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Arizona Securities Law: How Relevant is Federal Securities Law?

Richard G. Himelrick*

Both the Arizona Supreme Court and the Arizona legislature have approved using federal securities cases to interpret Arizona's securities statutes when federal law is settled and the Arizona and federal statutes are substantially the same. In practice though, federal law has limited utility. One reason is the U.S. Supreme Court's small volume of securities-law precedent. The Supreme Court averages only 1.3 securities cases per term. This leaves swaths of federal securities law on which the Supreme Court has not spoken and on which the lower-federal courts often disagree. The Supreme Court's decisions involve one or more of nine federal securities acts that frequently turn on uniquely federal issues of little or no relevance to state securities law. Differences in Supreme Court and Arizona securities-law policy and approaches to statutory interpretation further reduce the number of relevant federal cases. This article analyzes the fifty state and federal decisions interpreting Arizona securities law that have been reported since 1980. Through these cases, the article identifies the patterns and reasoning that have guided the courts in deciding when to rely on federal interpretations to interpret Arizona's securities statutes. The article concludes by presenting a set of interpretative principles through which truly relevant federal securities law can be identified.

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I. INTRODUCTION

In *Sell v. Gama*,[1] a 2013 decision, the Arizona Supreme Court expressed a preference for following settled federal securities law. The Court stated that when federal and Arizona securities statutes are substantially the same, "we will interpret the ASA [Arizona Securities Act] by following settled federal securities law unless there is a good reason to depart from that authority."[2] The Court made a similar statement in an earlier 1980 decision.[3] And in 1996, the Arizona legislature enacted a statute that authorized Arizona courts to use as a guide interpretations by state and federal courts, as well as the Securities and Exchange Commission ("SEC"), of substantially similar federal securities laws.[4]

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[1] Sell v. Gama, 295 P.3d 421 (Ariz. 2013).
[2] *Id.* at 425 ¶ 18.
[3] State v. Gunnison, 618 P.2d 604, 606-07 (Ariz. 1980) ("Unless there is a good reason for deviating from the United States Supreme Court's interpretation, we will follow the reasoning of that court in interpreting sections of our statutes which are identical or similar to federal securities statutes.").
[4] The 1996 statute reads:

Federal securities law is therefore potentially relevant in any case involving Arizona securities law. But how relevant? In many respects, Arizona's securities statutes are substantially different than Rule 10b-5 and the other federal statutes and rules enacted as part of the 1933 Securities Act ("1933 Act") and 1934 Securities Exchange Act ("1934 Act").[5] *Sell* itself identified Arizona's statute on participant-and-inducement liability as a statute that has no federal counterpart.[6] *State v. Gunnison*, the 1980 decision, refused to apply

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> C. It is the intent of the legislature that in construing the provisions of title 44, chapter 12, Arizona Revised Statutes, the courts may use as a guide the interpretations given by the securities and exchange commission and the federal or other courts in construing substantially similar provisions in the federal securities laws of the United States.

Private Securities Litigation Act, ch. 197, § 11(C), 1996 Ariz. Sess. Laws 1003, 1023.

[5] Arizona decisions rely almost exclusively on decisions under the 1933 and 1934 Acts. *See, e.g., Sell*, 295 P.3d at 425 ¶¶ 17-19 (relying upon U.S. Supreme Court decision eliminating aiding-and-abetting liability under § 10(b) and Rule 10b-5 of the 1934 Act); *Gunnison,* 618 P.2d at 606-07 (following the U.S. Supreme Court's interpretation of scienter under § 17(a)(2) of the 1933 Act); Nutek Info. Sys., Inc. v. Ariz. Corp. Comm'n, 977 P.2d 826, 830-35 (Ariz. Ct. App. 1998) (relying on federal case law under the 1933 and 1934 Acts to decide whether LLC memberships were investment contracts); Rose v. Dobras, 624 P.2d 887, 889-92 (Ariz. Ct. App. 1981) (relying on (a) federal interpretation of investment contracts under 1933 Act; (b) the U.S. Supreme Court's interpretation of materiality under the 1934 Act; and (c) federal case law regarding reliance under § 17(a) of the 1933 Act and § 10(b) of the 1934 Act); *cf.* State v. Tober, 841 P.2d 206, 208-09 (Ariz. 1992) (noting but declining to follow cases under the 1933 Act regarding treatment of promissory notes as securities).

[6] *See Sell*, 295 P.3d at 426 ¶ 24 (referring to A.R.S. § 44-2003(A) (2013)); *see also,* Standard Chartered, PLC v. Price Waterhouse, 945 P.2d 317, 329 (Ariz. Ct. App. 1996) (making the same point and refusing to consider federal case law).

the U.S. Supreme Court's interpretation of scienter under Rule 10b-5 to claims under Arizona Revised Statutes (A.R.S.) § 44-1991(A).[7] These cases alone show that caution is required when relying on federal securities law to interpret Arizona's statutes.

II. THE UNRULY NATURE OF FEDERAL SECURITIES LAW

To those unfamiliar with securities law, the U.S. Supreme Court's volume of securities-law precedent may seem surprisingly low. Since 1933, when Congress began enacting comprehensive federal securities legislation,[8] the U.S. Supreme Court has averaged only 1.3 securities decisions a year.[9] The

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[7] *See Gunnison,* 618 P.2d at 606-07 (declining to follow Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) as interpreted in Greenfield v. Cheek, 593 P.2d 293 (Ariz. Ct. App. 1978), *opinion adopted*, 593 P.2d 280 (Ariz. 1979).

[8] The first of these laws was the Securities Act of 1933. *See generally,* 1 LOUIS LOSS ET AL., SECURITIES REGULATION 268-71 (5th ed. 2014) (discussing the events leading to enactment of the 1933 and 1934 Acts). The first permanent federal securities legislation was enacted in 1920. In that year, Congress enacted federal legislation regulating securities in the narrow area of securities issues involving railroads. *See id.* at 266; John F. Turney, *Federal Regulation of Carrier Securities*, 25 LAW & CONTEMP. PROBS. 106, 107 (1960) (explaining that the legislation was enacted after the collapse of railroad credit and was intended to establish "a soundly-capitalized transportation industry, capable of adequate service at reasonable rates"). *See generally,* RICHARD G. HIMELRICK, ARIZ. SEC. L.: CIV. LIAB., DEFENSES, & REMEDIES § 2.3 (5th ed. 2017) (discussing early attempts at federal legislation).

[9] A study of securities-law decisions issued from 1946 through 2014 shows that the average number of cases decided per year was 1.3. *See* John C. Coates IV, *Securities Litigation in the Roberts Court: An Early Assessment*, 57 ARIZ. L. REV. 1, 8 tbl.2 (2015). An earlier study covering the 90 securities decisions issued between 1933 and 2004 also found that the number of decisions per year averaged 1.3. E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1578-80 (2004).

opinions that resulted involve not only substantive securities-law issues, like whether an investment is a security[10] or whether a statement is material,[11] but an array of issues that are largely unique to federal securities law.[12] These issues may arise under any of the nine federal securities acts.[13] Recent examples include cases concerning procedural issues in class certification under Rule 10b-5;[14] the constitutionality of the Sarbanes-Oxley Act;[15] the scope of the federal courts' exclusive jurisdiction under the 1934 Act;[16] federal preemption of state-law class actions involving covered securities (i.e., nationally traded securities that are listed on a regulated national ex-

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[10] *See, e.g.,* Reves v. Ernst & Young, 494 U.S. 56 (1990) (regarding when promissory notes are securities); SEC v. W.J. Howey Co., 328 U.S. 293 (1946) (regarding the definition of investment contracts).

[11] *See, e.g.,* Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 38-47 (2011) (regarding materiality under Rule 10b-5).

[12] *See infra* notes 14-21 and accompanying text (providing examples).

[13] *See infra* notes 29-35 and accompanying text (describing the nine acts).

[14] *See* Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014) (holding that defendants may introduce price-impact evidence at the class-certification stage to rebut the presumption of reliance under the fraud-on-the-market theory); Amgen Inc. v. Conn. Ret. Plans and Trust Funds, 133 S. Ct. 1184 (2013) (holding that proof of an alleged misrepresentation's materiality is not a prerequisite to class certification in a Rule 10b-5 action based on the fraud-on-the-market theory); Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804 (2011) (holding that in an action under Rule 10b-5 the plaintiff need not prove loss causation to obtain class certification). *See generally* Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market: Reflections on* Amgen *and the Second Coming of* Halliburton, 57 ARIZ. L. REV. 37 (2015) (describing the major procedural issues in Rule 10b-5 class certification that have occupied the federal courts).

[15] *See* Free Enter. Fund v. Public Co. Acct. Oversight Bd., 561 U.S. 477 (2010) (generally upholding with one exception the constitutionality of the Sarbanes-Oxley Act's scheme for the Public Company Accounting Oversight Board).

[16] *See* Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 136 S. Ct. 1562 (2016) (holding that exclusive jurisdiction under the 1934 Act is defined by the same test as that used to decide if a case "arises under" a federal law).

change);[17] the extraterritorial reach of the federal securities laws;[18] the standard for determining excessive fees under the Investment Company Act of 1940;[19] the accrual date on the statute of limitations applicable to civil-penalty actions by the SEC under the Investment Advisers Act of 1940;[20] and whistleblower issues regarding securities violations.[21] With the Supreme Court issuing so few securities-law decisions and so many of the decisions turning on uniquely federal issues, much of the Supreme Court's precedent has no relevance to substantive state securities law.

Another consequence of the Supreme Court's limited securities-law precedent—and the sweeping mix of federal statutes and issues the decisions address—is that federal securities law is frequently unsettled.[22] Often the Supreme Court has

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[17] *See* Kircher v. Putnam Funds Trust, 547 U.S. 633 (2006) (holding that a district court's order is not appealable when the order remands a securities case that is allegedly precluded from being filed in state court by the Securities Litigation Uniform Standards Act).

[18] *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (holding that § 10(b) of the 1934 Act applies only to transactions in securities listed on domestic exchanges and to domestic transactions in other securities).

[19] *See* Jones v. Harris Assocs. L.P., 559 U.S. 335 (2010) (holding that an excessive fee under § 36(b) of the Investment Company Act of 1940 is one that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arms-length bargaining).

[20] *See* Gabelli v. SEC, 133 S. Ct. 1216 (2013) (holding that the discovery rule does not extend the five-year statute of limitations when the SEC brings an enforcement action for civil penalties under the Investment Advisers Act of 1940).

[21] *See* Lawson v. FMR LLC, 134 S. Ct. 1158 (2014) (holding that whistleblower-protection under the Sarbanes-Oxley Act extends to employees of private contractors and subcontractors serving public companies).

[22] *See, e.g.,* Stratte-McClure v. Morgan Stanley, 776 F.3d 94, 101-04 (2d Cir. 2015) (rejecting the Ninth Circuit's contrary view and holding that Item 303, an SEC regulation, imposes a duty to speak that can give rise to liability under Rule 10b-5 and § 10(b)); Oregon Pub. Emps. Ret. Fund v. Apollo Grp. Inc., 774 F.3d 598, 604-05 (9th Cir. 2014) (describing conflicting deci-

settled an issue only at a general level.[23] For example, the Supreme Court's three-part *Howey* definition of investment con-

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sions on whether heightened pleading is required for Rule 10b-5 loss causation); John P. Flannery and James D. Hopkins, Exchange Act Release No. 3981, 2014 WL 7145625, at *14 & n.69 (Dec. 15, 2014) (disagreeing with decisions from the Second, Eighth, and Ninth Circuits on the scope of liability under Rule 10b-5(a) and (c)), *vacated on other grounds sub nom.* Flannery v. SEC*,* 810 F.3d 1 (1st Cir. 2015); Rome v. HEI Res., Inc., No. 13CA2090, 2014 WL 6486488, at *6 ¶¶ 33-35 (Colo. App. Nov. 20, 2014) (discussing the different tests used by the federal circuits to decide when general-partnership and joint-venture interests are securities); Wendy Gerwick Couture, Remarks, *Around the World of Securities Fraud in Eighty Motions to Dismiss,* 45 LOY. U. CHI. L.J. 553, 560-63, 565-69 (2014) (describing conflicting decisions and confusion in the lower-federal courts on a variety of issues including scienter; the core-operations inference; puffery; and cases ignoring the federal counterpart of A.R.S. § 44-2083, which requires trial judges to make Rule 11 findings when a securities-fraud case concludes); Charles W. Murdock, Janus Capital Group, Inc. v. First Derivative Traders: *The Culmination of the Supreme Court's Evolution from Liberal to Reactionary in Rule 10b-5 Actions*, 91 DENV. U. L. REV. 369, 434-35 (2014) (describing confusion in district-court decisions applying the ultimate-authority test for misrepresentations announced in Janus Capital Group, Inc. v. First Derivative Traders, 564 U.S. 135 (2011)).

[23] *See generally* Coates, *supra* note 9, at 4 ("This Article's main takeaway is that the Court can be expected to continue to have both marginal and lottery-like effects on substantive securities law."); A.C. Pritchard, *Securities Law in the Roberts Court: Agenda or Indifference?*, 37 J. CORP. L. 105, 144 (2011) ("The debates that engage the Justices in these cases do not come from the field of securities laws, but rather, are more general: statutory interpretation, the use of legislative history, the presumption against the extraterritorial application of legislation, etc."); William K. Sjostrom, Jr., *Direct Private Placements*, 102 KY. L.J. 947, 949-50 (2014) (describing the mishmash of law created in the lower courts under the rules for private-placement exemptions formulated by the U.S. Supreme Court in SEC v. Ralston Purina Co., 346 U.S. 119 (1953)); Sullivan & Thompson, *supra* note 9, at 1573 ("The dearth of securities and antitrust cases decided by the current Court during a decade [1994-2004] in which its membership has not changed suggests a lack of interest in these areas. The securities and antitrust cases that are taken and decided are less important and the decisions seem less coherent than in the earlier period.").

tracts has long been the law in federal courts.[24] But substantial disagreement exists about the meaning of *Howey*'s common-enterprise and effort-of-others elements.[25] Similarly, the Supreme Court has definitively ruled that material facts are those that a reasonable investor would consider important.[26] But what this means from case to case is far from settled.[27] And considerable confusion exists because of materiality-based doctrines like the bespeaks caution, truth-on-the-market, puffery, and price-movement doctrines that the lower-federal courts use in ruling on dismissal motions.[28] With federal law on these and

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[24] *See* SEC v. W.J. Howey Co., 328 U.S. 293 (1946) (regarding the definition of investment contracts).

[25] *See* 2 LOUIS LOSS ET AL., SECURITIES REGULATION 1067 (5th ed. 2014) ("At the current time, there are three cognate approaches."); James D. Gordon III, *Defining a Common Enterprise in Investment Contracts*, 72 OHIO ST. L.J. 59, 61 (2011) (describing the different definitions of common enterprise in the federal courts). *Compare* SEC v. Shields, 744 F.3d 633, 647 (10th Cir. 2014) (holding regarding the efforts-of-others' element that the relevant experience is the investor's experience in the particular business, not the investor's general business experience), *with* Holden v. Hagopian, 978 F.2d 1115, 1121 (9th Cir. 1992) ("The proper inquiry is whether the partners [the investors] are inexperienced or unknowledgeable 'in business affairs' generally, not whether they are experienced and sophisticated in the particular industry or area in which the partnership engages and they have invested.").

[26] *See, e.g.,* Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 38 (2011) (regarding materiality under Rule 10b-5).

[27] *See, e.g.,* Hogle v. Smestad, No. CV-13-01057-PHX-GMS, 2014 WL 554202 (D. Ariz. Feb. 12, 2014) (interpreting the Arizona Securities Act and reversing the bankruptcy court's materiality findings), *rev'g* In re Hogle, Nos. 11-bk-08991-SSC, 12-bk-00046-GBN, Adv. Nos. 11-ap-1205-SSC, 12-ap-183, 2013 WL 1001652 (Bankr. D. Ariz. Mar. 13, 2013). *Compare* Caruthers v. Underhill, 287 P.3d 807, 818 ¶¶ 44-47 (Ariz. Ct. App. 2012) (relying on federal cases to hold that opinions of value and appraisals were not material), *with* Trimble v. Am. Sav. Life Ins. Co., 733 P.2d 1131, 1136 (Ariz. Ct. App. 1986) (citing a Ninth Circuit decision in support of the materiality of misrepresentations regarding a stock's value).

[28] *See* Stefan J. Padfield, *Immaterial Lies: Condoning Deceit in the Name of Securities Regulation*, 61 CASE W. RES. L. REV. 143, 161-65, 179 (2010) (discussing these doctrines (at 161-65) and noting their tendency to create

many other issues conflicting or undeveloped in the area of securities law, identifying a federal statute that is substantially similar to an Arizona securities statute is no assurance that clear federal case law on the statute's meaning exists.

Citing federal securities law can also be problematic because of the number and overlap of potentially relevant federal statutes. Since 1933, Congress has enacted nine securities acts that are administered by the SEC.[29] The most important of these in Arizona securities litigation are the 1933 and 1934 Acts.[30] Under these two Acts alone, eight statutes expressly provide for civil liability.[31] These statutes cover registration

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"unnecessary confusion about the definition of materiality" (at 179)); *see also* Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 119-26 (2002) (discussing the puffery, bespeaks caution, zero-price change, and trivial-matters doctrines as materiality-based heuristics (shortcuts) used in securities-law opinions).

[29] *See* 1 LOSS ET AL., *supra* note 8, at 342 (listing as currently administered by the SEC the following statutes: the 1933 Act, the 1934 Act, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, to some extent the Securities Investor Protection Act of 1970, the Sarbanes-Oxley Act of 2002, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, and the Jumpstart Our Business Startups, or JOBS Act of 2012).

[30] *See supra* note 5.

[31] *See* Securities Act of 1933, ch. 38, § 11, 48 Stat. 74, 82 (codified as amended at 15 U.S.C. § 77k (2006) (amended 2012)) (regarding liability for misrepresentations or omissions in registration statements); *id.* § 12, 15 U.S.C. § 77*l* (regarding liability for registration violations and misrepresentations or omissions in prospectuses or oral communications); *id.* § 15, 15 U.S.C. § 77o (regarding control liability); Securities Act of 1934, ch. 404, § 9, 48 Stat. 881, 889 (codified as amended at 15 U.S.C. § 78i) (2006) (amended 2012) (regarding liability for manipulation of securities prices); *id.* § 16(b), 15 U.S.C. § 78p(b) (regarding liability for short-swing profits by officers, directors, and certain shareholders); *id.* § 18(a), 15 U.S.C. § 78r(a) (regarding liability for misrepresentations or omissions in documents filed

violations, misrepresentations, omissions, market manipulation, and other types of securities fraud.[32] In addition, under the 1934 Act, § 10(b) (and SEC Rule 10b-5),[33] § 14(a),[34] and § 29(b)[35] have been held to create implied-civil liability. Deciding whether any of these statutes are analogous to an Arizona securities statute can be challenging.[36] This is especially so because as causes of action under the federal securities statutes are cumulative;[37] that is, the statutes may provide overlapping remedies even when the statutes "involve distinct causes of action and were intended to address different types of wrongdoing."[38] It is possible, for example, for a defendant to simultaneously make misrepresentations or misleading omissions that

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with the SEC); *id.* § 20(a), 15 U.S.C. § 78t(a) (regarding control liability); *id.* § 20A, 15 U.S.C. § 78t-1 (regarding insider-trading liability).

[32] *See* statutes cited *supra* note 31.

[33] *See, e.g.,* Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2407 (2014) (regarding implied liability for securities fraud under § 10(b) and Rule 10b-5).

[34] *See, e.g.,* Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1086-87 (1991) (regarding implied liability under § 14(a) for misleading statements in proxy solicitations).

[35] *See, e.g.,* Reg'l Props., Inc. v. Fin. & Real Estate Consulting Co., 678 F.2d 552, 558 (5th Cir. 1982) (holding that § 29(b) creates an implied right to rescind contracts that violate the 1934 Act).

[36] *See, e.g.,* State v. Gunnison, 618 P.2d 604, 606-07 (Ariz. 1980) (relying upon § 17(a) of the 1933 Act to interpret state-of-mind requirements under § 44-1991(2) and (3) (now § 44-1991(A)(2) and (3)) and overruling case that relied upon Rule 10b-5 precedent); Grand v. Nacchio, 147 P.3d 763, 780 ¶¶ 57-60 (Ariz. Ct. App. 2006) (relying upon § 12(a)(2) to interpret loss-causation requirements under § 44-1991(A)(2) but relying upon § 10(b) and Rule 10b-5 to interpret loss causation under § 44-1991(A)(1) and (3)).

[37] *See* Herman & MacLean v. Huddleston, 459 U.S. 375, 384-90 (1983) (describing the "cumulative construction of the remedies under the 1933 and 1934 Acts" and holding that "the availability of an express remedy under Section 11 of the 1933 Act does not preclude defrauded purchasers of registered securities from maintaining an action under Section 10(b) of the 1934 Act").

[38] *Id.* at 381.

violate §§ 11(a) and 12(a)(2) of the 1933 Act, as well as § 10(b) of the 1934 Act,[39] even though § 10(b) requires scienter and reliance while §§ 11(a) and 12(a)(2) do not.[40] Since Arizona's primary antifraud statute, A.R.S. § 44-1991(A), also prohibits misrepresentations and omissions,[41] §§ 11(a), 12(a)(2), and 10(b) (as well as Rule 10b-5) are potentially relevant in cases under the Arizona Securities Act. But unlike many other courts,[42] Arizona's courts have largely overlooked

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[39] *See, e.g.,* In re Bank of Am. Corp. Sec., Derivative, & Emp. Ret. Income Sec. Act (ERISA) Litig., 757 F. Supp. 2d 260, 322-24, 332-33, 346 (S.D.N.Y. 2010) (denying motion to dismiss overlapping claims against a bank for misleading statements under §§ 10(b) and 14(a) of the 1934 Act and §§ 11 and 12(a)(2) of the 1933 Act).

[40] *See* NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co., 693 F.3d 145, 146 (2d Cir. 2012) ("Neither scienter, reliance, nor loss causation is an element of § 11 or § 12(a)(2) claims . . . ."); *In re Bank of Am. Corp. Sec.,* 757 F. Supp. 2d at 320, 322-23, 332-33, 346 (denying motion to dismiss overlapping claims under § 10(b) and § 12(a)(2) and noting that § 10(b) requires scienter while § 12(a)(2) requires only negligence). *Compare, e.g.*, Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2407 (2014) (listing reliance and scienter as elements of § 10(b) and Rule 10b-5), *with* Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1323 (2015) (holding that a securities purchaser suing under §11(a) need not prove that "the defendant acted with any intent to deceive or defraud").

[41] *See, e.g.,* Aaron v. Fromkin, 994 P.2d 1039, 1042 ¶¶ 14-15 (Ariz. Ct. App. 2000); Trimble v. Am. Sav. Life Ins. Co., 733 P.2d 1131, 1135-36 (Ariz. Ct. App. 1986).

[42] *See, e.g.,* MidAmerica Fed. Sav. & Loan Ass'n v. Shearson/Am. Express, Inc., 886 F.2d 1249, 1255-57 (10th Cir. 1989) (distinguishing Rule 10b-5 precedent and following § 12(2) (now § 12(a)(2)) case law as to Oklahoma's counterpart of § 44-1991(A)(2)); Kronenberg v. Katz, 872 A.2d 568, 595-99 (Del. Ch. 2004) (relying upon § 12(a)(2) to interpret Pennsylvania's counterparts of §§ 44-1991(A) and 44-2001(A) and concluding that reliance is not required under the Pennsylvania statutes); Marram v. Kobrick Offshore Fund, Ltd., 809 N.E.2d 1017, 1026-27 (Mass. 2004) (citing authority under § 12(a)(2) and holding that under the Massachusetts Securities Act the plaintiff does not need to prove either scienter or reliance); DMK Biodiesel, LLC v. McCoy, 859 N.W.2d 867, 872-75 (Neb. 2015) (citing § 12(a)(2) cases and holding that the Nebraska Securities Act does not require plaintiffs to prove reliance or to investigate a seller's statements); Geodyne

§ 12(a)(2).[43]

Differences in Arizona and federal approaches to statutory interpretation are another factor that must be considered. Federal interpretations of § 10(b) and Rule 10b-5 do not always involve normal statutory interpretation. The U.S. Supreme Court does not consider itself bound by the language of § 10(b) or Rule 10b-5.[44] Instead, the Court sometimes interprets the private action under § 10(b) and Rule 10b-5 more narrowly than what would result from the plain or fair meaning of the

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Energy Income Prod. P'ship I-E v. Newton Corp., 97 S.W.3d 779, 785 (Tex. Ct. App. 2003) (looking to § 12(2) (now § 12(a)(2)) as a guide in interpreting the Texas Securities Act and holding that the Texas Act "does not require the buyer to prove reliance"), *rev'd in part on other grounds,* 161 S.W.3d 482 (Tex. 2005); Gohler v. Wood, 919 P.2d 561, 565 (Utah 1996) (citing authority under § 12(a)(2) and holding that reliance is not required under the Utah Securities Act); *see also* 9 LOUIS LOSS ET AL., SEC. REG. 168-69 nn.21, 23 (4th ed. 2012) (explaining that § 410(a)(2) of the 1956 Uniform Securities Act was modeled on § 12(2) (now § 12(a)(2)) and was intended to create liability for materially misleading statements without proof of reliance).

[43] *See* Richard G. Himelrick, *Arizona Securities Fraud Liability: Charting a Non-Federal Path*, 32 ARIZ. ST. L. J. 203, 210-12 (2000) (discussing Arizona decisions' reliance on Rule 10b-5 rather than § 12(a)(2)). *But see* Grand v. Nacchio, 147 P.3d 763, 776 ¶¶ 41-42, 779 ¶ 51, 780 ¶ 58 (Ariz. Ct. App. 2006) (discussing damage and rescission remedies under the Arizona Securities Act and describing § 12(a)(2) as the federal counterpart to § 44-1991(A)(2)).

[44] *See, e.g.,* Chadbourne & Parke LLP v. Troice, 134 S. Ct. 1058, 1063 (2014) ("The scope of the private right of action [under § 10(b) and Rule 10b-5] is more limited than the scope of the statutes upon which it is based."); *see also Halliburton Co.,* 134 S. Ct. at 2425-26 (Thomas, J. concurring) (contending that the fraud-on-the-market presumption of reliance under § 10(b) is not based on statutory interpretation but Supreme Court policy).

statute's words.[45] This approach has resulted in the Court reading requirements into Rule 10b-5 like reliance, which the Rule's text does not require.[46] It has also led to interpretations that are contrary to ordinary English, for example, that the only persons who make Rule 10b-5 statements are those with the "ultimate authority" to speak.[47] Similarly, although prospectuses are statutorily defined to include all written offers,[48] the Supreme Court has held that the only prospectuses under § 12(a)(2) of the 1933 Act are those used in public offerings.[49] These decisions have been widely criticized.[50] If applied to

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[45] *See, e.g.,* Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 142-44 (2011) (limiting "make" in Rule 10b-5 to situations in which a statement's maker is the person with "ultimate authority" to make the statement and stating, "[o]ur holding also accords with the narrow scope that we must give the [Rule 10b-5] implied private right of action").

[46] *See* A.C. Pritchard, Stoneridge Inv. Partners v. Scientific-Atlanta*: The Political Economy of Securities Class Action Reform*, 2008 CATO SUP. CT. REV. 217, 241-42 ("Rule 10b-5's reliance element is nowhere to be found in the language of § 10(b) or Rule 10b-5; the [U.S. Supreme] Court borrowed it from the common law of deceit.").

[47] *See Janus*, 564 U.S. at 142-43 (limiting the "make" in Rule 10b-5 to situations in which a statement's maker is the person with "ultimate authority" to make the statement).

[48] *See* Stephen M. Bainbridge, *Securities Act Section 12(2) After the* Gustafson *Debacle*, 50 BUS. LAW. 1231, 1235, 1246-50 (1995) (arguing that "prospectus" is a defined term under § 2(10) of the 1933 Act and there is no legitimate reason not to give "prospectus" in § 12(2) (now 12(a)(2)) the broad interpretation for which § 2(10) provides); Louis Loss, *The Assault on Securities Act § 12(2),* 105 HARV. L. REV. 908, 916-17 (1992) (arguing that "prospectus" includes all written offers and that liability under § 12(2) (now § 12(a)(2)) extends to ordinary trading).

[49] *See* Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 569 (1995) (holding that "a prospectus under § 10 [of the 1933 Act] is confined to documents related to public offerings by an issuer or its controlling shareholders").

[50] *See, e.g.,* Bainbridge, *supra* note 48, at 1231-1232 ("[T]he [*Gustafson*] majority issued the most poorly-reasoned, blatantly results-driven securities opinion in recent memory."); Donald C. Langevoort, *Lies Without Liars? Janus Capital and Conservative Securities Jurisprudence*, 90 WASH. U. L. REV. 933, 934 (2013) ("There is nothing in the language or history of Rule 10b-5, a straight-forward prohibition against securities fraud, to suggest that

Arizona's securities statutes, this interpretative approach would undermine the plain-meaning rule at the forefront of Arizona statutory interpretation.[51] The approach is also contrary to the Supreme Court's normal practice of looking to the statute's words and giving those words their ordinary meaning.[52]

Policy differences are another reason that federal securities law may be inapposite. *Sell* noted that deferring to federal cases may be inappropriate when the Arizona and federal policies underlying the statutes "materially differ."[53] The Supreme Court sometimes justifies its narrow interpretations of Rule 10b-5 on the basis of policy arguments about curbing vexatious litigation, protecting business, and encouraging capital formation.[54] The narrow-liability rulings that result from

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the SEC intended for its words to be limited so that the person or entity with the greatest causal responsibility for a misrepresentation or actionable omission [the speaker] escapes its reach."); Murdock, *supra* note 22, at 429-30 (describing the *Janus* majority's reasoning as "dead wrong" and "irrational"); Steve Thel, *Free Writing*, 33 J. CORP. L. 941, 943 (2008) ("Gustafson is the most important authority on section 12(a)(2), and by all accounts the worst [U.S. Supreme Court] securities law opinion ever written.").

[51] *See, e.g.,* A.R.S. § 1-213 (2002) ("Words and phrases shall be construed according to the common and approved use of the language."); Sell v. Gama, 295 P.3d 421, 425 ¶ 16 (Ariz. 2013) ("'When the plain text of a statute is clear and unambiguous,' it controls unless an absurdity or constitutional violation results." (quoting State v. Christian, 66 P.3d 1241, 1243 (Ariz. 2003)).

[52] *See, e.g.,* Lawson v. FMR LLC, 134 S. Ct. 1158, 1165 (2014) ("In determining the meaning of a statutory provision, we look first to its language, giving the words used their ordinary meaning." (citation and internal quotation marks omitted)).

[53] *Sell*, 295 P.3d at 425 ¶ 18.

[54] *See, e.g.,* Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 163-65 (2008) (stating that "the § 10(b) private right should not be extended beyond its present boundaries" and noting that the "practical consequences" of an expanded interpretation might allow plaintiffs to "extort settlements" that might raise the costs of domestic business and deter

these policies reduce investor protection.[55] This contrasts with legislative policy under Arizona's securities laws, whose purpose has consistently been described as protecting the public.[56]

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overseas firms from doing business in the U.S.); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975) (limiting standing under Rule 10b-5 and referring to discovery abuse, groundless claims, and settlements induced by a claims *in terrorem* value); Central Bank v. First Interstate Bank, 511 U.S. 164, 175, 188-90 (1964) (noting that the text of § 10(b) provides no support for aiding-and-abetting liability, expressing concern about vexatious litigation, and reasoning that the uncertainty created by such expanded liability might increase the cost of professional services by accountants and others and deter these professionals from representing newer or smaller companies); *see also* Musick, Peeler & Garrett v. Emp'rs Ins. of Wausau, 508 U.S. 286, 295 (1993) (stating that the Court's goals include "establishing limits for the 10b-5 action . . . to promote clarity, consistency, and coherence for those who rely upon, or are subject to, 10b-5 liability").

[55] *See* Langevoort, *supra* note 50, at 935 (observing that in recent U.S. Supreme Court decisions "interpreting Rule 10b-5 . . . [t]here are repeated references to unnecessary litigation and preserving the competitiveness of American business, which infuriates those who instinctively look to the courts to help advance the cause of investor protection").

[56] *See, e.g.,* R & L Ltd. Invs., Inc. v. Cabot Inv. Props., LLC, 729 F. Supp. 2d 1110, 1114 (D. Ariz. 2010) (stating that the Arizona Securities Act establishes "substantive safeguards that Arizona's legislators have crafted to protect its investing citizenry"); Grand v. Nacchio, 236 P.3d 398, 401 ¶ 16 (Ariz. 2010) (beginning its discussion by explaining that the 1951 legislature intended the securities laws to be liberally construed for public protection); State v. Baumann, 610 P.2d 38, 45 (Ariz. 1980) ("Regulation of transactions in securities, commonly known as 'blue sky laws,' are designed to protect the public from fraud and deceit arising in those transactions."); Jackson v. Robertson, 368 P.2d 645, 648 (Ariz. 1962) ("It is the capacity for harm and danger to the public as well as accomplished fraudulent transactions to which the Securities Act is directed. The Act is designed to be prophylactic if possible, remedial only if necessary."); Shorey v. Ariz. Corp. Comm'n, 359 P.3d 997, 1001 ¶ 12 (Ariz. Ct. App. 2015) (Arizona's "[b]lue-sky laws 'are designed to protect the public from fraud and deceit arising in [securities] transactions.'" (quoting *Baumann*, 610 P.2d 45)); Hirsch v. Ariz. Corp. Comm'n, 352 P.3d 925, 935 ¶ 40 (Ariz. Ct. App. 2015) (noting "the stated intent of the ASA as a remedial measure that

With all these differences between Arizona and federal securities law, how is a court to decide when to rely upon federal precedent? Although an easy answer does not exist, it is possible through analysis of the cases to identify the major factors that determine federal precedent's relevance. After first summarizing the published decisions on Arizona securities law, Part IV presents a series of questions and comments that lead to a set of interpretative principles through which relevant federal precedent can be identified.

III. ARIZONA CASES: 1980-2017

Since 1980, Arizona's appellate courts have issued thirty-three reported securities decisions.[57] In the same period,

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should be liberally construed for the protection of the public"); Grand v. Nacchio, 147 P.3d 763, 777 ¶ 45 (Ariz. Ct. App. 2006) (explaining that Arizona's securities laws are designed to protect investors from financial schemes); Eastern Vanguard Forex, Ltd. v. Ariz. Corp. Comm'n, 79 P.3d 86, 97 ¶ 36 (Ariz. Ct. App. 2003) (declining to follow certain cases in the Ninth Circuit that the court characterized as too restrictive to adequately guard the public); Siporin v. Carrington, 23 P.3d 92, 98 ¶ 28 (Ariz. Ct. App. 2001) ("We will depart from those federal decisions that do not advance the Arizona policy of protecting the public from unscrupulous investment promoters."); Nutek Info. Sys., Inc. v. Ariz. Corp. Comm'n, 77 P.2d 826, 832-33 ¶¶ 27-28 (Ariz. Ct. App. 1998) (adopting the Fifth Circuit rather than the Ninth Circuit's interpretation of *Howey*'s efforts-of-others prong and explaining that the Fifth Circuit's approach advances the Arizona legislature's intent to protect investors); Butler v. Am. Asphalt & Contracting Co., 540 P.2d 757, 760 (Ariz. 1975) ("The purpose of the Securities Act of 1933 . . . from which the Arizona Act governing the sale of securities, A.R.S. § 44-1801 et seq., was derived, is to safeguard the investing public from fraudulent devices and tricks in the sale of securities by requiring publication of certain information concerning securities before they are offered for sale.").

[57] The cases and their holdings are listed in the Appendix A.

federal courts published an additional seventeen opinions interpreting Arizona's securities laws.[58] Of these fifty decisions, nine (eighteen percent) rejected or refused to be bound by federal securities decisions on one or more issues.[59] In addition, fourteen (twenty-eight percent) were issued without citing a federal securities case to interpret the Arizona Securities Act.[60]

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[58] The cases and their holdings are listed in the Appendix B. Where it adds perspective, the article also discusses unpublished federal decisions that interpret Arizona securities statutes. *See, e.g., infra* notes 103 and 107 and accompanying text.

[59] *See* State v. Tober, 841 P.2d 206 (Ariz. 1992) (refusing to apply a U.S. Supreme Court decision concerning when promissory notes are securities); State v. Gunnison, 618 P.2d 604 (Ariz. 1980) (refusing to follow a U.S. Supreme Court decision regarding scienter under Rule 10b-5 and instead relying on a U.S. Supreme Court decision interpreting § 17(a) of the 1933 Act); *Hirsch,* 352 P.3d at 936 ¶ 41 (refusing to follow federal law on disgorgement to interpret restitution in enforcement actions by the Corporation Commission because of differences in statutory language); *Grand,* 147 P.3d at 776 ¶¶ 41-42, 778-79 ¶ 51 (refusing to follow federal authority on loss-causation and tender requirements when statutory rescission is sought under § 44-2001(A)); *Eastern Vanguard*, 79 P.3d at 97 ¶ 36, 101 ¶ 50 (refusing to follow certain Ninth Circuit decisions and a U.S. Supreme Court decision to interpret control liability); *Siporin*, 23 P.3d at 103-04 ¶¶ 28-35 (refusing to follow a D.C. Circuit decision holding that investments in viatical settlements were not securities); Carrington v. Ariz. Corp. Comm'n, 18 P.3d 97, 99 ¶ 10 (Ariz. Ct. App. 2000) (holding that in actions to enforce Securities Division's subpoenas Arizona courts look to federal securities decisions for guidance; but "when interpreting Arizona law, Arizona courts are not bound even by the United States Supreme Court's interpretation of federal securities laws"; and that a federal interpretation that viaticals were not securities was not binding Arizona law); *Nutek*, 977 P.2d at 832-33 ¶¶ 27-28 (refusing to follow a Ninth Circuit decision regarding the third element of *Howey*'s investment-contract test and instead relying upon a Fifth Circuit decision addressing the issue); Standard Chartered PLC v. Price Waterhouse, 945 P.2d 317, 329 (Ariz. Ct. App. 1996) (refusing to consider federal cases regarding the meaning of § 44-2003 (now § 44-2003(A))).

[60] *See* Strategic Diversity, Inc. v. Alchemix Corp., 666 F.3d 1197 (9th Cir. 2012); Garvin v. Greenbank, 856 F.2d 1392 (9th Cir. 1988); Facciola v. Greenberg Traurig LLP, 281 F.R.D. 363 (D. Ariz. 2012); *Grand*, 236 P.3d 398; State ex rel. Corbin v. Pickrell, 667 P.2d 1304 (Ariz. 1983); *Baumann,* 610 P.2d 38; Albers v. Edelson Tech. Partners L.P., 31 P.3d 821 (Ariz. Ct.

On the other hand, twenty-one decisions by Arizona appellate courts[61] and twelve decisions by federal courts[62] (sixty-six per-

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App. 2001); Aaron v. Fromkin, 994 P.2d 1039 (Ariz. Ct. App. 2000); *Standard Chartered*, 945 P.2d at 328-34; Hernandez v. Superior Court, 880 P.2d 735 (Ariz. Ct. App. 1994); Rosier v. First Fin. Capital Corp., 889 P.2d 11 (Ariz. Ct. App. 1994); Ariz. Corp. Comm'n v. Media Prods., Inc., 763 P.2d 527 (Ariz. Ct. App. 1988); London v. Green Acres Trust, 765 P.2d 538 (Ariz. Ct. App. 1988); State v. Agnew, 647 P.2d 1165 (Ariz. Ct. App. 1982). Although *Baumann* cites a Sixth Circuit securities-law decision, the Sixth Circuit opinion relies upon its interpretation of Ohio securities law—not federal securities law. *See Baumann*, 610 P.2d at 46 (citing United States ex rel. Shott v. Tehan, 365 F.2d 191, 194-95 (6th Cir. 1966) (interpreting Ohio securities law)).

[61] *See* Sell v. Gama, 295 P.3d 421, 426-27 ¶¶ 19-29 (Ariz. 2013); *Gunnison,* 618 P.2d at 606-07; *Baumann*, 610 P.2d at 46; *Hirsch*, 352 P.3d at 931-32 ¶ 22; *Shorey*, 359 P.3d at 1003 ¶ 21; Caruthers v. Underhill, 326 P.3d 268, 276 ¶ 34 n.5 (Ariz. Ct. App. 2014); Caruthers v. Underhill, 287 P.3d 807, 818 ¶¶ 43-45, 819 ¶¶ 51-52 (Ariz. Ct. App. 2012); *Grand,* 147 P.3d at 773-75 ¶¶ 30-36; *Eastern Vanguard*, 79 P.3d at 98-99 ¶¶ 41-42, 100-01 ¶¶ 46, 48-50; *Siporin,* 23 P.3d at 96-99 ¶¶ 19-35; *Nutek*, 977 P.2d at 832-33 ¶¶ 26-28; Foy v. Thorp, 920 P.2d 31, 38 (Ariz. Ct. App. 1996); MacCollum v. Perkinson, 913 P.2d 1097, 1104-06 (Ariz. Ct. App. 1996); DeJonghe v. E.F. Hutton & Co., 830 P.2d 862, 866 (Ariz. Ct. App. 1991); Vairo v. Clayden, 734 P.2d 110, 114-15 (Ariz. Ct. App. 1987); Daggett v. Jackie Fine Arts, Inc., 733 P.2d 1142, 1148-50 (Ariz. Ct. App. 1986); Trimble v. Am. Sav. Life Ins. Co., 733 P.2d 1131, 1135-36 (Ariz. Ct. App. 1986); State ex rel. Corbin v. Goodrich, 726 P.2d 215, 223-24 (Ariz. Ct. App. 1986); Sullivan v. Metro Prods. Inc., 724 P.2d 1242, 1245-46 (Ariz. Ct. App. 1986); State v. Barber, 653 P.2d 29, 32-33 (Ariz. Ct. App. 1982); Rose v. Dobras, 624 P.2d 887, 889-92 (Ariz. Ct. App. 1981).

[62] *See* Warfield v. Alaniz, 569 F.3d 1015, 1019 n.5 (9th Cir. 2009); Davis v. Metro Prods., Inc., 885 F.2d 515, 522-23 & n.10, 524-25 (9th Cir. 1989); Shivers v. Amerco, 670 F.2d 826, 831 (9th Cir. 1982); Little v. Valley Nat. Bank of Ariz., 650 F.2d 218, 220, 223 (9th Cir. 1981); In re Allstate Life Ins. Co. Litig., 971 F. Supp. 2d 930, 938-44 (D. Ariz. 2013); In re Nat'l Century Fin. Enters., Inc., 846 F. Supp. 2d 828, 888-90 (S.D. Ohio 2012); Facciola v. Greenberg Traurig, LLP, 781 F. Supp. 2d 913, 920-23 (D. Ariz. 2011); Allstate Life Ins. Co. v. Robert W. Baird & Co., Inc., 756 F. Supp. 2d 1113, 1157-61 (D. Ariz. 2010); R & L Ltd. Invs., Inc. v. Cabot Inv. Props., LLC, 729 F. Supp. 2d 1110, 1113-14, 1116-17 (D. Ariz. 2010); In re

cent of the total dataset) affirmatively relied on federal securities precedent to interpret Arizona securities law. Of these, three by the Ninth Circuit assumed (without independently analyzing Arizona's securities laws) that Arizona would follow federal law.[63] Several of the Arizona appellate decisions relied on federal securities precedent to support one point while refusing to follow federal securities law on another point.[64]

Some patterns appear in the cases. At the most general level, statutory interpretation under the Arizona Securities Act is the same as statutory interpretation overall. Neither Arizona's courts nor other American courts have a "generally ac-

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Nat'l Century Fin. Enters., Inc. Inv. Litig., 541 F. Supp. 2d 986, 1011 (S.D. Ohio 2007); Wojtunik v. Kealy, 394 F. Supp. 2d 1149, 1157 n.4, 1170 (D. Ariz. 2005); McDaniel v. Compania Minera Mar de Cortes, Sociedad Anonimo, Inc., 528 F. Supp. 152, 166-67 (D. Ariz. 1981).

[63] *See Warfield*, 569 F.3d at 1019 n.5; *Shivers,* 670 F.2d at 831; *Little*, 650 F.2d at 220.

[64] *See, e.g., Hirsch,* 352 P.3d at 931-32 ¶ 22, 935 ¶ 41 (relying on federal cases to hold that loss causation does not apply to enforcement actions by the Corporation Commission but refusing to follow federal law to interpret restitution under § 44-2032(1)); *Grand,* 147 P.3d at 773-75 ¶¶ 30-36, 776-77 ¶¶ 41-45, 778-79 ¶¶ 49-51 (relying upon a U.S. Supreme Court decision to explain loss causation but refusing to follow federal case law regarding loss causation and tender requirements for statutory rescission); *Eastern Vanguard Forex*, 79 P.3d at 98-99 ¶¶ 40-42, 101 ¶ 50 (relying on federal cases to define "control" but refusing to follow certain Ninth Circuit decisions and a U.S. Supreme Court decision on other aspects of control liability); *Nutek*, 977 P.2d at 832-33 ¶¶ 26-28 (relying on a Fifth Circuit decision interpreting *Howey* and rejecting a contrary Ninth Circuit decision); *MacCollum*, 913 P.2d at 1104-06 (interpreting notes as securities; refusing to use the Ninth Circuit's risk-capital test; and applying the U.S. Supreme Court's *Reves* test to define notes as securities for purpose of the Arizona Securities Act's fraud statutes); *see also Gunnison*, 618 P.2d at 606-07 (refusing to follow a U.S. Supreme Court decision regarding scienter under Rule 10b-5 and instead relying on a U.S. Supreme Court decision interpreting § 17(a) of the 1933 Act).

cepted and consistently applied theory of statutory interpretation."[65] Instead, all American courts use a mix of interpretative tools including textual analysis; legislative history, intent, and purpose; canons of interpretation; and precedent, both judicial and administrative.[66] Arizona securities decisions follow the same pattern.[67]

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[65] Henry M. Hart, Jr. & Albert M. Sacks, THE LEGAL PROCESS: BASIC PROBS. IN THE MAKING AND APPLICATION OF L. 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); *accord* Antonin Scalia, A MATTER OF INTERPRETATION: FED. CTS. AND THE L. 14 (1997) ("We American judges have no intelligible theory of what we do most."); *see also* True v. Stewart, 18 P.3d 707, 712 ¶ 24 (Ariz. 2001) ("It sometimes seems that in interpreting a statute, one can reach almost any result simply by selecting the rule of construction to be applied." (Feldman, J. concurring)). *But see* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1775-85 (2010) (describing the three-step methodology used to control statutory interpretation in Oregon).

[66] *See generally* William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garret, LEGIS. AND STATUTORY INTERPRETATION 9 (2000) (suggesting that practitioners should "craft their arguments as cumulative rhetoric, taking the most convincing pieces of whatever approaches best fit their side of the case"); Antonin Scalia & Bryan A. Garner, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 44-51 (2008) (explaining the importance of collectively using textual analysis, canons of construction, and legislative history to make persuasive arguments).

[67] *See, e.g.,* Sell v. Gama, 295 P.3d 421, 424-27 (Ariz. 2013) (using legislative intent and history (¶¶ 15, 17-18), textual analysis (¶ 16-17, 20), federal precedent (¶ 18-19, 21), and Arizona precedent (¶ 29) to decide statutory aiding-and-abetting issues); Grand v. Nacchio, 236 P.3d 398, 401-03 (Ariz. 2010) (interpreting A.R.S. § 44-2003(A) and using statutory purpose (¶ 16), textual analysis (¶¶ 17-18, 23), Arizona precedent (¶ 19), the canon against superfluity (¶ 22), and statutory structure (¶ 23)); Caruthers v. Underhill, 326 P.3d 268, 275-76 (Ariz. Ct. App. 2014) (interpreting statutory rescission issues and using Arizona precedent (¶¶ 30-31), textual analysis (¶ 33), dictionary meaning (¶ 33), federal precedent (¶ 34 n.5), and the presumption against changing the common law (¶ 33)); *see also True*, 18 P.3d at 712 ¶ 24 ("It sometimes seems that in interpreting a statute, one can reach almost any result simply by selecting the rule of construction to be applied." (Feldman, J. concurring)).

Second, because of this interpretative mix, Arizona cases frequently cite federal securities cases to accredit an interpretation supported in other ways—for example, by existing Arizona cases or other by principles of statutory interpretation.[68] *Sell,* for instance, supported its holding on aiding and abetting not only by relying on a U.S. Supreme Court decision eliminating aiding and abetting under Rule 10b-5 but through analysis of the Arizona Securities Act's text and legislative intent.[69]

Third, Arizona cases cite not only U.S. Supreme Court decisions but those in the lower- federal courts.[70] The U.S. Supreme Court has issued at least thirty-two decisions interpret-

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[68] *See, e.g.,* State v. Baumann, 610 P.2d 38, 46 (Ariz. 1980) (citing federal cases to accredit the court's holding that the text of § 44-2033 places the burden of proving a registration exemption on the defendant); *Caruthers,* 326 P.3d at 276 ¶ 34 n.5 (citing federal cases and an Arizona case in concluding that rescission under § 44-2002(A) is an equitable claim on which plaintiffs are not entitled to a jury trial); DeJonghe v. E.F. Hutton & Co., 830 P.2d 862, 866 (Ariz. Ct. App. 1991) (citing a federal case to accredit the court's holding that § 44-1991(2) (now § 44-1991(A)) does not require scienter); State ex rel. Corbin v. Goodrich, 726 P.2d 215, 223-24 (Ariz. Ct. App. 1986) (citing a Ninth Circuit case to accredit a finding supported by Arizona case law on the materiality of certain facts).

[69] *See Sell,* 295 P.3d at 425-27 ¶¶ 16-29.

[70] *See, e.g.,* Hirsch v. Ariz. Corp. Comm'n, 352 P.3d 925, 931-32 ¶ 22 (Ariz. Ct. App. 2015) (citing decisions by the federal Courts of Appeals and a district court in holding that loss causation does not apply in enforcement actions by the Corporation Commission); Shorey v. Ariz. Corp. Comm'n, 359 P.3d 997, 1003 ¶ 21 (Ariz. Ct. App. 2015) (citing a district-court decision on the materiality of an undisclosed 72.5% commission); *Caruthers,* 326 P.3d at 276 ¶ 34 n.5 (citing federal Courts of Appeals decisions to support the court's holding that plaintiffs were not entitled to a jury trial on their rescission claim for statutory securities fraud); Grand v. Nacchio, 147 P.3d 763, 774 ¶ 35 (Ariz. Ct. App. 2006) (citing lower federal-court decisions to explain loss causation under A.R.S. § 44-1991(A)); Nutek Info. Sys., Inc. v. Ariz. Corp. Comm'n, 977 P.2d 826, 830-31 ¶¶ 19-20, 832-33 ¶¶ 26-27 (Ariz. Ct. App. 1998) (relying upon Fifth Circuit decisions to explain when LLC interests are investment contracts and therefore securities).

ing the scope of § 10(b) and Rule 10b-5 liability.[71] Other opinions have been issued under a variety of other federal securities statutes. These include decisions that address civil liability under federal securities statutes besides § 10(b),[72] as well as such issues as what is a security and the requirements for a federal-registration exemption.[73] On top of these Supreme Court decisions are thousands of district-court and circuit-court decisions issued by federal judges.[74] The sheer volume of federal precedent creates opportunities for practitioners and Arizona courts

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[71] *See* Joseph A. Grundfest, *Damages and Reliance Under Section 10(b) of the Exchange Act*, 69 BUS. LAW. 307, 324-25 & n.85 (2014) (collecting the 28 cases decided before 2014). In 2014, two additional cases were decided. *See* Chadbourne & Parke LLP v. Troice, 134 S. Ct. 1058, 1063 (2014); Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014). Two more were decided in 2016. *See* Salman v. United States, 137 S. Ct. 420 (2016); Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 136 S. Ct. 1562 (2016).

[72] *See, e.g.,* Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1327-32 (2015) (explaining when statements of opinion qualify as false or misleading (by omission) statements under § 11(a) of the 1933 Act); Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 568-78 (1995) (interpreting the meaning of prospectus under § 12(a)(2) of the 1933 Act); Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1090-96 (1991) (discussing when statements of reason, opinion, or belief in proxy statements are actionable as material misrepresentations under § 14(a) of the 1934 Act); Randall v. Loftsgaarden, 478 U.S. 647, 655-60 (1986) (interpreting rescission and rescissionary damages under § 12(2) (now § 12(a)(2)) of the 1933 Act); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 445-50 (1976) (defining materiality for purposes of implied liability under § 14(a) of the 1934 Act).

[73] *See, e.g.,* Reves v. Ernst & Young, 494 U.S. 56, 60-70 (1990) (formulating a test for determining when a note is a security under the 1934 Act); Int'l Bhd. of Teamsters v. Daniel, 439 U.S. 551, 570 (1979) (holding that the 1933 and 1934 Acts do not apply to noncontributory, compulsory pension plans); SEC v. Ralston Purina Co., 346 U.S. 119, 122-27 (1953) (interpreting the 1933 Act's registration exemption for private offerings); SEC v. W.J. Howey Co., 328 U.S. 293, 298-301 (1946) (defining investment contracts under the 1933 Act).

[74] For example, a Westlaw search of all federal-circuit court and all federal-district court cases citing Rule 10b-5 since January 1, 1990 produced over 10,000 decisions.

to selectively mine federal cases for decisions that support their position. Arguably, *Sell* limits what can be cited by approving only citations to "settled federal securities cases."[75] Historically, however, the Arizona Court of Appeals has cited federal decisions where the circuits are divided[76] and where the law is not well developed.[77]

Fourth, until 2006, Arizona cases overlooked the relevance of § 12(a)(2) of the 1933 Act. A 2006 Court of Appeals decision involving issues regarding loss causation and statutory rescission correctly recognized that § 12(a)(2) is the federal counterpart of § 44-1991(A)(2).[78] Earlier decisions interpreting reliance and scienter under § 44-1991(A)(2) failed to identify § 12(a)(2) as a relevant federal statute.[79] Instead, the cases drew on precedent under § 17(a) of the 1933 Act and § 10(b) of the 1934 Act.[80] Although the cases reached the correct result—neither scienter nor reliance is required under § 44-

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[75] *See* Sell v. Gama, 295 P.3d 421, 425 ¶ 18 (Ariz. 2013).

[76] *See, e.g.,* Eastern Vanguard Forex, Ltd. v. Ariz. Corp. Comm'n, 79 P.3d 86, 98-99 ¶¶ 40-41 (Ariz. Ct. App. 2003) (citing Eighth and Fifth Circuit authority to define control while refusing to follow certain Ninth Circuit decisions); Nutek Info. Sys., Inc. v. Ariz. Corp. Comm'n, 977 P.2d 826, 832-33 ¶¶ 26-28 (Ariz. Ct. App. 1998) (relying on a Fifth Circuit decision interpreting *Howey* and rejecting a contrary Ninth Circuit decision).

[77] *See, e.g.,* Caruthers v. Underhill, 326 P.3d 268, 276 ¶ 34 n.5 (Ariz. Ct. App. 2014) (citing two decisions from the Second and Sixth Circuits to hold that a claim for rescission under A.R.S. § 44-2002(A) is an equitable claim on which the plaintiff is not entitled to a jury trial).

[78] *See* Grand v. Nacchio, 47 P.3d 763, 780 ¶ 58 (Ariz. Ct. App. 2006).

[79] *See, e.g.,* State v. Gunnison, 618 P.2d 604, 606-07 (Ariz. 1980) (relying upon Supreme Court precedent under § 17(a) to interpret state-of-mind requirements under § 44-1991(2) (now § 44-1991(A)(2)); Trimble v. Am. Sav. Life Ins. Co., 733 P.2d 1131, 1135-36 (Ariz. Ct. App. 1986) (citing implied-liability cases under §§ 10(b) and 14(a) of the 1934 Act in which exceptions to a reliance requirement were recognized); Rose v. Dobras, 624 P.2d 887, 892 (Ariz. Ct. App. 1981) (relying upon precedent under § 17(a) and § 10(b)).

[80] *See, e.g.,* cases cited *supra* note 79.

1991(A)(2)—they would have been better reasoned if they had relied on § 12(a)(2) precedent.[81]

Finally, the nine Arizona decisions that rejected federal securities law did so for multiple reasons. One reason is because of differences in statutory language.[82] Another is because of differences in policy.[83] In other cases, the appellate court rejected one line of federal case law in favor of another line.[84] And in two cases, the courts departed from U.S. Su-

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[81] *See* Kronenberg v. Katz, 872 A.2d 568, 598-99 (Del. Ch. 2004) (similar as to reliance and scienter under Pennsylvania's counterpart of § 44-1992(A)); Marram v. Kobrick Offshore Fund, Ltd., 809 N.E.2d 1017, 1026-27 (Mass. 2004) (citing authority under § 12(a)(2) and holding that under the Massachusetts Securities Act the plaintiff does not need to prove either scienter or reliance); *see also* 9 LOSS ET AL., *supra* note 42, at 168-69 nn.21, 23 (explaining that § 410(a)(2) of the 1956 Uniform Securities Act was modeled on § 12(2) (now § 12(a)(2)) and was intended to create liability for materially misleading statements without proof of reliance).

[82] *See* Hirsch v. Ariz. Corp. Comm'n, 352 P.3d 925, 935-36 ¶ 41 (Ariz. Ct. App. 2015) (refusing because of differences in statutory language to follow federal law on disgorgement to interpret restitution in enforcement actions by the Corporation Commission); *Grand,* 47 P.3d at 778-79 ¶ 51 (declining to follow federal case law in scheme-liability cases because "the federal statutes contain no explicit rescission remedy" like that in § 44-2001(A)); Standard Chartered PLC v. Price Waterhouse, 945 P.2d 317 (Ariz. Ct. App. 1996) (declining to consider federal case law because § 44-2003 (now § 44-2003(A)) has no federal counterpart).

[83] *See, e.g.,* Eastern Vanguard Forex, Ltd. v. Ariz. Corp. Comm'n, 79 P.3d 86, 97 ¶ 36 (Ariz. Ct. App. 2003) (declining to follow cases in the Ninth Circuit that the court characterized as too restrictive to adequately guard the public); Siporin v. Carrington, 23 P.3d 92, 99 ¶ 35 (Ariz. Ct. App. 2001) (refusing to follow federal decision because its "rationale does not serve the prophylactic and remedial purposes of the Arizona Securities Act").

[84] *See* Nutek Info. Sys., Inc. v. Ariz. Corp. Comm'n, 977 P.2d 826, 832-33 ¶¶ 26-28 (Ariz. Ct. App. 1998) (interpreting *Howey* and rejecting the Ninth Circuit's knowledge test in favor of the Fifth Circuit's test); Daggett v. Jackie Fine Arts, Inc., 733 P.2d 1142, 1148-49 (Ariz. Ct. App. 1986) (noting that the lower-federal courts are divided on whether both horizontal and vertical commonality are required for a common enterprise and adopting the

preme Court precedent without fully acknowledging that they were doing so. In the first case, the Arizona Supreme Court fashioned a novel definition of when promissory notes are securities.[85] In the second case, *Shorey,* the Arizona Court of Appeals applied Arizona's securities-registration and antifraud statutes to an Arizona-based issuer's sales to foreign investors.[86]

Shorey cited Arizona's interest in protecting its business reputation and rejected arguments that extraterritorial application was federally preempted and violated the federal Commerce Clause.[87] *Shorey* failed to discuss the U.S. Supreme Court's *Morrison* decision, which held that federal securities laws should not be given extraterritorial application.[88] The same decision found unpersuasive the argument accepted by *Shorey* that without extraterritorial application, the U.S. was at risk of becoming a base of operations for fraudulent securi-

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Ninth Circuit's approach allowing use of either horizontal or vertical commonality).

[85] *Compare* State v. Tober, 841 P.2d 206, 208-09 (Ariz. 1992) (declining to follow Reves v. Ernst & Young, 494 U.S. 56 (1990) and holding that a note is not a security under Arizona's registration statutes if it is exempt from registration), *with* SEC v. Wallenbrock, 313 F.3d 532, 536-40 (9th Cir. 2002) (applying *Reves* to both registration and antifraud violations).

[86] Shorey v. Ariz. Corp. Comm'n, 359 P.3d 997, 1004-08 ¶¶ 25-44 (Ariz. Ct. App. 2015).

[87] *Id.* at 263 ¶ 40, 359 P.3d at 1007 ¶ 40 ("A state has an interest in seeing that its territory is not used as a base of operations to conduct illegal sales in other states. Thus, the host state has an interest in protecting its reputation as not being a center for illegal or questionable securities activity." (quoting Ariz. Corp. Comm'n v. Media Products, Inc., 763 P.2d 527, 533 (Ariz. Ct. App. 1988)).

[88] *See* Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 267 (2010) (holding that § 10(b) of the 1934 Act applies only to transactions in securities listed on domestic exchanges and to domestic transactions in other securities).

ties sales.[89]

IV. IDENTIFYING RELEVANT FEDERAL LAW: A SUGGESTED APPROACH

No case has attempted to comprehensively list the principles of statutory interpretation that should be followed to decide whether to cite federal securities law. But when carefully analyzed, the cases and intent provisions in Arizona's securities statutes articulate a core of interpretative principles. The cases state, for example, that relying on federal cases may not be appropriate because of differences in statutory language or policy.[90] The Arizona Supreme Court has also suggested that it will only follow settled federal law.[91] Other cases show that judge-made rules under implied-liability provisions like Rule 10b-5 may not be appropriate under the express-liability provisions of Arizona's securities statutes.[92] The cases also show it

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[89] *See id.* at 270 (rejecting argument that extraterritorial jurisdiction was proper to prevent "the United States from becoming a 'Barbary Coast' for malefactors perpetrating frauds in foreign markets").

[90] *See* Sell v. Gama, 295 P.3d 421, 424-25 ¶¶ 12, 18 (Ariz. 2013) (noting that the court will give less weight to and not necessarily defer to federal securities law when the federal statutes or their policies are materially different); Standard Chartered PLC v. Price Waterhouse, 945 P.2d 317, 329 (Ariz. Ct. App. 1996) ("Because, however, there is no counterpart in those [federal] statutes to the participation-or-inducement standard of our state statute, the federal statutes do not guide us here."); *see also* In re Allstate Life Ins. Co. Litig., 971 F. Supp. 2d 930, 944 (D. Ariz. 2013) (holding that unlike § 12(a)(2) of the 1933 Act, § 44-1991(A) is not limited to misleading statements made in a prospectus used in an initial public offering).

[91] *See Sell*, 295 P.3d at 424-25 ¶¶ 12, 18 (stating that the court will follow "settled federal securities law" unless there is a good reason not to); *see also* State v. Gunnison, 618 P.2d 604, 606-07 (Ariz. 1980) ("Unless there is a good reason for deviating from the United States Supreme Court's interpretation, we will follow the reasoning of that court in interpreting sections of our statutes which are identical or similar to federal securities statutes.").

[92] *See* Grand v. Nacchio, 147 P.3d 763, 778-79 ¶ 51 (Ariz. Ct. App. 2006) (refusing to apply Rule 10b-5 loss-causation requirements to rescission

may be necessary to consider more than one federal statute to decide whether federal law is relevant.[93]

Other cases reveal the importance of the intent statutes.[94] The intent statutes explain that the purpose of Arizona's securities laws is public protection;[95] that narrow interpreta-

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claims based on § 44-1991(A)(1) or (3) and noting that unlike the Arizona statutes, the federal statutes do not contain an express-rescission remedy for violations of scheme provisions like those in § 44-1991(A)(1) or (3)); *see also* Strategic Diversity, Inc. v. Alchemix Corp., 666 F.3d 1197, 1209 (9th Cir. 2012) (holding that unlike federal law under Rule 10b-5, "rescission under Arizona securities law does not require the existence of damages").

[93] *See Grand,* 147 P.3d at 778-79 ¶ 51 (declining to follow either Rule 10b-5 of the 1934 Act or § 12(a)(2) of the 1933 Act regarding loss causation requirements for claims seeking *rescission* for violations of § 44-1991(A)(1) and (3)); *see also id.* at 26 ¶¶ 58-59, 147 P.3d at 780 ¶¶ 58-59 (using loss-causation requirements under Rule 10b-5 and § 12(a)(2) to explain the loss-causation rules that govern *damages* under § 44-1991(A)'s three subsections).

[94] On the importance of statutes describing the legislature's purpose, see *Grand Canyon Trust v. Ariz. Corp. Comm'n*, 107 P.3d 356, 366 ¶ 30 n.13 (Ariz. Ct. App. 2005) (a session law's "statement of legislative purpose is itself enacted and is thus subject to the entire review process by which a bill becomes law. The statement is thus free from some of the vagaries that can otherwise accompany a judicial search for legislative intent."); *accord* Flood Control Dist. of Maricopa Cnty. v. Paloma Inv. Ltd. P'ship, 350 P.3d 826, 831 ¶ 20 (Ariz. Ct. App. 2015) ("When the legislature specifies the statute's applicability or purpose in the session law that contains the statute, it is appropriate to interpret the statutory provisions in light of that enacted purpose.").

[95] *See* Securities Act of Arizona, ch. 18, § 20, 1951 Ariz. Sess. Laws 46, 75:

> The intent and purpose of this Act is for the protection of the public, the preservation of fair and equitable business practices, the suppression of fraudulent or deceptive practices in the sale or purchase of securities, and the prosecution of persons engaged in fraudulent or deceptive practices in the sale or purchase of securities. This Act shall not be given a narrow or restricted interpretation or con-

tions are to be avoided;[96] that the statutes should be liberally construed;[97] that federal cases should be cited only when the Arizona and federal statutes are substantially similar;[98] and that interpretations by the SEC of substantially similar federal statutes may be considered.[99] The courts use these statutory expressions of legislative intent to evaluate and sometimes reject federal case law.[100]

When synthesized, the intent statutes and case law identify the body of interpretative principles that should be followed in deciding whether federal securities law provides relevant guidance on Arizona securities law. These principles are summarized below in ten questions and explanatory comments.

> struction, but shall be liberally construed as a remedial measure in order not to defeat the purpose thereof.

See also cases cited *supra* note 56 (regarding the ASA's public-protection goals).

[96] Securities Act of Arizona, ch. 18, § 20, 1951 Ariz. Sess. Laws 46, 75 (providing that the "Act shall not be given a narrow or restricted interpretation"); *see also* Eastern Vanguard Forex, Ltd. v. Ariz. Corp. Comm'n, 79 P.3d 86, 97 ¶ 36 (Ariz. Ct. App. 2003) (citing § 20 of the 1951 Act and declining to follow Ninth Circuit cases that the court characterized as too restrictive to adequately guard the public).

[97] Securities Act of Arizona, ch. 18, § 20, 1951 Ariz. Sess. Laws 46, 75 (providing that the Act "shall be liberally construed as a remedial measure"); *see also Grand*, 147 P.3d at 776-77 ¶¶ 42, 45 (noting the Arizona legislature's intent that the securities laws be liberally construed and refusing to follow federal case law that would have narrowed the plaintiff's choice of remedies under § 44-2001(A)).

[98] *See* Private Securities Litigation Act, ch. 197, § 11(C), 1996 Ariz. Sess. Laws 1003, 1023 (providing that the courts may use as a guide interpretations of "substantially similar provisions in the federal securities laws of the United States") (quoted in full *supra* note 4).

[99] *See id.* (providing that interpretations by the SEC may be used as a guide).

[100] *See, e.g.,* cases cited *supra* notes 96-97.

Questions	**Comments**
Is the text of the Arizona statute the same as the federal statute?	Some provisions in the Arizona Securities Act have no federal counterpart.[101] In cases involving these unique Arizona statutes, the courts have declined to consider federal case law.[102] In other instances, the Arizona and federal statutes are similar but have textual differences that require different interpretations.[103]

[101] *See, e.g., Grand,* 147 P.3d at 779 ¶ 51 (explaining that "the federal statutes contain no explicit rescission remedy" for scheme violations like those prohibited by § 44-1991(A)(1) and (3)); Standard Chartered, PLC v. Price Waterhouse, 945 P.2d 317, 329 (Ariz. Ct. App. 1996) (refusing to consider federal case law because there is no federal counterpart to § 44-2003 (now § 44-2003(A))).

[102] *See* cases cited *supra* notes 96-97.

[103] *See, e.g.,* In re Allstate Life Ins. Co. Litig., 971 F. Supp. 2d 930, 944 (D. Ariz. 2013) (holding that unlike § 12(a)(2) of the 1933 Act, § 44-1991(A) does not require a plaintiff to prove it purchased securities as part of an initial public offering); In re Allstate Life Ins. Co. Litig., No. CV-09-8162-PCT-GMS, 2012 WL 1900560, at *5 n.3 (D. Ariz. May 24, 2012) (stating that unlike the U.S. Supreme Court's interpretation of Rule 10b-5, the Arizona Securities Act "appears to create liability for one's participation in creating a misleading statement even where one is not the 'maker' of the statement." (citing A.R.S. § 44-2003(A) (2013))); Hirsch v. Ariz. Corp. Comm'n, 352 P.3d 925, 935 ¶ 41 (Ariz. Ct. App. 2015) (noting differences in statutory text and refusing to follow precedent under the federal-disgorgement statute to interpret restitution in securities-enforcement actions by the Corporation Commission).

Is the federal court's interpretation one that reduces public protection?	Some federal decisions adopt interpretations that conflict with the 1951 Act's intent to foster public protection.[104]
Does the federal case adopt a narrower interpretation than what is required by the statute's language?	Some federal decisions adopt narrower interpretations than a fair reading of the statute requires.[105] These cases are inconsistent with the Arizona legislature's intent to have Arizona's securities laws liberally construed without narrow or restricted interpretations.[106]

[104] *See Grand*, 147 P.3d at 776-77 ¶¶ 42, 45 (noting the Arizona legislature's intent that the securities laws be liberally construed and refusing to follow federal case law that would have narrowed the plaintiff's choice of remedies under § 44-2001(A)); Eastern Vanguard Forex, Ltd. v. Ariz. Corp. Comm'n, 79 P.3d 86, 97 ¶ 36 (Ariz. Ct. App. 2003) (declining to follow certain cases in the Ninth Circuit that the court characterized as too restrictive to adequately guard the public); Siporin v. Carrington, 23 P.3d 92, 99 ¶ 35 (Ariz. Ct. App. 2001) (refusing to follow federal decision because its "rationale does not serve the prophylactic and remedial purposes of the Arizona Securities Act").

[105] *See* cases cited *supra* notes 44-52 and accompanying text (discussing the U.S. Supreme Court's practice of interpreting Rule 10b-5 and § 10(b) of the 1934 Act more narrowly than their words require).

[106] *Compare, e.g.,* Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 165, 167 (2008) (expressing concern about avoiding expansion of Rule 10b-5 and stating that the Rule's implied cause of action should be given "narrow dimensions"), *with Eastern Vanguard*, 79 P.3d at 101 ¶ 50 (declining to follow U.S. Supreme Court precedent that would read a state-of-mind requirement into Arizona's control-liability statute because of the "legislative directive that Arizona's securities laws be interpreted liberally to protect the public"), *and Siporin*, 23 P.3d at 99 ¶ 35 (refusing to follow federal decision because its "rationale does not serve the prophylactic and remedial purposes of the Arizona Securities Act").

Does the federal court's method of statutory interpretation conflict with established methods of Arizona interpretation?	U.S. Supreme Court decisions, particularly those involving civil liability under Rule 10b-5, sometimes adopt narrower interpretations that contradict normal statutory interpretation in Arizona.[107]
Is federal case law settled?	If the U.S. Supreme Court has not addressed the issue, the lower-federal courts may not have developed a settled position.[108] The Arizona Supreme Court has only approved citing settled-federal securities law.[109]

[107] *Compare, e.g.,* Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 151 (2011) (criticizing the majority for interpreting the word "make" in Rule 10b-5 to contradict ordinary English (Breyer, J., dissenting)), *with* Red River Res., Inc. v. Mariner Sys., Inc., No. CV 11-02589-PHX-FJM, 2012 WL 2507517, at *10 (D. Ariz. June 29, 2012) ("While *Janus* limited liability under Rule 10b-5 to those with ultimate authority over a statement, Arizona has not defined 'make' in § 44-1991(A)(2) in the same way.").

[108] *See* cases cited *supra* notes 8-9 and accompanying text (discussing the small number of securities-law decisions issued by the U.S. Supreme Court) and *supra* notes 22-28 and accompanying text (discussing the frequently unsettled nature of federal securities law).

[109] *See* Sell v. Gama, 295 P.3d 421, 424-25 ¶¶ 12, 18 (Ariz. 2013) (stating that the court will follow "settled federal securities law" unless there is a good reason not to).

If unsettled federal case law is cited, what justifies its use?	If federal case law is cited on an issue where federal law is unsettled or conflicting, that fact should be mentioned. A reasoned explanation should then be provided as to why the selected case law provides an appropriate interpretation of the Arizona statute.[110]
Does more than one federal statute with similar language exist?	The federal securities laws include nine acts.[111] As a result, multiple federal statutes may be similar to the language of an Arizona statute.[112] If federal precedent is cited, all potentially relevant statutes and the differences in their elements and remedies should be considered.[113]

[110] *See, e.g., Eastern Vanguard*, 79 P.3d at 98-99 ¶¶ 39-41 ((a) noting conflicting positions by the federal courts on whether actual participation in a securities violation is required for control liability and (b) concluding that participation should not be required because the plain language of Arizona's control-liability statute (§ 44-1999(B)) does not support a participation requirement); Nutek Info. Sys., Inc. v. Ariz. Corp. Comm'n, 77 P.2d 826, 832-33 ¶¶ 27-28 (Ariz. Ct. App. 1998) (adopting the Fifth Circuit rather than the Ninth Circuit's interpretation of the efforts-of-others element of investment contracts and explaining that the Fifth Circuit's approach advances the Arizona legislature's intent to protect investors and more accurately takes account of the economic realities of the transaction).

[111] *See supra* note 29 and accompanying text (listing the federal acts).

If more than one federal statute applies, do the statutes have different elements of proof?

Federal securities statutes sometimes provide cumulative remedies.[114] Sometimes this statutory overlap exists even when the federal statutes "involve distinct causes of action and were intended to address different types of wrongdoing."[115] Care must therefore be taken to identify the federal statute that most closely parallels the Arizona statute.[116]

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[112] *See* Pritchard, *supra* note 46, at 234-37 (discussing the different approaches to reliance under the 1933 and 1934 Acts' antifraud statutes).

[113] *See, e.g.,* State v. Gunnison, 618 P.2d 604, 606-07 (Ariz. 1980) (implicitly noting differences in state-of-mind requirements under § 17(a) of the 1933 Act and § 10(b) of the 1934 Act and interpreting § 44-1991 (now § 44-1991(A)) on the basis of the U.S. Supreme Court's interpretation of § 17(a)); Grand v. Nacchio, 147 P.3d 763, 778-79 ¶ 51, 780 ¶¶ 58-59 (Ariz. Ct. App. 2006) (analyzing case law regarding loss causation under both § 12(a)(2) of the 1933 Act and Rule 10b-5 of the 1934 Act).

[114] *See* cases cited *supra* notes 37-40 and accompanying text.

[115] *See* cases cited *supra* notes 39-40 and accompanying text (regarding the different reliance and scienter requirements under the federal antifraud statutes); Grundfest, *supra* note 71, at 330-43 (discussing the elements of proof under the seven express-liability statutes that existed when the 1933 and 1934 Acts were initially enacted); Pritchard, *supra* note 46, at 234-37 (discussing the different approaches to reliance under the 1933 and 1934 Acts' antifraud statutes).

[116] *See, e.g., Gunnison*, 618 P.2d at 606-07 (implicitly noting differences in state-of-mind requirements under § 17(a) of the 1933 Act and § 10(b) of the 1934 Act and interpreting § 44-1991 (now § 44-1991(A)) on the basis of the U.S. Supreme Court's interpretation of § 17(a)); *Grand,* 147 P.3d at 778-79 ¶ 51, 780 ¶¶ 58-59 (analyzing case law regarding loss causation under both § 12(a)(2) of the 1933 Act and Rule 10b-5 of the 1934 Act).

Is the federal statute an express-liability statute or an implied-liability statute?	Arizona's securities statutes provide for express-liability and articulate the available remedies and elements of proof within the statutes' text.[117] By contrast, with implied remedies like those under Rule 10b-5, the elements of proof and permissible remedies were judicially created and often cannot be explained by the statute's text.[118] This judge-made law may be inconsistent with Arizona's statutes.[119]

[117] *See* Sell v. Gama, 295 P.3d 421, 427 ¶ 28 (Ariz. 2013) ("[T]he ASA prescribes the available remedies and categories of potential defendants, and articulates the 'elements of securities fraud.'" (quoting in part Aaron v. Fromkin, 994 P.2d 1039, 1042 ¶ 13 (Ariz. Ct. App. 2000) ("The elements of securities fraud are articulated within the statute itself.")).

[118] *See* Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 84 (2006) (acknowledging that the court had relied "chiefly, and candidly, on 'policy considerations'" to interpret Rule 10b-5's "'in connection with'" language as a limitation that restricts Rule 10b-5 claims to persons who actually purchase or sell a security (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737, 749 (1975))); *see also supra* note 46 and accompanying text (explaining that reliance is a required element under Rule 10b-5 even though nothing in the text of the Rule or § 10(b) of the 1934 Act requires reliance).

[119] *See, e.g., Gunnison*, 618 P.2d at 606-07 (overruling prior case law and refusing to follow U.S. Supreme Court precedent on Rule 10b-5 scienter regarding § 44-1991(2) (now § 44-1991(A)(2))). *Compare also* Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 151 (2011) (criticizing the majority for interpreting the word "make" in Rule 10b-5 in a manner that contradicts ordinary English (Breyer, J., dissenting)), *with* Red River Res., Inc. v. Mariner Sys., Inc., No. CV 11-02589-PHX-FJM , 2012 WL 2507517, at *10 (D. Ariz. June 29, 2012) ("While *Janus* limited liability

Does relevant precedent by the SEC or a state court exist?	Sometimes the SEC's rules or administrative decisions may provide relevant guidance.[120] Securities law in other states may also be relevant.[121]

From this ten-part list, the core principles that should govern citations to federal precedent can be stated even more succinctly. First, as an overarching principle, the text of Arizona's statutes should be given their fair meaning.[122] Second,

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under Rule 10b-5 to those with ultimate authority over a statement, Arizona has not defined 'make' in § 44-1991(A)(2) in the same way.").

[120] *See* Eastern Vanguard Forex, Ltd. v. Ariz. Corp. Comm'n, 79 P.3d 86, 99 ¶ 41 (Ariz. Ct. App. 2003) (relying upon an SEC rule defining control to interpret control-liability under § 44-1999(B)); *see also* Allstate Life Ins. Co. v. Robert W. Baird & Co., 756 F. Supp. 2d 1113, 1161 (D. Ariz. 2010) (refusing to apply SEC Rule 131 to interpret § 44-1998 because of uncertainty about the Rule's relevance); John P. Flannery and James D. Hopkins, Exchange Act Release No. 3981, 2014 WL 7145625, at *14 & n.69 (Dec. 15, 2014) (disagreeing with decisions from the Second, Eighth, and Ninth Circuits on the scope of liability under Rule 10b-5(a) and (c)), *vacated on other grounds sub nom.* Flannery v. SEC, 810 F. 3d 1 (1st Cir. 2015).

[121] *See* Private Securities Litigation Act, ch. 197, § 11(C), 1996 Ariz. Sess. Laws 1003, 1023 (providing that decisions of "the federal *or other courts*" may be used as a guide in construing substantially similar provisions in Arizona's securities laws (emphasis added)); State v. Baumann, 610 P.2d 38, 46 (Ariz. 1980) (relying upon a federal court's interpretation of Ohio securities law to explain that a defendant who claims the benefit of a registration exemption has the burden of proof (citing United States ex rel. Shott v. Tehan, 365 F.2d 191 (6th Cir. 1966))); Grand v. Nacchio, 147 P.3d 763, 775-76 ¶¶ 39-40 (Ariz. Ct. App. 2006) (relying in part on common-law cases from other states as authority for interpreting § 44-2001(A)'s tender requirement).

[122] *Grand,* 147 P.3d at 778-79 ¶¶ 50-51 (finding no support in the text for a loss-causation requirement when the plaintiff seeks rescission under § 44-1991(A)(1) or (3)); *Eastern Vanguard*, 79 P.3d at 99 ¶ 41 ("The plain lan-

federal cases should not be used to support narrow interpretations not required by an Arizona statute's words.[123] Third, requirements from federal case law should not be added to a statute when the requirements are not supported by its text.[124] And fourth, if an interpretation that furthers public protection is supported by the statute's text, that interpretation is the preferred one even if federal cases reach a different interpretation.[125] These four principles—giving the words their fair meaning; avoiding narrow interpretations; avoiding nontextual requirements; and adopting textually permitted interpretations that advance public protection—describe the predominate approach followed in Arizona securities cases. If fairly applied,

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guage of the statute [A.R.S. § 44-1999(B)] does not support a requirement that a 'controlling person' must have actually participated in the specific action upon which the securities violation is based.").

[123] *See Eastern Vanguard*, 79 P.3d at 98-99 ¶¶ 40-41 (concluding that the plain language of Arizona's control statute does not support the participation requirement added by some federal courts); Siporin v. Carrington, 23 P.3d 92, 99 ¶ 35 (Ariz. Ct. App. 2001) (refusing to follow federal decision because its "rationale does not serve the prophylactic and remedial purposes of the Arizona Securities Act").

[124] *See Grand,* 147 P.3d at 778-79 ¶¶ 50-51(finding no support in the text for a loss-causation requirement when the plaintiff seeks rescission under § 44-1991(A)(1) or (3)); *Eastern Vanguard*, 79 P.3d at 99 ¶ 41 (declining to follow contrary federal law and holding that a participation requirement for control liability is not supported by the text of Arizona's statute).

[125] *See, e.g., Grand,* 147 P.3d at 777-78 ¶¶ 45-48 (declining to follow contrary federal precedent and interpreting tender under § 44-2001(A) to permit substitute tender because that approach better protected the public); Nutek Info. Sys., Inc. v. Ariz. Corp. Comm'n, 77 P.2d 826, 832-33 ¶¶ 26-27 (Ariz. Ct. App. 1998) (adopting the federal interpretation of investment contracts that best protected investors); *cf.* DMK Biodiesel, LLC v. McCoy, 859 N.W.2d 867, 871-76 (Neb. 2015) (stating that Nebraska's securities act should be construed to afford the greatest possible public protection and refusing to follow Rule 10b-5 cases on reliance, constructive knowledge, an investor's duty to investigate, and the right to rely on oral representations that contradict written disclosures).

these principles will distinguish relevant federal case law from cases that are only superficially relevant.

Interpretive principles may of course sometimes point in different directions.[126] And the courts are not always consistent.[127] Interpretative canons are sometimes marshaled or distinguished in the manner that best suits the outcome the court prefers.[128] Federal cases can be selectively cited the same way.[129] But if fairly applied, the four suggested princi-

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[126] *See, e.g.,* Sell v. Gama, 295 P.3d 421, 426 ¶ 23 (Ariz. 2013) (acknowledging that the securities laws are to be liberally construed but placing greater weight on the absence of textual support for a separate or implied claim for aiding-and-abetting liability).

[127] *Compare id.* at 427 ¶ 10 (concluding that decisions recognizing common-law liability for aiding torts "do not persuade, let alone compel us, to extend common law aiding and abetting liability to the ASA [Arizona Securities Act]"), *with* Caruthers v. Underhill, 326 P.3d 268, 276 ¶ 33, 277 ¶ 37 (Ariz. Ct. App. 2014) (holding that a securities seller's right to statutory rescission is subject to nonstatutory, equitable defenses and citing the canon that courts will usually presume that the legislature did not intend to change the common law).

[128] *See* True v. Stewart, 18 P.3d 707, 712 ¶ 24 (Ariz. 2001) ("It sometimes seems that in interpreting a statute, one can reach almost any result simply by selecting the rule of construction to be applied." (Feldman, J. concurring)). *Compare Caruthers*, 326 P.3d at 277-78 ¶ 40 (rejecting the argument that the legislature's decision to enact express, statutory defenses to securities violations implied the legislature's intent to exclude nonstatutory defenses), *with* Legacy Res., Inc. v. Liberty Pioneer Energy Source, Inc., 322 P.3d 683, 692-93 ¶ 41 (Utah 2013) (concluding that recognizing equitable defenses was inconsistent with the Utah legislature's listing of specific statutory defenses).

[129] *Compare* In re Allstate Life Ins. Co. Litig., Nos. CV-09-01862-PCT-GMS, CV-09-8174-PCT-GMS, 2013 WL 5161688, at *13-15 (D. Ariz. Sept. 13, 2013) (relying upon federal cases to hold that scheme or course-of-conduct liability under § 44-1991(A)(1) or (3) requires conduct beyond misrepresentations or omissions), *with* Facciola v. Greenberg Traurig, LLP, 781 F. Supp. 2d 913, 922 (D. Ariz. 2011) (refusing to rely on federal cases cited by defendants and holding that § 44-1991(A)(1) and (3) do impose liability for misleading disclosures or omissions).

ples provide a reasoned and predictable approach to the use of federal securities law.

V. CONCLUSION

Both the Arizona Supreme Court and the Arizona legislature have approved using federal securities cases as interpretive guides. Under the case law, it is proper to look to federal securities law when federal law is settled and the Arizona and federal statutes are similar. In practice, however, federal law has limited utility. Many examples exist of Arizona securities decisions that do not cite federal decisions. In other decisions, the courts have expressly declined to follow federal case law.

Several reasons for the limited utility of federal law exist. One is the small volume of securities-law precedent generated by the U.S. Supreme Court, which averages only 1.3 securities cases per term. A second is that many of the Supreme Court's decisions turn on uniquely federal issues of little or no relevance to state securities law. A third is that the Supreme Court's small output results in open issues on which the lower-federal courts often disagree.

A fourth is the breadth and overlap of the nine federal securities acts that have been enacted since 1933. These laws provide cumulative remedies even when the elements of proof are different. As a result, identifying the most relevant federal counterpart can be challenging. This is illustrated by the tendency in Arizona decisions to focus on decisions under Rule 10b-5 without considering other analogous federal statutes such as §§ 11(a) and 12(a)(2) of the 1933 Act.[130]

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[130] *See* cases cited *supra* notes 41-43 and accompanying text.

Finally, differences in approach by Arizona's appellate courts and the U.S. Supreme Court on statutory interpretation and securities-law policy may also curb the relevance of federal precedent.[131]

Yet despite the limitations and difficulties in applying federal law, it is possible to cite federal cases in a principled way. Part IV provides an approach to identifying relevant law that can be reduced to four core principles of interpretation. Those principles, if fairly applied, will distinguish relevant federal precedent from precedent that is only superficially relevant.

[131] *See* cases cited *supra* notes 44-56 and accompanying text.

Appendix A

Reported Arizona Securities-Law Decisions: 1980-2017

Arizona Supreme Court Decisions

1. Grand v. Nacchio, 176 ¶ 24, 236 P.3d 398, 401-02 ¶ 18, 403 ¶ 24 (Ariz. 2010) (interpreting § 44-2003(A) and holding that (a) a complaint need not separately parse whether a defendant made, participated in, or induced an unlawful sale, (b) plaintiff's allegations did not describe statutory participation, and (c) allegations that defendants' acts and omissions encouraged plaintiff to buy stock described "classic inducement").

2. Sell v. Gama, 295 P.3d 421, 425-27 & n.6 ¶¶ 19-24 (Ariz. 2013) (holding that "a separate claim for aiding and abetting does not exist under the ASA" and leaving open whether participant liability under § 44-2003(A) is broad enough to cover aiding and abetting).

3. State ex rel. Corbin v. Pickrell, 667 P.2d 1304, 1307 (Ariz. 1983) (holding that the "legislature intended the consumer fraud act to provide an additional avenue of relief to those aggrieved by securities act violations").

4. State v. Baumann, 610 P.2d 38, 46 (Ariz. 1980) (holding in a criminal case that (a) the defendant has the burden of proving a registration exemption and (b) to prove a registration exemption the defendant "must hold a good-faith belief that the security to be exempted was in fact a bona fide security").

5. State v. Gunnison, 618 P.2d 604, 606-07 (Ariz. 1980) (overruling prior case law that held that § 44-1991(2) (now § 44-1991(A)(2)) requires scienter and holding, on the basis of the U.S. Supreme Court's interpretation of § 17(a) of the 1933 Securities Act, that scienter is not required for a § 44-1991(2) violation).

6. State v. Tober, 841 P.2d 206, 207-09 (Ariz. 1992) (distinguishing registration and antifraud violations in deciding when notes are securities; rejecting the federal, *Reves* [494 U.S. 56 (1990)] test when a registration violation is alleged; and holding that a promissory note is a security under the registration statutes unless the note falls within a registration exemption).

Arizona Court of Appeals Decisions

1. Aaron v. Fromkin, 994 P.2d 1039, 1042-44 ¶¶ 13-24 (Ariz. Ct. App. 2000) (discussing the elements of securities fraud under § 44-1991(A); concluding that damage is not a required element; and holding that the statute of limitations had run).

2. Albers v. Edelson Tech. Partners L.P., 31 P.3d 821, 825-26 ¶¶ 13-16 (Ariz. Ct. App. 2001) (holding that plaintiff's allegations that defendants promised funding and assistance that they never intended to provide stated a claim under §44-1991(A)).

3. Ariz. Corp. Comm'n v. Media Prods., Inc., 763 P.2d 527, 529-34 (Ariz. Ct. App. 1988) (interpreting the meaning of offer or sell "*from* this state" in § 44-1841 (the registration statute) and concluding that (a) the offer and sale were from Arizona and (b) application of the statute to a Delaware issuer was, under the facts, a violation of the federal Commerce Clause).

4. Carrington v. Ariz. Corp. Comm'n, 18 P.3d 97, 99 ¶ 10 (Ariz. Ct. App. 2000) (holding in an action to enforce the Securities Division's subpoenas that (a) "when interpreting Arizona law, Arizona courts are not bound even by the United States Supreme Court's interpretation of federal securities

laws" and (b) a federal case holding that viatical settlements are not securities was not binding Arizona law).

5. Caruthers v. Underhill, 287 P.3d 807, 818 ¶ 43 (Ariz. Ct. App. 2012) (discussing the materiality of appraisals and estimates of value and holding that materiality in securities cases contemplates a showing that an omitted fact *would have* been significant to a reasonable shareholder or *would have* significantly altered the total mix of information).

6. Caruthers v. Underhill, 326 P.3d 268, 274-78 ¶¶ 24-40 (Ariz. Ct. App. 2014) (holding that (a) rescission under § 44-2002(A) is an equitable remedy subject to equitable defenses, but (b) if rescission proves unavailable because of a successful defense, a plaintiff may seek damages).

7. Daggett v. Jackie Fine Arts, Inc., 733 P.2d 1142, 1148-49 (Ariz. Ct. App. 1986) (applying the *Howey* investment-contract test and holding that *Howey*'s common-enterprise element may be established by either horizontal or vertical commonality).

8. DeJonghe v. E.F. Hutton & Co., 830 P.2d 862, 866 (Ariz. Ct. App. 1991) (holding that scienter is not required under § 44-1991(2) (now § 44-1991(A)(2))).

9. Eastern Vanguard Forex, Ltd. v. Ariz. Corp. Comm'n, 79 P.3d 86, 98-99 ¶¶ 39-42, 100 ¶ 46, 101 ¶ 50 (Ariz. Ct. App. 2003) (interpreting the ASA's control-liability statute and holding that: (a) actual participation in the securities violation is not required for control liability, (b) § 44-1999(B) imposes presumptive control liability on those persons who have the *power* to control the activities of a securities violator, (c) the controlling person has the burden of proof on §

44-1999(B)'s good-faith-and-noninducement defense, (d) evidence of lack of scienter is not enough to prove good faith, and (e) in nonfeasance cases, good faith requires control persons to show that they exercised due care to prevent securities violations).

10. Foy v. Thorp, 920 P.2d 31, 38 (Ariz. Ct. App. 1996) (holding that a real-estate transaction involving the purchase of real estate with a property-management agreement was not an investment contract because neither the common-enterprise nor efforts-of-others element existed).

11. Grand v. Nacchio, 147 P.3d 763, 775-79 ¶¶ 37-51 (Ariz. Ct. App. 2006) (interpreting the ASA's loss-causation and remedies statutes and holding that (a) loss causation is not required for statutory rescission on claims based on violations of § 44-1991(A)(1) and (A)(3) and (b) plaintiffs who sell publicly traded stock before suing may make a substitute tender by purchasing and tendering replacement shares).

12. Hernandez v. Superior Court, 880 P.2d 735, 741 (Ariz. Ct. App. 1994) (holding in a criminal case interpreting § 44-1991 (now § 44-1991(A)) that securities fraud may be proved in "any one" of the three ways described in subsections (1), (2), and (3)).

13. Hirsch v. Ariz. Corp. Comm'n, 352 P.3d 925, 931-32 ¶¶ 19-24, 933-34 ¶ 27, 935 ¶ 41 (Ariz. Ct. App. 2015) (holding as follows: (a) the ASA's loss causation statutes do not apply to enforcement actions by the Corporation Commission, (b) materiality is based upon an objective standard that eliminates the need to investigate whether a misstatement or omission was material to a particular investor, and (c) the Corporation Commission's authority to order restitution under §

44-2032(1) creates a broader remedy than the SEC's statutory authority to order disgorgement).

14. London v. Green Acres Trust, 765 P.2d 538, 545-46 (Ariz. Ct. App. 1988) (affirming judgment for plaintiffs in a class action under multiple laws including the securities-registration statute and consumer-fraud statute and rejecting defenses that the class plaintiffs' class action was barred by the statute of limitations, election of remedies, or because it duplicated an Attorney General's action).

15. MacCollum v. Perkinson, 913 P.2d 1097, 1103-06 (Ariz. Ct. App. 1996) (applying Arizona's *Tober* test to find that promissory notes were securities under the registration statutes and applying the federal, *Reves* test to find that the notes were also securities under § 44-1991(A)).

16. Nutek Info. Sys., Inc. v. Ariz. Corp. Comm'n, 977 P.2d 826, 830-35 ¶¶ 16-36 (Ariz. Ct. App. 1998) ((a) holding that LLC membership interests were securities under the *Howey* test and (b) following Fifth Circuit law, and rejecting Ninth Circuit law, in holding that under *Howey*'s efforts-of-other element, proving knowledge requires evidence that the investor had meaningful knowledge of the specific business in which the investor invested).

17. Rose v. Dobras, 624 P.2d 887, 889-92 (Ariz. Ct. App. 1981) ((a) adopting *Howey*'s test for investment contracts; (b) holding that scienter is not required for a violation of § 44-1991(2) (now § 44-1991(A)(2)); (c) adopting *TSC Industries*' [426 U.S. 438 (1976)] would-have standard for materiality; (d) holding that reliance is not required under § 44-1991 (now § 44-1991(A)); and (e) concluding that a tender at the start of trial was sufficient for statutory rescission).

18. Rosier v. First Fin. Capital Corp., 889 P.2d 11, 15 (Ariz. Ct. App. 1994) (concluding that under § 44-1991 (now § 44-1991(A)) "even an innocent [misrepresentation], can be a violation of the securities statute").

19. Shorey v. Ariz. Corp. Comm'n, 359 P.3d 997, 1001-08 ¶¶ 12-14 (Ariz. Ct. App. 2015) (holding as follows: (a) because Arizona-based issuer's sales to foreign investors were "overwhelmingly connected to Arizona," they were sold "within or from" Arizona; (b) failure to disclose that 72.5% offering proceeds were spent on commissions and finders' fees was materially misleading; (c) federal law did not preempt Arizona's registration or antifraud statutes; and (d) Arizona's interest in protecting its business reputation by applying its securities laws to sales to foreign investors outweighed any incidental burden on interstate or foreign commerce).

20. Siporin v. Carrington, 23 P.3d 92, 96-99 ¶¶ 21-35 (Ariz. Ct. App. 2001) (holding that investments in viatical settlements were securities under *Howey*'s investment-contract test and rejecting a contrary decision by the D.C. Circuit as one that would undermine public protection).

21. Standard Chartered, PLC v. Price Waterhouse, 945 P.2d 317, 329, 332-33 (Ariz. Ct. App. 1996) (defining participation and inducement under § 44-2003) (now § 44-2003(A)) and refusing to consider federal securities cases because § 44-2003 has no federal counterpart).

22. State ex rel. Corbin v. Goodrich, 726 P.2d 215, 219-20, 223-24 (Ariz. Ct. App. 1986) (affirming preliminary injunction in Attorney General's action under the securities-fraud and consumer-fraud statutes and holding that (a) applying the ASA to out-of-state sellers did not violate the commerce clause, (b) gold-and-silver contracts were securities, (c)

omitted facts were material facts that "would have been facts important to an investor's decision").

23. State v. Agnew, 647 P.2d 1165, 1177 (Ariz. Ct. App. 1982) (holding in a criminal case that (a) the only act necessary for a defendant to violate § 44-1991 (now § 44-1991(A)) is the making of an untrue statement and (b) that there must be an offer or sale in connection with the untrue statement; but (c) the defendant need not make the offer or sale).

24. State v. Barber, 133 Ariz. 572, 575-76, 578, 653 P.2d 29, 32-33, 35 (Ct. App. 1982) (holding that (a) under the criminal statute of limitations, fictitious dividend payments that were made after stock was sold were part of a fraudulent-securities scheme and (b) a defendant who claims a registration exemption has the burden of proof).

25. Sullivan v. Metro Prods. Inc., 724 P.2d 1242, 1245-46 (Ariz. Ct. App. 1986) (applying *Howey*'s investment-contract test and holding that (a) investments in master videotapes were securities and (b) the word "solely" in *Howey* is not to be read literally).

26. Trimble v. Am. Sav. Life Ins. Co., 733 P.2d 1131, 1135-37 (Ariz. Ct. App. 1986) (refusing in an action by state securities and insurance regulators to follow a federal case that held that § 44-1991 (now § 44-1991(A)) requires reliance and holding that (a) under § 44-1991 plaintiffs are not required to prove due diligence, (b) defendants have an affirmative duty not to mislead, (c) materiality exists if omitted facts would be material to a reasonable investor, and (d) neither waiver nor election of remedies prevented investors from rescinding).

27. Vairo v. Clayden, 734 P.2d 110, 114-15 (Ariz. Ct. App. 1987) (applying *Howey*'s investment-contract analy-

sis to an investment in master videotapes and finding disputed facts regarding *Howey*'s common-enterprise and efforts-of-others elements).

Appendix B

Reported Federal Decisions Interpreting Arizona Securities Law: 1980-2017

Ninth Circuit Decisions

1. Davis v. Metro Prods., Inc., 885 F.2d 515, 522, 523 & n.10, 524-25 (9th Cir. 1989) (holding that (a) for purposes of personal jurisdiction, corporate officers who participated in a scheme to solicit Arizona investors had fair warning that they could be liable for securities violations under § 44-2003 (now § 44-2003(A)) and (b) investments in master videotapes were investment contracts and hence securities under Arizona law).

2. Garvin v. Greenback, 856 F.2d 1392, 1398 (9th Cir. 1988) (holding that under § 44-1991(2) (now § 44-1991(A)(2)) "[a] seller of securities is strictly liable for the misrepresentations or omissions he makes").

3. Little v. Valley Nat. Bank of Ariz., 650 F.2d 218, 220, 223 (9th Cir. 1981) (affirming trial court's ruling that "the proof required to show violations of Rule 10b-5, section 17 of the Securities Act of 1933, and the Arizona blue sky laws . . . was identical as a matter of law").

4. Shivers v. Amerco, 670 F.2d 826, 831 (9th Cir. 1982) (affirming dismissal of plaintiffs' Rule 10b-5 Arizona securities-law claims and reasoning that Arizona "intended [its securities] statutes to be interpreted consistently with the federal rule").

5. Strategic Diversity, Inc. v. Alchemix Corp., 666 F.3d 1197, 1209 & n.2 (9th Cir. 2012) (reversing district-court's dismissal of plaintiff's Arizona securities-fraud claim and holding that (a) "[u]nlike federal law, rescission under Arizona securities law does not require the existence of damages" and (b) "[w]ith respect to loss causation in a suit for rescissionary damages, Arizona law directs the court to consider 'equitable considerations' to determine whether loss causation is required").

6. Warfield v. Alaniz, 569 F.3d 1015, 1019 n.5 (9th Cir. 2009) (holding that charitable-gift annuities were investment contracts under the federal securities laws and concluding without separate analysis that they were also investment contracts under Arizona securities law because (a) the Arizona statute defining securities mirrors the federal definition and (b) Arizona courts look to federal courts for guidance in interpreting the state statute).

District Court Decisions

1. Allstate Life Ins. Co. v. Robert W. Baird & Co., Inc., 756 F. Supp. 2d 1113, 1157-61 (D. Ariz. 2010) (holding as follows: (a) law firms that were retained for "*the sole purpose of* preparing, drafting, and reviewing documents that were *primarily* designed to solicit" investors were statutory participants under § 44-2003(A); (b) scienter is required under § 44-1991(A)(1) but not under § 44-1991(A)(2) and (3)); (c) the bespeaks-caution doctrine was not a defense under § 44-1991(A) because there was evidence that defendants knew they were making false statements; (d) § 44-1998 did not apply to plaintiff's claim because the securities fell within an exemption to liability under § 44-1998; and (e) plaintiff's complaint adequately pleaded a claim for control liability under § 44-1999(B)).

2. In re Allstate Life Ins. Co. Litig., 971 F. Supp. 2d 930, 938-44 (D. Ariz. 2013) (holding as follows: (a) transaction causation is an element of a claim under § 44-1991(A); (b) transaction causation under § 44-1991(A) can be inferred from materiality; (c) transaction causation does not require reliance; (d) underwriters who sold bonds to fifteen plaintiffs in aftermarket purchases could be liable under § 44-2003(A) as persons who "made" the sales; (e) facts were not sufficient to

show that underwriters were statutory inducers or participants as to another seventeen aftermarket purchasers who did not purchase their bonds from the underwriters; and (f) unlike § 12(a)(2) of the 1933 Act, § 44-1991(A) does not require a plaintiff to prove that it purchased securities as part of an initial public offering).

3. Armbruster v. Wageworks, Inc., 953 F. Supp. 2d 1072, 1077 (D. Ariz. 2013) (holding that complaint did not satisfy § 44-1991(A)'s in-connection-with requirement where it failed to allege that the plaintiff and defendants were involved in a transaction to buy or sell securities).

4. Chrysler Capital Corp. v. Century Power Corp., 800 F. Supp. 1189, 1191-95 (S.D.N.Y. 1992) (holding as follows: (a) plaintiffs' complaint adequately alleged that defendants' securities were issued "from" Arizona within the meaning of § 44-1991 (now § 44-1991(A)) and (b) applying § 44-1991 to Arizona-based issuer who sold securities outside of Arizona did not violate federal Commerce Clause).

5. Facciola v. Greenberg Traurig, LLP, 781 F. Supp. 2d 913, 920-23 (D. Ariz. 2011) (holding as follows: (a) direct contact with a defendant is not needed to state a claim for fraud under § 44-1991(A); (b) conduct of corporate officers and LLC managers in preparing misleading offering documents stated a claim for participating or inducing under § 44-2003(A); (c) a defendant may be liable for misleading disclosures or material omissions under § 44-1991(A)(1) or (3); and (d) a defendant's status as a sole shareholder or as an officer or director may create the power to control needed for controlling-person liability under § 44-1999(B)).

6. Facciola v. Greenberg Traurig, LLP, 281 F.R.D. 363, 371-72 (D. Ariz. 2012) (holding as follows: (a) reliance is not an element of a claim under § 44-1991(A)(1) or (3); (b) the ASA does not require investors to show that they acted with

due diligence; and (c) § 44-1991(A) imposes an affirmative duty not to mislead).

7. McDaniel v. Compania Minera Mar de Cortes, Sociedad Anonimo, Inc., 528 F. Supp. 152, 166-67 (D. Ariz. 1981) (citing Rule 10b-5 precedent on reliance and interpreting § 44-1991 (now § 44-1991(A)) to require reasonable reliance (by implication)).

8. In re Nat'l Century Fin. Enters., Inc., 846 F. Supp. 2d 828, 888-90 (S.D. Ohio 2012) (holding that § 44-1991(A), which applies to sales "within or from" Arizona, applied to sales to Arizona entities that were made by a New York seller and noting that defendant had conceded that § 44-1991 does not require reliance).

9. In re Nat'l Century Fin. Enters., Inc. Inv. Litig., 541 F. Supp. 2d 986, 1011 (S.D. Ohio 2007) (holding as follows: (a) § 44-1998 is restricted to untrue statements by means of a prospectus and does not apply to private placements; but (b) unlike § 44-1998, § 44-1991(A) applies to any untrue statement and applies to private placements).

10. R & L Ltd. Invs., Inc. v. Cabot Inv. Props., *LLC*, 729 F. Supp. 2d 1110, 1113-14, 1116-17 (D. Ariz. 2010) (invalidating a choice-of-law provision that would have precluded application of the ASA and holding that an arbitration provision that would have altered the one-way-right to attorney's fees under § 44-2001(A) violated the anti-waiver provisions of § 44-2000).

11. Wojtunik v. Kealy, 394 F. Supp. 2d 1149, 1157 n.4, 1170 (D. Ariz. 2005) ((a) holding that "a § 44-1991 claim is subject to the same strict-pleading requirements as a § 10(b) claim" and (b) upholding a claim for aiding and abetting § 44-1991 violations on the basis of Arizona authority later overruled in Sell v. Gama, 231 Ariz. 323, 295 P.3d 421 (2013)).

BLACK, WHITE, AND BLUE

Sherrita L. Smoak*

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*Sherrita L. Smoak is a 2017 Juris Doctorate candidate at Arizona Summit Law School and an Executive Scholarship Editor on *Arizona Summit Law Review, Volume X*. Sherrita worked in the federal government for seventeen years including a tour in the U.S. Air Force before resigning to attend law school and begin her journey to fulfill a life-long goal of becoming a judge. The author is married to Kenneth Stubblefield and would like to dedicate this article to her only child Immanuel D. Smoak, whom she prays will never have to personally experience the kind of discrimination described in this article.

Power tends to corrupt, and absolute power corrupts absolutely.
-British Lord John Dalberg-Acton

I. INTRODUCTION

In 1963, "To Protect and to Serve" became the motto for the Los Angeles Police Academy and was later adopted by police agencies nationwide.[1] Ironically, it is police officers who are *protected* from consequences, while the public is *served* a platter of injustice that must be reformed. This paper examines the racial discrimination found in many police departments in the United States, which discrimination plays out in the form of police brutality, particularly against African-Americans.

Recognizably, police officers have a dangerous and spontaneous job, but they must not look at a citizen's race while carrying out their law enforcement duties. Officers' policing power is not absolute. They must apply careful discretion when dealing with the public, and without consideration of race or whether a person is a criminal suspect. While every public safety department that holds power over citizens is expected to establish checks and balances and quality control measures, sometimes departments have kinks that prevent effective law enforcement. When this occurs, departments tend to run themselves without any type of regulation from within that will limit rampant police brutality in the United States.

Police officers use excessive force—even deadly force—when it comes to routine traffic stops and other interactions with people of color.[2] When police officers step into their

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[1] *The Origin of the LAPD Motto*, L.A. POLICE DEP'T (Oct. 21, 2015), http://www.lapdonline.org/history_of_the_lapd/content_basic_view/1128.
[2] *Routine Traffic Stop Raises Concerns About Police Brutality*, ABC NEWS, http://abcnews.go.com/WNT/video/routine-traffic-stop-raises-concerns-po-

uniforms for the very first time with pride and sincere anticipation of serving their community, rendering aid to people, and bringing law and order to those who have committed crimes that warrant being brought to justice, the officer starts off on the right side of the law. However, somewhere there is a gradual decline that merely goes unnoticed until the day the officer is being investigated by Internal Affairs. An officer's superiors may lack leadership skills, or an officer may fall into a pit of peer pressure from seasoned veteran officers who conduct themselves on the wrong side of the law. Perhaps an officer's racism had already existed, lying dormant, waiting for the right time to rear its ugly head. You may ask what "it" is. It is "racism." These motives can only truly be answered by the police officers themselves, the officers who have been directly involved in police brutality through excessive and deadly force.

Oxford Dictionary defines "Racism" as "prejudice, discrimination, or antagonism directed against someone of a different race based on the belief that one's own race is superior."[3] How can police officers "serve" their community with so much disdain, discrimination and antagonism? The protection that many officers provide, often surfaces with prejudicial brashness, arrogance, and an "I got you" mindset that, if left unchecked, can materialize into police brutality and excessive force.

Racially motivated police brutality has become more prevalent in recent years, but the issue has existed all along. Like the white elephant in the room, many dare not bring up the subject because it is too controversial. However, now it has a voice and a face, in the form of modern technology, and more

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lice-brutality-25767797 (last visited Jan. 28, 2017). A police video was released showing a routine traffic stop where the police pulled over a driver for allegedly not wearing his seat belt. The officer asked the driver to produce his driver's license and when the driver reached into his vehicle to get his license, the officer opened fire and shot the driver in the hip. This officer was charged with assault and battery subsequently.

[3] *Racism*, ENG. OXFORD LIVING DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/racism (last visited Feb. 4, 2017).

specifically, cell phone videos. Technology has answered the prayers for many people of color, for without it, they would still be unable to prove what many have tried to report for years. The further technology advances, the greater exposure America will see in the area of police brutality on the streets.

This article will explore the topic of excessive and deadly force used by police officers during routine traffic stops and other harmful interactions that target people of color. The conclusion will offer solutions that may help alleviate this escalating problem in our country. "Black, White, and Blue" will not investigate police interactions with other races; it will only focus on police misconduct in the African-American community.

Part I will define police brutality in the form of excessive and deadly force and discuss when force is justifiable. Part II will look at historical data on police brutality and examine why the ball has been dropped in many police departments tasked with collecting adequate data. Congress has put a mandate on the Attorney General to get involved and collect data on police officers and excessive force issues for a reason, these reasons will be looked at further. Part III will illustrate examples of police officers who have used excessive force against citizens in violation of the Fourth Amendment. Part IV will explore the Department of Justice's investigation into the Cleveland, Indiana and Ferguson, Missouri police departments[2] patterns and practices of excessive force in violation of the Fourth Amendment. Part V concludes with mechanisms to create a systematic reform nationwide — focusing on accountability standards needed to ensure that police officers adhere to a duty to defend and preserve the dignity of all citizens, as opposed to acting with impunity.

We're not anti-police . . . we're anti-police brutality.
-Al Sharpton

In America's climate, race plays a major role in how police officers interact with people of color. "Stop, question, and frisk" is a policy in which officers stop, question, and frisk people they consider suspicious in an effort to deter crime. This strategy has been widely criticized for unfairly targeting young, male minorities.[4] These routine traffic stops, and other interactions with the public, have turned into unreciprocated injuries and deaths of American citizens; especially, African-American citizens.[5] Police-community relations in such precincts, with predominantly black and Hispanic residents, have been tenuous. The officers involved in these baffling, one-sided confrontations have often administered force that goes beyond the justified scope of their duties as police officers. This recurring act of disrespect for people of color, has turned into an "us-against-them" mentality and diminishes respect on both ends of the law.[6] There appears to be an unspoken, awkward fear that police have against African-American males. Although it is silent, actions tend to speak louder than words. When a call goes out over the dispatch radio that the suspect is an African-American male, multiple officers consistently show up at the scene. The officer perhaps senses a need to protect his fellow officer that got stuck with the call, or maybe it is deemed "lynching" time like in the

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[4] Laura Ly, *Can Cell Phones Stop Police Brutality*? CNN (Nov. 19, 2014, 5:31 PM), http://www.cnn.com/2014/11/18/us/police-cell-phone-videos ("In New York, cameras will be distributed to officers patrolling in precincts that reported the highest number of "Stop, Question, and Frisk" encounters in 2012. Police department figures showed that nearly nine out of [ten] people 'stopped and frisked' in 2011 were African-American or Hispanic, though New York Mayor Bill de Blasio has said 90% of those stopped were innocent.").

[5] Andie Adams et al, *SDPD Traffic Stop Data Raises Concerns Over Racial Profiling*, NBC SAN DIEGO (Feb. 26, 2015, 3:17 PM), http://www.nbcsandiego.com/news/local/SDPD-Traffic-Stop-Data-Raises-Concerns-Over-Racial-Profiling-294275111.html.

[6] *Id.*

slave era. The nation is talking about "it" in a way that calls for some type of relief. The media is discussing "it" because they have no choice, seeing that the topic is now "visible" and no longer hidden from Americans. The police officers are talking about "it" in a way that backs them into a corner, and when they come out, they must choose which side of the law they want to be on.

In past years, a small percentage of officer-involved shootings have been brought to the public eye through the use of cell phone videos and other recording devices on nearby buildings; portraying the truth for the victims who are no longer alive to tell their story. Ramsey Orta, Eric Garner's friend, recorded the fateful incident on July 17, 2014, when Garner was put in a chokehold by a NYPD officer as several other officers helped drag him to the ground.[7] Garner, who had a history of health problems and died soon after, repeatedly pleaded with police: "I can't breathe!"[8] Orta's recorded cell phone video has helped turn the fatal encounter from a local tragedy into a national debate over the use of force by police.[9] Some officers seem disturbed with bystanders who film their questionable policing practices, even going as far as confiscating citizens' cell phones and turning their injudicious attention towards them, sometimes with excessive force; however, this is unlawful. "When you are in public spaces, where you have a right to be, you can photograph anything that is in plain view," said Jay Stanley, a senior policy analyst for the American Civil Liberties Union ("ACLU").[10]

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[7] Josh Sanburn, *Behind the Video of Eric Garner's Deadly Confrontation with New York Police*, TIME.COM (July 22, 2014), http://time.com/3016326/eric-garner-video-police-chokehold-death.

[8] *Id.*

[9] *Id.*

[10] Ly, *supra* note 4 (The (ACLU) says that photographing things that are plainly visible from public spaces is a "constitutional right" and that this includes "federal buildings, transportation facilities, and police and other government officials carrying out their duties." Law enforcement officials do not

The Bible states in the book of Hosea, "My people perish for a lack of knowledge . . .," and that continues to be true for today's society.[11] Officers recognize that many people, especially those in uneducated and poor areas, are not familiar with the law. Unfortunately, being ignorant of the law falls in the favor of police officers. This, in turn, is used against citizens in getting them to submit to what is being asked of them for fear that non-compliance is an automatic trip to jail. The average person in the African-American community is not aware of his/her constitutional rights and may be unaware that police officers need a warrant to look at the content of his/her phone or confiscate it.[12]

Police brutality has taken on a new form. Before the Civil Rights Movement, brutality from the police was blatant and obvious; now, it has shifted to being discreet and subtle. In some ways, history is in danger of repeating itself. For instance, formerly a slave master could beat his slave in public and nothing was done about it because it was lawful. Police brutality cannot become the norm in society, as we know it today, without setting ourselves back hundreds of years in progress that has already been made through civil rights movements. This could impact generations to come if this problem is not dealt with quickly. The African-American community needs to feel they can trust law enforcement to do the right thing during a routine

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have the right to confiscate any video or photographs being taken, nor can they ask to view it without a warrant. "If you are not interfering in any real way with legitimate police operations, they don't have the right to interfere in any way," Stanley said).

[11] *Hosea* 4:6 (King James).

[12] Ly, *supra* note 4 (referencing "Luis Paulino's beating by NYPD officers in 2012, was captured on video and posted online, showing officers throwing Paulino to the ground, while several officers punched him repeatedly." "According to Paulino, the fifteen police officers started in on him after he saw and recorded them violently beating another young black man on the sidewalk." In the background, an unidentified male can be heard encouraging other people to record what was happening and yelling, "He didn't do nothing!").

traffic stop and beyond. America needs solutions that will allow police officers to serve their communities equally, and uphold their oath of honor with pride and joy.

If the problem is not explicitly defined, then its solution cannot be entirely designed.
-Anuj Somany

II. POLICE BRUTALITY DEFINED

Police brutality is a form of excessive and sometimes deadly force, and is an unjustifiable exercise and unreasonable abuse of authority, as well as a violation of the law.[13] Cruel and unusual punishments by the State (police) are prohibited by the Eighth Amendment to the U.S. Constitution.[14] The Fourteenth Amendment provides further protection to individuals, prohibiting the State from depriving any person of life, liberty, or property, without due process of law.[15] Deadly force is defined as the amount of force that is likely to cause either serious bodily injury or death to another person.[16] The Supreme Court ruled that, depending on the circumstances, if an offender resists arrest, police officers may use as much force as is reasonably required to overcome the resistance.[17] Whether the force is reasonable, is determined by the judgment of a reasonable officer at the scene, rather than by hindsight.[18] The Model Penal Code ("MPC"), although not adopted in all states, restricts police action regarding deadly force.[19] According to the MPC, officers should only use deadly force when the action will not endanger

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[13] *Excessive Force Law and Legal Definition*, USLEGAL.COM, http://definitions.uslegal.com/e/excessive-force (last visited Apr. 30, 2017).
[14] U.S. CONST. amend. VIII.
[15] U.S. CONST. amend. IV.
[16] *Deadly Force*, WEST'S ENCYCLOPEDIA OF AM. L., ED. 2, 2008, http://legal-dictionary.thefreedictionary.com/Deadly+Force (last visited Oct. 21, 2015).
[17] *Id.*
[18] *Id.*
[19] MODEL PENAL CODE § 3.07(2)(b)(IV) (1962).

innocent bystanders, the suspect used deadly force in committing the crime, or the officer believes a delay in arrest may result in injury or death to other people.[20] In *Tennessee v. Garner,* the Supreme Court held that it is a violation of the Fourth Amendment for police officers to use deadly force to stop fleeing felony suspects who are nonviolent and unarmed.[21] The decision, with an opinion written by Justice Byron R. White, held, in part, "[W]e conclude that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."[22] The court has ruled on this matter, but it does not always deter some officers from complying with the law. In South Carolina, a white police officer was charged with murder in the videotaped shooting death of a 50-year-old black man, Walter Scott, who appeared to be unarmed and fleeing arrest.[23] The graphic video appears to show North Charleston officer Michael Slager shooting Walter Scott eight times in the back following an earlier incident in which Slager stopped Scott over a broken taillight.[24] The law,

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[20] *Id*.

[21] Tennessee v. Garner, 471 U.S. 1, 3 (1985).

[22] *Id.* at 4.

[23] Josh Sunburn, *South Carolina Police Shooting Renews Calls for Body Cameras*, TIME.COM, (Apr. 7, 2015) http://time.com/3774841/south-carolina-walter-scott-shooting-body-cameras.

[24] Andrew Knapp, *North Charleston Officer Faces Murder Charge After Video Shows Him Shooting Man in Back,* THE POST AND COURIER (Apr. 6, 2015), http://www.postandcourier.com/article/20150407/PC16/150409468 (The U.S. Department of Justice said in a statement that FBI investigators would work with the State Law Enforcement Division, which typically investigates officer-involved shootings in South Carolina, and the state's attorney general to examine any civil rights violations in Scott's death. The Police Department, which has 343 sworn officers, has fought accusations in the past that aggressive patrolling tactics had unfairly targeted poor, predominately black communities. The newspaper reported in September that 18 percent of the officers were black while the city's population is 45 percent black).

under *Graham v. Connor,* makes it clear as to the exigent circumstances that would allow an officer to shoot a fleeing suspect.[25] These circumstances did not exist in this case, nor in another, in which the suspect was shot in the back and later discovered unarmed at the time of the shooting, therefore not posing a significant threat of death or serious physical injury to the officer or others.[26]

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[25] Graham v. Connor, 490 U.S. 386, 395 (1989) (Justice Rehnquist gives the opinion in the case and addresses how the claims of excessive force should be evaluated: Today we make explicit what was implicit in *Garner's* analysis,-and hold that all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process" must be the guide for analyzing these claims).

[26] Mark Clark, *Understanding Graham v. Connor,* POLICE: THE L. ENF'T MAG. (Oct. 27, 2014), http://www.policemag.com/channel/patrol/articles/2014/10/understanding-graham-v-connor.aspx (citing, the words of Chief Justice William Rehnquist can still be heard loud and clear today, 25 years after the *Graham v. Connor* decision. And every American law enforcement officer should know them well: "*The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving—about the amount of force that is necessary in a particular situation. The test of reasonableness is not capable of precise definition or mechanical application"*).

Who will protect the public when the police violate the law?
-Ramsey Clark

III. HISTORICAL DATA ON POLICE BRUTALITY

According to the FBI's annual Uniform Crime Report, 461 felony suspects were shot by police in 2014, which is the highest number seen in decades.[27] The statistics also reported that violent crime rates in the United States fell over 4% for the same year, bringing the amount of violent crimes lower than it has been in nearly 40 years.[28] While violence among citizens has dropped, violence against citizens by police has risen sharply.[29] These numbers, as alarming as they may seem, might actually be higher, since they only include felony suspects and some shootings that have gone unreported.[30]

Additionally, according to the FBI's most recent Uniform Crime Report, accounts of "justifiable homicide" between 2005 and 2012, a white officer has used deadly force against a black person almost two times per week.[31] Nearly one in every five of those black persons killed were under 21 years of age; however, only 8.7% of white people killed by police officers were younger than 21.[32]

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[27] John Vibes, *FBI Report: Americans Less Violent than Ever, Except for Police*, THE FREE THOUGHT PROJECT.COM (Nov. 12, 2014), http://thefreethoughtproject.com/prison-statistics/.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] Lulu Chang, *Do Police Shoot Black Men More Often? Statistics Say Yes, Absolutely*, BUSTLE (Aug. 18, 2014), http://www.bustle.com/articles/36096-do-police-shoot-black-men-more-often-statistics-say-yes-absolutely.
[32] *Id.*

The geographic diversity of these tragedies suggest that the problem is not centralized to one area of the country, but rather it is a nationwide issue of concern.[33] As the country watched from their living rooms, America witnessed one police involved shooting after another where the victim was predominately an unarmed African-American male. In August 2014, five unarmed black men were killed by police officers on both the east and west coasts.[34] The lack of reliable data on the extent of excessive force received the attention of the United States Congress which enacted the Violent Crime Control and Law Enforcement Act of 1994.[35]

> (a) The Attorney General shall, through appropriate means, acquire data about the use of excessive force by law enforcement officers.
> (b) Data acquired under this section shall be used only for research or statistical purposes and may not contain any information that may reveal the identity of the victim or any police officer.
> (c) The Attorney General shall publish an annual summary of the data acquired under this section.[36]

In 2011, the Justice Department's Bureau of Justice Statistics (BJS) announced an estimated 62.9 million U.S. residents

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[33] *Id.*

[34] *Id.* (The Department of Justice (DOJ) conducted a Police Public Contact Survey in 2008, in which it was reported that 74 percent of blacks felt that police used "excessive force" when dealing with them, a number much greater than that reported by either whites or Hispanics).

[35] Tom McEwen et al., *National Data Collection on Police Use of Force,* U.S. DEP'T OF JUST. BUREAU OF JUST. STAT., 3 (Apr. 1996), http://www.bjs.gov/content/pub/pdf/ndcopuof.pdf (The Act requires the Attorney General to collect data on excessive force by police and to publish an annual report from the data (Title XXI, Subtitle D, Police Pattern or Practice: Section 210402. Data on Use of Excessive Force).

[36] *Id.*

age 16 or older, had one or more contacts with police.[37] Black drivers (13%) were more likely than white (10%) and Hispanic (10%) drivers to be pulled over by police in a traffic stop; however, blacks, whites and Hispanics were equally likely to be stopped in a street stop (less than 1% each).[38] Among those involved in street or traffic stops, blacks were less likely than whites and Hispanics to believe the police behaved properly during the encounter.[39]

The basic problem is the lack of routine national systems for collecting data on incidents in which police officers use force during the normal course of duty and on the extent of excessive force.[40] The purpose of the information request by Congress demonstrates the government's need to keep track of police departments, since accurate records have not been kept in their individual departments.[41] *Amici* noted that "[a]fter extensive research and consideration, [they] have concluded that laws permitting police officers to use deadly force to apprehend unarmed, non-violent fleeing felony suspects actually do not protect citizens or law enforcement officers, do not deter crime or alleviate problems caused by crime, and do not improve the crime-fighting ability of law enforcement agencies."[42]

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[37] Lynn Langton, *Study Finds Some Racial Differences in Perceptions of Police Behavior During Contact with the Public*, BUREAU OF JUST. STAT. (Sept. 24, 2013), http://www.bjs.gov/content/pub/press/pbtss11rpa11pr.cfm#.

[38] *Id*.

[39] *Id*.

[40] *McEwen* et al., *supra* note 36, at 2.

[41] *Garner, supra* note 21, at 20 ("actual departmental policies are important for an additional reason. We would hesitate to declare a police practice of long standing "unreasonable" if doing so would severely hamper effective law enforcement. But the indications are to the contrary. There has been no suggestion that crime has worsened in any way in jurisdictions that have adopted, by legislation or departmental policy, rules similar to that announced today").

[42] *See generally*, *Garner, supra* note 21, at 20 (quoting W. Geller & K. Karales, *Split-Second Decisions* 33-42 (1981); Brief for Police Foundation et al. as *Amici Curiae)*.

Two national systems collect data that include homicides committed by law enforcement officers in the line of duty: The National Vital Statistics System and the Uniform Crime Reporting Program. The National Center for Health Statistics maintain the National Vital Statistics System ("NVSS"), which aggregates data from locally-filed death certificates.[43] State laws require that death certificates be filed with local registrars, but the certificates do not systematically document whether a killing was legally justified nor whether a law enforcement officer was involved.[44] Thus, this has not proved to be a reliable system to track police involved shootings.[45]

The FBI maintains the Uniform Crime Reporting Program ("UCR"), which relies on state and local law enforcement agencies voluntarily submitting crime reports.[46] A study of the years 1976 to 1998 found that both national systems underreport justifiable homicides by police officers.[47] In addition, between 2007 and 2012, more than 550 homicides by the country's 105 largest law enforcement agencies were missing from FBI records.[48] Law enforcement experts have long lamented the lack of information concerning killings by police, arguing that when cops are killed, there is a very careful account and there's a national database involved, why not do the same for the other side of the ledger.[49]

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[43] Colin Loftin et al., *Underreporting of Justifiable Homicides Committed by Police Officers in the United States, 1976-1998,* AM. J. PUB. HEALTH. 93 1117-1121 (July 2003).
[44] *Id.* at 1119.
[45] *Id.*
[46] *Id*.
[47] *Id.* at 1121.
[48] Rob Barry et al*., Hundreds of Police Killings Are Unaccounted in Federal Stats,* WALL STREET JOURNAL (Dec. 3, 2014), http://www.wsj.com/articles/hundreds-of-police-killings-are-uncounted-in-federal-statistics-1417577504.
[49] *Id.* (quoting Jeffrey Fagan, a law professor at Columbia University).

The Death in Custody Reporting Act required states to report individuals who die in police custody, which was active without enforcement provisions from 2000-2006 and restored in December 2014, amended to include enforcement through withdrawal of federal funding for noncompliant departments.[50] An additional bill requiring all American law enforcement agencies to report killings by their officers was introduced in the United States Senate in June 2015.[51]

Looking at all the legislation that has been enacted and the ongoing study of police, justifiable homicides, excessive force and deadly force, it is plain to see that America has a problem and from the data, has started to realize that the problem is severe. The expectations of how police data should be collected and recorded are set forth by legislation. However, when it comes down the pipeline to the police agencies, the ball is dropped and the records are incomplete or nonexistent. Keeping accurate records of excessive force used by police officers has not been a priority for police departments. Essentially it amounts to the departments telling on themselves, which they are not voluntarily willing to do.

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[50] Rashad Robinson, *The US government could count those killed by police, but it's chosen not to*, THE GUARDIAN (June 3, 2015), http://www.theguardian.com/commentisfree/2015/jun/03/us-government-could-count-killed-by-police-chosen-not-to.

[51] Jon Swaine, *US Senators Call for Mandatory Reporting of Police Killings*, THE GUARDIAN (June 2, 2015), http://www.theguardian.com/us-news/2015/jun/02/us-senators-call-for-mandatory-reporting-police-killings.

I realize I will always be the poster child for police brutality, but I can try to use that as a positive force for healing and restraint.
-Rodney King

III. EXAMPLES OF POLICE BRUTALITY

Israel Hernandez-Llach was caught spraying a building with graffiti and a Miami police officer used a Taser gun to subdue the 18-year-old.[52] Officer Jorge Mercado employed the use of a stun gun on Hernandez-Llach, after chasing him, ultimately killing him with excessive force.[53]

A 2011 Department of Justice report found that the devices [Taser guns] are considered safe for a vast majority of those who are subjected to them and can save lives by immobilizing suspects.[54] Taser use results in few injuries, and although people have died, the risk is extremely low, the report stated.[55] Often, deaths from (Taser guns) are associated with pre-existing medical conditions, drug use, a subsequent fall, and continuous or repeated shocks.[56]

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[52] Christina Coleman, *A Recent History of Police Brutality and the Officers Who Walked Free*, GLOBAL GRIND (Jan. 27, 2014), http://globalgrind.com/2014/01/27/history-police-brutality-officers-who-walked-free-list/.

[53] *Id.* Friends of Llach say the officers involved high-fived each other and joked about the teen's death stating: "You should have seen how funny it was when his butt clenched when he got Tased." Officer Meracado, a 13-year veteran on the force, was put on administrative leave.

[54] Nick Madigan, *Seeking Answers after Youth's Death in Police Stop*, THE N.Y. TIMES (Aug. 8, 2013), http://www.nytimes.com/2013/08/09/us/seeking-answers-after-youths-death-in-police-stop.html?_r=0.

[55] *Id.*

[56] *Id.*

Oscar Grant III and several passengers were detained on the platform at the Fruitvale BART Station after officers responded to a fight.[57] Officer Johannes Sebastian Mehserle shot Grant in his back, claiming that he was resisting arrest, and later told authorities he thought he was pulling out his stun gun.[58] Grant was unarmed and was pronounced dead the next day.[59] Officer Mehserle was found guilty of manslaughter and spent less than a year of his two-year sentence behind bars.[60]

Rodney King's infamous case was caught on video in March of 1991, when five Los Angeles Police Department officers surrounded King after a high speed car chase.[61] The brutal video, taken by a witness from his balcony, showed the officers striking and beating King severely.[62] Four of the police officers were charged with assault with a deadly weapon, and three were acquitted of the charges, while the jury acquitted the fourth officer of assault with a deadly weapon, but failed to reach a verdict on the use of excessive force.[63]

Kenneth Chamberlain Sr. in White Plains, New York was shot and killed in November 2011, after he inadvertently

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[57] Malaika Kambon, *Centuries of rage: The murder of Oscar Grant III*, SAN FRANCISCO BAY VIEW (Feb. 25, 2015), http://sfbayview.com/2015/02/centuries-of-rage-the-murder-of-oscar-grant-iii/.

[58] *Id.* The incident, which spurred an award-winning movie in 2013, was caught on video by dozens of passengers' cell phone cameras.

[59] *Id*.

[60] *Id.*

[61] Coleman, *supra* note 50*,* at 63.

[62] *Id.* Rodney King was tased twice and in the end, he suffered: a fractured facial bone, a broken right ankle, and multiple bruises and lacerations, 11 skull fractures, permanent brain damage, broken bones and teeth, as well as kidney damage.

[63] *Id.* In 1993, the officers were retried by a federal grand jury and two were found guilty and imprisoned, while the other two were acquitted again.

triggered his Life Aid medical alert necklace.[64] When police arrived at his home, he informed them of the accident and he declined to open his front door.[65] This frustrated the officers and caused them to taunt Chamberlain, calling him racial epithets and sending death threats.[66] The officers broke down the 68-year-old veteran's door, tased , and shot him twice, saying that Chamberlain charged at them with a knife.[67] A grand jury reviewed the case and decided that no criminal charge would be made against police officers involved in the killing, however, the officer who shot him has since been fired.[68]

Marlon Brown of Florida was struck and killed by a police cruiser in May 2013 after being pursued by police for a seatbelt violation.[69] Brown hopped out of the car and started escaping on foot heading towards a vegetable garden when rookie DeLand Officer James Harris, who was behind the wheel, accelerated towards the fence Brown was headed for.[70] Although Officer Harris struck Brown with the cruiser and killed him, a grand jury decided not to charge Officer Harris with any crime.[71]

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[64] Michael Powell, *Officer, Why Do You Have Your Guns Out*? THE N.Y. TIMES (Mar. 5, 2012), http://www.nytimes.com/2012/03/06/nyregion/fatal-shooting-of-ex-marine-by-white-plains-police-raises-questions.html.

[65] *Id*.

[66] *Id.* Chamberlain's niece, who lived in the same apartment building, later told NYT that she could hear her uncle saying that the officers were going to kill him.

[67] *Id.*

[68] *Id.*

[69] *Id*.

[70] Julia Dahl, *Marlon Brown Death: Family of Fla. Man Run Down by Police Car Files Complaint Against Medical Examiner*, CBS NEWS (Sept. 27, 2013), http://www.cbsnews.com/news/marlon-brown-death-family-of-fla-man-run-down-by-police-car-files-complaint-against-medical-examiner/.

[71] *Id.* Officer Harris was fired immediately after his chief viewed the video on May 31, but State's Attorney R.J. Larizza did not indict Harris on charges of vehicular homicide, which in Florida is defined as "the operation of a motor vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to, another." Instead, Larizza gave the case to a grand jury, which declined to press charges. Brown's family attorney Benjamin Crump

Sean Bell was shot and killed on the night before his wedding day in 2006 when police officers fired more than 50 bullets into the car carrying Bell and his three friends outside of a Queens, N.Y. strip club.[72] A plain-clothed officer, who said he believed that Bell and his friends had a gun, told authorities he called for backup after alerting the men he was a detective.[73] When Bell and his friends drove off, the detectives fired the shots into the car, killing an unarmed Bell and wounding two of the friends.[74] The detectives went on trial for charges ranging from manslaughter to reckless endangerment, but were later found not guilty.[75]

This is an American problem, not just a black problem, when anybody in this country is not being treated under the law, that's a problem and it's my job as president to help solve it.
-President Barack Obama

IV. DEPARTMENT OF JUSTICE INVESTIGATIONS

The Department of Justice ("DOJ"), following a two-year investigation, found that the Albuquerque, New Mexico Police Department "engages in patterns or practices of excessive

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tells CBS News' Crimesider that he believes the reason the grand jury failed to indict Harris was that the autopsy, signed by Dr. Marie Herrmann, determined that there was no evidence the car struck Brown - a conclusion the family's complaint says defies "logic, common sense, and seemingly scientific principle."

[72] Julian Borger, *New York on Edge as Police Kill Unarmed Man in Hail of 50 Bullets on His Wedding Day*, THE GUARDIAN (Nov. 27, 2006), http://www.theguardian.com/world/2006/nov/27/usa.julianborger.

[73] *Id.*

[74] *Id.*

[75] *Id.*

force, including deadly force, in violation of the Fourth Amendment."[76] A similar DOJ finding came in December 2014 regarding the Cleveland, Ohio Police Department.[77] In March 2015, the DOJ also issued a report detailing a pattern of "clear racial disparities" and "discriminatory intent" on the part of the Ferguson, Missouri police department.[78]

A. Cleveland Division of Police ("CDP")

The DOJ investigation, under the Violent Crime and Law Enforcement Act of 1994, 42 U.S.C. § 14141 focused on allegations of excessive force by Cleveland Division of Police officers.[79] Under U.S.C. § 14141 it is unlawful for government entities, such as the City of Cleveland and CDP, to engage in a pattern or practice of conduct by law enforcement officers that deprives individuals of rights, privileges, or immunities secured by the Constitution or laws of the United States.[80] Officers may be required to use force during the course of their duties, however, the Constitution requires that officers use only an amount of force that is reasonable under the circumstances.[81]

1. Cleveland Division of Police Department's Patterns and Practices of Misconduct:

    i. DOJ found that CDP officers too often use unnecessary and unreasonable force in violation of the

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[76] John Wihbey & Leighton Walter Kille, *Excessive or Reasonable Force by Police? Research on Law Enforcement and Racial Conflict*, JOURNALIST'S RESOURCE (July 1, 2015), http://journalistsresource.org/studies/government/criminal-justice/police-reasonable-force-brutality-race-research-review-statistics.
[77] *Id.*
[78] *Id*.
[79] U.S. DEP'T OF JUST. CIV. RTS. DIV., U.S. ATT'Y'S OFF., N. DIST. OF OHIO, INVESTIGATION OF THE CLEVELAND DIV. OF POLICE (Dec. 4, 2014), https://www.justice.gov/file/180576/download.
[80] *Id*.
[81] *Id.*

Constitution. Supervisors tolerate this behavior and, in some cases, they endorse it.

ii. CPD's pattern or practice of excessive force is both reflected by and stems from its failure to adequately review and investigate officers' uses of force;

iii. fully and objectively investigate all allegations of misconduct and to identify and respond to patterns of at-risk behavior,

iv. provide its officers with the support, training, supervision, and equipment needed to allow them to do their jobs safely and effectively;

v. Adopt and enforce appropriate policies; and implement effective community policing strategies at all levels of CDP.

vi. Force incidents often are not properly reported, documented, investigated, or addressed with corrective measures.

vii. Supervisors throughout the chain of command endorse questionable and sometimes unlawful conduct by officers.

viii. Review of supervisory investigations of officers' use of force appear to be designed from the outset to justify the officers' actions.

ix. Deeply troubling to us was that some of the specially-trained investigators who are charged with conducting unbiased reviews of officers' use of deadly force admitted to us that they conduct their investigations with the goal of casting the accused officer in the most positive light possible.

x. Another critical flaw discovered is that many of the investigators in CDP's Internal Affairs Unit advised that they will only find that an officer violated Division policy if the evidence against the officer proves, beyond a reasonable doubt that an officer engaged in misconduct-an unreasonably

high standard reserved for criminal prosecutions and inappropriate in this context.[82]

B. Ferguson Police Department

Ferguson Police Department's ("FPD") approach to law enforcement, shaped by the City's pressure to raise revenue, has resulted in a pattern and practice of constitutional violations.[83] Ferguson's approach to law enforcement both reflects and reinforces racial bias, including stereotyping.[84] The harms of Ferguson's police and court practices are borne disproportionately by African-Americans, and there is evidence that this is due in part to intentional discrimination on the basis of race.[85]

1. Officers Violate the Fourth Amendment in Stopping People Without Reasonable Suspicion, arresting them Without Probable Cause, and Using Unreasonable Force.

    i. FPD failed to adequately supervise officers or review their enforcement actions.
    ii. In Ferguson, officers sometimes make arrests without writing a report or even obtaining an incident number. Incidentally, hundreds of reports pile up for months without supervisors reviewing them.
    iii. Officers' use of force frequently go unreported and reports are reviewed only laxly if reviewed at all.[86]

2. Examples of Ferguson Police Department's Misconduct:

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[82] *Id.* at 3-5.
[83] U.S. DEP'T OF JUST. CIV. RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEP'T (Mar. 4, 2015), https://assets.documentcloud.org/documents/1681138/ferguson-doj-report.pdf.
[84] *Id.* at 4.
[85] *Id.*
[86] *Id.* at 16.

i. A sergeant vigorously defended FPD's actions, characterizing the detention as 'minimal' and pointing out that the car was air-conditioned.[87] Even temporary detention, however, constitutes a deprivation of liberty and must be justified under the Fourth Amendment.[88]

ii. An African-American man sitting at the bus stop was made to walk up to the police car that pulled up and asked him for his identification. When the man asked, 'Why?' The officer told him to stop being a smart ass and give him his identification. The lieutenant ran the man's name for warrants and found nothing, he then told the man to '[g]et the hell out of my face.'[89]

iii. FPD participates in legally unsupportable stops described as 'ped checks' or 'pedestrian checks.' The law clearly states that, 'Officers may not detain a person, even briefly, without articulable reasonable suspicion.'[90]

Everyone is on their best behavior when the cameras are running. The officers, the public - everyone. – Ron Miller, Chief of Police, Topeka (Kansas) Police Department

V. SYSTEMIC REFORM

Police Departments "must undergo a cultural shift at all levels to change an 'us-against-them' mentality [that has been]

[87] *Id.* at 17.
[88] Whren v. United States, 517 U.S. 806, 809-10 (1996).
[89] INVESTIGATION OF THE FERGUSON POLICE DEP'T, *supra* note 80.
[90] Terry v. Ohio, 392 U.S. 1, 21 (1968).

too often observed and to truly integrate and inculcate community oriented policing principles into the daily work and management of the Division."[91] The only effective mechanism to address these significant problems is to reach a consent decree that provides for a monitor to oversee the implementation of systematic reform in all Police Divisions.[92] Some police departments have already launched plans to improve their units with preventive items such as body cameras for their department.[93]

This section briefly explores alternatives that can help to begin the systematic reform nationwide that will bring police and communities to a position of greater trust. These ideas will allow citizens to be treated with the dignity they deserve and allow the police to do their jobs with "joy, and not with grief."[94]

A. Body Cameras

President Obama has taken a stand against police misconduct by getting the government involved. He supported funding for body cameras across the nation that will record events like the ones that have recently taken place in our country.[95] "President Obama is proposing a three-year, $263 million

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[91] *See, e.g.*, *supra* note 76, at 6.
[92] *Id.*
[93] Laura Ly, *Can Cell Phones Stop Police Brutality*? CNN (Nov. 19, 2014), http://www.cnn.com/2014/11/18/us/police-cell-phone-videos (NYPD Commissioner Bill Bratton stated, "The NYPD is committed to embracing new and emerging technology in order to continue to keep New York City safe . . . Having patrol officers wear body cameras during this pilot demonstrates our commitment to transparency while it will also allow us to review its effectiveness with the intention of expanding the program.").
[94] *Hebrews* 13:17 (King James).
[95] Nedra Pickler, *Obama Wants More Cops Wearing Body Cams,* POLICEONE.COM (Dec. 1, 2014), https://www.policeone.com/police-products/body-cameras/articles/7910646-Obama-wants-more-cops-wearing-body-cams/ (President Obama had asked Congress to fund 50,000 body cameras to record "events like the shooting death of [an] unarmed 18-year-old Michael Brown" and to build trust between police and minority communities nationwide. He

spending package to increase use of body-worn cameras, expand training for law enforcement[,] and add more resources for police department reform."[96]

At the State level, Mayor Stephanie Rawlings-Blake, of Baltimore, MD, "has pledged to start a pilot program where police in the Western District neighborhood, where [Freddie] Gray was arrested, will wear body cameras."[97] She further stated, "the cameras will help drastically reduce police misconduct as well as frivolous complaints from citizens."[98] Other police departments are embracing camera technology and even utilizing it to strengthen transparency and accountability between their officers and the community.[99]

Body cameras have received enormous amounts of media attention recently. Some citizens believe that victims, like Sandra Bland, would still be alive today if the police had worn a body camera that day. The full story would have been told—precisely, what led a routine traffic stop for failing to signal while changing lanes, to landing Ms. Bland in jail, and then three

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announced the creation of a task force to study success stories and recommend ways the government can support accountability, transparency, and trust).

[96] *Id.* "The package includes $75 million to help pay for 50,000 [sic] of the small, lapel-mounted cameras to record police on the job, with state and local governments paying half the cost." *Id.* Estimates vary about the precise number of full-time, sworn law enforcement officers in communities across the U.S., though some federal government reports in recent years have placed the figure at roughly 700,000. *See Id.*

[97] Editorial, *Baltimore Approves Settlement in Freddie Gray Case*, CBS NEWS/APS (Sept. 9, 2015), http://www.cbsnews.com/news/baltimore-approves-6-4m-settlement-in-freddie-gray-case.

[98] *Id.*

[99] Ly, *supra* note 90 ("Police departments in Rialto, California, and Mesa, Arizona, have already implemented body-camera programs for their officers").

days later finding her dead in a cell.[100] Body cameras, could "potentially help resolve the type of disputes between police and witnesses that also arose in the Ferguson shooting."[101] These devices will be instrumental in making police officers accountable for their actions and allow them to take an extra second to ask, "Is it worth it?" before proceeding with unlawful conduct.

It is further recommended that body cameras, in order to be efficient, should have live-feed capabilities, accessible only by a neutral third party, not police or their superiors. Business owners and residents install video cameras around their property to make it safe. Likewise, police officers that employ body cameras will allow many citizens to feel safe when being pulled over for a routine traffic stop.

Although body cameras are a great tool for officers to add to their arsenal, there are other issues to address. These issues include privacy of officers, suspects, victims, and bystanders; legal questions over who should have access to the recordings; and training to ensure proper use. For instance, officers should be trained to keep the cameras on at critical times.[102] With the proper training and monitoring, body cameras would greatly minimize police misconduct on the streets.

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[100] Michael McLauglin, *Sandra Bland Threatened with Taser by Officer Making Arrest*, HUFF. POST (July 21, 2015, 7:42 PM), http://www.huffingtonpost.com/entry/sandra-bland-threatened-with-taser-by-officer-making-arrest_us_55aec02be4b0a9b94852e3b6 ("The encounter between Bland, 28, and state trooper Brian Encinia quickly became contentious after he pulled [Bland] over on July 10 for allegedly failing to signal when she changed lanes." She eventually was taken to the Waller County jail in Hempstead. "On July 13, [three days later,] she was found hanged to death in her cell by a plastic garbage bag.").

[101] Pickler, *supra* note 92 (Some witnesses have said Brown had his hands up when Wilson shot him. The officer who shot him said he feared for his life when Brown hit him and reached for his gun).

[102] Pickler, *supra*.

B. Ongoing Training for Police Officers

Most public service professions make it mandatory for their members to complete ongoing training.[103] Likewise police officers, especially given their dangerous field, should receive ongoing training in such topics as improving people skills, de-escalating of situations, enhancing community relations, and conducting diversity training.[104] These topics may change with time, however, police officers have daily interactions with citizens from all walks of life. These ongoing trainings are necessary to start communication and to make contacts with citizens that are fair and respectful. Moreover, the trainings will build trust between police officers and the community. Superiors should recognize when police officers are in need of training and then provide the officers time off for this training.

When there are no consequences, the actions, whether good or bad, will continue. Just like the Oath states for the officers discussed at the beginning of this article: "I will . . . hold myself and others accountable for our actions,"[105] there is a reason this was put into the oath. Some officers may just have a bad day from time to time and take that out during a routine stop and then go on with life as usual. Other officers have a history of making questionable stops, bad choices, and biased decisions

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[103] *See RITE Programs and Pricing*, http://riteacademy.com/training (last visited Apr. 27, 2016) ("The executive leadership team, first-line supervisors, police officers, corrections officers, public service professionals, and all sworn and non-sworn personnel employed in your department will benefit from the RITE program. With departments under the radar to public scrutiny, easy access to public video, usage of body cams, witnesses shooting video, and heightened awareness of public opinion, the RITE program teaches your officers how to handle stress in an effective way. Imagine bringing in Cultural Diversity Training, they'll actually enjoy and use, personally, professionally, and in the community.").

[104] *Id*.

[105] Int'l Ass'n of Chiefs of Police, *Oath of Honor*, IACP, http://dnn9ciwm8.azurewebsites.net/What-is-the-Law-Enforcement-Oath-of-Honor (last visited Jan. 27, 2017).

on the street regularly. The ongoing training may help to alleviate bad choices made on the street by giving officers reminders of why they chose their profession in the first place, how to handle tough situations on the street, how to de-escalate situations, and how to use the least amount of force necessary to achieve an objective, instead of shooting and asking questions later.

C. Independent Monitoring Team

Having an independent monitoring team come in to each department nationwide and ensure that each department is complying with the law would be an ideal solution to this issue. They would be responsible for: collecting and recording the data on a quarterly basis, issuing fines, or withdrawing funds for non-compliance. Departments struggling to maintain adequate data and records could receive up to monthly visits. Once the police departments know that they have no choice but to comply, they will eventually take the necessary steps to comply.

"Ohio, for example, does not require an investigation of police shootings by an agency other than the one for which the officer works."[106] This has to be turned around to create some type of consequences for wrongful actions. With no national standard that defines force—let alone consistent requirements for reporting—it can be difficult to find reliable data and valid reports about the number of confrontations with police that turn violent.

D. Prosecutors Justly Charging Officers

"A few officers are charged with criminal wrongdoing after shooting someone[,]" but others are not.[107] When officers are charged for the wrong that they have committed in the line

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[106] Sheila McLaughlin, *What Happens When Officers Use Deadly Force?* USA TODAY (Feb. 21, 2014, 2:49 PM), http://www.usatoday.com/story/news/nation/2014/02/21/police-deadly-force-accountability/5697611/.
[107] *Id*.

of duty, it brings about a general deterrence that other officers will not commit these same crimes for fear of suffering the same punishment that a fellow officer has suffered.[108]

There has even been an instance when racial bias caused officers to brutalize their fellow officer, and this behavior did not result in charges being filed, which is unacceptable.[109] In 2014, "a grand jury indicted Charlotte-Mecklenburg, [North Carolina], police Officer Randall Kerrick in the shooting death of an unarmed 28-year-old man."[110] "Kerrick was charged with voluntary manslaughter for shooting Jonathan Ferrell [ten] times after responding to reports of a man trying to break into a home."[111] "Ferrell had wrecked his car and had pounded on a nearby resident's door to get help . . . , [but t]he resident thought someone was trying to break in. . . ."[112] It was the first time in thirty years that a Charlotte police officer had been charged in an on-duty shooting.[113] All six officers, in the Freddie Gray

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[108] Ellen S. Podgor, et al., CRIM. L.: CONCEPTS AND PRACTICE 4 (3d ed. 2013).

[109] Lynette Holloway, *Black NYPD Cop Awarded $15 Million After False Arrest & Beating By Fellow Officers At His Home,* NEWSONE, http://newsone.com/3352249/black-nypd-cop-larry-jackson-awarded-15-million-after-assault-by-fellow-officers/# (last visited Jan. 27, 2017) ("A federal jury has awarded a Black New York police officer $15 million after he was falsely arrested, beaten, and had his hand fractured by fellow officers at this Queens home in 2010. . . Off-duty Officer Larry Jackson [] was beaten with batons, choked, kicked, sprayed in the face with pepper spray and had his hand fractured [by fellow officers at his home], according to his lawyer, who blames race biases on escalating the incident. . . The Brooklyn Federal Court jury decided [] that Jackson was entitled to punitive damages from 12 individual officers for a total of $2.6 million, in addition to $12.5 million in damages. The Queens District Attorney's Office refused to prosecute the arresting officers following an investigation. . .") (internal quotations and emphasis omitted).

[110] McLaughlin, *supra* note 103.

[111] *Id.*

[112] *Id.*

[113] David Zucchino, *Charlotte Cop Indicted in Shooting of Ex-Florida A&M Football Player*, L.A. TIMES (Jan. 28, 2014, 10:35 AM), http://www.

case, including Edward Nero and Garrett Miller, were charged with second-degree assault, misconduct in office, and reckless endangerment. Lt. Brian Rice, Sgt. Alicia White and Officer William Porter also face a manslaughter charge, while Officer Caesar Goodson faces the most serious charge of all: "second-degree 'depraved-heart' murder."[114]

Although prosecutors try to keep a positive working relationship with police officers, they will have to play their part also in keeping officers accountable to the excessive and deadly force charges that keep coming up. If everyone passes the buck onto the next department or the next person to take the responsibility off of themselves, then the problem will remain just that, a problem. In some situations, it is possibly easier for a prosecutor to pass the buck onto the grand jury to decide the officers' fate, if charges are brought at all. Prosecutors are needed that are not afraid to stand up to police officers and not intimidated to do their job by bringing charges when necessary. A case should not have to be in the news in order for the State to do the right thing, once the country is watching.

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latimes.com/nation/nationnow/la-na-nn-charlotte-police-officer-indicted-famu-killing-20140128-story.html ("Charles G. Monnett III, a Charlotte attorney representing the family, told the Times [] [that] he appreciated the efforts of the grand jury to 'appropriately examine the evidence' in the case." Monnett further stated, "We hope to change the culture and attitude and training of the police department so that this type of thing doesn't happen again.").

[114] Editorial, *supra* note 97.

A functioning police state needs no police.
-William Seward Burroughs

VI. CONCLUSION

Police officers take an oath of honor that states: ". . . I will always have the courage to hold myself and others accountable for our actions."[115] Nevertheless, many officers are not holding true to the oath, nor are they holding themselves or others accountable for their actions. Police officers have an awesome, daily responsibility and no one disputes the fact that their lives are in jeopardy minute by minute out on the street. The problem more or less arises when an officer uses different judgments for one person versus another based upon the color of their skin.

Almost all police work is subjective—from passing out tickets, to bringing charges. Racial bias will eventually surface in the officer's performance. Police brutality will continue if its roots are ignored and if offending officers are given immunity. The issue of excessive force is not new, but has recently become more prevalent as a result of decades of problems. More recently, evidence has blossomed into more severe cases, where before, prejudice was more difficult to prove. Unless police officers are held accountable by supervisors, department heads, prosecutors, juries and citizens, the problem will continue to go onward and spread like rapid wildfire. We the people cannot afford to wait until this issue personally hits home, a young person or an African-American we know, in order for us to act; it is ***all*** of our problem. This article expects to have drawn your attention to and explored possible solutions to the very real issue of race and police brutality that remains: "Black, White and Blue."

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[115] Pickler, *supra*, note 92.

HOUSE BILL 2312: TO END STONEWALLING EMPLOYMENT FOR EX-CONVICTS

Nicole Hall*

I. INTRODUCTION

> *"This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can't find work, or a home, or help, they are much more likely to commit more crimes and return to prison . . America is the land of the second chance, and when the gates of the prison open, the path ahead should lead to a better life."*
>
> ***—President George W. Bush, 2004 State of the Union Address***[1]

The criminal justice system punishes an individual for committing criminal acts. Although persons convicted of a felony eventually regain their liberty, many privileges that individual once had are now restricted, including employment opportunities.[2] House Bill 2312 ("H.B. 2312") seeks to prevent discrimination in hiring practices based on an individual's criminal record. This bill would prevent employers from deny-

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[1] *Prisoners and Prisoner Re-Entry*, U.S. DEP'T OF JUST., https://www. justice.gov/archive/fbci/progmenu_reentry.html (last visited Mar. 17, 2017).

[2] Deborah N. Archer & Kele S. Williams, *Making America 'The Land of Second Chances': Restoring Socioeconomic Rights for Ex-Offenders,* 30 N.Y.U. REV. L. & SOC. CHANGE 527, 527 (2006).

ing an applicant based on their criminal record unless three conditions are met: (1) the employer has extended a "conditional offer of employment" to the applicant; (2) the record must only revert five years from the date of the offer; and (3) the record must have a "direct relationship" with the type of position available.[3] Enacting such legislation will reduce the need for desired litigation and help break down the difficult barrier to employment.[4]

This comment will first provide some details into the background of H.B. 2312 and its predecessor. Next, it will discuss the two diverging interests in the bill, where public policy's demands to decrease crime rates grapples with public safety interests.

II. BACKGROUND

The "Banning-the-Box" movement began in the nineties.[5] Advocates began challenging employers to remove questions from their applications regarding an applicant's criminal history, and pushed them to focus more on an applicant's skills and experience.[6] "The argument is straightforward: increasing the rate at which individuals with criminal records are cleared

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[3] H.B. 2312, 53rd Leg., 1st Reg. Sess. (Ariz. 2017), https://apps.azleg.gov/BillStatus/GetDocumentPdf/445921.

[4] Archer & Williams, *supra* note 2, at 528. (Archer urges that "in light of unfavorable federal law, litigation under state law theories provides the best hope for relief. While legal advocacy aimed at helping ex-offenders surmount existing barriers to housing, employment, and other basic necessities is an invaluable step, collateral sanctions will continue to have a devastating impact on individuals and their communities unless resources are directed at changing these policies.").

[5] Bill Mosley, *Removing the Stigma of Past Incarceration: "Ban the Box" Laws,* 14 NEW POL. 3 (2013).

[6] EXECUTIVES' ALLIANCE, FAIR-CHANCE HIRING IN PHILANTHROPY 15 (2016), http://www.bantheboxphilanthropy.org/wp-content/uploads/2016/02/Fair-Chance-Hiring-Philanthropy-Guide.pdf.

to work can both increase employment and decrease crime."[7] On the other hand, public policy requires the legislature and employers to consider public safety when permitting dangerous individuals to work in certain positions.[8]

The Equal Employment Opportunity Commission ("EEOC") has written guidelines with respect to the use of criminal records by employers.[9] The EEOC has recognized that selecting employees on a basis of an individual's previous arrests and convictions may be discriminatory in nature.[10] Under Title VII of the Civil Rights Act of 1964 ("Title VII"), it is "unlawful employment practice for employers to . . . fail or refuse to hire or . . . to limit, segregate, or classify . . . applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . , because of such individual's race, color, religion, sex, or national origin."[11] While having a criminal record does not invariably suggest the individual is part of a protected class, statistics indicate that Black and Hispanic individuals are overrepresented in the criminal justice system.[12]

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[7] Megan Denver, Girima Swach, & Shawn D. Bushway, *A New Look at the Employment and Recidivism Relationship Through the Lens of a Criminal Background Check,* 55 CRIMINOLOGY 174, 176 (2017).
[8] *See id.* at 178.
[9] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC ENF'T GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMP'T DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#sdendnote122anc [Hereinafter EEOC Guidelines].
[10] *See id.*
[11] 42 U.S.C. § 2000e-2(a)(1)-(2) (2012).
[12] Jocelyn Simonson, *Rethinking "Rational Discrimination" Against Ex-Offenders*, 13 GEO. J. ON POVERTY L. & POL'Y 283, 284 (2006).

The EEOC focused on these employer hiring practices and their implications under Title VII because minorities are disproportionately affected by such policies[13] and these types of "facially neutral policies" are exactly what Title VII aims to prohibit.[14] However, the EEOC guidelines will benefit people from all backgrounds.[15] Across the United States, twenty-five states have embraced the "ban-the-box" movement statewide for jobs in the public sector.[16] Of those states, only nine have required the same policies for private employers.[17]

Although Arizona is not on the list for state-wide policies, five Arizona cities have "ban-the-box" policies for applicants who apply to work for the city.[18] The City of Phoenix remodeled its hiring process and moved background checks to the "finalist interview stage," where any prior convictions are sifted through using the EEOC guidelines.[19] From here, if an applicant is disqualified based on a prior conviction, the City of

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[13] *See id.*

[14] Michelle Natividad Rodriguez & Maurice Emsellem, 65 MILLION "NEED NOT APPLY" 5 (Mar. 2011), http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf.

[15] *See id.* at 4.

[16] Michelle Natividad Rodriguez & Beth Avery, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR-CHANCE POLICIES TO ADVANCE EMP. OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS 1 (Feb. 2017), http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf (Listing the following states: "California (2013, 2010), Colorado (2012), Connecticut (2010, 2016), Delaware (2014), Georgia (2015), Hawaii (1998), Illinois (2014, 2013), Kentucky (2017), Louisiana (2016), Maryland (2013), Massachusetts (2010), Minnesota (2013, 2009), Missouri (2016), Nebraska (2014), New Jersey (2014), New Mexico (2010), New York (2015), Ohio (2015), Oklahoma (2016), Oregon (2015), Rhode Island (2013), Tennessee (2016), Vermont (2015, 2016), Virginia (2015), and Wisconsin (2016)").

[17] *See id. (*These states include: "Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont.").

[18] *See id.* at 3. (These cities include: "Glendale, Phoenix, Pima County, Tempe, and Tucson.").

[19] *Id.* at 75; *see also* PHX. ADMIN. REG. 2.81 (2016).

Phoenix provides a ten-day appeals period, which allows the applicant to "dispute the record or provide any mitigating information."[20] H.B. 2312 is comparable to Phoenix's Administrative Regulation 2.81 and follows the EEOC guidelines, but as an enforceable Arizona statute it would bind public and private employers statewide from excessively barring criminal convicts from employment.

III. SOCIETAL IMPLICATIONS OF CIVIL SANCTIONS

Recidivism—a tendency to relapse into criminal behavior—has a direct correlation with an individual's inability to gain employment.[21] Studies show that seven percent of ex-convicts who obtain employment will be rearrested within a year, but that percentage jumps closer to twenty percent when ex-convicts are denied employment.[22] The study concluded that "the most plausible reason for the decrease in subsequent arrest is through employment."[23]

An ex-offender who re-enters mainstream society with a desire to participate will hit what seems to be an insurmountable barrier—a civil sanction to employment.[24] Ex-offenders

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[20] *Id.*

[21] *Id. See* Simonson, *supra* note 12, at 284. (*"*A number of studies establish a link between unemployment and recidivism, finding that ex-offenders who are unable to secure jobs upon release are much more likely to re-offend than those who are employed.").

[22] Denver, Swach & Bushway, *supra* note 7, at 185.

[23] *Id.* at 197.

[24] *See* Simonson, *supra* note 12, at 285; *see also* Tammy R. Pettinato, *Employment Discrimination Against Ex-Offenders: The Promise and Limits of Title VII Disparate Impact Theory,* 98 MARQ. L. REV. 831, 836 (2014); Green v. Missouri Pac. R. Co., 523 F.2d 1290, 1298 (8th Cir. 1975) ("We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed…. To deny job opportunities to these individuals because of some conduct which may be remote in time or

are too often punished "beyond the appropriate extent of the law" by employers who impose such civil sanctions.[25] Employers are fifty percent less likely to offer employment to those with a criminal history and even more so for offenders convicted of violent crimes.[26] "Ban-the-box" policies decrease the rate at which applicants are "barred from employment for youthful indiscretions, minor run-ins with the law, or . . . offenses from the distant past."[27]

Driven by fear and stereotypes, businesses hinder the economy by making background checks such an integral part of the hiring process.[28] In Philadelphia—a city that has yet to "ban-the-box"—an economical study provided the state with estimates on its potential earnings and savings resulting from simply employing 100 people with prior convictions.[29] The study estimated an increase of over $55 million in lifetime income for these employees, which converts to an extra $1.9 million recovered from taxed wages and $770,000 in sales tax revenues.[30] In addition to the massive increase in economic contributions, the city is estimated to reduce costs by approximately $3.7 million annually after reducing the rate of recidivism by 100 inmates.[31] This can serve as a model for Arizona consider-

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does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.").

[25] Simonson, *supra* note 12, at 285.

[26] *See* Pettinato, *supra* note 24, at 837.

[27] Rodriguez & Emsellem, *supra* note 14, at 6.

[28] *See* Rodriguez and Emsellem, *supra* note 14, at 7.

[29] *See generally* ECON. LEAGUE OF GREATER PHILA., ECON. BENEFITS OF EMPLOYING FORMERLY INCARCERATED INDIVIDUALS IN PHILADELPHIA (Sep. 2011), http://economyleague.org/uploads/files/712279713790016867-economic-benefits-of-employing-formerly-incarcerated-full-report.pdf.

[30] *Id.* at 11-13.

[31] *Id.* at 16-17. (these estimates include savings from police departments, court costs, probation and parole costs, inmate housing costs, and paid wages to correctional officers).

ing Phoenix's population is only 40,000 less than that of the city of Philadelphia.[32]

As it stands, ex-convicts who are given a second chance are more likely to lead successful lives and at the same time, are guaranteed to help the economy grow by contributing to it and reducing tax dollars used to incarcerated these individuals. H.B. 2312 can bring about such change, but employers are its most avid and oppositional critics.

IV. PREDATORY EMPLOYMENT PRACTICES

Most crimes do not occur in the workplace,[33] but employers hesitate to hire certain individuals because they may jeopardize the safety of other employees as well as the business's consumers.[34] Employers fear that hiring an ex-offender will subject them to liability for the employee's negligence or for negligent hiring.[35] The doctrine of respondeat superior holds an employer liable for damages that arise out of their employee's negligent conduct, so long as the conduct is "within the scope of employment or in furtherance of the employer's

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[32] 30 Philadelphia's current population is 1,553,165 and Phoenix's current population is 1,513,367. BALLOTPEDIA, LARGEST CITIES IN THE UNITED STATES BY POPULATION, https://ballotpedia.org/Largest_cities_in_the_United_States_by_population (last visited May 5, 2017). (it is also important to note that Arizona has the sixth fastest rate of incarceration, where Pennsylvania—a state twice as populated—sits in the seventeenth position. *See* Press Release, Peter Wagner & Alison Walsh, States of Incarceration: The Global Context 2016, Prison Policy Initiative (June 16, 2016)).

[33] Pettinato, *supra* note 24, at 839.

[34] *See* Amy L. Solomon, *In Search of a Job: Criminal Records and Barriers to Employment*, 270 NIJ J. 42, 46 (2012). *But see* Rodriguez & Emsellem, *supra* note 14, at 7. (The authors argue that because criminal records are often incomplete and contain inaccurate information, "[a] criminal record alone is an inadequate measure of an individual's risk of creating a safety or security threat . . .."*)*.

[35] *See* Pettinato, *supra* note 24, at 873.

interest . . . ."[36] For example, a furniture company failed to conduct a background check on John Turner, one of its delivery men, which would have uncovered his history of mental illness, violence, and property crimes.[37] Turner returned to a home where he had recently delivered a couch, and the homeowner welcomed him inside.[38] The homeowner sustained serious injuries from Turner, who stabbed her numerous times and beat her until she slipped into unconsciousness.[39] Under a theory of negligent hiring, the furniture company was held liable for over $2 million in damages.[40]

Cases like this and others that may be less extreme appear to legitimize an employer's rationale in refusing to hire ex-offenders. In fact, two-thirds of employers strictly adhere to a *no prior record* rule.[41] Employers attach a stigma to criminal records and quickly write off these types of applicants as people that cannot be trusted.[42] They believe that an applicant's criminal history is the best way to weed out the applicants who have the propensity to commit fraudulent or violent acts.[43] However, "[n]o research has shown that workplace violence is generally attributed to employee[s with records] or that hiring [people with records] is causally linked to increased workplace violence."[44]

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[36] Monica Scales, *Casenote, Employer Catch-22: The Paradox Between Employer Liability for Employee Criminal Acts and the Prohibitions Against Ex-Convict Discrimination*, 11 GEO. MASON L. REV. 419, 422 (2002).
[37] Tallahassee Furniture Co., Inc., v. Harrison, 583 So.2d 744, 748-49 (Fla. Dist. Ct. App. 1991).
[38] *Id.* at 748.
[39] *Id.* at 749.
[40] *Id.* at 764.
[41] *See* Scales, *supra* note 36, at 430.
[42] *See id.*
[43] *See id.* at 420.
[44] Executives' Alliance, *supra* note 6, at 29.

The EEOC guidelines and other anti-discrimination statutes not only seek to prevent employers from discriminating against minority groups, which have higher conviction rates, it also "force[s] employers to hire ex-offenders in order to solve the problem of high unemployment rates among this sector of society."[45] Courts enforcing this legislation can compel employers to rehire the employee and to pay damages or lost wages to the employee.[46] Together, the contrasting principles underlying the doctrine of respondeat superior and the "ban-the-box" movement suggest that employers are placed in a perpetual conundrum, but quite frankly these principles simply ask employers to not completely disregard minority populations and perform due diligence by exercising reasonable care when selecting employees.[47]

V. CONCLUSION

H.B. 2312 is not the first of its kind. At both the federal and state level, policies like H.B. 2312 have been implemented and as a result, "almost two-thirds of the U.S. population . . . live[s] in a jurisdiction with some form of ban-the-box or fair-chance policy."[48] The country has acknowledged the importance of hiring ex-convicts, but employers continue to be wary. It is unlikely that Arizona will pass a bill like H.B. 2312 until citizens battling to reduce recidivism and citizens battling to keep their businesses and the public safe from convicts understand that they are fighting the same fight.

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[45] Scales, *supra* note 36, at 427.
[46] *See id.* at 428.
[47] *See id.* at 430-31. ("Business owners are encouraged to thoroughly investigate a prospective employee's background before hiring, and yet, an employer who uses the results of the background investigation to bar employment can be found liable for discrimination.").
[48] Rodriguez & Avery, *supra* note 16, at 1.

ARIZONA SENATE BILL 1080: BAN ON CELL PHONE USAGE FOR NOVICE TEEN DRIVERS IS LONG OVERDUE

Dawn McCraw*

I. INTRODUCTION

Does anyone really argue that it is a bad idea to ban novice teenage drivers from using a cell phone while driving? The only critics of the proposed Arizona law seem to be those who want stronger laws, which also bar adults from texting and driving, and are concerned the bill would not send a powerful enough message to teens.[1] Since 2011, the Arizona legislature has futilely attempted to pass a bill prohibiting only teenage drivers from using a wireless communications device while driving a motor vehicle.[2] Arizona is one of only two states without some form of a texting ban, but it is not for lack of trying (Montana is the other state).[3] Despite six years of unsuc-

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[1] Mary Jo Pitzl, *Arizona legislators take small step to ban texting while driving*, AZCENTRAL.COM, (Jan. 24, 2017), http://www.azcentral.com/story/news/politics/arizona/2017/01/24/arizona-legislators-take-small-step-ban-texting-while-driving/97003930/ [https://perma.cc/P72U-8CXA] (noting Missouri, Montana, Texas, and Arizona are the only states without a texting while driving ban for all drivers).

[2] H.B. 2241, 52d Leg., 2d Reg. Sess. (Ariz. 2016); H.B. 2343, 52d Leg., 1st Reg. Sess. (Ariz. 2015); H.B. 2359, 51st Leg., 2d Reg. Sess. (Ariz. 2014); S.B. 1268, 51st Leg., 1st Reg. Sess. (Ariz. 2013); S.B. 1056, 50th Leg., 2d Reg. Sess. (Ariz. 2012); H.B. 2311, 50th Leg., 2d Reg. Sess. (Ariz. 2012); H.B. 2426, 50th Leg., 1st Reg. Sess. (Ariz. 2011).

[3] Anne Teigen, *Cellular Phone Use and Texting While Driving Laws*, NAT'L CONF. OF LEGISLATURES (Mar. 10, 2016) (citing Insurance Institute for Highway Safety 2016), http://www.ncsl.org/research/transportation/cellular-phone-use-and-texting-while-driving-laws.aspx [https://perma.cc/7R4W-URNY].

cessful efforts, the Arizona legislature has brought forward Senate Bill 1080 ("S.B. 1080") to try once again to amend the laws for novice drivers.[4] The bill would prohibit teen drivers from using a wireless communications device while driving if they have an instruction permit license or have had their Class G driver's license for less than six months.[5] This comment provides background on how this bill would amend the current law, discusses its potential to save lives and prevent injuries by averting distracted driving accidents, and considers whether the bill goes far enough to have an effect on such injuries.

II. BACKGROUND

Arizona already has restrictions on licenses for new drivers.[6] The state grants instruction permits to drivers who are at least fifteen years and six months of age and pass all parts of the examination, except the driving test and, while driving, are accompanied by a licensed driver over twenty-one years of age.[7] A Class G driver's license is granted to teens between the ages of sixteen and eighteen years if they have successfully passed a driver's education program as well as the written and driving examinations.[8] A Class G licensee may drive alone, but there are restrictions, such as a prohibition from driving on public highways between 12:00 a.m. and 5:00 a.m.[9] Senate Bill 1080 ("S.B. 1080") would amend the instruction permit statute to prohibit a permittee from driving while using a wire-

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[4] S.B. 1080, 53d Leg., 1st Reg. Sess. (Ariz. 2017) (teenage drivers; communication devices prohibited), https://apps.azleg.gov/BillStatus/BillOverview/68707?SessionId=117 [https://perma.cc/DF5S-5F9T].
[5] *Id*.
[6] *See* ARIZ. REV. STAT. § 28-3154 (instruction permit for a class D or G license); ARIZ. REV. STAT. § 28-3174 (class G driver's licenses: restrictions; civil penalties; motorcycles).
[7] *Id*. § 28-3154.
[8] ARIZ. REV. STAT. § 28-3174.
[9] *Id*.

less communications device for any reason except during an emergency.[10] Additionally, the bill also provides that for the first six months after obtaining their Class G driver's license, the licensee is prohibited from driving while using a wireless communications device for any reason, except an emergency, or using a hands-free audible turn-by-turn navigation system.[11] Further, an officer may not stop or issue a citation for this violation unless the officer has a reasonable cause to believe there is another breach of a motor vehicle law.[12] A citation for the first offense would involve a $75 fine and thirty-day extension of the wireless device ban, and the punishment escalates from there, up to a $100 fine and a 30-day license suspension.[13]

III. ANALYSIS

Talking or texting while driving is just one component within the larger framework of distracted driving, which also includes activities such as talking to passengers, eating and drinking, grooming, using a navigation system, reading, watching videos, or adjusting the radio. Distracted drivers are "driving while doing another activity that takes [their] attention away from driving," and every day in the U.S., it causes crashes that kills eight people and injures 1,161.[14] It is estimated that cell phone use alone (texting, handheld, hands free) causes

[10] S.B. 1080, *supra* note 4.

[11] S.B. 1080, *supra* note 4. (An amendment to S.B. 1080 was passed on Feb. 13, 2017, to allow class G drivers to use audible turn-by-turn navigation systems while driving if: 1) the destination is not manually entered into the device while the licensee is driving and 2) the licensee does not manually adjust the device while driving.).

[12] S.B. 1080, s*upra* note 4.

[13] S.B. 1080, *supra* note 4.

[14] *Distracted Driving*, CENTERS FOR DISEASE CONTROL & PREVENTION, (Mar. 7, 2016), https://www.cdc.gov/motorvehiclesafety/distracted_driving/ [https://perma.cc/9X22-BN5Q].

1.5 million accidents each year.[15] It is important to keep this larger picture in mind while assessing the need for legislation.

A. The Rationale for This Proposed Legislation

Under the existing Arizona law, teens may drive while using a wireless communications device to talk; manually type, send, or read a written message; or send a video via text message, email, or social media without violating the law.[16] Even more disturbing, if due to the use of a mobile device while driving, a teen causes an accident that leads to the death or injury of another, there is no law that allows for prosecutors to take any action against the teen for causing the accident.[17]

According to the National Conference of State Legislatures, as of March 2016, thirty-seven states and Washington D.C. banned all cell phone use by novice or teen drivers, and forty-six states banned texting for all drivers.[18] Although an Arizona legislator was the first in the nation to introduce a texting ban (which included adults), Arizona still has no ban for any age driver for using a cell phone while driving (for texting or talking).[19] In 2015, 391,000 people were injured and 3,477 were killed in motor vehicle accidents involving distracted

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[15] Emma Gormley, *Indiana's Testing-While Driving Ban: Why Is It Not Working and How Could It Be Better?* 91 IND. L.J. SUPP. 87, 93 (2016).
[16] *See* ARIZ. REV. STAT. § 28-3154 and ARIZ. REV. STAT. § 28-3174, *supra* note 6.
[17] *See* Pitzl, *supra* note 1.
[18] *See* Teigen, *supra* note 3.
[19] *See* Pitzel, *supra* note 1 (noting that Senator Steve Farley, D-Tucson was the first lawmaker in the U.S. to propose a texting ban).

drivers.[20] Approximately 660,000 U.S. drivers are using hand-held phones at any typical daylight moment.[21]

The sponsor of S.B. 1080, Senator Karen Fann, (R-Prescott), stated the youngest drivers need to concentrate on driving and also need to learn good driving habits that they can hopefully carry forward.[22] Although teens recognize that talking, texting on a cell phone, or using social media applications while driving is unsafe, they often engage in these behaviors any way.[23] The National Highway Traffic Safety Administration stated that in 2015, of all drivers fifteen to nineteen years old involved in fatal crashes, nine percent were reported as distracted at the time of the crashes.[24] In March 2015, the AAA Foundation for Traffic Safety conducted an extensive study of 1,700 in-vehicle videos of the seconds leading up to crashes by teen drivers and determined that the distracted teen driving issue is likely significantly worse than previously known.[25] The

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[20] *Distracted Driving: Facts and Statistics*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., https://www.distraction.gov/stats-research-laws/facts-and-statistics.html. [https://perma.cc/E4ED-RF2P].

[21] *Driver Electronic Device Use in 2011*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (Apr. 2013) (research Note DOT HS 811 719), https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/811719 [https://perma.cc/YNT9-GJLE].

[22] Howard Fischer, *Bill Would Keep Cell Phones Out of Hands of Newest Drivers*, ARIZ. CAP. TIMES (Jan. 25, 2017), http://azcapitoltimes.com/news/2017/01/25/bill-would-keep-cell-phones-out-of-hands-of-newest-drivers/ [https://perma.cc/5YB4-HBBN].

[23] C.C. McDonald & M.S. Sommers, *Teen Drivers' Perceptions of Inattention and Cell Phone Use While Driving*. TRAFFIC INJURY PREVENTION, 16 Supp. 2 S52-58 (2015), https://www.ncbi.nlm.nih.gov/pubmed/26436243 (last visited June 3, 2017).

[24] *Distracted Driving*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (Mar. 2017) (research Note DOT HS 812 381), https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812_381_distracteddriving2015.pdf [https://perma.cc/67AB-WVAL].

[25] *Distraction and Teen Crashes: Even Worse than We Thought*, AAA FOUND. FOR TRAFFIC SAFETY (Mar. 25, 2015), http://newsroom.aaa.com/

study found that distractions were a factor in fifty-eight percent of moderate-to-severe crashes involving drivers ages sixteen to nineteen.[26] Studies also indicate that mobile devices have increasingly become a larger part of teens' lives: nearly eighty percent of teens check their phones hourly, seventy-two percent feel the need to immediately respond to texts and social media messages, and fifty percent feel they are addicted to their mobile devices.[27]

Both data and common sense dictate that everyone would benefit if distracted driving were reduced, especially for our most vulnerable population of novice drivers. The question is how it can be effectively reduced.

B. Opposing Arguments to the Bill

At the Senate Transportation and Technology committee meeting on January 24, 2017, there were many organizations and individuals who spoke in favor of the bill.[28] Only one individual spoke emotionally against the bill's passage, but her motivation was that she believed the bill should cover all drivers, not just teens. Her father was killed by an adult driver distracted by a mobile device.[29] The only other argument that has been raised also infers the bill should be broader. The con-

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2015/03/distraction-teen-crashes-even-worse-thought/ [https://perma.cc/PCZ4-B7EK].

[26] *Id*.

[27] Kelly Wallace, *Half of Teens Think They're Addicted to Their Smartphones*, CNN (July 29, 2016) (citing Common Sense Media), http://edition.cnn.com/2016/05/03/health/teens-cell-phone-addiction-parents/ [https://perma.cc/8U8Z-LRRA].

[28] S.B. 1080, 53d Leg. 1st Reg. Sess. (Ariz. 2017), Hearing Before S. COMM. ON TRANSP. & TECH, http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=18437&meta_id=381762 (last visited June 3, 2017).

[29] *Id*.

cern is that the bill sends teens the wrong message—that it is acceptable to text and drive after six months of driving.[30]

C. *Does The Bill Go Far Enough?*

1. The Deterrent Factor

Studies have found that collision rates of teen drivers are measurably reduced by tough Class G driver's license laws.[31] The proposed bill is comprehensive in that it would ban the complete use of a cell phone for probationary drivers (except for emergencies or hands-free navigation).[32] However, a police officer cannot even issue a citation for this violation unless there is a reasonable belief the teen committed a different infraction of a motor vehicle law; this is known as secondary enforcement.[33] Some states that passed texting bans have introduced measures to increase the law from secondary enforcement, such as Arizona's bill proposes, to primary enforcement, where a driver can be cited solely for texting and driving.[34] Seat belt laws can serve as an important example of the impact of primary enforcement.[35] The compliance of seat belt laws is ten percent higher in states where there is primary enforcement, and fatality rates are significantly lower than in

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[30] *See* Fischer, *supra* note 22.

[31] Rebecca E. Trempel, *Graduated Driver Licensing Laws and Insurance Collision Claim Frequencies of Teenage Drivers*, HIGHWAY LOSS DATA INST. (Nov. 2009), http://www.iihs.org/frontend/iihs/documents/ masterfiledocs.ashx?id=2022 [https://perma.cc/3TXS-MPHD].

[32] *See supra* text accompanying note 4.

[33] *Id*.

[34] Sean Slone, *Enforcement of Texting While Driving Bans*, THE COUNCIL OF ST. GOVERNMENTS (Apr. 2014), http://knowledgecenter.csg.org/kc/system/files/CR_TextingDriving.pdf [https://perma.cc/3UMB-AL9S].

[35] Linda C. Fentiman, *A New Form of WMD? Driving with Mobile Device and Other Weapons of Mass Destruction*, 81 UMKC L. REV. 133, 169 (2012).

states where there is secondary enforcement.[36] In Nebraska, for example, where texting and driving is a secondary offense, there were only 234 tickets issued for the offense in 2011 and 2012, which would hardly be considered a deterrent.[37] The total handheld ban in New Jersey for drivers with a learner's permit or graduated license is treated as a primary offense; enforcement was significantly more successful when implementing a decal system so police could easily identify to whom the ban applies.[38] Arizona would likely see a better deterrent effect if the ban were treated as a primary offense.

Another deterrent for teens is the severity of the penalty for getting caught. In a study of teens across the country, the top motivation teens cited as influencing them to give up their cell phones was the potential of having their driver's license taken away.[39] Under the proposed ban, there is no risk of a suspended license until the third violation of the law.[40] To receive three violations, a teen would need to be caught committing three separate unrelated driving violations, in addition to concurrent use of his or her wireless device. Thus, the probability of a teen receiving a suspended license under this ban is quite low. An interesting comparison, in terms of penalties and deterrence, is to consider the drunk driving laws in Arizona. Arizona's drunk driving laws are ranked as having *the toughest*

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[36] *Id*.
[37] *See* Slone, *supra* note 34.
[38] *GDL Decal Research*, THE CHILD. HOSP. OF PHILA. TEEN DRIVER SOURCE, http://www.teendriversource.org/more_pages/page/chop_young_driver_research_gdl_decal_research/researcher [https://perma.cc/Z6Q4-DDVZ].
[39] *What Could Influence Teens to Give Up Cell Phone Use While Driving*, THE CHILD. HOSP. OF PHILA. TEEN DRIVER SOURCE, http://www.teendriversource.org/stats/support_teens/detail/76 [https://perma.cc/M7HQ-KPR8].
[40] S.B. 1080, *supra* note 4.

penalties in the nation.[41] Arizona is a zero-tolerance state, and for any driver under twenty-one with a blood alcohol content ("BAC") above zero percent, the driver faces a first time drunk driving conviction of one to ten days of imprisonment, a $1600 fine, and a license suspension of three months to one year.[42] This penalty is a stark contrast to the minor penalties in the proposed handheld ban, yet "texting while driving has been found to be six times more dangerous than drunk driving."[43] Even further, a 2013 study determined the deaths of teen drivers due to texting while driving has surpassed those who die from drinking and driving.[44] Although ninety-seven percent of teens believe texting and driving to be dangerous (which includes seventy-five percent who say it is "very dangerous"), the perceived benefits of using a cell phone while driving are high, while the perceived risks are low.[45] Forty years ago, drinking and driving was also treated as a minor traffic offense, but concerted national campaigns, creating awareness of the dangers of drinking and driving, changed public opinion into making drunk driving a *per se* crime, meaning the violation itself rose to the inference of a presumed illegality.[46] It may take a similar nationwide campaign to change public opinion about using a mobile device while driving.

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[41] Alina Comoreanu, *Strictest and Most Lenient States on DUI*, WALLETHUB (Aug. 10, 2016), https://wallethub.com/edu/dui-penalties-by-state/13549/#overall-rankings [https://perma.cc/L4SN-S8D4].

[42] Rich Stim, *Arizona: Underage DUI*, DRIVING LAWS PUBLISHED BY NOLO, http://dui.drivinglaws.org/resources/dui-and-dwi/dui-laws-state/arizona-underage-dui.htm [https://perma.cc/FB2L-AAYU].

[43] *See* Gormley, *supra* note 15, at 93.

[44] *Texting and Driving: Leading Cause Of Death Among Teens, Study Finds*, AM. COUNCIL ON SCI. AND HEALTH (May 9, 2013), http://www.acsh.org/news/2013/05/09/texting-and-driving-leading-cause-of-death-among-teens-study-finds [https://perma.cc/ET33-NE2C].

[45] *AT&T Teen Driver Survey* (2012), https://www.att.com/Common/about_us/txting_driving/att_teen_survey_executive.pdf [https://perma.cc/W869-56NV]. *Also see supra* note 38, at 89.

[46] *See* Slone, *supra* note 34, at 163.

2. Expanding the Restrictions Beyond Novice Drivers

In the current legislative session, two other bills have been proposed that would be much broader than S.B. 1080.[47] Senate Bill 1049 ("S.B. 1049") would be a complete ban for all drivers on texting while driving and Senate Bill 1135 ("S.B. 1135") would ban the use of a handheld communications device while driving for all drivers.[48] Bob Worsley, Chairman of the Senate Transportation and Technology Committee, said he will not give a hearing this year to either S.B. 1049 or S.B. 1135 because he first wants to see how S.B. 1080 fares and learn about the issues from that process.[49]

A February 2017 study indicated that young millennials might even be more likely than teens to use mobile devices while driving.[50] Drivers, ages nineteen to twenty-four, were twice as likely as all drivers to report typing a text message or email while driving.[51] Additionally, drivers in their twenties make up twenty-four percent of drivers in all fatal crashes, but thirty-three percent of the distracted drivers that were using cell phones in fatal crashes, which is the highest percentage for any age group.[52] "Alarmingly, some of the nineteen to twenty-four year old drivers believe that their dangerous driving behavior is acceptable."[53]

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[47] S.B. 1049 and S.B 1135, 53d Leg. 1st Reg. Sess. (Ariz. 2017).
[48] *Id*.
[49] *See supra* note 21.
[50] *See generally* Tamra Johnson, *Young Millennials Top List of Worst Behaved Drivers*, AAA FOUND. FOR TRAFFIC SAFETY (Feb. 15, 2017), http://newsroom.aaa.com/2017/02/young-millennials-top-list-worst-behaved-drivers/ [https://perma.cc/7WQM-SQ88].
[51] *Id*.
[52] *See supra* note 24.
[53] *See* Johnson, *supra* note 50 (quoting Dr. David Yang, AAA Foundation for Traffic Safety executive director).

3. What Police in Arizona Are Doing While They Wait for Regulation

Over a four-month review period, the Department of Public Safety ("DPS") found that nearly 1,200 crashes were caused by distracted drivers—about eleven percent of all crashes in Arizona.[54] Because there is no law in Arizona prohibiting driving while texting or talking on a cell phone, Highway Patrol officers, concerned about the increase in distracted drivers, began to enforce an existing law in a new way in 2014.[55] Under the Arizona Revised Statute 28-701A, drivers must maintain a speed that is no greater than what is "reasonable and prudent under the circumstances," which has typically meant issues such as bad weather or road construction.[56] DPS has been using the statute to enforce all types of distracted driving.[57] "The essence of the idea . . . is that it is not reasonable to drive any speed without looking," said DPS Officer and Spokesman, Carrick Cook.[58] This may be a "work-around" in lieu of having enforceable laws, but it certainly does not send any message to Arizonans about the dangers of using a mobile device while driving.

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[54] Meghan Cassidy, *Arizona DPS cracking down on distracted drivers*, THE REPUBLIC | AZCENTRAL.COM (Apr. 25, 2014), http://www.azcentral.com/story/news/arizona/2014/04/26/distracted-drivers-getting-dps-attention/8190109/ [https://perma.cc/JR24-7JFQ].
[55] *Id*.
[56] *Id*.
[57] *Id*.
[58] *See* Cassidy, *supra* note 54.

IV. CONCLUSION

S.B. 1080 is a starting point to bring Arizona in line with the majority of states that have already enacted restrictions on teen driving.[59] Studies clearly show that teens are susceptible to the distractions of mobile devices and would benefit by developing good driving habits in their formative months of learning to drive.[60] This bill will most likely save lives. Although there is arguably a significant need to consider more comprehensive measures, which more effectively deter teens, and eventually apply to every driver in Arizona, that need does not justify preventing the passage of S.B. 1080. Arizona is both the toughest state for drunk driving penalties, and virtually the last state to enact some type of ban for the use of mobile devices for even the youngest drivers; Arizona must start somewhere with regards to this issue.[61]

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[59] *See* Pitzl, *supra* note 1.

[60] *See supra* note 25.

[61] S.B. 1080, 53d Leg. 1st Reg. Sess. (Ariz. 2017), https://apps.azleg.gov/BillStatus/BillOverview/68707?SessionId=117 [https://perma.cc/C77X-YWUH], (on Apr. 27, 2017, Arizona Governor Doug Ducey signed S.B. 1080 into law).