Available at: https://scholar.google.com/scholar_case?case=6603419483197027214

On March 20, 2006, plaintiff recognized that she was experiencing symptoms of hypomania while she was vacationing. She sought medical advice and was instructed to lessen her use of prednisone. Plaintiff reported to her immediate supervisor that she was experiencing symptoms of hypomania due to the prednisone. She worked with her health care providers to monitor her use of prednisone in hopes of becoming healthy enough to return to work.
Plaintiff apprised her employer of her health status. On March 30, 2006, plaintiff and her employer discussed obtaining the BME's authority to return to work. On March 30, 2006, plaintiff contacted BME and reported her prednisone-induced temporary manic episode and her desire to return to work when healthy. *Plaintiff* requested that BME open a formal investigation. Subsequently, an investigation was undertaken and *plaintiff was advised that she could not return to work until authorized to do so by BME*.
Plaintiff alleges that she was discouraged from retaining counsel[25], and that *she was compelled to grant access to all of her medical records, including those that contain personal health information and therapy information unrelated to plaintiff's manic episode*[26]. She asserts that the BME's investigative committee did not consult with her, and did not consult with any of her health care providers, her employer, co-workers or family.

Plaintiff claims that as a result of the investigation, and the fact that she had been rendered unemployable during its pendency, *she was coerced into participating in a chemical dependency program*[27], and agreeing to be monitored for substance abuse. Beginning in April 2006, plaintiff repeatedly protested defendants' conduct in monitoring her, committing invasions of her privacy, and treating her differently[28] than other similarly-situated physicians.

Plaintiff alleges that on July 13, 2006, *BME forced her to stipulate to a corrective action order (CAO)*[29]. Specifically, *plaintiff asserts that BME threatened her with revocation or suspension of her license unless she stipulated to the CAO*. . . .

On September 23, 2006, BME *publicized the CAO in its quarterly newsletter*[30], which is mailed to all BME licensees and is available on-line for public access.

Plaintiff sought reconsideration of the CAO. She alleges that *her protests resulted in threats that her license will be suspended or otherwise impaired*[31]. Nevertheless, on January 24, 2007, plaintiff submitted a formal written request that the CAO be removed from the BME website and that it be converted to a confidential order for evaluation. She also requested termination of her participation in the chemical dependency program. The *BME denied these requests."* [32]

---

[25] This suggests a violation of the 6th Amendment, which requires counsel in criminal investigations. This interpretation becomes more apparent later in this document.
[26] In a criminal case, unrestricted access to personal healthcare records (especially those involving mental health) constitutes a pretty serious violation of both 4th, 5th, and 14th Amendment rights.
[27] Interestingly, the coercion into chemical dependency programs seem to be correlated with reports of falsified drug test samples, consistent with findings of NCPHP audit. See: http://www.chapmanlawgroup.com/publications/HPRP-Class-Action-Complaint.pdf , http://pathologyblawg.com/wp-content/uploads/2014/08/Langan-v.-Quest-Diagnostics.pdf , and https://mllangan1.files.wordpress.com/2014/11/august-6-2014-to-langan-with-health-materials1.pdf
[28] This also constitutes a 14th Amendment violation due to unequal treatment.
[29] This is a 5th Amendment violation because this type of agreement involves asserting that the allegations are true in what amounts to a confession of guilt. An example of one of these agreements is available here: https://techmedweb.omb.state.or.us/Clients/ORMB/Public/..%5COrderDocuments%5C4519012b-e2b6-4e52-be2d-91622e92412f.pdf
[30] This is seriously an abuse of the board's immunity, especially in the context of the 4th, 5th, 6th, and 14th Amendment violations.
[31] This is a 1st Amendment violation because she has the right to petition the government for a redress of grievances.
[32] *Haney v. OREGON BOARD OF MEDICAL EXAMINERS, Civil No. 07-1807-HA (D. Or. Oct. 20, 2008).* Available at: https://scholar.google.com/scholar_case?case=12172384490245540442

Before we address the due process issues of this case in greater detail, we must first recognize that the licensing board is not considered a HIPAA covered entity because:

> "The Court noted that even if HIPAA applied, "the regulations are not applicable to disclosures of medical records to a licensure or disciplinary agency, such as the Board."[33]

(ORS § 676.177(1) further allows confidential information to be exchanged between public entities involved in the regulatory process.) So, because the Board is not a covered entity of HIPAA, the law allows them to publish information that would be otherwise defamatory under HIPAA and obtain immunity from civil action (e.g. claiming libel/defamation). It is important that we recognize that in Dr. Haney's case, although the initial complaint (which was her self-report to the board) contained no allegations of incompetence or substance abuse, investigators searched and seized personal healthcare records and other documents – and without consideration for whether or not the allegations contained evidence of substance abuse, she was required by board action to undergo treatment in a chemical dependency program. In essence, without any pre-trial evidentiary hearing or warrant for search and seizure, the board leveraged Dr. Haney's own testimony against her and threatened that if she did not comply, they further threatened her with loss of her licensure (and by publishing the matter to all of the other licensees in her profession). Whether or not evidence supported the value of her participation in the chemical dependency program is immaterial as a matter of law because no allegations pertaining to substance abuse or drugs (in general) existed in Haney's case. Notice also that reports involving drug testing labs that have been involved in falsifying drug tests to convict innocent people have been detected[34].

4.2 Examining due process

So, as a matter of law, the more important matter to assess in cases such as the one above are the issues of due process. Particularly, the Fourth and Fifth Amendment are largely intended to prevent the government from pressuring a person (esp. an innocent person) into any form of self-accusation.

> "*It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem, that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty. . . .* The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence, — it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; *but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment.* In this regard the Fourth and Fifth Amendments run almost into each other." [35]

This Court opinion makes a motivation for the Fourth and Fifth Amendments clear: It is a serious injustice for the law to allow a state official – in the name of good faith – to forcibly extort a person to testify against their own self because forced self-accusation subverts the process of justice by allowing the law to force any innocent person into a false

---

[33] *NC State Bd. of Dental Examiners v. Woods, 688 S.E.2d 84, 202 N.C. App. 89 (Ct. App. 2010).* Available at: https://scholar.google.com/scholar_case?case=17120240294450544126

[34] http://www.cbsnews.com/news/massachusetts-lab-tech-arrested-for-alleged-improper-handling-of-drug-tests/

[35] *Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886).* Emphasis added, after citing after citing Lord Camden's judgment in *Entick v.Carrington*, 19 Howell's State Trials, 1029. Available at: https://scholar.google.com/scholar_case?case=9067527596654000149

confession of guilt, therefore making it impossible to distinguish the innocent from those who are truly guilty. Continuing, the Court states:

> ". . . And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, *or to forfeit his property*[36], is contrary to the principles of a free government. . . . It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom. . . . For the 'unreasonable searches and seizures' condemned in the Fourth Amendment *are almost always made for the purpose of compelling a man to give evidence against himself*, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. *And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself*. We think it is within the clear intent and meaning of those terms." (Id.)

It is loathsome to imagine police illegally seizing a person's personal mental health record for use in a criminal case involving allegations completely unrelated to the reasons for the search. What the Court recognized, however, is that even professional licensing investigatory proceedings should be considered criminal, rather than civil, because proceedings are considered criminal any time a person is deprived of property due to an offense that was committed by them. Thus, the interpretation of the Constitutional underpinnings of the Fourth and Fifth Amendments heretofore substantiate an interpretation of the practices used by state licensing boards as *criminal, rather than civil, proceedings*, as stated by the Court:

> "We are also clearly of opinion that *proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal.*" (Id.)

This distinction by the Court is extremely important because it denotes that any time a person is deprived property, such as a professional license they were already granted, the proceedings are criminal – not civil – and therefore they must embody the regulations that typically govern criminal proceedings. For example, these proceedings must include evidentiary rules, due process, and the many other procedural and statutorily rules governing criminal cases. This results in a substantial required change in our current professional licensure regulatory practices. (Clearly, deprivation of a license to practice in a profession constitutes a deprivation of property; and if the deprivation of licensure is a consequence of the licensee's alleged misconduct, the deprivation of that licensure is by reason of offenses committed by the licensee, consistent with the holding in *Boyd v. United States*.) This interpretation makes it clear that the reason the proceedings are considered to be criminal, rather than civil, are *because* a person's *property was forfeited by reason of some offense the accused person committed*.

According to Black's Law Dictionary, Fifth Edition:

> An offense is: "A violation of the law; a crime, often a minor one."
> A crime is: "An *act* that the law makes punishable; the breach of a legal duty treated as the subject matter of a *criminal proceeding*." (Emphasis added)

First of all, as we have identified heretofore that investigatory proceedings of licensees constitute criminal proceedings, we, by definition should recognize that offenses pertaining to professional conduct are acts, or individual actions, not classifications of people.

Second, these definitions indicate that the existence of an offense implies the existence of a law that makes such action punishable. This implication entails that every act constituting an offense of professional conduct must be defined and accompanied by an appropriate punishment.

[36] Such as a professional license.

If such punishment involves any form of delegation to a private market participant, we can easily uphold the "state's own" requirement by requiring the process to be defined as well.
To enforce promulgation of law with such strict requirements, a mechanism for challenging such laws for violations of these requirements must be imposed. Traditionally, a constitution is required to impose such a mechanism if the rules are to be governed by statutes.

The other implication, though not as obvious, is that the knowledge of actions constituting offenses may be unknown by members outside of that profession. It is important to recognize, however, that promulgation of criminal statutes are primarily a legislative, not an administrative, duty.

One possible way to judge the seriousness of a licensee's misconduct uniformly is by affixing a dollar amount to the estimated cost to society of the alleged offender's misconduct, insomuch as estimating procedures follow actuarial and statistical best practices. For offenses against persons, we may include pain & suffering and mental distress with the estimable parts of the formula. This practice also establishes a uniform and quantifiable mechanism for implementing an objective procedure designed for rulemakers to assess penalties, seriousness of offenses, and appropriateness for disciplining a licensee. For example, if a physician suffers from bipolar disorder but is stable with medication, does their medical disability alone constitute an offense to society? How is that much different from a statue prohibiting African Americans on the same basis? To prevent discrimination, requiring each type of offense to be explicitly statutorily defined and measurable (as to an individual offender's offense's cost to society, not in general, but individually) ensures that we achieve a clear distinction between classifications of people (which are inherently discriminatory) and individuals' personal choices that are destructive to society. Offenses also inherently affect others, unlike the classification of a person, because it is not possible for a person to offend their self.[37]

Let us also consider the distinction between classifying a person as a substance abuser from convicting a person for the act of diverting narcotics. In the first case, a consultant could conceivably allege a person to be lying and "in denial" and (incorrectly) classify them as a substance abuser and subsequently recommend to the board that the person needs to be urgently admitted to their expensive inpatient drug rehab program. In the second case, clearly the evidence must exist before a person could be convicted of professional misconduct.

So, compelling Dr. Haney to provide her own personal healthcare records for the Board to subsequently leverage information therein to produce a testimony against her is clearly a violation of both the Fourth and Fifth Amendments. It should be clear that any licensing board action that restricts a licensee's license – or involves seizure of the licensee's property for investigatory purposes – constitutes a type of forfeiture of property.

> "*Once licenses are issued*, as in petitioner's case, *their continued possession may become essential in the pursuit of a livelihood*. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. *In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment*. *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969); *Goldberg* v. *Kelly*, 397 U. S. 254 (1970). This is but an application of the general proposition that *relevant constitutional restraints limit state power to terminate an entitlement* whether the entitlement is denominated a 'right' or a 'privilege.' "[38]

Because this adjudication is a consequence of an offense committed by a licensee, hence the proceeding is criminal and must be subjected to the same due process granted to criminals. Clearly, any type of professional license governed by the state "may become essential in the pursuit of a livelihood" and therefore necessitates that "licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."

4.2.1 Determining due process

To provide direction on the nature of procedural due process that must be afforded, the Court recognized:

---

[37] Consider Mark 9:47, which states, "And if thine eye offend thee, pluck it out. . ."
[38] *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971). Emphasis added. Available at: https://scholar.google.com/scholar_case?case=14647645297270353921

> "A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case. . . . Clearly, however, the inquiry into fault or liability requisite to afford the licensee due process need not take the form of a full adjudication of the question of liability. That adjudication can only be made in litigation between the parties involved in the accident. Since the only purpose of the provisions before us is to obtain security from which to pay any judgments against the licensee resulting from the accident, we hold that *procedural due process will be satisfied by an inquiry limited to the determination whether there is a reasonable possibility of judgments in the amounts claimed being rendered against the licensee*." (Id. Emphasis added.)

Thus, it is reasonable to infer that some forms of professional misconduct are more serious than others. For example, a physician accused of sexually exploiting patients under anesthesia[39] should be held to a different standard than those accused of "potential impairment" (e.g. due to a report of consumption of alcohol prior to performing a medical procedure that was provably falsified by the facility conducting the drug test[40]) [See attached letter from Dr. Michael Langan's law firm] or of deviating from the board's undefined "standard" of care. (See relevant OAR)

Regarding the extent of due process required, the Court stated:

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss[41]," *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union* v. *McElroy,* 367 U. S. 886, 895 (1961), "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." See also *Hannah* v. *Larche,* 363 U. S. 420, 440, 442 (1960)."[42]

There currently exists no pretrial evidentiary hearing process or search and seizure restrictions defined in ORS or OARs for investigations of professional licensure. What this means is that investigators (for professional misconduct) are able to perform exhaustive searches and seizures of practically any personal property of the individuals they are investigating, and because they have absolute immunity, these licensees have no legal remedy to protect themselves – regardless of how wrong the due process violations may be[43].

Taking even a closer view of the need for an evidentiary hearing prior to search and seizure, the Court stated:

> "*This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind*, even though it may not involve the stigma and hardships of a criminal conviction, *is a principle basic to our society*. Regard for this principle has guided Congress and the Executive. Congress has often entrusted, as it may, protection of interests which it has created to administrative agencies rather than to the courts. But rarely has it authorized such agencies to act without those essential safeguards for fair judgment which in the course of centuries have come to be associated with due process. See *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297; *Tutun* v. *United States,* 270 U. S. 568, 576, 577; *Pennsylvania R. Co.* v. *Labor Board,* 261 U. S. 72.[15] *And when Congress has given an administrative agency discretion to determine its own procedure, the agency has rarely chosen to dispose of the rights of individuals without a hearing, however informal.*[16]"[44]

Professional licensing boards have transgressed this discretion, and they have woefully abused their authority.

---

[39] This type of offense is serious enough that it really should be prosecuted as a criminal rape rather than by a licensing board.

[40] Note, for example, OAR 847-010-0073(3)(c)(A-C), (3)(b)(C)

[41] It is also worth considering the extent of "grievous loss" that would be imposed by publishing otherwise defamatory information, such as in *Haney v. Oregon Board of Medical Examiners*.

42 *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970). Available at: https://scholar.google.com/scholar_case?case=8198734814206499959

[43] See, for example, *Dover v. Haley*, No. 3: 13-CV-01360-BR (D. Or. Nov. 26, 2013).

[44] *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 71 S. Ct. 624, 95 L. Ed. 817 (1951). Available at: https://scholar.google.com/scholar_case?case=3245341013213844183

> "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and *fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights*.
> An opportunity to be heard may not seem vital when an issue relates only to technical questions susceptible of demonstrable proof on which evidence is not likely to be overlooked and argument on the meaning and worth of conflicting and cloudy data not apt to be helpful. But in other situations an admonition of Mr. Justice Holmes becomes relevant. 'One has to remember that when one's interest is keenly excited evidence gathers from all sides around the magnetic point . . . .'[18] It should be particularly heeded at times of agitation and anxiety, when fear and suspicion impregnate the air we breathe. Compare Brown, The French Revolution in English History. '*The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.*' *United States ex rel. Knauff* v. *Shaughnessy,* 338 U. S. 537, 551 (dissenting). Appearances in the dark are apt to look different in the light of day." (Id. Emphasis added.)

Due process is important enough in general, but when combined with confidentiality, due process is vital to ensuring that corruption is not safe-harbored. Moreover, when we combine both lack of due process with confidentiality, immunity becomes a dangerous vice.

> "Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. *Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness*. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.[19]" (Id. Emphasis added.)

Immunity from deprivations of the rights of others is inherently prone to corruption. Think about it: What government organizations can we remember as historically abhorrent to the rights of people? Nazi Germany under Hitler? Rome under the reign of Nero? The Soviet Union under Stalin? And what more did these deplorable governments possess beyond immunity from depriving the rights of individuals? Perhaps confidentiality of the information used against the people whose rights were being deprived? Clearly, the importance of a pre-investigatory hearing is essential to ensuring that a person will only be deprived of their freedom from search and seizure when ample evidence exists that they have committed the alleged offense. And even then, such a hearing will ensure that search and seizure is limited only to the offenses alleged by mechanism of a warrant to search.

Pretrial evidentiary hearings prevent secret allegations and secret evidence from authorizing search and seizure when the evidence is either unrelated to the allegations, illegally obtained, insufficient, inconsistent with the truth, or perjurious. When combining immunity with confidentiality, anticompetitive factors, and a lack of due process, The Book of Mormon refers to these as instances of a "secret combination," stating:

> "And the regulations of the government were destroyed, because of the secret combination of the friends and kindreds of those who murdered the prophets." (3 Nephi 7:6)

Despite claims from state licensing boards that they provide due process and hearings, the Court stated:

> "[D]ue process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use."[45]

[45] *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969). Available at: https://scholar.google.com/scholar_case?case=15272636124373466401

This statement condemns the practice of licensing boards that restrict a person's license to practice and conduct aggressive search and seizure activities before giving the licensee an opportunity to "establishing the validity, or at least the probable validity, of the underlying claim" against them. Such an opportunity to contest the allegations would suffice to provide the due process required insofar as the evidentiary rules and practices governing the hearing process are legitimate and not arbitrary or fixed against the licensee.

The boards' decisions to arbitrarily sanction licensees' licenses simply due to the "risk" that they "may be" impaired or incompetent – without further lawfully-obtained evidence – is a serious deprivation of due process. The Court spoke strongly against this practice in a case where the petitioner was deprived an identification badge that provided security clearance to highly classified weapons systems. Similar to the practices imposed by professional licensing boards, Justice Stewart of the United States Supreme Court stated:

> "Petitioner was not simply excluded from the base summarily, without a notice and chance to defend herself. She was excluded as a 'security risk,' that designation most odious in our times. The Court consoles itself with the speculation that she may have been merely garrulous, or careless with her identification badge, and indeed she might, although she will never find out. But, in the common understanding of the public with whom petitioner must hereafter live and work, the term 'security risk' carries a much more sinister meaning. See *Beilan* v. *Board of Public Education,* 357 U. S. 399, 421-423 (1958) (dissenting opinion). It is far more likely to be taken as an accusation of communism or disloyalty than imputation of some small personal fault. Perhaps the Government has reasons for lumping such a multitude of sins under a misleading term. But it ought not to affix a 'badge of infamy,' *Wieman* v. *Updegraff, supra,* at 191, to a person without some statement of charges, and some opportunity to speak in reply."

Clearly, if there is any reason that deprivation of a person's property might seem justified for purposes of "public safety" access to highly classified weapons systems would arguably suffice to meet that requirement – at least to the extent that a severely incompetent medical practitioner would potentially endanger the public (if not substantially more so). But the Supreme Court clearly disagreed with the holding that even a situation of such propensity for danger would justify deprivation of property without due process: Even then, the Court concluded that it was entirely unjustified to deprive the petitioner of at least a "notice and chance to defend herself." Yet, as Dr. Haney's case provides clear evidence of, such a "badge of infamy" was exactly what her licensing board affixed to her without any opportunity to legitimately defend herself.

In considering the extent to which a professional license constitutes "real or personal property," the Court spoke conclusively on this subject in the following case. But the Court also went one step further: They made a point to define exactly when

> "*It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose*, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, *and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken*."[46]

The Court held that due process is intended to ensure that persons are not arbitrarily deprived of their property:

[46] *Dent v. West Virginia*, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889). Available at: https://scholar.google.com/scholar_case?case=4686309898940103852

> "As we have said on more than one occasion, it may be difficult, if not impossible, to give to the terms 'due process of law' a definition which will embrace every permissible exertion of power affecting private rights and exclude such as are forbidden. They come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land.' In this country, the requirement is intended to have a similar effect *against legislative power*, that is, *to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property*." [47]
>
> *"Legislation must necessarily vary with the different objects upon which it is designed to operate.* It is sufficient, for the purposes of this case, to say that *legislation is not open to the charge of depriving one of his rights without due process of law*, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters: that is, by process or proceedings adapted to the nature of the case. *The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen*. As said by this court in *Yick Wo v. Hopkins*, speaking by Mr. Justice Matthews: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that *they do not mean to leave room for the play and action of purely personal and arbitrary power*.' "(Id.)

Now, because "legislation must necessarily vary with the different objects upon which it is designed to operate," our existing legislative system may be insufficient to promulgate regulations that pertain to the technicalities of various professional licensing domains. This gap is filled by the solution proposed herein.

To further emphasize the importance of due process, in a case pertaining to the practice of law, the Court stated:

> "*A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment*.[5] *Dent* v. *West Virginia,* 129 U. S. 114. Cf. *Slochower* v. *Board of Education,* 350 U. S. 551; *Wieman* v.*Updegraff,* 344 U. S. 183. And see *Ex parte Secombe,* 19 How. 9, 13. A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. *Douglas* v.*Noble,* 261 U. S. 165; *Cummings* v. *Missouri,* 4 Wall. 277, 319-320. Cf. *Nebbia* v.*New York,* 291 U. S. 502. Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. *Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory*. Cf. *Yick Wo* v. *Hopkins,* 118 U. S. 356."[48]

Had due process occurred, petitioner never would have been deprived of licensure. Interestingly, in this case, the professional licensing board (i.e. the Bar) had attempted to deny licensure based on various allegations about the "moral character" of the petitioner, including evidence of several arrests, but when forced to consider the evidence, the Court held that, "the State of New Mexico deprived petitioner of due process in denying him the opportunity to qualify for the practice of law."

---

[47] Id. Emphasis added.

[48] *Schware v. Board of Bar Examiners of NM*, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957). Emphasis Added. Available at: https://scholar.google.com/scholar_case?case=9656421124030669324

4.2.2 Constitutional right to work

The Fourteenth Amendment also governs professional licensure to ensure that people are given equal opportunity to exercise their personal agency to work for a living in the occupation of their choice. Is it right for a state licensing board to capriciously prohibit some members from their profession but affording those rights to others?

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."[49]

[cite court case that affirmed this interpretation] It should also be equally clear that licensing board's investigatory and disciplinary actions always result from some alleged offense that the licensee is alleged to have committed. Accordingly, the court's holding should affirm that licensing investigatory and disciplinary proceedings, particularly those that may result in restrictions of a licensee's license, should be governed by the well-established body of laws pertaining to criminal – rather than civil – proceedings.

4.2.3 Fourth and Fifth Amendment Protections

By the Court's statements in *Haney v. OBME*, it should be obvious that the board extorted a forced self-accusation against Dr. Haney by threatening her with deprivation of her license for any refusal to comply with any aspect of their investigations, evaluations, "findings," or actions against her – even if illegal practices were used during the investigatory process.

It was further stated by the Court:

> "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, *in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority*, and to forever secure the people, their persons, houses, papers and effects *against all unreasonable searches and seizures under the guise of law*. This protection reaches all alike, *whether accused of crime or not*, and *the duty of giving to it force and effect is obligatory* upon all entrusted under our Federal system with the enforcement of the laws. *The tendency of those who execute the criminal laws*[50] *of the country to obtain conviction by means of unlawful seizures and enforced confessions*, *the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution,* should find no sanction in the judgments of the courts *which are charged at all times* with the support of the Constitution and to which *people of all conditions have a right to appeal for the maintenance of such fundamental rights.* . . . If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."[51]

4.3 Approaches to investigative proceedings

In a case involving certain Rules of Procedure adopted by a Congressional Commission on Civil Rights, detailed analysis of several possible approaches to investigative proceedings were analyzed, including legislative, judicial, and executive modes of investigation. The Court stated:

---

[49] *Truax v. Raich*, 239 U.S. 33, 36 S. Ct. 7, 60 L. Ed. 131 (1915). Available at: https://scholar.google.com/scholar_case?case=9143444901684209267

[50] Remember, this includes professional offenses, as heretofore explained.

[51] *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914). Emphasis added. Available at: https://scholar.google.com/scholar_case?case=8676110639881267815

> " 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, *it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process*. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account." [52]

4.3.1 Purpose of legislative committees

Legislative committees perform best when performing rulemaking, rather than adjudication. For adjudication, administrative agencies also tend to deprive citizens of due process.

> ". . . A frequently used type of investigative agency is the legislative committee. The investigative function of such committees is as old as the Republic.[22] The volumes written about legislative investigations have proliferated almost as rapidly as the legislative committees themselves, and the courts have on more than one occasion been confronted with the legal problems presented by such committees.[23] The procedures adopted by legislative investigating committees have varied over the course of years. Yet, the history of these committees clearly demonstrates that *only infrequently have witnesses appearing before congressional committees been afforded the procedural rights normally associated with an adjudicative proceeding*. In the vast majority of instances, congressional committees have not given witnesses detailed notice or an opportunity to confront, cross-examine and call other witnesses.[24]" (Id.)

One of the reasons that the rulemaking (i.e. legislative) body must be distinct and separate from adjudicatory and executive functions is due to the close relationship between the executive body and the legislature when making treaties, as described by Alexander Hamilton in 1788:

> "A FOURTH objection to the Senate in the capacity of a court of impeachments, is derived from its union with the Executive in the power of making treaties. This, it has been said, would constitute the senators their own judges, in every case of a corrupt or perfidious execution of that trust. After having combined with the Executive in betraying the interests of the nation in a ruinous treaty, what prospect, it is asked, would there be of their being made to suffer the punishment they would deserve, when they were themselves to decide upon the accusation brought against them for the treachery of which they have been guilty?" [53]

This perspective is particularly relevant to professional licensing boards who are immune to prosecution in most cases. The propensity for danger is greatest when the rulemaking body engages in anticompetitive conduct. However, as Alexander Hamilton continues, he argues that much of the power of a true legislative body is its ability to correct itself when sufficient proof can be demonstrated that a rule was promulgated for a corrupt purposes. He continues:

> "So far as might concern the misbehavior of the Executive in perverting the instructions or contravening the views of the Senate, we need not be apprehensive of the want of a disposition in that body to punish the abuse of their confidence or to vindicate their own authority. We may thus far count upon their pride, if not upon their virtue. And so far even as might concern the corruption of leading members, by whose arts and influence the majority may have been inveigled into measures odious to the community, *if the proofs of that corruption should be satisfactory, the usual propensity of human nature will warrant us in concluding that there would be commonly no defect of inclination in the body to divert the public resentment from themselves by a ready sacrifice of the authors of their mismanagement and disgrace*." (Id.)

Alexander Hamilton's perspective is based on the assumption that a public that has been angered by the proof of discovered corruption will naturally be motivated to correct the corruption and hold responsible individuals

---

[52] *Hannah v. Larche*, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960). Available at: https://scholar.google.com/scholar_case?case=7109889644123653268

[53] FEDERALIST No. 66 Objections to the Power of the Senate To Set as a Court for Impeachments Further Considered From the New York Packet. Tuesday, March 11, 1788. Alexander Hamilton.

accountable. He reasons that public resentment will occur once proof for the corruption appears, thus motivating responsible legislative members to correct the corruption lest the legislators be expelled from office or simply chosen to be not re-elected. This public nature of the legislature is quite valuable for rulemaking purposes because rulemaking is inherently a process where the greater truth should eventually become apparent to the people over the course of time. Thus, as rules stand the test of time, when they are discovered to be corrupt, the people become motivated to correct the wrongs – a process made possible by mechanism of a legislative body. Administrative bodies, on the other hand, do not generally have such auto-corrective features. Accordingly, errors committed by a legislative body should eventually be corrected, unlike errors committed by a purely administrative agency.

4.3.2 Purpose of administrative agencies

Executive branches of government are generally intended to enforce the laws set forth by the legislature. The legislature has often deferred various activities to administrative government, and this practice was interpreted in *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, as described:

> "[T]he principle of deference to administrative interpretations 'has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations' . . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[54]

The problem with using deference in the matter described herein is that current policies are causing absolute immunity power to be *delegated* to private market participants – whose identities can be concealed by confidentiality rules and hence protected against both civil and criminal actions when submitting false allegations against competitors.
The delegation of power begins with the adjudicatory authority being delegated to the licensing board.

> "[T]he majority distinguishes *Crowell* as a case in which the Court upheld the delegation of adjudicatory authority to an administrative agency simply because the agency's power to make the 'specialized, narrowly confined factual determinations' at issue arising in a 'particularized area of law,' made the agency a 'true `adjunct' of the District Court. . . . There is thus no attempt to interfere with, but rather provision is made to facilitate, the exercise by the court of its jurisdiction to deny effect to any administrative finding which is without evidence, or `contrary to the indisputable character of the evidence' or where the hearing is `inadequate,' or `unfair,' or arbitrary in any respect. ' "[55]

The constitutional concerns of delegating too heavily to executive government were noted by Justice Thomas, "noting constitutional concerns with broad delegations of authority to administrative agencies"[56] Indeed:

> "[T]he Supreme Court affirmed [the ruling in that case], holding that the Controlled Substances Act does not give the Attorney General the authority to 'define general standards of medical practice' "[57]

If we generalize "standards of medical practice" to the standards of any professional practice, we may infer from this judgment that the Attorney General doesn't have the authority to define the standards of *any* profession. With that being said, Congress has frequently delegated authority by Chevron deference to delegate authority to executive

---

[54] *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Available at: **https://scholar.google.com/scholar_case?case=14437597860792759765**
[55] *Stern v. Marshall*, 131 S. Ct. 2594, 564 U.S., 180 L. Ed. 2d 475 (2011). Available at: **https://scholar.google.com/scholar_case?case=7341255674651649353**
[56] *Gonzales v. Oregon*, 546 U.S. 243, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006). Available at: **https://scholar.google.com/scholar_case?case=17055043890936848595**
[57] *Volkman v. United States Drug Enforcement Administration*, No. 08-3802 (6th Cir. June 3, 2009). Available at: **https://scholar.google.com/scholar_case?case=4449346777298893724**

agencies for the purposes of "formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[58] To be specific about when Chevron deference is warranted:

> "Deference to an agency's regulation in accordance with Chevron "is warranted only `when it appears that Congress delegated authority to the agency generally *to make rules carrying the force of law*, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.' "[59]

However, what has happened in the regulation of professional licensure is that professional licensing boards have greatly transgressed the bounds of merely making rules carrying the force of law and have instead operated as parliamentary-style arbitration boards that are exclusively controlled by an executive director with almost dictatorial authority and complete control over what evidence is admissible and what evidence is suppressed from discovery. For example, in the case of the Oregon Medical Board, delegation is regulated by OARs 847-001-0015, which give the Executive Director complete control over the entire investigative process, including but not limited to governance and control of the evidentiary discovery process[60]. These rules also govern the peer review process, as defined by OAR 847-010-0095 (in the case of the medical board) as per ORS 441.055.

Such a structure fundamentally conflicts with the intent of Article III of the Constitution, which governs the authority to adjudicate matters arising between private parties. In the case of professional licensing, it could be argued that these matters (arguably requiring adjudication) arise between a private party and the state (rather than directly between private parties), and for the most common cases of licensure registration and de-registration, this argument would suffice; but because the *disciplinary process itself* is almost always initiated by a complaint from *another private market participant,* the licensure disciplinary process is almost always a matter arising ultimately between private parties. Furthermore, when the licensure disciplinary process (and the investigative proceedings it entails) occur, adjudication does not typically occur directly between the private parties involved because the complainant's identity is protected by the State (as confidential) and state statutes have granted authority to the executive branch of government to use congressional authority to prosecute licensee misconduct on the complainant's behalf. From this viewpoint, the private market advantage is clearly given to the complainant, who has every incentive to file complaints against competitors inasmuch as they are able to avoid consequences arising from false testimony. Clearly, in this light, the discovery and enforcement of justice in the case of perjury becomes the single most important protection against a complete subversion of this process by anticompetitive fanfare in the marketplace.

Administrative agencies are not known to provide due process generally, so certainly we cannot expect the states' administrations to equally provide due process to all members of each regulated profession.

> *"The history of investigations conducted by the executive branch of the Government is also marked by a decided absence of those procedures here in issue.*[25] The best example is provided by the administrative regulatory agencies. Although these agencies normally make determinations of a quasi-judicial nature, they also frequently conduct purely fact-finding investigations. When doing the former, they are governed by the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. §§ 1001-1011, and the parties to the adjudication are accorded the traditional safeguards of a trial. However, *when these agencies are conducting nonadjudicative, fact-finding investigations, rights such as apprisal, confrontation, and cross-examination generally do not obtain.*"(Id.)

The guidance provided by this case is helpful in allowing us to identify that administrative "fact-finding" investigations are notorious for depriving those due process procedures most desirable for ensuring the proper course of justice. For the greatest due process, a formal judiciary is required. The importance of formal judicial review of administrative agencies was emphasized by the Court in Heckler v. Chaney:

---

[58] *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Available at: **https://scholar.google.com/scholar_case?case=14437597860792759765**

[59] *Forgione v. HCA INC.*, 954 F. Supp. 2d 1349 (N.D. Fla. 2013). Available at: **https://scholar.google.com/scholar_case?case=9359849603854928476**

[60] E.g. OAR 847-001-0015(1)(a-b).

> "If inaction can be reviewed to assure that it does not result from improper abnegation of jurisdiction, from complete abdication of statutory responsibilities, from violation of constitutional rights, or from factors that offend principles of rational and fair administrative process, it would seem that a court must always inquire into the reasons for the agency's action before deciding whether the presumption applies.[12] As Judge Friendly said many years ago, review of even a decision over which substantial administrative discretion exists would then be available to determine whether that discretion had been abused because the decision was "made without a rational explanation, inexplicably departed from established policies, or rested . . . on other considerations that Congress could not have intended to make relevant." *Wong Wing Hang* v. *INS,* 360 F. 2d 715, 719 (CA2 1966). In that event, we would not be finding enforcement decisions unreviewable, but rather would be reviewing them on the merits, albeit with due deference, to assure that such decisions did not result from an abuse of discretion.
>
> . . . Under [5 U.S.C.] § 706(A)(2) and *Abbott Laboratories* v. *Gardner,* 387 U. S. 136 (1967), agency action, including the failure to act, is reviewable to assure that it is not "arbitrary, capricious, or an abuse of discretion," unless Congress has manifested a clear and convincing intent to preclude review. Review of enforcement decisions must be suitably deferential in light of the necessary flexibility the agencies must have in this area, but at least when "enforcement" inaction allegedly deprives citizens of statutory benefits or exposes them to harms against which Congress has sought to provide protection, review must be on the merits to ensure that the agency is exercising its discretion within permissible bounds. See Berger, Administrative Arbitrariness: A Synthesis, 78 Yale L. J. 965 (1969); L. Jaffe, Judicial Control of Administrative Action 375 (1965)."[61]

So, according to the Court, it is proper and necessary that administrative discretion, including administrative inaction, is subject to review by a formal judiciary, pursuant to 5 U.S.C. § 706, which states:

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> **(1)** compel agency action unlawfully withheld or unreasonably delayed; and
>
> **(2)** hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> > **(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> >
> > **(B)** contrary to constitutional right, power, privilege, or immunity;
> >
> > **(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> >
> > **(D)** without observance of procedure required by law;
> >
> > **(E)** unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> >
> > **(F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
> >
> > In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.
>
> (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)"[62]

It is important that we recognize that the phrase "substantial evidence" has different meaning to the federal courts than it does to the court in the State of Oregon. We discuss this issue further in the section on Perjury and the Evidentiary

---

[61] *Heckler v. Chaney*, 470 U.S. 821, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985). P. 853-854.

[62] 5 U.S.C. § 706. Available at: https://www.law.cornell.edu/uscode/text/5/706 . Accessed 12-8-2015.

Standard herein. So, generally, we notice that administrative government performs best when enforcing the laws enacted by the legislature inasmuch as we allow the judicial branch to review the administrative actions (including inaction) and interpret the statutes promulgated by the legislature. Accordingly, for the present matter, best practices dictate that professional rulemaking should occur as a function of a legislative body, enforcement of the rules should occur as a function of the administration, and the review and trial processes should occur as functions of the judiciary.

4.3.3 Importance of Formal Judicial Adjudication

> "The fundamental requisite of due process of law is the opportunity to be heard."[63]

It is reasonable to expect that whatever process is utilized to regulate professional licensure must provide a similar mechanism of law to ensure that licensees are given such an opportunity – especially in consideration of the fact that allegations brought against them may be imposed by their competitors (who have an obvious financial interest in the matter).

Now, in the case of a person accused of committing a felony, due to the nature of danger immediately imposed to the public, due process is given a different set of requirements than that pertaining to less sensitive matters, such as distribution of welfare benefits. Yet, even in felony criminal proceedings, despite the perceived danger imposed to the public, the Court only brought into question the right of a person to be appointed counsel while considering Fourth and Fifth Amendment rights as "immune from state invasion," by stating:

> "[T]his Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States. Explicitly recognized to be of this 'fundamental nature' and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, religion, assembly, association, and petition for redress of grievances.[4] For the same reason, though not always in precisely the same terminology, the Court has made obligatory on the States the Fifth Amendment's command that private property shall not be taken for public use without just compensation,[5] the Fourth Amendment's prohibition of unreasonable searches and seizures,[6] and the Eighth's ban on cruel and unusual punishment.[7]"[64]

It is a perversion of justice for a state licensing board to discipline licensees in retaliation to action taken by licensees to "petition [the government] for redress of grievances" or to speak to the press for similar purposes. Such action censors free speech and conceals the public from issues such as anticompetitive activities involving licensing board members.

4.4 Exceptions to pretrial evidentiary hearings

> "The State argues that the licensee's interest in avoiding the suspension of his licenses is outweighed by countervailing governmental interests and therefore that this procedural due process need not be afforded him. We disagree. In cases where there is no reasonable possibility of a judgment being rendered against a licensee, Georgia's interest in protecting a claimant from the possibility of an unrecoverable judgment is not, within the context of the State's fault-oriented scheme, a justification for denying the process due its citizens. Nor is additional expense occasioned by the expanded hearing sufficient to withstand the constitutional requirement. " `While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process.' " *Goldberg* v. *Kelly,* 397 U. S., at 261, quoting *Kelly* v.*Wyman,* 294 F. Supp. 893, 901 (SDNY 1968).

---

[63] *Grannis v. Ordean*, 234 U.S. 385, 34 S. Ct. 779, 58 L. Ed. 1363 (1914). Available at: https://scholar.google.com/scholar_case?case=17699626398137114110

[64] *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). Available at: https://scholar.google.com/scholar_case?case=694784363938594707

> The main thrust of Georgia's argument is that it need not provide a hearing on liability because fault and liability are irrelevant to the statutory scheme. We may assume that were this so, the prior administrative hearing presently provided by the State would be "appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306, 313 (1950). But "[i]n reviewing state action in this area . . . we look to substance, not to bare form, to determine whether constitutional minimums have been honored." *Willner* v. *Committee on Character,* 373 U. S. 96, 106-107 (1963) (concurring opinion). And looking to the operation of the State's statutory scheme, it is clear that liability, in the sense of an ultimate judicial determination of responsibility, plays a crucial role in the Safety Responsibility Act. If prior to suspension there is a release from liability executed by the injured party, no suspension is worked by the Act. Ga. Code Ann. § 92A-606 (1958). The same is true if prior to suspension there is an adjudication of nonliability. *Id.* Even after suspension has been declared, a release from liability or an adjudication of nonliability will lift the suspension. Ga. Code Ann. § 92A-607 (Supp. 1970). Moreover, other of the Act's exceptions are developed around liability-related concepts. Thus, we are not dealing here with a no-fault scheme. Since the statutory scheme makes liability an important factor in the State's determination to deprive an individual of his licenses, the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing.
>
> The hearing required by the Due Process Clause must be "meaningful," *Armstrong*v. *Manzo,* 380 U. S. 545, 542*542 552 (1965), and "appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co., supra,* at 313. It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision whether licenses of the nature here involved shall be suspended does not meet this standard.
>
> Finally, we reject Georgia's argument that if it must afford the licensee an inquiry into the question of liability, that determination, unlike the determination of the matters presently considered at the administrative hearing, need not be made prior to the suspension of the licenses. While "[m]any controversies have raged about . . . the Due Process Clause," *Id.,* it is fundamental that except in emergency situations (and this is not one)[5] due process requires that when a State seeks to terminate an interest such as that here involved, it must afford "notice and opportunity for hearing appropriate to the nature of the case" *before* the termination becomes effective. *Id. Opp Cotton Mills* v. *Administrator,* 312 U. S., at 152-156; *Sniadach* v. *Family Finance Corp., supra; Goldberg* v. *Kelly, supra;Wisconsin* v. *Constantineau,* 400 U. S. 433 (1971)."[65]

So, except in "emergency situations," "notice and opportunity for hearing appropriate to the nature of the case" must occur before deprivation of rights, including the freedom from unlawful search and seizure, can possibly ever be justified.

To determine what factors are required to assess the extent to which due process must be ensured, the Court has identified three factors:

> "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e. g., *Goldberg* v. *Kelly, supra,* at 263-271."[66]

It is worth noting that neither "public good" nor "safety of the public" are among these three factors.

4.4.1 Evidentiary Standards and the effects of perjury on immunity powers

In Oregon, professional licensing boards retain complete control over the evidentiary discovery processes, including allowing or denying the discovery itself. For example, OAR 847-001-0015 states:

---

[65] *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971). Available at: https://scholar.google.com/scholar_case?case=14647645297270353921

[66] *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Available at: https://scholar.google.com/scholar_case?case=10296811528183203766

> "(1) The Oregon Medical Board (Board) has *delegated to the Executive Director the authority* to make certain procedural determinations on its behalf on matters arising under the Attorney General's Model Rules for Contested Cases in OAR 137-003-0001 to OAR 137-003-0700. The procedural functions include, but are not limited to:
>
> (a) For discovery requests before the Board*, to authorize or deny requested discovery in a contested case*, *to include specifying the methods, timing and extent of discovery*;
> (b) *To review all requests to take a deposition of a witness and to authorize or deny any request for deposition*. . . . "

In *Mapp v. Ohio*, Court interpretations of the Fourth Amendment identified that unlawful search and seizure subverts the process of justice largely due to how it affects witnesses. It is quite clear that the state statutes permit private market participants to submit allegations of professional misconduct to their state's licensing board.

> "An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own."[67]

The problem is that when perjury cannot be exposed to the typical evidentiary discovery process because "confidentiality" prohibits disclosure of key information, the *protections* of truth upon which the immunity depends are completely void and non-existent. In fact, such an environment provides *favor* to those who are willing to commit the act of perjury to exercise monopoly control in the marketplace when confidentiality protects their identity from exposure, especially when those same licensees are referred to them for business services under the immunity deferred by executive board orders[68].

4.5 Relationships between perjury, confidentiality, and immunity

4.5.1 Perjury and the evidentiary standard

The sanctity of the evidentiary discovery process is of the utmost importance even when adequate safeguards exist to prevent corruption of the truth-seeking process. The safeguards of this process are even more important when the consequences of an unlawful or unjust search and seizure may deprive an otherwise innocent (but falsely alleged) licensee from an adequate defense when those searches and seizures allow new evidence to be brought against the licensee with new allegations that were not part of the initial investigation, particularly on issues that are as subtle as alleged misconduct due to arbitrary errors or omissions in patient chart documentation[69].

> "[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was

---

[67] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). Available at: https://scholar.google.com/scholar_case?case=4836406244398815814

[68] An example scheme is one in which a physician specializing in addiction medicine becomes "pre-approved" by a medical licensing board and then hires individuals to submit false allegations against other physicians who are then referred to the addiction medicine "expert" for "addiction evaluation services." In such an example, the "expert" can falsely evaluate the licensee as "addicted," submit the false report to the board, and then recommend to the board that the license undergo exorbitantly priced services as a requirement for the licensee to have their licensure re-activated. This may occur under the guise of OAR 847-010-0095, as per ORS 441.055, but is still subject to the discovery rules governed by OAR 847-001-0015(1).

[69] Let us be realistic and recognize that no physician (for example) could perfectly document every visit involving every patient in their entire career. Surely, an overly aggressive investigative process could eventually find something that could be construed as "not following the standard of care."

> lacking on the face of the affidavit. . .[T]the alternative sanctions of a perjury prosecution, administrative discipline, contempt, or a civil suit are not likely to fill the gap. *Mapp* v. *Ohio* implicitly rejected the adequacy of these alternatives. Mr. Justice Douglas noted this in his concurrence in *Mapp,* 367 U. S., at 670, where he quoted from *Wolf* v. *Colorado,* 338 U. S. 25, 42 (1949): " `Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered.' ""[70].

In this same case, it was determined that the sufficiency of an affidavit is subject to review before trial, particularly because the affidavit must be subject to tests to prevent perjury before a person's Fourth Amendment right is violated:

> "It is the *ex parte* nature of the initial hearing, rather than the magistrate's capacity, that is the reason for the review. A magistrate's determination is presently subject to review before trial as to *sufficiency* [of an affidavit] without any undue interference with the dignity of the magistrate's function. Our reluctance today to extend the rule of exclusion beyond instances of deliberate misstatements, and those of reckless disregard, leaves a broad field where the magistrate is the sole protection of a citizen's Fourth Amendment rights, namely, in instances where police have been merely negligent in checking or recording the facts relevant to a probable-cause determination."

In the case of a licensee investigation, a *mere preponderance* of evidence has been sufficient to revoke a license to practice. Though harsh, this lack of rigor of evidentiary burden may be appropriate as long as it is possible for the licensee to bring claim against the complainant in the case that the complainant's allegations were known to be materially false (especially if the complainant is a competitor and even more especially if the licensee can prove that the competitor knew that the allegations were false at the time they were submitted).

Despite ORS 183.450(5) stating that "substantial evidence" is required, it was determined conclusively that:

> "[T]he legislature intended to prescribe a standard of proof that corresponded to the preponderance standard.[5] . . . In *Santosky v. Kramer,* 455 U.S. 745, 754, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982),the United State's Supreme Court considered whether, in a parental-rights termination proceeding, the Due Process Clause required a standard of proof higher than the preponderance standard that was mandated by a state law. The Court relied on the factors identified in *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), noting that those factors applied generally to determinations regarding the constitutional burdens of proof in "particular proceeding[s]." *Santosky,*455 U.S. at 754, 102 S.Ct. 1388. Those factors are: (1) the private interest; (2) the risk of error, *including the probable value of additional safeguards*; and (3) the countervailing public interest. *Mathews,* 424 U.S. at 335, 96 S.Ct. 893. The Court further explained that, "in any given proceeding, the [constitutional burden of proof] should reflect not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Santosky,* 455 U.S. at 755, 102 S.Ct. 1388. "[71]

Despite this interpretation of "substantial evidence" by the Oregon Court of Appeals to correspond to the "preponderance standard", in a 1951 U.S. Supreme Court case, the Court said:

> " '[S]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Consolidated Edison Co.* v. *Labor* ***Board,*** 305 U. S. 197, 229. Accordingly, it 'must do more than create a suspicion of the existence of the fact to be established. . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' *Labor* ***Board*** v. *Columbian Enameling & Stamping Co.,* 306 U. S. 292, 300. . . . Criticism of so contracted a reviewing power reinforced dissatisfaction felt in various quarters with the Board's administration of the Wagner Act in the years preceding the war. The scheme of the Act was attacked as an inherently unfair fusion of the functions of prosecutor and judge.[3] Accusations of partisan bias were not wanting.[4] The "irresponsible admission and weighing of hearsay, opinion, and emotional speculation

---

[70] *Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).* P. 155-156, 169. Available at: https://scholar.google.com/scholar_case?case=6436964399753145533

[71] *Gallant v. Board of Medical Examiners*, 974 P.2d 814, 159 Or. App. 175, 159 Or. 175 (Ct. App. 1999). Emphasis added.

> in place of factual evidence" was said to be a "serious menace."[5] . . . What is here relevant, however, is the climate of opinion thereby generated and its effect on Congress. Protests against "shocking injustices"[7] and intimations of judicial "abdication"[8] with which some courts granted enforcement of the Board's orders stimulated pressures for legislative relief from alleged administrative excesses. . . . the majority concluded that "[d]issatisfaction with the existing standards as to the scope of judicial review derives largely from dissatisfaction with the fact-finding procedures now employed by the administrative bodies."[11]Departure from the "substantial evidence" test, it thought, would either create unnecessary uncertainty or transfer to courts the responsibility for ascertaining and assaying matters the significance of which lies outside judicial competence. Accordingly, it recommended against legislation embodying a general scheme of judicial review.[12]

Although the concern that the "substantial evidence" test – if implemented by delegating evidentiary and investigatory proceedings to the judiciary – would "transfer to courts the responsibility for ascertaining and assaying matters the significance of which lies outside judicial competence," in the case of professional licensure issues, may be legitimate on the assumption that a judge (not a member of that profession) would be required to adjudicate the professional misconduct, the complexities can be sufficiently resolved by implementation of a jury comprised of members entirely of that profession. In such a novel system, the Sixth Amendment right to a jury trial would be satisfied.

The value of using a formal judiciary to arbitrate issues pertaining to deprivation of a person's rights was also affirmed by the Oregon Supreme Court:

> "[T]he common law thus evolved to protect individuals in two respects: as "a shield against arbitrary government actions involving a person's life, liberty, or property * * * [and as] a guarantee to every subject that a legal remedy was available for injury to goods, land, or person by any other subject of the realm." *Id*. at 97, 23 P.3d 333. The court in *O'Leary* characterized those protections as "a guarantee of equal access to justice for redress of legal wrongs." 303 Or. at 301 n. 3, 736 P.2d 173."[72]

Such a system would also require that we separate the rulemaking process from the adjudicatory authority. It is reasonable to reason that rulemaking is a function best performed by legislative bodies.

> ""`No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.' "" (Id. at p. 113).

This case reasoned that because Board members are well equipped to analyze misconduct, there are sufficient "safeguards against erroneous fact finding" to support the preponderance evidentiary standard instead of stronger burdens of proof, such as those requiring evidence to be "clear and convincing." However, this court decision did not consider whether or not appropriate safeguards were in place to prevent perjurious evidence from being used as the basis of the evidence used to meet the preponderance evidentiary burden.

Perjury and confidentiality

The lack of safeguarding against perjurious evidence from being used to support the preponderance standard is exasperated by the use of confidentiality rules to prevent disclosure of evidence that may be perjurious. For example:

---

[72] *State v. MacBale*, 305 P.3d 107, 353 Or. 789 (2013). P. 113. Available at: https://scholar.google.com/scholar_case?case=7069748234745117812

> "In response to the notice of proposed revocation, petitioner requested a hearing on the allegations. Her counsel then issued a subpoena *duces tecum* to the board's investigator, Hudson, requesting that Hudson bring to the hearing her entire file and any other documents pertaining to the charges or investigation. The board, in turn, moved to quash the subpoena, arguing, in part, (1) that its own procedural rules limited discovery to 'a list of witnesses to be called by the parties in their case in chief and the documents that the parties intend to introduce as exhibits at the contested case hearing during the presentation of their case in chief,' OAR 851-001-0005(5),[1] and (2) that state law governing confidentiality of board investigations prohibited petitioner from obtaining any of the requested information. As to the latter contention, the board relied on ORS 676.175(1) (2003),[2] which provided:
>
> > 'A health professional regulatory board shall keep confidential and not disclose to the public any information obtained by the board as part of an investigation of a licensee or applicant, including complaints concerning licensee or applicant conduct and information permitting the identification of complainants, licensees or applicants. However, the board may disclose information obtained in the course of an investigation of a licensee or applicant to the extent necessary to conduct a full and proper investigation.'
>
> According to the board's argument, petitioner is a member of 'the public' for purposes of ORS 676.175, and the board therefore was not authorized to disclose to petitioner any of the information that it obtained as a result of the investigation of her conduct"[73]

Confidentiality is regulated by OARs 847-001-0022. Notice that violating confidentiality, such as whistleblowing investigatory complaints involving perjury, are grounds for disciplinary action[74].
Unfortunately, once a licensee's right to freedom from search and seizure are violated, due to the preponderance standard, it is often not difficult for an investigator to find something that would arguably constitute misconduct, particularly in the case of medical practitioners when an investigator peruses the practitioner's medical charts – searching for some element of an error or omission (from the standard of care) in the practitioner's documentation. In this context, enabling a licensee to contest the factual basis of the allegations that would subject them to a search becomes extremely important when we consider that the allegations may be untrue and anticompetitive.

4.5.2 Subornation of perjury

As an example of a case proceeding when perjury is apparent:

> "[T]he Court addressed a habeas petition related to Emmanuel Whiteside's conviction for the murder of Calvin Love. . . . Robinson [(Whiteside's attorney)] explained to the court that until shortly before trial Whiteside had consistently indicated that he saw no gun. When Whiteside changed his story and indicated that he would testify that he saw "something metallic," Robinson told him:
> [W]e could not allow him to [testify falsely] because that would be perjury, and as officers of the court we would be suborning perjury if we allowed him to do it; ... I advised him that if he did do that it would be my duty to advise the Court of what he was doing and that I felt he was committing perjury; also, that I probably would be allowed to attempt to impeach that particular testimony. App. to Pet. for Cer. A-85.
> Id. at 161, 106 S.Ct. at 991. Robinson also indicated that he would seek to withdraw if Whiteside insisted on committing perjury."

This is clearly not how perjury was addressed in Stephen Whittaker's case because the administrative law judge – despite admitting the testimony as invalid – continued to allow the perjury to occur. Though it may seem specious that state officials would knowingly engage in subornation of perjury[75], not only do documented cases exist (one of which I mention below), the danger of even allowing a risk of this to plausibly occur becomes even more apparent when state officials are both protected by absolute immunity and when the discovery of the perjurious information itself can be suppressed on the basis of "confidentiality".

---

[73] *Shank v. Board of Nursing*, 185 P.3d 532, 220 Or. App. 228 (Ct. App. 2008).
[74] E.g. As per OAR 847-001-0022(1-3) in the case of the medical board
[75] 18 U.S.C. §1622

In criminal law, Chief Justice Warren wrote, "[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. 360 U.S. at 269, 79 S.Ct. 1173"[76]**.** Furthermore, it is mentioned in this case:

> "[C]ontrary to the State's theory, that the witness was tricked into lying on the witness stand by the State does not, in any fashion, insulate the State from conforming its conduct to the requirements of due process. As our court noted in *Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1114 (9th Cir.2001): 'Few things are more repugnant to the constitutional expectations of our criminal system than covert perjury....' It is reprehensible for the State to seek refuge in the claim that a witness did not commit perjury, when the witness unknowingly presents false testimony at the behest of the State. 'This saves [the witness] from perjury, but it does not make his testimony truthful.' *Willhoite v. Vasquez*, 921 F.2d 247, 251 (9th Cir.1990) (Trott, J., concurring). . . The fact that the witness is not complicit in the falsehood is what gives the false testimony the ring of truth, and makes it all the more likely to affect the judgment of the jury. That the witness is unaware of the falsehood of his testimony makes it more dangerous, not less so.[1]
>
> There is nothing redemptive about the sovereign's conspiring to deceive a judge and jury to obtain a tainted conviction. This is, as Judge Trott put it, 'a pernicious scheme without any redeeming features.' Id. *Napue* forbids the knowing presentation of false evidence by the State in a criminal trial, whether through direct presentation or through covert subornation of perjury.[2]
>
> Further, the argument that the presentation of false testimony, carefully orchestrated to avoid perjury, does not offend the Constitution flies in the face of *Alcorta* and *Pyle* because those cases create an affirmative duty on the part of the prosecution to correct false testimony at trial, even when the testimony is unsolicited. There is no exception under *Alcorta* and *Pyle* for solicited false testimony. The State's knowing presentation of false evidence and failure to correct the record at Hayes's trial violated the Fourteenth Amendment. . . . We have already noted that *Napue*, decided nearly a half century ago, specifically addressed 'false evidence,' and was not limited to barring the subornation of perjury. *Alcorta* and *Pyle*, which require the State to correct false facts introduced as evidence at trial, were decided in 1957 and 1942, respectively. Indeed, as we stated in Bowie:
>
> > Because of the gravity of depriving a person of liberty on the basis of false testimony, the Supreme Court and the United States Courts of Appeal have fashioned over the years a workable set of precise rules designed not only to remedy egregious wrongs that have already occurred, but also prophylactically to prevent damaging false testimony from happening in the first place.
> >
> > 236 F.3d at 1087.
>
> The rule originated with *Mooney* in 1935, which held that a criminal defendant is denied due process when the 'state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.' 294 U.S. at 112, 55 S.Ct. 340. Seven years later, in *Pyle*, the Supreme Court expanded this rule to encompass not only 'perjured testimony, knowingly used by the State,' but also 'the deliberate suppression by those same authorities of evidence favorable to [the criminal defendant].' 317 U.S. at 216, 63 S.Ct. 177.
>
> *Alcorta*, decided in 1957, involved a case quite similar to the one at bar. In that case, the Court was confronted with a prosecutor who, on direct examination, knowingly allowed a witness to create a false impression. 355 U.S. at 29-30, 78 S.Ct. 103. The prosecutor had instructed the witness not to volunteer what the prosecutor thought might be damaging information and then sat mute while the witness committed perjury. Id. at 31, 78 S.Ct. 103. In granting Alcorta's petition for a writ of habeas corpus, the Court held that the false impression given to the jury by the prosecutor and the State violated Alcorta's right to due process. *Id*.
>
> *Napue,* which we have discussed, was decided two years later. *Napue* quoted with approval a decision from the New York Court of Appeals involving false testimony from a witness who had been given substantial consideration for his testimony, in which that court stated: "`A lie is a lie, no matter what its subject, and, if it is

[76] *Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005).

> in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.' "360 U.S. 264, 269-70, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) (quoting *People v. Savvides,* 1 N.Y.2d 554, 154 N.Y.S.2d 885, 136 N.E.2d 853, 854-55 (1956)).
>
> In *United States v. Bagley,* 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Supreme Court noted the "well-established rule that `a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' " (Citation omitted)." (Id.[77])

4.5.3 How confidentiality safe-harbors false testimony

To make the need for protections against perjury even more clear, we may consider that the investigators, prosecutors, and members of a state licensing board can leverage both the immunity and the confidentiality to conceal evidence of secret dealings with witnesses that are used as incentives to invoke false testimony.

> "Presumably, the importance to the State's case of James's testimony is what initially led the prosecution to make the secret deal; likewise, the importance to James's credibility of his false testimony regarding the absence of a deal is what led the prosecution to endeavor to keep that deal secret. Thus, the State achieved the desired effect of artificially bolstering James's credibility without taking the more overtly unconstitutional step: having James testify affirmatively, but falsely, that there was no deal protecting him from prosecution of other crimes." (Id.)

Although *Hayes v. Brown* involved habeas corpus, it is reasonable to infer that the Court's opinion of perjury would equally affect other areas of law where the truthfulness of one's testimony is of utmost importance. Arguably, the need for assurances that testimony is truthful is actually more important when evidentiary burden is only a mere preponderance, rather than "beyond reasonable doubt," because a mere preponderance has none of the safeguards offered by stronger evidentiary tests, such as pertain to criminal law.

Amazingly, when we combine the criminal nature of the investigatory proceedings of professional licensing boards (as explained earlier in this document) with the confidentiality statutes[78] pertaining to professional licensure in the State of Oregon, the result actually violates Sections 10 and 11 of the Oregon Constitution, which state:

> **"Section 10. Administration of justice.** *No court shall be secret*, but justice shall be administered, *openly* and without purchase, completely and without delay, and *every man shall have remedy by due course of law for injury done him in his person, property, or reputation*.—
>
> **Section 11. Rights of Accused in Criminal Prosecution.** In all criminal prosecutions, *the accused shall have the right to public trial by an impartial jury* in the county in which the offense shall have been committed; *to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor*; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; provided further, that the existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all prosecutions for crimes committed before the taking effect of this amendment."[79]

Moreover, section 17 further indicates that even in civil cases, there must remain the right to a jury trial:

> "**Section 17. Jury trial in civil cases**. In all civil cases the right of Trial by Jury shall remain inviolate." (Id.)

---

[77] Id. (*Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005).)
[78] E.g. ORS 676.175.
[79] Constitution of Oregon. Art. I §11. Emphasis added. Available at: http://bluebook.state.or.us/state/constitution/const2014.pdf

The confidentiality of information safe-harbors due process violations by concealing from the defendant those evidences unlawfully obtained, thereby depriving the (now disconsolate) defendant of even the basest mechanism of redress for the injustices that will inevitably culminate from those evidences unlawfully obtained. By depriving a licensee of both due process *and* the right to a fair trial denigrates the American justice system enough, but to also deprive the licensee of any hope of remedy is an execration to the authority claiming to deserve protections from litigation through the privilege of immunity.

4.5.3.1

4.5.3.2 The limitations of immunity powers

ORS § 675.585(4), 679.310(3), 681.505, 678.128(2), 147.115, 677.335, and probably other Oregon statutes all have the language of "except for perjury" regarding the confidentiality and/or answerability of a complainant to their testimony. 18 U.S.C. §6002 contains similar exceptions that retract protections when testimony is perjurious. Although the Court's history of decisions seem to indicate that confidentiality has taken precedence over protections against perjury (especially because it is somewhat impossible for a licensee to assert a claim that the complainant's testimony is perjurious when confidentiality prevents disclosure of both the identity of the complainant and the allegations thereof, at least until the opportunity to claim evidence as perjurious is prevented until they are cited as findings of fact in administrative law proceedings).

Moreover, if a state official pressures a witness into falsely testifying regardless of whether or not the witness is aware of the falsity of the information, we need additional protections to ensure that the state official is not able to then leverage their absolute immunity to avoid criminal proceedings for subornation of perjury.[80]

It was recognized by Justice Powell that absolute immunity has it's purposes, but he clearly articulated that absolute immunity does not extend to unconstitutional suppression of evidence when he stated:

> "[H]istory and policy support an absolute immunity for prosecutors from suits based solely on claims[5] that they knew or should have known that the testimony of a witness called by the prosecution was false . . . [despite] 42 U. S. C. § 1983. . . . However, insofar as the majority's opinion implies an absolute immunity from suits for constitutional violations other than those based on the prosecutor's decision to initiate proceedings or his actions in bringing information or argument to the court, I disagree. Most particularly I disagree with any implication that the absolute immunity extends to suits charging unconstitutional suppression of evidence. *Brady* v. *Maryland,* 373 U. S. 83 (1963)"[81].

This argument that absolute immunity does not extend to unconstitutional suppression of evidence is particularly relevant in the present matter because interpretation of confidentiality rules appears to be currently suppressing evidence of perjury on multiple fronts. Though it may seem hard to believe that our current statutes could be unconstitutional, it is important to recognize that it is due to no fault of the Oregon legislature – nor of any individual person – that the Court's combined historical rulings have contributed to the formation of the situation described heretofore.

4.5.4 The effects of suppression of evidence on due process

Regarding constitutionality of the suppression of evidence:

> "The Third Circuit in the *Baldi* case construed that statement in *Pyle* v. *Kansas* to mean that the "suppression of evidence favorable" to the accused was itself sufficient to amount to a denial of due process. 195 F. 2d, at 820. In *Napue* v. *Illinois,*360 U. S. 264, 269, we extended the test formulated in *Mooney* v. *Holohan* when we said: "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." And see *Alcorta* v. *Texas,* 355 U. S. 28;*Wilde* v. *Wyoming,* 362 U. S. 607.
>
> Cf. *Durley* v. *Mayo,* 351 U. S. 277, 285 (dissenting opinion).
>
> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad

[80] 18 U.S.C. §1622

[81] *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976).

> faith of the prosecution. The principle of *Mooney* v. *Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly"[82].

The principle described in *Mooney v. Holohan* makes it obvious that the Fourteenth Amendment is clearly intended to prevent State actions that deprive citizens of their liberty, particularly when the State actions in question are capable of depending upon perjured testimony:

> "[I]n safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. *Hebert* v. *Louisiana,* 272 U.S. 312, 316, 317. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, 'whether through its legislature, through its courts, or through its executive or administrative officers.' *Carter* v. *Texas,* 177 U.S. 442, 447; *Rogers* v. *Alabama,* 192 U.S. 226, 231; *Chicago, Burlington & Quincy R. Co.* v. *Chicago,* 166 U.S. 226, 233, 234.
>
> Reasoning from the premise that the petitioner has failed to show a denial of due process in the circumstances set forth in his petition, the Attorney General urges that the State was not required to afford any corrective judicial process to remedy the alleged wrong. The argument falls with the premise. *Frank* v. *Mangum,* 237 U.S. 309, 335; *Moore* v. *Dempsey,* 261 U.S. 86, 90, 91.
>
> We are not satisfied, however, that the State of California has failed to provide such corrective judicial process. The prerogative writ of *habeas corpus* is available in that State. Constitution of California, Art. I, § 5; Art. VI, § 4. No decision of the Supreme Court of California has been brought to our attention holding that the state court is without power to issue this historic remedial process when it appears that one is deprived of his liberty without due process of law in violation of the Constitution of the United States. Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution. *Robb* v.*Connolly,* 111 U.S. 624, 637"[83].

I reason that the exceptions to the Sherman Act that apply to state sovereignty do not extend to the case where perjury is permitted, particularly when suppression of evidence occurs – regardless of whether or not that suppression of evidence is supported by State statute. In other words, I reason that the Sherman Act prohibits market participants from knowingly submitting false (perjured) testimony against competitors in a complaint to a licensing board and subsequently leveraging the protections of confidentiality to suppress discovery of their perjured testimony from any future civil proceedings – either against them or in defense of a licensee in a licensing disciplinary proceeding.

I furthermore reason that the state licensing agencies should not be immune from anticompetition challenges when their absolute immunity is utilized (in either official or unofficial capacities of the involved State officials) to prevent the confidentiality of any testimony that is alleged to be perjurious from being penetrated. After all, if they are using the absolute immunity power to suppress discovery of a testimony that may be perjurious, than they are bringing into question the legitimacy of their use of that absolute immunity power in that instance. Logically, it follows that the State is responsible for promulgating policy that effectively prevents that absolute immunity power from safe-harboring anticompetitive activity in the marketplace, particularly from actions imposed by a State licensing entity. I reason that allowing policy to allow State officials to utilize confidentiality to suppress discovery of perjurious testimony and then impose their absolute immunity to protect the confidentiality of the information is a safe-harbor for anticompetitive activity unless certain policies are promulgated to ensure that adequate protections are implemented to give cause of

---

[82] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).
[83] *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935).

action to licensees – both as a valid defense against search and seizure by a licensing board and in civil action (against the complainant) when the complainant's testimony is found to be perjurious. Moreover, I reason that a mechanism of law must be implemented to ensure that confidentiality of a complainant's testimony can be penetrated when a licensee can demonstrate to either the court (i.e. not the licensing board or any administrative agency) or a legislative entity (as would need to be established by law) who are wrongfully alleged by the false testimony of a competitor.

4.6 Reevaluating the basis for confidentiality

Why would Congress have adopted the present form of the confidentiality statutes despite the problems described herein?

In general, confidentiality of information typically constitutes a type of privilege, and privileges generally are intended to protect individuals from unnecessary litigation or from litigation that would subvert the truth seeking process.

I also reason that the "election process" described to govern the election of licensing board members is not sufficient to protect the public because it isn't actually a public election process: rather than utilizing our existing election process (in combination with a database of licensing information), the election process is delegated to a non-profit agency that may have its own motivations and agenda.

4.7 Preponderance evidentiary standard

> "The holding that the suppression of exculpatory evidence violated Brady's right to due process was affirmed. . . Under today's ruling, if the prosecution has not made knowing use of perjury, and if the defense has not made a specific request for an item of information, the defendant is entitled to a new trial only if the withheld evidence actually creates a reasonable doubt as to guilt in the judge's mind. . . With all respect, this rule is completely at odds with the overriding interest in assuring that evidence tending to show innocence is brought to the jury's attention. The rule creates little, if any, incentive for the prosecutor conscientiously to determine whether his files contain evidence helpful to the defense. Indeed, the rule reinforces the natural tendency of the prosecutor to overlook evidence favorable to the defense, and creates an incentive for the prosecutor to resolve close questions of disclosure in favor of concealment."[84]

4.8 Importance of judicial pretrial evidentiary hearings (prior to search and seizure)

[Introduction]

> "As the Court has repeatedly emphasized, '[T]he most basic constitutional rule in this area is that `searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specially established and well-delineated exceptions,'' *Coolidge v. New Hampshire,* 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971) (quoting *Katz v.* ***United States***, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967)), which are 'jealously and carefully drawn.' *Jones v.* ***United States***, 357 U.S. 493, 499, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514 (1958); *accord Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973); *Swint v. City of Wadley,* 51 F.3d 988, 995 (11th Cir.1995). Similarly, '[i]n enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution.' *Chambers v. Maroney,* 399 U.S. 42, 51, 90 S.Ct. 1975, 1980, 26 L.Ed.2d 419 (1970). . . . Conducting an *ad hoc* analysis of the reasonableness of the search based on the judge's personal opinions about the governmental and privacy interests at stake, instead of applying the Supreme Court's well-established *per se* rules regarding warrants, prior judicial scrutiny of proposed searches, probable cause, and individualized suspicion ignores these crucial Fourth Amendment

[84] *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).

> principles. The need to apply these *per se* rules reaches all searches, whether of the home, office, person, or other location. *See, e.g., O'Rourke v. Hayes,* 378 F.3d 1201, 1206 (11th Cir. 2004) ("[The Fourth Amendment's] protection extends to any area in which an individual has a reasonable expectation of privacy. Offices and other workplaces are among the areas in which individuals may enjoy such a reasonable expectation of privacy." (quotation marks and citations omitted)).[9]
>
> In general, warrantless searches are permissible only where an individual has a substantially reduced expectation of privacy. That expectation of privacy has both a subjective and objective component. That is, a person must both assert or otherwise exhibit a belief in a right to privacy in the object of the search, and that expectation must be one that society is prepared to accept as reasonable. *Katz,*389 U.S. at 361, 88 S.Ct. at 516 (Harlan, J., concurring). Situations in which such expectations are reduced include automobile searches,[10] searches incident to arrest,[11] border searches,[12] and searches of open fields,[13] items in plain view believed to contain contraband,[14] and prisoners' cells.[15]"[85]

From this court interpretation, it is reasonable to expect that a physician's office or medical clinic, a location where HIPAA provides substantially *increased* privacy protections to patients, it is reasonable to expect that patients and physicians would have an increased expectation of privacy, *not* a "substantially reduced expectation of privacy" as would be required to permit "warrantless searches."

> " 'Exigent circumstances' may also excuse the warrant requirement in some cases, but not here. Such searches are permitted when 'the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action.' ***United States*** *v. Satterfield,* 743 F.2d 827, 844 (11th Cir.1984). Even a search under exigent circumstances must be supported by probable cause. *See* ***United States*** *v. Santa,* 236 F.3d 662, 668 (11th Cir.2000) ('A warrantless search is allowed, however, where both probable cause and exigent circumstances exist.'); ***United States*** *v. Pantoja-Soto,* 739 F.2d 1520, 1523 (11th Cir.1984) ('When exigent circumstances coexist with probable cause, the Fourth Amendment has been held to permit warrantless searches and seizures.')." (Id. at 1316.)

To make explicitly clear the criteria for "exigent circumstances," in *United States v. Satterfield*, the Court clarifies:

> "The exigent circumstances doctrine applies only when the inevitable delay incident to obtaining a warrant must give way to an urgent need for *immediate action."* [86]

To clarify what exactly is meant by "immediate action," the Court provided an example of an exigent circumstance:

> "Pursuing an escaped felon, the police discovered the suspect in a motel room with his girlfriend and immediately placed him in handcuffs. Within forty-five seconds after the arrest, one of the officers found a pistol beneath the bed sheets. The former Fifth Circuit held the search was justified as a 'cursory safety check' because the suspect was reasonably believed to be armed when he entered the motel room, and the girl in the room with him, who was unrestrained at the time, was reasonably believed to be his accomplice and could have gained access to any concealed weapons." (Id. at 844.)

The court also contrasted this example against an example in which a search was conducted within minutes (rather than seconds).

In contrast, the Court stated that the appellant's case was *not* an exigent circumstance despite undisputed probable cause, even though the search of a home was conducted within minutes after a homicide was verified and the government contended that an immediate search was justified "because the delay involved in obtaining a warrant would have endangered the police or the public." In this light, the argument often used by professional licensing boards is invalid that possible threats to public safety justify both exceptions to due process and exceptions that allow immediate forfeiture of a licensee's property (i.e. licensure or investigatory evidence) pending the results of an

---

[85] *Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. 2004). P. 1313-1315. Available at: **https://scholar.google.com/scholar_case?case=869053528905421394**

[86] *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984). At p. 844. Available at: https://scholar.google.com/scholar_case?case=15212572328109734311

investigation. (Surely, if due process could not be exempted for a murder within minutes after a homicide, due process definitely must not be exempted for a licensed professional in the context of their profession.)

4.8.1 Free Speech Exemptions

Moreover, the Court has specifically warned against licensing statutes that allow government officials to grant or deny licenses according to free speech exemptions, as mentioned in *Bourgeois v. Peters,* because they give "an executive official unbridled discretion" to "grant or deny a license," thereby "creating a 'threat of censorship that by its very existence chills speech'." (Id. at 1317.) So, for a licensing board to discipline a licensee[87] because the licensee publically criticized the licensing board's investigatory process -- violates the First Amendment.

4.8.2 Exemptions for seizure of "mere evidence"

> "*Congress has never authorized the issuance of search warrants for the seizure of mere evidence of crime.* See *Davis* v. ***United States***, 328 U. S. 582, 606 (dissenting opinion of Mr. Justice Frankfurter). Even in the Espionage Act of 1917, where Congress for the first time granted general authority for the issuance of search warrants, the authority was limited to fruits of crime, instrumentalities, and certain contraband. 40 Stat. 228. *Gouled* concluded, needlessly it appears, that the Constitution virtually limited searches and seizures to these categories.[12] After *Gouled,* pressure to test this conclusion was slow to mount. Rule 41 (b) of the Federal Rules of Criminal Procedure incorporated the *Gouled* categories as limitations on federal authorities to issue warrants, and *Mapp* v. *Ohio,* 367 U. S. 643, only recently made the "mere evidence" rule a problem in the state courts. Pressure against the rule in the federal courts has taken the form rather of broadening the categories of evidence subject to seizure, thereby creating considerable confusion in the law. See, *e. g.,* Note, 54 Geo. L. J. 593, 607-621 (1966).
>
> The rationale most frequently suggested for the rule preventing the seizure of evidence is that 'limitations upon the fruit to be gathered tend to limit the quest itself.' ***United States*** v. *Poller,* 43 F. 2d 911, 914 (C. A. 2d Cir. 1930). . . . The 'mere evidence' limitation has spawned exceptions so numerous and confusion so great, in fact, that it is questionable whether it affords meaningful protection. But if its rejection does enlarge the area of permissible searches, the intrusions are nevertheless made *after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of "a neutral and detached magistrate*. . . ." *Johnson* v. ***United States***, 333 U. S. 10, 14. The Fourth Amendment allows intrusions upon privacy *under these circumstances*, and there is no viable reason to distinguish intrusions to secure 'mere evidence' from intrusions to secure fruits, instrumentalities, or contraband."[88]

As the Court described, the present interpretation of "mere evidence," a basis for the current interpretation of the "mere preponderance" standard (as described where again?), is largely a side-effect of the judgment from Gouled. But the Court assumed that intrusions to search and seizure limitations would only occur "after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of 'a neutral and detached magistrate.' " Therefore, state policy must ensure that both of these safeguards are implemented to:

a) prevent licensing boards from conducting searches and seizures for "mere evidence" of misconduct; and
b) ensure that evidentiary hearings from neutral and detached magistrates are utilized to test probable cause and the particularity requirements of the Fourth Amendment before warrants to search and seize are issued to licensing boards.

The Court also explained:

---

[87] e.g. for "unprofessional conduct" (See OAR.)

[88] *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967). P. 306 – 311. Emphasis added. Available at: https://scholar.google.com/scholar_case?case=911645244227693 66

> "In *Gouled* v. ***United States***, 255 U. S. 298, 309, the Court said that search warrants 'may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a *criminal or penal proceeding* . . . .' The Court derived from ***Boyd*** v. ***United States***, *supra,* the proposition that warrants 'may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken,' 255 U. S., at 309; that is, when the property is an instrumentality or fruit of crime, or contraband. Since it was 'impossible to say, on the record . . . that the Government had any interest' in the papers involved 'other than as evidence against the accused . . . ,' '*to permit them to be used in evidence would be, in effect, as ruled in the Boyd Case, to compel the defendant to become a witness against himself*.' Id., at 311." (Id. at 302.)

Consistent with the argument that professional licensing board investigatory proceedings are criminal, rather than civil, in nature, in *One 1958 Plymouth Sedan v. Pennsylvania*,[89] the Court reasoned that if property forfeitures were not considered as criminal proceedings, any government prosecutor could file a civil information against any person and use that device as probable cause to "extort from them a production of their private papers, or, as an alternative, a confession of guilt." The court concluded:

> "As, therefore, *suits for penalties and forfeitures incurred by the commission of offences* against the law, *are of this quasi-criminal nature*, *we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution*" (Id. p. 698)

Considering the fact that such information suffices to meet the "preponderance" evidentiary burden of proof to initiate an investigation (as defined where again?), it allows licensing boards to stipulate allegations against licensees and then use those allegations to satisfy the burden of proof required to compel the licensee to allow search and seizure of property for further investigatory proceedings or provide an extorted (and likely false) confession of guilt.
It is vitally important that we recognize that licensing boards *are* doing exactly this: Under the context of immunity, they are publishing information that is as equivalently defamatory as an indictment and subsequently using this "evidence" to support their cases against the licensees and to defend against civil action brought against them by the licensees in the case of an antitrust or other equitable claim.

The holding in *Dent v. West Virginia* suggests that a license to practice a profession is indeed a type of property, when the Court stated, "[T]he right of every citizen of the United States to follow any lawful calling, business, or profession . . . cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken." (cited earlier) Accordingly, from *Bell v. Burson*, we see that "licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment," consistent with the interpretation that a license constitutes a type of property. Based on the holding in *Boyd v. United States* that, "forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal,"[90] we may therefore conclude that the deprivation of licensure (of persons already licensed) must be considered as a type of criminal proceeding, which subjects the proceeding to the Seventh amendment right to a jury trial and from preventing courts from overturning a *jury's* findings of fact. (This is in contrast to the "findings of fact" alleged to be discovered by a licensing board's investigation or administrative law judge hearing.) Because the implications of such an interpretation deprecate[91] existing state policy pertaining to licensee disciplinary proceedings, we must ensure that we understand how the Court held in *Boyd v. United States* that property forfeitures are criminal proceedings.

---

[89] *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S. Ct. 1246, 14 L. Ed. 2d 170 (1965). P. 697 – 699.
[90] Cited earlier. See p. 633-634.
[91] i.e. make obsolete

To further emphasize the importance of upholding the Amendments governing search and seizure, despite the confusion generated by the categorization of "property" in *Gouled*, the Court emphasized:

> "It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in ***Boyd*** v. ***United States***, 116 U.S. 616, in *Weeks* v. ***United States***, 232 U.S. 383, and in *Silverthorne Lumber Co.* v. ***United States***,251 U.S. 385) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments. The effect of the decisions cited is: that such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen, — the right, *to trial by jury*, to the writ of *habeas corpus* and to *due process* of law. *It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers*."[92]

4.9 Consent searches governed by executive board order

Despite the importance of upholding Constitutional due process, the Court found in *People v. DeMorrow* that these rights can be waived by consent searches as long as "the consent was given voluntarily." They stated:

> "The test given for consent searches is whether the consent was given voluntarily.
> In *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed.2d 854, 93 S.Ct. 2041, the test of voluntariness used by the court was discussed in the following terms:
>
> > '* * * that the question whether a consent to a search was in fact `voluntary' or was the product of duress of coercion, express of implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent." 412 U.S. at 227, 36 L.Ed.2d at 862-3.
> >
> > '* * * Rather, it is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced. It is this careful sifting of the unique facts and circumstances of each case that is evidenced in our prior decisions involving consent searches.' " 412 U.S. at 233, 36 L.Ed.2d at 866."[93]

It should be recognized from the testimony in *Haney* that coercision was used to enter licensee into an agreement that easily could be modified by a licensing board to include a waiver to licensee's search and seizure rights. Accordingly, a statutory requirement that licensing boards must uphold due process during investigative proceedings is alone insufficient to prevent licensing boards from pressuring licensees to waive their due process rights (e.g. as part of an interim stipulated order). To prevent these types of problems, we identify a comprehensive solution herein that separates the rulemaking authority from the adjudicatory process and implements controls that should suffice to address the problems at hand.

4.10 The purpose of absolute immunity is clear.

> "The Supreme Court has consistently accorded absolute immunity 'to judges and prosecutors functioning in their official capacity' to ensure judicial officers are 'free to act upon [their] own convictions, without apprehension of personal consequences.' . . . The Ninth Circuit, district courts in the Ninth Circuit, and other circuit courts have concluded members of state medical boards are entitled to absolute immunity under

---

[92] *Gouled v. United States*, 255 U.S. 298, 41 S. Ct. 261, 65 L. Ed. 647 (1921). P. 303-305. Emphasis added. Available at: https://scholar.google.com/scholar_case?case=12360786866493551649

[93] *People v. DeMorrow*, 320 N.E.2d 1, 59 Ill. 2d 352 (1974). P. 360-361. https://scholar.google.com/scholar_case?case=12424386845977246446

> common law for their quasi-judicial and quasi-prosecutorial acts. . . . Courts have also concluded [Oregon Medical Board] members and staff are absolutely immune from suit under common law for alleged due-process and equal-protection violations in the revocation process. *Gambee II,* 2011 WL 1311782, at *6. For example, the Ninth Circuit held in Olson that members of the Idaho State Medical Board, the Board of Professional Development, their staff, and legal counsel were entitled to absolute immunity from suit by the plaintiff under § 1983 because their actions were 'procedural steps involved in the eventual decision denying [the Plaintiff] her license requirement' and 'such acts are inextricably intertwined with [the defendants'] statutorily assigned adjudicative functions.' 363 F.3d at 928."[94]

However,

> "Even a policeman who exacts a confession by force and violence can be held criminally liable under the Civil Rights Act . . . It is one thing to give great leeway to the legislative right of speech, debate, and investigation. But when a committee perverts its power, brings down on an individual the whole weight of government for an illegal or corrupt purpose, the reason for the immunity ends. It was indeed the purpose of this civil rights legislation to secure federal rights against invasion by officers and agents of the states. I see no reason why any officer of government should be higher than the Constitution from which all rights and privileges of an office obtain"[95]

Even if the officials to whom the immunity is given are completely unaware that a complainant has submitted a perjured testimony, if at any point an official becomes aware that a testimony is perjured, if they do not act to bring justice against the complainant for the crime, immunity cannot be justified. Obviously, if state officials knowingly participate in subornation of perjured testimonies, especially if they are protecting the financial interests of private market participants (whether they realize it or not):

> "[T]he Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair,[8] and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.[9] It is this line of cases on which the Court of Appeals placed primary reliance. In those cases the Court has applied a strict standard of materiality, not just because they involve prosecutorial misconduct, but more importantly *because they involve a corruption of the truth-seeking function of the trial process."*[96]

Now, for cases involving complex issues of professional misconduct, it could be argued that a complainant could raise allegations that would involve enough ambiguity that the claims could conceivably be submitted in good faith but – in truth – be false (when the evidence is considered). To prevent against nuisance litigation and defamation that could result from vengeful licensees (esp. those involved in serious misconduct) who retaliate against complainants by making false allegations of perjury – a test must exist to resolve questions of whether or not an allegation might be perjurious in comparison to those that are arbitrarily ambiguous[97].

> "Generally speaking, the existence of some ambiguity in a falsely answered question will not shield the respondent from a perjury or false statement prosecution. . . . It is for the jury to decide in such cases which construction the defendant placed on a question. *See United States v. Slawik,* 548 F.2d 75, 86 (3d Cir.1977). If, however, a question is "excessively vague, or `fundamentally ambiguous,' " the answer may not, as matter of law, form the basis of a prosecution for perjury or false statement. . . . A question is fundamentally ambiguous when "men of ordinary intelligence" cannot arrive at a mutual understanding of its meaning. *See Boone,* 951 F.2d at 1534 (quoting *Lighte,*782 F.2d at 375)" [98]

---

[94] *Dover v. Haley*, No. 3: 13-CV-01360-BR (D. Or. Nov. 26, 2013). Available at: https://scholar.google.com/scholar_case?case=358807910124588136

[95] *Tenney v. Brandhove*, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951). Available at: https://scholar.google.com/scholar_case?case=10480225119712071928

[96] *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). Emphasis added.

[97] E.g. These could be allegations that were well intended but could be construed to be false when subject to expert analysis.

[98] *US v. Culliton*, 328 F.3d 1074 (9th Cir. 2003). Emphasis added. Available at: **https://scholar.google.com/scholar_case?case=6321736910643684011**

Because the "men of ordinary intelligence" rule does not suffice for addressing issues of the complexity that pertains to most skilled professions, it is reasonable to infer that a technical question (of that complexity) is fundamentally ambiguous when men of ordinary intelligence *of that profession* cannot arrive at a mutual understanding of its meaning. Regardless, to constitute perjury, the witness must know that the testimony is false.

> "Perjury requires that a witness believe that the testimony he gives is false. . . 'It does not make any difference whether the statements were in fact true or not — the defendant's belief as to their truth or falsity is the issue.' "[99]

The purpose of perjury statutes are to protect against the self-interests of witnesses.

> "Perjury statutes operate to prevent false testimony in judicial proceedings. . . . A statute prohibiting perjury, or in the instant case false declarations before a grand jury, is today aimed primarily at allowing the government to press an inquiry into wrongdoing free from the self-interest of those witnesses who hide the truth behind a curtain of vexing lies."[100]

Clearly, the greatest propensity for "the self-interest of those witnesses who hide the truth behind a curtain of vexing lies" would be in the case of actions that are aggravated by anticompetitive dealings.

> "The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III."[101]

5 Need for expungement mechanism

6 Active supervision

Current rulemaking procedures do not satisfy the "active supervision" requirement in cases involving the above set of combined issues. The legislative report states, "an inquiry into whether the requirement is met hinges on the manner in which the entity engages in the conduct." The problem with the current rulemaking procedures is that they, in fact, provide no mechanism whatsoever to prevent problems from occurring in the above matters.

We can gain considerable insight by addressing several of the matters presented by the Court in *Patrick v Burget et al.* In this case, a physician filed a lawsuit under a section 1 and 2 of the Sherman Act against a hospital who filed a complaint against their licensing board. (Note: This case was in 1988 and occurred before statutes allowed confidentiality to conceal the identities of complainants.) Petitioner "contended that the Clinic partners initiated and participated in the hospital peer-review proceedings to reduce competition from petitioner rather than improve patient care." Citing the reversal from the Court of Appeals, it was found that respondents "had acted in bad faith in the peer-review process." In the Court of Appeals, the Court stated, "The most damning evidence against [a complainant, Dr. Russell,] was the evidence of his duplicity at the BOME; the fact that this conduct was immunized would likely have affected the jury's decision." Regarding the complainants Drs. Harris and Boelling, the Court "found that some of their conduct amounted to 'deliberate disregard for the rights of others or reckless indifference to such rights.' We believe this equates to a finding of bad faith. Thus, it is unclear how much significance should be attached to the absence of a good faith

[99] Id. (*US v. Culliton*, 328 F.3d 1074 (9th Cir. 2003).)
[100] *United States v. Lighte*, 782 F.2d 367 (2d Cir. 1986).
[101] *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). Available at: https://scholar.google.com/scholar_case?case=5132513257326080850

immunity instruction."[102] That court expressed a need for additional guidance from the legislature, however, when they mentioned the absence of "a good faith immunity instruction."

7 Needs from legislative counsel

We must identify the rules responsible and perform review.

Discovery of evidence of anticompetitive and perjurious information must not be suppressed on the basis of confidentiality, and immunity rules should not be allowed to protect the confidentiality of the information. The problem is that a licensee cannot introduce a tort action involving perjury because the confidentiality of the initial complaint (and complainant) prevents the licensee from proving the basis of a claim. Power delegated by deference consequently extends immunity to market participants. It is important to note that these market participants may participate in confidentially submitting allegations against competitors without their competitors having any action by which those false allegations could be exposed. Here's an example: In Dover vs Hailey et al, Dr. Dover presented evidence supporting a claim that his competitor was the expert witness who testified against him… But despite this, the board later disciplined that same "expert" on the basis of incompetence on the exact issue that he testified against Dr. Dover on. I reason that the lack of safeguards to prevent perjurious evidence from being used to satisfy the preponderance standard present an extraordinary risk to the public in view of the fact that perjury is an extremely important element of establishing whether or not an anti-competitive motivation exists when a licensee's competitor is in fact the complainant of allegations against the licensee.

8 Expungement

To consider the concept of expungement, we must first look to the basis of expungement in existing criminal cases before mapping the concept into the domain of professional licensure.

> "Implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole. The first step in a revocation decision thus involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation? The first step is relatively simple; the second is more complex. The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts. This part of the decision, too, depends on facts, and therefore it is important for the board to know not only that some violation was committed but also to know accurately how many and how serious the violations were. Yet this second step, deciding what to do about the violation once it is identified, is not purely factual but also predictive and discretionary. . . . Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.' . . . The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment. . . . Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require

[102] *Patrick v. Burget*, 486 U.S. 94, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988). P. 1508. Available at: https://scholar.google.com/scholar_case?case=5785321635817699830

> citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. '[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' "[103]

If we compare a parolee to a licensed professional who is on probation due to misconduct, we immediately observe that the licensed professional would need to have conditions of probation that are pertinent to the profession involved. Because it is reasonable to expect that these conditions will be most effectively determined by members elected from the profession involved, a governing body would need to be established to ensure that these conditions could be defined transparently while providing some room for judicial flexibility.

9 Proposed solution

Extension of the legislature

Article II of the Oregon Consitution governs elections.

Article III sec. 2 indicates that budgetary controls must be established by the legislature.

Article IV governs the legislative branch. Articles would need to be adopted and modified as necessary to constitute the governing structure for the proposed legislative body.

One representative delegate would be elected for each profession in each district. These legislative members would replace the existing administrative boards.

Two delegates of each profession would also be elected regardless of the districting.

9.1 Trial by jury of peers

The concept of a jury is based on body of peers, as explained by the Court:

> "The very idea of a jury is a body of men composed of the peers or *equals of the person whose rights it is selected* or summoned to determine; that is, of his neighbors, fellows, associates, persons *having the same legal status in society* as that which he holds. "[104]

An administrative board of members of a given profession may hold the same license as other members of that profession, but that does not mean that they are peers! As heretofore explained by the Court, to constitute a "peer," the members must have "the same legal status in society." This interpretation was upheld again by the Court in Carter v. Jury Comm'n of Greene Cty. In that case, the Court also mentioned:

> "Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection. People excluded from juries because of [discrimination] are as much aggrieved as those indicted and tried by juries chosen under a system of [discriminatory] exclusion. . . Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on

[103] *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). Available at: https://scholar.google.com/scholar_case?case=6651080982371538818

[104] *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664, 25 L. Ed. 2d 664 (1880). P. 308. Emphasis added. Available at: https://scholar.google.com/scholar_case?case=10979220518323133653

> [discriminatory] grounds than it may invidiously discriminate in the offering and withholding of the elective franchise."[105]

What this holding helps us recognize is that members of a profession are also given the right to participate *as* members of a jury without being prejudicially excluded by any discriminatory criteria or fixed election process, insofar as they have "good moral character, of their respective counties as they may deem otherwise well qualified to serve as jurors, being persons of sound judgment and free from all legal exceptions." (Id. at p. 335)

Immunity delegation doctrine requires that immunity not be granted unless the *process* under which it is govern "is the State's own," as per *FTC v. Ticor Title Ins. Co.,* 504 U.S. 621, 636, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992) interpretation of Parker in FTC v NC Dental Board. At the present moment, no state p

> "[T]he defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria. . . The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. *Duncan* v. *Louisiana,* 391 U. S. 145, 156 (1968).[8] Those on the venire must be "indifferently chosen,"[9] to secure the defendant's right under the Fourteenth Amendment to "protection of life and liberty against . . . prejudice." *Strauder, supra,* at 309.. . . Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. See *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217, 223-224 (1946). . . . The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. . . . The Constitution requires, however, that we look beyond the face of the statute defining juror qualifications and also consider challenged selection practices to afford "protection against action of the State through its administrative officers in effecting the prohibited discrimination." *Norris* v. *Alabama, supra,* at 589; see *Hernandez* v. *Texas,* 347 U. S. 475, 478-479 (1954); *Ex parte Virginia, supra,* at 346-347. "[106]

Let us note the vitally important factor: Jury verdicts are reached by unanimous vote. The same rule should apply to disciplinary actions. It is seriously without justice to allow the voice of dissenters to go unnoticed during decisions of that magnitude.

This complexities would require that the members of a profession would need to be judged by their peers of that profession to ensure that questions of complexity that pertains to their profession could be adequately answered upon deliberation of their peers. The underlying problem with implementing this, however, is that it would require fundamental changes to how we regulate professions requiring licenses.

Luckily, many existing policies and practices already exist for implementing an ideal system.

By combining a legislative process with a judicial process, we can easily satisfy the requirements of the system.

> "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."[107]

Thus the Congress, in exercising the powers confided to it, may establish `legislative' courts (as distinguished from `constitutional courts in which the judicial power conferred by the Constitution can be deposited') which are to form part of the government of territories or of the District of Columbia,[12] or to serve as special tribunals "to examine and determine various matters, arising between the government and others, which from their nature do not require judicial

---

[105] *Carter v. Jury Comm'n of Greene Cty.*, 396 U.S. 320, 90 S. Ct. 518, 24 L. Ed. 2d 549 (1970). P. 329-330. Available at: https://scholar.google.com/scholar_case?case=5705946853331133320

[106] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). P. 85-87.

[107] *Crowell v. Benson*, 285 U.S. 22, 52 S. Ct. 285, 76 L. Ed. 598 (1932). Available at: **https://scholar.google.com/scholar_case?case=7911057176554806047**

determination and yet are susceptible of it." But "the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.' " As we have already assessed the dangers of delegating that power to executive officers, and because judicial tribunals could put an undue burden on the judiciary to evaluate subjects of greater complexity[108] than they are prepared to adjudicate, we propose an innovative system that would allow Congress itself to govern the licensure disciplinary process.

The rules governing the traditional electorial process must be modified to allow the same process to be used for elections among members who hold licenses to professions governed by the State.

The rules governing the traditional judicial process (involving a jury by a body of peers) must be modified to allow the same process to be used to judge disciplinary actions brought against members of a given profession insofar as would ensure that the peer review body (insofar as would judge a licensee's disciplinary action) consists of a jury of members of that profession.

Procedurally, if each licensing board was required (perhaps by an executive order of the governor, who happens to be in favor of reform in this area) to provide a digital document with contact information of all of their licensees, a database could be established to contain the information required to use existing processes to fulfill 1 and 2 (e.g. by mailing specialized ballot envelopes to licensed professionals and for contacting members for professional jury duty).

This same election process could be used to allow the legislature to govern licensed professions by requiring (by statute) that this same election process is used to elect the professional representatives whom are responsible for promulgating policies whereby members of that given profession are disciplined. In essence, each existing administrative licensing board would be replaced with one legislative body comprised of delegates elected by the given profession[109]. Moreover, in the same way that judges are elected into office, the judges whom would be responsible for arbitrating matters pertaining to a given profession should also be members of that profession to ensure that they are adequately credentialed and qualified to arbitrate matters involving the complexities of that profession.

These elected committees would be responsible for promulgating:

- The rules of what practices constitute misconduct or a violation;
- The rules of what the maximum (and potentially minimum) punishments satisfy each type of misconduct; and
- The expungement process (unless prohibited by the seriousness of the violation) required for the licensee to have their record cleared.

Any policies or rules required for the professional judges to uphold when arbitrating matters involving disciplinary actions.

Moreover, each of these committees could elect a member as a delegate to represent the committee for a supercommittee responsible for promulgating rules that govern all of the licensing boards. This supercommittee could act as a bona fide congressional committee that could would conceivably be given a limited set of powers of congress.

This new system would suffice as a permanent solution to most, if not all, of the existing (and any future) problems pertaining to our administrative licensing boards.

We must have something like jury duty but for members of that profession. This would ensure that professionals are judged by their peers. This would ensure that the process literally is "peer review." This would eliminate the incentives that might appear when an appointed or elected board is chosen by a process that is subject to control (in any amount) by private market participants. It would also invoke the traditional judicial practices (that are well established) for allowing members of a profession to be tried.

In the case that a person of a particular specialty is involved, the members of the peer review board should be members of that particular specialty. (e.g. A cardiologist should be tried by a board of cardiologists, not a board comprised of a mixed group of professions – regardless of how competent and experienced the members are.) This would protect against the problems associated with a single expert witness testifying against a competitor because the selection profess for the jury would be randomized (and governed by traditional procedures).

---

[108] E.g. The details of medical diagnostic misconduct.

[109] i.e. Each profession would be represented by a set of representatives of that profession such that each profession would be represented by its own legislative committee.

It is argued that such a system would allow Congress itself to provide the active supervision sufficient to satisfy the tests of the FTC vs NC Dental Board ruling.

9.1.1 Authority and jurisdiction

The proposed adjudicatory authority could be constructed by Congressional authority under Article I. By constructing the adjudicatory system under Article I, it would ensure that adjudicatory decisions could be subjected to Article III review but without overly burdening Article III judges with peer review cases, particularly while the system is still under initial development.

> "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well.
>
> In the precedents of this Court, the claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances. "[110]

9.2 Proposed structure of the legislative bodies

The legislative bodies should be governed by a constitution, containing items such as:

1. The purpose of the professional legislative members is primarily to create rules and guidelines that govern:
    a. Offenses that pertain to misconduct of that profession;
    b. Maximum punishments indicated for each type of offense;
    c. The expungement process required for each offense;
    d. Types of misconduct that are not eligible for expungement;
    e. The evidentiary process and burden of evidence required for each type of offense;
    f. Defenses, where applicable, to each type of offense.
    g. Adjudicatory rules that govern the professional jury trial process and arbitration;
    h. The professional electoral process;
    i. Investigative procedures and due process, where applicable;
    j. Administrative procedures, such as those required to maintain centralized recordkeeping, statistical information, and other miscellaneous tasks that do not require adjudicatory, peer-review, or other delegated authority;

9.3 Proposed structure of the electoral process

The existing election process is fixed and controlled by private market participants.

The electoral process would extend the existing legislative electoral process to include members of each professional licensure regulated by the state.

9.4 Financial considerations

The costs associated with implementing the professional jury trial process, the legislative bodies, and the centralized election process and licensure database would be provided by:

1. elimination of the costs of supporting the existing administrative licensing boards; and
2. tax revenues generated by the professionals allowed to re-enter the workforce as a consequence of the suggested expungement process

[110] *Bond v. US*, 131 S. Ct. 2355, 564 U.S., 180 L. Ed. 2d 269 (2011). P. 2365. Available at: https://scholar.google.com/scholar_case?case=12691789482415909888