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A GATHERING STORM: FUTURE CHALLENGES NECESSITATE
REFORM OF ARIZONA'S DYSFUNCTIONAL
POST-CONVICTION REGIME

Matthew B. Meehan*

I. INTRODUCTION

“Executive clemency has provided the ‘fail-safe’ in our criminal justice system . . . It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible.”¹ Those were the words of Chief Justice William Rehnquist, taken from the Court’s opinion in *Herrera v. Collins*, a case involving the appeal of a petitioner convicted of capital murder that was denied habeas relief, or a new trial, after new evidence came to light.² In January 1983, Leonel Torres Herrera was convicted of capital murder and sentenced to death for the killing of two Texas police officers.³ In February 1992, Herrera lodged the habeas petition alleging his innocence based on affidavits suggesting that Herrera’s brother was the killer.⁴ The Court granted review, stating, “[p]etitioner’s showing of innocence, and indeed his constitutional claim for relief . . . must be evaluated in the light of previous proceedings in this case.”⁵ However, the Court stopped short of remanding the case for a new trial because Herrera had an alternative “forum to raise his actual innocence claim,” namely, “a request for executive clemency.”⁶ Accordingly, the Court validated state clemency actions

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¹ *Herrera v. Collins*, 506 U.S. 390, 415 (1993) (citations omitted).

² *Id.* at 395.

³ *Id.* at 393.

⁴ *Id.* at 395-97.

⁵ *Id.* at 398.

⁶ *Id.* at 411.

as an appropriate mechanism for post-conviction relief, and opined that this “fail-safe” is worthy of endorsement because clemency had been “exercised frequently” throughout the twentieth century.⁷

Herrera supports the proposition that executive clemency is an appropriate form of relief for capital prisoners, and its use effectively insulates the criminal justice system from constitutional challenges in those cases. But, what if the “fail-safe” becomes the only form of post-conviction relief for non-capital offenders? What happens when inmates sentenced to life become statutorily eligible for release and can only petition a backlogged, inconsequential system that is not “exercised frequently,” but barely at all? In coming years, those questions will be answered in the court system if Arizona does not undertake pragmatic reform of its post-conviction regime.

Somewhat ironically, around the time of the *Herrera* opinion, federal and state legislation was enacted that significantly alters post-conviction relief in many states, including Arizona. Prompted by political pressure and promises of federal grants, states began enacting Truth-in-Sentencing (“TIS”) laws in 1994.⁸ The federal precursor, The Violent Crime Control and Law Enforcement Act of 1994 (“VCCLEA” or “the Act”), required that states, *inter alia*, increase time served before prisoners are eligible for release.⁹ Consequently, Arizona followed

⁷ *Id.* at 415 (explaining that while the Court’s opinion in *Herrera* stems from the appeal of a capital sentence, the Court’s view of executive clemency is not distinguishable where it involves a lesser sentence, especially considering the expansive use of clemency proceedings under state TIS regimes, which is the focus of this article).

⁸ Susan Turner et al., *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 STAN. L. & POL’Y REV. 75, 75-76 (1999).

⁹ The Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 13704(a)(1)(A)(i)-(ii) (2000) [hereinafter VCCLEA].

suit by removing parole eligibility for all offenders, which has essentially led to a system where the only option for post-conviction relief afforded to many state inmates comes in the form of executive clemency.¹⁰

This article will discuss the massive expansion of clemency applications in Arizona and why this system will ultimately prove untenable when inmates sentenced to life under TIS statutes become eligible for release starting in 2019. Because Arizona eliminated parole via its TIS enactments, the Arizona Board of Executive Clemency (“Board”) hears all clemency actions (pardon, commutation, and reprieve) for crimes committed after January 1, 1994. For an action to be successful, the Board must make a unanimous recommendation to the Governor, who then grants or denies sentence modification. Consequently, this system has led to prison overcrowding and the systematic elimination of post-conviction relief for many state prisoners who would otherwise have a substantial chance of release under a parole model. This article will not take a position on TIS enactments as a vehicle for crime reduction, nor the merits of retributivist punishment. However, it will explore defects in the current clemency system, which have constrained Board operations and all but foreclosed successful clemency actions. These factors include budgetary constraints, political pressure, bed quotas in private prison contracts, and executive influence on board members. In coming years, inmates sentenced to life after enactment of TIS laws will become eligible for release, but their only avenue for release will be executive clemency.

Constitutional challenges will follow, and the existence of a clemency process will not effectively insulate the state, because

¹⁰ Cami Byrd, *Criminal Code Revision*, 26 ARIZ. ST. L.J. 341, 344-45 (1994).

“[r]ecognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless.”¹¹ The Arizona Legislature must consider pragmatic reforms, which would give life inmates a meaningful opportunity for release. This article will outline how the United States Supreme Court’s Eighth Amendment analysis is already trending in this direction following review in cases of juveniles sentenced to life without parole. Alternatively, reforms would reduce prison populations, thereby saving taxpayer money. Moreover, other states have already demonstrated that rolling back TIS laws will not precipitate the political backlash feared by legislators.

This article will argue that the Arizona Legislature must roll back TIS provisions and institute a workable post-conviction regime to provide life-sentenced inmates a “meaningful opportunity for release,” because Arizona’s defective clemency system will not insulate the state from constitutional challenges. Following this introduction, Part II will discuss the history of federal and state TIS laws and their impact on criminal sentencing. Part III will examine post-conviction relief in Arizona for prisoners sentenced after the enactment of TIS provisions. Part IV will consider factors that have impacted the clemency system in Arizona, ultimately foreclosing the system to most applicants. Part V will examine the merits of future Due Process and Eighth Amendment challenges via federal and state case law. Finally, Part VI will propose pragmatic changes to Arizona TIS laws, including the removal of executive authority in clemency actions and the re-institution of a parole system.

¹¹ *Solem v. Helm*, 463 U.S. 277, 303 (1983) (where the Court found that the possibility of commutation under state law did not save the defendant’s otherwise unconstitutional sentence).

II. FEDERAL AND STATE TIS LAWS WERE THE RESULT OF PUBLIC AND LEGISLATIVE DESIRE TO ENFORCE IMPOSED CRIMINAL SENTENCES

A. History of TIS Legislation

Beginning in the 1980s, public opinion showing a widespread aversion to early release influenced Congress to enact tougher sentencing laws.¹² As a result, TIS, which refers to “a collection of laws and policy positions,” was introduced.¹³ Proponents of these measures stressed the need for prisoners to be incarcerated for the actual length of time commensurate to their sentences (hence “Truth-in-Sentencing”).¹⁴ Accordingly, TIS was seen as a movement aiming to abolish or curb parole regimes in federal and state sentencing.¹⁵ Inspired by the TIS movement, legislators sought to enact “three strikes” laws and mandatory minimum sentencing, but only five states enacted TIS laws prior to 1994.¹⁶

The idea of TIS laws was revived at the state level in 1994 after the passage of the aforementioned VCCLEA.¹⁷ The Act included a provision for Violent Offender Incarceration and Truth-in-Sentencing incentive grants (“VOITIS grants”), “which provide funds to state and local correctional systems to

¹² Tim Eigo, *Incomplete Sentence: No Traction for Reform in Arizona*, 48-JAN ARIZ. ATT’Y, Jan. 2012, at 36, 37.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Timothy A. Hughes et al., *Trends in State Parole, 1990-2000*, U.S. DEP’T OF JUSTICE NCJ 184735, Oct. 2001, at 3.

¹⁷ VCCLEA, *supra* note 10.

expand their capacity to incarcerate violent offenders and to impose longer and more determinate sentences.”¹⁸ The Act states that eligibility for TIS incentive grants requires the following:

[S]uch State has implemented truth-in-sentencing laws that—require persons convicted of part 1 violent crime to serve not less than 85 percent of the sentence imposed (without counting time not actually served, such as administrative or statutory incentives for good behavior); or result in persons convicted of a part 1 violent crime serving on average not less than 85 percent of the sentence imposed (without counting time not actually served, such as administrative or statutory for good behavior).¹⁹

The Act defines a “part 1 violent crime” as, “murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault.”²⁰ Due in part to the VOITIS grant program, twenty-four states and the District of Columbia enacted TIS legislation between 1994 and 2000.²¹ Of the states that adopted TIS

¹⁸ See *id.*; see also Susan Turner et al., *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 STAN. L. & POL’Y REV. 75 (1999).

¹⁹ VCCLEA, *supra* note 10, at §§ 13703(a), (b)(1)–(2) (finding that the preceding provision, 42 U.S.C. § 13703, outlines requirements for states to receive a minimum grant under the program where it is shown that the State has “increased the percentage of person arrested for a part 1 violent crime sentenced to prison; or increased the average prison time actually served or the average percent of sentence served by persons convicted of a part 1 violent crime.”).

²⁰ *Id.* at § 13701(2).

²¹ Hughes, *supra* note 17, at 3.

laws, sixteen abolished parole for all criminal offenders.²² Arizona was among the states that removed all forms of discretionary release.²³

As states became eligible, more than \$2.7 billion was awarded through the VOITIS grant program between 1996 and 2001.²⁴ Arizona received nearly \$58 million during this period, which was exclusively allocated for “design, construction, and administrative oversight of 4224 beds,” thereby expanding the capacity of the state prison system.²⁵ However, no funds have been appropriated for any eligible states since 2001.²⁶ Unsurprisingly, the expansion of TIS laws precipitated a marked increase in state prison populations as the percentage of prisoners outgained the parole population; from 1990 to 2000 parolees increased by thirty percent, compared to seventy-five percent for incarcerated prisoners.²⁷

B. TIS in Arizona

In the early 1990s, “Arizona’s statewide crime rate rank[ed] among the top half dozen states in the nation,” and “[a]mong metropolitan areas, Phoenix and Tucson [were] considered leaders in violent crime.”²⁸ In an effort to counter these rising crime rates and determine the best course of action, the Arizona legis-

²² *Id.*

²³ *Id.*

²⁴ *Report to Congress: Violent Offender Incarceration and Truth-in-Sentencing Incentive Formula Grant Program*, U.S. DEP’T OF JUSTICE 1, 5 (Feb. 2001), <https://www.bja.gov/Publications/VOITIS-Final-Report.pdf>.

²⁵ *Id.* at 8.

²⁶ *Id.* at 1.

²⁷ Hughes, *supra* note 17, at 2.

²⁸ Michael Dann, *Arizona’s Criminal Justice System*, 29-OCT ARIZ. ATT’Y, Oct. 29, 1992, at 14 (1992).

lature commissioned a report prepared by the Institute for Rational Public Policy, Inc.²⁹ The study, sometimes referred to as the “Knapp” report, covered a wide range of issues related to crime and corrections in Arizona and concluded that TIS reforms would benefit the Arizona criminal justice system.³⁰

In April 1993, the Arizona legislature enacted Senate Bill 1049, which included TIS reform laws.³¹ As a result, all early release, including parole, was eliminated notwithstanding earned release credits and commutation.³² Discussed previously, eligibility for federal VOITIS grants required states to enact TIS laws that apply to class one, two, and three felonies.³³ But, Arizona went further, applying the TIS statutes to all felony offenders,³⁴ thereby becoming one of only sixteen states to enact such sweeping reforms.³⁵

Initially, commentators optimistically believed these reforms would provide workable remedies when a judge or defendant felt that the required mandatory sentence was too harsh.³⁶ However, this has not proved to be the case. Enactment

²⁹ *Dollars, Sentences & Long-Term Public Safety: Managing a Fiscal Crisis with a Goal of Long-Term Public Safety*, MIDDLE GROUND PRISON REFORM 2-3 (2003), http://www.middlegroundprisonreform.org/forms/Dollars_Sentences.pdf.

³⁰ *See id.*; Dann, *supra* note 29, at 15.

³¹ S.B. 1049, 1993 Leg., 1st Reg. Sess. (Ariz. 1993).

³² ARIZ. REV. STAT. ANN. §§ 13-604-604.01, -3407 (1993).

³³ VCCLEA, *supra* note 10.

³⁴ Ego, *supra* note 13, at 38.

³⁵ Hughes, *supra* note 17, at 1.

³⁶ Cami Byrd, *Criminal Code Revision*, 26 ARIZ. ST. L.J. 341, 344-45 (1994)); *see e.g.*, ARIZ. REV. STAT. ANN. § 13-603(L) (1994) (providing that a judge can authorize special action allowing the prisoner to petition for a clemency hearing within ninety days of sentencing where the judge feels the mandatory sentence is excessive).

of TIS laws caused the Arizona prison population to swell.³⁷ In June 1980, one in every 749 Arizonans was incarcerated, and by June 2014, the figure was one in every 170.³⁸ Moreover, the state prison growth rate for Arizona is the third highest of all fifty states.³⁹ In June 2014, the total number of confined prisoners in the Arizona state system totaled 41,773.⁴⁰

III. POST-CONVICTION RELIEF IS NO LONGER AN OPTION FOR MANY ARIZONA PRISONERS FOLLOWING TIS REFORMS

A. Executive Clemency in the Wake of TIS

When Arizona enacted TIS legislation, the laws foreclosed parole eligibility to offenders whose crimes were committed after January 1, 1994.⁴¹ Consequently, the Board of Pardons and Paroles was renamed the Arizona Board of Executive Clemency (“Board”).⁴² The Board remains empowered to conduct parole hearings for offenders whose sentencing occurred prior to the statutory changes; however, the Board’s main function is to con-

³⁷ Judith Greene, *Turning the Corner: Opportunities for Effective Sentencing and Correctional Practices in Arizona*, ARIZ. ATTORNEYS FOR CRIMINAL JUSTICE, 6 (Jan. 2011), <http://www.justicestrategies.org/sites/default/files/publications/AZ%20Turning%20the%20Corner%20Final%20Report.pdf>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *FY2014 Admissions, Releases, Confined Population Fact Sheet*, ARIZ. DEPT. OF CORRECTIONS, https://corrections.az.gov/sites/default/files/REPORTS/Inmate_Population/063014_inmatepopulationfactsheet.pdf (last visited Nov. 27, 2015).

⁴¹ ARIZ. REV. STAT. ANN. §§ 31-401-402 (1994).

⁴² *Id.*

duct hearings for pardon, commutation of sentence, and reprieve.⁴³ A *pardon* “absolves the convicted felon of the legal consequences of their crime and conviction,” a *commutation of sentence* is “[a] change or modification of a sentence imposed by the court,” and a *reprieve* is “[a] delay or temporary suspension of the carrying out of punishment.”⁴⁴ The Board is not allowed to act autonomously on any of these clemency proceedings; the Governor must approve a Board-recommended clemency request for it to be granted.⁴⁵

It is important to note that “earned release credits” are still operative in the state of Arizona and can work to authorize release of a prisoner who has reached the eighty-five percent threshold, if the prisoner’s credits, when added to time served, equal the imposed sentence.⁴⁶ However, the “earned credit release” program is not available to prisoners serving “flat time” or a “calendar year” sentence as it appears in state sentencing guidelines⁴⁷—meaning the prisoner must serve the imposed sentence day-for-day before becoming eligible for release.⁴⁸ A “flat” sentence can be imposed on an offender convicted of “a dangerous felony, a dangerous crime against children, a violent

⁴³ *Report for Fiscal Years 2008, 2009, and 2010*, ARIZ. BD. OF EXEC. CLEMENCY (May 2011), <https://www.maricopa.gov/pdweb/docs/2014/suppDocs/v24q1-2009-2011BOECAnnualRpt.pdf>.

⁴⁴ *Id.*

⁴⁵ ARIZ. REV. STAT. ANN. § 31-402 (1994).

⁴⁶ ARIZ. REV. STAT. ANN. § 41-1604.10(D) (1994).

⁴⁷ ARIZ. REV. STAT. ANN. § 13-105(4) (1994).

⁴⁸ See Vladimir Gagic, *Sentencing in Arizona: What Does Time Off for Good Behavior Really Mean?*, HG.ORG, <http://www.hg.org/article.asp?id=21105> (last visited Nov. 2, 2015),); see also DEPARTMENTAL ORDER: 1002, *INMATE RELEASE ELIGIBILITY*, ARIZ. DEPT. OF CORRECTIONS 8 (Jan. 8, 2003), <https://corrections.az.gov/sites/default/files/policies/1000/1002.pdf> (“An inmate serving a flat sentence shall be released upon completion of the sentence without deduction of release credits.”).

felony, or a sex crime.”⁴⁹ This includes inmates sentenced to life imprisonment for serious, violent, or aggravated offenses,⁵⁰ and inmates convicted of first-degree murder who become eligible for release after serving twenty-five calendar years.⁵¹ Therefore, under current Arizona law, inmates serving “flat time” can only obtain a reduced sentence (or release, if sentenced to life) via a successful clemency application.

B. Board Backlog

In recent years, clemency applications have increased dramatically. The State of Arizona first established a parole board in 1913, and from that time until 1993, fewer than sixty inmates per year applied for a commutation of sentence.⁵² Applications for commutation rose to more than 1200 per year by 2005, due almost exclusively to TIS enactments.⁵³

The rise in number of applications has outpaced the Board’s ability to conduct timely hearings, and, in fact, the number of hearings conducted per year has declined over the past decade. Between 2005 and 2010, the Board conducted 677 clemency hearings per year, on average.⁵⁴ In 2011, budget cuts reduced

⁴⁹ Gagic, *supra* note 49, at 1.

⁵⁰ ARIZ. REV. STAT. ANN. § 13-706(A) (2009).

⁵¹ ARIZ. REV. STAT. ANN. § 13-751 (2012) (explaining that the term of calendar years before a life sentenced inmate is eligible for release can increase to thirty-five years for repeat violent or aggravated felony offenders under A.R.S. § 13-706(B) and for a first-degree murder conviction of a victim under the age of fifteen, pursuant to A.R.S. § 13-751(2)-(3)).

⁵² Bob Ortega, *Arizona Prisoners Rarely Granted Clemency*, THE ARIZONA REPUBLIC (May 12, 2012, 11:03 PM), <http://archive.azcentral.com/arizonarepublic/news/articles/20120412arizona-prison-clemency.html>.

⁵³ *Id.*

⁵⁴ CLEMENCY, *supra* note 44, at 5, *see also* REPORT FOR FISCAL YEARS 2006 AND 2007 ARIZ. BD. OF EXEC. CLEMENCY 5 (May 2008), <https://www.maricopa.gov/pdweb/docs/2014/suppDocs/v24q1-2006-2007ExClemencyBdAnnualRpt.pdf>.

the number of cases the Board could hear by nearly three-quarters, which resulted in a two-year, 900 case backlog.⁵⁵ In 2013, the Board was able to cut through much of the backlog by hearing 1304 cases,⁵⁶ but it is unknown whether that caseload will be manageable in coming years. Only 384 hearings were conducted in 2014,⁵⁷ and the Board operates on a relatively small yearly budget of less than \$1 million.⁵⁸

C. Recommendation and Approval of the Governor

Even in the event that the Board recommends a commutation, pardon, or reprieve, executive approval is extremely rare. In the 1980s, the Board implemented a phase system for commutation requests whereby an initial hearing is conducted to determine if the case should be moved to a second phase where the Board will conduct a personal interview with the inmate.⁵⁹ After the second phase, if the Board votes unanimously to grant the commutation, the case will be recommended to the Governor for ultimate approval or denial.⁶⁰ To illustrate, in calendar year

⁵⁵ Ortega, *supra* note 53, at 2.

⁵⁶ ARIZ. BD. OF EXEC. CLEMENCY, REPORT FOR FISCAL YEAR 2013 ARIZ. BD. OF EXEC. CLEMENCY 5-6 (2013), www.azauditor.gov/sites/default/files/14-105_Report_0.pdf.

⁵⁷ REPORT FOR FISCAL YEAR 2014, ARIZ. BD. OF EXEC. CLEMENCY 5-6 (July 2014), <https://boec.az.gov/sites/default/files/documents/files/AZ-BOEC%20annual%20report%202014.pdf>.

⁵⁸ STATE OF ARIZONA OFFICE OF THE AUDITOR GENERAL, PERFORMANCE AUDIT AND SUNSET REVIEW: ARIZONA BD. OF EXECUTIVE CLEMENCY, Rep. No. 14-105 at 4 (Sept. 2014) [hereinafter *Sunset*] (explaining that the Board operates with appropriations distributed from the State General Fund. Appropriations totaled roughly \$824,000 in 2013 and 2014, but were increased to \$958,600 in 2015, to pay for a fifth board member when board chair and executive director positions were separated.).

⁵⁹ ARIZONA JUSTICE PROJECT, REPORT ON ARIZONA'S PRE-AUGUST 1973 LIFE-SENTENCE INMATES at 5 (2013).

⁶⁰ *Id.*

2013, the Board conducted 354 Phase I hearings. Of those, seventeen passed to Phase II.⁶¹ In the same year, the Board made forty-two Phase II decisions and recommended seventeen to the Governor for commutation.⁶²

During her term in office, Governor Jan Brewer granted an average of only seven commutations per year and no pardons.⁶³ Many of the granted sentence commutations were cases where the inmate was in “imminent danger of death.”⁶⁴ These numbers are staggering when compared to the rate of parole for prisoners sentenced under pre-TIS laws. As discussed previously, the Board still regularly conducts parole hearings for inmates whose crimes were committed prior to 1994. In 2013, 326 parole hearings were conducted, eighty of which were granted.⁶⁵ By contrast, in that same year, of the 1122 cases for which a Phase I hearing was conducted, the Governor ultimately commuted only six.⁶⁶ Put simply, post-TIS inmates have a one in 200 chance of being granted clemency, compared to a one in four chance of being released on parole in a pre-TIS sentencing regime. Notwithstanding the revocation of parole, this cannot be what the *Herrera* Court envisioned when it endorsed clemency where “exercised frequently.”⁶⁷

⁶¹ AUDITOR GENERAL, *supra* note 59 at 3.

⁶² *Id.*

⁶³ Associated Press, *Brewer in Final Year Continues Pattern on Clemency*, ABC 15 (Jan. 2, 2015, 1:03 PM), <http://www.abc15.com/news/state/brewer-in-final-year-continues-pattern-on-clemency>.

⁶⁴ *Id.* These are prisoners on the verge of death that were “released to die with their families.”

⁶⁵ CUMULATIVE STATISTICS REPORT, ARIZ. BD. OF EXEC. CLEMENCY (July 2012-June 2013).

⁶⁶ *Id.*

⁶⁷ *Herrera*, 506 U.S. at 415.

IV. TROUBLING FACTORS ACCOUNT FOR LOW CLEMENCY RECOMMENDATIONS AS WELL AS EXECUTIVE RELUCTANCE TO GRANT CLEMENCY

A. *Executive Fear of Political Backlash*

Executive unwillingness to pardon or grant commutations is not exclusive to Arizona. Commentators have suggested that the drop in governor pardons going back to the 1960s is a political issue.⁶⁸ Governors are reluctant to approve any clemency in general because “[o]fficials fear the potential political nightmare of releasing from prison someone who goes on to commit a violent crime.”⁶⁹

In recent history, presidential candidate Mike Huckabee was subjected to considerable scrutiny for releasing prisoners during his term as Arkansas Governor.⁷⁰ Nine years before Huckabee kicked off his presidential run seeking the Republican nomination in 2012, he commuted the sentence of former convict Maurice Clemmons.⁷¹ In 2009, Clemmons was linked to the murder of four police officers near Tacoma, Washington.⁷² Huckabee’s political action committee attempted to mitigate the damage by implicating the criminal justice system. Specifically the committee argued that commutation is only granted after parole

⁶⁸ Maggie Clark, *Governors’ Pardons are Becoming a Rarity*, STATELINE (Feb. 8, 2013), http://www.governing.com/templates/gov_print_article?id=190369151.

⁶⁹ Ortega, *supra* note 53, at 5.

⁷⁰ Clark, *supra* note 69, at 1.

⁷¹ *Id.*

⁷² *Id.*

board endorsement, but the accusation did little to silence critics.⁷³ Huckabee's political turmoil has wide-ranging implications on executive clemency in other states; "[e]very time something like that happens, every politician takes note."⁷⁴

B. Privatized Prison System

TIS laws have contributed to a surge in the state prison population⁷⁵ that topped 41,000 prisoners by the end of 2014.⁷⁶ Prior to TIS reforms, it was estimated that Arizona incarcerated one in seventy-nine citizens; by 2009, that figure was one in thirty-one and corrections costs were \$1 billion per year.⁷⁷ To keep up with the incarcerated population increase, lawmakers needed a quick alternative, and they began contracting with private companies to construct and manage prisons.⁷⁸ Private companies currently operate six private prison facilities within the state of Arizona.⁷⁹ In fact, as recently as February 2015, another 3000-bed private prison has been pitched to the legislature.⁸⁰ The proposal is part of a \$52 million corrections budget increase

⁷³ Mara Gay, *Mike Huckabee's Unfortunate Pardon*, THE WIRE (Nov. 30, 2009), <http://www.thewire.com/politics/2009/11/mike-huckabee-s-unfortunate-pardon/26300/>.

⁷⁴ Ortega, *supra* note 53, at 5.

⁷⁵ Eigo, *supra* note 13, at 38.

⁷⁶ ARIZ. DEPT. OF CORRECTIONS, ADMISSIONS, RELEASES, CONFINED POPULATION FACT SHEET (FY 2014).

⁷⁷ Eigo, *supra* note 13, at 38.

⁷⁸ Chris Kirkham, *Prison Quotas Push Lawmakers to Fill Beds, Derail Reform*, THE HUFFINGTON POST, (Sept. 19, 2013, 11:54 AM), http://www.huffingtonpost.com/2013/09/19/private-prison-quotas_n_3953483.html.

⁷⁹ Craig Harris, *Some Arizona Lawmakers Skeptical of Another Private Prison*, THE ARIZONA REPUBLIC, (Feb. 4, 2015, 6:27 AM), <http://www.azcentral.com/story/news/arizona/politics/2015/02/03/arizona-lawmakers-skeptical-another-private-prison/22835597/>.

⁸⁰ *Id.*

offered by Governor Doug Ducey, which seeks “to combat current overcrowding and accommodate a projected increase in inmates.”⁸¹

These private contracts have come under scrutiny for many reasons, including costs and political impropriety. The contracts for these prisons heavily favor the private companies.⁸² Many contracts for private prisons in the state require that at least ninety percent of the beds be filled; some stipulate one hundred percent occupancy.⁸³ Many critics have argued that these prisons actually drive up corrections costs.⁸⁴ Unfortunately, there is no way to perform a comprehensive cost-benefit analysis because the 2012 legislature repealed a law requiring the Department of Corrections to compare state and private prison costs.⁸⁵ Additionally, former Governor Brewer was scrutinized for her, and her staff’s, relationship with private prison lobbying groups.⁸⁶ A 2011 American Civil Liberties Union report linked several of the former Governor’s key staff members to private prison lobbyists, including her chief of staff and campaign manager.⁸⁷ Further, Brewer accepted “nearly \$60,000 in campaign contributions from people associated with private prisons.”⁸⁸

On the surface, a link between private prison contracts and executive clemency denials seems tenuous at best. But, privatizations of state prisons coupled with the unscrupulous actions of politicians in a league with the private companies supports an

⁸¹ *Id.*

⁸² Kirkham, *supra* note 79, at 3.

⁸³ *Id.*

⁸⁴ Harris, *supra* note 80, at 2.

⁸⁵ *Id.*

⁸⁶ Michael Brickner & Shakyra Diaz, *Prison for Profit: Incarceration for Sale*, 38 HUM. RTS. 13 (2011).

⁸⁷ *Id.*

⁸⁸ *Id.*

argument that any actions taken to give prisoners post-conviction relief may be met with disreputable opposition. For instance, one rollback in TIS legislation that would provide a substantial opportunity for release is the return to a parole model (this will be discussed in detail later in the article). As stated earlier, parole hearings grant release nearly twenty-five percent of the time.⁸⁹ A more liberal approach to post-conviction relief would certainly impact private contracts requiring ninety to one hundred percent occupancy. Therefore, it is likely that the companies operating private prisons in the state, as well as the politicians and legislators beholden to them, may scrutinize reform for that reason alone.

C. Allegations of Indecorum and Pressure from the Governor's Office

Some of the most disturbing allegations related to the Board's clemency recommendations, and the Governor's unwillingness to grant them suggests a high degree of impropriety. In 2014, the Office of the Auditor General submitted a "Performance Audit and Sunset Review" ("Sunset Review") for the Board.⁹⁰ Among the issues listed in the Sunset Review was the directive that Board members must be free from conflicts of interest.⁹¹ The Sunset Review states, "[t]o help ensure the integrity of the Board's hearing process and decisions, it is critical that board members have the ability to reach fair, objective, and independent decisions."⁹² Two incidents were cited to implicate the Board's impartiality.⁹³

⁸⁹ *Supra* note 49.

⁹⁰ *Supra* note 59.

⁹¹ *Id.* at 5.

⁹² *Id.*

⁹³ *Id.*

First, the Sunset Review referred to a joint investigation conducted by the Arizona Department of Administration's Human Resources Division and the Governor's Office of Equal Opportunity that "substantiated several concerns regarding the Board's former chair/executive director, including concerns related to conflicts of interest."⁹⁴ The investigation alleged that, "[The Board's] chair/executive director joked with staff that he was provided basketball tickets by the family member [of an inmate applying for commutation], and the investigation found that a photograph of the former chair/executive director taken with the family member was posted on social media."⁹⁵ Although the Board ultimately denied the inmate's commutation in that case,⁹⁶ the Board chairman implicated in the investigation, Jesse Hernandez, later resigned.⁹⁷

Second, in 2013, two Arizona prisoners facing the death penalty filed a civil lawsuit in federal court which alleged a Due Process violation where pressure from the Governor's office foreclosed a fair and impartial hearing before the Board.⁹⁸ The lawsuit uncovered several incidents where the Governor's office "overtly attempted to influence" Board members to vote against clemency.⁹⁹ Additionally, three former Board members claimed they were unseated due to their affirmative recommendations.¹⁰⁰

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *See Supra* note 1.

⁹⁷ Michael Keifer, *Ex-members: Brewer Strong-Armed Clemency Board on Decisions*, THE ARIZONA REPUBLIC, (Sept. 26, 2013 9:54 PM) http://www.azcentral.com/news/politics/articles/20130926governor-brewer-clemency-board-lawsuit.html?nclck_check=1.

⁹⁸ *Supra* note 59, at 5.

⁹⁹ Keifer, *supra* note 98, at 2.

¹⁰⁰ *Id.*

The District Court's order recounted sworn statements from five former Board members:¹⁰¹

1. Duane Belcher

Belcher, who served on the Board for twenty years, recalled a meeting in April 2012 with Governor Brewer's chief of staff, Scott Smith, where Smith opined that "the Governor's office wanted Board members who would vote the wishes of her office, rather than vote their conscience, based on facts and circumstances of each case."¹⁰²

2. Ellen Stenson

Stenson served on the Board for five years, but was replaced in April 2012 after her application for reappointment was denied.¹⁰³ She felt that her dismissal was connected to her part in the Board's unanimous decision to recommend clemency for William Macumber in 2009.¹⁰⁴ Macumber, a convicted murderer, was later denied clemency by Governor Brewer but was released through court proceedings.¹⁰⁵ Brewer's denial of clemency resulted in embarrassing national headlines for the Governor.¹⁰⁶ Stenson stated that, "in combination with my interview

¹⁰¹ *Schad v. Brewer*, No. CV-13-01962-PHX-ROS, 2013 WL 5524547, at *2-4 (D. Ariz. Oct. 4, 2013).

¹⁰² *Id.* at *2.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Keifer, *supra* note 98, at 3.

¹⁰⁶ *Id.*; see, e.g., Adam Liptak, *Governor Rebuffs Clemency Board in Murder Case*, THE NEW YORK TIMES (June 14, 2010) http://www.nytimes.com/2010/06/15/us/15bar.html?_r=0&pagewanted=print. Macumber was sentenced to life without parole in 1975 for the murder of a young couple north of Scottsdale in 1962. *Id.* Another, individual had confessed to the murders, but the judge would not admit hearsay testimony from the man's

response that I did not regret my 2009 vote and my indication that I would likely vote the same way, if given the chance, influenced the Governor's decision to oust me from the Board."¹⁰⁷

3. Marilyn Wilkens

Wilkens was a Board member for two years and was replaced in April 2012 at the same time as Belcher and Stenson.¹⁰⁸ Her account of the interview is similar to Stenson's, but Wilkens received scrutiny for her vote to reduce the sentence of Robert Flibotte, a seventy-four-year-old first-time offender sentenced to ninety years for possession of child pornography.¹⁰⁹ Wilkens recounted an exchange during her interview where Scott Smith, the Governor's chief of staff, "became 'agitated' and told her in a raised voice that she had 'voted to let a "sex offender" go.'"¹¹⁰ Wilkens stated, "the Governor's office does not want to receive clemency recommendations from Board members in high-profile cases."¹¹¹

4. Melvin Thomas

Thomas was appointed to the Board in April 2012 but resigned in August, 2013.¹¹² Thomas stated in no uncertain terms that, "the three Board members (referring to Belcher, Stenson,

attorney and a psychiatrist recounting the confession. *Id.* The Board unanimously recommended clemency to remedy "a miscarriage of justice," but Brewer rejected the recommendation without explanation around the same time she announced that she was running for a full term as Governor. *Id.* One commentator stated, "I have been following state clemency for 30 years, and this is easily, easily, the most disturbing. *Id.* It's borderline despicable." *Id.*

¹⁰⁷ Schad, 2013 WL 5524547, at *2.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 3.

and Wilkens) who left before me were forced out because each one of them had recommended clemency in one or more cases that got sent up to Governor Brewer.”¹¹³

5. Jesse Hernandez

Hernandez served as Board Chairman from April 2012 until he resigned in August 2013.¹¹⁴ In his declaration to the court, Hernandez asserted that the Board “is not independent from the Governor.”¹¹⁵ He also described several “come to Jesus” meetings presided over by Scott Smith and other officials representing Governor Brewer, where “he was lectured about the lectured about the Governor’s policy to be tough on crime.”¹¹⁶ In one such meeting, he was specifically told, “[w]e don’t want another Macumber or Flibotte.”

Despite these sworn declarations, the court, somewhat amazingly, stated, “this does not demonstrate that the current Board members are incapable of objectivity or are biased.”¹¹⁷ Thus, the court ruled in favor of the Governor’s office.¹¹⁸

V. FUTURE DUE PROCESS AND EIGHTH AMENDMENT CHALLENGES FROM LIFE-SENTENCED INMATES MAY NECESSITATE REFORMS PROVIDING A MEANINGFUL OPPORTUNITY TO OBTAIN RELEASE

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 9.

¹¹⁸ *Id.*

Under current Arizona law, the majority of inmates sentenced to life imprisonment become statutorily eligible for release after serving twenty-five years.¹¹⁹ Accordingly, this means that some of the first life inmates sentenced after TIS enactments will become eligible for release in 2019. However, a clemency application will be their only vehicle for release, and, given the current climate, it is highly unlikely that this will be a viable option. Approximately 800 Arizona prisoners were sentenced to life-imprisonment between 1994 and 2012;¹²⁰ therefore, starting in 2019, some seventy-five to one hundred inmates per year will reach the point of release eligibility conceived by statute. But, these prisoners will not have access to parole release available to life inmates sentenced prior to 1994. When these inmates are in a position to show that they are release-eligible, but have no meaningful opportunity for release, their cases will be ripe for Constitutional challenges. Some may assert a Due Process violation contemplated in the *Schad* case, or Eighth Amendment complaints could find a logical foothold commensurate with recent U.S. Supreme Court decisions on cases of juveniles sentenced to life without parole.

A. Due Process Challenges to Executive Clemency

Historically, the U.S. Supreme Court has given considerable deference to discretionary decisions made in clemency proceedings. In *Connecticut Bd. of Pardons v. Dumschat*, the issue before the Court was whether the respondent's Due Process rights were violated where it was argued that the Connecticut Board of Pardons created a constitutional "liberty interest" by granting

¹¹⁹ ARIZ. REV. STAT. ANN. § 13-706(A) (2015).

¹²⁰ THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 25 (2013) [hereinafter *Sentencing*.], http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf.

three-quarters of applications for commutations of life sentences.¹²¹ In answering the question, the Court said, “the mere existence of a power to commute a lawfully imposed sentence, and the granting of commutations to many petitioners, creates no right or ‘entitlement.’”¹²² The Court held that in the absence of “statutes or other rules defining the obligation of the authority charged with exercising clemency,” the respondent’s only right was to seek commutation.¹²³

Subsequently, the Court upheld *Dumschat* in *Ohio Adult Parole Authority v. Woodard*.¹²⁴ In *Woodard*, the plurality denied the respondent’s claim that there is a continuing life interest in clemency that should be afforded consideration under the Due Process Clause.¹²⁵ A plurality also joined part II of the order, which announced a broad discretionary standard, stating, “The process respondent seeks would be inconsistent with the heart of executive clemency, which is to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations.”¹²⁶ But, Justice O’Connor, in her concurrence, did not support the conclusion that “because clemency is committed to the discretion of the executive, the Due Process Clause provides no constitutional safeguard.”¹²⁷ The concurrence provided that some “*minimal* procedural safeguards” apply to clemency proceedings, and opined that judicial intervention may “be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner

¹²¹ Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 459 (1981).

¹²² *Id.* at 467.

¹²³ *Id.* at 465, 467.

¹²⁴ Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998).

¹²⁵ *Id.* at 273.

¹²⁶ *Id.* at 280-81.

¹²⁷ *Id.* at 288.

any access to its clemency proceeding.”¹²⁸ Thus, it seems that *Woodard* has not altogether foreclosed Due Process challenges to executive clemency proceedings and has left the door open to future challenges, albeit minimally.

In returning to *Dumschat*, the Court was careful to note that a Due Process claim could succeed where there is a violation of “rules defining obligations of the authority charged with exercising clemency.”¹²⁹ That statement was in reference to an earlier decision by the Court in *Greenholtz v. Nebraska Penal Inmates*.¹³⁰ In *Greenholtz*, the Court held that there was a protectable expectation of parole where Nebraska statutory procedures expressly mandated that the Nebraska Board of Parole “shall” order the inmate’s release “unless” one of four specified reasons for denial is applied.¹³¹ Thus, where a statute or other rule outlining the procedural limitations of a state’s executive clemency process is violated, deference cannot be granted automatically.

Prior Arizona court decisions have announced the procedural mandates of post-conviction relief proceedings alluded to in the *Greenholtz* decision. In 1962, the Supreme Court of Arizona decided *McGee v. Arizona State Board of Pardons and Paroles*.¹³² In that case, Patrick McGee petitioned the court for a writ of mandamus to compel the Board of Pardons and Paroles “to hear and determine his application for commutation of [his] death sentence.”¹³³ Previous to the lawsuit, the Board of Pardons and Paroles had refused to grant McGee a hearing or any further consideration of his plea.¹³⁴ The court found that the

¹²⁸ *Id.* at 289.

¹²⁹ *Dumschat*, 452 U.S. at 465.

¹³⁰ *Greenholtz v. Neb. Penal Inmates*, 442 U.S. 1 (1979).

¹³¹ *Id.* at 11.

¹³² *McGee v. Ariz. State Bd. of Pardons & Paroles*, 376 P.2d 779 (Ariz. 1962).

¹³³ *Id.* at 780.

¹³⁴ *Id.*

Board of Pardons and Paroles “failed to comply with the minimal requirements of the Law.”¹³⁵ It further stated, “[d]ue process of law requires notice and opportunity to be heard, and there must be a hearing in a substantial sense . . . in accordance with the cherished judicial tradition embodying the basic concepts of fair play.”¹³⁶ Further, in a 1970 decision of the Court of Appeals of Arizona, which was denied review by the Supreme Court of Arizona, it was held that Arizona courts have “the power to review the proceedings of the Board to determine the presence or absence of due process in the conduct of [a] hearing on commutation.”¹³⁷

In *Woratzeck v. Arizona Board of Executive Clemency*, a capital prisoner brought an action in federal court alleging a violation of his Due Process rights, where his former counsel on appeal participated in his clemency hearing.¹³⁸ Woratzeck argued that because his former counsel “prepared the brief submitted to the Board, and helped prepare witnesses and exhibits to oppose Woratzeck’s request for clemency,” the hearing was “presumptively prejudicial.”¹³⁹ The court held that there was no Due Process violation because he was given an adequate opportunity to petition the Board.¹⁴⁰ But, interestingly, the dissent cited both *McGee* and *Ariz. State Bd. of Pardons and Paroles* to support the proposition that Due Process in an Arizona executive clemency proceeding is framed by those cases.¹⁴¹

¹³⁵ *Id.* at 781.

¹³⁶ *Id.*

¹³⁷ *Ariz. State Bd. of Pardons & Paroles v. Superior Court of Maricopa Cnty.*, 467 P.2d 917, 920 (Ariz. Ct. App. 1970).

¹³⁸ *Woratzeck v. Ariz. Bd. of Exec. Clemency*, 117 F.3d 400, 402 (9th Cir. 1997).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 404.

¹⁴¹ *Id.* at 405.

Undoubtedly, prevailing on a Due Process claim brought against the Board will be an uphill battle. But, at least in Arizona, a claimant can formulate a cogent argument in support of his or her claim. The U.S. Supreme Court, in both *Greenholtz* and *Dumschat*, has expressly mandated that a state's existing statutes or rules dictate the procedural limitations of a clemency proceeding. Accordingly, a departure from those rules implicates Due Process; thus, clemency applicants in Arizona are entitled to a "hearing in a substantial sense." Further, given the Board's conflicts and impropriety discussed previously, can it be said that current Board proceedings satisfy even minimal safeguards? It seems that where clemency decisions are recommended and denied based on political pressure or threats from executive officials, it would constitute the type of arbitrary scheme Justice O'Connor warned against in her *Woodard* concurrence.

B. Eighth Amendment Challenges

Another argument that will undoubtedly be raised by life-sentenced inmates in Arizona is that a sentencing scheme, which contemplates release at twenty-five years, is unconstitutional where no meaningful opportunity for release exists. To support this argument, recent U.S. Supreme Court cases concerning life-sentenced juvenile offenders are illustrative.

In *Graham v. Florida*, the issue before the Court was whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a lesser crime than homicide.¹⁴² The Court held that the Eighth Amendment bars the state from sentencing a juvenile non-homicide offender to

¹⁴² *Graham v. Fla.*, 560 U.S. 48, 52 (2010).

life without parole.¹⁴³ Further, the “State is not required to guarantee eventual freedom to [the] juvenile offender,” but must provide “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”¹⁴⁴ Subsequently, the *Graham* decision was extended in *Miller v. Alabama*, where the Court stated, “the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.”¹⁴⁵

The central holdings in both *Graham* and *Miller* are couched in prior decisions implicating the Eighth Amendment. They suggest that the “prohibition of cruel and unusual punishment ‘guarantees individuals the right not to be subject to excessive sanctions.’”¹⁴⁶ The *Miller* Court further stated, “[t]hat right, we have explained, ‘flows from the basic ‘precept of justice that punishment for crime should be graduated and proportioned’” to both the offender and the offense.”¹⁴⁷

The holdings in *Graham* and *Miller* could be extended to adults serving sentences of life without parole.¹⁴⁸ Much of the reasoning in both cases is not exclusive to juvenile offenders. Consider the following statement from *Graham*:

The State does not execute the offender sentenced to life without parole, but the sentence alters the offender’s life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration,

¹⁴³ *Id.* at 74.

¹⁴⁴ *Id.* at 75.

¹⁴⁵ *Miller v. Ala.*, 132 S.Ct. 2455, 2469 (2012).

¹⁴⁶ *Id.* at 2463 (quoting *Roper v. Simmons*, 542 U.S. 552, 560 (2005)).

¹⁴⁷ *Id.* (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

¹⁴⁸ *Sentencing*, *supra* note 121, at 18.

except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.¹⁴⁹

The Court cites *Solem v. Helm* when it asserts that the possibility of clemency will not work to foreclose an Eighth Amendment argument in support of a claim that sentencing is too severe.¹⁵⁰ This statement could just as easily describe the plight of an offender sentenced to life under a TIS regime. Arizona inmates sentenced to life after enactment of TIS laws are essentially given a sentence of natural life “by a forfeiture that is irrevocable.” Commentators suggest “adolescence is not the only period in which transformation and reform are possible and a meaningful opportunity for release does not have to be limited to those who commit crimes in their youth.”¹⁵¹ Thus, future challenges raised by life inmates sentenced in TIS regimes will likely be given consideration in federal courts, and the current trend in Eighth Amendment jurisprudence will give weight to those challenges.

VI. OTHER STATES HAVE MADE PRAGMATIC CHANGES TO TIS PROVISIONS; ARIZONA WOULD DO WELL TO FOLLOW SUIT

A. Removing Approval Authority from the Executive

In recent years, Arizona legislators have sought to reform the commutation process by removing the governor’s power to commute prison sentences, thereby vesting autonomy in the

¹⁴⁹ Graham, 560 U.S. at 69-70.

¹⁵⁰ *Solem v. Helm*, 463 U.S. 277, 300-01 (1983).

¹⁵¹ *Sentencing*, *supra* note 121, at 18.

Board.¹⁵² In 2011, state representatives introduced a bill designed to accomplish that end, entitled HCR 2025: the Arizona Commutation Reform Act.¹⁵³ Signees felt the change would “ease over-crowding and save money—not to mention, spare the governor political pressure.”¹⁵⁴ Further, giving the Board exclusive clemency power would not be unprecedented: “[i]n 6 states, clemency is granted or denied at the discretion of an independent board or commission.”¹⁵⁵

A resolution such as HCR 2025 would likely be a step in the right direction. Commentators have urged that a politically-insulated administrative body is better suited to make clemency decisions because, as discussed previously, the executive is “reluctant to wield” the power.¹⁵⁶ However, four years later, HCR 2025 has not gained any traction in the Arizona legislature. As of this writing, the bill has yet to be read on the floor of either body.¹⁵⁷ The “Fiscal Note” prepared for HCR 2025 points to concerns that the change would increase the Board’s caseload and additional funding would be needed for “additional staff to

¹⁵² Gregory Pratt, *Arizona Lawmakers Move to Strip Governor Jan Brewer of Commutation Power*, PHOENIX NEW TIMES (Jan. 19, 2011, 5:13 PM), http://blogs.phoenixnewtimes.com/valleyfever/2011/01/bill_introduced_to_strip_brewer.php?print=true.

¹⁵³ H.R. Con. Res. 2025, 50th Leg. 1st Reg. Sess. (Ariz. 2011).

¹⁵⁴ Pratt, *supra* note 153.

¹⁵⁵ *Sunset*, *supra* note 59, at 25.

¹⁵⁶ Daniel T. Kobil, *How to Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 219, 228-32 (2003).

¹⁵⁷ *Bill Status Overview: HCR2025*, ARIZ. STATE LEG., http://www.azleg.gov/FormatDocument.asp?inDoc=/leg-text/50leg/1r/bills/hcr2025o.asp&Session_ID=102 (last visited Mar. 15, 2015) (stating “Final Disposition: Held awaiting First Reading.”).

ensure its research was sound and recommendations were correct.”¹⁵⁸ This cursory rejection serves to illustrate that the Arizona legislature does not appreciate the full scope of the state’s post-conviction defects. A practical change to the existing TIS regime is needed to remedy the problem as opposed to merely tweaking the clemency process, which has already been proved ineffectual.

B. Reinstitution of Parole System

Reinstitution of a retroactive parole model is the only appropriate solution to ensure a “meaningful opportunity for release” in the event that *Miller* is extended to adult life sentences. Accordingly, some states have already done just that. This section will discuss two states that have returned or modified parole eligibility and have seen positive results. First, Mississippi rolled back TIS legislation by returning parole and “scal[ing] back mandatory sentences for a variety of non-violent offenses, retroactive to 1995.”¹⁵⁹ Additionally, the state “introduced an evidence-based tool for risk prediction to identify which parole candidates are less likely to recidivate.”¹⁶⁰ Mississippi’s changes have been successful and positive—in just five months, “3,100 inmates were reduced early, with virtually no public notice and no controversy.”¹⁶¹

¹⁵⁸ JAMES ALCANTAR, FISCAL NOTE: HCR 2025, 50th Leg. 1st Reg. Sess. (Ariz. 2011).

¹⁵⁹ Bob Ortega, *Arizona Prison Sentences Among Toughest for Many Crimes*, THE ARIZONA REPUBLIC (Oct. 9, 2011, 12:00 AM).

¹⁶⁰ Greene, *supra* note 38, at 13.

¹⁶¹ *Id.*

Second, Michigan has achieved significant notoriety among states seeking to reduce their reliance on incarceration.¹⁶² Following a publicized series of rape-murders by a parolee, Michigan instituted “get-tough parole policies” in 1992, which resulted in parole grant rates dropping from sixty-eight percent in 1990 to forty-eight percent by 2002.¹⁶³ In 2002, the Michigan legislature codified measures that retroactively resulted in nearly 1200 inmates being eligible for release.¹⁶⁴ Additionally, Michigan uses a “data-driven” release policy “to identify people who pose lower risks to public safety.”¹⁶⁵ As a result, there are now more than 21,000 people on parole in the state, but those parolees commit fewer violations than when the parole population was below 16,000.¹⁶⁶ Additionally, Michigan closed twenty prison facilities between 2002 and 2010, which has lowered corrections spending by 8.9%.¹⁶⁷ Further, serious violent and property crimes dropped by thirteen percent and twenty-four percent, respectively, from 2003 to 2012.¹⁶⁸

Interestingly, Arizona may not be averse to a reinstitution of parole for life-sentenced inmates; the state has already done so for juvenile offenders. Presumably in the wake of *Miller*, HB 2593 was signed into law in April 2014, which codified Ariz. Rev. Stat. § 13-716, stating that juvenile offenders sentenced to life imprisonment “are eligible for parole on completion of service of the minimum sentence, regardless of whether the offense

¹⁶² Ram Subramanian & Ruth Delaney, *Playbook for Change? States Reconsider Mandatory Sentences*, VERA INST. FOR JUSTICE, Feb. 2014, at 14.

¹⁶³ Judith Greene, *Downscaling Prisons: Lessons from Four States*, THE Sentencing Project, 2010, at 32.

¹⁶⁴ Subramanian, *supra* note 163, at 14.

¹⁶⁵ Greene, *supra* note 164, at 36.

¹⁶⁶ *Id.* at 37-38.

¹⁶⁷ Subramanian, *supra* note 163, at 14.

¹⁶⁸ *Id.*

was committed on or after January 1, 1994.”¹⁶⁹ The legislature must act to remove the juvenile qualification from Ariz. Rev. Stat. § 13-716, thereby reinstituting parole eligibility for all life-sentenced inmates. This change will foreclose any cogent argument for extension of the *Miller* decision to adult offenders, because a “meaningful opportunity to obtain release” is cognizable. Further, Arizona should institute objective, “data-driven” criteria, to guide the reinstituted parole system, which, as demonstrated by other states, will result in lower incarceration rates, decreased recidivism, reduction in correction costs, and public support.

VII. CONCLUSION

From the outset, it was understandable that many would not be receptive to the notion that convicted murderers should be afforded a “meaningful opportunity for release.” Undoubtedly, the cathartic response to this argument is in league with common precepts that have prevailed in the criminal justice system for decades: criminals should serve their time and they are not entitled to post-conviction relief following an adjudicated sentence. But, the issue is not whether prisoners should be released or whether they are entitled to post-conviction relief. The issue is whether a life sentence, coupled with a statutory contemplation of release eligibility at a set time (twenty-five years in most cases), where the offender’s only avenue for release is a dysfunctional clemency system, will withstand constitutional scrutiny. Arguably, it will not.

Executive clemency in Arizona is a far cry from the “fail-safe” contemplated by Chief Justice Rehnquist. The legislature has crippled the Board through budgetary setbacks, and the executive has asserted its influence to the point that decisions are made at the behest of the Governor. Thus, Board members lack

¹⁶⁹ H.B. 2593, S. Engrossed H. B., 51st Leg. 2nd Reg. Sess. (Ariz. 2014).

the ability to reach fair, objective, and independent decisions. Perhaps the clemency process in Arizona violates an offender's Due Process rights. But, clemency defects coupled with TIS enactments have essentially created a de-facto natural life sentence for many offenders, which certainly implicates the Eighth Amendment. The U.S. Supreme Court has said that the prohibition of cruel and unusual punishment guarantees individuals the right not to be subject to excessive sanctions. Current jurisprudence in this area is trending toward the notion that adult offenders should be given a meaningful opportunity for release, notwithstanding the remote chance of executive clemency.

When the cases of inmates serving life in Arizona under the TIS regime become ripe, this question will have to be answered by the courts, unless the legislature acts first. Arizona must follow the example of jurisdictions that rolled back TIS legislation and instituted a retroactive parole model. Anecdotal evidence shows that where parole has been reinstituted with objective standards for release, prison populations have decreased, taxpayer money has been saved, and the public reception has been positive.

The issue articulated in this article has already been anticipated by the Arizona Department of Corrections ("DOC"). In 2003, Justin Joyce wrote a letter to his sentencing judge after he learned that a plea deal he signed in May 2001, which guaranteed "life *with* the possibility of parole after 25 years," was defective because he was sentenced well after TIS enactments banning parole. The sentencing judge responded with a minute entry that stated, "the Defendant *will* be eligible for parole consideration after serving 25 calendar years."¹⁷⁰ The DOC responded to the minute entry as follows:

¹⁷⁰ Minute Entry at 1, *Arizona v. Joyce*, CR 2000-014807 (Super. Ct. of Ariz. 2003) (emphasis added).

Truth in Sentencing has no mechanism for Parole review on Life sentences after 25 years. The Department of Corrections has asked and has not received an opinion from the Attorney General's Office on how to review and release this type of inmate.¹⁷¹

To date, there is still no indication, from the Attorney General or any other Arizona official, as to how these cases will be handled. In less than five years, the first inmates in Arizona sentenced to life under TIS enactments will become statutorily eligible for release. If the legislature acts to institute a retroactive parole model, the looming question of what to do with these inmates will be answered, and the state will be insulated from constitutional challenges that are surely on the horizon.

¹⁷¹ Letter from Ariz. Dept. of Corr. to the Hon. Jeffrey A. Hotham, re: *Ariz. v. Joyce*, CR 2000-014807 (Jan. 14, 2004) (on file with author).

*QUIHUIS V. STATE FARM MUTUAL
AUTOMOTIVE INSURANCE COMPANY:*
A POTPOURRI OF INSURANCE ISSUES RESOLVED?

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The law governing consent settlement agreements (*Damron* agreements,¹ *Morris* agreements,² and *Peaton* agreements³) in the insurance context continues to evolve. The judicial Richter scale⁴ of impact varies with each new published decision. Recent decisions had monumental and immediate impacts. For

¹ *Damron v. Sledge*, 460 P.2d 997 (Ariz. 1969) (explaining that a *Damron* agreement involves situations where the insurance company has refused to defend its insured. When the insurer refuses to defend its insured, the insured is no longer bound by the cooperation clause of the policy for that particular case and can enter into a consent settlement arrangement with the claimant thereby receiving protection in the form of a covenant not to execute).

² *United States Auto. Ass'n v. Morris*, 741 P.2d 246 (Ariz. 1987) (describing that a *Morris* agreement involves situations where the insurance company agrees to defend its insured in a third-party tort liability case under a reservation of rights. Under that circumstance the scope of the cooperation clause narrows (but it does not cease to exist) and permits the insured to enter into a consent settlement agreement with the claimant in order to protect the insured against the possibility that the insurance company will prevail in its belief that no coverage exists under the policy for the allegations asserted in the third-party case).

³ *State Farm Mut. Auto. Ins. Co. v. Peaton*, 812 P.2d 1002 (Ariz. Ct. App. 1990) (providing that a *Peaton* agreement involves a situation where the insurance company agrees to defend its insured, unequivocally, and without reservation. The insurance company also agrees to stand behind its insured's potential liability up to the full policy limits. Nevertheless, in those situations where liability is absolutely clear and the exposure to the insured clearly and without doubt exceeds the policy limits but the insurer fails to settle the case to protect the insured, then the insurer will have violated the duty of equal consideration allowing the insured to enter into a consent settlement agreement).

⁴ *Richter Scale Definition*: an open-ended logarithmic scale for expressing the magnitude of a seismic disturbance (as an earthquake) in terms of the energy dissipated in it with 1.5 indicating the smallest earthquake that can be felt, 4.5 an earthquake causing slight damage, and 8.5 a very devastating

example, the Arizona Court of Appeals decisions in *Leflet*⁵ and *Munzer*⁶ had dramatic impact on identifying the boundaries of *Damron* and *Morris* agreements. Other cases had a subtler impact. The Arizona Supreme Court's recent decision in *Quihuis v. State Farm Mut. Auto. Ins. Co.*⁷ falls into the latter category. In *Quihuis* the Court addressed issue preclusion regarding *Damron* agreements and thereby unified the principles of issue preclusion for all insurance consent settlement agreements.

Part I of this article generally discusses the *Damron v. Sledge* decision and the Hobson's dilemma (or choice) that insurance companies face regarding whether to defend or not defend insureds. Part II discusses the concept of issue preclusion in the context of an insurer's failure to defend. In part II.A, general principles of issue preclusion are set forth. Part II.B discusses Arizona's law regarding issue preclusion prior to the Supreme Court's *Quihuis* decision. Part II.C discusses the Arizona Supreme Court's *Quihuis* decision and its significance to the concept of issue preclusion in the context of insurance consent settlement agreements. Part III discusses the estoppel doctrine in the context of an insurer's breach of its duty to defend. The court in *Quihuis* addressed the issue of whether Arizona was going to adopt the majority view finding that when an insurer refuses to defend its insured it does not, thereby, waive its coverage defenses. The Arizona Supreme Court in *Quihuis* rejected the so-called *Illinois Rule*, under which insurance companies are

earthquake, MERRIAMWEBSTER.COM <http://www.merriam-webster.com/dictionary/richter%20scale> (last visited April 21, 2015); a system used to measure the strength of an earthquake. <http://dictionary.cambridge.org/dictionary/british/the-richter-scale> (last visited April 21, 2015).

⁵ *Leflet v. Redwood Fire and Cas. Ins. Co.*, 247 P.3d 180 (Ariz. App. 2011).

⁶ *Munzer v. Feola*, 985 P.2d 615, (Ariz. App. 1999).

⁷ *Quihuis v. State Farm Mut. Auto. Ins. Co.*, 334 P.3d 719 (Ariz. 2014).

estopped from raising any coverage defenses upon their wrongful refusal to defend their insured. Part IV of the article addresses comments made by the Arizona Supreme Court in dicta regarding whether *Damron* agreements are subjected to a reasonableness filter regarding enforceability. Finally, the authors discuss the significance of the *Quihuis* decision in Part V.

I. TO DEFEND OR NOT DEFEND: A HOBSON'S DILEMMA OR CHOICE

Prior to the landmark decision of *Damron v. Sledge*,⁸ insurance companies in Arizona were traditionally confronted with having to make a decision to defend their insureds in situations where it was unclear that the claim being asserted was covered in the insurance policy.⁹ Insurance companies were confronted with a proverbial Hobson's dilemma.¹⁰ If the insurance company refused to defend its insured, it could risk having to pay a

⁸ *Damron*, 460 P.2d 997.

⁹ Steven Plitt, *Let's Make A Deal: A Requiem For Reservation Of Rights Defenses In Arizona*, 23 ARIZ. B.J., 38 (April/May 1988).

¹⁰ A Hobson's dilemma involves a situation where there is a choice between two or more options, none of which is attractive. See "Hobson's choice" Wikipedia http://en.wikipedia.org/wiki/Hobson's_choice (last visited April 2, 2015). Some might describe the dilemma as a "Hobson's choice" which is a free choice in which only one option is offered. Because a person may refuse to take that sole option, the choice is therefore between taking the option or not; "take it or leave it." It is said that the genesis of a "Hobson's choice" originated from a Thomas Hobson (1544-1630) who ran a stable in Cambridge, England. He gave patrons a choice of hiring the horse nearest the door or no horse at all. See "What Is A 'Hobson Choice'? Where Did That Originate From?" EduQnA at <http://www.eduqna.com/Quotations/645-1-quotations-3.html> (last visiting April 2, 2015). In the context of Arizona law, and consent settlement agreements, both phrases, Hobson's dilemma and Hobson's choice are applicable. Prior to *Damron v. Sledge*, insurance companies were faced with a dilemma in choosing between two options—defend or not defend—neither of which was attractive. In terms of

significant judgment, if the insurer was unable to ascertain a valid basis for denying its insured coverage.¹¹ On the other hand, if the insurance company chose to defend the lawsuit, in an attempt to reduce the risk of an excessive judgment, it would be unable to later assert a policy defense or coverage exclusion under the policy.¹²

In *Damron*,¹³ the plaintiffs were injured in an automobile accident.¹⁴ The plaintiffs brought suit against Ples Sledge (“Sledge”) and Perel Polk (“Polk”).¹⁵ At the time of the accident, Sledge was driving an automobile owned by Polk. During the course of discovery, it was suspected that Sledge was driving the automobile without permission. Because of the non-permissive use issue, both Sledge’s and Polk’s insurance carriers withheld the defense of Sledge.¹⁶ Sledge then retained independent

accepting a defense of the insured, it was on a take it or leave it basis and therefore a Hobson’s choice. There was no intermediate position that the insurance company could take. Following *Damron v. Sledge*, insurance companies were given the opportunity to accept the defense of their insureds under a reservation of rights and therefore were no longer faced with a take it or leave it choice.

¹¹ *Id.*

¹² *Id.* An unconditional defense often estopped the insurance company from later contesting coverage. *See, e.g., Alliance Ins. Co. v. Collela*, 995 F.2d 944, 945 (9th Cir. 1993); *Knox-Penn Rental Co. v. Home Ins. Co.*, 833 F. Supp. 665 671 (E.D. Tenn. 1992); *Sauer v. Home Indemnity Co.*, 841 P.2d 176, 182 (Alaska 1992); *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 46 Cal. App. 4th 1810, 1838-39 (1996); *American Gen. Fire & Cas. Co. v. Progressive Cas. Co.*, 199 P.2d 1113, 1117 (N.M. 1990). *But see, AIG Hawaii Ins. Co. v. Smith*, 891 P.2d 261, 264 (Haw. 1995) where the court permitted the insurance company to initially assume an unconditional defense while it performed a coverage investigation and thereafter could reserve its rights.

¹³ *Damron*, 460 P.2d 997, 998.

¹⁴ *Id.* at 998.

¹⁵ *Id.*

¹⁶ *Id.*

counsel.¹⁷ On the eve of the trial, Sledge entered into a settlement agreement whereby plaintiffs gave Sledge a covenant not to execute against his personal assets, and they agreed to help pay a portion of his attorney's fees in exchange for an assignment of Sledge's claim against the insurance carriers for bad faith and failing to defend.¹⁸ Then, on the day of trial, the plaintiffs moved to dismiss Polk.¹⁹ The insurance carrier defending Polk opposed the dismissal so that they could appear at trial to rebut evidence of the severity of plaintiffs' injuries.²⁰ The trial court permitted the dismissal.²¹ In addition, Sledge's attorney withdrew his client's Answer and let the case result in a judgment by default.²² On appeal, the Supreme Court affirmed the trial court proceedings. The court held that an insured abandoned by his insurance company may assign his bad faith claim to the injured party, either before or after judgment is entered.²³ The court then stated:

When the insurer breaches its obligation of good faith settlement, it exposes its policyholder to the sharp thrust of personal liability. At that point, there is an acute change in the relationship between policyholder and insurer. The change does not or should not affect the policyholder's obligation to appear as defendant and to testify to

¹⁷ *Id.*

¹⁸ *Damron*, 460 P.2d at 998-99.

¹⁹ *Id.* at 999.

²⁰ *Id.*

²¹ *Id.* at 1000 ("[W]hen a lawyer is retained by a client to defend a lawsuit, his ultimate aim is to procure a dismissal with prejudice or a favorable verdict. We therefore hold a plaintiff has an absolute right to a voluntary dismissal of his complaint with prejudice.").

²² *Id.*

²³ *Damron*, 460 P.2d at 999.

the truth. He need not indulge in financial masochism, however. Whatever may be his obligation to the carrier, it does not demand that he bare his breast to the continued danger of personal liability. By executing the assignment, he attempts only to shield himself from the danger to which the company has exposed him. He is doubtless less friendly to his insurer than he might otherwise have been. The absence of cordiality is attributable not to the assignment, but to his fear that the insurer has callously exposed him to extensive personal liability.²⁴

The court held that the settlement agreement was not collusive,²⁵ even though the effect of the agreement was to secure for plaintiff an unjustifiably large verdict completely ex parte when no medical rebuttal witnesses were called at trial. This result was commented upon by the court:

This is a question that a liability-insurance carrier should consider before refusing to defend. Liability policies give the carrier the exclusive right to manage the defense and make it the company's

²⁴ *Id.* (citing with approval, *Critz v. Farmers Ins. Group*, 230 Cal.App.2d 788, 41 Cal.Rptr. 401 (Cal. Ct. App. 1964)).

²⁵ *Id.* at 1001 ("It cannot be held that as a matter of law collusion exists simply because a defendant chooses not to defend when he can escape all liability by such an agreement, and must take large financial risks by defending. If, at a hearing, where the testimony comes from sworn witnesses rather than from arguments of the attorneys, it appears that the defendant instead of defaulting agrees to perjure himself and testify falsely to statements that are untrue, and that plaintiff is a party to the agreement, or if some other definite evidence of collusion is adduced by proper testimony, a dismissal of the entire action may be justified.").

duty to defend. . . . If the company refuses to defend at all, it must accept the risk that an unduly large verdict may result from lack of cross-examination and rebuttal.²⁶

Standard liability insurance policies give the insurance company the exclusive right to manage the defense of the insured's case.²⁷ When an insurance company refuses to defend its insured, under *Damron* and its progeny, the insurance company is faced with the risk that an unduly large verdict may result from a lack of cross-examination and rebuttal.²⁸

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Damron*, 460 P.2d at 1001. See also, *City of Tucson v. Gallagher*, 493 P.2d 1197 (Ariz. 1972); *State Farm Mut. Auto. Ins. Co. v. Paynter*, 593 P.2d 948 (Ariz. Ct. App. 1979). Both the *Gallagher* and *Paynter* cases demonstrate the exposure that can occur where the insured does not put up a viable defense.

In *City of Tucson v. Gallagher*, the Court considered a similar agreement. The insurance carrier had agreed to pay the plaintiff its policy limits of \$10,000 in return for an agreement that if a judgment was obtained against the co-defendant in excess of \$10,000 the plaintiff would not execute against the driver. The agreement provided that plaintiff would have the option at any time to take the \$10,000 and release the driver, but that until such option was exercised, the driver would remain in the case as a codefendant with the city. In return, plaintiff promised that if a judgment were obtained against the city for more than \$10,000, no attempt would be made to collect anything from the driver, but if judgment were obtained against the City for less than \$10,000, the driver's insurance carrier would pay the difference. 108 Ariz. at 142, 493 P.2d at 1199. The agreement required the insured to remain a party to the lawsuit. The City was a co-defendant in the case. The City challenged the pre-trial agreement, arguing that it was collusive. The Court rejected that argument. Next, the City argued "it was deprived of a fair trial because the effect of the agreement was to take away from the driver [insured] all motivation to defend vigorously, since he could not lose, and could only gain, by helping plaintiff get a large verdict against the city." *Id.* The Court held that there was no evidence that the driver's motive or his trial tactics were

A wrongful failure to defend the insured can result in a variety of exposures to the insurance company including payment of attorney's fees and costs,²⁹ exposure for judgments entered against the insured in excess of the policy limits,³⁰ liability for settlements entered into by the insured,³¹ and possible exposure for bad faith. Another exposure to the insurance company in breaching its duty to defend exists in the form of estoppel.³²

The court's holding in *Damron v. Sledge* allowed insurance carriers to avoid the Hobson's dilemma/choice that had previously confronted them in cases where coverage was questionable, by recognizing the validity of a carrier's defense of its insured under a reservation of rights to later contest coverage.³³ The purpose of defending an insured under a reservation of

changed by the agreement. The City argued that the driver was biased by the agreement, as evidenced by the fact that his attorney only asked one question during trial and did not cross-examine either the plaintiff or her doctor. The Court summarily rejected this claim, stating: "We know of no rule of law requiring cross-examination." *Id.* at 143, 493 P.2d at 1200.

In *State Farm Mut. Auto. Ins. Co. v. Paynter*, a judgment was obtained against the insured after State Farm refused to defend. The insured had "admitted liability pursuant to an agreement in which [the claimant] agreed not to execute [the judgment] against the insured, in exchange for an assignment of the insured's rights in the State Farm insurance policy." 122 Ariz. at 199, 593 P.2d at 949. The insured then admitted liability in the pretrial statement and a short trial was held on damages. Judgment was entered against the insured in excess of State Farm's policy limits. The insured did not raise the defense of contributory negligence during the trial on damages.

²⁹ Steven Plitt & Jordan R. Plitt, 1 PRACTICAL TOOLS FOR HANDLING INSURANCE CASES, § 2:16, 2-96, n.17 (Thomson Reuters 2011) (citing cases).

³⁰ Plitt & Plitt, *supra* note 22, n. 18 at p.2-96 – 2-97 (citing cases).

³¹ Plitt & Plitt, *supra* note 22 at p. 2-97, fn. 19 (citing cases).

³² See, e.g., *Sentinel Ins. Co., Ltd. v. First Ins. Co. of Hawaii, Ltd.*, 875 P.2d 894, (Haw. 1994), *on reconsideration*, 879 P.2d 558 (1994), for an excellent summary of the application of estoppel to the insurer's coverage defenses following a breach of the duty to defend.

³³ *Id.* at 1001.

rights and litigating coverage in a collateral proceeding was discussed in *Kepner v. Western Fire Ins. Co.*³⁴ The court stated:

Where there are facts which might exclude coverage, the insurer cannot always defend with complete fidelity. There must be a proceeding at which the insurer and the insured are each represented by counsel of their own choice to fight out their differences. Such a testing of the insurer's liability may take the form of a declaratory judgment brought in advance of the third party's action or proceedings on garnishment following the trial of the third party's action as in the instant case. If the insurer refuses to defend and awaits the determination of its obligation in a subsequent proceeding, it acts at its peril, and if it guesses wrong it must bear the consequences of its breach of contract.³⁵

³⁴ *Kepner v. Western Fire Ins. Co.*, 509 P.2d 222, 225 (Ariz. 1973).

³⁵ *Id.* at 225 (citations omitted). The Court of Appeals in *McGough* observed: "*Kepner* is a strong indication that the Arizona Supreme Court will recognize the right of an insurer to defend its insured under a reservation of rights." *McGough v. Ins. Co. of North America*, 691 P.2d 738, 744 (Ariz. Ct. App. 1984).

If the insurance carrier defends its insured when a coverage defense is contemplated, the carrier "must do so under a properly communicated reservation of rights to later litigate coverage." Vagnozzi, 675 P.2d at 708 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 58 (1982)). The reservation, to be effective, must fairly inform the insured of the basis upon which the carrier is questioning coverage. Blomfield, 562 P.2d at 1375, (citing 44 AM. JUR. 2D *Insurance* § 1156). The reservation of rights notice must, in a straightforward manner, inform a reader of average intelligence that while the carrier is providing a defense, it is doing so without waiving any rights to contest liability under the policy. *Equity General Ins. Co. v. C & A Realty Co.*, 715

P.2d 768 (Ariz. Ct. App. 1985). The following reservation language was held to be sufficient by the Court in Equity General:

Certain allegations of the complaint assert a right on the part of the plaintiff to recovery of damages known as punitive or exemplary damages. It is the position of the insurer that such damages are not an insured liability. . . .

Therefore, while Equity General Insurance Company intends to protect your interest, they do so with the following reservations and qualifications:

1. The defense or investigation of this claim shall be without waiver of or prejudice to the right of the insurer to contend that any . . . loss or damage associated with the above captioned claim is not within the terms, conditions, and provisions of the insurance coverage afforded by the subject insurance certificate.

Id. at 770. The Court held that the reservation notice fairly informed the insured of the carrier's position regarding coverage for punitive damages. Ambiguities in the reservation notice will be construed against the carrier. *Moody v. Pennsylvania Millers Mut. Ins. Co.*, 263 S.E.2d 495 (Ga. Ct. App. 1979).

The reservation of rights notice must be timely given to the insured. *Equity General*, 148 Ariz. at 518, 715 P.2d at 771. *See also* 14 COUCH CYCLOPEDIA OF INSURANCE LAW § 51:82 (2d ed. 1982).

An insured is entitled to know early in the litigation process whether the insurer intends to honor that duty in order that the insured may take steps to defend himself. If in fact the insurer undertakes that defense the insured may reasonably rely upon the non-existence of policy defenses. To hold otherwise would allow the insurer to conduct the defense of the action without the knowledge of the insured that a conflict of interest exists between itself and the insurer. The conflict is that the insurer retains a policy defense

The reservation of rights approach has allowed insurance carriers to defend their insureds, minimizing the risk that an unduly large verdict would result from a lack of cross-examination or rebuttal at trial,³⁶ while preserving the carrier's right to challenge coverage.

The court in *Damron* also recognized the right of an insured to protect himself from the "sharp thrust of personal liability" in those cases where the carrier refused to defend the lawsuit.³⁷ The court held that when a carrier refused to defend its insured, the insured was permitted to enter into an agreement with the tort claimant respecting liability, with the insured assigning any cause of action against the carrier to the claimant in exchange

which would relieve the insurer of all liability while simultaneously depriving the insured of the right to conduct his own defense. It is the reliance of the insured upon the insurer's handling of the defense and the subsequent prejudice which gives rise to an estoppel in the first instance against the insurer from raising policy defenses.

Equity General, 715 P.2d at 771 (citations omitted). Mere delay, without prejudice, should not give rise to an estoppel. In *Hoyt v. St. Paul Fire & Marine Ins. Co.*, 607 F.2d 864 (9th Cir. 1979), the Court held that an insurance carrier may withdraw from a defense of the insured if the insured is not prejudiced thereby. A fortiori, the insurance carrier ought to be able to continue the defense under a reservation of rights.

For cases holding that the carrier's delay in giving a reservation notice created an estoppel, see *City of Carter Lake v. Aetna Cas. & Sur. Co.*, 604 F.2d 1052 (8th Cir. 1979), *United Servs. Auto. Ass'n v. Glen Falls Ins.*, 429 F. Supp. 101 (D. Conn. 1976), and *Transamerica Ins. Group v. Chubb & Son, Inc.*, 554 P.2d 1080 (Wash. Ct. App. 1976).

³⁶ See, e.g., *State Farm Mut. Auto. Ins. Co. v. Paynter*, 593 P.2d 948, 950 (Ariz. Ct. App. 1979).

³⁷ *Damron*, 460 P.2d at 999.

for the claimant covenanting not to execute the judgment against the personal assets of the insured.³⁸ In reaching its decision to permit consent settlement agreements, the court observed that the relationship between the insured and a carrier acutely changes when a carrier abandons its insured by refusing to defend the lawsuit. This creates a conflict of interest.³⁹ While the insured was still obligated to testify truthfully should the matter proceed to trial, he did not need to indulge in financial masochism by expending significant resources on his defense.⁴⁰

³⁸ *Id.* at 1001.

³⁹ *Id.*

⁴⁰ The Court in *Damron* made the following observations:

Whatever may be his obligation to the carrier, it does not demand that he bare his breast to the continued danger of personal liability. By executing the assignment, he attempts only to shield himself from the danger to which the company has exposed him.

460 P.2d at 999 (quoting *Critz v. Farmers Ins. Grp.*, 230 Cal. App. 2d 788, 41 Cal. Rptr. 401 (1964)).

The Court's analysis in *Damron* was one-sided. Indeed, the Supreme Court has recently described the reservation of rights approach as allowing the carrier to have a "double bite at escaping liability." In *United States Auto. Ass'n v. Morris*, 741 P.2d 246, 251 (Ariz. 1987), the court stated:

Only one trial outcome would be beneficial to both [the insurance carrier] and its insureds: a verdict against the claimant. . . . If the verdict were in favor of [the claimant], however, [the carrier] would have another chance at escaping the obligation to indemnify because it would be able to relitigate the [policy defense or exclusion] in a declaratory judgment action. . . . In addition, absent bad faith conduct [the carrier] will never be at risk for more than its . . . policy limit. Thus, the insureds risk financial catastrophe if they

The principles set forth in the *Damron* decision were widely accepted throughout the insurance community. The so-called “reservation of rights defense” became the standard approach to all defense matters where the carrier seriously questioned the availability of coverage to the insured. Arizona courts have refused to resurrect the Hobson’s choice, which confronted insurance companies before the *Damron* decision.⁴¹ This article will not address reservation of rights defense situations.

are held liable, while the insurer may save itself by litigating both issues—the insured’s liability and the coverage defense—and winning either.

While the *Damron* decision afforded protection to insurance carriers through the validation of reservation of rights defenses, the decision allowed the insured to protect himself only in those circumstances where the carrier refused to defend under its policy. This limited means of self-protection is eviscerated when the carrier defends under a reservation of rights because the carrier, which has the right to control the defense, will not allow *Damron*-type agreements to be made. Under such circumstances, the sharp sword of personal liability hangs over the insured’s head like the ancient sword of Damocles. The insured can no longer protect his personal assets through a negotiated settlement with the tort claimant as a result of the carrier’s qualified assumption of the defense, and at the same time, the insured must face the prospect that the carrier will prevail in its claim of no coverage, leaving the insured’s personal assets exposed. With this in mind, it becomes evident that the “acute change” in the relationship between the insured and the carrier that was described in the *Damron* decision also occurs in those circumstances where the carrier defends under a reservation of rights.

⁴¹ As an example, in *McGough v. Ins. Co. of North America*, 691 P.2d 738 (Ariz. Ct. App. 1984), the Arizona Court of Appeals rejected the majority view which permitted an insured to reject a defense offered under a reservation of rights. The insured could force the insurance company to elect either to defend unconditionally or to refuse to defend at its peril. *Id.* at 745. This majority rule, which was rejected by the Arizona Court of Appeals, would have resurrected the Hobson’s choice:

This solution puts an insurer honestly attempting to perform its duty between *Scylla* and *Charybdis*. The insurer must either give up its right to raise tenable coverage defenses or its right to insist on full application of the cooperation clause. An astute lawyer need but reject the offer of a defense under the reservation, forcing the insurer either to defend unconditionally or to turn the insured loose to go it alone. In the former event, the insurer loses the coverage defense; in the latter, the insured often settles with the claimant, who then attempts to find some method of binding the insurer by the settlement.

Morris, 741 P.2d at 251-52 (citations omitted). One commentator has discussed Justice Feldman's reference to *Scylla* and *Charybdis* as follows:

Scylla is a rock on the Italian mainland side of the Strait of Mycena, opposite the whirlpool of Charybdis. In the ODYSSEY, Homer recounted Odysseus' struggle to guide his ship between Scylla, personified as a sea monster, and Charybdis. Homer, THE ODYSSEY, BOOK VII, 189-201 (1946). A pressing place between Scylla and Charybdis is, therefore, in a position where avoidance of one danger exposes him to destruction by the other. In his majority opinion in *United Services Auto Association v. Morris*, Arizona Supreme Court Vice Chief Justice Feldman concluded that the practice of allowing insureds to reject defenses offered pursuant to reservation of rights places insurance companies between Scylla and Charybdis: The insurer must either give up its right to raise tenable coverage defenses or its right to insist on full application of the cooperation clause.

Note: *Between Scylla and Charybdis*: Morris, 741 P.2d 246 (1987) and *Reservation of Rights Defenses*, 22 ARIZ. ST. L.J., 528, n.11. A true Hobson's dilemma (or choice).

II. ISSUE PRECLUSION AND THE FAILURE TO DEFEND

A. *General Principles of Issue Preclusion*

Issue preclusion, also referred to as collateral estoppel, bars re-litigation of the same issues.⁴² The purpose of this doctrine is to protect litigants from burdensome and needless re-litigation, encourage reliance on previous adjudications, and to promote judicial economy.⁴³ Issue preclusion bars only issues that were actually litigated, determined, and determined to be essential.⁴⁴ Issue preclusion does not apply when there is some overriding consideration of fairness involved.⁴⁵ Generally, application of the doctrine of issue preclusion requires that the following conditions be present: (1) the issue in question was actually litigated in a previous proceeding; (2) there was a full and fair opportunity to litigate the issue; (3) there was a final decision on the merits; (4) resolution of the issue in question was essential to the prior decision; and, (5) there is a common identity of the parties.⁴⁶

⁴² *Yavapai Cnty. v. Wilkinson*, 534 P.2d 735, 736 (Ariz. 1975); *Estate of Harris*, 708 P.2d 1341 (Ariz. Ct. App. 1985); *Indus. Park Corp. v. U.S.I.F. Palo Verde Corp.*, 547 P.2d 56 (Ariz. Ct. App. 1976).

⁴³ *United States v. Mendoza*, 464 U.S. 154, 158 (1984).

⁴⁴ *W. Cable v. Indus. Com'n*, 698 P.2d 759 (Ariz. Ct. App. 1985).

⁴⁵ *Ferris v. Hawkins*, 660 P.2d 1256 (Ariz. Ct. App. 1983).

⁴⁶ *Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 91 P.3d 1019 (Ariz. Ct. App. 2004).

B. Issue Preclusion Prior to Quihuis

Both the Arizona Supreme Court and the Arizona Court of Appeals have addressed issue preclusion in the insurance context⁴⁷ before the Court's recent decision in *Quihuis v. State Farm Mut. Auto. Ins. Co.*⁴⁸ These cases involved *Morris* agreements and stipulated facts. Prior to *Quihuis*, Arizona Courts had not directly analyzed what issue preclusion principles applied when the insurer refused a defense, a *Damron* agreement was entered into, and a default judgment with stipulated facts was entered.

In *Farmers Ins. Co. of Arizona v. Vagnozzi*, the insured injured Vagnozzi in a recreational basketball game after the two were engaging in rough play.⁴⁹ After the insured was knocked down by Vagnozzi, the insured angrily sprang up and swung his elbow towards Vagnozzi's chest as he lunged towards the man with the basketball.⁵⁰ At the instant the insured swung his elbow, Vagnozzi bent over, and the insured's elbow hit him in the face.⁵¹ Vagnozzi lost consciousness after falling and hitting his head on the concrete court as a result of his contact with the insured's elbow.⁵² Vagnozzi filed a negligence lawsuit against the insured for the personal injuries he sustained.⁵³ Farmers defended the insured under a reservation of rights.⁵⁴ At the same

⁴⁷ See, e.g., *Farmers Ins. Co. of Ariz. v. Vagnozzi*, 675 P.2d 703, 708 (Ariz. 1983); *Associated Aviation Underwriters v. Wood*, 98 P.3d 572, 581-82 (Ariz. Ct. App. 2004).

⁴⁸ *Quihuis v. State Farm Mut. Auto. Ins. Co.*, 334 P.3d 749 (Ariz. Ct. App. 2014).

⁴⁹ *Vagnozzi*, 675 P.2d 703, 708 (Ariz. 1983).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 708-09.

⁵³ *Id.* at 705.

⁵⁴ *Vagnozzi*, 675 P.2d 703, 708.

time, Farmers filed a declaratory judgment action seeking a determination that its homeowner's policy did not cover the bodily injuries sustained by Vagnozzi and that Farmers had no duty to defend the insured.⁵⁵ The Farmers policy had a typical intentional injury exclusion. There was an ensuing "race to the courthouse," where the parties hastily attempted to bind each other to facts favorable to their own respective interests.⁵⁶ In the tort action, the attorney representing the insured withdrew because of a perceived ethical conflict when Vagnozzi's attorney approached him about an agreement that the insured would not respond to Vagnozzi's motion for summary judgment in exchange for a covenant not to execute the judgment against the insured himself.⁵⁷ The insured ultimately obtained new counsel in the tort action and went forward with the agreement not to answer in exchange for the covenant not to execute.⁵⁸

⁵⁵ *Id.* Some jurisdictions prohibit insurance companies from instituting declaratory judgment proceedings on policy coverage before the conclusion of the underlying lawsuit. See e.g., *Fuisz v. Selective Ins. Co.*, 61 F.3d 238, 247 (4th Cir. 1995); *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083 (Colo. 1991) (declaratory judgment action appropriate only after underlying action is complete); *United States Fid. & Guar. Co. v. Wilken Insulation Co.*, 550 N.E.2d 1032, 1041 *aff'd* 578 N.E.2d 926 (Ill. 1991); *Found. Reserve Ins. Co., v. Mullenix*, 642 P.2d 604 (N.M. 1982) (declaratory judgment suit on coverage inappropriate when the same facts will be addressed in the underlying action); *N. Pac. Ins. Co. v. Wilson's Distrib. Serv., Inc.*, 908 P.2d 827 (Or. 1995) (duty to defend may not be vitiated by an imposed declaratory judgment prior to the conclusion of the underlying action); *Commonwealth Cnty. Mut. Ins. Co. v. Moctezuma*, 900 S.W.2d 798, 800 (Tex. Civ. App. 1995).

⁵⁶ *Vagnozzi*, 675 P.2d 703, 707.

⁵⁷ *Id.* at 705, 707.

⁵⁸ *Id.* at 707.

The insured did not oppose Vagnozzi's motion for partial summary judgment.⁵⁹ While the motion for summary judgment was pending in the tort action, Farmers moved to consolidate the tort and declaratory judgment actions and filed a motion for summary judgment in the declaratory action.⁶⁰ Vagnozzi's motion for partial summary judgment was granted in the tort action—finding the insured negligent based on the fact the motion was unopposed—before Farmer's motion was considered.⁶¹ Vagnozzi attempted to derail the declaratory judgment proceedings, in what can only be comprehended as gamesmanship, by arguing the insurance carrier was precluded from raising an issue about whether the insured's conduct was intentional or negligent because that factual determination had already been decided (*i.e.*, collateral estoppel).⁶² Through discovery in the declaratory judgment action, both the insured and Vagnozzi had agreed to the rough play and that the insured intentionally swung his elbow towards Vagnozzi in a heated pick-up game.⁶³ Despite the ruling in the tort action, the court in the declaratory judgment action granted Farmers' motion for summary judgment--finding the insured "intended to hit Vagnozzi and therefore the injury was outside coverage of the policy."⁶⁴ The Court in the declaratory judgment action rejected the insured's collateral estoppel argument.

⁵⁹ *Id.* at 705.

⁶⁰ *Id.*

⁶¹ *Vagnozzi*, 675 P.2d 703, 705.

⁶² *Id.* at 707 ("We can conceive of no explanation for these tactics other than the desire of Vagnozzi's counsel to maneuver the insurer into a position where it would be obligated to pay the judgment and estopped from raising the defense of non-coverage under the intentional acts exclusion.").

⁶³ *Id.* at 708-09.

⁶⁴ *Id.* at 705.

Vagnozzi appealed the trial court's ruling in the declaratory judgment action and argued that the doctrine of collateral estoppel applied to preclude a finding that the insured acted intentionally.⁶⁵ The Arizona Supreme Court rejected this argument and focused its analysis of issue preclusion on the RESTATEMENT (SECOND) OF JUDGMENTS § 58.⁶⁶ The Arizona Supreme Court held:

⁶⁵ *Id.*

⁶⁶ RESTATEMENT (SECOND) OF JUDGMENTS § 58 (1982) states as follows:

§ 58 Effect of Judgment Against Indemnitee on Indemnitor
Who Has Independent Duty to Defend Indemnitee

(1) When an indemnitor has an obligation to indemnify an indemnitee (such as an insured) against liability to third persons and also to provide the indemnitee with a defense of actions involving claims that might be within the scope of the indemnity obligation, and an action is brought against the indemnitee involving such a claim and the indemnitor is given reasonable notice of the action and an opportunity to assume its defense, a judgment for the injured person has the following effects on the indemnitor in a subsequent action by the indemnitee for indemnification:

(a) The indemnitor is estopped from disputing the existence and extent of the indemnitee's liability to the injured person; and

(b) The indemnitor is precluded from re-litigating those issues determined in the action against the indemnitee as to which there was no conflict of interest between the indemnitor and the indemnitee.

(2) A "conflict of interest" for purposes of this Section exists when the injured person's claim against the indemnitee is such that it could be sustained on different grounds, one of which is within the indemnitor's obligation to indemnify and another of which is not.

[W]e think the better rule is to suspend the operation of collateral estoppel where there is an adversity of interests. We hold that where there is a conflict of interest⁶⁷ between an insured and his

The RESTATEMENT (SECOND) OF JUDGMENTS is consistent with the majority of courts in other jurisdictions. In *Midwestern Indem. Co. v. Laikin*, the Court considered various issues relating to *Helme*-type agreements. 119 F. Supp. 2d 831, 838 (S.D. Ind. 2000). These courts hold that where the insurance company is defended under a reservation of rights or has filed a declaratory judgment action, a consent judgment between an insured and a tort plaintiff will bind the insurer as to issues not related to coverage, at least so long as the insured has acted reasonably and in good faith. RESTATEMENT (SECOND) OF JUDGMENTS, § 57 addresses the effect of an indemnitor of a judgment against an indemnity. See, generally, Austin A. Harris, Note, *Judicial Approaches to Stipulated Judgments, Assignment of Rights, and Covenants Not to Execute in Insurance Litigation*, 47 DRAKE L. REV. 853, 856-57 (1999); Chris Ward, Note, *Assignments of Rights and Covenants Not to Execute*, 75 TEX. L. REV. 1373 (1997).

⁶⁷ The conflict of interest issue has received significant academic attention. See, e.g., Michael A. Berch & Rebecca White Berch: Will The Real Counsel For The Insured Please Rise?, 19 ARIZ. ST. L.J. 27 (1987); Karen O. Bowdre, Conflicts Of Interest Between Insurer And Insured: Ethical Traps For The Unsuspecting Defense Counsel, 17 AM. J. TRIAL ADVOCACY 101 (1993); Bruce L. Gelman, The Insurance Company Or The Insured: Where Does Defense Counsel's Loyalty Really Lie?, 70 U. DET. MERCY L. REV. 215 (1992); Eric M. Holmes, A Conflict Of Interest Roadmap For Insurance Defense Counsel: Walking An Ethical Tightrope Without A Net, 26 WILLAMETTE L. REV. 1 (1989); John K. Morris, Conflicts Of Interest In Defending Under Liability Insurance Policies: A Proposed Solution, 1981 UTAH L. REV. 457 (1981); Richard L. Neumeier, Serving Two Masters: Problems Facing Insurance Defense Counsel And Some Proposed Solutions, 77 MASS. L. REV. 66 (1992); Robert E. O'Malley, Ethics Principles For The Insurer, The Insured, And Defense Counsel: The Eternal Triangle Reformed, 66 TUL. L. REV. 511 (1991); Allan I. Widiss, Abrogating The Right And Duty Of Liability Insurers To Defend Their Insureds: The Case For Separating The Obligation To Indemnify From The Defense Of Their Insureds, 51 OHIO

insurer, the parties will not be estopped from litigating in a subsequent proceeding those issues as to which there was a conflict of interest, whether or not the insurer defended in the original tort claim.⁶⁸

ST. L. J. 917 (1990); Charles Silver & Ken Syverud, *The Professional Responsibilities Of Insurance Defense Lawyers*, 45 DUKE L. J. 255 (1995); Charles Silver, *Does Insurance Defense Counsel Represent The Company Or The Insured?*, 72 TEX. L. REV. 1583 (1994); Douglas R. Richmond, *Walking A Tightrope: The Tripartite Relationship Between Insurer, Insured, And Insurance Defense Counsel*, 73 NEB. L. REV. 265 (1994).

⁶⁸ Vagnozzi, 675 P.2d at 708. Some courts have instituted a stay of the declaratory judgment action in order to avoid prejudice to the insured who may be required to engage in a simultaneous defense of the declaratory judgment action and the underlying action. A stay of the declaratory judgment action allows the resolution of factual issues in the underlying litigation. See e.g., *Montrose Chemical v. Superior Court*, 861 P.2d 1153 (Cal. 1993) ("To eliminate the risk of inconsistent factual determinations that could prejudice the insured, a stay of the declaratory judgment action pending resolution of the third party suit is appropriate when the coverage question turns on facts to be litigated in the underlying action. For example, when the third party seeks damages on account of the insured's negligence, and the insurer seeks to avoid providing a defense by arguing that its insured harmed the third party by intentional conduct, any potential that the insurers proof will prejudice its insured in the underlying litigation is obvious. This is the classic situation in which the declaratory relief action should be stayed.") *Id.* at 1162 (citations omitted). See also, *Connecticut Gen. Life Ins. Co. v. Triple A Water Proofing Co., Inc.*, 911 P.2d 684 (Colo. Ct. App. 1995); *Murphy v. Urso*, 430 N.E.2d 1079, 1084-85 (Ill. 1981); *North Pacific Ins. Co v. Wilson's Distrib. Serv.*, 908 P.2d 827, 832 (Ore. Ct. App. 1995). See also, *Frankenmuth Mut. Ins. Co. v. Williams*, 690 N.E. 2d 675, 679 (Ind. 1997) where the insurance company wanted to litigate whether the insurance conduct had been negligent or intentional. The Court treated the consent judgment that was entered as a "final legal conclusion" that the insured had acted negligently, and found that "the time has passed" for the insurer to argue that the insured's negligence was not a proximate cause of the tort claimant's injuries. *Id.* at 678-79. The

The Court found that Farmers was not collaterally estopped from asserting the policy's intentional acts exclusion in litigating whether the elbow and injuries were intentional in the declaratory judgment action.⁶⁹

In *Associated Aviation Underwriters v. Wood*,⁷⁰ the Arizona Court of Appeals addressed issue preclusion with respect to liability issues and *Morris* agreements. In *Wood*, the insurance company filed a declaratory action to determine its coverage obligations under commercial general liability ("CGL") policies issued between 1960 and 1972⁷¹ for mass tort actions arising out

Court in *Frankenmuth* held that the insurer had forfeited its right to litigate the negligent versus intentional issue by failing either to defend the insured under a reservation of rights or to clarify its obligation to a declaratory judgment action. *Id.* at 679. The key was the insurance company's filing of a declaratory judgment action to retain its ability to litigate the issues.

⁶⁹ Vagnozzi, 675 P.2d at 708.

⁷⁰ *Wood*, 98 P.3d 572.

⁷¹ The October 1, 1960 through August 1, 1969 CGL policies were "accident" policies, where the insurer agreed to pay on the insured's behalf as follows:

all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, . . . for damages . . . because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of such of the hazards defined herein . . .

Id. at 579. The August 1, 1969 through October 1, 1972 CGL policies were "occurrence" policies, containing identical language as quoted above, but covering injuries "caused by an 'occurrence'" instead of "caused by an accident." *Id.* "Occurrence" was defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." *Id.*

of the city's groundwater contamination.⁷² The insurer defended the insureds under a reservation of rights in the underlying action.⁷³ While the declaratory judgment action was pending, the claimants and the insureds entered into a *Morris* agreement and stipulated to a judgment in the amount of approximately \$35,000,000.⁷⁴ The trial court upheld the *Morris* agreement in the declaratory action finding it reasonable, and it found

⁷² The court elaborated on the facts as follows:

In 1985, Barbara Valenzuela and approximately 1,600 other plaintiffs . . . sued Hughes Aircraft Company in federal district court. The plaintiffs alleged they had been injured by exposure to water from an underground aquifer that had been contaminated by [the chemical trichloroethylene] that had been used at Hughes's facility. Hughes filed a third-party complaint against TAA/City[, the insured,] seeking contribution for any liability that might be imposed against it. After receiving the third-party complaint, TAA/City asked its insurer, AAU, to defend it in the action and indemnify it should it be found liable. AAU agreed to defend TAA/City, but reserved its right to later contest whether its policies covered the plaintiffs' claims.

In 1986, the *Valenzuela* plaintiffs filed a new action in Pima County Superior Court against TAA/City, alleging that TAA/City was responsible for their injuries because it had contaminated the groundwater aquifer with TCE. TAA/City again tendered their defense to AAU, which again agreed to defend its insureds while reserving its rights to later contest its own indemnity obligation under its policies.

Id. at 578 (citations omitted).

⁷³ *Id.* at 577.

⁷⁴ *Id.*

coverage under the policy for the underlying groundwater contamination claims primarily based on the *Morris* agreement and consent judgment rather than the actual litigation.⁷⁵

⁷⁵ The Arizona Court of Appeals in *Wood* described the enduring and complicated underlying procedure of the trial court as follows:

¶ 9 In May 1988, AAU exercised its reserved right to contest coverage and filed this [Declaratory Rights Action (“DRA”)] against TAA/City, seeking a declaration that its policies did not cover the tort claims of the plaintiffs/Intervenors in [two underlying actions] *Valenzuela* or *Gerardo*. In February 1989, as this DRA was progressing, the Intervenors offered to settle all their underlying claims against TAA/City. TAA/City notified AAU about the settlement proposal and urged AAU to either pay the settlement demand or attempt to negotiate a settlement more amenable to it. TAA/City also told AAU that if it did not settle or negotiate with Intervenors, they would enter a *Morris* agreement with them. AAU refused to settle or otherwise negotiate with Intervenors.

¶ 10 After negotiating settlement terms and conditions, Intervenors and TAA/City executed a *Morris* agreement in June 1989. Under the agreement, the parties stipulated to the entry of a judgment against TAA/City in *Gerardo* for \$35 million, with TAA/City assigning all its rights to indemnity from AAU for that amount to Intervenors in return for Intervenors’ release of all claims against TAA/City and a covenant not to execute on the consent judgment against TAA/City. In May 1990, the federal court in *Valenzuela* approved the agreement. And, in April 1991, the superior court in *Gerardo* entered judgment on the agreement in favor of Intervenors and against TAA/City.

¶ 11 In August 1989, Intervenors filed a motion seeking to intervene in this DRA and, pursuant to the parties’ stipulation, the trial court granted that motion. Intervenors

also filed a “complaint” in which they sought a declaration that AAU’s policies covered their claims and that the *Morris* agreement they had reached with TAA/City was reasonable.

¶ 12 While TAA/City and Intervenors were negotiating and entering into the *Morris* agreement, this DRA was moving forward. In March 1990, the trial court (J. Buchanan) approved a “Case Management Order” in which it ordered that the trial on the DRA would proceed in two phases. Phase I of the litigation would determine “the issues relating to the interpretation of the insurance policies at issue in this lawsuit.” Among those issues were “the trigger and scope of coverage,” “the applicability of any [policy] exclusions,” and a determination of the meaning of certain terms used in the insurance policies. Phase II of the trial would apply the rulings made in phase I and determine, *inter alia*, the reasonableness of the *Morris* agreement entered into by Intervenors and TAA/City.

¶ 13 In 1992, AAU moved for summary judgment, arguing its policies did not cover Intervenors’ claims against TAA/City because the latter entities could not have been liable for any injuries caused by TCE contamination. AAU based its argument on the general rule that a landlord is not responsible for a tenant’s torts committed on leased property, *see, e.g., Gibbons v. Chavez*, 160 Ariz. 73, 75–76, 770 P.2d 377, 379–80 (App. 1988), and on its allegation that any acts that had caused TCE to seep into the aquifer had been committed only by TAA/City’s tenants. The trial court (J. Buchanan) apparently accepted AAU’s argument and, in granting the motion, ruled that “the insurance policies which are at issue in [this DRA] do not provide coverage for the judgments” in *Gerardo*. Judge Buchanan entered judgment in favor of AAU in March 1993.

¶ 14 On Intervenors’ appeal from that summary judgment, this court reversed. *Smith v. Tucson Airport Auth.*,

180 Ariz. 165, 882 P.2d 1291 (App. 1994). There, we concluded that the issue of whether no coverage existed because of TAA/City's alleged non-liability under landlord/tenant law was "a liability question, not a coverage question," and that the grant of summary judgment had violated *Morris*. *Id.*

¶ 15 Our supreme court initially granted review of that decision. After oral argument, however, the court concluded "that nonliability-dependent coverage issues are not precluded or foreclosed by the Court of Appeals' opinion." *Smith v. Tucson Airport Auth.*, 183 Ariz. 1, 899 P.2d 162 (1995). Apparently on that basis, the supreme court determined that review had been improvidently granted but ordered that our decision not be published. *Id.*

¶ 16 Due to collateral issues concerning Environmental Protection Agency claims against TAA/City arising out of these same incidents, this case did not come up on the trial court's calendar for several years following our supreme court's denial of review. The only activity that occurred between 1995 and 1998 in this litigation was a change of judge; Judge Velasco replaced Judge Buchanan as the trial judge.

¶ 17 In July 1998, the trial court (J. Velasco) ordered briefing on the issues to be tried in light of Judge Buchanan's 1990 case management order. In its January 1999 minute entry, the trial court stated that "the Phase I portion of this cause will require the Intervenor to prove 1) ... the policy/policies [,] 2) ... notice and 3) happening of an insured event." The court also stated that during phase II, "[i]f necessary[,] ... the Intervenor shall have the burden of establishing the settlement was reasonable given the issues affecting liability, defense and coverage." In addition, noting the need "to bring some measure of resolution within a reasonable period of time," the trial court ordered that Intervenor "select by lot a total of 20 intervenors for trial." Six of the twenty intervenors chosen were eventually

dismissed from the case, leaving fourteen intervenors for trial.

¶ 18 In September 2000, after a bench trial held in June and July on phase I, the trial court issued its findings of fact and conclusions of law.⁴ The court found that “[t]he events of migration, dispersal and ingestion” of TCE qualified as “accidents” under AAU’s accident policies in effect from 1960–1969, but were not “occurrences” under AAU’s occurrence policy in effect from 1969–1972. The court also found that “TCE contaminated water was supplied to the homes, schools and workplaces of Intervenors during the entire period of AAU’s coverage,” and that an individual’s first exposure to TCE causes “cellular damage.” The court further found that such cellular damage constitutes “bodily injury” under AAU’s accident policies and that those injuries occurred during AAU’s policy period. Based on those findings, the trial court concluded that AAU’s accident policies provided coverage for Intervenors’ claims.

¶ 19 In that same ruling after the phase I trial, the trial court concluded that any inquiry into “the injury aspect contemplated by the policies” was foreclosed by *Morris*, “subject to reasonableness vis à vis the alleged injury and the settlement amount agreed upon.” In addition, the trial court expressly *refused* to find the following facts proposed by AAU: “No Intervenor sustained any bodily injury within the meaning of the AAU policies”; “TCE did not cause any bodily injury to any Intervenor during the period of any AAU policy”; and “TCE which emanated from the Airport premises did not cause any bodily injury to any Intervenor during the period of any AAU policy.” The trial court refused to find those facts because, according to the court, they were “foreclosed by *Morris*.”

¶ 20 Sometime after issuing the foregoing phase I minute entry, Judge Velasco left the superior court and Judge Harrington replaced him as trial judge during this DRA’s second phase. In April 2002, after an eight-day, phase II

On appeal, the insurer argued that it was not bound by the initial determination of liability and damages against the insured that occurred in the liability case.⁷⁶ The issue before the Arizona Court of Appeals in *Wood* was “whether and to what extent a *Morris* agreement, related consent judgment between an insured and third-party claimant, and the doctrine of collateral estoppel can prevent an insurer from litigating facts essential to insurance

trial, the trial court issued additional findings of fact and conclusions of law on “the reasonableness of [the] *Morris* Agreement.” The court ultimately concluded that the global, \$35 million settlement was reasonable in fact and amount.

¶ 21 In September 2002, the trial court entered a “Judgment for the Fourteen Intervenors Under Consideration in Phase Two.” In that judgment, the trial court incorporated by reference all findings of fact and conclusions of law in Judge Velasco’s September 2000, phase I ruling and its own April 2002 minute entry. The trial court then found that “[i]nsurance coverage exists under one or more of the AAU ‘Accident Policies[,]’ which provided coverage to the Tucson Airport Authority and the City of Tucson from October 1, 1960 to August 1, 1969, for the claims asserted by the [fourteen] Intervenors,” and that the “settlements entered into by the [fourteen] Intervenors were reasonable.” The trial court, however, rejected Intervenors’ proposed form of judgment that would have included a monetary award.

Wood, 98 P.3d at 579-81.

⁷⁶ *Id.* at 584 (“Based primarily on . . . statements in *Morris*, [the insurer] essentially argues it may fully litigate all liability and damage issues in the coverage phase of this DRA, irrespective of what occurred in the [underlying cases] . . . [contending] neither the *Morris* agreement nor the consent judgment precludes it from avoiding coverage by challenging [the insured’s] fault, causation, and [the claimant’s] alleged damages under the basic insuring provision of its policies.”).

coverage when those facts overlap with those necessary to establish its insured's underlying tort liability."⁷⁷ Essentially, the insurer wanted to re-litigate the liability issues and damages as a means of not providing coverage.⁷⁸ At the heart of the debate was that under *Morris*, the insurance company could not re-litigate the liability and damage aspects of the case once the consent settlement agreement was executed.⁷⁹

⁷⁷ *Id.* at 581-82.

⁷⁸ *Id.* at 580 (Insurer moving for summary judgment "based [on] its argument on the general rule that a landlord is not responsible for a tenant's torts committed on leased property . . . and on its allegation that any acts that had caused TCE to seep into the aquifer had been committed only by [the insured's] tenants.").

⁷⁹ Under *Morris*, the scope of the inquiry is narrowly drawn compared to the issues in the underlying tort action. The Court in *Morris* rejected the insurance company's argument that it had the "absolute" right to relitigate "all" aspects of the liability and damage case. Courts should not challenge the reasonableness of a consent judgment as an opportunity to relitigate issues based merely on 20/20 hindsight or intervening changes in the law, nor because the insurance carrier believes that if it had been directing the defense it could have gotten a better deal. *See, generally*, *D.E.M. v. Allickson*, 555 N.W.2d 596, 603 (N.D. 1996) (settlement agreement was reasonable even though a later change in state law might have precluded a finding of liability against the insured; an insured's "failure to predict future appellate court rulings of other states certainly has no bearing on the reasonableness of the settlement.") This unconditional position, the Court stated, would "destroy the purpose served by allowing insureds to enter into *Damron* agreements because claimants would never settle with insureds if they never could receive any benefit." *Morris*, 741 P.2d at 253. An insurance company will not overcome the agreement by showing that its insured was not liable in the subsequent settlement, reasonableness hearing or trial because the reasonableness test centers on the insured's potential, not actual, exposure to liability and damage. *Id.* One court has observed that *Damron*-type agreements are particularly attractive to third-party claimants whose claims are weak or whose chances of full recovery are small. *American Physicians Ins. Exchange v.*

In *Wood*, the insurance company wanted to challenge liability and damages from the underlying action in the guise of a coverage dispute. The Court in *Wood* concluded that the *Morris* agreement and consent agreement precluded the insurer's coverage defenses to the extent they hinged solely on " 'the same legal and factual issues' that underlie the judgment."⁸⁰ The Court in *Wood* found that the insurer was collaterally estopped from re-litigating "tort liability and damage issues in the guise of a coverage defense."⁸¹ Focusing on the RESTATEMENT (SECOND) OF JUDGMENTS § 58, the *Wood* Court determined that no required conflict of interest existed simply by defending the insured under a reservation of rights that would permit the insurer to relitigate pure liability issues. The *Wood* Court noted that its decision was distinguishable from *Vagnozzi* and *Morris* where conflicts of interest existed regarding negligent as opposed to intentional acts.⁸²

Garcia, 876 S.W.2d 842, 869 n.10 (Tex. 1994) (citing *Steil v. Florida Physicians' Ins. Reciprocal*, 448 S.2d 589, 592 (Fla. D. Ct. App. 1984).

⁸⁰ *Wood*, 98 P.3d 572, 578, 585 ("On [the insurer's] appeal, we conclude that, to the extent coverage under [the insurer's] policies hinges on an initial determination of liability against the insureds . . . the *Morris* agreement and consent judgment preclude [the insurer] from litigating what essentially are liability issues in its effort to defeat coverage.")

⁸¹ *Id.* at 585.

⁸² *Id.* at 586-87 ("We find several flaws in [the insurer's] argument. Like *Morris*, *Vagnozzi* involved a policy's intentional act exclusion and, at a minimum, a factual dispute on whether the insured's act had been intentional. Thus, the entire discussion about conflict of interest in *Vagnozzi*, as in *Morris*, revolved around the insurer's coverage defense, which was based on the intentional act exclusion. The Court in neither *Vagnozzi* nor *Morris* suggested, let alone held, that merely defending an insured under a reservation of rights creates a conflict of interest between the insurer and insured on *all* issues and claims in the underlying case, thereby entitling the insurer to litigate all liability and damage issues in a subsequent DRA in an effort to avoid coverage.") (citations omitted).

C. Issue Preclusion Post *Quihuis*

In *Quihuis v. State Farm Mut. Auto. Ins. Co.*,⁸³ the Arizona Supreme Court clarified the scope of collateral estoppel⁸⁴ in cases where the insurance company refused to defend its insured, a *Damron* agreement is executed, and a judgment against the insured is entered by default. In *Quihuis*, Norma Bojorquez bought a Jeep from Carol Cox, which was intended to be used by her daughter, Illiana Bojorquez.⁸⁵ Per the terms of their agreement, the amount owed would be paid over eight monthly installments, and Ms. Cox would keep the Jeep title until the full purchase price had been paid.⁸⁶ Ms. Cox had given Mrs. Norma Bojorquez the only keys to the Jeep, but maintained insurance for the Jeep through State Farm.⁸⁷ State Farm's policy covered the Coxes and permissive users for "bodily injury caused by accident[s] resulting from the use of cars owned by the Coxes. . . ."⁸⁸

While using the Jeep her mother purchased, Ms. Illiana Bojorquez was involved in a collision with another car driven by Yolanda Quihuis.⁸⁹ Mrs. Quihuis and her husband sued both the Coxes for negligent entrustment and Ms. Illiana Bojorquez for negligence.⁹⁰ One element to the Quihuis' negligent entrustment claim against the Coxes was ownership of the car.⁹¹ State

⁸³ *Quihuis*, 334 P.3d 749 (2014).

⁸⁴ More modernly known as issue preclusion. *Id.* at 723, n. 3.

⁸⁵ *Id.* at 721.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Quihuis*, 334 P.3d 749, 721.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

Farm refused to defend the Coxes in the underlying action because State Farm asserted that the vehicle ownership had transferred to Mrs. Norma Bojorquez prior to the accident.⁹² Thereafter, the Quihuises, the Bojorquezes, and the Coxes entered into a *Damron* agreement, which assigned rights against State Farm to the Quihuises in exchange for a covenant not to execute.⁹³ As part of the *Damron* agreement, the parties stipulated to certain facts, including that the Coxes held ownership of the Jeep at the time of the accident and that the damages were \$275,000.⁹⁴ By agreement, the parties requested a judgment by default to end the case and the state court entered a \$350,000 default judgment.⁹⁵

The Quihuises subsequently initiated a declaratory judgment action against State Farm, which was ultimately removed to the United States District Court for the District of Arizona.⁹⁶ The district court held that State Farm was not precluded from litigating the Jeep ownership issue despite the fact the underlying default judgment stipulated to ownership by the Coxes.⁹⁷ The district court also held “that the undisputed facts established that the Bojorquezes owned the Jeep at the time of the accident as a matter of law.”⁹⁸

⁹² *Id.*

⁹³ *Quihuis*, 334 P.3d 749, 721.

⁹⁴ *Id.* at 721-22 (stipulating that “the Coxes owned the Jeep at the time of the accident, that Illiana was incompetent to drive a motor vehicle and her negligence caused the accident, and that the Coxes should have known that Illiana was incompetent to drive and therefore should not have entrusted the Jeep to her.”).

⁹⁵ *Id.* at 722 (including \$325,000 for Yolanda’s injuries and \$25,000 for Robert Quihuis’ loss of consortium).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Quihuis*, 748 F.3d at 912-14

On appeal to the United States Court of Appeals for the Ninth Circuit, the Quihuises contended no conflict of interest existed and that State Farm should be precluded from re-litigating the ownership issue.⁹⁹ While the Ninth Circuit Court of Appeals agreed that the undisputed facts showed the Coxes did not own the Jeep at the time of the accident, it noted the appeal outcome depended on the preclusive effect, if any, of the *Damron* agreement and default judgment.¹⁰⁰ Accordingly, the Ninth Circuit certified the following question regarding issue preclusion under Arizona law to the Arizona Supreme Court:

Whether a default judgment against insured-defendants that was entered pursuant to a *Damron* agreement that stipulated facts determinative of both liability and coverage has (1) collateral estoppel effect and precludes litigation of that issue in a subsequent coverage action against the insurer, as held in *Associated Aviation Underwriters v. Wood*, [209 Ariz. 137,] 98 P.3d 572 (App.2004), or (2) no preclusive or binding effect, as suggested in *United Services Automobile Association v. Morris*, [154 Ariz. 113,] 741 P.2d 246 (1987).¹⁰¹

⁹⁹ *Id.* (“The Quihuises timely appealed, contending there was no conflict of interest between the Coxes and State Farm, and that Arizona case law establishes that an insurer may not litigate an issue determinative of coverage if that issue is also determinative of liability and was stipulated to as part of a *Damron* agreement that resulted in entry of a default judgment. They also contended that ownership of the Jeep was a genuine issue of material fact.”).

¹⁰⁰ *Id.* at 914, 918.

¹⁰¹ *Id.* at 723 (“The certified question turns on what issue-preclusion rules apply under these circumstances.[footnote omitted] As the Ninth Circuit observed, no Arizona case squarely resolves the question presented here.”); see also *Quihuis v. State Farm Mut. Auto. Ins. Co.*, 748 F.3d 911,

For the first time, the Arizona Supreme Court was asked to determine which issue preclusion principles applied in a *Damron* situation.¹⁰² State Farm argued that the general issue preclusion rule set forth in RESTATEMENT (SECOND) OF JUDGMENT § 27¹⁰³ should apply in that “no insured-insurer relationship existed between State Farm and the Coxes because the Coxes sold the Jeep before the accident”—automatically terminating any policy duties.¹⁰⁴ In contrast, the Quihuises contended that RESTATEMENT (SECOND) OF JUDGMENTS § 58 applied concerning indemnitors which had an independent duty to defend.¹⁰⁵

In *Quihuis*, the Arizona Supreme Court expanded upon *Vagnozzi*’s application of § 58, holding it applied, rather than § 27, to the analysis of issue preclusion in the *Damron* context where facts have been stipulated to and a default judgment has been entered.¹⁰⁶ More generally, the RESTATEMENT § 58 issue

914-18 (9th Cir. 2014) (describing the tension between *Morris* and *Wood* as they apply principles of issue preclusion).

¹⁰² *Quihuis*, 334 P.3d at 723.

¹⁰³ RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) states as follows:

§ 27 Issue Preclusion—General Rule

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

¹⁰⁴ *Quihuis*, 334 P.3d at 723; *Chaney Bldg. Co. v. City of Tucson*, 716 P.2d 28, 30 (distinguishing claim preclusion from issue preclusion and finding the latter requires actual litigation under RESTATEMENT § 27).

¹⁰⁵ *Quihuis*, at 723.

¹⁰⁶ *Id.* at 724 (“Although we ‘incorporate[d]’ RESTATEMENT § 58 in *Vagnozzi* . . . we have not yet applied it in a case such as this.”).

preclusion analysis would apply to subsequent actions where there has been a prior judgment, an insurer that owed separate defense and indemnity obligations, and the insurer was given reasonable notice and an opportunity to defend the insured in an underlying action. At that point, the insurer will be precluded from re-litigating two types of issues to the extent they were decided in the prior judgment: (a) the “existence and extent” of an insured’s liability to a claimant;¹⁰⁷ and (b) issues “determined in the action” against the insured where no “conflict of interest” exists between the insured and insurer.¹⁰⁸

The *Quihuis* Court found the elements of § 58(1) had been met, including: (1) imposing indemnity and defense obligations on State Farm; (2) the claims were potentially in the scope of State Farm’s coverage; (3) a reasonable opportunity was given to State Farm to assume the defense; and (4) a judgment in favor of the Quihuises was entered against the Coxes.¹⁰⁹

In examining the extent of precluded issues, the *Quihuis* court stated § 58 precludes an insurer from challenging the “existence and extent” of the insured’s liability to the claimants.¹¹⁰ The Arizona Supreme Court found no inconsistencies between the *Morris*¹¹¹ and *Wood*¹¹² decisions with respect to issue preclusion. In *Morris*, the insurer wished to re-litigate all liability issues in contesting its duty to indemnify.¹¹³ The court there rejected the insurer’s ability to re-litigate factual or damage is-

¹⁰⁷ RESTATEMENT (SECOND) OF JUDGMENTS § 58(1)(a) (1982); *see also Quihuis*, 334 P.3d at 725 (adopting RESTATEMENT § 58 analysis).

¹⁰⁸ RESTATEMENT (SECOND) OF JUDGMENTS § 58(1)(b) (1982); *see also Quihuis*, 334 P.3d at 725 (adopting RESTATEMENT § 58 analysis).

¹⁰⁹ *Quihuis*, 334 P.3d at 724

¹¹⁰ *Id.*

¹¹¹ *United States Auto. Ass’n v. Morris*, 741 P.2d 246, 254, (Ariz. 1987).

¹¹² *Wood*, 98 P.3d 572, 617.

¹¹³ *Morris*, 741 P.2d at 253.

sues with respect to liability, as long as the settlement was reasonable and prudent.¹¹⁴ Nonetheless, the *Morris* court held that an insurer could re-litigate any stipulated facts essential to determining coverage obligations.¹¹⁵ The Arizona Supreme Court has continually protected an insurer's rights to litigate coverage issues so as to not incentivize the manufacture of coverage by simply entering into a *Morris* or *Damron* agreement.¹¹⁶

In responding to the certified question, the Arizona Supreme Court stated that the *Wood* decision did not contradict other Arizona law on issue preclusion and simply "illustrate[d] the boundaries *Morris* set for insurers in contesting coverage."¹¹⁷ *Wood* straightforwardly applied § 58(1)(a) and "preclude[d] an insurer from litigating not only the fact of liability, but also those issues that 'relat[e] strictly to liability and damages [and not] coverage.'"¹¹⁸ Between the *Morris* and *Wood* cases it was clear that § 58(1)(a) has no preclusive effect on pure coverage issues in a declaratory action.¹¹⁹ Although the facts in *Quihuis* fall somewhere in between *Morris* and *Wood*, the Arizona Supreme Court held that State Farm would not be precluded from litigat-

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Morris*, 741 P.2d at 253; *Quihuis*, 334 P.3d at 724.

¹¹⁷ *Quihuis*, 334 P.3d at 724.

¹¹⁸ *Id.* (quoting *Associated Aviation Underwriters v. Wood*, 98 P.3d 572, 587 (Ariz. Ct. App. 2004; *see also* Ariz. Prop. & Cas. Ins. Guar. Fund v. Martin, 113 P.3d 701, 704 (Ariz. Ct. App. 2005) (distinguishing *Wood* because the insurer in that case argued there was no liability and therefore no coverage, whereas the insurer in *Martin* sought to litigate "legitimate coverage issues in a [DJA] based on specific policy exclusion.")).

¹¹⁹ *Quihuis*, 334 P.3d at 724 ("Although the facts of this case fall between the situations presented in *Morris* and *Wood*, those cases demonstrate that § 58(1)(a) does not preclude litigation of pure coverage issues in a DJA.").

ing facts relevant to ownership of the Jeep because the ownership issue bore directly on coverage under the policy, in addition to the Coxes' underlying liability.¹²⁰

Next, the Arizona Supreme Court analyzed whether the second component, § 58(1)(b), which precluded issues "determined in the action" if no conflict of interest existed, precluded State Farm from re-litigating the ownership issue.¹²¹ This part of the analysis required courts to analyze what "determined in the action" meant and what constituted a conflict of interest.

First, in addressing what "determined in the action" meant, the Arizona Supreme Court found guidance in two illustrations in the RESTATEMENT:

1. A is injured when struck by a car owned by B and driven by C. A brings an action against B, contending that C operated the car with B's permission. B is insured by I under a policy covering B's liability for another's use of his car with B's permission. The policy also imposes on I the duty to defend B in actions in which a claim within the indemnity obligation might be sustained. I refuses to assume defense of the action. A recovers judgment by default against B. I may not dispute the existence and extent of B's liability to A and may under applicable law be estopped to deny its liability for indemnification of B.

¹²⁰ *Id.*

¹²¹ *Id.*; see also RESTATEMENT (SECOND) OF JUDGMENTS § 58(1)(b) (1982), stating ("The indemnitor is precluded from relitigating those issues determined in the action against the indemnitee as to which there was no conflict of interest between the indemnitor and the indemnitee.").

2. Same facts as Illustration 1, except that I assumes defense of B. After actual litigation of the issue of permission, judgment is for A. I is precluded as to the existence and extent of B's liability to A and, if the term "permission" has the same meaning under the policy as under the rule making B vicariously liable for C's act, I is precluded as to whether the loss was within the terms of the policy so far as "permission" is concerned. Whether I would be estopped to litigate whether B's policy had lapsed for failure to pay the premium is a matter of the law of insurance.¹²²

For the reasons explained below, the court found the phrase "determined in the action" meant that factual issues were actually litigated on the merits, as opposed to a complete lack of any sort of adversarial proceeding, such as a default judgment.¹²³ The Arizona Supreme Court found that illustration one, like § 58(1)(a), did not preclude an insurer from re-litigating coverage issues, such as ownership, permission, or intentional acts.¹²⁴ An important area of discussion with respect to illustration one, and issue preclusion in general, regards whether "applicable law" can estop an insurer from raising coverage defenses where an

¹²² *Quihuis*, 334 P.3d at 725 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 58 cmt. a, illus. 1-2. (1982)).

¹²³ *Id.* at 725.

¹²⁴ *Id.* (stating illustration one and § 58(1)(a) do not "preclude[] the insurer from litigating the permission issue in a later coverage action to determine whether it must indemnify."); *see also Vagnozzi*, 138, 675 P.2d at 708 (applying § 58 to allow relitigation of facts to determine whether insured's conduct during a basketball game was intentional, so as to implicate the intentional acts exclusion).

insurer wrongfully denies a defense.¹²⁵ This is discussed in part III, *infra*.

The important difference between illustration one and two involved the method obtaining the judgment: the first involved only a default judgment and the second involved actual litigation and a judgment on the merits.¹²⁶

Because the *Quihuis* court determined that there was no issue preclusion based on the fact that there was no actual litigation on the merits, the court did not analyze whether a conflict of interest existed.¹²⁷ However, the court noted “an insurer generally may contest coverage even if the allegations in the tort action do not themselves create a conflict of interest within the meaning of § 58’s definition.”¹²⁸ Under the RESTATEMENT, a conflict of interest exists when the claimant’s cause of action against the insured could be sustained on separate grounds, and one ground being within an insurer’s indemnity obligation and the other, not.¹²⁹

¹²⁵ *Quihuis*, 334 P.3d at 725 (stating “the illustration states that ‘applicable law’ will determine whether the insurer will ‘be estopped to deny its liability for indemnification.’”).

¹²⁶ *Id.*

¹²⁷ *Id.* at 726 (“Because ownership was not actually litigated in the underlying tort case, § 58(1)(b) does not preclude State Farm from litigating that issue in the DJA, regardless of whether State Farm and the Coxes had a ‘conflict of interest’ in the underlying case under § 58(2).”).

¹²⁸ *Id.*; *Cf. Vagnozzi*, 675 P.2d at 706, 708 (adopting RESTATEMENT § 58 but also “observing that a “conflict of interest” arises “when investigation by the insurer reveals facts which tend to place the claim outside coverage of the policy, yet the question of coverage depends on facts to be litigated in the tort suit,” and that “the better rule is to suspend the operation of collateral estoppel where there is an adversity of interests.””).

¹²⁹ RESTATEMENT (SECOND) OF JUDGMENTS § 58(2) (1982) states that a:

“conflict of interest” for purposes of this Section exists when the injured person’s claim against the indemnitee is

While the Arizona Supreme Court correctly determined there was a clear conflict of interest in *Vagnozzi*, it is debatable whether that same logic would have translated over to *Quihuis*. In *Vagnozzi*, the insured had an incentive to put forth facts showing his negligence to trigger insurance coverage and protect his personal assets, whereas the insurer would have an incentive to argue the act was intentional so as to preclude coverage. At the core of *Quihuis* was a negligent entrustment action against the Coxes. To be successful on a negligent entrustment claim, the claimant must prove ownership of the vehicle. There is no alternative element to ownership in a negligent entrustment action. Without ownership, a negligent entrustment claim can be defeated. Accordingly, from both a liability and coverage standpoint, it would be in the Coxes' and insurer's interest to prove that the Coxes didn't own the Jeep if the facts were actually litigated. It is only when the option of a *Morris* or *Damron* agreement was on the table that the interests of the Coxes and State Farm came into conflict. With a *Morris* or *Damron* agreement, the insured had an incentive to stop defending the merits of the case in exchange for a covenant not to execute against the insured's personal assets.

such that it could be sustained on different grounds, one of which is within the indemnitor's obligation to indemnify and another of which is not.

III. THE ESTOPPEL DOCTRINE AND A BREACH OF THE DUTY TO DEFEND

It is universally agreed that where a claim is clearly not covered by the policy, the insurer has no duty to defend the insured.¹³⁰ A liability insurer's duty to defend is separate and broader than its duty to indemnify.¹³¹ The duty to defend arises when a claim comes or potentially comes within policy coverage.¹³² To determine if there is a duty to defend, the insurer first looks to the allegations of the complaint.¹³³ The insurer must consider extrinsic facts made known to it that are not alleged in the complaint.¹³⁴ When the allegations of the complaint do not trigger a defense, but the insured comes forward with facts tending to show coverage, the insurer has a duty to defend.¹³⁵ Conversely, extrinsic facts may preclude the duty to defend.¹³⁶ When the allegations of the complaint trigger a defense, but facts not appearing in the complaint preclude coverage, the insurer does not have a duty to defend.¹³⁷

Where an insurer breaches its duty to defend there can be a number of consequences, including payment of attorney's fees

¹³⁰ Steven Plitt & Jordan R. Plitt, 1 PRACTICAL TOOLS FOR HANDLING INSURANCE CASES, § 2:16, 2-93 (Thomson Reuters 2011); *E.g.*, *Ananda Church of Self-Realization v. Mass. Bay Ins. Co.*, 116 Cal. Rptr. 2d 370 (Cal. Ct. App. 2002).

¹³¹ *Morris*, 741 P.2d 242, 252).

¹³² *Id.* at 250.

¹³³ *Lennar Corp. v. Auto-Owners Ins. Co.*, 151 P.3d 538, 547-48 (Ariz. Ct. App. 2007); *United States Fid. & Guar. Corp. v. Advance Roofing Supply Co.*, 788 P.2d 1227, 1231 (Ariz. Ct. App. 1989).

¹³⁴ *Lennar Corp.*, 151 P.3d 538, 547.

¹³⁵ *Id.*

¹³⁶ *Kepner v. Western Fire Ins. Co.*, 509 P.2d 222, 224 (Ariz. 1973).

¹³⁷ *Id.*

and costs,¹³⁸ extra-contractual liability exposure for judgments in excess of the policy limits,¹³⁹ potential liability for settlements

¹³⁸See, e.g., *Esicorp, Inc. v. Liberty Mut. Ins. Co.*, 193 F.3d 966 (8th Cir. 1999) (applying Missouri law); *North Bank v. Cincinnati Ins. Cos.*, 125 F.3d 983, 7 A.D. Cas. (BNA) 790, 71 Empl. Prac. Dec. (CCH) P 45004, 1997 FED App. 0294P (6th Cir. 1997) (applying Michigan law); *Pennzoil Co. v. U.S. Fidelity and Guar. Co.*, 50 F.3d 580 (8th Cir. 1995) (applying North Dakota law); *Silverball Amusement, Inc. v. Utah Home Fire Ins. Co.*, 842 F. Supp. 1151 (W.D. Ark. 1994), decision aff'd, 33 F.3d 1476 (8th Cir. 1994); *Green v. Standard Fire Ins. Co. of Ala.*, 477 So.2d 333 (Ala. 1985); *Sauer v. Home Indem. Co.*, 841 P.2d 176 (Alaska 1992); *Woodliff v. Cal. Ins. Guarantee Ass'n*, 110 Cal. App. 4th 1690, 3 Cal. Rptr. 3d 1 (2d Dist. 2003); *Bernhard v. Farmers Ins. Exchange*, 885 P.2d 265 (Colo. App. 1994), aff'd, 915 P.2d 1285 (Colo. 1996); *Oliver B. Cannon and Son, Inc. v. Fid. and Cas. Co. of New York*, 484 F. Supp. 1375 (D. Del. 1980); *Sentinel Ins. Co., Ltd. v. First Ins. Co. of Haw., Ltd.*, 875 P.2d 894 (Haw. 1994), *reconsideration filed*, (May 20, 1994) *and as amended on reconsideration*, (June 24, 1994) *and on reconsideration*, 879 P.2d 558 (Haw. 1994); *Abbie Uriguen Oldsmobile Buick, Inc. v. U. S. Fire Ins. Co.*, 511 P.2d 783 (Idaho 1973); *Utica Mut. Ins. Co. v. Ueding*, 370 N.E.2d 373 (Ind. Ct. App. 1977); *N.H. Ins. Co. v. Christy*, 200 N.W.2d 834 (Iowa 1972); *Bossier Plaza Assocs. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 813 So.2d 1114 (La. Ct. App. 2d Cir. 2002); *Union Mut. Fire Ins. Co. v. Inhabitants of Town of Topsham*, 441 A.2d 1012 (Me. 1982); *Bankers and Shippers Ins. Co. of N.Y. v. Electro Enters., Inc.*, 415 A.2d 278 (Md. 1980); *Oweiss v. Erie Ins. Exch.*, 509 A.2d 711 (Md. 1986) (abrogated by *Sherwood Brands, Inc. v. Hartford Acc. and Indem. Co.*, 698 A.2d 1078 (Md. 1997)); *Polaroid Corp. v. Travelers Indem. Co.*, 610 N.E.2d 912, 36 Env't. Rep. Cas. (BNA) 2045 (Mass. 1993); *Brown v. State Auto. & Cas. Underwriters*, 293 N.W.2d 822 (Minn. 1980); *Mavar Shrimp & Oyster Co. v. U. S. Fidelity & Guar. Co.*, 187 So.2d 871 (Miss. 1966); *Farmers Union Mut. Ins. Co. v. Staples*, 90 P.3d 381 (Mont. 2004); *A.B.C. Builders, Inc. v. Am. Mut. Ins. Co.*, 661 A.2d 1187 (N.H. 1995); *Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 425 N.E.2d 810 (N.Y. 1981); *Bruce-Terminix Co. v. Zurich Ins. Co.*, 504 S.E.2d 574 (N.C. 1998); *First Bank of Turley v. Fidelity and Deposit Ins. Co. of Md.*, 928 P.2d 298 (Okla. 1996); *Motorists Mut. Ins. Co. v. Trainor*, 294 N.E.2d 874 (Ohio 1973); *Nw. Pump & Equip. Co. v. Am. States Ins. Co.*,

between the claimant and the insured,¹⁴⁰ and potential bad faith exposure.¹⁴¹

925 P.2d 1241 (Or. 1996); *C. Raymond Davis & Sons, Inc. v. Liberty Mut. Ins. Co.*, 467 F. Supp. 17 (E.D. Pa. 1979); *Seaboard Indus. Inc. v. Monaco*, 392 A.2d 738 (Pa. Super. Ct. 1978); *Conanicut Marine Services, Inc. v. Ins. Co. of N. Am.*, 511 A.2d 967 (R.I. 1986); *Sharon Steel Corp. v. Aetna Cas. and Sur. Co.*, 931 P.2d 127, 44 Env't. Rep. Cas. (BNA) 1745 (Utah 1997); *Kirk v. Mt. Airy Ins. Co.*, 951 P.2d 1124 (Wash. 1998); *Radke v. Fireman's Fund Ins. Co.*, 577 N.W.2d 366 (Wis. Ct. App. 1998); *Burlington Drug Co., Inc. v. Royal Globe Ins. Co.*, 616 F. Supp. 481 (D. Vt. 1985); *Parker v. Hartford Fire Ins.* 278 S.E.2d 803 (Va. 1981); *Aetna Cas. & Sur. Co. v. Pitrolo*, 342 S.E.2d 156 (W. Va. 1986).

¹³⁹ See, e.g., *Twin City Fire Ins. Co. v. City of Madison, Miss.*, 309 F.3d 901 (5th Cir. 2002); *Employers Nat'l Ins. Corp. v. Zurich Am. Ins. Co. of Illinois*, 1985 U.S. Dist. LEXIS 22489 (N.D. Texas 1985); *Makarka ex rel. Makarka v. Great Am. Ins. Co.*, 14 P.3d 964 (Alaska 2000); *Damron*, 460 P.2d 997 (Ariz. 1969); *Cincinnati Ins. Co. v. Vance*, 730 S.W.2d 521 (Ky. 1987).

¹⁴⁰ See, e.g., *Royal Ins. Co. of Am. v. Kirksville Coll. of Osteopathic Med., Inc.*, 304 F.3d 804 (8th Cir. 2002) (applying Missouri law); *Twin City Fire Ins. Co. v. Triple/S Dynamics Inc.*, 2000 U.S. Dist. LEXIS 10871 (W.D. Wash. 2000); *American Motorists Ins. Co. v. Trane Co.*, 544 F. Supp. 669 (W.D. Wis. 1982), judgment aff'd, 718 F.2d 842 (7th Cir. 1983); *Earth Elements, Inc. v. Nat'l Am. Ins. Co.*, 48 Cal. Rptr. 2d 399 (Cal. Ct. App. 1995); *Sentinel Ins. Co., Ltd. v. First Ins. Co. of Hawai'i, Ltd.*, 875 P.2d 894 (1994), *reconsideration filed*, (May 20, 1994) *and as amended on reconsideration*, (June 24, 1994) *and on reconsideration*, 879 P.2d 558 (Haw. 1994); *Boggs v. Aetna Cas. and Sur. Co.*, 252 S.E.2d 565 (S.C. 1979); *Esterovich v. City of Kellogg*, 80 P.3d 1040 (Idaho 2003); *Black v. Goodwin, Loomis and Britton, Inc.*, 681 A.2d 293 (Conn. 1996); *A.B.C. Builders, Inc. v. Am. Mut. Ins. Co.*, 661 A.2d 1187 (1995); *Conanicut Marine Servs., Inc. v. Ins. Co. of N. Am.*, 511 A.2d 967 (R.I. 1986); *Fed. Ins. Co. v. Stroh Brewery Co.*, 35 F. Supp. 2d 650 (N.D. Ind. 1998).

¹⁴¹ With bad faith exposure, remedies are usually limited to contractual damages when there has been a breach of the duty to defend. An insurer

Another potential consequence for an insurer when it wrongfully fails to defend its insured includes estoppel from raising coverage defenses and denying its duty to indemnify.¹⁴² A rule that has widely become known as the “Illinois Rule” estops an insurer from asserting coverage defenses when it has breached its duty to defend.¹⁴³ Only a minority of jurisdictions follow the

would likely be responsible for consequential damages, which could potentially include the full value of a judgment, even if it is in excess of the policy limits.

¹⁴² See Steven Plitt & Jordan R. Plitt, PRACTICAL TOOLS FOR HANDLING INSURANCE CASES, § 2:16, p. 2-96, (Thomas Reuters (2001) (citing cases); Allan D. Windt, 1 *INSURANCE CLAIMS & DISPUTES: REPRESENTATION OF INSURANCE COMPANIES AND INSURED*, § 4:37 (citing cases); Sentinel Ins. Co., Ltd. v. First Ins. Co. of Hawai’I, Ltd., 875 P.2d 894 (1994) (containing detailed analysis of the application of estoppel to the insurer’s coverage defenses where there is a wrongful failure to defend the insured).

¹⁴³ Illinois is a major proponent to the application of estoppel following a breach of the duty to defend. See, e.g., *Employers Ins. Of Wausau v. Ehlco Liquidating Trust*, 708 N.E.2d 1122, 1134-35 (Ill. 1999) (discussing Illinois’ “deep roots” with respect to the estoppel doctrine); *LaGrange Mem’l Hosp. v. St. Paul Ins. Co.*, 740 N.E.2d 21 (Ill. 1st Dist. 2000). This rule has been discussed in detail by a number of scholars and lawyers. E.g., Steven Plitt, *et al.*, 14 *COUCH ON INSURANCE* 3D § 205:73; Allan D. Windt, 1 *INSURANCE CLAIMS & DISPUTES* § 4:37; Barry Ostrager & Thomas R. Newman, 1 *HANDBOOK ON INSURANCE COVERAGE DISPUTES* § 5.06[a] at 315; Susan Randall, *Redefining the Insurer’s Duty to Defend*, 2 *CONN. INS. L.J.* 221, 230 n. 24 (1997); Todd J. Weiss, *A Natural Law Approach to Remedies For the Liability Insurer’s Breach of the Duty to Defend: Is Estoppel of Coverage Defenses Just?*, 57 *ALB. L.REV.* 145, 147 (1993); Susan Randall, *Redefining the Insurer’s Duty to Defend*, 2 *Conn. Ins. L.J.* 221 (1997) (discussing public policy considerations); Stanley C. Nardoni and John S. Vishneski, III, *The Illinois Estoppel Doctrine Revisited: How Promptly Must an Insurer Act?*, 24 *N. ILL. U. L. REV.* 211 (2004); Steven Plitt & Jordan Plitt, *High-Stakes Poker in New York Over Insurer’s Decision Not to Defend Its Insured*, 23 *WESTLAW JOURNAL INSURANCE COVERAGE* 1 (2013); Steven Plitt & Jordan

Illinois Rule.¹⁴⁴ The Illinois Rule estops an insurer from asserting policy provisions, endorsements, or exclusions to preclude coverage, even if they are recognized as valid and otherwise enforceable.¹⁴⁵ The Illinois Rule rationalizes that the duty to defend is such a fundamental and key obligation that a breach of that obligation constitutes a repudiation of the contract.¹⁴⁶ The

Plitt, *New York Court of Appeals' Stunning K2 About Face*, 36 No. 13 INS. LIT. RPTR. NL 1 (August 8, 2014).

¹⁴⁴ See, e.g., *Ehlco*, 708 N.E.2d 1122, (Ill. 1999); *LaGrange*, 740 N.E.2d 21 (Ill. App. Ct. 2000). See also *Underwriters at Lloyds v. Denali Seafoods, Inc.*, 927 F.2d 459, 462–465 (9th Cir. 1991)(applying Washington law); *Jones v. S. Marine & Aviation Underwriters, Inc.*, 888 F.2d 358, 363 (5th Cir. 1989) (applying Mississippi law); *Solo Cup Co. v. Fed. Ins. Co.*, 619 F.2d 1178, 1184 (7th Cir. 1980) (applying Illinois law); *In re Abrams & Abrams, P.A.*, 605 F.3d 238, 241 (4th Cir. 2010) (North Carolina law) (“if an insurer improperly refuses to defend a claim, it is estopped from denying coverage and must pay any reasonable settlement—even if it made an honest mistake in its denial.”); *Supreme Laundry Serv., L.L.C. v. Hartford Cas. Ins. Co.*, 521 F.3d 743, 749 (7th Cir. 2008) (Illinois law); *Link Snacks, Inc. v. Fed. Ins. Co.*, 664 F. Supp. 2d 944, 958 (W.D. Wis. 2009); *Sauer v. Home Indem. Co.*, 841 P.2d 176 (Alaska 1992); *Flannery v. Allstate Ins. Co.*, 49 F. Supp. 2d 1223, 1227–28 (D. Colo. 1999); *Missionaries of Co. of Mary, Inc. v. Aetna Cas. & Sur. Co.*, 230 A.2d 21, 25–26 (Conn. 1967; *Emp’rs Ins. of Wausau v. Recticel Foam Corp.*, 716 N.E.2d 1015 (Ind. Ct. App. 1999); *White Mountain Cable Constr. Co. v. Transamerica Ins. Co.*, 631 A.2d 907 (N.H. 1993); *Naddeo v. Allstate Ins. Co.*, 533 S.E.2d 501, 507 (N.C. Ct. App. 2000); *Conanicut Marine Servs. v. Ins. Co. of N. Am.*, 511 A.2d 967, 971 (R.I. 1986); *Truck Ins. Exch. v. Vanport Homes, Inc.*, 58 P.3d 276, 281 (Wash. 2002).

¹⁴⁵ *Ehlco*, at 1135 (“Once the insurer breaches its duty to defend . . . the estoppel doctrine has broad application and operates to bar the insurer from raising policy defenses to coverage, even those defenses that may have been successful had the insurer not breached its duty to defend.”).

¹⁴⁶ *Id.* at 1135 (citing *Kinnan v. Charles B. Hurst Co.*, 148 N.E. 12 (Ill. 1925)).

estoppel doctrine will not apply where a defense obligation has not been triggered because of the absence of a tender.¹⁴⁷ One exception to the application of the estoppel doctrine arises when there are serious conflicts of interest present between the insurance company and its insured.¹⁴⁸

An unusual judicial flip-flop recently occurred regarding the Illinois Rule. The New York Court of Appeals initially adopted the Illinois Rule and shortly thereafter, reversed itself. The Court's analysis is insightful.

The New York Court of Appeals temporarily adopted the Illinois Rule in *K2 Investment Group, LLC v. American Guarantee & Liability Ins. Co.* (hereinafter "*K2-I*"),¹⁴⁹ holding that "when a liability insurer has breached its duty to defend its insured, the insurer may not later rely on policy exclusions to escape its duty to indemnify the insured for a judgment against him."¹⁵⁰ In *K2-I*, two plaintiffs sued a third-party company, Goldan LLC, on loans totaling \$2.83 million, which were secured by mortgages on the property.¹⁵¹ After Goldan defaulted on the loans and filed for bankruptcy, the plaintiffs learned that the properties were never properly recorded.¹⁵² The plaintiffs asserted various actions against the two principals, including a

¹⁴⁷ *Id.*; See *La Rotunda v. Royal Globe Ins. Co.*, 408 N.E.2d 928 (Ill. App. Ct. 1980); *McFadyen v. N. River Ins. Co.*, 209 N.E.2d 833 (Ill. App. Ct. 1965).

¹⁴⁸ *Ehclo*, 708 N.E. 2d at 1135; *Thornton v. Paul*, 384 N.E.2d 335, 344 (Ill. 1978) (noting serious conflict of interest with respect to application of battery exclusion), overruled on other grounds by *Am. Family Mut. Ins. Co. v. Savickas*, 739 N.E.2d 445 (Ill. 2000).

¹⁴⁹ *K2 Inv. Grp., LLC v. Am. Guarantee & Liab. Ins. Co.*, 993 N.E.2d 1249 (N.Y. 2013), *decision vacated by* *K2 Inv. Grp., LLC v. Am. Guarantee & Liab. Ins. Co.*, 6 N.E.3d 1117 (N.Y. 2014).

¹⁵⁰ *K2 Inv. Grp.*, 993 N.E.2d at 1251.

¹⁵¹ *Id.*

¹⁵² *Id.*

legal malpractice claim against one principal.¹⁵³ The principal notified his professional liability carrier, American Guarantee and Liability Insurance Company of the pending legal malpractice claims and forwarded a copy of the complaint.¹⁵⁴ American Guarantee refused to defend or indemnify because the allegations against the principal “[were] not based on the rendering or failing to render legal services for others.”¹⁵⁵ The principal defaulted in the plaintiffs’ action against him and plaintiffs obtained a default judgment in excess of the two million dollar policy limits.¹⁵⁶ The principal assigned his rights against American Guarantee and plaintiffs brought breach of contract and bad faith claims against American Guarantee.¹⁵⁷

American Guarantee asserted two coverage defenses: an insured’s status exclusion and a “business enterprise” exclusion which precluded coverage when acting in an official capacity for that business, such as a director or officer.¹⁵⁸ The New York Court of Appeals upheld the intermediate appellate division, holding that American Guarantee could not assert its exclusions because it breached its duty to defend.¹⁵⁹ According to the court, the so-called *Illinois Rule* “give[s] insurers an incentive to defend the cases they are bound by law to defend, and thus [gives] insureds the full benefit of their bargain.”¹⁶⁰ The court reasoned it “would be unfair to insureds, and would promote unnecessary and wasteful litigation, if an insurer, having wrongfully aban-

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *K2 Inv. Grp.*, 993 N.E.2d at 1251.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1252.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *K2 Inv. Grp.*, 993 N.E.2d at 1254.

doned its insured's defense, could then require the insured to litigate the effect of policy exclusions on the duty to indemnify."¹⁶¹

In *K2 Investment Group, LLC v. American Guarantee & Liab. Ins. Co.* (hereinafter "*K2-II*"),¹⁶² the New York Court of Appeals stunningly vacated its *K2-I* decision *sua sponte*--choosing to follow *stare decisis* after re-argument.¹⁶³ In *K2-II*, the Court of Appeals held that it erred in failing to apply *Servidone Constr. Corp. v. Security Ins. Co. of Hartford* as controlling precedent.¹⁶⁴ The Court of Appeals acknowledged that the duty

¹⁶¹ *Id.*

¹⁶² *K2 Inv. Grp.*, 6 N.E.3d 1117.

¹⁶³ *Id.* at 1118.

¹⁶⁴ *Id.* (acknowledging *K2-I* and *Servidone* are irreconcilable); *Servidone Constr. Corp. v. Sec. Ins. Co. of Hartford*, 477 N.E.2d 441 (N.Y. 1985) (holding that a breach of the duty to defend does not preclude a coverage dispute). "In *Servidone*, an employee was paralyzed from the waist down after falling from a tower. The employee brought a personal injury action under the Federal Tort Claims Act against the United States, which owned the premises, stating he had not been provided a safe place to work. A Third Party Action was commenced by the United States against the employee's employer, Servitude, for common law indemnity and contractual indemnity pursuant to a construction contract requiring Servitude to be responsible for all safety precautions. Servitude then looked to its compensation and liability insurer, Security Insurance Company, for a defense and indemnity. Security responded that, pursuant to an exclusion in the policy, a loss based upon any obligation the insured had assumed by contract was outside coverage, but it nonetheless agreed to defend Servidone as to both claims asserted by the Government, reserving its right to disclaim liability for recovery based on contractual indemnification. Eventually a pretrial order was entered defining the third party action as one in contract for indemnity, which caused Security to immediately withdraw its defense claiming the United States had abandoned its claim for common law indemnification. Servitude retained new counsel and sought declaratory judgment against Security. Servitude also notified Security that it had an opportunity to settle with the injured employee for \$50,000, which Security never responded to. Servidone again notified Security it intended to settle for \$50,000 with no response." Steven Plitt &

to defend and the duty to indemnify are separate duties and the application of estoppel wrongfully enlarges the bargained-for coverage as a penalty for breaching the duty to defend.¹⁶⁵

New York's *K2-II* decision is in line with a majority of states, which do not follow the Illinois Rule.¹⁶⁶ New York and

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¹⁶⁵ K2 Inv. Grp., 6 N.E.3d at 1123-24 (citing *Servidone*, 477 N.E.2d 441).

¹⁶⁶ Allan D. Windt, 1 *INSURANCE CLAIMS & DISPUTES* § 4:37 (citing cases); *E.g.*, *Royal Ins. Co. of Am. v. Kirksville Coll. of Osteopathic Med., Inc.*, 304 F.3d 804, 806-807 (8th Cir. 2002) (Missouri law); *Spencer v. Assurance Co. of Am.*, 39 F.3d 1146, 1149 (11th Cir. 1994) ("Florida law clearly states that liability of an insurer depends upon whether the insured's claim is within the coverage of the policy. This remains true even when the insurer has unjustifiably failed to defend its insured in the underlying action."); *Hamlin Inc. v. Hartford Acc. and Indem. Co.*, 86 F.3d 93, 94-95 (7th Cir. 1996) (Wisconsin law); *Esicorp, Inc. v. Liberty Mut. Ins. Co.*, 193 F.3d 966, 970-71 (8th Cir. 1999) (Missouri law); *Enserch Corp. v. Shand Morahan & Co., Inc.*, 952 F.2d 1485, 1493 (5th Cir. 1992), *as clarified on denial of reh'g*, (Mar. 9, 1992) (Texas law); *Underwriters at Lloyds v. Denali Seafoods, Inc.*, 927 F.2d 459, 464 (9th Cir. 1991) (Washington law); *Flannery v. Allstate Ins. Co.*, 49 F. Supp. 2d 1223, 1227 (D. Colo. 1999); *Servants of Paraclete, Inc. v. Great Am. Ins. Co.*, 857 F. Supp. 822, 833 (D.N.M. 1994), *amended on reconsideration in part*, 866 F. Supp. 1560 (D.N.M. 1994); *Burroughs Wellcome Co. v. Commercial Union Ins. Co.*, 713 F. Supp. 694, 697-99 (S.D. N.Y. 1989); *Emhart Indus., Inc. v. Home Ins. Co.*, 515 F. Supp. 2d 228, 257-62 (D.R.I. 2007); *Time Oil Co. v. Cigna Property & Cas. Ins. Co.*, 743 F. Supp. 1400, 1421 (W.D. Wash. 1990); *Johnson v. Studyvin*, 828 F. Supp. 877, 886-87 (D. Kan. 1993); *Johnson v. Studyvin*, 839 F. Supp. 1490, 1497 (D. Kan. 1993); *Ala. Hosp. Ass'n Trust v. Mut. Assur. Soc. of Ala.*, 538 So.2d 1209, 1216 (Ala. 1989); *Ala. Farm Bureau Mut. Cas. Ins. Co., Inc. v. Moore*, 349 So.2d 1113, 1116 (Ala. 1977); *Afcan v. Mut. Fire, Marine and Inland Ins. Co.*, 595 P.2d 638, 647 (Alaska 1979); *State Farm Mut. Auto. Ins. Co. v. Paynter*, 593 P.2d 948, 953 (Ariz. Ct. App. 1979); *Hogan v. Midland Nat'l Ins. Co.*, 476 P.2d 825, 832 (Cal. 1970); *Keller Indus., Inc. v. Employers Mut. Liab. Ins. Co. of Wisconsin*, 429 So.2d 779, 780-81 (Fla. Dist. Ct. App. 3d Dist. 1983); *Colonial Oil Indus. Inc. v. Underwriters Subscribing to*

the majority of other courts held that the better rule is to treat the duty to defend separately from the duty to indemnify.¹⁶⁷ Applying the estoppel doctrine, a failure to defend undermines the meaningful distinction between the two duties and only serves to punish the insurer by giving the insured a windfall in non-bargained-for coverage.¹⁶⁸ Logically, the primary injury where

Policy Nos. TO31504670 and TO31504671, 491 S.E.2d 337, 339 (Ga. 1997); *Hirst v. St. Paul Fire & Marine Ins. Co.*, 683 P.2d 440, 447 (Idaho Ct. App. 1984); *J.A. Jones Const. Co. v. Hartford Fire Ins. Co.*, 645 N.E.2d 980, 983 (Ill. App. Ct. 1995); *Aselco, Inc. v. Hartford Ins. Grp.*, 21 P.3d 1011, 1020 (Kan. Ct. App. 2001); *Arceneaux v. Amstar Corp.*, 66 So.3d 438, 452 (La. 2011) (Supreme Court reversed lower court's holding that, because the insurer had breached its duty to defend, the insurer was liable for the entire amount paid by the insured in settlement. The remedy for the insurer's breach of contract was not a loss of its policy defenses; the remedy was "determined by ordinary contract law principles."); *Elliott v. Hanover Ins. Co.*, 711 A.2d 1310, 1313 (Me. 1998); *Fireman's Fund Ins. Co. v. Rairigh*, 475 A.2d 509, 515 (Md. Ct. Spec. App. 1984); *Polaroid Corp. v. Travelers Indem. Co.*, 610 N.E.2d 912, 921 (Mass. 1993); *Detroit Edison Co. v. Michigan Mut. Ins. Co.*, 301 N.W.2d 832, 836 (Mich. Ct. App. 1981); *St. Paul Ins. Co. v. Bischoff*, 389 N.W.2d 443, 445 (Mich. Ct. App. 1986); *Brown v. State Auto. & Cas. Underwriters*, 293 N.W.2d 822, 825–26 (Minn. 1980); *A.B.C. Builders, Inc. v. Am. Mut. Ins. Co.*, 661 A.2d 1187, 1191 (N.H. 1995); *Servidone Const. Corp. v. Sec. Ins. Co. of Hartford*, 430 N.Y.S.2d 991, 996 (N.Y. Sup. Ct. 1980) (reaffirmed on *stare decisis* grounds in *K2 Inv. Grp., LLC v. Am. Guarantee & Liab. Ins. Co.*, 6 N.E.3d 1117 (N.Y. 2014)); *Northwest Pump & Equipment Co. v. American States Ins. Co.*, 925 P.2d 1241, 1243 (Or. Ct. App. 1996); *Am. States Ins. Co. v. State Auto Ins. Co.*, 721 A.2d 56, 64 (Pa. Super. Ct. 1998).

¹⁶⁷ *E.g.*, *Flannery v. Allstate Ins. Co.*, 49 F.Supp. 1223, 1228 (D. Colo. 1999); *Sentinel Ins. Co. v. First Ins. Co. of Hawai'i, Ltd.*, 875 P.2d 894, 911–12 (Haw. 1994).

¹⁶⁸ *Flannery*, 49 F.Supp. 1223, 1228 ("We believe that the Illinois rule, which ignores the critical distinction between the duty to defend and the duty to indemnify, is far too broad. The logical basis for the rule is untenable – especially when it can be proven that no claim is covered by a given insurance policy – and its apparent public policy objectives can otherwise be achieved. Blanket application of coverage by waiver or estoppel . . . would result in the

there has been a breach of the duty to defend is the cost of defense.¹⁶⁹ If there are no hard consequences, such as estoppel, concern arises with insurers unreasonably denying defenses. However, the more appropriate mechanism for punishing such conduct would be through tort remedies, such as bad faith.¹⁷⁰ Such an approach “preserves the traditional distinction between tort and contract remedies.”¹⁷¹

Prior to *Quihuis*, Arizona never addressed whether a breach of duty to defend estops an insurer from asserting coverage defenses. In *Quihuis*, the Arizona Supreme Court, for the first time, addressed the estoppel doctrine in conjunction with the duty to defend. The Arizona Supreme Court held that an insurer is not estopped from asserting coverage defenses if the insurer breaches its duty to defend the insured.¹⁷² In so holding, Arizona has officially adopted the majority viewpoint that the duty to defend and the duty to indemnify are separate contractual obligations.¹⁷³ The court also noted that if the court were to allow application of the estoppel doctrine, it would potentially encourage a “race to the courthouse” despite Arizona’s clear case law

insured receiving a windfall.”); *Enserch Corp. v. Shand Morahan & Co., Inc.*, 952 F.2d 1485, 1493 (5th Cir.1992) (applying Texas law) (“Even an unfaithful insurer may not be bound to an insurance contract it did not write.”).

¹⁶⁹ *Sentinel*, 875 P.2d at 912-13 (citing 7C J. Appleman, *INSURANCE LAW & PRACTICE* § 4689, at 215 n. 13); *Colonial Oil Indus., Inc. v. Underwriters Subscribing to Policy Nos. TO31504670 and TO31504671*, 133 F.3d 1404, 1405 (11th Cir.1998) (applying Georgia law) (“The rationale for this rule is that when the insurer breaches the contract by wrongfully refusing to provide a defense, the insured is entitled to receive only what it is owed under the contract—the cost of defense.”).

¹⁷⁰ *Sentinel*, 875 P.2d at 913.

¹⁷¹ *Id.*

¹⁷² *Quihuis*, 334 P.3d at 729.

¹⁷³ *Id.* at 728 (“Because ‘the two duties are truly separate and distinct. . . an insurer’s wrongful failure to defend should not result in a loss of an indemnity defense,’” quoting *Flannery*, 49 F.Supp.2d at 1228).

that there is not an absolute duty to defend.¹⁷⁴ If Arizona followed the estoppel doctrine, then insurers would need to defend the insured in order to avoid being precluded from denying coverage in a declaratory action, even when the policy clearly does not cover the underlying tort claim.¹⁷⁵ The Arizona Supreme Court discouraged this tactic in *Vagnozzi* and the Court reaffirmed its disapproval of such gamesmanship in *Quihuis*.¹⁷⁶

IV. QUIHUIS AND THE REASONABLENESS OF *DAMRON* SETTLEMENTS

As the court in *Quihuis* concluded its analysis, the court took a moment to emphasize, in dicta, the court's prior admonition regarding the consequences of an insurer's refusal to defend its insured. The court stated:

We take this opportunity, however, to emphasize our prior admonition that when an insurer refuses to defend, . . . it does so “at its peril,” and if a court later finds coverage, the insurer must pay the damages awarded in the default judgment (***at least up to the policy limits***) unless it can prove fraud or collusion.¹⁷⁷

In support of this principle, the Arizona Supreme Court cited to its prior decision in *Parking Concepts, Inc. v. Tenney*.¹⁷⁸ In

¹⁷⁴ *Id.* at 727-28; *Kepner*, 509 P.2d at 224.

¹⁷⁵ *Quihuis*, 334 P.3d at 727-28.

¹⁷⁶ *Vagnozzi*, 675 P.2d at 707; *Quihuis*, 334 P.3d at 728.

¹⁷⁷ *Quihuis*, 334 P.3d at 730 (citing *Kepner*, 109 Ariz. at 332, 509 P.2d at 225 (1973)).

¹⁷⁸ *Parking Concepts, Inc. v. Tenney*, 83 P.3d 19 (Ariz. 2004).

Parking Concepts, the Court made the following observation, also in dicta:

[I]n cases where the insurer has refused to defend and the parties enter into a *Damron* agreement, the insurer has no right to contest the stipulated damages on the basis of reasonableness, but rather may contest the settlement only for fraud or collusion.”¹⁷⁹

¹⁷⁹ *Id.* at 22 n.3. The Court’s statement in *Quihuis* and its reference to *Parking Concepts* involved two potentially different procedural approaches to consent settlement agreements. In *Quihuis*, the Court indicated that “the insurer must pay *the damages awarded in the default judgment*” while the Court’s reference to *Parking Concepts* involves “stipulated damages.”

In the default judgment context, the court must carefully scrutinize large damage award requests. *Daou v. Harris*, 678 P.2d 934, 942 (Ariz. 1984). Pursuant to Rule 55(b), it is incumbent upon the court to conduct a hearing to determine the reasonable amount of damages. *Mayhew v. McDougall*, 491 P.2d 848, 853 (Ariz. App. 1971). “Simply giving the plaintiff what he asks for may not attain that level of judicial discretion which will pass appellate muster.” *Id.* By contrast, stipulated judgments are different in nature from a judgment rendered on the merits, because they are primarily an act of the parties rather than the considered judgment of the court. *See* 46 AM. JUR. 2D, *Judgment*, § 208. When the parties have agreed to a stipulated judgment, the activity of the court is often ministerial, for example to have the stipulated judgment entered as agreed upon by the parties. The court generally does not enlarge or lessen the scope or amount of a stipulated judgment. *Id.* at § 209.

The Arizona Supreme Court has essentially acknowledged the differences between stipulated judgments and judgments validated by the judicial process. In *Morris*, the Court concluded:

Plainly, the [stipulated] “judgment” does not purport to be an adjudication on the merits; it only reflects the settlement agreement. It is also evident that, in arriving at the settlement terms, the [insured’s] would have been quite willing to

The *Quihuis* Court's comments reinvigorated a longstanding debate in Arizona as to whether *Morris*, and its requirement of reasonableness for settlement enforceability, has superseded the strict penalties of the *Damron* line of cases when the insurer does not defend its insured.¹⁸⁰ Under *Damron*, an insurance company refusing to defend its insured is at risk to pay the judgment against its insured. This judgment is without the benefit of judgment reduction based on reasonableness, if the insurer failed to establish a reasonable basis for denying coverage.

agree to anything as long as plaintiff promised them full immunity.

Morris, 741 P.2d at 254 (quoting Miller, 316 N.W. 2d, 729, 735 (Minn. 1982)). In *Xebec Development Partners Limited v. National Union Fire Ins. Co.*, 12 Cal.App.4th 501, 540, 15 Cal.Rptr.2d 726, 746 (1993) noted that the real issue as to damages attributable to unreimbursed loss under an insurance contract to the way given to the procedure, short of a contested judgment, by which the parties other than the insured purport to fix the value of the claim. The Court noted that none of the assurances of validity implicit in judicial proceedings openly contested to final judgment or even in contested arbitration proceedings, were furnished by this process. Therefore, the stipulated judgment did not bind the insurer who refused to defend its insured and the Appellate Court remanded the case for proceedings on the reasonableness of damages. The Court in *Morris* recognized the dangers inherent to stipulated judgments entered pursuant to with *Damron*-type agreements and that the stipulated judgments agreed upon may have no relationship to actual damages. *Morris*, 741 P.2d at 252-53. The statement of the Court in *Morris* represents a departure from prior Arizona case law. Previously, the Court had held that a judgment is conclusive as to damages. *Dairyland Ins. Co. v. Richards*, 492 P.2d 1196, 1198 (1992). The amount of damages in a particular case is a question peculiarly within the province of the jury, and the duty to reduce excessive verdicts lies initially with the trial court. *Frontier Motors, Inc. v. Horrall*, 496 P.2d 624, 626 (Ariz. Ct. App. 1972).

¹⁸⁰ See, e.g., *Fulton v. Woodford*, 545 P.2d 979, 983 (Ariz. 1976); *General Acc. Fire & Life Assur. Corp. v. Little*, 443 P.2d 690, 697 (Ariz. 1968).

However, under *Morris*, an insurance company that defended its insured through a reservation of rights has the benefit of a reasonableness determination. To the extent, the claimant cannot establish the consent or stipulated judgment was unreasonable, the judgment is unenforceable. There are two principal opposing views from case precedent prior to *Parking Concepts* and *Quihuis* regarding reasonableness and consent settlements.¹⁸¹ One view draws a clear distinction between *Damron* and *Morris* predicated on the insurer's choice regarding defense of its insured.¹⁸² A second view finds that *Damron* is superseded by the "reasonableness" approach requiring *Damron* agreements to be reasonable in amount.¹⁸³ The court's comments in *Parking Concepts, Inc.* suggest continued judicial support for the first view. The first view draws a clear distinction between *Damron* and *Morris* and exposes the insurer to potentially limitless liability based upon the whims of the parties to the *Damron* agreement as to how much the stipulated damages will be. However, the court's dicta observation in *Quihuis* suggests that the court will permit the consideration of "reasonableness" by limiting the stipulated damages in a *Damron* agreement at least to the boundary line of the policy limits. The *Quihuis* approach presumptively considers the policy limits as a potential reasonable cap because the insurance company had agreed to insure the exposures of its insured at least up to the policy limits. The insurance company implicitly has accepted the risk of judgments up to the

¹⁸¹ Steven Plitt, *The Evolving Boundaries Of Damron/Morris Agreements: A Search For The Missing Link, A Judicial Determination Of The Length Of A Reasonable Person's Arm, And Other Progressive Issues*, 35 ARIZ. ST. L.J. 1331, 1357 (2003).

¹⁸² *Id.*

¹⁸³ *Id.*

policy limits.¹⁸⁴ Therefore, it is reasonable to allow *Damron* agreement values up to that boundary line of the policy limits.

¹⁸⁴ A common scenario arises when the *Damron*-type agreement is entered and as a condition of the agreement, where the answer previously filed on behalf of the insured is withdrawn and a default is thereafter taken against the insured. Two options are then available: (1) present a stipulation for entry of judgment to the court in the default proceedings or (2) proceed forward with a default hearing under Arizona Rules of Civil Procedure, Rule 55(b)(2). The default process authorizes the court to enter judgment or, where necessary, “to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter” ARIZ. R. CIV. P. 55(b)(2). The court is authorized to conduct “such hearings or order such references as it deems necessary and proper” for the administration of justice and the adjudication of judgment. Moreover, Rule 55(b)(2) requires the court to “accord a right of trial by jury to the parties when required by law.” ARIZ. R. CIV. P. 55(b)(2).

The insurance company can intervene in the default proceedings in accordance with Rule 24(a)(2). The Arizona courts have long recognized that insurance companies are a proper real party in interest in liability cases where the conduct of the insured may operate to impair or impede the insurance company’s ability to protect its own interest with respect to the insurance policy under which coverage is claimed. *See, e.g.,* Comacho v. Gardner, 456 P.2d 925 (Ariz. 1969); East v. Hedges, 608 P.2d 327 (Ariz. Ct. App. 1980); Koven v. Saberdyne Systems, Inc., 625 P.2d 907 (Ariz. App. 1980) *review denied*. In *Anderson v. Martinez*, 762 P.2d 645, 646 (Ariz. App. 1988), the Court held that an insurance company has the right to intervene once the claimant and the insured begin formal negotiation of a *Morris*-type agreement. *Id.* Where the claimant and the insured have entered into a *Morris*-type agreement, the insurance company may move to intervene to participate as a real party in interest in the evidentiary hearing scheduled to determine damages, such as the default hearing or reasonableness hearing. (*H.B.H. v. State Farm Fire & Cas. Co.*, 823 P.2d 1332 (Ariz. App. 1991). In *H.B.H.* the Appellate Court concluded that State Farm’s express right to question the reasonableness of the *Morris*-type agreement was appropriately exercised prior to the evidentiary hearing which would be held when all parties were

When the court in *Parking Concepts* made its sweeping comment that insurance companies had no right to contest the stipulated damages on the basis of reasonableness, the court exclusively cited to the *Damron* decision for support of the court proposition.¹⁸⁵ The court in *Parking Concepts*, however, did not provide any additional explanation for its dicta statement. Prior to this statement in *Parking Concepts*, the Intermediate Appellate Courts in Arizona supported the same outcome premised

present. *Id.* at 1337-38. Once the insurance company successfully intervenes, it can then request a jury trial for the default hearing. A trial on the reasonableness of a settlement can present as a complex trial within a trial. At the core of the proceedings would be the evidence on the underlying claims *i.e.*, evidence of liability, injury and damages. This aspect of the reasonableness trial would be closely akin to the trial that both the insured and the claimant sought to avoid by entering into the settlement in the first place. Presumably, the court would exclude or limit any evidence or legal arguments first raised after the settlement was reached. Layered over the trial of core events would be additional evidence in the form of opinions from lawyers, claims adjusters, and perhaps mediators and judges, expressing their views on the reasonableness of the settlement terms. One could easily imagine the testimony of lawyers or legal scholars attempting to persuade a jury on the differing views regarding the apparent strength and/or weaknesses of a particular liability and damage position. Such daunting prospects have led the Minnesota court, which had previously decided *Miller*, to hold that such issues of reasonableness should be tried only to a court, and not a jury. *See, e.g.,* Mora, 996 P.2d at 120-21; Alton M. Johnson Co. v. M.A.I. Co., 463 N.W.2d 277, 2779 (Minn. 1990).

If the insurance company refuses to defend its insured, it loses the right of intervention because its' no coverage position defeats its "real party in interest" status.

¹⁸⁵ *Parking Concepts, Inc.*, 83 P.3d at 22 n.3 ("In contrast, in cases where the insurer has refused to defend and the parties enter into a *Damron* agreement, the insurer has no right to contest the stipulated damages on the basis of reasonableness, but rather may contest the settlement only for fraud or collusion. *See Damron*, 460 P.2d at 999.").

upon an erroneous analysis of differential insurer duty. The Intermediate appellate Courts in Arizona found that breach of duty to defend was so substantial that the breach precluded any participation of the insurance company in the judicial proceedings after the denial takes place. Moreover, by implication, the breach is so horrendous that the insurer cannot challenge the *Damron* agreement on the basis of reasonableness as to amount. By way of example, this concept was supported by dicta in *Mora v. Phoenix Indem. Ins. Co.*¹⁸⁶ where the court observed, “[s]ome breaches are deemed so substantial and so antithetical to the essential purpose of the insurance contract that, if committed, they forfeit an insurer’s right to appear and be heard on the damages stages.”¹⁸⁷ The dictum of the *Mora* court must be placed into proper perspective. The Court in *Mora* made the following relevant observation:

By asserting it has no duty to defend its insured, *an insurer also implies that it owes no duty to indemnify: the insurer has asserted that the policy does not apply and it therefore has no interest in the litigation between the insured and the claimant.* If the insurer has no interest in the litigation, it follows that no policy reason justifies allowing it to intervene and help determine the outcome of the litigation.[¹⁸⁸]

¹⁸⁶ *Mora*, 996 P.2d 116, 120 (Ariz. Ct. App. 1999), *rev. denied* (2000).

¹⁸⁷ *Id.* at 120.

¹⁸⁸ Similarly, an insurer’s right to intervene is dependent upon its offering of a reservation of rights defense to its insured. Where the insurer refuses to defend its insured, it may be found to have waived its right to intervene. *See, e.g.,* *Anderson v. Martinez*, 762 P.2d 645, 648-49 (Ariz. Ct. App. 1988); *McGough v. Ins. Co. of North America*, 691 P.2d 738, 744 (Ariz. Ct. App. 1984); *Kepner v. Western Fire Ins. Co.*, 509 P.2d 222, 225 (Ariz. 1973).

By contrast, if the insurer acknowledges its duty to defend – even if it reserves the right to later contest coverage – it has at least implicitly acknowledged that the policy may provide coverage and that it might be required to indemnify. In that situation, the insurer has an interest in the outcome of the litigation and should be allowed to intervene to protect that interest. *Since the insured's interests are adequately protected, there is no need to banish the insurer from a case in which no one else in the litigation is protecting the insurer's interest and in which it indisputably has no interest.*¹⁸⁹

The *Mora* case is an intervention case. An insurer establishes that it has no interest in the proceeding when it denies its obligation to indemnify and defend its insured. For this reason, an insurance company is denied the option to intervene. For example, when the insurer asserts there is no coverage, the insurer does not qualify as a real party in interest supporting intervention. The denial of intervention is not based on denial of a “special duty” which justifies the loss of the right to intervene. Rather, the right of intervention does not exist when coverage and a defense is refused because the insurance company has no stated interest in the proceeding to establish a “real party in interest” supporting intervention. The court in *Mora*, however, explicitly recognized that when an insurance company is the “real party in interest,” the insurance company should be involved in the procedure validating the stipulated judgment. That is because the insurer has an interest, which is not being protected.

¹⁸⁹ *Mora*, 996 P.2d 116, 120-121 (emphasis added) (citation omitted).

The underpinning logic the Intermediate Appellate Courts in Arizona use to support the principle that an insurance company refusing to defend its insured could face limitless liability is at odds with Arizona Supreme Court's decision in *Arizona Property and Cas. Ins. Guar. Fund v. Helme*.¹⁹⁰ The *Helme* case is "the missing link between *Damron* and *Morris* and connects the evolution in this area of the law showing that all *Damron*-type agreements are subject to reasonableness requirements affecting enforceability."¹⁹¹

After enumerating the three duties insurance companies owe to their insureds, the Arizona Supreme Court in *Helme* concluded that:

Any breach, actual or anticipatory, of these duties deprive the insured of the security that he is purchased because the breach leaves him exposed to personal judgment and damage which may not be covered or may exceed the policy limits.¹⁹²

In recognizing the precarious situation insureds are faced with when their insurance companies breach any policy duties, the *Helme* court held that:

¹⁹⁰ Ariz. Prop. & Cas. Ins. Guar. Fund v. Helme, 735 P.2d 451 (Ariz. 1987).

¹⁹¹ See *supra* note 182 at 1359. Other jurisdictions have found that where an insurance company refuses to defend its insured it must nevertheless be given an opportunity to establish that the settlement was reasonable. See, e.g., *Steil v. Florida Physicians' Ins. Reciprocal*, 448 So.2d 589, 592 (Fla. App. 1984); *Glenn v. Fleming*, 799 P.2d 79, 92 (Kan. 1990); *Detroit Edison Co. v. Michigan Mut. Ins. Co.*, 301 N.W.2d 832, 837 (Mich. Ct. App. 1981); *Alton M. Johnson Co. v. M.A.I. Co.*, 463 N.W.2d 277, 278 (Minn. 1990); *Griggs v. Bertram*, 443 A.2d 163, 172 (N.J. 1982).

¹⁹² *Helme*, 735 P.2d 451, 459.

[a]lthough the insurers in *Damron* and *Paynter* breached by refusing to defend, the principle of those cases remains the same: once an insurer breaches *any duty* to its insured, the insured is no longer fully bound by the cooperation clause.¹⁹³

In so holding, however, the *Helme* court concluded:

We do not hold that the insurers [breach] eliminates the insured's duty of cooperation so that the insured may enter into any type of agreement or any type of action that may protect him from financial ruin . . . the insurer's breach narrows the insured's obligations under the cooperation clause and permits him to take reasonable steps to save himself. Among those steps is making a *reasonable settlement* with the claimant.¹⁹⁴

Thus, the import of *Helme* is regardless of the type of breach committed by the insurer, including breaches of the duty to defend, the insured may only enter into a "reasonable settlement

¹⁹³ *Id.* (emphasis added).

¹⁹⁴ *Id.* at 460 (emphasis added). The decision in *Helme* is similar to cases in other jurisdictions which hold that if the insurance carrier refuses coverage or refuses to defend, in breach of its contractual obligation to defend, the insured may make a reasonable settlement in good faith which is binding on the carrier. See *Isaacson v. California Ins. Guar. Ass'n*, 750 P.2d 297, 308-309 (Cal. 1988); *Shook v. Allstate Ins. Co.*, 498 So.2d 498, 500 (Fla. App. 1986); *Gladstone v. D.W. Ritter Co.*, 133 Misc.2d 922, 508 N.Y.S. 2d 880, 882 (N.Y. Sup. 1986); *Alfiero v. Berks Mut. Leasing Co.*, 500 A.2d 169, 172 (Pa. Super Ct. 1985); *Texas United Ins. Co. v. Burt Ford Enterprises*, 703 S.W.2d 828, 835 (Tex. App.-Tyler 1986). Interestingly, the Minnesota Court in *Buyse, et al. v. St. Paul Fire & Marine Ins. Co.*, 448 N.W.2d 865 (1989) rejected the theory of anticipatory breach adopted in *Helme*. *Id.* at 874 n.7.

with the claimant.”¹⁹⁵ The *Helme* court, however, did not discuss what constitutes a reasonable settlement agreement between an insured and a claimant.

The Arizona Supreme Court decided *Morris* three and one-half months after *Helme*.¹⁹⁶ In *Morris*, the court delineated the concept of reasonableness in the context of consent settlement agreements in relationship to the overall public policy in Arizona in allowing such consent settlement agreements:

From a public policy standpoint, the result of such [consent] agreements is both, unpredictable and often are unfair to one side or the other. The better result would permit the insurer to raise the coverage defense, and also permit an insured to protect himself from the risk of non-coverage or

¹⁹⁵ See 7 C.J. Appleman, INSURANCE LAW AND PRACTICE, § 4690, pp. 222 and 229 (1979) (“[I]f an insurer unjustifiably refuses to defend a suit, the insured may make a reasonable settlement or compromise of the injured person’s claim” and “recovery from the insurer, after it . . . refuses to defend, depends on whether the action taken by the insured was reasonable”); 41 AM.JUR. 2d, *Indemnity*, § 46 (“[I]n order to recover, the indemnitee settling the claim must show that the indemnitor was legally liable, and that the settlement was reasonable”). See also, *Plumbers Specialty Supply Co. v. Enter. Prods. Co.*, 632 P.2d 752, 758 (N.M. 1981). In *Plumbers* the New Mexico Supreme Court held that an indemnitee could recover against the indemnitor company that refused to defend, if the indemnitee could “show that it acted reasonably” by settling the claim. The *Plumbers*’ Court held that the reasonableness of the indemnitee’s action is determined by looking at the amount of the settlement in light of the risk of exposure; *i.e.* the probable amount of a judgment if the claimant were to prevail at trial. *Id.*

¹⁹⁶ The *Helme* decision was rendered by the Arizona Supreme Court on March 26, 1987. The *Morris* decision was rendered by the Court on June 16, 1987.

excess judgment, while at the same time protecting the insurer from unreasonable agreements between the claimant and the insured.¹⁹⁷

The *Morris* court explained that an insured's right to enter into a *Damron*-type consent agreement is not unfettered. "Such agreements *must be made fairly*, with notice to the insurer, and without fraud or collusion on the insurer."¹⁹⁸ The amount of liability unilaterally agreed to by the insured is not binding on the insurance company unless the insured or the claimant can show that the settlement was reasonable and prudent.¹⁹⁹ In so holding, the court in *Morris* addressed the blunt reality surrounding *Damron*-type agreements:

An insured . . . might settle for an inflated amount or capitulate to a frivolous case merely to escape exposure or further liability. . . . Plainly, the [stipulated] 'judgment' does not purport to be an adjudication on the merits; it only reflects the settlement agreement. It is also evident that in arriving at the settlement terms, the [insureds] would have been quite willing to agree to anything as long as plaintiff promised them full indemnity.²⁰⁰

¹⁹⁷ *Morris*, 741 P.2d at 252 (emphasis added).

¹⁹⁸ *Id.* (emphasis added).

¹⁹⁹ *Id.* at 254 (citing *Miller v. Shughart*, 316 N.W. 2d 729, 735 (Minn. 1982) and noting that this proposition comports with general principles of indemnification).

²⁰⁰ *Id.* (citing *Miller*, 316 N.W. 2d 729, 735).

Based upon these concerns, the court adopted a reasonableness test in determining whether an insurance company is bound by the settlement amount agreed upon by the insured:

The test as to whether the settlement is reasonable and prudent is what a reasonably prudent person in the insured's position would have settled for on the merits of the claimant's case . . . this involves evaluating the facts bearing on the liability and damage aspects of the claimant's case, as well as the risks of going to trial.²⁰¹

²⁰¹ *Id.* There are two principle approaches to the burden of proof on the closely related issues of bad faith, collusion and reasonableness of any consent judgment. One approach places the burden upon the claimant to show by a preponderance of the evidence that the amount of the judgment was reasonable and prudent. *See, e.g.,* Red Giant Oil Co. v. Lawlor, 528 N.W. 2d 524, 534 (Iowa 1995); Fisher v. American Family Mu. Ins. Co., 579 N.W. 2d 599, 607 (N.D. 1998). A different approach places the initial burden of producing evidence on the insured of whether "the settlement is prima-facie, reasonable in amount and untainted by bad faith;" if the insured satisfies this burden of production, then the insurance carrier has the "burden of demonstrating, by a preponderance of the evidence, that it is not liable because the settlement is neither reasonable nor reached in good faith." *See, e.g.,* Griggs, 443 A.2d 163, 173-74 (N.J. 1982); Glenn, 799 P.2d 79, 92-93 (Kan. 1990) (adopting the New Jersey rule as stated in *Griggs*); *Steil*, 448 So.2d 589, 592 (Fla. App. 1984).

Additional factors may be taken into consideration in determining reasonableness. *See, generally,* Associated Wholesale Grocers, Inc. v. Americold Corp., 934 P.2d 65, 87 (Kan. 1997) (factors in evaluating reasonableness of settlement by abandoned insured include the releasing person's damages; the merits of the releasing party's liability theory; the merits of the released party's defense theory; the released person's relative fault; the risks and expenses of continued litigation; the released party's ability to pay; any evidence of bad faith, collusion or fraud; the extent of the releasing party's investigation in preparation of the case; and the interest of the party's not being released.) *See also,* Washington Ins. Guar. Ass'n v. Ramsey, 922 P.2d

Arizona public policy requires that *any* stipulated judgment undergo an adjudicatory process to validate the judgment for

237, 247-48 (Alaska 1996) (citing *Glover v. Tacoma Gen. Hosp.*, 658 P.2d 1230-1236 (Wash. 1983).

Commentators support the conclusion that a refusal to defend does not eliminate requirement of reasonableness. *See e.g.*, 7 C.J. Appleman, *INSURANCE LAW AND PRACTICE*, § 4690, pp. 222 and 229 (“If an insurer unjustifiably refuses to defend a suit . . . recovery from the insurer, after it withdraws or refuses to defend, depends on whether the action taken by the insured was reasonable.”) 14 *COUCH ON INSURANCE* 3D, § 205:71 (1999) (“an insurer’s unjustified refusal to defend . . . does not render the insurer liable for more than the amount of the policy limit, nor does it obligate the insurer to pay the amount of unreasonable settlement or a settlement made in bad faith); *see also* 14 *COUCH ON INSURANCE* 2d, § 51:22 (stating that “the insurer who breaches its duty [to defend] will not be liable for the full amount of a settlement negotiated by the insured regardless of the reasonableness of such settlement.”); 44 *AM.JUR.* 2d, *Insurance*, § 1420 (consequently, an insurer’s unjustified refusal to defend relieves the insured from his contract obligation not to settle . . . in order to bind the insurer the settlement must be reasonable and entered in good faith.”).

reasonableness. All judgments must bear a reasonable relationship to the actual damages;²⁰² otherwise, they are punitive in nature.²⁰³ The purpose behind such a rule is to guard against excess and to prevent damage awards that result from passion or

²⁰² The California appellate courts have been active in attempting to sort out an approach of reasonableness that balances the interest of the insured and the insurance company. In *Pruyn v. Agricultural Ins. Co.*, 42 Cal.Rptr.2d 295 (App. 1995), the Court preliminarily observed that where an insurance company has furnished a defense to its insured, in fulfillment of its contractual obligations, a settlement of the pending lawsuit without the consent of the insurance company would violate the policy's cooperation clause, giving the provider a defense against the enforcement of a stipulated judgment. *Id.* at 303. However, where the insurance company wrongfully denied its insured a defense, the Court determined that the stipulated judgment might be enforceable depending upon the degree of judicial participation involved up to the point the judgment was rendered against the insurance company. *Id.* at 304-05. Where the judgment was entered at a default hearing held after the settlement, or at an uncontested trial where the insured presented no defense after a settlement, the judgment would be binding on the insurance company because "significant independent adjudicatory action" mitigated the risk of fraud or collusion between the insured and the plaintiff. *Id.* at 304. The Court was unwilling to come to the same conclusion regarding a stipulated judgment subject only to a good faith determination under California civil procedure. *Id.* at 304-05, 308. Cal. Civ. Procedure Code § 877.6 (West 1999) allowed settling parties to file for a hearing to determine whether a settlement was made in good faith, where joint tortfeasors or co-obligors are involved. Under Sec. 877.6(a)(1), "A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor with equitable comparative contribution, partial or comparative indemnity, based on comparative negligence or comparative fault." Section 877.6(C). Due to the limited nature of judicial participation during the hearing where a good faith determination is made, the court formulated an approach whereby a settlement by the abandoned insured would give rise to an evidentiary presumption as to the insured's liability and the amount of damages. *Id.* *Pruyn*

prejudice rather than reason and justice.²⁰⁴ The public policy in Arizona, that judgments must have a reasonable relationship to the actual damages incurred by the injured party, pervades every aspect of the judicial process and should also apply to *Damron* agreements entered into after the insurance company has refused a defense.²⁰⁵

v. Agricultural Ins. Co., 42 Cal.Rptr.2d at 311-12. To rely upon the presumption, the insured was required to establish (1) that the insurance company wrongfully refused to furnish coverage or a defense; (2) the insured entered into a settlement with the plaintiff; and (3) the settlement was reasonable and in good faith. *Id.* at 312. A good faith determination under California civil procedure would be considered substantial evidence of reasonableness sufficient to satisfy the third prong of the insured's showing of entitlement to the presumption. *Id.* at 312. Once the presumption is established, the burden of proof is shifted to the insurance company "to persuade the trier of fact, by a preponderance of the evidence, that . . . [the] settlement did not represent a reasonable resolution of plaintiff's claim or that the settlement was the product of fraud or collusion." *Id.* at 314. The Court did not state what the results would be following a finding that the settlement was not reasonable.

California's burden-shifting approach is more favorable to the assignee and less protective of the interests of the insurance company as it attempts to fairly determine the damages that would arise from a full adversarial trial of the issues.

²⁰³ *Cf.*, Gary Outdoor Adver. Co. v. Sun Lodge, Inc., 650 P.2d 1222, 1224 (Ariz. 1982).

²⁰⁴ *See* Magma Copper Co. v. Shuster, 575 P.2d 350, 352 (Ariz. Ct. App. 1978).

²⁰⁵ At trial, for example, the trier of fact's function to determine the amount of damages, that a claimant is reasonably entitled to. If a jury's verdict was actuated by prejudice or passion, then its verdict may not stand, and the defendant may ask the court to exercise its discretion and order a remitter. *See* Miller v. Condon, 182 P.2d 105, 109 (Ariz. 1947); Spur Feeding Co. v. Fernandez, 472 P.2d 12 (Ariz. 1970). A defendant may also use the procedures provided in Rule 59(i), of the Arizona Rules of Civil Procedure, to motion the court for a new trial on the grounds that the damage award was excessive. If the jury verdict far exceeds the amount supported by the evidence,

V. THE SIGNIFICANCE OF THE *QUIHUIS* DECISION

The Arizona Supreme Court continues to tackle new issues in the insurance arena, especially involving *Damron*-type agreements. A close analysis of *Quihuis* reveals that Arizona's highest court has established several new important principles to evaluating *Damron* agreements. An insurer's defense and indemnity obligations will impact all cases involving insurance coverage moving forward. The *Quihuis* decision firmly roots the RESTATEMENT (SECOND) OF JUDGMENTS § 58 in the analysis for issue preclusion—expanding upon its analysis and application in *Vagnozzi*—to the context involving a *Damron* agreement which results in a default judgment containing stipulated facts. This is important as it will provide further guidance on what issues an insurer can litigate in a subsequent coverage dispute, where a *Damron* agreement has been entered into with stipulated facts. While *Morris*, *Vagnozzi*, and *Wood* involved issue preclusion where a *Morris* agreement was entered into after a defense was provided by the insurer under reservation, *Quihuis* explored issue preclusion where the insurer has denied a defense and a default judgment is entered with coverage-determining stipulated facts pursuant to a *Damron* agreement. While the Ninth Circuit originally certified the question to the Arizona Supreme Court to determine whether *Morris* logic or *Wood* logic was to be utilized for determining issue preclusion, the Arizona Supreme Court, the either/or nature of the Ninth Circuit's inquiry, found the principles of *Morris* and *Wood* to be harmonious. As explained by the *Quihuis* Court, in *Morris*, the insurer

then an appellate court may order that the defendant is entitled to a new trial on the issue of the damages rather than a remitter. See, e.g., *Flory v. Silvercrest Indus.*, 633 P.2d 424 (Ariz. Ct. App. 1981); *Stallcup v. Rathbun*, 258 P.2d 821 (Ariz. 1953).

was precluded from litigating facts with respect to liability and damages, but was able to re-litigate any stipulated facts essential to coverage. The *Quihuis* Court explained that *Wood* still follows the same principles set forth in *Morris*, but simply delineates the outer boundaries of *Morris*. Issue preclusion resulted when the insurer attempted to re-litigate defenses at the heart of the insured's liability as opposed to coverage. In that sense, the *Quihuis* case represents the Arizona Supreme Court coming full circle with its roots in § 58 and expanding the same issue preclusion principles into the *Damron* context, which had only previously applied in the *Morris* context.

Post *Quihuis*, Arizona courts should uniformly apply the same analysis regardless of whether there is a *Morris* or *Damron* agreement, including stipulated facts which have resulted in a judgment. More generally, a § 58 issue preclusion analysis will apply to subsequent actions where there has been a prior judgment. An insurer that owed separate defense and indemnity obligations, and the insurer was given reasonable notice and an opportunity to defend the insured in an underlying action. At that point, the insurer will be precluded from relitigating two types of issues to the extent they were decided in the prior judgment: (1) the "existence and extent" of an insured's liability to a claimant; and (2) issues "determined in the action" against the insured where no "conflict of interest" exists between the insured and the insurer.

In applying § 58 to the issue preclusion analysis between an insured/claimant and the insurer, the court will first determine whether the issue is one involving liability or damages as opposed to underlying coverage under the policy. As explained in *Vagnozzi* and *Wood*, if the issue involves only liability or damages then the insurer will be precluded from re-litigating. Next, the court will determine whether a conflict of interest exists with respect to the issue between the claimant/insured and the insurer. For purposes of this analysis, a qualifying conflict of interest

exists when the claimant's cause of action against the insured can be sustained in at least two different ways, one of which is covered by the insurer and the other(s) not. The prototypical example of a conflict of interest involves an accident versus an intentional act, as examined in *Vagnozzi*. If the issue does not present a conflict of interest and was actually litigated on the merits, issue preclusion will apply. However, where a conflict of interest exists, the insurer will be able to re-litigate issues for the purpose of determining if coverage is owed under the policy.

Moving forward, courts will have to carefully examine whether a conflict of interest actually exists with respect to coverage-determining facts when evaluating the application of issue preclusion. While intentional versus accidental acts present a classic conflict of interest with respect to coverage-determining facts, other issues may not be so clear. As seen in *Quihuis*, the court found that coverage-determining stipulated facts regarding ownership of the Jeep were not actually "determined in the action;" therefore, issue preclusion did not apply. However, if was an actual determination in the action on the ownership issue (as opposed to stipulation), State Farm may have very well been precluded from re-litigating the ownership issue. Technically, no liability on the part of the Coxes would have existed without being determined to be the owners because the only claim against them was for negligent entrustment, which requires ownership. With respect to the ownership issue in a negligent entrustment claim, arguably, there would not be a conflict of interest between the insured and insurer. Either the Coxes were the owners and coverage existed, or they were not the owners and there was no liability or coverage.

Next, the *Quihuis* court took the opportunity to elaborate on the consequences of an insurer's wrongful failure to defend its insured. The Arizona Supreme Court has officially held as a matter of first impression that an insurer will not be estopped from raising coverage defenses to its duty to indemnify when

there has been a breach of the duty to defend. In refusing to apply the estoppel doctrine to breaches of defense obligations, Arizona is now officially in agreement with a majority of jurisdictions that the duties to defend and indemnify are separate and distinct. In so holding, the Arizona Supreme Court has protected the long standing principle in Arizona that no insurer has an absolute duty to defend, as established in *Kepner*. Furthermore, it has signaled that the breach of a separate defense duty should not be grounds to create indemnity coverage, which was never bargained for between the insured and insurer.

Through both issue preclusion and estoppel doctrine analysis adopted in *Quihuis*, the Arizona Supreme Court has reinforced protections for insurance companies to blunt creative attempts at manufacturing coverage between claimants and insureds. Furthermore, with these newly established principles, Arizona's highest court has encouraged merit based litigation and reduced ongoing gamesmanship, such as a race to the courthouse between the claimant, the insured, and the insurer.

The Arizona Supreme Court's dicta statement in *Parking Concepts* that an insurance company had no right to contest the stipulated damages on the basis of reasonableness in the *Damron* context is problematic. What if the parties agreed to an arbitrary five billion dollar *Damron* settlement? A five billion dollar judgment would threaten the financial solvency of the insurance company and thereby place at risk not only the financial viability of the insurance company itself, but it would put at risk the insurance company's policyholders and the Arizona State Insurance Guarantee Fund. If the stipulated judgment amount was not tethered to reasonableness, then there would be no judicial mechanism in place to protect against such an oppressive stipulated damage judgment.

Certainly an outrageously large stipulated judgment could be viewed as being fraudulent and collusive. The problem with using "fraud and collusion" as the policeman in this context

against outrageously large stipulated judgments, is the complete absence of objective measures to determine at what dollar value an otherwise acceptable stipulated judgment crosses the boundary line and becomes fraudulent and collusive. The uncertainty of measuring where that boundary line falls in a particular case will act as a disincentive to plaintiffs to enter into *Damron* agreements. Fear would ensue that an otherwise collectible insurance recovery (at least to the policy limits) may be jeopardized by a larger than policy limits stipulated judgment.

The Arizona Supreme Court's dicta in *Quihuis*, which appears to set a presumptively valid boundary line at the policy limits, would present a workable analytic framework for assessing the amount of *Damron* agreement damages. It is the authors' belief that the Court's statement in *Quihuis* represents informed dicta where the Court was making a pronouncement for the purposes of providing future guidance regarding *Damron* agreement damages.²⁰⁶ Insurance companies obligate themselves to pay for third-party liability claims at least up through the assigned policy limits of the insurance policy. It would be difficult for an insurance company to assert that a stipulated *Damron* judgment for the policy limits was so excessive that it represented fraud and collusion given the insurance company's acceptance of the risk that it might, in any given case, have to pay its policy limits. By establishing a presumptive boundary line at the policy limit amount, the Arizona Supreme Court may be providing protection against the possibility of extreme unreasonableness by tethering the presumptive reasonableness to the insurance company's risk acceptance. That approach is the first step to avoiding the analytic inconsistency of quantitatively measuring the materiality of different insurance policy breaches.

²⁰⁶ Resolution Trust Corp. v. Segel, 839 P.2d 462 (Ariz. Ct. App. 1992) (“[S]tatements which might otherwise be considered dicta are authoritative where court declares as guide for future conduct.”).

At the moment of policy inception, an insurance company has made an underwriting determination to offer its insured specific protection through the terms of its insurance policy with a defined maximum dollar value assigned to that protection. When an insurance company erroneously refuses to defend its insured, it potentially places the full stated limits of the policy at risk. Allowing the policy limits to be the presumptive measure of non-fraudulent and non-collusive damages, *i.e.*, the boundary line dividing reasonableness from fraudulent and collusive activity, will prove sufficient in the selection of stipulated damage amount for *Damron* agreements. A corollary question now exists in light of the *Quihuis* dicta: Are the policy limits also the presumptive boundary line of reasonableness in the *Morris* agreement context?

VI. CONCLUSION

The issues surrounding *Damron* and *Morris* agreements have not been eliminated with the passage of time. Like a slowly dripping faucet, the law continues to develop on a case-by-case basis as the courts are presented with unique facts in the real-time litigation environment that prod, expand and contract the conduct of the parties in those cases leaving them at risk for going too far in their zeal to enter into one of these type agreements. The judicial sign post ahead reads "PROCEED WITH CAUTION" with a follow up road sign saying "DANGEROUS CURVES AHEAD."

LEGAL ISSUES SURROUNDING UNACCOMPANIED ALIEN CHILDREN

Lory Pounder*

I. INTRODUCTION

An unflinching, uniformed guard gestures those at the court entrance through the metal detector while another rifles through belongings. Hidden by tall, wooden doors beyond this entrance are windowless rooms dominated by towering judges' benches. There, prepared to argue, is the adversary—a highly educated government official in a black suit.

Now, imagine this scene from the perspective of a ten-year-old child, without representation of counsel, who recently survived the treacherous journey from El Salvador to escape gang members who murdered his father in the street in front of him.¹ For a new student in law school, understanding the complexities of court proceedings seems nearly unattainable. So, as a child lacking adult intellectual and emotional capacity, attempting to

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¹ On July 9, 2014, the American Civil Liberties Union filed a class action lawsuit on behalf of all children in immigration proceedings without representation. It includes the above-referenced ten-year-old and his two siblings, whose family was targeted because their parents ran a center to assist those trying to leave gangs. *J.E.F.M. v. Holder*, Case 2:14-cv-01026, 1, 15 (W.D. Wash. 2014), available at <https://www.aclu.org/immigrants-rights/jefm-v-holder-complaint> [hereinafter *J.E.F.M v. Holder*].

navigate the immigration system—a system that has been compared to the Internal Revenue Service in terms of its intricacy and complexity²—and articulate a case in a manner that satisfies a remedy offered at law is a nearly impossible task.

This research article seeks to address legal issues surrounding unaccompanied alien children, following the recent influx of arrivals that thrust the issue into the spotlight, thereby providing the United States an opportunity to demonstrate leadership in humanitarian relief. The recent high volume environment has served to further expose inadequacies in the system and the need for greater protections. While many scholars have recognized the compelling need to provide legal counsel to this vulnerable population, recently proposed legislation instead, sought to diminish current protections and expedite proceedings.

The influx of children illustrates the quandary the country faces in its difference in value and application of due process and child protections based on citizenship and national origin. Ultimately what has arrived with the surge of children is an urgency to remedy this dilemma. Part II of this paper will describe the background as to why Central American children embark on the dangerous journey to the United States and the differing treatments of arrivals from contiguous countries. Part III will tackle the need for fair proceedings and advocacy. Part IV will address the disjointed application of asylum law and the underutilized T visa for victims of trafficking, furthering the need for counsel. Finally, Part V will discuss the dangerous and uncertain future for these children and the laws protecting them.

II. BACKGROUND: WHY CHILDREN MAKE THE DANGEROUS JOURNEY AND TREATMENT OF UACs FROM CONTIGUOUS AND NONCONTIGUOUS COUNTRIES

² *Id.* at 2.

In June 2014, when shocking images of U.S. Customs and Border Protection (“CBP”) processing stations crowded with children were leaked to news agencies, the general public became aware of the growing number of children fleeing Central American countries.³ CBP reports an increased apprehension of nearly double the number of children along the southwest border as the previous year, with estimates for 2014 of 60,000 children.⁴ In response to the publicity, political debate flared in Congress, the government began new partnerships with Central American countries, immigration proceedings for minors were expedited, and the Trafficking Victims Protection Reauthorization Act (“TVRA”) of 2008 faced potentially harsh revisions.⁵ While many of the children have been sent back and others sit in limbo of an uncertain future, what is clear is that the surge in

³ Bob Ortega, USA TODAY, *Official: White House underestimated child migrant surge*, (Aug. 29, 2014), <http://www.usatoday.com/story/news/nation/2014/08/29/white-house-underestimated-border-children-crisis/14789767/> (according to the author, government officials knew the surge was coming due to the increasing trend, but officials underestimated its size and were unprepared).

⁴ U.S. Customs and Border Protection, *Southwest Border Unaccompanied Alien Children*, AILA InfoNet Doc. No. 14070747, at 1, 2 (last visited July 7, 2014) [hereinafter *Southwest Border*].

⁵ The response from President Barack Obama included granting the Department of Homeland Security secretary additional authority to exercise discretion in the processing, return, and removal of UACs and expediting cases. The White House Office of the Press Secretary, *Letter from the President – Efforts to Address the Humanitarian Situation in the Rio Grande Valley Areas of Our Nation’s Southwest Border* (June 30, 2014), <http://www.whitehouse.gov/the-press-office/2014/06/30/letter-president-efforts-address-humanitarian-situation-rio-grande-valle>. The changes the president requested would include allowing Border Patrol agents to expedite proceedings against the UACs. Alan Gomez, USA Today, *Obama seeks change to law that protects immigrant kids*, (July 2, 2014), <http://www.usatoday.com/story/news/nation/2014/07/02/immigration-obama-deportation-children-border/11915723/>.

arrivals has served to demonstrate the inadequacy of international child protections under the current law and the need for protection is more urgent than ever.

A. Influx of Unaccompanied Alien Children Coinciding with the Increase in Violence

An Unaccompanied Alien Child (“UAC”) is someone under the age of eighteen who lacks lawful immigration status and either has no parent or legal guardian in the United States or has no parent or legal guardian in the country that is available to provide care and physical custody.⁶ Those arriving through the southwest border are predominately from El Salvador, Guatemala, Honduras, and Mexico, and from fiscal year 2013 to 2014 children from these countries of Central America about doubled, with the largest increase coming from Honduras.⁷

CBP began keeping records of the numbers of UAC arrivals in 2009,⁸ following the enactment of TVPRA. That year, CBP apprehended about 20,000 UACs, of which about 3,300 were from El Salvador, Guatemala, and Honduras. Each year since, the numbers of UACs from these three countries has risen, about doubling each year for the past three years and now reaching a high of about 40,000 in 2014, while those from Mexico average about 14,000 a year.⁹

A study conducted by the United Nations High Commissioner for Refugees (“UNHCR”) found fifty-eight percent of the children they interviewed were forcibly displaced after suffering

⁶ 6 U.S.C. § 279(g)(2).

⁷ *Southwest Border*, *supra* note 4, at 2.

⁸ U.S. Department of Homeland Security Office of Inspector General, *CBP’s Handling of Unaccompanied Alien Children*, at 6 (September 2010), http://www.oig.dhs.gov/assets/Mgmt/OIG_10-117_Sep10.pdf [hereinafter *CBP’s Handling of Unaccompanied Alien Children*].

⁹ *Southwest Border*, *supra* note 4, at 2.

harms indicating a need for international protection.¹⁰ Also, of all the countries receiving asylum applications from El Salvador, Honduras, Guatemala, and the United States, recorded the highest number of new applications. And, of the total amount of asylum applications received in the United States, these three countries accounted for eighty-five percent in 2012.¹¹ Other countries surrounding the three including Mexico, Panama, Nicaragua, Costa Rica, and Belize, also noted a combined increase in asylum applications of 435%.¹² The top reasons the children fled home included: violence in society, abuse in the home, deprivation, and family reunification or opportunity.¹³ While some made the journey simply seeking a better life, others traveled alone to escape violent situations or were trafficked into the United States.¹⁴

Criminality in Honduras, Guatemala, and El Salvador, also known as the “Northern Triangle,” has also risen exponentially

¹⁰ The UNHCR is the only international, intergovernmental UN organization charged with providing international protection to refugees. This comprehensive study was designed to examine the reasons behind the displacement of children from Mexico, El Salvador, Guatemala, and Honduras. United Nations High Commissioner for Refugees, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*, at 6 (March 12, 2014), http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf [hereinafter *Children on the Run*].

¹¹ *Id.* at 4.

¹² *Id.*

¹³ *Id.* at 7.

¹⁴ *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System*, Center for Gender & Refugee Studies and Kids In Need of Defense at ii (2014), http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf [hereinafter *A Treacherous Journey*] (this report raises issues surrounding the treatment and protections of UACs and provides recommendations, including the need for an informed public).

throughout the past decade.¹⁵ This area suffers from “some of the world’s highest homicide rates, staggering corruption and, in recent years, tottering political instability.”¹⁶ Gangs, whose roots trace to the streets of Los Angeles in the 1960s, swelled with undocumented immigrants deported from the United States in the 1990s following peace treaties that put an end to Central American civil wars.¹⁷

These “criminally radicalized immigrants were returned in droves” essentially seeding gang members from the United States to the Northern Triangle.¹⁸ The scene led to drug cartel connections aiding in smuggling cocaine to the United States, and as the smuggling increased, so did the violence, turf wars, and lawlessness.¹⁹ In fact, one town in Guatemala, Atlántida, has a murder rate seventeen times greater than the global rate.²⁰

¹⁵ These three countries are often referred to as the Northern Triangle due to their “relative positions to one another, shared history, and more recently their combined role in the Latin America drug trade.” Tomas Ayuso, *Central America: The Downward Spiral of the Northern Triangle*, NORIA Research Report at 2 (July 2012) [hereinafter *The Downward Spiral*] (“the tormented region is slowly coming back to the fore of international press but hardly for an enviable reason: the drug war has metastasized into an existential threat for the isthmus.”).

¹⁶ *Id.*

¹⁷ *Id.* at 4.

¹⁸ *Id.*

¹⁹ *Id.* at 9-10.

²⁰ *The Downward Spiral*, *supra* note 15 at 9-10.

Mexican gang presence, mostly Los Zetas and the Sinaloa Cartel,²¹ have also increased in recent years,²² contributing to the violent environment.

B. Desperate to Escape: The Harrowing Journey from Central America to the United States

To arrive at the United States border, children risk being raped, kidnapped, robbed, trafficked, or even murdered. The extreme violence they could potentially face is evidenced in what has become known as the San Fernando massacres. There, members of drug cartels brutally slaughtered more than 250 people in 2010 and 2011, many of whom were migrants from Central America making their way to the United States.²³ Reports describe gunmen targeting groups of migrants and killing those who refused to work for the cartels.²⁴ The mass graves were discovered after one young man, who had been shot in the neck, survived and walked the night to a military checkpoint.²⁵

²¹ Los Zetas and the Sinaloa Cartel are two of the most powerful and dangerous drug cartels in Mexico with reaches far beyond. See Ginger Thomson, *U.S. Agencies Infiltrating Drug Cartels Across Mexico*, N.Y. TIMES (Oct. 24, 2011), <http://www.nytimes.com/2011/10/25/world/americas/united-states-infiltrating-criminal-groups-across-mexico.html?pagewanted=all>; Patrick Radden Keefe, *Cocaine Incorporated*, N.Y. TIMES (June 15, 2012), <http://www.nytimes.com/2012/06/17/magazine/how-a-mexican-drug-cartel-makes-its-billions.html?pagewanted=all>.

²² *The Downward Spiral*, *supra* note 15, at 12.

²³ Michael Evans, *Migration Declassified: A Project of the National Security Archive, Mexican Officials Downplayed "State's Responsibility" for Migrant Massacres*, (Aug. 29, 2013), <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB445/> (the author reports that the drug trafficking organizations in northeastern Mexico operate with "near total impunity," while quoting the U.S. Embassy in Mexico City).

²⁴ *Id.*

²⁵ Adam Goodman, *A Long Series of Uncertainties*, THE NATION (Sept. 3, 2013), <http://m.thenation.com/article/181467-long-series-uncertainties>.

While this is just one example of the uncertainty that may lie ahead on the journey, what is certain is that the journey is more difficult, dangerous, and deadly than ever.²⁶ Drug gangs are further diversifying into kidnapping, extortion, and human smuggling.²⁷ Reports have surfaced of children being threatened and forced to carry backpacks of drugs through the desert and across the border for the cartels.²⁸ Also, cartels are using children to smuggle humans across the border, knowing the children will simply be repatriated if caught.²⁹

In Mexico, widespread police and military corruption poses an additional challenge,³⁰ leaving the unaccompanied children unprotected and exposed to potential cartel violence along the way. Much data related to the children is not recorded or reported in any way so complete statistics regarding UACs cannot be fully known. However, recent interviews conducted with 404 children “demonstrate that many of these displaced children faced grave danger and hardship in their countries of origin,”

²⁶ *See id.*

²⁷ Rick Jervis, *Tactical shift by drug cartels could be fueling migrant surge*, USA TODAY (June 30, 2014), <http://www.usatoday.com/story/news/nation/2014/06/27/immigrant-youth-border-cartels/11423695/>.

²⁸ Golden McCarthy, Esq., Children’s Initiative Supervising Attorney at The Florence Project, training regarding *Representing Unaccompanied Minors* in Phoenix, Arizona (July 25, 2014) (during the presentation, McCarthy reported stories of children picked up by Border Patrol while carrying backpacks of drugs, one of whom she was working with to request a T visa from U.S. Citizenship and Immigration Services).

²⁹ *Findings and Recommendations Relating to the 2012-2013 Missions to Monitor the Protection Screening of Mexican Unaccompanied Children Along the U.S.-Mexico Border*, United Nations High Commissioner For Refugees at 20 (June 2014), http://americanimmigrationcouncil.org/sites/default/files/UNHCR_UAC_Monitoring_Report_Final_June_2014.pdf [hereinafter *UN Findings and Recommendations*].

³⁰ *Mexico 2013 Human Rights Report*, U.S. Department of State at 1 (Mar. 27, 2014), <http://www.state.gov/documents/organization/220667.pdf>.

which led them to take on this journey.³¹ Still, less than one percent of children are granted relief from removal during their stay in the Office of Refugee Resettlement (“ORR”) custody.³²

C. The Difficult Journey Continues: Post -Arrival Experience for UACs from Central America and Mexico

When handling UACs, the guiding principles come from the Flores Settlement Agreement of 1987, Homeland Security Act of 2002, and TVPRA of 2008. The Flores Settlement Agreement governs the treatment of UACs in federal custody.³³ It imposes minimum standards including requirements of food and water, medical assistance for emergencies, toilets and sinks, adequate temperature control and ventilation, adequate supervision, and separation from unrelated adults whenever possible.³⁴

The Homeland Security Act of 2002 then consolidated several agencies creating the Department of Homeland Security (“DHS”) and has CBP and Immigration and Customs Enforcement (“ICE”) share responsibilities for UACs.³⁵ Once border patrol or port of entry officers apprehend or identify a UAC, the

³¹ *Children on the Run*, *supra* note 10, at 11.

³² Olga Byrne & Elise Miller, *The Flow of Unaccompanied Children Through the Immigration System, A Resource for Practitioners, Policy Makers, and Researchers*, VERA Institute of Justice at 4 (Mar. 2012), <http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf> [hereinafter *The Flow of Unaccompanied Children*] (this system overview reports an average of 596 monthly admissions to the ORR’s Division of Unaccompanied Children’s Services).

³³ *Flores v. Reno*, Stipulated Settlement Agreement, Case No. CV 85-4544-RJK(Px) (Nov. 30, 1987), https://cliniclegal.org/sites/default/files/attachments/flores_v_reno_settlement_agreement_1.pdf [hereinafter *Flores Settlement*].

³⁴ *Id.*

³⁵ *CBP’s Handling of Unaccompanied Alien Children*, *supra* note 8, at 3.

child is taken for processing. If the child is Mexican, the Mexican Consulate interviews the child for citizenship and releases the child to Mexican authorities or a legal guardian, unless, within a short series of questions by the U.S. agent, the child is identified as a possible victim of trafficking or has a credible fear of persecution. The questions the agent is charged with asking in a less than ten-minute interview are whether the child is a victim of trafficking, whether the child has a fear of persecution, and if the child can make an independent decision to withdraw his or her application for admission into the United States.³⁶ If the answer is no to the first two and the child can make an independent decision, the agent can immediately repatriate the child without any review. However, if the child is from a noncontiguous country, ICE takes over in the placement of the child.³⁷

TVPRA provides that children from noncontiguous countries be placed in removal proceedings, allowing them more time to seek relief than children from Mexico are afforded.³⁸ It also encourages counsel for UACs and provides for appointment of child advocates in certain cases. It expands efforts to ensure safe repatriation, and includes modifications to Special Immigrant Juvenile Status requirements.³⁹ Children of noncontiguous

³⁶ 8 U.S.C. §1232(a)(2); *UN Findings and Recommendations*, *supra* note 29, at 37 (CBP interviews with UACs involved little eye contact from agents who reviewed Form I-770 and completed Form 93 questions in about 10 minutes).

³⁷ *CBP's Handling of Unaccompanied Alien Children*, *supra* note 8, at 4.

³⁸ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. 110-457, §§ 235(a)(2)-(3), (5); 235(c)(4)-(6); 235(d)(1)-(5), (7), 122 Stat. 5044 (2008).

³⁹ *Id.* Special Immigrant Juvenile Status is a form of relief that allows children who have been abused, abandoned, or neglected and who have been declared dependent on a juvenile court an opportunity to obtain permanent residency in the United States. INA § 101(a)(27)(J).

countries are to be transferred to the Office of Refugee Resettlement that operates within the Department of Health and Human Services within seventy-two hours of arrival.⁴⁰ Both TVPRA and the Flores Settlement Agreement favor releasing children to family members or community settings. In fact, TVPRA requires UACs be “promptly” placed “in the least restrictive setting that is in the best interest of the child,”⁴¹ while the Flores Settlement mandates the government release the minor from custody “without unnecessary delay.”⁴² About seventy-five percent of children remain in Office of Refugee Resettlement custody between one week and four months, with an average stay of sixty-one days.⁴³

In the summer of 2014, investigations began after complaints surfaced of human rights violations taking place at the detention facilities.⁴⁴ Also, advocates report CBP is failing to

⁴⁰ Wilberforce, *supra* note 38, at 457, § 235(c).

⁴¹ 8 U.S.C. § 1232(c)(2)(A).

⁴² *Flores Settlement*, *supra* note 33, at ¶ 14.

⁴³ *The Flow of Unaccompanied Children*, *supra* note 32, at 4.

⁴⁴ DHS Inspector General John Roth, Office of the Inspector General, *Oversight of Unaccompanied Alien Children* (Aug. 28, 2014), http://www.oig.dhs.gov/assets/pr/2014/Sig_Mem_Over_Unac_Alien_Child090214.pdf (this memorandum documents an investigation, including 57 unannounced site visits following an ACLU complaint on behalf of 116 UACs); Media outlets, the Human Rights Watch, and the American Immigration Council all document accounts of “inadequate efforts” to assist immigrants in accessing the asylum process. See Emily Creighton, American Immigration Council Immigrant Impact, *Civil Rights Complaint Documents Government’s Failure to Properly Screen Asylum Seekers*, (Nov. 14, 2014), available at <http://immigrationimpact.com/2014/11/14/civil-rights-complaint-documents-governments-failure-properly-screen-asylum-seekers/>.

screen Mexican UACs who are vulnerable to persecution, trafficking, and abuse,⁴⁵ and the “vast majority” are returned immediately to Mexico.⁴⁶ This is because agents lack child-welfare expertise and fail to conduct child interviews in a manner that would elicit this kind of sensitive information.⁴⁷

Moreover, TVPRA only requires officers ask a child how they received injuries if they show signs of torture, malnourishment, fatigue, or emotional abuse.⁴⁸ However, signs of torture or emotional abuse are often not physical, and based on interviews observed by the UNHCR, officers do not appear trained in eliciting sensitive information or picking up on cues that could lead to sensitive information. For instance, border agents indicate they do not think a UAC involved in human smuggling, who expressed fear of return and being labeled a snitch, would have a need for protection.⁴⁹ Even in the case of children repeatedly caught for human smuggling, agents did not inquire as to whether force or coercion was used to keep them involved in these activities—which, based on the nature of the work, would present the possibility of human trafficking.⁵⁰

⁴⁵ ACLU’s Immigrants’ Rights Project, *The Rights of Children in the Immigration Process*, at 3 (July 2014); *UN Findings and Recommendations*, *supra* note 29; Human Rights Watch, “You Don’t Have Rights Here” *US Border Screening and Returns of Central Americans to Risk of Serious Harm*, at 8 (Oct. 2014), http://www.hrw.org/sites/default/files/reports/us1014_web.pdf [hereinafter *Human Rights Watch*].

⁴⁶ *Children on the Run*, *supra* note 10, at 21.

⁴⁷ *Id.*; *Human Rights Watch*, *supra* note 45, at 8 (those referred for credible fear interviews report being intimidated and confused by the process).

⁴⁸ *CBP’s Handling of UACs*, *supra* note 8, at 16 (within the recommendations provided to CBP was that CBP establish a procedure for inquiries regarding any injury or illness that may require medical attention).

⁴⁹ *UN Findings and Recommendations*, *supra* note 29, at 29

⁵⁰ *Id.* at 30.

The first line of defense in protecting victimized children is to properly screen Mexican children. Failing to understand trafficking can perpetuate the breakdown of this defense.⁵¹ These children rarely make it to the Office of Refugee Resettlement to join UACs from noncontiguous countries in removal proceedings.⁵² Although, even if they do make it, like all UACs, the challenge of navigating the complex legal process alone lies in front of them.

III. FAIR PROCEEDINGS, CHILD COMPETENCY LEVELS, AND THE NEED FOR ADVOCACY

A. American Value of Fairness and Due Process Not Followed in Immigrant Proceedings Involving Juveniles and the Urgent Call for Government-Sponsored Attorneys

While the thought of a toddler defending himself in court against a trained lawyer equipped with evidence and knowledge of the law may seem like a scene from “Family Guy,”⁵³ it is a reality of the immigration system. After the American Civil Liberties Union filed a class action seeking legal representation for all children in immigration proceedings, attorneys asked to add three-year-old Arturo to the children plaintiffs. He was conceived in El Salvador when his mother was raped at the age of fifteen. She fled as a result of continued threats from the rapist,

⁵¹ *Id.* at 5, 8, 13-14, 22 (of all Mexican UACs apprehended, 4.5 percent were not returned to Mexico, and while these children accounted for 45 percent of the total UACs apprehended at the southern border, they account for 3.4 percent of the those referred to ORR custody).

⁵² *Id.*

⁵³ Kris De Leon, Buddy TV, *A Brief History on The Family Guy*, (April 9, 2007), available at <http://www.buddytv.com/articles/family-guy/family-guy-episode-summaries-5684.aspx> (created by Seth MacFarlane in the 1990s, this cartoon satire includes a talking infant intent on world domination).

leaving Arturo with family members until he was taken to the Texas border where he underwent legal proceedings without representation.⁵⁴

In 1967, after a fifteen-year-old had been committed as a juvenile delinquent to state industrial school, the Supreme Court reversed, holding the teenager had a right to notice of charges, counsel, confrontation and cross-examination of witnesses, and to privilege against self-incrimination.⁵⁵ The Supreme Court said, “[t]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child requires the guiding hand of counsel at every [instance throughout the] proceedings against him.”⁵⁶

While the Court was referring to a juvenile who had committed a delinquent act, as compared to one who crossed the southern United States border without documentation, the same is no less true for a juvenile in immigration proceedings. Both are civil proceedings, and in both cases, the child does not have the capacity to fully understand his or her rights and the complex procedures he or she is facing. The government has recognized

⁵⁴ Legal Action Center, *How Can a Three Year Old Represent Himself in Court?* (Oct. 22, 2014), available at <http://immigrationimpact.com/2014/10/22/can-three-year-old-represent-court/> (the children plaintiffs in *J.E.F.M v. Holder* each attempted to find pro bono legal representation, but were unsuccessful).

⁵⁵ *In re Gault*, 387 U.S.1, 36 (1967).

⁵⁶ *Id.*

this need, as TVPRA recommends children's needs to be represented to the greatest extent possible.⁵⁷ Nevertheless, the vast majority is not afforded this kind of "guiding hand."⁵⁸

For this reason, legal organizations throughout the country, including the American Civil Liberties Union, American Immigration Lawyers Association ("AILA"), and American Bar Association ("ABA") Commission on Immigration, are calling for attorneys to aid the recent arrivals. Also, in response to the crisis, pro bono service providers are working with the government or are provided by the government. However, the increase in volume of UACs has meant many children cannot find representation,⁵⁹ further exasperating the need for government-sponsored attorneys appointed to UAC cases.

The United States Supreme Court has also recognized that immigrants are entitled to due process when facing deportation.⁶⁰ This ruling means the immigrant must be offered a full

⁵⁷ 8 U.S.C. § 1232(c)(5).

⁵⁸ *A Treacherous Journey*, *supra* note 14, at iii; "Like all others in removal proceedings, children have no right to legal counsel paid by the government. Most families don't have financial resources to hire a private attorney to represent them, thus many children are forced to navigate the complicated immigration law system by themselves." The RMIAN Reporter, *RMIAN Responds to Urgent Humanitarian Crisis of Unaccompanied Children in Colorado*, at 1 (Fall 2014).

⁵⁹ Abbie Johnson, Esq., Children's Program Managing Attorney with Rocky Mountain Immigrant Advocacy Network (RMIAN) in Colorado, Address in the Children's Asylum Training (Nov. 20, 2014) (reporting that just six months ago the organization was seeing fifteen UACs each month and is now seeing fifty. RMIAN held the training to encourage attorneys in Colorado to take on a UAC case pro bono.).

⁶⁰ *See Reno v. Flores*, 507 U.S. 292, 306 (1993) (arguing that respondents, a class of juvenile aliens arrested and in deportation proceedings, stated they have a right under the Constitution and immigration laws to be released into the custody of "responsible adults").

and fair hearing.⁶¹ However, in addition to UACs frequently facing language barriers, UACs also lack the maturity to decipher the legal processes or what it means for their future. So, while part of receiving a full and fair trial includes the ability to present defenses and forms of relief for which the UACs may be eligible, as outlined by the Supreme Court in *In re Gault*,⁶² children are “unlikely to understand the complex procedures they face or remedies available.”⁶³

To combat this, the guiding “best interest of the child” standard, which permeates United States courts in determining a wide range of issues relating to a child’s well being, is recommended by TVPRA.⁶⁴ Also, international human rights and refugee standards support the provision of legal counsel to UACs.⁶⁵ Nevertheless, as the system operates now, the majority of children are left unheard, unsupported, and lack an understanding of the proceedings they are in—which is hardly consistent with these international standards. This is illustrated through data, showing that when children are represented, about half are

⁶¹ See Immigration and National Relations Act § 240, 8 U.S.C. § 1229(a) (2006).

⁶² *In re Gault*, 387 U.S. 1, 36 (1967).

⁶³ *A Treacherous Journey*, *supra* note 14, at iii.

⁶⁴ Wilberforce, *supra* note 38, at §§ 104, 235.

⁶⁵ See generally International Covenant on Civil and Political Rights, Mar. 23, 1967, 999 U.N.T.S. 171, American Convention of Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 17955, United Nations Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3, and 1951 Refugee Convention and 1967 Protocol, Oct. 4, 1967, 606 U.N.T.S. 267, (demonstrating a few of the treaties that embody human rights standards, including refugee protections and children’s rights, recognizing the “best interest of the child principle” and supporting free legal counsel for UACs).

granted relief. However, when there is no attorney present, nine out of ten UACs are deported.⁶⁶

In the same way the United States Supreme Court precisely articulated a juvenile's inability to make skilled inquiry or submit a proper defense, it is this incapacity that undermines due process in the removal hearing of an unrepresented UAC. Children typically do not have the level of competency needed to exercise their rights, rendering those same rights meaningless. So, without an advocate to interpret the process to the child's level of comprehension or without counsel to guide the child through the system, a fair hearing cannot be accomplished. According to the U.S. Attorney General, Eric Holder, "[i]t is inexcusable that young kids . . . six, seven-year-olds, [fourteen]-year-olds have immigration decisions made on their behalf, against them, whatever, and they are not represented by counsel. That is simply not who we are as a nation. It's not the way in which we do things."⁶⁷

B. Mental and Developmental Incompetency

A shy, teenage boy stood in front of the judge planning to ask for a continuance so he could transfer to be with his family.

⁶⁶ *New Data on Unaccompanied Children in Immigration Court*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC), <http://trac.syr.edu/immigration/reports/359/> (July 15, 2014).

⁶⁷ *Oversight of the U.S. Department of Justice*, SENATE JUDICIARY COMMITTEE HEARING (March 6, 2013, at 1:28:30), <http://www.judiciary.senate.gov/meetings/oversight-of-the-us-department-of-justice-2013-03-06> (responding to questions regarding a Senate office hearing stories of six, seven, and eight-year-old children appearing in front of Immigration Judges by themselves, U.S. Attorney General Eric Holder said that he wants to come up with ways of assuring children have legal representation, but added it will be an issue of resources).

Instead, although eligible for “[v]oluntary [d]eparture,”⁶⁸ he agreed to be deported.⁶⁹ The teenage boy agreeing to deportation was the result of the child’s lack of expertise in formal courtroom proceedings and lack of an attorney by his side to help navigate the process.

In the 2013 decision of *Franco-Gonzalez v. Holder*, a class action lawsuit filed on behalf of hundreds of immigration detainees in California, Arizona, and Washington who suffer from mental disabilities, the court held that several lead plaintiffs had the right to legal representation.⁷⁰ The district court found that the plaintiffs’ mental incompetency hindered them from being able to reasonably participate in the court process.⁷¹

In *Franco-Gonzalez*, the court recognized that the plaintiffs did not seek relief from removal, but rather sought “only the ability to meaningfully participate in the immigration court process, including the rights to examine the evidence against the alien, to present evidence on the alien’s own behalf, and to cross-examine witnesses presented by the Government.”⁷² Following the *Franco-Gonzalez* decision, a federal judge ordered

⁶⁸ *Voluntary Departure*, UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES, <http://www.uscis.gov/tools/glossary/voluntary-departure> (last visited July 15, 2015) (“Voluntary Departure” is a departure from the U.S. without a removal order. “An alien allowed to voluntarily depart concedes removability but does not have a bar to seeking admission at a port-of-entry at any time.”). See generally Immigration and National Relations Act (INA) § 240, 8 U.S.C. § 1229(a) (2006).

⁶⁹ *Issue Packet: Protecting Unaccompanied Children*, AMERICAN IMMIGRATION LAWYERS ASSOCIATION at 8 (Mar. 9, 2005) <http://www.aila.org/in-fonet/aila-issue-packet-on-unaccompanied-children>.

⁷⁰ *Franco-Gonzalez v. Holder*, 2013 U.S. Dist. LEXIS 186258 (C.D. Cal. Apr. 23, 2013).

⁷¹ *Id.* at 22.

⁷² *Id.* (quoting 8 U.S.C. § 1229a(b)(4)(B)).

the government to implement a system to identify and protect detained immigrants with mental disorders.⁷³

For the same reasons the court in *Franco-Gonzalez* held that those suffering from mental illness deserve the right to understand and participate in proceedings as afforded by the regulations, unaccompanied children should also be afforded this right. Similar to a mentally incapacitated person who does not have the competency to understand the proceedings affecting his future, a six-year-old fails to have the requisite level of competency. Furthermore, in American society, parents are seen to have the right of control over children, as are guardians over those who are mentally handicapped. Yet, in immigration court, UACs without parents are making major and binding life decisions without being fully informed or understanding the consequences.

Within other legal context, minors and incompetent persons fall under Fed. R. Civ. P. 17(c) regarding capacity. In a situation with minors or incompetent persons, a court may appoint a guardian *ad litem* to protect the rights of these individuals. Throughout domestic proceedings, courts recognize this need for representation of children and for others who lack capacity to negotiate the system. Therefore, the same protections should be afforded to those originating in other countries who lack capacity. They face the same challenges as United States children and mentally incompetent United States citizens.

C. Lack of Crime Reporting and the Need for Child Welfare Experts to Protect UAC Victims

“I did [not] believe in police. I really believed what my trafficker said. My trafficker said they will put you in jail. They

⁷³ *Franco-Gonzalez v. Holder*, No. 2:10-cv-02211-DMG-DTB (C.D. Cal. Oct. 10, 2014) https://www.aclu.org/sites/default/files/asset/ord_dct_786_order_further_implementing_pi.pdf.

will send you back . . . [s]he said— in this country dogs have more rights. And I believe. I believe everything she said because she’s been living here for a long time, she knows. She speaks English. She has money, everything, and I didn’t have anything,” reported human-trafficking survivor “Esperanza.”⁷⁴

Esperanza is not alone in her fear to report that she is a victim. Often times, victims are reluctant to report their situation due to shame, mistrust of law enforcement, or fear of retribution.⁷⁵ This makes a conversation with a uniformed agent carrying a gun in the desert an unlikely place for a foreign child victim, lacking knowledge and trust of the system, to openly discuss fear or the harm he or she has suffered. Also, police corruption in the child’s home country may further add to this lack of trust.⁷⁶

In the United States, child citizens are afforded legal protections by virtue of their lack of maturity and development. Following the ideal to advocate in the “best interest” child standard, TVPRA granted government officials the authority to appoint an independent child advocate in cases of “child trafficking and other vulnerable unaccompanied alien children.”⁷⁷ Yet, while UACs, who are separated from parents and guardians when arriving in an unknown country and being immersed into an un-

⁷⁴ INT’L ASS’N OF CHIEFS OF POLICE, THE CRIME OF HUMAN TRAFFICKING: A LAW ENFORCEMENT GUIDE TO IDENTIFICATION AND INVESTIGATION, at 8, <http://www.theiacp.org/portals/0/pdfs/CompleteHTGuide.pdf> (noting that victims need to feel safe before being able to assist in an investigation, as well as the fact that a victim could be in danger for providing assistance. Building a relationship is necessary to gain the trust of the victim while taking care to not “re-traumatize” them.).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *A Treacherous Journey*, *supra* note 14, at iv.

known culture that speaks a foreign language, are frequently victims of trafficking or abuse, the government rarely grants a child an advocate and it is on a discretionary basis.⁷⁸

Across the board, children find it difficult “to initiate a conversation about something secret, confusing, distressful, and where there are few conversational routines in a family for talking about such themes.”⁷⁹ This was clear in a study regarding possible sexual abuse where children had a hard time finding enough privacy or prompts to share their experiences.⁸⁰ Techniques have been developed over time in order to assist in forensic interviews with children, as it is often difficult to obtain evidence in child abuse cases.⁸¹ One of the techniques used is rapport building, which is necessary for disclosure and evidence in a domestic child abuse case, and the same is true for children from other countries.⁸²

While the appropriate physical environment for an interview is essential to allow a child to feel safe to discuss protection needs, current facilities are failing to address this critical first step in a way that would solicit sensitive information regarding

⁷⁸ *Id.*

⁷⁹ Tine K. Jensen, *Child Abuse & Neglect, Reporting possible sexual abuse: A qualitative study on children's perspectives and the context for disclosure*, at 1395 (2005).

⁸⁰ *Id.*

⁸¹ See Robert Giles, *Behind the Net: Technology and the Forensic Interview*, at 1, National District Attorneys Association, (Nov. 2, 2012), http://www.ndaa.org/pdf/GreenUpdateV6N2_NDAA.pdf.

⁸² *Id.* at 2. Attorneys who work on UACs asylum cases also noted the importance of building rapport with child victims during the RMIAN *Children's Asylum Training* in Denver, CO (Nov. 20, 2014). “Two meetings are not going to cover it with a child. You need the time for trust,” said Lisa Fryman, Associate Director/ Managing Attorney for the Center for Refugee Studies.

persecution and trafficking as mandated by TVPRA.⁸³ In a UNHCR report, all of the UACs observed were screened in an open room by a computer, just feet from other stations.⁸⁴ A demanding official without proper training related to children also does not promote an inviting conversation, especially since children have a hard time communicating trauma in even the most private, comforting environment with child experts.⁸⁵ Further, the process does not provide for building of rapport, as the cases of Mexican UACs observed by the UNHCR showed the questioning to determine if the child was a victim of trafficking or persecution, along with the completion of a form, took all of ten minutes.⁸⁶

As studies have shown, environment is key to a child's ability to disclose his or her story.⁸⁷ Neither CBP stations nor crowded detention facilities are likely places for a child to dis-

⁸³ 8 U.S.C. § 1232(a)(2).

⁸⁴ UNHCR Findings and Recommendations, *supra* note 29, at 33 (the UNHCR found that, despite the availability of at least one private interview room, screenings of UACs occurred in a common processing area alongside other apprehended individuals).

⁸⁵ *Id.* at 5 ("The information gathered . . . led UNHCR to conclude that, while the law is clear regarding DHS's burden to establish that each Mexican UAC does not have an international protection need, CBP's operational practices, including new efforts to implement the TVPRA mandate to DHS, continue to reinforce the presumption of an absence of protection needs for Mexican UACs rather than a ruling out of any needs as required by TVPRA 08.").

⁸⁶ *Id.* at 37 (in one interview observed in the report, the officer was not fluent in Spanish, so he read from a translation, which left the child confused because some of the questions were directed to the official for response).

⁸⁷ Tine K. Jensen, Child Abuse & Neglect, *Reporting possible sexual abuse: A qualitative study on children's perspectives and the context for disclosure*, at 1395 (2005); Robert Giles, National District Attorneys Association, *Behind the Net: Technology and the Forensic Interview* at 1 (Nov. 2, 2012).

cuss trauma. Having untrained officials—in terms of child-sensitive interviews and understanding of trafficking cues⁸⁸—leads to violations of protections of UACs under TVPRA and international treaties.⁸⁹ To combat these issues, as in domestic cases involving child abuse, an office of child welfare experts is needed to oversee UAC interviews and cases. Also, because UACs are vulnerable by definition, child advocates should be appointed—not on a discretionary basis, but for all unaccompanied children—to aid in the process and treatment and to create a safe environment for those who are victims of human trafficking and persecution to tell their stories.

IV. GAPS IN RELIEF FOR VICTIMS OF PERSECUTION AND HUMAN TRAFFICKING

A. Asylum and Gang Recruitment as Membership in a Particular Social Group

Inconsistent judicial interpretation and application of child-sensitive interviews have led to the removal of many children who would have qualified for asylum if a child-sensitive approach had been binding on adjudicators.

Domestic violence, sexual abuse and incest, recruitment as child soldiers, slavery, and other human rights violations are reasons children seek asylum. Yet, while reports from advocacy organizations regarding the percentage of children who would

⁸⁸ UNHCR *Findings and Recommendations*, *supra* note 29, at 30.

⁸⁹ See the *International Covenant on Civil and Political Rights*, Nov. 29, 1968-Dec. 23, 1975, 999 U.N.T.S. 171; *American Convention of Human Rights*, *United Nations Convention on the Rights of the Child*, and *The 1951 Refugee Convention and 1967 Protocol*.

qualify for some sort of relief range from forty to eighty percent,⁹⁰ only a small number of the thousands of UAC arrivals request asylum.⁹¹ In fact, through the third quarter of fiscal year 2014, U.S. Citizenship and Immigration Services reported adjudicating 167 cases and granting asylum to 108 unaccompanied children, two of whom were apprehended in fiscal year 2014.⁹²

A child asylum applicant must meet the same standard as an adult for a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group where the government is the persecutor or cannot control the persecutor.⁹³ However, as children, they may not have the cognitive ability to discuss the traumatic events meeting this definition.

Furthermore, ethical issues arise when dealing with UACs, including their ability to participate in interviews based on age, developmental immaturity, language ability, capacity to consent, and inability to present testimony at the same level as

⁹⁰ Depending on the estimated percentage, the range of children who would qualify for some sort of relief in 2014 would be between 24,000 and 48,000. Annie Chen, *An Urgent Need: Unaccompanied Children and Access to Counsel in Immigration Proceedings*, Am. Bar Ass'n. (July 14, 2014), <http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2014-0714-urgent-need-unaccompanied-children-access-counsel-immigration-proceedings.html>); KIND in the Media, *Heath and Human Services Scrambling To Serve Influx of Undocumented Immigrant Kids* (July 2, 2014), <https://www.supportkind.org/en/kind-in-the-media/893-health-and-human-services-scrambling-to-serve-influx-of-undocumented-immigrant-kids>.

⁹¹ Ruth Ellen Wasem, CONG. RESEARCH SER., R43664, *Asylum Policies for Unaccompanied Children Compared with Expedited Removal Policies for Unauthorized Adults: In Brief*, at 2 (July 30, 2014), <http://trac.syr.edu/immigration/library/P8891.pdf>.

⁹² *Id.*

⁹³ 8 U.S.C. § 1158.

adults.⁹⁴ Other concerns include credible fear interviews conducted in the child's second language and challenged information leading to repeat interviews⁹⁵ where the child is being re-traumatized with each telling.⁹⁶ Based on these issues, while applying the same definition, an interview should be done in a manner factoring the child into the analysis.

In fact, the UNHCR has issued guidelines and urged adjudicators to recognize these added vulnerabilities.⁹⁷ However, because the guidelines are not binding, rulings vary greatly across the system—most notably in cases involving children's fears of gang persecution.⁹⁸ This is a major reason children seek asylum and it is on the rise due to the heightened organized crime violence.⁹⁹ But, whether victims of criminal gangs are found to be

⁹⁴ Harrington, Ashley et al., Representing Unaccompanied Children in Immigration Proceedings (July 2014).

⁹⁵ Ruby Powers, Esq., AILA Leadership Blog, *A Look into Karnes*, (Oct. 1, 2014), <http://www.lexisnexis.com/legalnewsroom/immigration/b/outside-news/archive/2014/10/01/a-look-into-karnes-ruby-powers-aila-leadership-blog.aspx> (Powers, a firm owner and AILA member who volunteered at the Karnes detention facility in Texas, noted that many of the detained immigrants spoke indigenous languages and thus had to communicate in their second language during credible fear interviews. "If an error is caught and challenged, this often turns into another round of credible fear interviews with the requisite wait time.").

⁹⁶ Lisa Green, Esq., partner at Green and Gardner LLC in Colorado, *Children's Asylum Training* in Denver, CO (Nov. 20, 2014) (children clients seeking asylum should be approached in a sensitive manner during an interview because each time the child talks about what happened he or she has to relive the trauma).

⁹⁷ UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, at 10 (Feb. 1997), <http://www.refworld.org/docid/3ae6b3360.html>, ("Children seeking asylum, particularly if they are unaccompanied, are entitled to special care and protection.").

⁹⁸ *A Treacherous Journey*, *supra* note 14, at 10.

⁹⁹ Lisa Green, Esq., partner at Green and Gardner LLC in Colorado, & Lisa Frydman, Esq., Associate Director/ Managing Attorney for the Center

in need of international protection, the definition of a refugee varies by specific circumstances and jurisdictional interpretations.¹⁰⁰ Circuits are split in their treatment of these minors during asylum proceedings.¹⁰¹

For instance, one immigration judge found that a fourteen-year-old girl suffered persecution after gang members threatened her at gunpoint and she witnessed the kidnapping of two girls from her school, later found dead.¹⁰² The ruling was based in significant part on her age at the time of this experience.¹⁰³ However, another immigration judge found a boy, who, while under the age of eleven, was “hounded at school by the gang members . . . and was personally threatened with death” and witnessed them beat his brother, did not suffer past persecution.¹⁰⁴ If the persecution were viewed through the eyes of an elementary-school child following a child-sensitive approach, the outcome would have been similar to the previously mentioned case.

“A lack of binding child-sensitive standards in children’s cases leads not only to inconsistent application of the standards, but to inconsistent decision-making, with disparate outcomes in cases with very similar facts.”¹⁰⁵ Moreover, asylum social group claims based on resistance to organized gangs are some of the most controversial.¹⁰⁶ Membership of a particular social group is determined by whether the group is described in a way that is

for Refugee Studies, *Children’s Asylum Training* in Denver, CO (Nov. 20, 2014).

¹⁰⁰ *Id.*

¹⁰¹ Hiroko Kusuda, Geoffrey Hoffman, & Tammy Lin, AILA 2014 Fundamentals of Immigration Law Conference Resources, *Asylum and Related Claims of Relief* (Oct. 17, 2014).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Kusuda *et al.*, *supra* note 101.

recognized in the society. Further, a nexus must be shown between the persecution and membership of a protected group in the definition of refugee.¹⁰⁷ The argument must clearly show that the relationship involves an immutable characteristic of the child, is not too broad, and that, within many jurisdictions, is socially visible.¹⁰⁸ This means that even if the child suffered egregious persecution, he or she may not be able to show it was on account of a protected ground, if the nexus is not clearly described or the group is not found to be socially visible or involving an immutable characteristic.¹⁰⁹

The UNHCR published guidelines specifically for gang-related asylum claims. The UNHCR, recommended that if a UAC from a gang-infiltrated Northern Triangle country can show the requisite persecution, membership based on immutable characteristics and social visibility should be found. “Young people of a certain social status are generally more susceptible to recruitment attempts or other violent approaches by gangs because of the characteristics that set them apart in society, such as their

¹⁰⁷ *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1091 (9th Cir. Ct. App. 2013).

¹⁰⁸ Lisa Frydman, Esq., Associate Director/ Managing Attorney for the Center for Refugee Studies, & Lisa Green, Esq., partner with Green and Gardner in Boulder, CO, *Children's Asylum Training* in Denver, CO (Nov. 20, 2014).

¹⁰⁹ Some examples of a particular social group include families, former child soldiers, persons with disabilities, gay men with female sexual identities, Guatemalan and Honduran street children, and persons who are HIV positive. Examples of immigration judge rejected social groups include affluent Guatemalans, former members of the military, non-criminal drug informants working against the Cali cartel, and cooperative taxi drivers. Kusuda, Hoffman, and Lin, *supra* note 101.

young age, impressionability, dependency, poverty, and lack of parental guidance.”¹¹⁰

Therefore, while the guidelines to both applying a child-sensitive approach and adjudicating gang-related asylum claims already exist in various places, the guidelines should be uniform and binding in proceedings and adjudication. Without consistent adjudication many children who would qualify in one jurisdiction will not in another. This system flaw sends child victims back into deadly situations. The flaw bases relief on the luck of geography and ability of the child to find an attorney that can articulate that child’s story in terms of the evidence required and precisely craft it to fit the definition.¹¹¹

B. Child Trafficking: A Lost Opportunity to Help and Look Beyond Initial Stories

Some of the most common forms of relief that UACs qualify for include asylum, Special Immigrant Juvenile Status,¹¹² and relief through T visas. The T visa was created specifically for victims of trafficking for the dual purpose of investigating

¹¹⁰ UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, at 12 (March 2010), <http://www.refworld.org/pdfid/4bb21fa02.pdf>.

¹¹¹ See Lisa Frydman, Esq., *supra* note 108. Frydman noted that a case involving threats without physical contact is often difficult to argue. She referenced a case that was appealed involving a child terrified by multiple death threats from a gang known to kill people. Without representation willing to appeal the decision, the child would have been removed.

¹¹² Special Immigrant Juvenile Status is a form of relief for children who have been abused, abandoned, or neglected. INA § 101(a)(27)(J). As children may qualify for more than one form of relief, initial screenings are important because SIJS is typically “less traumatic” on the child. Lisa Frydman, Esq., *supra* note 108.

crimes and protecting the victim.¹¹³ It may also be the most underutilized visa, not coming close to reaching its annual cap of 5,000,¹¹⁴ even though the U.S. Department of State estimates that more than 20,000 people are trafficked into the country each year.¹¹⁵

The stories recounted by children are some of the most harrowing told. For instance, in 2010, one victim's description of this vile aspect of life led the Department of Homeland Security to ask her to come to the United States to tell her story.¹¹⁶ She gave a horrifying account of how young girls were drugged, forced into prostitution, and then murdered. The girls described the cross-border Mexico-United States trade, and said regular orders for young children and babies came from the United States.¹¹⁷ Additionally, the UNHCR reports Mexico is a large source, transit, and destination for children subjected to sex and labor trafficking.¹¹⁸ Victims, particularly from Guatemala, Honduras, and El Salvador, many on route to the United States,

¹¹³ INA § 101(a)(15)(T)(i).

¹¹⁴ Cynthia Lucas, Dalia Castillo-Granados and Hiroko Kusuda, AILA Fundamentals of Immigration Conference in New Orleans, LA, *Humanitarian Relief* presentation (Oct. 17, 2014).

¹¹⁵ CNN, *Human Trafficking in Mexico Targets Women and Children*, (Jan. 13, 2010), <http://www.cnn.com/2010/WORLD/americas/01/13/mexico.human.traffic.drug/>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ UNHCR, *2013 Trafficking in Persons Report – Mexico* (June 19, 2013), <http://www.refworld.org/docid/51c2f3a314.html> (the report indicates that organized crime groups force children and migrants into prostitution, to work as hit men, and into the drug trade. Criminal organizations' threats of violence impede the Mexican government from effectively combating the trafficking to the point that the government is not in full compliance with even *minimum standards* for eliminating trafficking.) (emphasis added).

are exploited,¹¹⁹ and organized crime groups coerce children to work for them.¹²⁰

Unfortunately, help for these child victims are often dismissed when border officials do not look beyond a UAC's initial story. The UNHCR noted failed opportunities for further investigation, including one example of an unquestioned fifteen-year-old girl traveling with two unrelated adult men.¹²¹ In another case, while a friendly agent drove a Mexican girl processed for Voluntary Departure back to the border, she confessed her fear of the cartel that had been trying to force her into prostitution. The agent was concerned by what he heard, but felt he could do nothing because she had already been processed.¹²²

If a child can get past the initial hurdle of stating he or she is a victim of trafficking to a border official, another challenge lies in the path of the child victim. Inconsistencies in his or her story due to fear, trauma, or developmental maturity could later affect the UAC's ability to obtain relief.¹²³ Although studies show memories can shift due to trauma, a minute detail could lead to a denial by U.S. Citizenship and Immigration Services.¹²⁴ Advocates have reported interviews that drill children and immigration judges who question their credibility for this reason.¹²⁵

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ UN, *Findings and Recommendations*, *supra* note 29, at 44.

¹²² *Id.* at 24.

¹²³ Golden McCarthy, Esq., Children's Initiative Supervising Attorney at The Florence Project, *Representing Unaccompanied Minors* training in Phoenix, Arizona (July 25, 2014).

¹²⁴ Lisa Green, Esq., partner with Green and Gardner LLC in Boulder, CO, *Children's Asylum Training* in Denver, CO (Nov. 20, 2014) (emphasized the importance of noting inconsistencies or stating the child does not remember an exact detail and the reason why, because otherwise the case may be denied due to the inconsistency).

¹²⁵ *Id.*

The missed opportunities to assist trafficking victims and the lack of comprehension of the effects of trauma on a child again show the system is failing victims—which beyond the reports and observations is clear by the high volume of trafficking victims and minimal use of the T Visa. As the system currently operates, particularly for those entering from contiguous countries, the system is ineffective in addressing this population of UACs. For those from Mexico, questions asked in an intimidating environment of processing that takes ten minutes, does not lead to a proper determination of whether a child is a victim of human trafficking.¹²⁶

Furthermore, if currently proposed legislation takes effect,¹²⁷ the limited additional protections for UACs from the Northern Triangle could be taken away, putting them at the same risk as children from Mexico by allowing expedited removal. However, with an office of child welfare experts who understand the challenges and how to properly assess all children, as discussed in Part III-C, without discrimination by country proximity, the United States could better fulfill its stated commitment to end human trafficking.¹²⁸

V. AN UNCERTAIN FUTURE: POLITICALLY CHARGED UNDER-CURRENT PUTS CHILD PROTECTIONS AT RISK

A. *The Politicized Future of TVPRA*

¹²⁶ UN, *Findings and Recommendations*, *supra* note 29, at 37.

¹²⁷ *Asylum Reform and Border Protection Act of 2014*, H.R. 5137, 113th Cong. (2014),

¹²⁸ The White House Office of the Press Secretary, *Presidential Proclamation – National Slavery and Human Trafficking Prevention Month 2014*, (Dec. 31, 2013), <http://www.whitehouse.gov/the-press-office/2013/12/31/presidential-proclamation-national-slavery-and-human-trafficking-prevent>.

Following the 2014 summer release of shocking, child-crowded CBP station photos, the issues surrounding UACs gained political steam and debate flared. In July, lawmakers proposed a bill that would strip away current TVPRA protections.¹²⁹ A month later, the House passed H.R. 5230, a bill that would expedite procedures and thus remove critical legal protections of UACs from noncontiguous countries.¹³⁰

Expedited removal or a newly developed procedure to move these children quickly through the system would violate the United States' obligations under the UN Refugee Convention, UN Convention Against Torture, and other human rights principles by reducing the time available to access counsel and develop their case if they meet the elements for some form of relief.¹³¹ So, in response to the proposals, the American Immigration Council, American Civil Liberties Union, Northwest Immigrant Rights Project, Public Counsel, and K&L Gates LLP filed a lawsuit (*J.E.F.M v. Holder*) against the government for failure to provide attorneys in children's deportation hearings.

Also, as UAC cases have been prioritized,¹³² meaning they have been pushed through removal proceedings more rapidly,

¹²⁹ Asylum Reform and Border Protection Act of 2014, H.R. 5137, 113th Cong. (2014), <https://www.congress.gov/bill/113th-congress/house-bill/5137>.

¹³⁰ Making supplemental appropriations for the fiscal year ending September 30, 2014, and for other purposes, H.R. 5230, 113th Cong. (2014), <https://www.congress.gov/bill/113th-congress/house-bill/5230>.

¹³¹ See the *International Covenant on Civil and Political Rights*, *American Convention of Human Rights*, *United Nations Convention on the Rights of the Child*, and *The 1951 Refugee Convention and 1967 Protocol*. These are a few of the treaties that embody human rights standards, including refugee protections and children's rights recognizing the "best interest of the child principle" and supporting free legal counsel for UACs.

¹³² U.S. Department of Justice Memorandum, *Docketing Practices Relating to Unaccompanied Children Cases in Light of the New Priorities* (Sept. 10, 2014).

children are afforded less time to attempt to retain counsel.¹³³ These “rocket dockets” are giving children about three weeks before the first hearing and thirty to forty-five days until the next, compared to continuances in the past, which were usually four to six months.¹³⁴ Additionally, weakened protections for asylum seekers at the border have led to failures of immigration officials to comply with statutory mandates or to ignore expressions of feared persecution resulting in individuals giving up their claims.¹³⁵ Advocates responded to these issues and the proposed bills by enumerating the ways in which the changes would void fundamental victim protections. Instead of moving toward advocacy and child-sensitive procedures, the proposed changes would mean children victims would need to meet a higher standard and tell border patrol agents about their experiences within hours of arrival—an unlikely occurrence for the reasons laid out in Part III-C of this paper.¹³⁶

While reports disagree on the reasons UACs are coming in droves and cite misconceptions about U.S. immigrant laws and

¹³³ One UAC, who arrived with the summer surge and sought assistance at the Law Firm of Imelda Mulholland, LLC in Grand Junction, Colo., reported that an immigration judge granted her one extension. He told her that if she failed to retain counsel before the next hearing, a month later, she would be afforded no more time.

¹³⁴ Lisa Frydman, Esq., Associate Director/ Managing Attorney for the Center for Gender and Refugee Studies, *Children's Asylum Training* in Denver, Colo. (Nov. 20, 2014).

¹³⁵ Human Rights First, *How to Protect Refugees and Prevent Abuse at the Border*, at 10-13 and Appendix C (June 5, 2014), <http://www.human-rightsfirst.org/resource/how-protect-refugees-and-prevent-abuse-border>.

¹³⁶ Greg Chen, AILA, *Shame on Representatives Goodlatte (R-VA) and Chaffetz (R-UT) for proposing the Asylum Reform and Border Protection Act (H.R. 5137)* (July 23, 2014), <http://www.aila.org/content/default.aspx?docid=49509>.

a tactical shift by the cartels as primary factors besides violence,¹³⁷ this does not negate the need for child-sensitive procedures. Children have been coming for decades; a percentage of them have been trafficked into the country, fear of persecution in their home countries, abandonment and family violence,¹³⁸ and a percentage come seeking a better opportunity. Not all UACs will qualify for a form of relief, but all are children and deserve to be treated with care, concern, and protection due to their age and maturity and in order to ensure meaningful participation in the proceedings against them. Understanding their rights is a key aspect of a just system and necessary to protect the most vulnerable. Additionally, the only way to meet the country's obligations of refugee protection and desire to end human trafficking is to accurately assess children through child-sensitive procedures.

In response to those coming due to rumored immigration policies, this percentage may be reduced through educational campaigns and collaboration with their home countries. Providing immigrants with information regarding the limited opportunities to gain legal status, hardships they will face, and dangers of the journey may reduce the numbers of those who are not in need of international protections. In June 2014, a White House press release stated that the government will be collaborating on

¹³⁷ Louise Stewart, NEWSWEEK, *Leaked Report Claims Rumors About U.S. Law at Root of Border Crisis*, (July 17, 2014), <http://www.newsweek.com/leaked-intel-report-immigration-crisis-contains-both-iffy-informative-259598>; Rick Jervis, USA TODAY, *Tactical shift by cartels could be fueling migrant surge* (June 20, 2014), <http://www.usatoday.com/story/news/nation/2014/06/27/immigrant-youth-border-cartels/11423695/>.

¹³⁸ These first three reasons may lead to relief under a T-visa, asylum claim, or Special Immigrant Juvenile Status.

campaigns to address these issues,¹³⁹ and in September, the administration increased the number of refugee admissions for 2015, potentially providing UACs meeting the definition of a refugee, a safer path to the United States.¹⁴⁰

This collaboration and effort is part of the solution, but it does not address the needs of the recent arrivals, the children who will be trafficked into the country, or children who will continue to take on the dangerous journey to escape life-threatening situations. Instead, the way to address the needs of these children is to view the situation through human eyes and develop a system of child protections involving legal representation rather than diminish the current inadequate ones.¹⁴¹ As a senior staff attorney with the American Civil Liberties Union put it, “[t]hese children face an imminent threat of being deported, potentially to their death. . . . [t]o force them to defend themselves against a trained prosecutor with their lives literally on the line, violates due process and runs counter to everything our country stands for.”¹⁴²

¹³⁹ The White House Office of the Press Secretary, *Fact Sheet: Unaccompanied Children from Central America*, (June 20, 2014), <http://www.whitehouse.gov/the-press-office/2014/06/20/fact-sheet-unaccompanied-children-central-america>.

¹⁴⁰ The White House Office of the Press Secretary, *Presidential Determination on Refugee Admissions for Fiscal Year 2015*, (Sept. 30, 2014), <http://www.whitehouse.gov/the-press-office/2014/09/30/presidential-memorandum-fy-2015-refugee-admissions>.

¹⁴¹ Reps. Karen Bass & Ted Poe, THE HILL, *Both parties agree: Time to end human trafficking* (May 20, 2014), <http://thehill.com/blogs/congress-blog/judicial/206527-both-parties-agree-time-to-end-human-trafficking> (the Representatives who wrote this blog state that because Representatives are mothers, fathers, aunts, uncles, grandmothers, and grandfathers, this common bond unites them in a desire to protect children).

¹⁴² American Immigration Council, *Groups Ask Federal Court to Block Deportation Hearings for Children Without Legal Representation*, (Aug. 1, 2014) (quoting Ahilan Arulanantham, a senior staff attorney with the

B. Strain on System and Shift of Funds

In June, the government took a step toward providing counsel for UACs under age sixteen by deciding to issue two million dollars in grants, enrolling approximately one hundred lawyers and paralegals to represent immigrant children.¹⁴³ Although this is a positive move forward, the limited legal staff does not rise to serve the nation's need and is an attempted temporary fix, not a policy shift. Meanwhile, children are still forced to appear alone in court.¹⁴⁴

Currently, immigration courts have a backlog of more than 375,000 cases, taking an average of 589 days to be heard.¹⁴⁵ Annually, immigration judges can carry a docket of more than 2,000 cases.¹⁴⁶ Yet, while Congress has continually increased

ACLU's Immigrants' Right Project and the ACLU Foundation of Southern California)

¹⁴³ Kirk Semple, *NEW YORK TIMES*, *Youths Facing Deportation to be Given Legal Counsel*, (June 6, 2014), http://www.nytimes.com/2014/06/07/us/us-to-provide-lawyers-for-children-facing-deportation.html?_r=0 ("but even while applauding the new initiative, advocates pointed out that at best it would only touch on a fraction of all unaccompanied minors expected to appear in court in the coming months." Also, Jonathan Ryan, with the Refugee and Immigrant Center for Education and Legal Services in San Antonio, said that preschoolers appear in court alone, at times not even knowing where they are or what is going on.).

¹⁴⁴ Abbie Johnson, Esq., Children's Program Managing Attorney with Rocky Mountain Immigrant Advocacy Network (RMIAN) in Colorado, *Children's Asylum Training* in Denver, Colo. (Nov. 20, 2014).

¹⁴⁵ Diego Quezada, Center for American Progress, *Children Fleeing Central American Violence Need Access to Lawyers*, (Aug. 7, 2014), <http://www.americanprogress.org/issues/immigration/news/2014/08/07/95290/children-fleeing-central-american-violence-need-access-to-lawyers>.

¹⁴⁶ ABA Commission on Immigration, *A Humanitarian Call to Action, Unaccompanied Alien Children at the Southwest Border*, at 9, (Oct. 17,

funding for immigration enforcement, the adjudication system receives just two percent of the immigration enforcement budget.¹⁴⁷

Furthermore, lengthy delays mean individuals are more likely to fail to appear¹⁴⁸—an issue that could be combated by providing counsel. In the case of UACs, studies show 92.5% appear when represented compared to 27.5% of those who are not represented.¹⁴⁹ Also, a study conducted by NERA Economic Consulting regarding the provision of public counsel to indigent persons subject to removal proceeding determined that providing counsel would decrease the amount of time it takes to adjudicate a case.¹⁵⁰

The NERA study additionally found that providing counsel is a program that would pay for itself in lowered detention costs, reduced need for transportation, reduced foster care, and reduced legal orientation programs. While the study is incomplete and not solely targeted at the needs of UACs, it offers a foundation for which the already strained immigration system could

2014), <http://www.americanbar.org/content/dam/aba/administrative/immigration/UACStatement.authcheckdam.pdf>.

¹⁴⁷ *Id.*

¹⁴⁸ Human Rights First, *How to Protect Refugees and Prevent Abuse at the Border*, at 7 (June 2014), <http://www.humanrightsfirst.org/sites/default/files/Asylum-on-the-Border-final.pdf>.

¹⁴⁹ American Immigration Counsel Immigration Policy Center, *Taking Attendance: New Data Finds Majority of Children Appear in Immigration Court*, (July 29, 2014), <http://www.immigrationpolicy.org/just-facts/taking-attendance-new-data-finds-majority-children-appear-immigration-court>.

¹⁵⁰ Dr. John D. Montgomery, NERA Economic Consulting, *Cost of Counsel in Immigration: Economic Analysis of Proposal Providing Public Counsel to Indigent Persons Subject to Immigration Removal Proceedings*, (May 28, 2014), http://www.nera.com/content/dam/nera/publications/archive2/NERA_Immigration_Report_5.28.2014.pdf.

explore a shift in funds to provide a cost-effective program supporting the humanitarian protection needs of these children.

VI. CONCLUSION

This issue is not one of politics, but of human international protection. The tales of violence, persecution, and trafficking suffered by UACs are not uncommon, particularly as organized crime is widespread and increasing in Mexico, Guatemala, Honduras, and El Salvador. However, many of the stories will go unheard and UACs' suffering will fall on deaf ears. Instead of increasing international protections for this vulnerable population, the current and already inadequate protections are sitting on a chopping block.

The need for counsel and advocacy is not a new one, but the urgency to fill this need has doubled each year for the past three years. The system is failing UAC victims of trafficking and persecution, especially those from Mexico who will most likely never have their day in front of an immigration judge for the sole reason that the country shares a border with the United States. In the future, the same may be true for all UACs.

As a society, American values have been placed on protecting children by implementing the "best interest" standard and affording children more legal protections than adults. But, this is not the case if the child is an undocumented immigrant.

Another value held in high esteem in the United States is the importance of due process. But, it is one that is failing this population in immigration court.

Finally, a value of protecting the most vulnerable exists as demonstrated through government-funded programs and non-profit assistance organizations. This means now, when the need has reached an all-time high and thrust the issue in front of the public sector, is the time to remedy the system that is incon-

sistent with American values and afford all UACs counsel, advocates, and child-sensitive processes. This humanitarian crisis illustrates the need for additional resources directed toward adjudication, an office of child welfare experts to assist and assess UACs, and a shift from the political blame-game to accomplish reform in the shape of more than a Band-Aid.

EQUITABLE DEFENSES UNDER ARIZONA SECURITIES LAW

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Nearly all states refuse to read non-statutory, equitable defenses into their securities statutes. Early Arizona blue-sky cases also refused to consider equitable defenses. These state cases contrast with cases under the Securities Exchange Act of 1934, § 10(b), and the Securities Exchange Commission Rules under this section, including 17 C.F.R. § 240.10b-5 (“Rule 10b-5”). Because liability under § 10(b) and Rule 10b-5 is implied, neither the elements of proof nor the defenses are statutorily defined. Consequently, it was left to the courts to judicially define the elements and defenses. On the other hand, express-liability statutes like Ariz. Rev. Stat. § 44-1991(A) and § 44-2001(A) define the elements of proof by their words. These statutes are accompanied by other statutes that provide defenses like the statutes of limitation, reasonable care under § 44-2001(B), and failure to tender. After introducing the treatment of equitable defenses under state securities law, the article analyzes the Arizona Court of Appeals 2014 *Caruthers* decision. *Caruthers* broke with the near-uniform body of modern-state-securities law decisions that decline to recognize equitable defenses to statutory claims.

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I. INTRODUCTION

State and federal securities laws diverge considerably on the availability of common-law defenses.¹ Because the Rule 10b-5 cause of action was judicially implied, the federal courts were required to create defenses to define the action.² They did so by drawing on common-law defenses like waiver, ratification, estoppel, and failure to mitigate.³

On the other hand, blue-sky decisions under Arizona's pre-1951 securities laws refused to recognize equitable defenses.⁴ These blue-sky decisions are part of what has become a growing

¹See *Legacy Res., Inc. v. Liberty Pioneer Energy Source, Inc.*, 322 P.3d 683, 693 ¶42 (Utah 2013) (discussing the difference); Richard G. Himelrick, *The Importance of Statutory Text: From Scienter to Nonstatutory Defenses under Arizona Securities Law*, 41 ARIZ. ST. L.J. 49, 81-84 (2009) (same).

²Compare *Royal Air Props., Inc. v. Smith*, 312 F.2d 210, 213 (9th Cir. 1962) (reasoning that because liability under Rule 10b-5 was judicially implied, it is appropriate to permit common-law defenses like waiver and estoppel), with Louis Loss, *The Assault on Securities Act § 12(2)*, 105 HARV. L. REV. 908, 910 (1992) (explaining that the Rule 10b-5 elements of scienter, reliance, and causation were judicially created).

³See, e.g., *Hecht v. Harris, Upham & Co.*, 430 F.2d 1202, 1207-09 (9th Cir. 1970) (upholding findings of estoppel, laches, and waiver in a Rule 10b-5 action); *Royal Air Props., Inc.*, 312 F.2d at 213 (holding that waiver and estoppel are defenses in a Rule 10b-5 action); *Van Syckle v. C.L. King & Assocs., Inc.*, 822 F. Supp. 98, 101-04 (N.D.N.Y. 1993) (recognizing ratification and failure to mitigate as defenses to claims under Rule 10b-5).

⁴See *United Bank & Trust Co. v. Joyner*, 11 P.2d 829, 832 (Ariz. 1932) (rejecting ratification by estoppel and *in pari delicto* defenses to securities-registration violation); *Reilly v. Clyne*, 234 P. 35, 39-40 (Ariz. 1925) (same); Dale C. LaPorte, *Voidability Provisions Under State Blue Sky Laws*, 17 W. RES. L. REV. 1148, 1162-63 (1966) (describing the Arizona Supreme Court's decision in *United Bank* as representing the majority view under which a contract for the sale of securities that violates a statute's blue-sky law is unenforceable in an action against the investor).

body of state securities law that rejects non-statutory defenses.⁵

These decisions typically reason that reducing investor protection through equitable defenses is inconsistent with the legislature's intent to increase public protection in securities transactions.⁶ The cases also commonly note that unlike implied actions under Rule 10b-5, state securities acts include express,

⁵ See, e.g., *Legacy Res., Inc.*, 322 P.3d at 692-93 (holding that violations of a Utah securities statutes requiring registration of brokers are not subject to equitable defenses like waiver, estoppel, and *in pari delicto*); *Go2Net, Inc. v. FreeYellow.com, Inc.*, 143 P.3d 590, 591 (Wash. 2006) (holding that the equitable defenses of waiver and estoppel are not available in an action for violations of the Washington Securities Act's antifraud statute); *Duperier v. Tex. State Bank*, 28 S.W.3d 740, 753 (Tex. Ct. App. 2000) (holding that common-law ratification is not a defense to statutory-securities fraud under Texas law); *Gowdy v. Richter*, 314 N.E.2d 549, 557-58 (Ill. App. Ct. 1974) (rejecting estoppel and *in pari delicto* defenses to a registration violation because "[t]he law in Illinois is clear in allowing only statutory, not equitable, defenses to be raised by a defendant in a case involving a blue sky violation."); cf. *Henderson v. Hayden, Stone Inc.*, 461 F.2d 1069, 1072-73 (5th Cir. 1972) ((a) rejecting the trial court's conclusion that because the Florida registration "statute made the sale voidable, the court was vested with equitable discretion to deny rescission" and (b) finding that estoppel was inapplicable on the facts); *contra* *Logan v. Panuska*, 293 N.W.2d 359, 363-64 (Minn. 1980) (holding that equitable estoppel is a defense to a statutory-rescission action based on a registration violation (three judges dissenting)). See generally 12A JOSEPH C. LONG, BLUE SKY LAW § 9:126 (updated to Nov. 2015) (collecting cases and stating, "there is a substantial body of case law which holds that the equitable defenses have no place when construing statutory claims under the securities acts").

⁶ See, e.g., *Go2Net, Inc.*, 143 P.3d at 593 ("[P]ermitting a seller to assert equitable defenses is contrary to the [Washington] Act's primary purpose of protecting investors."); *United Bank*, 11 P.2d at 831-32 (observing that the blue-sky laws are intended to protect the public and rejecting ratification, estoppel, and *in pari delicto* as defenses).

statutory defenses.⁷ They therefore reject arguments that the courts are free to read additional defenses into the securities statutes.⁸ Anti-waiver statutes—like the one in the Arizona Securities Act⁹—have also been cited as a reason for refusing to recognize equitable defenses.¹⁰ The courts reason that allowing equitable defenses like waiver and estoppel is inconsistent with the statutory ban on waivers.¹¹

II. *CARUTHERS V. UNDERHILL*

In *Caruthers v. Underhill*,¹² a 2014 decision, the Court of Appeals broke with this line of reasoning. *Caruthers* held that equitable defenses are proper when rescissionary relief is sought.¹³ It also concluded that when equitable relief is sought for a securities violation, the plaintiff is not entitled to a jury trial.¹⁴

⁷*Legacy Res., Inc.*, 322 P.3d at 692-93 (concluding that recognizing equitable defenses was inconsistent with the Utah legislature's listing of specific statutory defenses); *Go2Net, Inc.*, 143 P.3d at 593 (“[B]ecause the [Washington] Act is intended to deter a seller's presale misrepresentations and omissions, a seller should not be permitted to avoid statutory liability by shifting the focus to the post-sale conduct of the uninformed investor.”).

⁸ See *Legacy Res., Inc.*, 322 P.3d at 692-93; *Go2Net, Inc.*, 143 P.3d at 593.

⁹ The Arizona statute, ARIZ. REV. STAT. § 44-2000 (2013), provides, “Any condition, stipulation or provision binding any person acquiring any security to waive compliance with this chapter or chapter 13 of this title or of the rules of the commission is void.”

¹⁰ See *Legacy Res., Inc.*, 322 P.3d at 693; *Go2Net, Inc.*, 143 P.3d at 593.

¹¹ See *Legacy Res., Inc.*, 322 P.3d at 693; *Go2Net, Inc.*, 143 P.3d at 593.

¹² *Caruthers v. Underhill*, 326 P.3d 268, 277-78 (Ariz. Ct. App. 2014).

¹³ *Id.* at 277-78 ¶¶ 38-40.

¹⁴ *Id.* at 275-76 ¶¶ 30-34.

Unlike most securities cases, the plaintiffs in *Caruthers* were sellers.¹⁵ They sold stock in a closely held corporation to one of the company's insiders, a man named Clinton.¹⁶ After the sale, plaintiffs alleged that Clinton had misled them about their stock's value.¹⁷ When Clinton refused to return the stock, plaintiffs sued on fraud theories including securities fraud under § 44-1991(A).¹⁸ Their pleadings requested rescission or, alternatively, damages.¹⁹ During trial, they elected rescission as their remedy.²⁰

A central issue on appeal concerned the scope of the plaintiffs' rights on their securities claim. Under the Arizona Securities Act, a defrauded seller may elect to void the sale and sue for damages. The statute reads:

A purchase or contract for purchase from a seller of securities made in violation of section 44-1842, 44-1991 or 44-1994 is *voidable at the election of the seller* of the securities, *and the seller may bring an action* in a court of competent jurisdiction *to recover the amount of the seller's damages*, with interest, taxable court costs and reasonable attorney fees.²¹

The parties in *Caruthers* disagreed about whether statutory rescission was governed by equitable principles.²² But both par-

¹⁵ *Id.* at 270 ¶ 2.

¹⁶ *Id.* at 271 ¶¶ 4-5.

¹⁷ *Id.* at 271 ¶ 4.

¹⁸ *Id.* at 271 ¶ 5.

¹⁹ *Id.*

²⁰ *Id.* at 271 ¶ 9.

²¹ ARIZ. REV. STAT. § 44-2002(A) (2013) (emphasis added).

²² See Appellants' Opening Brief, *Caruthers v. Underhill*, 326 P.3d 268 (2014) (No. 1 CA-CV 12-0618), 2012 WL 6743704, at *26-36 (arguing that

ties assumed that the statute permitted either rescission or damages.²³ The Court of Appeals also reached that conclusion. The court interpreted the statute's use of the word "voidable" to mean, "that the sale is subject to rescission or ratification at the seller's option."²⁴

This is one way to interpret the statute, but it is hardly a matter of plain meaning. The substance of what the court did was to imply a rescission remedy from the voidability language—for the statute nowhere expressly provides for rescission.

The federal courts have been more candid when interpreting similar voidability provisions. They have interpreted voidability language in the federal securities laws as *implying* a private right to sue for damages or rescission.²⁵ But none of the federal cases have suggested that a voidability provision is plain enough to expressly provide for either damages or rescission.²⁶

rescission under § 44-2002(A) is a statutory remedy and that equitable defenses cannot be read into the statute); Answering Brief, *Caruthers v. Underhill*, 326 P.3d 268 (2014) (No. 1 CA-CV 12-0618), 2013 WL 955586, at *38-42 (arguing that rescission under § 44-2002(A) is governed by common-law equitable principles).

²³ See briefs cited *supra* note 22.

²⁴ *Caruthers*, 326 P.3d at 276 ¶ 33.

²⁵ See 9 LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, *SECURITIES REGULATION* 369-81 (4th ed. 2013) (discussing federal interpretations of the voidability provisions).

²⁶ See, e.g., *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 18-19 (1979) (concluding that § 215 of the Investment Adviser's Act of 1940, which provides that contracts that violate the Act are void, implies a right to rescind an investment adviser's contract that violates the Act); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 386-88 (1970) (concluding that § 29(b) of the 1934 Act, which declares a contract that violates the Act void, implies a right to rescind where a materially misleading proxy statement has been used to complete a merger).

If limited to its words, § 44-2002(A) could reasonably have been interpreted to give the seller the option of rejecting the sale and suing for damages but not to provide for rescission. “Voidable” means only that a transaction is “capable of being affirmed or rejected at the option of one of the parties.”²⁷ It is only by implying a remedy that voidability can be expanded to provide for rescission.²⁸

The language of similar securities statutes also suggests that § 44-2002(A) was not drafted with rescission in mind. Unlike § 44-2002(A), securities statutes that expressly contemplate rescission require the plaintiff to tender what was received in the transaction. The Arizona Securities Act’s statute on buyers’ remedies is an example. It allows a defrauded buyer to recover the consideration that was paid but only upon tender of the securities.²⁹ Similarly, in states that allow a defrauded seller to

²⁷ BLACK’S LAW DICTIONARY 1805 (10th ed. 2014); *see Caruthers*, 326 P.3d at 276 (citing BLACK’S LAW DICTIONARY 350 (8th ed. 2004)); *see also* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2562 (1969) (defining “voidable” as “capable of being voided; *specif*: capable of being adjudged void, invalid, and of no force (“a ~ contract . . . may be set aside at the option of one party—S. B. Ackerman” (emphasis original))).

²⁸ *Cf. supra* notes 25-26 and accompanying text.

²⁹ *See* ARIZ. REV. STAT. § 44-2001(A) (2013) (emphasis added):

A sale or contract for sale of any securities to any purchaser in violation of § 44-1841 or 44-1842 or article 13 of this chapter is voidable at the election of the purchaser, and the purchaser may bring an action in a court of competent jurisdiction to recover the consideration paid for the securities, . . . *on tender of the securities purchased or the contract made*, or for damages if the purchaser no longer owns the securities.

While tender is mandatory, the courts have been flexible in finding that the plaintiff’s tender was sufficient. *See, e.g., Grand v. Nacchio*, 214 Ariz. 9, 23 ¶¶ 45-46, 147 P.3d 763, 777 ¶¶ 45-46 (Ct. App. 2006) (stating that the

rescind, the statutes are explicit in requiring the plaintiff to tender the consideration received in the sale.³⁰ Section 44-2002(A), on the other hand, does not mention tender—an omission that suggests the legislature did not contemplate rescission for sellers.

Another hallmark of securities statutes that allow rescission is that they explicitly provide for the recovery of what the plaintiff parted with in the sale. Arizona's statute on buyers' remedies is again on point. It is worded to give the buyer a choice of recovering "the consideration paid" or suing for damages.³¹ In addition, in states that allow a seller to obtain rescission, the statutes are clear in stating that the seller may sue for damages or to recover the securities that were sold.³² By contrast, § 44-2002(A), while explicitly allowing the seller to sue for damages, says nothing about allowing the seller to recover the securities that were sold.

securities laws should be liberally construed and allowing substitute tender of replacement securities); *Rose v. Dobras*, 128 Ariz. 209, 214, 624 P.2d 887, 892 (Ct. App. 1981) (holding that tender at commencement of suit was timely); *Bullard v. Garvin*, 1 Ariz. App. 249, 251, 401 P.2d 417, 419 (1965) (stating that § 44-2001 is to be liberally construed and rejecting the defendants' strict-tender argument).

³⁰ See, e.g., MICH. COMP. LAWS ANN. § 451.2509(3)(a) (2009) ("*The seller may maintain an action to recover the security*, any income received on the security, costs, and reasonable attorney fees determined by the court, *on the tender of the purchase price*, or for actual damages" (emphasis added)); MINN. STAT. ANN. § 80A.76(c)(1) (2008) (same); N.M. STAT. ANN. § 58-13C-509(C)(1) (2010) (same).

³¹ ARIZ. REV. STAT. ANN. § 44-2001(A) (2013) (quoted *supra* note 29).

³² See, e.g., MICH. COMP. LAWS ANN. § 451.2509(3)(a) (2009) ("*The seller may maintain an action to recover the security*, any income received on the security, costs, and reasonable attorney fees determined by the court, *on the tender of the purchase price, or for actual damages*" (emphasis added)); MINN. STAT. ANN. § 80A.76(c)(1) (2008) (same); N.M. STAT. ANN. § 58-13C-509(C)(1) (2010) (same).

Differences in § 44-2002(A)'s text and those statutes that expressly allow rescission suggest that *Caruthers* read more into the statute than the legislature intended. This judicial expansion of the statute's text is even more apparent in the court's analysis of the defenses to rescission. *Caruthers* implied a right to rescind and then limited the implied remedy by reading equitable defenses into § 44-2002(A). The court did so even though it recognized that the text of the Arizona Securities Act does not provide for equitable defenses.³³ The court also acknowledged other state-court decisions that have refused to add equitable defenses to their state's securities statutes.³⁴ *Caruthers*, however, found those cases unpersuasive and concluded that the existence of express, statutory defenses in the Arizona Securities Act was insufficient to, "demonstrate legislative intent to exclude other defenses to the *remedies* provided by § 44-2002(A)."³⁵

Caruthers focused upon its view that a rescission remedy, even when it arises under a statute, is governed by equitable principles.³⁶ With this equitable characterization as the cornerstone of its reasoning, the court cited the interpretative principle that the legislature does not ordinarily change the common law unless the legislature manifests an intent to make a change.³⁷ The court found no indication that the legislature intended such

³³ See *Caruthers v. Underhill*, 326 P.3d 268, 277-78 (Ariz. Ct. App. 2014). The court listed examples of express defenses that the legislature had enacted. See *id.* It also cited the Arizona Securities Act's statute that prohibits waivers of compliance with the Act. See *id.* (citing ARIZ. REV. STAT. ANN. § 44-2000 (2013)).

³⁴ See *id.* at 277-78.

³⁵ *Id.* (court's emphasis).

³⁶ See *id.* at 276 ("rescission is governed by equitable principles."); *id.* at 277-78 (distinguishing between defenses to liability and defenses to remedies).

³⁷ See *id.* at 276.

a change.³⁸ On that basis, the court concluded that the statutory right to rescission that it had implied was an equitable remedy subject to equitable defenses.³⁹

This conflicts not only with other states' court decisions⁴⁰ but also with Arizona decisions that *Caruthers* did not discuss.⁴¹ Section 44-2002(A) was originally enacted as part of the 1951 Securities Act.⁴² The 1951 Act was enacted because the existing laws did not adequately protect the public.⁴³ Unlike *Caruthers*, other Arizona cases have recognized that the legislature intended securities statutes to change the common-law by making securities fraud easier to prove.⁴⁴ Adding non-statutory, equitable defenses has the opposite effect. Even under the securities

³⁸ *Id.*

³⁹ See *id.* at 276-78; cf. *Rose v. Dobras*, 624 P.2d 887, 893 (Ariz. Ct. App. 1981) (affirming judgment awarding full rescission without reduction for equitable offsets asserted by defendant).

⁴⁰ See cases cited *supra* note 5 (collecting contrary decisions in other states).

⁴¹ See *infra* notes 44-45 and accompanying text.

⁴² See Richard G. Himelrick, *A Historical Introduction to Arizona's Securities Laws*, 7 ARIZ. SUMMIT L. REV. 679, 707 (2014) (discussing the background to the statute on seller's remedies).

⁴³ See Richard G. Himelrick, *Turning 60: Bud Jacobson, Earl Hastings, and Arizona's 1951 Securities Act*, ARIZ. ATTY., Dec. 2011, at 22, 23-27 [hereinafter Himelrick, *Turning 60*] (discussing the events leading to the Act's passage).

⁴⁴ See *Trump v. Badet*, 327 P.2d 1001, 1005 (Ariz. 1958) (stating that liability under § 44-1991 may exist "even though [the] evidence falls short of the necessary ingredients of common law fraud . . ."); *Aaron v. Fromkin*, 994 P.2d 1039, 1042 (Ariz. Ct. App. 2000) ("The legislature made the task of proving securities fraud much simpler than proving common-law fraud."); *Rose*, 624 P.2d at 892 ("A presence of the nine elements of common law fraud are not essential to establishing a violation of this section [ARIZ. REV. STAT. § 44-1991].").

statutes that preceded the 1951 Act, Arizona's courts had refused to allow securities violators to diminish public protection through equitable defenses.⁴⁵ There was, therefore, a considerable body of Arizona case law that supported the reasoning of state courts that refused to read equitable defenses into their securities statutes.

III. JURY TRIALS When RESCISSIONARY RELIEF IS SOUGHT

Caruthers' holding on the equitable nature of statutory rescission led to another significant change in Arizona securities law. The plaintiff in an equitable action does not have a right to a jury trial.⁴⁶ *Caruthers* thus held that there is no right to a jury trial when a securities plaintiff seeks rescissionary relief.⁴⁷ It accredited its holding by citing federal securities cases rejecting the right to a jury trial when the plaintiff seeks rescissionary relief.⁴⁸

A district court independently reached that same conclusion two months later in *In re Allstate Life Insurance Co. Litigation*, interpreting Arizona's securities statutes.⁴⁹ *Allstate* held, without citing *Caruthers* or discussing contrary authority that

⁴⁵ See *United Bank & Trust Co. v. Joyner*, 11 P.2d 829, 832 (Ariz. 1932) (rejecting ratification by estoppel and *in pari delicto* defenses to securities-registration violation); *Reilly v. Clyne*, 234 P. 35, 39-40 (Ariz. 1925) (same).

⁴⁶ See *Caruthers v. Underhill*, 326 P.3d 268, 276 (Ariz. Ct. App. 2014); cf. *Mill Alley Partners v. Wallace*, 341 P.3d 462, 463, 465 (Ariz. Ct. App. 2014) (holding in a nonsecurities case that parties do not have a right to a jury trial on equitable defenses like laches and estoppel).

⁴⁷ *Caruthers*, 326 P.3d at 276.

⁴⁸ See *id.* at 276 n.5 (citing *Royal Am. Managers, Inc. v. IRC Holding Corp.*, 885 F.2d 1011, 1019 n.4 (2d Cir. 1989) and *Arber v. Essex Wire Corp.*, 490 F.2d 414, 422-23 (6th Cir. 1974)).

⁴⁹ See *In re Allstate Life Ins. Co. Litig.*, 2014 WL 2804004, at *4 (D. Ariz. June 20, 2014) (holding in an action under the Arizona Securities Act

Caruthers found unpersuasive, that the defendants were entitled to present evidence on an equitable defense they had raised.⁵⁰

IV. CARUTHERS AND THE UNCERTAINTY OF STATUTORY INTERPRETATION

Securities cases commonly turn on statutory interpretation—a fact that, by itself, creates uncertainty in securities law.⁵¹ This occurs because Arizona courts, like all courts, lack a consistent theory of statutory interpretation.⁵² Instead, they pick and choose from an array of interpretative principles including textual analysis, legislative intent and purpose, canons of construction, and prior interpretations of the same or arguably similar statutes under state and federal case law.⁵³ Two canons used in *Caruthers* illustrate the lack of predictability that results.

that claims by bond purchasers for rescission or rescissory damages are equitable claims on which a Seventh Amendment right to a jury trial does not exist).

⁵⁰ See *id.* at *3. According to an earlier decision in the *Allstate* litigation, the equitable defense was based on defendants' allegations that the indenture trustee and one of the plaintiffs had damaged the bonds' value by diverting funds for debt service to litigation fees. See *In re Allstate Life Ins. Co. Litig.*, 2013 WL 5161688, at *49 (D. Ariz. Sept. 13, 2013).

⁵¹ See *True v. Stewart*, 18 P.3d 707, 712 (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)).

⁵² See *id.*; HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (stating that American courts have no "generally accepted and consistently applied theory of statutory interpretation."); accord ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 14 (1997) ("We American judges have no intelligible theory of what we do most.").

⁵³ See generally WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRET, *LEGISLATION AND STATUTORY INTERPRETATION* 9 (2000)

The first is the canon that unless the legislature clearly expresses an intent to change the common law, a court will presume that the statute did not change the common law.⁵⁴ *Caruthers* cited this principle to justify its conclusion that statutory rescission under § 44-2002(A) is subject to discretionary, equitable principles.⁵⁵ But a year earlier, in *Sell v. Gama*, the Arizona Supreme Court rejected the argument that common-law liability for aiding and abetting a securities violation was part of the Arizona Securities Act.⁵⁶ *Caruthers* could reasonably have cited *Sell* as authority for refusing to read common-law defenses into the Arizona Securities Act's remedies statutes.⁵⁷

The second canon is the principle of *expressio unius est exclusio alterius*; that is, the expression of one thing implies the exclusion of others.⁵⁸ *Caruthers* realized that other state courts had concluded that their legislature's enactment of statutory de-

(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).

⁵⁴ See generally ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 52 (2012) [hereinafter SCALIA & GARNER, READING LAW] (discussing the canon).

⁵⁵ See *Caruthers v. Underhill*, 326 P.3d 268, 276 (Ariz. Ct. App. 2014).

⁵⁶ See *Sell v. Gama*, 295 P.3d 421, 427 (Ariz. 2013) (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].”).

⁵⁷ The plaintiffs made this argument. See Appellants' Reply Brief, *Caruthers v. Underhill*, 326 P.3d 268 (2014) (No. 1 CA-CV 12-0618), 2013 WL 1564981, at *11.

⁵⁸ See generally SCALIA & GARNER, READING LAW, *supra* note 54, § 10 (discussing the canon).

fenses to securities fraud implied the legislature's intent to exclude non-statutory defenses.⁵⁹ *Caruthers* listed examples of defenses and limits on waiver that the legislature enacted as part of the Arizona Securities Act.⁶⁰ Even so, *Caruthers* dismissed the existence of these express defenses as an unpersuasive reason for applying the *expressio unius* canon to exclude non-statutory, equitable defenses. This contrasts with the same court's decision in an opinion less than four months later that refused to add equitable exceptions to a statute.⁶¹ In that case, the court supported its reasoning with the principle that the legislature's enactment of statutory exceptions implied the exclusion of equitable exceptions.⁶²

V. CONCLUSION

By reading equitable defenses into securities statutes, *Caruthers* represents a major change in Arizona securities law. The decision is questionable on several grounds. From the statutory text alone, it is far from clear that the legislature intended the reference to "voidable" in § 44-2002(A) to create a right to rescission, much less to imply equitable defenses. Early blue-sky decisions in Arizona refused to permit equitable defenses,

⁵⁹ *Caruthers*, 326 P.3d at 277.

⁶⁰ See *id.* at 277-78; see generally RICHARD G. HIMELRICK, ARIZONA SECURITIES LAW: CIVIL LIABILITY, DEFENSES, AND REMEDIES § 4.1.10.1 (4th ed. 2014) (discussing defenses under § 44-1991(A)).

⁶¹ *Rogone v. Correia*, 335 P.3d 1122, 1128 (Ariz. Ct. App. 2014) (holding that "a homestead is exempt from sale under a judgment except in certain expressly enumerated circumstances, none of which includes discretionary equitable considerations.").

⁶² *Id.* (explaining that "[g]enerally, when items are expressly articulated in a statute, the legislature is presumed to have intended to exclude those not listed.").

and a near-uniform body of modern-securities-law decisions rejects equitable defenses.⁶³ These decisions reason that implied equitable defenses should not be used to reduce the public protection that the enacted securities laws provide.⁶⁴ The cases also commonly note that implying equitable defenses on top of expressly enacted defenses is inconsistent with the way the legislature wrote the statutes.⁶⁵

Apart from the persuasiveness of these contrary decisions, *Caruthers* fails to offer a compelling reason for its own conclusion. *Caruthers*' reasoning centers on an assumption of logic in construing the word "voidable" to necessarily include equitable defenses. Beyond that, *Caruthers*'s use of the presumption against changing the common law seems dubious. After all, Arizona's securities laws were enacted precisely because the existing statutes and common-law rules did not adequately protect the public.⁶⁶

⁶³ See cases cited *supra* note 5.

⁶⁴ See *supra* note 6 and accompanying text.

⁶⁵ See *supra* notes 7-8 and accompanying text.

⁶⁶ See cases cited *supra* note 44; Himelrick, *Turning 60*, *supra* note 43, at 23-27.

CONCENTRATED ANIMAL FEEDING OPERATIONS:
THE FARMING INDUSTRY THREATENING ARIZONA'S LIMITED
NATURAL WATER RESOURCES

By: Ashley N. Garcia*

I. INTRODUCTION

Environmentalists often live by the teachings of Mahatma Gandhi in that Earth provides enough to satisfy every man's need, but not every man's greed.¹ As recent as the 1960s, Americans became aware of global environmental issues claimed to be caused by human activity. Still, people do not realize these issues are closer to home than they think. One major environmental impact that produces a significant amount of pollution and is rarely talked about is commercial farms. In particular,

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¹ Diane M. Jones, *The Greening of Gandhi: Gandhian Thought and the Environmental Movement in India*, in J. DONALD HUGHES, *THE FACE OF THE EARTH: ENVIRONMENT AND WORLD HISTORY* [need page citation] (Routledge 2015).

Concentrated Animal Feeding Operations (“CAFOs”) are becoming the norm in the United States as well as other parts of the world to raise livestock.²

The Environmental Protection Agency (“EPA”) defines CAFOs as “agricultural operations where animals are kept and raised in confined situations.”³ These farms are used to massively produce meat, eggs, milk, or other products for human consumption.⁴ One major difference between CAFOs and a traditional farm is that instead of the animals roaming or grazing freely within the farmlands, the animals are confined inside a modernized type barn with limited space to move around.⁵ CAFOs “congregate animals, feed, manure and urine, dead animals, and production operations on a small land area.”⁶ An operation is considered a large CAFO if it holds equal to or more than 700 mature dairy cows, 1000 beef cattle, 55,000 turkeys, or 125,000 chickens.⁷

² DANIEL IMHOFF, CAFO: CONCENTRATED FEEDING OPERATION, xi (Foundation for Deep Ecology ed., 2010).

³ *What is a CAFO?* U.S. ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/region07/water/cafo/> (last visited Mar. 15, 2015).

⁴ Carrie Hribar, *Understanding Concentrated Animal Feeding Operations and their Impact on Communities*, NATIONAL ASSOCIATION OF LOCAL BOARDS OF HEALTH, http://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf, 1 (last visited Apr. 12, 2015).

⁵ Susan M. Brehm, *From Red Barn to Facility: Changing Environmental Liability to Fit the Changing Structure of Livestock Production*, 93 CAL. L. REV. 797, 798 n. 2 (2005) (“Consider the California Milk Advisory Board advertisements that feature red barns and dairy cows freely wandering green pastures--“happy cows”--and compare this image to the reality of most dairy operations in California, which confine hundreds or thousands of animals in a single facility”).

⁶ IMHOFF, *supra* note 2.

⁷ *What is a CAFO?*, *supra* note 3; see also *Regulatory Definitions of Large CAFOs, Medium CAFOs, and Small CAFOs*, http://www.epa.gov/npdes/pubs/sector_table.pdf (last visited on Apr. 12, 2015). (According to the U.S. EPA, not all commercial feeding operations

Part II of this paper briefly covers the history of United States' population growth and how it created a market for factory farming. Part III introduces federal statutes resulting from environmental issues and how their purposes is to protect natural resources within the country for continued enjoyment by the people. Part IV will present Arizona statutes aimed to protect the State's environmental interest. Part V will discuss Arizona's desert landscape and water scarcity as well as CAFOs within the state. Part VI discusses the benefits of concentrated animal farming and why it is the most popular method of livestock production to date. Part VII is an in-depth discussion of alleged problems arising from CAFOs. Finally, part VIII of this paper discusses potential solutions to the growing problems connected to CAFOs within Arizona and how such solutions may be implemented.

II. HISTORY AND GROWTH OF THE UNITED STATES' POPULATION AND FARMING OPERATIONS

The first known migrating humans walked the earth estimated two million years ago.⁸ In the early years, humans hunted

are categorized as CAFOs. Smaller commercial farming operations are categorized as Animal Feeding Operations or AFOs. The difference between an AFO and a CAFO is determined by the number of animals on the land, the size of the land, and the number of days annually that an animal is confined; when an animal is confined for more than forty-five days out of the year, the operation is classified as a CAFO. The greater the number of animals in a smaller amount of land, the more likely the operation will be categorized as a CAFO.) *See also* Hribar, *supra* note 4, at 2 (explaining that an operation is classified as a CAFO by the way the operation discharges its waste into the local water supply).

⁸ *Introduction to Human Evolution*, SMITHSONIAN: NATIONAL MUSEUM OF NATURAL HISTORY, <http://humanorigins.si.edu/resources/intro-human-evolution>, (last visited Apr. 15, 2015).

animals and gathered plants.⁹ By 8500 B.C., humans developed farming for fruits and vegetables.¹⁰ By 7000 B.C., humans had domesticated sheep, pigs and soon after, cattle.¹¹ Until the eighteenth century, most livestock was slaughtered at the beginning of winter because winter did not enable farmers to grow enough food to feed their animals.¹²

In the year 1880, the United States population was an estimated fifty million people.¹³ As the population started to grow, so did developments in machinery, technology, and the demand for more food. By 1930, the United States population grew to just over 123 million people.¹⁴ According to the United States census, there were just under 310 million people living in the country in 2010.¹⁵ With these numbers tripling in a relatively

⁹ Tim Lambert, *A Brief History of Farming*, LOCAL HISTORIES, <http://www.localhistories.org/farming.html> (last visited Feb. 15, 2015) (stating that around 9,000 B.C. humans changed how they lived by developing farming techniques).

¹⁰ *Id.*

¹¹ *Id.* (stating that humans domesticated cattle by 6,000 B.C.).

¹² *Id.* (reasoning that the winter soil did not allow crops to grow until the later years of the eighteenth century when Dutch farmers started harvesting turnips which restored the soil and enabled crops to grow during the winter months, creating enough food to feed livestock).

¹³ *Pop Culture: 1880*, UNITED STATES CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/fast_facts/1880_fast_facts.html (last visited Feb. 15, 2015) (accounting for 50,189,209 people as of 1880 for the United States Census).

¹⁴ *Pop Culture: 1930*, UNITED STATES CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/fast_facts/1930_fast_facts.html (last visited Feb. 15, 2015) (accounting for 123,303,624 people as of 1930 for the United States Census).

¹⁵ *Pop Culture: 2010*, UNITED STATES CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/fast_facts/2010_fast_facts.html (last visited Feb. 15, 2015) (accounting for 308,745,538 people as of 2010 for the United States Census).

short amount of time, the population can only be expected to continue to grow.

As the demand for meat protein continued to grow and technology enabled factory operations, farming underwent a whole new operating system. The first known CAFO operated in the United States as early as 1946 in California,¹⁶ and since then, most Americans have received their chicken, beef, and pork from these feeding operations.¹⁷ With a rapidly growing and hungry population, technology developments enabled farming to operate more like factories rather than small family-owned farms.¹⁸ Factory-like technologies allow meat, eggs, and milk to be produced in massive amounts in a short period of time.¹⁹ For instance, in 1920, it took on average sixteen weeks for a chicken to reach just under two-and-a-half pounds, whereas now it takes about seven weeks for a chicken to reach five pounds.²⁰

There are many companies that utilize CAFO operating systems in order to massively produce their products. For example, Smithfield's Foods, founded in 1936, started off as a small family-run meat packaging plant.²¹ Today, it operates roughly a dozen subsidiary meat packaging companies such as, Armour, Margherita, Farmland, and Healthy Ones.²² With locations throughout the United States, Mexico, and Europe, Smithfield

¹⁶ Kelly J. Donham et al., *Community Health and Socioeconomic Issues Surrounding Concentrated Animal Feeding Operations*, 115 ENVTL. HEALTH PERSP. 2, 317, 317-20 (Feb. 2007), <http://www.jstor.org/stable/4133137>.

¹⁷ JoAnn Burkholder et al., *Impacts of Waste from Concentrated Animal Feeding Operations on Water Quality*, 115 ENVTL HEALTH PERSP. 2 (Feb. 2007), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1817674/>.

¹⁸ Hribar, *supra* note 4.

¹⁹ *Id.*

²⁰ *Id.*

²¹ SMITHFIELD FOODS, <http://smithfieldfoods.com/our-company/our-locations/> (last visited Mar. 15, 2015).

²² *Id.*

provides meat products to millions of families throughout the world.²³

As of 2010, Murphy-Brown, a Smithfield's subsidiary, was considered, and still remains, the largest hog producer in the United States and the *world*.²⁴ Another leading, massive meat producer is Pilgrim's Pride.²⁵ Pilgrim's Pride employs 48,000 workers within 4000 family farms throughout the United States and Mexico.²⁶ "As the second-largest chicken producer in the world, Pilgrim's has the capacity to process more than thirty-four million birds per week for a total of more than over seven billion pounds of live chicken annually."²⁷

Farming on such large scales has made traditional farm terminology diminish. CAFO operators call their buildings "production facilities," not farms, and animals are called "production units."²⁸ Operations like these are able to produce enormous amounts of product more efficiently than traditional farms due to technological improvements of animal breeding, mechanical innovations, feed, and antibiotics.²⁹

²³ *Id.* (Its mission is to "be an ethical food industry leader that excels every day at bringing delicious and nutritious meat products to millions of people around the world in a manner that sets industry benchmarks for sustainability." Smithfield's animal care policy has a "zero tolerance policy for animal abuse or mishandling. Willful neglect or abuse of animals by any employee is grounds for immediate dismissal and possible criminal prosecution." Murphy-Brown, with the help of 6,000 employees, is able to produce seventeen million hogs each year.)

²⁴ IMHOFF, *supra* note 2, at 39.

²⁵ *About Pilgrim's*, PILGRIM'S, <http://www.pilgrims.com/our-company/about-us.aspx> (last visited Mar. 15, 2015).

²⁶ *Id.*

²⁷ *Id.*

²⁸ IMHOFF, *supra* note 2, at 39.

²⁹ Hribar, *supra* note 4, at 1.

III. CURRENT FEDERAL REGULATIONS

The United States EPA has authority to set various environmental standards that each state must meet through an implementation plan or else the EPA will preempt that state with its own regulation directly on industries within the state.³⁰ Federal environmental laws overall seek to “avoid possible catastrophic results and to compensate for the uncertain[ty] of environmental science.”³¹ Richard Lazarus provides, “[m]uch of environmental law, particularly the environmental standards themselves, are based on ‘scientifically informed value judgment.’”³² Lazarus also notes that in order for environmental laws and standards to remain effective, “momentum towards change is constant.”³³

In 1972, the EPA enacted the Federal Water Pollution Control Act, more commonly known as the Clean Water Act (“CWA”).³⁴ It provides for federal, state, and local municipalities to develop “programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters.”³⁵ The objective was to prevent pollution point and non-point sources from disrupting the biological integrity within the waters of the country, specifically, “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”³⁶ A “point source” is considered “any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock,

³⁰ See, e.g., 33 U.S.C §1313.

³¹ Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2423-38 (1995).

³² *Id.*

³³ *Id.*

³⁴ 33 U.S.C. §§ 1251, 102(a) (2002).

³⁵ *Id.*

³⁶ *Id.*

concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft that discharge pollutants.”³⁷ It is important to note that point sources do not include return flows from irrigated agriculture or agricultural storm water runoff.³⁸

The CWA does not specifically apply to ground water, which makes up roughly forty-four percent of Arizona’s water sources.³⁹ This raises a concern about relying on federal regulations to protect a state’s ground water supplies. An example of this difficulty is the case *United States v. Earth Sciences, Inc.*, where the Tenth Circuit held that the purposes of the CWA require a broad reading of “point source,” which is a source that emits pollution.⁴⁰ Point sources require permits, while nonpoint sources do not require permits. Therefore, the CWA does not federally regulate nonpoint sources.⁴¹

Congress did, however, pass an act specifically applicable to ground water—the 1974 Safe Drinking Water Act (“SDWA”).⁴² The goal of the SDWA was “to protect public health by regulating the nation’s public drinking water supply.”⁴³ The need for the SDWA arose from improper disposal of chemicals, animal wastes, pesticides, human wastes, water injected deep underground, and naturally occurring substances.⁴⁴ As such, “drinking water that is not properly treated or disinfected, or which travels through an improperly maintained distribution system,

³⁷ 40 C.F.R. § 122.2 (2015).

³⁸ *Id.*

³⁹ See *Infra* pp. 13-14 and notes 78-90.

⁴⁰ *United States v. Earth Scis., Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

⁴¹ See *Id.*

⁴² 42 U.S.C. § 300(f) (1996).

⁴³ *Understanding the Safe Drinking Water Act*, EPA 1 (June 2004) <https://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf>.

⁴⁴ 78 AM. JUR. 2D *Waterworks and Water Companies* § 42 (2015).

may . . . pose a health risk.”⁴⁵ As a result, if a CAFO discharges into navigable waters, its owner must apply for and obtain a permit in order to lawfully operate the CAFO under the SDWA.⁴⁶

IV. CURRENT ARIZONA LAWS AND REGULATIONS

While federal agencies like the Environmental Protection Agency have taken steps to regulate and improve water quality within the country, it is each state’s responsibility to follow federal regulations properly.⁴⁷ The EPA granted the Arizona Department of Environmental Quality (“ADEQ”) the rights and responsibilities of ensuring that Arizona’s drinking water complies with EPA standards.⁴⁸ Although states have a duty to follow EPA regulations, local municipalities alone are responsible to ensure drinking water quality.⁴⁹ In short, local governments are responsible for making sure household water meets EPA standards.

Within Arizona, there are several applicable drinking water rules, such as Title 18, Chapter 4, of the Arizona Administrative Code.⁵⁰ Arizona adopted the federal rules to maintain primary enforcement authority of EPA standards.⁵¹ The ADEQ holds

⁴⁵ *Understanding the Safe Drinking Water Act*, *supra* note 40.

⁴⁶ Terence J. Centner, *Courts and the EPA Interpret NPDES General Permit Requirements for CAFOs*, 38 ENVTL. L. 1215, 1217 (Fall 2008) (highlighting that water pollution from CAFOs has been a legislative topic since the 1990s considering that CAFOs are a major contributor to impaired water quality).

⁴⁷ 33 U.S.C §1313.

⁴⁸ *Water Quality Division: Safe Drinking Water: Drinking Water*, ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY, <http://www.azdeq.gov/environ/water/dw/rules.html> (last visited Feb. 15, 2015).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

authority under A.R.S. § 49-353(A)(2)(a), which requires ADEQ to “create rules which implement the federal safe drinking water program.”⁵² Specifically, the statute provides that the ADEQ director shall prescribe rules regarding the “treatment, distribution and testing of potable water by public water systems, except that such rules shall not apply to irrigation, industrial or similar systems where the water is used for nonpotable purposes.”⁵³ The director’s rules shall meet the EPA’s requirements established for the state’s primary SDWA enforcement responsibility.⁵⁴ The director alone shall make rules ensuring water is safe for public use and complies with federal laws.⁵⁵

The Arizona statute also references the Code of Federal Regulations, chapter forty, titled “Protection of the Environment.”⁵⁶ Section 141, “National Primary Drinking Water Regulations,” provides that the statute applies to drinking water as it relates to the SDWA.⁵⁷ Section 142 implements section 141 and provides that states shall be the primary enforcers for public water systems.⁵⁸ The water quality standards of article two, chapter two, “Water Quality Control” also provide:

The director shall consider, but not be limited to, the following:

1. The protection of the public health and the environment.

⁵² *Id.*

⁵³ ARIZ. REV. STAT. ANN. § 49-353(A)(2) (2015).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 40 C.F.R. (2015).

⁵⁷ 40 C.F.R. § 141.1 (2015).

⁵⁸ 40 C.F.R. § 142.10 (2015).

2. The uses which have been made, are being made or with reasonable probability may be made of these waters.

3. The provisions and requirements of the clean water act and safe drinking water act and the regulations adopted pursuant to those acts.

4. The degree to which standards for one category of waters could cause violations of standards for other, hydrologically connected, water categories.

5. Guidelines, action levels or numerical criteria adopted or recommended by the United States environmental protection agency or any other federal agency.

6. Any unique physical, biological or chemical properties of the waters.⁵⁹

Title three of the Arizona Revised Statutes is fully devoted to agriculture regulation within the State.⁶⁰ Under Arizona law, CAFOs are known as *feed lots*, which the law defines based on two criteria: (a) “beef cattle feed lot or feed yard, having more than five hundred head of beef cattle at one time” or (b) “any other beef cattle feed lot whose operator elects to come under this article.”⁶¹ In order for someone to lawfully operate a feed lot, that person must obtain a license from the Department of Agriculture, unless the feed lot has less than 500 heads of beef cattle.⁶² Title three also states that a licensed owner or operator shall, “provide adequate drainage of surface waters falling

⁵⁹ ARIZ. REV. STAT. ANN. § 49-221(C) (2015).

⁶⁰ ARIZ. REV. STAT. ANN. § 3 (2015).

⁶¹ ARIZ. REV. STAT. ANN. § 3-1451(2) (2015).

⁶² ARIZ. REV. STAT. ANN. § 3-1452(A)-(B) (2015).

upon the area occupied by such feed lots” and “provide adequate services for detection control and treatment of beef cattle diseases.”⁶³

Arizona law also provides a method for the inspection of feed lots, however, the law does not specify inspection intervals (e.g., monthly or annually).⁶⁴ The law states that livestock officers and inspectors shall inspect livestock unless the operation is authorized for “self-inspection.”⁶⁵ The only place within the named methods for a set inspection time is when an owner is notified that an inspection will occur.⁶⁶ From that point, officers and inspectors must commence the inspection within forty-eight hours.⁶⁷ Without a set period for routine inspections, it is difficult for the public to easily know whether feed lots routinely meet regulatory inspection standards.

Federal courts have heard cases regarding whether CAFOs are point sources under federal regulations.⁶⁸ If a CAFO is not a point source, then the owners are not responsible for the pollution the CAFO emits and do not need a permit.⁶⁹ Arizona law leaves no room for debate, providing that a CAFO *is* a point source and therefore does require a permit to operate.⁷⁰ Under title forty-nine of the Arizona Revised Statutes, it is unlawful to discharge (any

⁶³ ARIZ. REV. STAT. ANN. § 3-1454(A)(3)-(4) (2015).

⁶⁴ ARIZ. REV. STAT. ANN. § 3-1332(A) (2015).

⁶⁵ *Id.*

⁶⁶ ARIZ. REV. STAT. ANN. § 3-1332(B) (2015).

⁶⁷ *Id.*

⁶⁸ *United States v. Earth Scis, Inc.*, 599 F.2d 368 (10th Cir. 1979).

⁶⁹ *Id.* at 371.

⁷⁰ ARIZ. REV. STAT. ANN. § 49-201(27) (2015) (emphasis added). *See also* ARIZ. DEP’T OF ENVTL. QUALITY, *Fact Sheet for the Issuance of Arizona Pollutant Discharge Elimination System*, 29 (Apr. 16, 2004), <http://www.azdeq.gov/environ/water/permits/download/cafogp.pdf>.

addition of any pollutant) from any point source to a “navigable water or waters of the U.S.”⁷¹ Specifically, the law defines a point source as “any discernible, confined and discrete conveyance, including but not limited to, any pipe, ditch, [or] . . . *concentrated animal feeding operation* . . . from which pollutants are or may be discharged to navigable waters.”⁷²

An Arizona Supreme Court case held that a CAFO, or feed lot, may be considered a nuisance. In *Spur Industries, Inc., v. Del E. Webb Development Co.*, appellee (“Webb”) complained that Spur’s feeding operation was a public nuisance because of the flies and odor blowing in the direction of the homes in Sun City, Arizona.⁷³ At the time the suit commenced, Spur was feeding roughly 20,000-30,000 head of cattle.⁷⁴ Trial testimony provided that “cattle in a commercial feed lot will produce between 35 to 40 pounds of wet manure per day, per head, or over a million pounds of wet manure per day for 30,000 heads of cattle.”⁷⁵ That testimony also showed that those numbers are despite the owner’s attempt to maintain good housekeeping practice.⁷⁶

The court recognized that Sun City predominately houses retired senior citizens.⁷⁷ The court noted that because of the foul odor and swarming flies, it was likely

⁷¹ ARIZ. REV. STAT. ANN. § 49-255.01(F) (2015).

⁷² ARIZ. REV. STAT. ANN. § 3-1332(B) (2015).

⁷³ *Spur Indus., Inc., v. Del E. Webb Dev. Co.*, 494 P.2d 700, 705 (Ariz. 1972).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

that the senior residents could not enjoy the type of outdoor living Arizona usually allows.⁷⁸ However, Sun City's residents were not suing. Rather, the housing developer, Webb, was suing because of lost profit concerns it had after difficulty selling homes due to the neighboring feeding operation.⁷⁹ Regardless, the Supreme Court of Arizona held that Webb was entitled to enjoin the cattle feeding operations as a nuisance, but it was "required to indemnify [the] cattle feeder for the reasonable cost of moving or shutting down."⁸⁰

V. CAFOS INSIDE OF ARIZONA'S DESERT LANDMASS

Arizona is a relatively young state compared to most states in the union. Even more so when compared to its neighboring, well-established state, California, which is more than fifty years older.⁸¹ Currently, California has more dairy cows and CAFOs than any other state in the country.⁸² CAFOs within California produce as much untreated solid waste as 456 million people, which consists of more than the entire U.S. population.⁸³

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 700.

⁸¹ *States and their Admission to the Union*, About.com, http://americanhistory.about.com/od/states/a/state_admission.htm (Dec. 31, 2015). Arizona entered the union in 1912, while California was admitted in 1850, a difference of sixty-two years.

⁸² Doug Gurian-Sherman, *CAFOs Uncovered: The Untold Costs of Confined Animal Feeding Operations*, USC Publications (Apr. 2008), http://www.ucsusa.org/sites/default/files/legacy/assets/documents/food_and_agriculture/cafos-uncovered.pdf (stating, in 2007, California hosted approximately 1,677,983 dairy CAFOs); see Factory FARM MAP, <http://www.factoryfarmmap.org/#animal:all;location:CA;year:2007> (last visited Mar. 15, 2015).

⁸³ *California Facts*, FACTORY FARM MAP, <http://www.factoryfarmmap.org/states/ca/> (last visited Mar. 15, 2015) (taking into account the

Unfortunately, the much younger state of Arizona is not far behind California in producing manure within CAFOs. As provided earlier, CAFOs are defined based on the number of animals within their lands, the size of the land, and how long that animal is confined during production.⁸⁴ Additionally, CAFOs use the lagoon method to dispose of animal waste, which has the potential to leak into the local ground water if not maintained properly.⁸⁵ Once the lagoon water leaks into the local ground water, it becomes contaminated and hazardous to drink.

The climate in central and southern Arizona is ideal for agriculture due to its lack of freezing temperatures⁸⁶ and over three-hundred days of sunshine.⁸⁷ Arizona, more so than other rural states, operates factory farms on an extreme level, considering it is a desert state with limited natural water resources. In 2007, Arizona held approximately 367,000 cows for human consumption within CAFOs.⁸⁸

1.7 million dairy cows, 563,000 beef cattle, 131,000 hogs, 49.6 million broiler chickens, and 19.7 million egg-laying hens within the farms).

⁸⁴ See *supra* note 7.

⁸⁵ Carrie Hribar, *Understanding Concentrated Animal Feeding Operations and their Impact on Communities*, NATIONAL ASSOCIATION OF LOCAL BOARDS OF HEALTH 7, http://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf (last visited Apr. 12, 2015) (explaining that CAFOs use lagoons, which are large pits in the ground to store the waste produced from the animals, which contributes to the production of greenhouse gases, and contributes to the odor CAFO neighbors can smell from five to six miles away).

⁸⁶ *Farming and Ranching*, THE ARIZ. EXPERIENCE, <http://arizonaexperience.org/land/farming-and-ranching> (last visited Oct. 14, 2015).

⁸⁷ Climate Phoenix-Arizona, U.S. CLIMATE DATA, <http://www.usclimatedata.com/climate/phoenix/arizona/united-states/usaz0166> (last visited Oct. 25 2015) (documenting thirty-six days of participation in Phoenix annually). Three-hundred sixty-five minus thirty-six equals three-hundred twenty-nine days of sunshine annually in Phoenix.

⁸⁸ FACTORY FARM MAP, <http://www.factoryfarmmap.org/#animal:all;location:AZ;year:2007> (last visited Oct. 16, 2015).

While Arizona does not host a Murphy-Brown or Pilgrim's operation, Arizona still produces a significant amount of animal products within CAFO facilities.⁸⁹ The 2012 Census of Agriculture lists Arizona as the thirteenth largest milk producer in the nation.⁹⁰ Arizona CAFOs are in a highly concentrated area of the state. According to the EPA, seventy to ninety percent of all Arizona CAFOs are within Pinal, Yuma, and Maricopa⁹¹ Counties.⁹² The average Arizonan dairy-producing factory-farm has an estimated 2,700 dairy cows.⁹³ The Food and Drug Administration calculated that dairy cows, beef cattle, and hens raised within Arizona CAFOs produce as much waste as seventy-seven million people.⁹⁴ Even more significant, Maricopa County dairy cows alone produce as much waste as 20 million people--more than twice the state's entire population.⁹⁵ With hundreds to thousands of animals in a confined space, the animal waste cannot be disposed of properly causing it to leak into the local ground water.⁹⁶

CAFOs threaten Arizona's limited water resources because of the desert environment. Less than one-half of one percent of Arizona's area consists of bodies of water, making water too

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Home to the State's capitol, Phoenix.

⁹² Arizona State Profile, 2012 CENSUS OF AGRIC., http://www.agcensus.usda.gov/Publications/2012/Online_Resources/County_Profiles/Arizona/cp99004.pdf (last visited Mar. 16, 2015). This is a significant drop from 1997 when the Census of Agriculture listed Maricopa County as the seventh largest milk producer. *See also Arizona Animal Waste Management*, EPA: PAC. SW., REGION 9, <http://www.epa.gov/region9/animalwaste/arizona.html> (last visited Oct. 14, 2015).

⁹³ *See, supra* note 73.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *See infra* note 103.

precious to contaminate.⁹⁷ Arizona gets roughly a quarter of its water from the Colorado River, which is running low.⁹⁸ However, about half of Phoenix's water supply comes from the Colorado River and Lake Mead.⁹⁹ Another forty-four percent of Arizona's water comes from ground water resources.¹⁰⁰ In other words, nearly half of the state's water comes from ground water. Roughly seventy percent of Arizona's water supply is devoted to agriculture.¹⁰¹ However, only an estimated twenty-five percent of Arizona's water is used for municipalities.¹⁰² These statistics are alarming considering that Arizona uses more than half its water to raise food, instead of giving it to local municipalities.

These numbers should concern the residents of the Valley of the Sun. Even though Phoenix and surrounding municipalities obtain most of their water from surface sources,¹⁰³ people living within the valley, are living within the same areas of land where CAFOS produce great amounts of waste and polluting the indispensable ground water source. Residents can continue to survive so long as there is clean water to drink. Once the local water is irreversibly contaminated, health and life can rapidly decline. According to Dr. Bob England, the director of

⁹⁷ *How Much of Your State is Wet?*, USGS, <http://water.usgs.gov/edu/wetstates.html> (last visited Oct. 14, 2015).

⁹⁸ Collin Schultz, *Arizona Could Be Out of Water in Six Years*, SMITHSONIAN (June 20, 2014), <http://www.smithsonianmag.com/smart-news/arizona-could-be-out-water-6-years-180951814/?no-ist>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Arizona's Water: Use and Sources*, THE ARIZ. EXPERIENCE, <http://arizonaexperience.org/people/arizonas-water-uses-and-sources> (last visited Oct. 16, 2015).

¹⁰² *Id.*

¹⁰³ *2010 Water Quality Report*, City of Phoenix, https://www.phoenix.gov/waterservice/site/Documents/d_046242.pdf (last visited Apr. 4, 2016) (reporting that ninety-eight percent of Phoenix's water comes from surface water).

the Maricopa County Department of Public Health, in Arizona, “More people die from heat than any other weather event.”¹⁰⁴ Imagine how many more deaths can occur from heat exhaustion and dehydration when our water supply is simply no longer drinkable.

VI. BENEFITS TO MASSIVE FACTORY FARMING

CAFOs have a number of immediate benefits. For instance, CAFO products are relatively inexpensive.¹⁰⁵ Some families depend on government aid for groceries, and frequently shop at large supermarkets that sell mass-produced chain brand meat and dairy products. Further, fast-food chains known for serving cheeseburgers and chicken nuggets usually have cheap “value meals.”¹⁰⁶ CAFOs provide a benefit by keeping the cost of food down for families that cannot afford many groceries or do not have the means to provide a hot meal.¹⁰⁷ Even if a family or individual can afford a lavish meal, it can be much easier to stop by a fast-food restaurant after a long day at work and buy a family meal than to spend more time cooking. Additionally, it may make more sense for people who live on their own, like college students, to buy food for themselves instead of cooking a large meal, which takes time and resources that college students typically lack. Lastly, CAFOs often promoted themselves as enhancing the local economy and job market before building

¹⁰⁴ Ryan Koronowski, *Phoenix Sets Temperature Records as Arizona Gets Punished by Extreme Heat Wave*, CLIMATE PRESS, <http://thinkprogress.org/climate/2014/07/25/3464391/phoenix-temperature-records/> (last visited Oct. 14, 2015).

¹⁰⁵ Hribar, *supra* note 4, at 2 (confirming that CAFOs provide low-cost meat, eggs, and dairy products because of the efficiency of the feeding operations).

¹⁰⁶ See IMHOFF, *supra* note 2, at 33.

¹⁰⁷ Hribar, *supra* note 4, at 2.

within a community.¹⁰⁸ CAFOs show an immediate benefit to the American people in these ways.

VII. THE PROBLEMS

Although CAFO meat and dairy products have immediate benefits, there are long-term and often hidden dangers surrounding CAFOs. CAFOs are directly linked to several environmental problems resulting in human and animal health risks. Not every CAFO produces the same product for consumption, but all CAFOs have a tendency to produce the same risks. Some of these risks overlap each other, but it is important to understand how they affect the planet in regards to the environment, humans, and animals.

A. *Environmental Impacts*

The rapid growth and clustering of CAFOs have resulted in several developing environmental issues throughout the country.¹⁰⁹ CAFOs have the capability of contaminating ground water, surface water, and air quality, and are significant contributors to climate change.¹¹⁰ CAFO waste is responsible for contributing an estimated eighteen percent of greenhouse gas production, with an additional seven percent from trucks transporting CAFO products.¹¹¹ CAFOs pollute the air people breathe

¹⁰⁸ *Id.* (Arguing that because CAFOs are run locally by using local materials and provides local employment, a ripple effect in the community where increased tax expenditures will increase school funding and infrastructure).

¹⁰⁹ Hribar, *supra* note 4, at 3.

¹¹⁰ See generally Hribar, *supra* note 4, at 3-7.

¹¹¹ Hribar, *supra* note 4, at 7; see also IMHOFF, *supra* note 2, at 43 (claiming the World Wide Institute reported that CAFOs singlehandedly may be

not just by the foul odor, but by dangerous gases like methane, ammonia, and hydrogen sulfide.¹¹²

Drinking water is another victim of CAFO pollution. CAFO animal waste leaks into the ground water¹¹³ causing serious contamination issues from chemicals, antibiotic-resistant bacteria, and hormones.¹¹⁴ Ground water contamination is due to geographically concentrated CAFOs, and the massive number of animals—making reasonable disposal of animal waste nearly impossible.¹¹⁵ CAFO operators have a particular method for disposing the great quantities of animal manure—toxic storage lagoons. These lagoons are essentially bodies of water made up of animal waste.¹¹⁶ The waste within these toxic storage lagoons leaks into the ground water and causes contamination. The contamination comes from nitrogen-containing pollutants, mostly derived from agricultural fertilizers and overused livestock antibiotics, increases the likelihood of antibiotic-resistant bacteria within the water.¹¹⁷ Even after a CAFO is closed and the la-

responsible for fifty percent of *all* climate-changing emissions, thus, the most influential factor for the global warming crisis).

¹¹² Hribar, *supra* note 4, at 5.

¹¹³ See *The Basics*, THE GROUNDWATER FOUND., <http://www.groundwater.org/get-informed/basics/groundwater.html> (last visited Oct. 16, 2015) (“Groundwater is the water found underground in the cracks and spaces in soil, sand and rock. It is stored in and moves slowly through geologic formations of soil, sand and rocks called aquifers.”).

¹¹⁴ Terence J. Centner, *Courts and the EPA Interpret NPDES General Permit Requirements for CAFOs*, 38 WASH. & LEE L. REV. 1215, 1218 (2008) (“Improperly managed manure has caused serious acute and chronic water quality problems throughout the United States.” (citing National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68 Fed. Reg. 7176, 7176 (Feb. 12, 2003))).

¹¹⁵ IMHOFF, *supra* note 2, at 47.

¹¹⁶ Hribar, *supra* note 4, at 3.

¹¹⁷ *Id.*

goons emptied, the ground water can remain contaminated; contamination levels depend on proximity to the CAFO, size of the CAFO, and whether the lagoons had protective liners.¹¹⁸

B. Human Health Risks

Environmental and human health risk go hand in hand. CAFO pollutants such as antibiotics, nitrates, and fecal coliform bacteria can cause both temporary and chronic health impacts when lagoons or containment units leak into local ground water.¹¹⁹ Scientific studies have found a connection between contaminated drinking water (derived from CAFO-waste-contaminated ground water) to birth defects, various types of cancers, and other illnesses.¹²⁰ “When lagoons burst, develop leaks, or are overwhelmed by flood events, as often happens, millions of gallons of manure reach waterways and spread microbes that can cause gastroenteritis, fevers, kidney failure, and death.”¹²¹

Scientists have found that “high-risk populations are generally the very young, the elderly, [and] pregnant women.”¹²² Infants exposed to contaminated waters are at risk for blue baby syndrome¹²³ and even death.¹²⁴ Adult women with low blood oxygen levels can lead to birth defects, miscarriages, and poor

¹¹⁸ IMHOFF, *supra* note 2, at 47.

¹¹⁹ Hribar, *supra* note 4, at 3.

¹²⁰ Hribar, *supra* note 4, at 7.

¹²¹ *Id.*

¹²² Burkholder, *supra* note 18, at 2.

¹²³ *Id.* (“Nitrates oxidize iron in hemoglobin in red blood cells to methemoglobin. Most people convert methemoglobin back to hemoglobin fairly quickly, but infants do not convert back as fast . . . hinder[ing] the ability of the infant’s blood to carry oxygen, leading to a blue or purple appearance in affected infants.”).

¹²⁴ *Id.*

general health.¹²⁵ Nitrate pollutants are believed to be connected to increased risks of stomach and esophageal cancer.¹²⁶

Drinking contaminated water is not the only way CAFOs affect human health. Harmful gases such as methane, ammonia, and hydrogen sulfide create dangerous health risks for people near CAFOs.¹²⁷ Animal excrement emits these chemicals into the air.¹²⁸ Hydrogen-Sulfate can quickly be released into the air when “the liquid manure slurry is agitated, an operation commonly performed to suspend solids so that pits can be emptied by pumping.”¹²⁹ As a result, asthma-related emergency visits, especially by children, are higher if the hospital is within three miles of a CAFO.¹³⁰

These gases also put CAFO workers and neighbors in danger for multiple respiratory system health risks, mental health problems, and other diseases.¹³¹ Respiratory effects have been severe enough to cause workers to leave the industry.¹³² Air quality is already a particularly troublesome issue given the dry Arizona desert air.¹³³ With so many farming operations within

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ IMHOFF, *supra* note 2.

¹²⁸ *Id.* at 47.

¹²⁹ *Id.*

¹³⁰ *Environmental Health Effects of Concentrated Animal Feeding Operations: Implications for Nurses*, PUB. MED, <http://www.ncbi.nlm.nih.gov/pubmed/20838176> (last visited Oct. 14, 2015).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *State of the Air*, AMER. LUNG ASS'N, <http://www.stateoftheair.org/2014/states/arizona/maricopa-04013.html> (last visited Oct. 14, 2015) (giving Maricopa County an “F” on this particular day for its ozone grade and partial pollution twenty-four hour grade.) While many factors, including those possibly unrelated to CAFO emissions, contribute to the air quality grade, it is common for the American Lung Association to give Maricopa County a failing grade in its air quality on a given day.

Maricopa County alone, it is reasonable to say that CAFOs could further degrade the air quality.¹³⁴ Residents within low-income neighborhoods in Central Arizona often live closer to factories which emit a substantial amount of air pollution.¹³⁵ These Arizonans face higher risks for diseases like COPD (“Chronic Obstructive Pulmonary Disease”), asthma, and lung cancer.¹³⁶

Living near or working in, these facilities has a tendency to cause mental and emotional risks.¹³⁷ CAFO neighbors often suffer from various mood states like depression, anger, fatigue and confusion.¹³⁸ Even more serious is the potential exposure to hydrogen sulfide, which is linked to neuropsychiatric abnormalities.¹³⁹ Neuropsychiatric abnormalities and symptoms range from, “dementia in Alzheimer’s disease . . . other mental disorders caused by brain damage and dysfunction and by physical illness . . . other specific mental disorders, and personality and behavioral disorders resulting from brain disease, damage, and dysfunction.”¹⁴⁰

Factory workers also suffer from mental and physical health risks. CAFO work is not easy, as workers find themselves repeating the same cutting motions over and over again, causing serious stress to their hands, wrists, shoulders, and backs.¹⁴¹ These motions are repeated over and over again to prepare the animal for meat packaging and sale to the public. Repeating

¹³⁴ Centner, *supra* note 103.

¹³⁵ *State of the Air*, *supra* note 120.

¹³⁶ *Id.*

¹³⁷ IMHOFF, *supra* note 2, at 40.

¹³⁸ *Id.*

¹³⁹ KOHO MIYOSHI & YASUSHI MORIMURA, 3, NEUROPSYCHIATRIC DISORDERS, (Springer Publishing 2010), <http://link.springer.com/book/10.1007%2F978-4-431-53871-4>.

¹⁴⁰ *Id.*

¹⁴¹ IMHOFF, *supra* note 2, at 70.

these motions and tasks also has a mental toll on the workers. According to a former factory worker, Steve Striffle, “[i]t is hard to tell which is more overwhelming: the oppressive routine at work or the inability to establish a viable routine beyond the factory gates.”¹⁴² Factory workers are estimated to have work-related stress that “might contribute to the increases in crime and occurrences of other depression, divorce, and alcoholism.”¹⁴³

Lastly, the most common human health risk people face that is most likely to occur whether one lives near an operation or not, is the main reason for the operations existence: consumption of the product. The Centers for Disease Control and Prevention estimated about three million contaminated meat and poultry related infections occur each year, “killing at least 1,000—figures that are probably underreported.”¹⁴⁴ The human population is affected primarily through contaminated food and water from animal waste, which is the leading cause of infectious bacteria such as *E. coli* and *Salmonella*.¹⁴⁵ Diabetes, cancer, high cholesterol, heart disease, and obesity are higher than ever partly due to a diet high in meat and dairy products.¹⁴⁶

Americans recently lived through the mad cow disease outbreak. Mad cow disease, or Bovine Spongiform Encephalopa-

¹⁴² *Id.* at 71.

¹⁴³ Amy J. Fitzgerald et al., *Slaughterhouses and Increased Crime Rates: An Empirical Analysis of the Spillover from “The Jungle” Into the Surrounding Community*, 22 *Org. & Env’t* 158, 163 (June 2009).

¹⁴⁴ PAUL FRENZEN, ET. AL., CONSUMER ACCEPTANCE OF IRRADIATED MEAT AND POULTRY PRODUCTS, *AGRIC. INFO. BULLETIN* No. 757, at 1 (Aug. 2000).

¹⁴⁵ IMHOFF, *supra* note 2, at 37.

¹⁴⁶ *Id.*

thy (“BSE”) is a disorder affecting a cow’s neurological system.¹⁴⁷ This disorder can be transmitted to humans by consuming beef from an infected cow.¹⁴⁸ Once a human has been infected, he or she can suffer within a year from loss of memory, emotional instability, dementia, and ultimately death.¹⁴⁹ Luckily, the government acted quickly to help prevent an outbreak of BSE by requiring testing within operations and restricting foreign cattle from entering the country.¹⁵⁰

C. *Animal Health and Welfare Risks*

Last but not least, animals may be the worst off with regard to health and potential dangers in feeding operations. Generally, Americans picture their meat and dairy products being raised in a red barn with large green pastures, but these images are not realistic.¹⁵¹ Livestock raised in CAFOs live in tightly enclosed buildings, usually in large numbers, with essentially no space to move.¹⁵² Factory farmers claim these enclosed buildings are “modern barns,” aimed to protect the animals¹⁵³ from

¹⁴⁷ *Mad Cow Disease: Fast Facts*, <http://www.cnn.com/2013/07/02/health/mad-cow-disease-fast-facts/> (last visited Mar. 16, 2015).

¹⁴⁸ *Mad Cow Disease: Stop the Madness*, ORGANIC CONSUMERS ASS’N., (Feb. 23, 2015), <https://www.organicconsumers.org/campaigns/mad-cow-usa>.

¹⁴⁹ *Id.*

¹⁵⁰ *The Basics of Mad Cow Disease*, WEBMD: BRAIN & NERVOUS SYSTEM HEALTH, (Feb. 23, 2015), <http://www.webmd.com/brain/mad-cow-disease-basics?page=2#2>.

¹⁵¹ Brehm, *supra* note 5, at 798.

¹⁵² *Id.*; see also *Livestock Confinement Dust and Gases*, IOWA STATE U., NAT’L AG SAFETY DATABASE (1992), <http://www.cdc.gov/nasd/docs/d001501-d001600/d001501/d001501.html>.

¹⁵³ Chickens and pigs and other smaller animals are likely too never spend time outside the walls of the factory farm. Dairy cows and cattle are

harsh weather, predators, and illnesses.¹⁵⁴ However, the reality is that the animals rarely see sunlight, are cramped inside, and are living in their own feces developing illnesses as a result.¹⁵⁵ Livestock raised in these environments are likely to become sick from living in feces and thus are administered antibiotics regularly to control their sickness.¹⁵⁶

VIII. SOLUTIONS TO THE RISKS SURROUNDING CAFOs

While CAFOs are leading the way in producing milk, eggs, and meat¹⁵⁷, there is a way to continue production without having the same negative effects we are seeing in the environment today. One way is to raise public awareness. The more the public knows where its food comes from and how it is made, the more likely the public will make informed and healthy choices. Increasingly, American consumers are becoming aware of issues surrounding factory farming by seeing food packaging labels with organic phrases like “antibiotic free,” “vegetarian fed,” “cage free,” or “free roam.”¹⁵⁸ These phrases pique the consumers’ interest and allow the consumers to pick which product

confined more than forty-five days out of the year according to the EPA definition of a CAFO.

¹⁵⁴ Joseph Mercola, *How Factory Farmers Use the Media to Distort Reality and Make Them Look Good*, MERCOLA.COM (Mar. 28, 2012), <http://articles.mercola.com/sites/articles/archive/2012/03/28/cafo-vs-organic-farm-environment.aspx>.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Hribar, *supra* note 4, at 9.

¹⁵⁸ *Marketing Organic Products*, Marketing-Schools.org, Educational Option in the Creative Field of Marketing, (May 10, 2015), <http://www.marketing-schools.org/consumer-psychology/marketing-organic-products.html> (stating that retail sales for organic products have “blossomed” as consumers become more educated of where their food comes from; for instance, a commercial for organic chicken breast strips promotes “a quick meal ‘without all

they prefer. Similarly, dairy products are broadened by milk alternatives such as soy and almond milk.

The less people rely on, purchase, and consume animal based proteins like meat and dairy, the less the market demands for the products. This is a simple supply and demand¹⁵⁹ situation: the less demand for the products in large businesses, the less need for the mass production of the products.¹⁶⁰ In return, the less of a demand causes a lesser use of CAFO operations and hence, reducing the risk of contaminating the ground water Arizonans rely on. Reducing the demand for the products is also a large contributing factor in that it can make these operations weaken.

Although these protein alternatives are slowly becoming more accessible to the average consumer, changing one's diet is not something that can easily happen overnight. A person's diet is a private and personal decision. For this reason, continued education is necessary. When Americans became educated about the dolphins deaths in tuna production, within fifteen years of learning the issue, the entire United States tuna fleet became dolphin-safe.¹⁶¹ It also helps if the issues are learned

the added junk,”” and labels the product made without the use of antibiotics or growth hormones).

¹⁵⁹ Reem Heakal, *Economics Basics: Supply and Demand*, INVESTOPEDIA, (May 10, 2015), <http://www.investopedia.com/university/economics/economics3.asp> (defining demand as how much of a product or service is desired by buyers, and supply as how much the market can offer; when demand and supply are equal, the goods are most efficient because the amount of goods being supplied is exactly the same as the amount being demanded).

¹⁶⁰ *Id.*

¹⁶¹ *The Dolphin-Safe Label*, THE HUMANE SOC'Y, (May 10, 2015), http://www.hsi.org/about/how_we_work/policy/treaties/dolphin_safe_label.html?referrer=https://www.google.com/ (providing that in the late 1980s

at an early age; the earlier someone learns an issue, the longer it will stick with him or her. Therefore, in order for this solution to work, the state needs to educate children about CAFOs and diet choices in elementary school. The state can create and alter education programs for middle school and high school too. Education materials can include guest speakers specialized in dieting and the environment. Education materials can also include pamphlets, posters, documentary screenings and other presentations. The more the younger generation understands about the environmental, human health, and animal health risks involving CAFOs, the easier change can take place.

Recently, Arizona House Bill 2150, entitled “Livestock or Poultry Cruelty; Exception,” was introduced by Representative Brenda Barton. The purpose of this bill was to omit livestock from the definition of an “animal” in regards to animal cruelty. The bill provided, “[a]nimal does not include livestock . . . and poultry . . . that are part of an agricultural operation that is regulated by the Arizona Department of Agriculture.”¹⁶² The Legislative House passed it.¹⁶³ Governor Ducey received thousands of letters, emails, and phone calls from local animal welfare advocates and pressure from social media to veto the bill.¹⁶⁴ Julia Shumway reports, “Chris Green, the [Animal Legal Defense Fund] group's legislative-affairs director, said the only reason lawmakers would create separate laws governing livestock and

Americans pressured companies to catch tuna safely without harming dolphins. By 1994 all tuna fleets in the U.S. were dolphin-safe as a result from the awareness and consumer pressure.).

¹⁶² H.B. 2150, 52d Leg. (Ariz. 2015).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

pets is so they could later loosen livestock protections.”¹⁶⁵ Governor Ducey vetoed the bill on March 30, 2015.¹⁶⁶ This is an example of what public awareness and education can accomplish. If the public failed to be informed of the issues surrounding livestock treatment and the actions involved within CAFOs, Governor Ducey might have passed the bill.

Another solution enforcing current state regulations and creating stricter regulations. As a desert state, it is important for Arizona to set higher regulatory standards to protect its citizens and the environment from the harmful toxic pollution leaking into the ground water before it is irreversible. While the federal EPA has the power to set standards for all states, it arguably cannot do what is best for each state individually since each state’s land and bodies of water are unique. If Arizona were to pass new agricultural, ground water, waste, and contamination regulations, operations would be safer. Arizona can do this by revisiting the statutory number of animals within a certain area of land, limiting how long the animals are confined, and enforcing proper waste disposal.

Another simple solution to the ground water contamination problem is installing liners along toxic waste lagoons. This is considered standard practice in other industries.¹⁶⁷ In modern

¹⁶⁵ Julia Shumway, *Arizona Animal-Cruelty Bill Advances Despite Criticism*, THE ARIZ. REPUBLIC, (Mar. 23, 2015), <http://www.azcentral.com/story/news/arizona/politics/2015/03/24/arizona-animal-cruelty-bill-advances-despite-criticism/70360594/>.

¹⁶⁶ Ed Boks, *Governor Ducey Vetoes House Bill 2150*, THE DAILY COURIER, (Mar. 31, 2015), <http://dcourier.com/main.asp?SectionID=74&SubSectionID=114&ArticleID=143616>.

¹⁶⁷ Kerry L. Hughes, Ann D. Christy, and Joe E. Heimlich, *Landfill Types and Liner Systems*, OHIO STATE U., <http://ohioline.osu.edu/cd-fact/pdf/0138.pdf> (last visited Oct. 30, 2015).

landfills, the waste is contained by a liner system.¹⁶⁸ The primary purpose of the liner system is to isolate the landfill contents from the environment, thus protecting the soil and ground water.¹⁶⁹ If all CAFOs would use liners, ground water leakage and toxic spills could be prevented and perhaps make CAFOs more environmentally friendly.

IX. CONCLUSION

Farming has been a way of life as early as 7000 B.C. Since then, the United States population has grown to over 310 million people.¹⁷⁰ Vast population growth has created a demand for more efficient food production to feed hungry people of the planet. Increasingly, Americans are becoming more aware of global environmental issues caused by human activity. CAFOs are an environmental impact of which the most people are unaware, and CAFOs are considered the world's number one source for pollution. CAFOs collect massive amounts of animal waste and dead animals.¹⁷¹ CAFOs are becoming mainstream in the United States as well other parts of the world.¹⁷²

Within these operations, animals live a stressful and dangerous life. Food is brought straight to the animal instead of the animals roaming or grazing within the farmlands, allowing for little exercise.¹⁷³ As a desert state with a limited water resource,

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Lambert, *supra* note 10.

¹⁷¹ *Farming and Ranching*, THE ARIZ. EXPERIENCE, <http://arizonaexperience.org/land/farming-and-ranching> (last visited Oct. 30, 2015).

¹⁷² Joseph Mercola, *How Factory Farmers Use the Media to Distort Reality and Make them Look Good*, MERCOLA.COM, <http://articles.mercola.com/sites/articles/archive/2012/03/28/cafo-vs-organic-farm-environment.aspx> (last visited Oct. 30, 2015) (claiming that most of the food raised for meat and dairy products come from factory farming facilities).

¹⁷³ Brehm, *supra* note 5, at 798.

it is important for Arizona to prevent ground water contamination.¹⁷⁴ CAFOs contaminate the state's ground water supplies. Additionally, CAFOs pose health risks such as cancer, intentional infections, mental health issues, obesity, and even death. While there are some claimed benefits to CAFOs and their products, the risks substantially outweigh the benefits.

Solutions to these issues are within our own control. Education is probably the most important factor when considering solutions. Without understanding the issues, there is no motivation to change. Americans can eat less meat causing a lesser demand for the operations. The Arizona legislator has the power to pass strict regulations relating to CAFOs, such as limited the number of animals within a confined area. Law enforcement is another large contributing factor when it comes to making new regulations. Without enforcement, the new laws lose their purpose.

A trend has already started, causing agriculture businesses to decline for the first time in decades. Americans are looking for healthier food options, eating vegetarian and vegan diets and cutting down on meat. Unfortunately, it takes more than just a handful of people to see change happen. As Mahatma Gandhi once said, "you must be the change you wish to see in the world."¹⁷⁵

¹⁷⁴ *How Much of Your State is Wet?* (July 2015), U.S.G.S., <http://water.usgs.gov/edu/wetstates.html> (last visited Oct 30, 2015).

¹⁷⁵ PAUL LEINWAND & CESARE MAINARDI, *THE ESSENTIAL ADVANTAGE: HOW TO WIN WITH A CAPABILITIES-DRIVEN STRATEGY*, 59 (Harvard Business Review Press Dec. 2010) (quoting Mahatma Gandhi in Michael W. Potts, *Arun Gandhi Shares the Mahatma's Message*, (India-West 27, No. 13 Feb. 2002); but see Brian Morton, *Falser Words Were Never Spoken*, N.Y. TIMES (April 29, 2011) <http://www.nytimes.com/2011/08/30/opinion/falser-words-were-never-spoken.html> (stating that Gandhi's grandson spoke the words from his memory of his grandfather and no such documentation exists).

MOVING BEYOND PROPERTY CRIME-VIOLENCE AGAINST ANIMALS AS DANGEROUS CRIMES

Juliann DuBerry¹

“[Animal protection] is a matter purely of conscience. It has no perplexing side issues. Politics have no more to do with it than astronomy. No, it is a moral question in all its respects.”²

I. INTRODUCTION

Concern towards the treatment and welfare of animals has changed considerably in the last 150 years since the founding of the first American animal welfare group, the American Society for the Prevention of Cruelty to Animals. All fifty states now consider animal cruelty to be a felony offense,³ though considered to be a non-violent or non-dangerous crime.⁴ Specifically in Arizona, “violent” or “dangerous” aggravating factors are reserved for crimes against persons, not animals or non-humans.⁵ Although animals are considered sentient beings, they are still

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² Nathan J. Winograd, *REDEMPTION 8* (Almaden Books 2009) (quoting Henry Bergh, founder of the ASPCA during an initial meeting of the ASPCA on February 8, 1866).

³ Chris Berry, *All 50 States Now Have Felony Animal Cruelty Provisions!*, ALDF.ORG (March 14, 2014), <http://aldf.org/blog/50-states-now-have-felony-animal-cruelty-provisions/> (Last visited February 18, 2015).

⁴ *Id.*

⁵ See ARIZ. REV. STAT. ANN. §13-706(F) (2015); ARIZ. REV. STAT. ANN. §13-704 (2015).

viewed as property in the American legal system and are not afforded rights.⁶ However, in a recent trend, prosecutors in the state of Arizona have begun charging these additional aggravating factors to acts of heinous and depraved animal cruelty, including the use of deadly weapons or other extreme measures.

Part II of this article deals with the history and evolution of anti-animal cruelty laws in the United States starting with the first anti-cruelty law to the development and achievements of both the American Society for the Prevention of Cruelty to Animals (“ASPCA”) and the Animal Legal Defense Fund (“ALDF”). Although the treatment of animals has improved in this nation over the last 230 years, animals are still viewed through the lens of property law and are refused the attachment of basic rights, including “to be free from exploitation, cruelty, neglect, and abuse.”⁷ Part III of this article discusses the road blocks still present in the advancement of animal law including the lack of victimhood status for animals, and the underlying property interests of anti-cruelty laws. Additionally, it will be discussed what the federal government has done to the benefit and detriment of animals through national legislation and Supreme Court opinions. Part IV discusses, in detail, the current criminal statutes in Arizona as they apply to crimes against animals. Included in this section is a discussion of the sentencing guidelines and the high degree of discretion afforded to prosecutors and the judiciary in the litigation and sentencing of animal cruelty crimes. Part V discusses on a deeper level what constitutes a dangerous crime under Arizona law and Part VI presents

⁶ Jesse McKinley, *Chimps Don't Have the Same Rights as Humans, Court Says*, N.Y. TIMES (December 4, 2014) <http://www.nytimes.com/2014/12/05/nyregion/chimps-dont-have-same-rights-as-humans-court-says.html> (last visited February 26, 2015).

⁷ *Animal Bill of Rights*, ALDF.ORG, http://org2.salsalabs.com/o/5154/p/dia/action/public/?action_KEY=5078, (last visited April 4, 2015).

two cases that demonstrate how prosecutors are beginning to understand that dangerous acts and violence are not only reserved for crimes against persons.

Part VII of this article focuses on the necessity for prosecutors to include aggravating factors into charges of depraved acts of animal cruelty for the sake of the true “victims” and their owners, who are victims by law. By recognizing animal cruelty as more than just property crime, there are multiple potential societal benefits to be gained, including: the prevention of future harm against persons, prevention of harm against animals through deterrence, and the fulfillment of the moral obligation to adequately protect innocent animals.

II. BRIEF HISTORY OF THE EVOLUTION OF ANTI-ANIMAL CRUELTY IN THE UNITED STATES

A. *The Founding of the ASPCA*

The Massachusetts Bay Colony enacted the first anti-animal cruelty law in the United States in 1641.⁸ The provision, number ninety-two, “Cruelty to Animals,” provided that, “No man shall exercise any Tirranny [sic] or Crueltie [sic] towards any brute [sic] Creature which are usuallie [sic] kept for man’s use.”⁹ American colonists brought with them an understanding that animals were to be protected and their welfare safeguarded. The United States of America was not the first nation to advocate for animal welfare on a wide scale.¹⁰ The Society for the Prevention

⁸ *The 10 Most Groundbreaking U.S. Animal Welfare Laws*, ASPCA.ORG, (April 30, 2014) <http://www.aspc.org/blog/10-most-broundbreaking-us-animal-welfare-laws>, (last visited January 28, 2015).

⁹ *Id.*

¹⁰ *About Us*, RSPCA.ORG, http://www.rspca.org.uk/utilities/aboutus/-/articleName/EM_About_us.

of Cruelty to Animals (“Society”) was founded in London, England in 1824.¹¹ The Society was recognized by Queen Victoria in 1840 and became the Royal Society for the Prevention of Cruelty to Animals.¹² The impact of the Royal Society influenced not only an impetus for the need of animal protections in Europe, but exposed the need for animal protection in the United States.¹³ Henry Bergh founded the American Society for the Prevention of Cruelty to Animals (“ASPCA”) in 1866.¹⁴ The impetuses for Mr. Bergh to found the ASPCA were in the deplorable conditions and cruel treatment that New York City working horses endured daily.¹⁵ These work horses were overloaded, beaten, broken, and starving in plain sight while passers-by gave little notice.¹⁶ The ASPCA was quick to act once it had received its official charter on April 10, 1866.¹⁷ Only nine days after becoming incorporated, the ASPCA was instrumental in passing the first anti-cruelty law in New York and was granted the authority to enforce it.¹⁸ Not only was it now a crime in New York to abuse an animal, but the sentencing for such an act could result in jail time.¹⁹ Over time, the ASPCA moved away from just legal animal advocacy, and in response to the deplorable conditions in city-run shelters, it began providing shelters and rescue to stray and abandoned animals.²⁰ Currently, the ASPCA

¹¹ *Our History*, RSPCA.ORG, <http://www.rspca.org.uk/utilities/aboutus/history>.

¹² *Id.*

¹³ Winograd, *supra* note 2.

¹⁴ Berry, *supra*, note 3.

¹⁵ Winograd, *supra*, note 2 at 7.

¹⁶ *Id.*

¹⁷ Berry, *supra*, note 3.

¹⁸ *Id.*

¹⁹ *Id.* In 1867, under the newly enacted anti-animal cruelty law, an abuser by the name of David Heath was sentenced to ten days in prison for beating a cat to death.

²⁰ Berry, *supra* note 3.

operates shelters in New York State but maintains an active role in national legislation regarding animal welfare.²¹

B. Animal Legal Defense Fund and Using the Legal System to Benefit Animals

On the legal front, a group of attorneys active in progressing animal law founded a new group, the Animal Legal Defense Fund, in 1979.²² ALDF has been instrumental in shaping and molding animal law around the nation through legislation and the legal system.²³ Through the work done at ALDF, animals have gained monumental legal victories in the last thirty-six years.²⁴ Most notably, all fifty states now consider animal abuse a felony offense.²⁵ Furthermore, the ALDF, through litigation or legislative advocacy, has been influential across the country for all animals, including companion animals, livestock, and wildlife.²⁶ For example, in 2012, the Oregon Court of Appeals agreed with the state's argument, supported by an ALDF amicus brief, that "individual animals can be considered 'victims' of acts of cruelty and neglect" rather than just the state being the victim.²⁷ Additionally, in Rhode Island, ALDF contributed to the "First Strike & You're Out Law" that prohibits convicted animal abusers from owning or residing with animals for up to five years in misdemeanor offenses and up to fifteen years in

²¹ *About Us*, ASPCA.ORG, <https://www.aspc.org/about-us> (last visited February 24, 2015).

²² *About Us*, ALDF.ORG, <http://aldf.org/about-us/> (last visited February 24, 2015).

²³ *Id.*

²⁴ *Id.*

²⁵ Berry, *supra*, note 3.

²⁶ *Victories*, ALDF, <http://aldf.org/cases-campaigns/victories/> (last visited February 24, 2015).

²⁷ *Id.*

felonies.²⁸ Violations of this law carry criminal misdemeanor charges, potential jail time, fines, and surrender of the animal.²⁹ Presently, the ALDF tirelessly fights to “protect the lives and advance the interests of animals through the legal system.”³⁰ Currently, the organization boasts thousands of attorney affiliates and more than 100,000 members and supporters.³¹

C. *National Attitude Shifts Toward the Treatment of Animals*

As mentioned in the previous section, the United States has had anti-cruelty laws since colonization.³² The first federal humane law was enacted in 1873.³³ The federal government, in an effort to reduce the suffering of animals traveling long distances in overcrowded railcars, enacted the Twenty-Eight Hour Law.³⁴ This law provided that all animals, except birds, being transported for twenty-eight hours or more must be unloaded, properly fed and watered, and allowed to rest during their journey.³⁵ It was almost 100 years later that any additional federal laws regarding the humane treatment of animals were passed.³⁶ In 1958, Congress passed the Humane Methods of Slaughter Act, which required slaughterhouses to render animals used for consumption “insensible to pain.”³⁷ Congress amended the law in 1978 to grant the USDA the power to shut down facilities not

²⁸ Stephen Otto, *Rhode Island Passes “First Strike & You’re Out Law”*, ALDF.ORG, (July 1, 2011), <http://aldf.org/blog/rhode-island-passes-first-strike-youre-out-law/> (last visited February 24, 2015).

²⁹ *Id.*

³⁰ Berry, *supra*, note 3.

³¹ *Id.*

³² *See supra*, Part III, sect. A.

³³ *See supra*, note 8.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ 7 U.S.C.A. §1902 (West 2014).

in compliance.³⁸ The federal government continued its crusade for animal welfare by enacting of the Animal Welfare Act in 1970.³⁹ The Act's purpose is:

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment; (2) to assure the humane treatment of animals during transportation in commerce; and (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.⁴⁰

Over the next ten years, Congress continued to pass legislation to protect not only livestock but also wildlife.⁴¹ In 1971, Congress passed the Wild Free-Roaming Horses and Burros Act to protect these “living symbols of the historic and pioneer spirit of the West.”⁴² Shortly after, Congress enacted the Endangered Species Act in 1973.⁴³ Congress recognized that “these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.”⁴⁴ In 2006, in response to the devastation caused by Hurricane Katrina, Congress passed the Pets Evacuation and Transportation Standards (“PETS”) Act.⁴⁵ The Act addresses

³⁸ 7 U.S.C.A. §1907 (West 2014).

³⁹ 7 U.S.C.A. §2131 (West 2014).

⁴⁰ *Id.*

⁴¹ ARIZ. REV. STAT. ANN. §13-706(F) (2015); ARIZ. REV. STAT. ANN. §13-704 (2015).

⁴² 16 U.S.C.A. § 1331 (West 2014).

⁴³ 16 U.S.C.A. §1531 (West 2014).

⁴⁴ *Id.*

⁴⁵ ARIZ. REV. STAT. ANN. §13-706(F) (2015); ARIZ. REV. STAT. ANN. §13-704 (2015).

the responsibilities of emergency responders to properly deal with the needs of persons with service animals and pets alike following natural disasters and other emergencies.⁴⁶ “The law recognizes that animals are vital members of families and that no one should have to choose between abandoning a beloved pet and personal safety.”⁴⁷ More recently, Congress enacted the Prohibition Against Animal Crush Videos Act of 2010 to criminalize activities which film, record, or otherwise depict acts of animal cruelty for “entertainment” purposes⁴⁸ and amended the Animal Fighting Venture Prohibition which prohibit persons from operating or participating in anyway with organized animal fighting.⁴⁹

The states have also made steps to protect animals from exploitation and cruelty. Though all states have felony animal cruelty statutes, some states have increased their commitments to more stringent laws to protect and harsher penalties to punish. Since 2008, the ALDF has consistently ranked Illinois as number one on its *U.S. Animal Protection Laws Rankings*.⁵⁰ Factors considered in the ranking include fifteen different categories of animal protection, including current anti-animal cruelty laws,

⁴⁶ 42 U.S.C.A. § 5121 (West 2014).

⁴⁷ ARIZ. REV. STAT. ANN. §13-706(F) (2015); ARIZ. REV. STAT. ANN. §13-704 (2015).

⁴⁸ 18 U.S.C.A. § 48 (West 2014) (though the Supreme Court held that the 1999 version of the statute was unconstitutional, its original passage reflects Congress’s movement toward protecting animals).

⁴⁹ 7 U.S.C.A. § 2156 (West 2014), amended in 2014 by the Agricultural Act of 2014 which amended the Animal Welfare Act which encompasses the Animal Fighting Venture Prohibition.

⁵⁰ See, 2011 *U.S. Animal Protection Laws Rankings*, ALDF.ORG, (December 13, 2011) <http://aldf.org/press-room/press-releases/2011-u-s-animal-protection-laws-rankings/> (last visited February 24, 2015); 2013 *U.S. Animal Protection Laws Rankings*, ALDF, <http://aldf.org/wp-content/uploads/2013/12/2013-United-States-Animal-Protection-Laws-Rankings.pdf> (last visited February 24, 2015).

improvements made in animal welfare legislation, and room for potential improvement.⁵¹ Illinois anti-animal cruelty laws provide protection for all animals, and not just companion animals, like cats and dogs.⁵² Illinois's criminal code provides strong felony provisions for neglect and abandonment of animals, and it has increased penalties for offenders with prior convictions of animal abuse or animal hording.⁵³ The most recent "worst state" on the *Ranking List* is Kentucky.⁵⁴ The ranking was based upon the state's failure to apply felony status to all cruelty offenses involving animals, failure to penalize for egregious acts performed in front of minors, and inadequate laws regarding the prohibition against animal fighting.⁵⁵ Arizona, in 2012, was listed as making an overall fifty-two percent improvement in its anti-animal cruelty laws by expanding the range of protections for animals and strengthening standards for animal care, among others.⁵⁶ In 2013, Arizona was listed as number ten overall in the rankings just behind Indiana.⁵⁷

III. ROAD BLOCKS IN PROGRESSIVE ANIMAL LEGISLATION

A. *Animal Subordination*

⁵¹ 2013 U.S. Animal Protection Laws Rankings, ALDF.ORG, <http://aldf.org/wp-content/uploads/2013/12/2013-United-States-Animal-Protection-Laws-Rankings.pdf> (last visited February 24, 2015).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 2012 U.S. Animal Protection Laws Ranking, ALDF, <http://aldf.org/custom/rankings/ALDF2012USRankingsReport.pdf> (last visited February 24, 2015).

⁵⁷ *Supra*, note 51.

Animals as subordinate creatures, has been the construct of the relationship between man and animal since ancient times.⁵⁸ Early philosophers, including Aristotle, believed that animals were incapable of moral and rational judgment.⁵⁹ Such elevated abilities and virtues were reserved solely for human kind.⁶⁰ This theology of animal subordination is also present in early Jewish and Christian philosophies.⁶¹ In the story of creation, God bestows upon Adam dominion over the animals of the air, sea, and land.⁶² Additionally, in the Christian New Testament, humans are espoused to be more valuable in the eyes of God than “birds” or “sparrows.”⁶³ And though science, over time, has discovered that animals do hold “human-traits,” such as communication and problem solving capabilities, humans continue to hold these characteristics to a lower standard.⁶⁴ The subordinate view that animals are non-rational creatures under the dominion of man, has aided the rationalization for their mistreatment and abuse.⁶⁵

B. Animals Still Inherently Viewed as Property

Despite all of these accomplishments and victories in the name of animal protection, all fifty states as well as the federal government still consider animals as property and “animals [thus] lack ‘rights.’”⁶⁶ Encompassed in this property-based

⁵⁸ Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law's Role in Prevention*, 87 IOWA L. REV. 1, 8 (2001).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 10.

⁶² *Id.* at n. 38.

⁶³ Livingston, *supra*, at 10.

⁶⁴ *Id.* at 10.

⁶⁵ *Id.* at 11.

⁶⁶ Amie J. Dryden, *Overcoming the Inadequacies of Animal Cruelty Statutes and the Property-Based View of Animals*, 38 IDAHO L. REV. 177, 178 (2001).

view is the notion that owners could “do with [the animal] as [they] wished” and the animal’s treatment was only the concern of society when the animal was economically valuable.⁶⁷ Traditionally, it was only a crime to inflict injury on another person’s animal, not personally owned animals.⁶⁸ Additionally, acts of animal cruelty were not crimes under common law but rather only punishable if integrated into another common law offense.⁶⁹ Since animals were deemed “commodities,” the underlying offense was usually trespass or criminal mischief.⁷⁰ The victims of these offenses were not the animals themselves, but rather the owners as victims of property crimes.⁷¹

Punishments for these acts, under a property view, are traditionally disproportionate to the harm inflicted. In 1998, three men in Iowa broke into an animal shelter and violently assaulted numerous cats within the facility.⁷² Twenty-three animals died either immediately after the men bludgeoned them or later from their injuries.⁷³ One of the men was given probation as part of a plea deal.⁷⁴ The other two were charged under facilities-break-in laws since the established animal cruelty laws offered minimal redress for the crimes committed.⁷⁵ However, since the alternative charge was still under a property law violation, the

⁶⁷ *Id.* at 181-82.

⁶⁸ Luis E. Chiesa, *Why Is It A Crime to Stomp A Goldfish?--Harm, Victimhood, and the Structure of Anti-Cruelty Offenses*, 78 Miss. L.J. 1, 25 (2008).

⁶⁹ *Id.*

⁷⁰ *Id.* at 24-25.

⁷¹ *Id.* at 26.

⁷² *Another Man Charged Sentenced in Fairfield Cat Killings Case*, Dispatch Argus (Dec. 22, 1998), http://www.qconline.com/news/iowa/another-man-charged-sentenced-in-fairfield-cat-killings-case/article_bb069b66-86a7-57d8-aa45-c5faa6dce1bc.html (last visited Mar. 23, 2016).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

damage to the animals were “valued” by their economic cost.⁷⁶ The jury found that the monetary value of the slaughtered cats was not enough to warrant felony charges, so the two remaining defendants were only charged with misdemeanor offenses and sentenced to twenty-three days imprisonment.⁷⁷

However, as discussed above, society’s view of animals “has evolved into the recognition of them as something more than mere property.”⁷⁸ Though legislation and public views of animals has changed drastically over time, many people are still reluctant to the idea that animals have “rights.”⁷⁹ In December 2014, the Supreme Court of New York unanimously ruled, “a chimpanzee is not a ‘person’ entitled to the rights and protections afforded by the writ of habeas corpus.”⁸⁰ The case surrounded the welfare of Tommy, an adult chimpanzee privately owned and caged in upstate New York.⁸¹ On behalf of Tommy, an advocacy group, Non-Human Rights Project, Inc., sued for a writ of habeas corpus and argued that as an “autonomous, self-determining being” he had a right to address his captivity.⁸² The court however declined to “afford legal rights to an animal” reasoning “it is [the] incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights—such as the fundamental right to liberty protected by the writ of habeas corpus—that have been afforded to human beings.”⁸³

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Dryden, *supra*, at 183.

⁷⁹ *Id.*

⁸⁰ People ex rel. Nonhuman Rights Project, Inc. v. Lavery, 124 A.D.3d 148, 150 (N.Y. App. Div. 3 2014)

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 152.

Additionally, many are also reluctant to assign animals the status of victim after a crime against the animal has occurred. In a ground breaking opinion, a court of appeals in Oregon held that the recognition of an animal's sentient nature was the core purpose of the state's anti-cruelty provision, and due to that purpose, each animal injured was considered to be a victim of crime.⁸⁴ Devastatingly, the Oregon Supreme Court in *State of Oregon v. Nix*, vacated the holding of the lower court reasoning that the State had inappropriately appealed a misdemeanor conviction and thus the appellate court never had jurisdiction over the matter.⁸⁵ By vacating the judgment by the court of appeals, the Oregon Supreme Court stripped the animal victims of their newly established status and reverted the case back to being seen as only property crime, where the victim is the property owner, not the property itself.

Despite the unwillingness to afford animals legal rights, many states include in their anti-animal cruelty laws an affirmative duty to provide care for animals in a person's charge.⁸⁶ Arizona Revised Statutes §13-2910, concerning animal cruelty, includes the duty to provide medical care "to prevent suffering to any animal under the person's custody or control."⁸⁷ In 2015, Senate Bill 1265 was proposed to amend the statute to expand this duty to include "care and treatment" and to apply a reasonable standard when evaluating the animal's suffering.⁸⁸ Arizona has also expanded its view of animals beyond mere property by charging alleged defendants of animal abuse with aggravating

⁸⁴ Scott Heiser, *Great News in Oregon: Each Animal Counts!*, ALDF.ORG (August 3, 2012), <http://aldf.org/blog/great-news-in-oregon-each-animal-counts/> (last visited January 6, 2015).

⁸⁵ *State of Or. v. Nix*, 356 Or. 768, 782 (2015).

⁸⁶ *Lavery*, 124 A.D.3d at n.34.

⁸⁷ ARIZ. REV. STAT. ANN. §13-2910 (2015).

⁸⁸ S.B. 1265, 52nd Leg., 1st Reg. Sess. (Ariz. 2015).

factors that have historically been reserved for only crimes against persons.

C. Federal Actions Against Animal Cruelty

As discussed above, over the past fifty years the federal government has attempted to stop and punish acts of overt animal cruelty on a national level. In 1976, Congress passed the Animal Fighting Venture Prohibition.⁸⁹ The most recent incarnation of the prohibition forbids individuals from sponsoring, attending, or participating in any way in an animal fight.⁹⁰ An “animal fighting venture” as defined in the act is “any event, in or affecting interstate or foreign commerce, that involves a fight conducted or to be conducted between at least 2 animals for purposes of sport, wagering, or entertainment”⁹¹ The penalties for violating the Prohibition include fines and potential imprisonment of not more than five years.⁹²

The federal government has also attempted to deal legislatively with the appalling production of animal “crush” videos under the Commerce Clause.⁹³ These videos, which cater to a specific fetish, depict women crushing animals to death under their feet and have been in production since the 1950s.⁹⁴ Congress, asserting its power to regulate interstate commerce, came head to head with the individual’s First Amendment right of free

⁸⁹ 7 U.S.C.A. § 2156 (1976).

⁹⁰ 7 U.S.C.A. § 2156 (a) (2014).

⁹¹ *Id.* at (g)(1).

⁹² 18 U.S.C.A. § 49(a) (2014).

⁹³ 18 U.S.C.A. § 48 (2014).

⁹⁴ Meredith L. Shafer, *Perplexing Precedent: United States v. Stevens Confounds a Century of Supreme Court Conventionalism and Redefines the Limits of “Entertainment,”* 19 VILL. SPORTS & ENT. L.J. 281, 281 (2012).

speech in *United States v. Stevens* and *United States v. Richards*.⁹⁵ Though the Act was not enacted specifically for animal welfare, the Act's prohibition of conduct had consequential benefits for animals.⁹⁶ However, the Supreme Court held in *Stevens* that the Act's prohibitions on speech were overly broad and vague as it applied all animal cruelty not specifically crush videos, thus rendering the Act unconstitutional.⁹⁷ This holding and reasoning was mirrored by the United States District Court in *Richards*, but the Fifth Circuit later reversed and remanded the matter, holding that the statute prohibited only unprotected speech and was thus constitutionally sound.⁹⁸ Responsively, Congress revised § 48 to make it a crime to knowingly create, sell, market, advertise, exchange, or distribute an "animal crush video" that "(1) depicts actual conduct in which one or more non-human animals is intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury and (2) is obscene."⁹⁹

IV. CLASSIFICATIONS FOR CRIMES AGAINST ANIMALS, AN ARIZONA CASE STUDY

A. Current Anti-Animal Cruelty Statutes and Sentencing Guidelines in Arizona

⁹⁵ *United States v. Stevens*, 130 S.Ct. 1577, 1582 (U.S. 2010); *United States v. Richards*, 940 F.Supp.2d 548, 550 (S.D. Tex. 2013).

⁹⁶ *Stevens*, 130 S.Ct. 1577, 1582.

⁹⁷ *Id.* at 1592.

⁹⁸ *United States v. Richards*, 755 F.3d 269, 271 (5th Cir. 2014) cert. denied sub nom. Justice v. United States, 135 S. Ct. 1546, 191 L. Ed. 2d 642 (2015) and cert. denied, 135 S. Ct. 1547 (2015).

⁹⁹ 18 U.S.C.A. § 48 (2014).

Arizona's animal cruelty provisions are encompassed in title thirteen, section 2910, of the Arizona Revised Statutes.¹⁰⁰ Currently, the Arizona anti-animal cruelty statute defines cruelty to animals if a person:

1. Intentionally, knowingly or recklessly subjects any animal under the person's custody or control to cruel neglect or abandonment.
2. Intentionally, knowingly or recklessly fails to provide medical attention necessary to prevent protracted suffering to any animal under the person's custody or control.
3. Intentionally, knowingly or recklessly inflicts unnecessary physical injury to any animal.
4. Recklessly subjects any animal to cruel mistreatment.
5. Intentionally, knowingly or recklessly kills any animal under the custody or control of another person without either legal privilege or consent of the owner.
6. Recklessly interferes with, kills or harms a working or service animal without either legal privilege or consent of the owner.
7. Intentionally, knowingly or recklessly leaves an animal unattended and confined in a motor vehicle and physical injury to or death of the animal is likely to result.
8. Intentionally or knowingly subjects any animal under the person's custody or control to cruel neglect or abandonment that results in serious physical injury to the animal.

¹⁰⁰ ARIZ. REV. STAT. ANN. §13-706(F) (2015); ARIZ. REV. STAT. ANN. §13-704 (2015).

9. Intentionally or knowingly subjects any animal to cruel mistreatment.¹⁰¹

The current version of §13-2910 has gone through few, but very important modifications since its original enactment.¹⁰² Arizona classified animal cruelty as a felony by amendment in 1996,¹⁰³ sixteen years before other states in the union.¹⁰⁴ In 1999, Arizona's anti-animal cruelty law underwent another overhaul, this time removing the distinction between what was considered an "animal" (domestic) and other animals (poultry).¹⁰⁵ It was not until 2002 that §13-2910 was amended to impose an affirmative duty towards animals by the additions of sections seven, eight, and nine.¹⁰⁶ Previously, only an intentional act was sufficient to charge a person with animal cruelty.¹⁰⁷ The felony classification, however, does not include all actions that are considered animal cruelty under the section.¹⁰⁸ Only actions that are done intentionally, done knowingly, or involve injury to a service animal are considered felony offenses and may be subject to felony sentencing.¹⁰⁹

¹⁰¹ §13-2910.

¹⁰² *Id.*

¹⁰³ 1996 Ariz. Legis. Serv. Ch. 89 (H.B. 2543) (West).

¹⁰⁴ Berry, *supra* note 3.

¹⁰⁵ 1999 Ariz. Legis. Serv. Ch. 143 (S.B. 1174) (West). Though not the topic of this article, HB 2429 (proposed in 2015) is attempting to remove farm animals from the protection of §13-2910 onto a separate and weaker anti-cruelty statute.

¹⁰⁶ 2002 Ariz. Legis. Serv. Ch. 302 (H.B. 2036) (West).

¹⁰⁷ *Id.*

¹⁰⁸ §13-2910 (G) (2015) "A person who violates subsection A, paragraph 1, 2, 3, 4, 5, 6, 7 or 12 of this section is guilty of a class 1 misdemeanor. A person who violates subsection A, paragraph 8, 9, 10, 11 or 13 of this section is guilty of a class 6 felony."

¹⁰⁹ *Id.*

There are some actions of intentionally harming an animal that will not result in a charge of animal cruelty. The Arizona Revised Statutes, §13-2910, include defenses to allegations of animal cruelty.¹¹⁰ Poisoning of a dog, if done in connection with the loss of wounded or killed livestock or poultry on that person's private property, is permitted if a warning has been posted and the poison is removed once the "threat" has "ceased to exist."¹¹¹ Additionally, §13-2910 does not pertain to the "taking of wildlife . . . or [a]ctivities regulated by the Arizona game and fish department or the Arizona department of agriculture."¹¹² Legislation during the 2015 Fifty-Second Legislature First Regular Session, was proposed to make all acts listed in §13-2910 qualify as felony offenses but ultimately did not pass.¹¹³

The highest felony charge allotted to animal cruelty in Arizona, without the addition of any aggravating factors, is a class six.¹¹⁴ A class six felony conviction, for a first time offender, has a presumptive imprisonment term of one year.¹¹⁵ The minimum sentence for such as offense can be mitigated down to only four months or to a class one misdemeanor.¹¹⁶ A repeat class six felony offender may be sentenced more leniently.¹¹⁷ Dependent on what category the repeat offender is given, the sentence imposed can be as little as three months if mitigating factors exists for a category one offender¹¹⁸ or as much as a sentence of 3.75 years for a category three offender¹¹⁹

¹¹⁰ §13-2910(B), (C).

¹¹¹ §13-2910(B)(1).

¹¹² §13-2910(C)(1), (3).

¹¹³ S.B. 1265, 52nd Leg., 1st Reg. Sess. (Ariz. 2015).

¹¹⁴ See *supra* note 108.

¹¹⁵ ARIZ. REV. STAT. ANN. §13-702(D) (2014).

¹¹⁶ *Id.*

¹¹⁷ ARIZ. REV. STAT. ANN. §13-703 (2014).

¹¹⁸ *Id.* at (H).

¹¹⁹ §13-2910(J).

V. WHAT MAKES A CRIME DANGEROUS

A. *Definitions of Dangerous*

“Dangerous: *adjective* \ˈdān-jə-rəs; ˈdān-jərs, -zhɹəs\: involving possible injury, harm, or death characterized by danger; able or likely to cause injury, pain, harm, etc.”¹²⁰ Under Arizona law, the term “dangerous” is included in four criminal definitions.¹²¹ A dangerous instrument “means anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury.”¹²² A dangerous offense “means an offense involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another person.”¹²³ It is within the discretion of the prosecutor, upon review of the evidence, whether to charge a crime as “dangerous.”¹²⁴ If the prosecution fails to charge a “dangerous” factor allegation before an indictment is obtained, the allegation is barred from being brought against the defendant.¹²⁵

B. *The Power of Aggravating Factors*

¹²⁰ *Dangerous*, MERRIAM-WEBSTER DICTIONARY.COM, <http://www.merriam-webster.com/dictionary/dangerous> (last visited March 16, 2015).

¹²¹ ARIZ. REV. STAT. ANN. §13-105(11)-(13), (22) (2015).

¹²² §13-105 (12).

¹²³ §13-105 (13).

¹²⁴ ARIZ. R. CRIM. P. 13.5(a) (“[t]he prosecutor may amend an indictment, information or complaint to add an allegation of one or more prior convictions or other non-capital sentencing allegations”).

¹²⁵ *Id.* at 13.5(b) (“[t]he charge may be amended only to correct mistakes of fact or remedy formal or technical defect, unless the defendant consents to the amendment.”).

The trier of fact in Arizona, when assigning a sentence, is responsible for determining whether an aggravating factor exists for an offense,¹²⁶ such as if the offense was committed in an “[e]specially heinous, cruel[,] or depraved manner.”¹²⁷ The court must consider this when determining a proper sentence.¹²⁸ These aggravating factors can increase a prison sentence, but the offense can also be mitigated to a lesser term.¹²⁹ By adding the label “dangerous” to an offense, the minimum sentence for an offender is 1.5 years with a presumptive sentence of 2.25 years.¹³⁰ Additionally, there is no option to mitigate an imprisonment term.¹³¹ For a repeat offender, one with three or more prior dangerous felony convictions, the maximum sentence is a prison term of six years.¹³²

VI. AGGRAVATING FACTORS IN ACTION- ARIZONA’S ATTEMPT TO HOLD ABUSER’S ACCOUNTABLE

A. The State of Arizona v. Daniel Dick

In the early morning hours of March 29, 2010, an act of senseless violence ended in the taking of an innocent life.¹³³ The “victim” of this crime was a six-month-old puppy named “Panda,”¹³⁴ and the defendant, Daniel Dick, was the neighbor of

¹²⁶ ARIZ. REV. STAT. ANN. §13-701(D) (2014).

¹²⁷ *Id.* at (D)(5).

¹²⁸ *Id.* at (D).

¹²⁹ §13-702(D).

¹³⁰ ARIZ. REV. STAT. ANN. §13-704 (2014).

¹³¹ *Id.* at (A).

¹³² *Id.* at (C).

¹³³ *State v. Dick*, No. 2 CA-CR2012-0256, 2013 WL 1188958, at *1, (Ariz. Ct. App. March 22, 2013.)

¹³⁴ *Id.*

Panda's owners, Matthew and Tina M., in a rural community in Pinal County.¹³⁵ The morning of March 29 was like any other according to witnesses, until the sound "[of] a fairly large-caliber handgun . . ." was heard.¹³⁶ The witness, Tim P. was standing on the M.'s back porch when he heard the shot, and heard defendant utter, "I can't believe I didn't just kill you."¹³⁷ Tim P. then saw Panda, "stumbling back towards the property. Blood . . . gushing out of her muzzle . . ."¹³⁸ Panda's owner, Matthew M., recalls being told by Tim P. "the neighbor shot Panda" and then seeing "'Panda on the front porch bleeding profusely,' with a 'large hole through her nose' and one of her legs severely injured."¹³⁹ Panda was unable to receive timely medical treatment and Matthew M. was forced to euthanize her.¹⁴⁰

The State charged Dick with animal cruelty and disorderly conduct for the use of the handgun in injuring Panda.¹⁴¹ Unfortunately, the jury could not reach a verdict on either charge.¹⁴² The State re-tried the matter, but charged both crimes as misdemeanors rather than felonies.¹⁴³ The jury found Dick guilty of both charges.¹⁴⁴ On appeal, Dick challenged both of his convictions and his sentencing.¹⁴⁵

Dick contested his animal cruelty conviction by arguing, that he "was not charged with the crime for which he was convicted."¹⁴⁶ The State had charged Dick originally for a violation

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Dick*, 2013 WL 1188958, at *1

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Dick*, 2013 WL 1188958, at *1.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at *3.

of Ariz. Rev. Stat. §13-2910(A)(3) but convicted under Ariz. Rev. Stat. §13-2910(A)(9).¹⁴⁷ Dick argued “§13–2910(A)(3) is not a lesser-included offense of §13–2910(A)(9) because ‘an individual can commit cruel mistreatment of an animal without inflicting unnecessary physical injury.’”¹⁴⁸ The court however stated, “we can imagine no scenario in which a person could subject an animal to cruel mistreatment under §13–2910(A)(9) without also violating §13–2910(A)(3) . . . Thus, it appears that subsection (3) is always a constituent part of subsection (9).”¹⁴⁹ The court accordingly upheld the animal cruelty conviction.¹⁵⁰

The disorderly conduct conviction however was not affirmed.¹⁵¹ The court found fault only in an essential procedural error, not that the charge was unwarranted.¹⁵² The State had improperly reduced the disorderly conduct charge from a class six felony to a class one misdemeanor.¹⁵³ The court held that the State did not have the authority to reduce the charge from a felony to a misdemeanor based on the legislative intent of creating a “dangerous nature offense.”¹⁵⁴ The legislature specifically had prohibited “the redesignation of dangerous offenses to misdemeanors.”¹⁵⁵ Consequently, the court reasoned “Dick was charged with, tried for, and convicted of, an offense the legislature clearly has decided can only be a class six felony.”¹⁵⁶ However, because the State had not dismissed the “dangerous nature

¹⁴⁷ *Id.* at *5.

¹⁴⁸ *Id.*

¹⁴⁹ *Dick*, 2013 WL 1188958, at *1.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at *4.

¹⁵² *Id.* at *3, *4.

¹⁵³ *Id.* at *2.

¹⁵⁴ *Dick*, 2013 WL 1188958, at *1.

¹⁵⁵ *Id.* at *3

¹⁵⁶ *Id.*

allegation” and a dangerous offense qualifies as a “serious offense,” Dick was entitled to a jury trial by both the United States and Arizona Constitution.¹⁵⁷ Dick had not waived his right to a jury trial, but the State prosecuted the second trial only before a judge, thus violating Dick’s constitutional right to a jury trial.¹⁵⁸ This error was not harmless in the eyes of the court, and accordingly the court vacated the disorderly conduct conviction.¹⁵⁹

Though the defendant in this case had the disorderly conduct conviction vacated, this case demonstrates the potential societal benefit of expanded sentencing when charging violent acts of animal cruelty as serious offenses. Without the procedural mishap on the part of the State, the “dangerous offense” charge against Dick could not have been mitigated down to a misdemeanor,¹⁶⁰ which could have potentially increased the sentencing and punishment of Dick in connection to his cruelty towards Panda.¹⁶¹

B. State of Arizona v. Russell Files

Most recently, earlier in 2015, the criminal case of the *State of Arizona v. Russell Files* was conducted in Maricopa County.¹⁶² The State had charged Files with animal cruelty in violation of Ariz. Rev. Stat. §13-2910 and because of the nature

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Dick*, 2013 WL 1188958, at *4.

¹⁶⁰ *Id.* at *2 (citing *State v. Garcia*, 219 Ariz. 104, ¶¶4-5, 16, 193 P.3d. 798, 802 (App. 2008)).

¹⁶¹ *Id.* at *3 (referencing that the sentencing imposed was only for a misdemeanor).

¹⁶² Verdict, *State v. Files*, No. 2:13-cr-00436-DGC (D. Ariz. Jan. 14, 2015).

of the crime, based upon the evidence, also charged aggravating factors under Ariz. Rev. Stat. §13-701.¹⁶³

On December 18, 2012 Russell Files, under the guise of his position with U.S. Department of Agriculture, set steel leg traps in his front yard, not to catch feral animals like he told his supervisors, but to snare what he considered a nuisance, his neighbor's dog, Zoey.¹⁶⁴ Files was successful in his endeavor capturing Zoey by two of her paws in the steel trap.¹⁶⁵ Though neighbors tried to render aid to the helpless animal, Files' son demanded they leave the property, leaving Zoey trapped.¹⁶⁶ The neighbor, having no other choice called police who responded to find a grisly sight.¹⁶⁷ The police noticed several traps which had been baited with animal flesh to lure Zoey into the trap.¹⁶⁸ Police eventually were able to free Zoey, noting that she had blood coming from her mouth, was unable to stand, and "appeared very afraid and . . . trembling."¹⁶⁹ Zoey was taken to a veterinary hospital where it was determined that the bleeding from her mouth was caused by extreme trauma to her teeth, she had lost almost all of them trying to chew through the trap.¹⁷⁰ Additionally, the veterinarian discovered that "metal shards from the trap [were] lodged inside her jaw."¹⁷¹

¹⁶³ Indictment, Files, No. 2:13-cr-00436-DGC (D. Ariz. February 14, 2013).

¹⁶⁴ State's Response to Defendant's Notice of Removal at 2, No. 2:13-cr-00436-DGC (April 4, 2013).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ State's Response to Defendant's Notice of Removal at 2, No. 2:13-cr-00436-DGC (April 4, 2013).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

During the pendency of the trial, Files attempted to use his position with the U.S. Department of Agriculture as an affirmative defense against the allegations of animal cruelty and removed the action to federal district court.¹⁷² Though the action was removed, the court denied Files' defense of qualified immunity and set the action for trial.¹⁷³ Zoey and her family did not receive justice however, after a week-long trial, the verdict was returned "not guilty" against Files and he was fully acquitted.¹⁷⁴

Though the jury did not find Russell Files guilty of the charged crimes of extreme and dangerous acts of animal cruelty, the case is a prime example of prosecutors seeing the need to charge such acts as dangerous offenses as a means to hold the abuser accountable for their crimes and recognizing cruelty towards animals is more than a property crime.

VII. THE NECESSITY OF CHARGING VIOLENT ANIMAL CRUELTY AS "DANGEROUS"

A. *Harsher penalties for offenders and deterrent effects towards future acts of animal cruelty.*

The utilitarian theory regarding assignment of consequence for actions is a means to protect social welfare in an efficient manner by offering incentives and avoidance of punishment for obeying the law.¹⁷⁵ Deterrence is the general means by which

¹⁷² Defendant's Notice of Removal, No. 2:13-cr-00436-DGC (D. Ariz. March 27, 2013).

¹⁷³ Order Re: Federal Immunity Defense, No. 2:13-cr-00436-DGC (D. Ariz. July 31, 2014).

¹⁷⁴ See *supra* note 161.

¹⁷⁵ John T. Parry, *Culpability, Mistake, and Official Interpretations of the Law*, 25 AM. J. CRIM. L. 1, 31 (1997).

this goal is obtained.¹⁷⁶ Deterrence is typically categorized as either general or specific deterrence.¹⁷⁷ Specific deterrence, as its name suggests, serves to deter the offending individual from committing similar offenses as the punishment assigned reduces their ability to do so.¹⁷⁸ General deterrence is defined by using punishment of the individual as a means to deter the masses from committing similar offenses.¹⁷⁹

Arizona utilizes the utilitarian theory of deterrence through its criminal code, under title thirteen of the Arizona Revised Statutes.¹⁸⁰ The classifications of criminal offenses incorporate a tiered system of severity ranging from class three misdemeanors to class one felonies.¹⁸¹ According to the Arizona Legislature, a purpose for these classifications is “to differentiate on reasonable grounds between serious and minor offenses and to prescribe proportionate penalties for each.”¹⁸² Hence it follows, that the more severe the crime, the harsher the penalty. When applied to crimes of animal cruelty, by designating the crime as more severe, it follows a more severe punishment will be assigned. As discussed above in Part IV, though felony animal cruelty has been in Arizona for nineteen years,¹⁸³ advances in punishment for these crimes have not followed. Without aggravating factors, such as the offense being classified as dangerous, the punishment can be mitigated down to four months.¹⁸⁴ By

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 32.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ ARIZ. REV. STAT. ANN. §13-101(5) (2015). One of the stated purpose of Title 13 is “[t]o insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized[.]”

¹⁸¹ *Id.*

¹⁸² ARIZ. REV. STAT. ANN. §13-101 (2015).

¹⁸³ *See supra* note 105.

¹⁸⁴ §13-703(H).

charging heinous acts of animal cruelty as dangerous crimes punishable by more severe consequences, it is assumable that the deterrent effect of these punishments will also increase to help prevent future acts of animal cruelty.

B. Moral obligation to protect animals through harsher punishments heinous acts of animal cruelty.

“Our culture defines our laws, but our laws define what we stand for as a culture and as a society.”¹⁸⁵ The United States has had a long history of possessing a compelling interest in preventing cruelty towards animals.¹⁸⁶ Additionally, an aversion to intentional cruelty or harm towards animals has been a long standing value in American society.¹⁸⁷ Society has a “well recognized” moral obligation to protect and show “benevolence and mercy to those useful animals, which being domesticated, and wasting their lives in man's service, were supposed to be entitled to his kind and humane consideration.”¹⁸⁸ The establishment of humanity's moral obligation to the plight of innocent animals has been relatively addressed in the creation and amendments to federal and state anti-animal cruelty statutes and provisions.

Opponents of the moral obligation facet to anti-cruelty laws, hold that a certain act being immoral “is not in itself a sufficient reason for criminalizing the conduct.”¹⁸⁹ The Supreme Court has echoed this belief in *Lawrence v. Texas* holding, “the fact

¹⁸⁵ Randal Lockwood, *Animal Cruelty and Violence Against Humans: Making the Connection*, 5 ANIMAL L. 81, 81 (1999).

¹⁸⁶ H.R. Rep. No. 549, 111TH Cong., 2ND Sess. 2010, 2010 WL 2816371, 2010 U.S.C.C.A.N. 1224 H.R. REP. 111-549, 2010 U.S.C.C.A.N. 1224 (West 2010).

¹⁸⁷ *Id.*

¹⁸⁸ *Grise v. State*, 37 Ark. 456, 458 (1881).

¹⁸⁹ Lockwood, *supra* note 183.

that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice”¹⁹⁰ Nevertheless, it is the duty of the law to adequately protect animals, beyond mere property laws, and to hold their abusers accountable for their crimes.

C. Potential to protect humans from harm.

Studies have shown an almost direct link between cruelty towards animals and eventual cruelty towards humans.¹⁹¹ Links include partner violence, child abuse, and violence towards strangers.¹⁹² Connections have also been established between acts of animal cruelty and serial killers and mass murders.¹⁹³

The connection between acts of violence against animals and the connection of violence against humans is not new.¹⁹⁴ Depictions and references linking the two acts have been documented in works of psychology, anthropology, criminology, and veterinary medicine.¹⁹⁵ Animal violence has been noted as the beginning in a “cycle of violence” that can escalate to violence against persons.¹⁹⁶ One notable depiction of the cycle is William Hogarth’s woodcutting in 1751 entitled *The Four Stages of Cruelty*.¹⁹⁷ In the first stage, the subject is depicted as young boys inflicting a variety of tortures on dogs and cats.¹⁹⁸ The

¹⁹⁰ *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

¹⁹¹ Joseph G. Sauder, *Enacting and Enforcing Felony Animal Cruelty Laws to Prevent Violence Against Humans*, 6 *ANIMAL L.* 1, 9 n. 80 (2000).

¹⁹² *Id.* at n. 81-83

¹⁹³ *Id.* at n. 84.

¹⁹⁴ Sauder, *supra* note 190.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 10.

¹⁹⁷ Lockwood, *supra* note 184 at 82.

¹⁹⁸ *Id.*

second stage shows an older boy over loading his workhorse to the point that horse breaks his leg and the driver beats the animal to provoke movement.¹⁹⁹ The woodcuttings progress in their depictions of violence turning from acts against animals to exhibiting violent acts against persons.²⁰⁰

Children who witness or themselves perform acts of animal cruelty are more likely to pass on by example the pattern of abuse and violence towards animals and potentially humans.²⁰¹ Furthermore, studies have shown an almost concrete link between acts of animal cruelty as children, to later acts of serial or mass murder, arson, and sexually perpetrated crimes.²⁰² The link between animal abuse and serial murder was established by psychiatrist John McDonald in the 1960s.²⁰³ According to his research, involving the interview of over thirty multiple-murderers, thirty-six percent admitted to torturing small animals in their young childhood, and forty-six percent in their adolescence.²⁰⁴ Additionally, the link between domestic violence and animal abuse is unmistakable.²⁰⁵

Children are more at risk of developing violent tendencies when they witness acts of animal cruelty.²⁰⁶ Some studies have

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Sauder, *supra* note 190 at 11.

²⁰² Lockwood, *supra* note 184, at 82.

²⁰³ *Id.* at 15.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 11, n. 92, 93 (“[i]n a survey of thirty-eight women seeking protection from domestic violence, seventy-one percent of those who owned pets reported that their abusers also harmed or killed their pets. Another study reported that twenty-eight percent of animal abusers were also charged with domestic violence.”)

²⁰⁶ Sauder, *supra* note 184.

shown that children who act violently towards animals are reenacting acts of violence from home.²⁰⁷ In some of these situations, the child's pet is either harmed or killed as a way of assuring compliance by the abuser.²⁰⁸ Violent criminals also usually have a history of violence towards animals.²⁰⁹ Animal abusers are five times more likely to commit violent crimes such as robbery or rape.²¹⁰ Consequently, acts of animal violence, especially dangerous acts, need to be punished more severely to serve as a deterrent and prevent other acts of violence towards animals and persons.

By appropriately charging dangerous acts of animal cruelty as dangerous crimes and awarding appropriate punishments, positive effects can be made towards ending the cycle of violence. Abusers who begin their cycle of violence through animal abuse may be deterred from future acts due to the severity of consequences assigned these acts and thus thwart the escalation towards human violence.

Other avenues are also being employed to deal with the problem and are being done in the context of animal protection.²¹¹ In Arizona, some state representatives exposed to the cycle of violence in society are trying to address the problem at the source. State Representative, John Kavanagh, has proposed legislation to amend the current anti-cruelty statute that would re-

²⁰⁷ *Id.* at 12.

²⁰⁸ *Id.* at 13.

²⁰⁹ *Id.*

²¹⁰ *Id.* (citing Arnold Arluke & Jack Levin, Animal Cruelty, Crimes Against People Linked, Salt Lake Trib., Nov. 9, 1997, at AA5 and David Tingle et al., Childhood and Adolescent Characteristics of Pedophiles and Rapists, in *Cruelty to Animals and Interpersonal Violence* 211, 221-22 (Randall Lockwood & Frank R. Ascione eds., 1998)).

²¹¹ S.B. 1265, 52nd Leg., 1st Reg. Sess. (Ariz. 2015).

quire abusers convicted of animal cruelty to undergo a psychological evaluation prior to sentencing.²¹² As of the publication of this article, the bill's status is "held in committees."²¹³ Additionally, Representative John Farley has been a spokesperson for the proposed animal abuse registry.²¹⁴ The proposed bill would amend Ariz. Rev. Stat. §13-2910 to include a mandatory registration for those convicted of animal cruelty.²¹⁵ The mandatory registration would apply to both those convicted within the state or if a person had been convicted for animal cruelty in another state for an offense that is recognized in Arizona.²¹⁶ The proposed registry applies to all classes of animal cruelty offenses.²¹⁷ In addition to adding "violent" and "dangerous" aggravating factors to animal cruelty charges, proposed laws like these are workable solutions to shutting down the cycle of violence before it even begins.

VIII. CONCLUSION

The change in society's view of animals has been astounding. Animal welfare groups exist in almost every state and larger organizations are recognized nationally and globally.

²¹² *Id.*

²¹³ ARIZONA STATE LEGISLATURE, Committee Report, Judiciary, http://www.azleg.gov/FormatDocument.asp?inDoc=/leg-text/52leg/1r/bills/sb1265o.asp&Session_ID=114 (last visited April 6, 2016); ARIZONA STATE LEGISLATURE, Committee Report, Rules, http://www.azleg.gov/FormatDocument.asp?inDoc=/leg-text/52leg/1r/bills/sb1265o.asp&Session_ID=114 (last visited April 6, 2016).

²¹⁴ S.B. 1301, 52nd Leg., 1st Reg. Sess. (Ariz. 2015), http://www.azleg.gov/FormatDocument.asp?inDoc=/leg-text/52leg/1r/bills/sb1301p.htm&Session_ID=114.

²¹⁵ *Id.*

²¹⁶ *Id.* at (C).

²¹⁷ *Id.* at (A).

But despite these achievements, obstacles still exist regarding the protection of animals in the civilized world. One of the most prevalent is the property view of anti-cruelty laws. Because of this prevailing viewpoint, the need to properly charge dangerous acts of animal cruelty as dangerous crimes is vital in recognizing animals as more than chattel but as sentient beings in need of protection. If a crime is considered dangerous against a human, the crime should be viewed as dangerous against an animal. By holding animal abusers fully accountable for their acts, society as a whole will benefit. Appropriate punishments for violent and dangerous abusers will serve the aims of animal interests through specific and general deterrence, and they will serve the human population by ending the cycle of violence before it escalates. Anti-cruelty protections have increased in the last 150 years, but laws fully protecting animals still have a long way to go.

POSSIBLE COLLATERAL CONSEQUENCES OF SAME-SEX
MARRIAGE: IS FREEDOM OF RELIGION BEING REDEFINED TO
MEAN ONLY FREEDOM OF WORSHIP?

Hon. Gerald A. Williams*

I. INTRODUCTION

A popular Phoenix area pastor often states that Christians are no longer the home team.¹ While reasonable people can disagree on whether the United States ever was a Judeo-Christian nation, it is perhaps noteworthy that the treaty with Great Britain that officially recognized our country as a country, begins with the phrase “In the Name of the most Holy and undivided Trinity.”² John Adams, Benjamin Franklin, and John Jay signed the treaty in 1783.

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¹ Ronald Keener, *Don Wilson: Senior Pastor, Christ's Church of the Valley, Peoria, AZ*, CHURCH EXECUTIVE (July 2, 2012), <http://churchexecutive.com/archives/don-wilson-senior-pastor-christ's-church-of-the-valley-peoria-az>. CCV is a large nondenominational Christian church with locations in the Phoenix, Arizona area in Anthem, Avondale, Mesa, Peoria, Scottsdale, and Surprise. For Easter Services in 2015, it rented the University of Phoenix Stadium, which is the stadium for the National Football League's Arizona Cardinals.

² The Definitive Treaty of Paris, U.S.-Gr. Brit., 1783, [WWW.OURDOCUMENTS.COM](http://www.ourdocuments.com), available at: <http://www.ourdocuments.gov/doc.php?flash=true&doc=6&page=transcript> (last visited Nov. 27, 2015). The text of the treaty begins, “It having pleased the Divine Providence to dispose the Hearts of the most Serene and most Potent Prince George the Third, by the Grace of God, King of Great Britain, France, and

By design, there is a natural antagonism between the First Amendment's command not to establish a religion and its equal command to not inhibit the free exercise of religion. While some recent legal changes have caused some people of faith to face a new reality, neither case law nor popular opinion are near a point where, as one commentator claimed, American Christians would be required to "learn how to live as exiles in our own country."³ Generally, even people who seem to be polarized on nearly every issue usually set aside their differences and oppose what are viewed as genuine attacks on the fundamental freedom of religious liberty.⁴ But perceptions can quickly become complicated.

By way of example, the United States Air Force Academy, whose main architectural landmark is its cadet chapel, recently built a worship center for cadets who may wish to practice pagan

Ireland, Defender of the Faith, Duke of Brunswick and Lunebourg, Arch-Treasurer and Prince Elector of the Holy Roman Empire etc.. and of the United States of America, to forget all past Misunderstandings and Differences that have unhappily interrupted the good Correspondence and Friendship which they mutually wish to restore ..." *Id.* An excellent source on the impact of religious faith on the formation of the United States is the Library of Congress' on-line exhibition titled, "Religion and the Founding of the American Republic." It is available at <http://www.loc.gov/exhibits/religion/>.

³ Rod Dreher, *Orthodox Christians Must Now Learn to Live as Exiles in Our Own Country*, TIME, (Jun. 26, 2015), <http://time.com/3938050/orthodox-christians-must-now-learn-to-live-as-exiles-in-our-own-country/>. A discussion of Biblical theology is well beyond the scope of this article; but it is interesting that one of the few references to a legal system in the New Testament commands followers of Jesus Christ to also obey the laws of governments. *Romans* 13:1-3.

⁴ Ken Starr, *Religious Liberty Issues Divide Our Nation*, THE MONITOR, (Aug. 10, 2014 3:30 AM) http://www.themonitor.com/opinion/commentary-ken-starr-religious-liberty-issues-divide-our-nation/article_157b3148-1f4b-11e4-8b1a-001a4bcf6878.html.

faiths.⁵ Previously, in 2004, Air Force's football coach was directed to remove a Fellowship of Christian Athletes banner from the locker room that declared, "I am a Christian first and last ... I am a member of Team Jesus Christ."⁶ How those two events are viewed may depend on individual biases related to religious tolerance and religious endorsement.⁷ So where is the line? This comment will include an analysis of where we started as a nation on issues concerning freedom of religion, Arizona's prior laws on same-sex marriage, and some of the recent developments in case law and their impact on religious freedom in connection with wedding ceremonies.

⁵ Jenny Deam, *Air Force Academy Adapts to Pagans, Druids, Witches and Wiccans*, LOS ANGELES TIMES, (Nov. 26, 2011), <http://articles.latimes.com/2011/nov/26/nation/la-na-air-force-pagans-20111127>; Don Branum, *Why building Falcon Circle was 'right thing to do,'* U.S. AIR FORCE ACADEMY, (Jan. 4, 2012), <http://www.usafa.af.mil/news/story.asp?id=123284367>.

⁶ Sally Jenkins, *DeBerry's Religious Posting Questioned*, L.A. TIMES, (May 29, 2005), <http://articles.latimes.com/2005/may/29/sports/sp-d2comment29>. There was a more recent controversy concerning whether Air Force Academy football players should be allowed to engage in voluntary prayer before kickoff. Jeff Schogol, *Air Force Academy Football players Allowed to Pray Publicly*, A. F. TIMES (Dec. 23, 2015, 3:05 PM), <http://www.airforcetimes.com/story/sports/2015/12/23/air-force-academy-football-players-allowed-pray-publicly/77838894/>.

⁷ Perhaps in contrast, because the Ten Commandments are sacred texts in both Jewish and Christian faiths, they do not endorse a specific religion. As such, even though they are clearly religious, they can sometimes be displayed on public property. *See*, *Van Orden v. Perry*, 125 S. Ct. 2854, 2856 (2005) (holding that the Establishment Clause was not violated by display on Texas state capitol grounds because while Ten Commandments were undoubtedly religious, they had historical significance). *Contra*, *Prescott v. Okla. Capitol Pres.*, 2015 WL 3982750 (Okla. 2015) (holding that a Ten Commandments monument on state capitol grounds violated state constitution); *See*, *McCreary Cty, Ky. v. Am. Civil Liberties Union of Ky*, 125 S. Ct. 2722, 2722 (2005) (Ten Commandments could not be posted in courthouse because they were posted for a religious objective).

II. BRIEF HISTORY OF THE ORIGIN OF THE SEPARATION OF CHURCH AND STATE

If you ask most Americans about religious freedom, they would proudly state that our Constitution specifically provides for the separation of church and state and that we have always had a history of religious tolerance. Neither of those points is correct.

As our new republic was being formed, Episcopal pastors petitioned to make the Episcopal Church the official state religion of Virginia. The proposal made it out of a legislative committee; but the Virginia House of Delegates adjourned without taking action on the legislation.⁸ Perhaps even more controversial, there was a serious legislative proposal for a statewide tax to fund the teaching of Christianity.⁹ Our history of religious tolerance is also less than commendable.

Even within the Christian faith, there were bitter conflicts. A new group of Christians, called Baptists, had formed. By 1768, Baptist ministers were jailed in Virginia on disorderly conduct type charges for, among other things, preaching the Gospel to strangers.¹⁰ No doubt to the frustration of some, as mass arrests continued for years, the various defendants apparently followed the example of the Apostle Paul, and the imprisoned Baptists continued to preach, worship, and sing hymns while they were confined.¹¹ But official oppression also gave license to private misconduct. Members of the public would assault church members and would disrupt baptism ceremonies by

⁸ Chris DeRose, *Founding Rivals, Madison vs. Monroe, The Bill of Rights, and The Election That Saved A Nation* 81 (Regnery Publ'g 2015).

⁹ *Id.* at 92.

¹⁰ *Id.* at 99.

¹¹ *Id.*

riding their horses through rivers.¹² It was against this historical backdrop that Thomas Jefferson wrote one of his most famous lines.

On December 30, 1801, a letter from the Danbury Baptist Association arrived for the recently inaugurated President.¹³ Members of the association felt that they were being harassed by the official state-sponsored religion in Connecticut, known as Congregationalism. Jefferson's response contained what would be one of his most famous phrases. He wrote, "I contemplate with sovereign reverence that the act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building *a wall of separation between Church & State*."¹⁴ Although he clearly tied the concept of separation of church and state to the First Amendment, he also apparently saw no problem with attending church services in the U.S. Capitol building two days after he sent the letter.¹⁵

The U.S. Supreme Court first used the phrase, "separation of church and state," in 1879.¹⁶ It did so by specifically referencing Jefferson's letter and noted that while Jefferson had nothing to do with the language of the Constitution, because he was in France at the time, his words should be given special significance. The Court further stated that, as an established advocate for freedom of religion, Jefferson's opinion "may be accepted almost as an authoritative declaration of the scope and effect of

¹² *Id.*

¹³ TARA ROSS & JOSEPH C. SMITH JR. *Under God, George Washington and the Question of Church and State* 118 (Colonial Press 2009).

¹⁴ *Id.* at 119-20. (emphasis added). See also, David Reiss, *Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence*, 61 MD. L. REV. 94 (2002).

¹⁵ *Id.* at 121.

¹⁶ *Reynolds v. United States*, 98 U.S. 145, 164, 166-67 (1879) (holding that religious belief in polygamy is not a valid defense for the crime).

the” First Amendment.¹⁷ However, the concept that the First Amendment created a wall between church and state did not become the law of the land until the U.S. Supreme Court made it so in 1947.

In *Everson v. Board of Education*, the question presented was whether tax dollars could be used to provide student transportation to parochial, as well as public, schools.¹⁸ While the Court ruled in favor of the private Catholic schools, it did so with some very significant language that arguably went well beyond what was in Jefferson’s letter. In the majority opinion, Justice Hugo Black concluded by stating, “The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.”¹⁹ Thus, a new standard was born.

III. PRIOR ARIZONA LAW ON SAME-SEX MARRIAGE

As recently as 2003, the Arizona Court of Appeals held, in *Standhardt v. Superior Court*, that two men did not have a constitutional right to marry each other.²⁰ The appellate court in *Standhardt* held that same-sex marriage was not a fundamental right and therefore only a rational basis analysis was necessary. Not surprisingly, the traditional definition of marriage passed a rational basis analysis; but the Arizona Court of Appeals expressly held:

In summary, Petitioners have failed to prove that the State's prohibition of same-sex marriage is

¹⁷ *Id.* at 164.

¹⁸ *Everson v. Bd. of Educ.*, 67 S. Ct. 504 (1947).

¹⁹ *Id.* at 513.

²⁰ *Standhardt v. Super. Ct.*, 77 P.3d 451, 460 (Ariz. Ct. App. 2003).

not rationally related to a legitimate state interest. We hold that the State has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest.²¹

Justice Ann Timmer's opinion went on to note that the State's rationale for prohibiting same-sex marriage was "debatable" and "arguably unwise;" however, it was not "arbitrary or irrational."²²

In 2008, the Arizona legislature passed a resolution referring a proposed amendment to the Arizona Constitution for a popular vote that limited marriage to its traditional definition. The proposal read, "Only a union of one man and one woman shall be valid or recognized as a marriage in this state."²³ It passed with 56.2% of the vote.²⁴ This constitutional amendment, banning same-sex marriages in Arizona, would last only six years.

Other federal judges and justices had declared same-sex marriages to be lawful in Arizona before the U.S. Supreme

²¹*Id.* at 463-64.

²² *Id.* at 464. See Alan Sears, *Wrong in the Law and in the Culture*, 40 ARIZ. ATT'Y 15 (March 2014) (presenting arguments in favor of traditional marriage); Amelia Cramer, *The Freedom to Marry Must Not Be Denied*, 40 ARIZ. ATT'Y 14 (March 2014) (presenting arguments in favor of same-sex marriage). See also Courtney Cahill *Regulation at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43 (2012).

²³ ARIZ. CONST. art. XXX, § 1 (*invalidated by* *Majors v. Horne*, 14 F. Supp. 3d 1313, 1314 (D. Ariz. 2014). See also *Connolly v. Jeanes*, 73 F. Supp. 3d 1094, 1095 (D. Ariz. 2014).

²⁴ ARIZ. SEC'Y OF ST., ST. OF ARIZ. OFFICIAL CANVASS, 2008 GEN. Election Results (Nov. 4, 2008).

Court did. In *Majors v. Horne*,²⁵ a federal district judge declared that Arizona's constitutional and statutory provisions that prohibited same-sex marriage were unconstitutional. He did so based on the Ninth Circuit's ruling in *Latta v. Otter*, which had just made rulings on identical issues.²⁶ On October 17, 2014, the first gay marriages were performed in Arizona.²⁷ However, in spite of the results of the 2008 election, there were some strong indications that Arizona was following the national trend toward the legalization of gay marriages.

Before any same-sex marriages were lawfully performed in Arizona, they were being recognized. In *Beatie v. Beatie*,²⁸ a transgendered person and a woman married in Hawaii. The couple then sought a divorce in Arizona. The facts of the case are unique.

One of the parties, Thomas, was given the name Tracy, at birth. Tracy identified as a male and was able to obtain a Hawaii driver's license as a male. This person then married Nancy. However, Nancy was not able to have children and so Thomas, who was biologically a female, agreed to bear the couple's children. The children's birth certificates identified Thomas as their father, even though he was their biological mother. They moved to Arizona and filed joint tax returns as husband and wife. However, when they wanted a divorce, the trial court judge found

²⁵ *Majors*, 14 F. Supp. 3d at 1314. A federal judge subsequently ruled that that state of Arizona must pay \$300,000 in attorney's fees to the Plaintiffs. Alia B. Rau, *Same-Sex Marriage Didn't Come Cheap in Arizona*, THE REPUBLIC (Dec. 18, 2015, 4:23 PM), <http://www.azcentral.com/story/news/politics/politicalinsider/2015/12/18/same-sex-marriage-legal-fees-arizona/77566376/>.

²⁶ *Latta v. Otter*, 771 F.3d 456, 464-65 (9th Cir. 2014). *Contra*, *DeBoer v. Snyder*, 772 F.3d 388, 389 (6th Cir. 2014), *overruled by* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607-08 (2015).

²⁷ Alia Beard Rau, *Arizona Gay Marriage Legal; Couples Marry Immediately*, AZCENTRAL.COM (Oct. 17, 2014, 11:16 PM).

²⁸ *Beatie v. Beatie*, 333 P.3d 754, 755 (Ariz. Ct. App. 2014).

that an Arizona Family Court lacked subject matter jurisdiction because this was a marriage between two women.

On August 13, 2014, the Arizona Court of Appeals held that an Arizona Family Court had jurisdiction to grant a divorce, even though Arizona prohibited same-sex marriages, because Hawaii had recognized their marriage as being between a male and a female.²⁹ A few weeks later, in a less complicated case, a federal judge ordered Arizona, on September 12, 2014, to recognize a same-sex marriage from California so that the surviving spouse could receive an Arizona death certificate indicating that they were married.³⁰

IV. IMPACT OF GAY MARRIAGE ON SOME RELIGIOUS WEDDING PHOTOGRAPHERS, BAKERS, AND JUDGES

On June 26, 2015, in *Obergefell v. Hodges*, the U.S. Supreme Court held that the Fourteenth Amendment required states to issue marriage licenses to same-sex couples and required states to recognize a marriage between two people with the same gender if their marriage was lawfully performed in another state.³¹ In his dissenting opinion, Chief Justice John Rob-

²⁹ *Id.* at 760. *See also*, *Surnamer v. Ellstrom*, 2012 WL 2864412, at 1 (Ariz. Ct. App. 2012) (holding in an unpublished opinion, that annulling a same-sex marriage is consistent with Arizona's prohibition of same-sex marriage).

³⁰ *Majors v. Horne*, 48 F. Supp. 3d 1310 (D. Ariz. 2014).

³¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2588 (2015). *See generally*, Laurence Tribe & Joshua Mats, *The Constitutional Inevitability of Same-Sex Marriage*, 71 MD. L. Rev. 471 (2012); Clifford J. Rosky, *Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law*, 53 Ariz. L. Rev. 913 (2011) (analyzing California's Prop. 8 decision); Sherif Girgis, Robert P. George & Ryan T. Anderson, *What is Marriage?* 34 HARV. J. L. & Pub. Pol'y. 243 (2011) (presenting arguments against redefining marriage).

erts expressed concern that the scope of the Court's decision re-defining marriage was so broad, that it "creates serious questions about religious liberty."³²

Both the Chief Justice and Justice Samuel Alito believe that the *Obergefell* decision will provide the basis for attacks against people of faith. The Chief Justice noted, "It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's 'better informed understanding' as bigoted."³³ Justice Alito wrote that this holding "will be used to vilify Americans who are unwilling to assent to the new orthodoxy."³⁴

Justice Anthony Kennedy, writing for the majority, stated that this decision would not impact anyone's free exercise of their own religious beliefs. Specifically, he wrote:

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own

³² *Id.*

³³ *Id.*

³⁴ *Id.* See generally, Roger Severino, *Or For Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J. L. & PUB. POL'Y. 939 (2007); Contra, Eric Alan Issacson, *Are Same-Sex Marriages Really a Threat to Religious Liberty?*, 8 STAN. J. CIV. RTS. & CIV. LIBERTIES 123 (2012). See also Robin Fretwell Wilson & Anthony Michael Kreis, *Embracing Compromise: Marriage Equality and Religious Liberty in the Political Process*, 15 GEO. J. GENDER & L. 473 (2014).

deep aspirations to continue the family structure they have long revered.³⁵

The California Supreme Court had previously claimed, “[A]ffording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person.”³⁶ However, even before the *Obergefell* opinion, small business owners, who identified themselves as Christians, were running into legal problems based on state law.

Perhaps the most well-known case involving a claim of religious freedom, a small business, and same-sex marriage is *Elane Photography, LLC v. Willock*.³⁷ The facts of the case were not disputed. A husband and wife in Albuquerque owned a photography studio known as Elane Photography. They offered their services on a commercial basis and usually photographed significant life events, like weddings and graduations. However, they had a policy of only photographing events that were consistent with their Christian faith.

A lady sent an e-mail to the studio requesting pricing information and inquired whether a photographer would photograph her upcoming commitment ceremony. (New Mexico did not recognize gay marriage at the time.) When the studio confirmed that it would be a “same gender ceremony,” their representative politely declined the offer and stated they do not photograph same-sex couples.

In December 2006, the potential customer filed a discrimination claim against Elane Photography with the New Mexico

³⁵ *Id.*

³⁶ *In re Marriage Cases*, 183 P.3d 384, 451-52 (2008) *superseded by constitutional amendment stated in*, *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013).

³⁷ *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert denied*, 134 S. Ct. 1787 (2014).

Human Rights Commission alleging that it had refused to offer its services to her because of her sexual orientation. The commission agreed with the customer and ordered the studio to pay \$6,637.94 in attorneys' fees and in court costs. The studio appealed in district court but lost. The studio then appealed to the New Mexico Court of Appeals.

On appeal, the studio argued that its actions were not discriminatory because it would have been willing to photograph the plaintiff in other contexts, such as a portrait photo.³⁸ The studio also maintained that forcing their photographers to take pictures in violation of their religious belief violated their freedom of expression and their freedom of religion. The studio also unsuccessfully argued that good photography is an art form and someone who supports gay marriage is likely to document such an event very differently than someone who is opposed to it.

The appellate court held that the studio was a public accommodation that could not discriminate³⁹ and rejected all of the studio's arguments. The opinion noted that the customer merely requested the studio to take pictures, "not to disseminate any message of acceptance or tolerance on behalf of the gay community."⁴⁰ The New Mexico Supreme Court affirmed.⁴¹

In a peculiar and somewhat parallel fact pattern, as the *Elane Photography* case was making its way through the New Mexico

³⁸ *Elane Photography, LLC v. Willock*, 284 P.3d 428, 437 (N.M. Ct. App. 2012).

³⁹ *Id.* at 433-37 (discussion of why studio is a public accommodation). The Civil Rights Act prohibits discrimination based on race, religion, or national origin at a place of public accommodation, which is usually defined to include almost any conceivable business where people could, eat, stay, or be entertained. 42 U.S.C. § 2000a; Avins, *What is a Place of Public Accommodation?* 52 MARQ L. REV. 1 (1968) (discussing the early history of various types of public accommodations).

⁴⁰ *Elane*, 284 P.3d at 440.

⁴¹ *Elane*, 309 P.3d at 53.

appellate system, a gay hairdresser refused to continue to cut the hair of the state's governor, Susana Martinez. He stated that he was doing so because the governor did not support same-sex marriage.⁴² The governor apparently found another hairdresser and the hairdresser apparently was not the target of any type of legal action.⁴³

Almost anyone with a Facebook page has heard about the bakery case from Oregon.⁴⁴ In that case, a lesbian couple, who had been together for eleven years, decided to get married in part to provide a sense of stability to their foster children. After attending a bridal show, and based on a favorable recommendation from one of their mothers, they made an appointment to visit the Sweet Cake's bakery shop for a cake tasting.

When the mother and her daughter went to the appointment, a bakery shop owner asked for the names of the bride and groom. When told that there was no groom but two brides, the owner apologized but said that the shop "did not make wedding cakes for same-sex ceremonies because of [the owners'] religious convictions."⁴⁵ In response, the daughter "became hysterical" and felt humiliated.⁴⁶ After a few moments, the mother reentered the bakery, only to hear the owner call her daughter's sexuality an abomination.

⁴² Ashley Powers, *Hairstylist Spurns Gov. Susana Martinez Over Gay Marriage Stance*, L.A. TIMES, (Feb. 23, 2012) <http://articles.latimes.com/2012/feb/23/nation/la-na-nn-susana-martinez-gay-marriage-20120222>.

⁴³ However, the governor was apparently denied service based on her political views, and not because she was part of a constitutionally protected class or status.

⁴⁴ *In the Matter of Klein d/b/a Sweetcakes by Melissa*, Final Order from Bureau of Labor and Industries of the State of Oregon, (2015) available at <http://www.oregon.gov/boli/SiteAssets/pages/press/Sweet%20Cakes%20FO.pdf> (last visited Mar. 30, 2016).

⁴⁵ *Id.* at 5.

⁴⁶ *Id.* at 6.

Within a few days, the couple found a new baker, but one of them also filed a complaint with the state of Oregon through her smart phone. The administrative opinion found that the bakery violated Oregon state law, that the bakery was a public accommodation, and that the bakery had to pay \$135,000 in damages for emotional suffering.⁴⁷

In a similar fact pattern, the Colorado Court of Appeals upheld an order that required a Christian baker to make cakes for gay weddings, provide remedial staff training, and submit compliance reports for two years to the state.⁴⁸ Like the business owners in *Elane Photography*, he argued that he was not refusing to make a cake because of the couple's sexual orientation. Instead, he was refusing to make only a wedding cake for them because he does not support gay marriage. The court held this to be a distinction without a difference and stated, "We conclude that the act of same sex marriage is closely correlated to [the male couple's] sexual orientation, and therefore, the ALJ did not err when he found that [the baker's] refusal to create a wedding cake for [the couple] was 'because of' their sexual orientation" in violation of Colorado law.⁴⁹ In doing so, the appellate court agreed that the baker's religious objection was inauthentic and that it was, in reality, an opposition to the existence of gays in general. In short, the court held that any opposition to gay marriage could only be based on bigotry.

⁴⁷ *Id.* at 42. The bakers subsequently sent a \$25 restaurant gift card and cakes with the inscription "We really do love you!" to various LGBTQ organizations. See also George Rede, *Sweet Cakes Bakers Send Cakes to LGBTQ Groups as 'Expression of Love'*, THE OREGONIAN, Aug. 20, 2015 http://www.oregonlive.com/business/index.ssf/2015/08/sweet_cakes_bakers_send_cakes.html.

⁴⁸ *Craig v. Masterpiece Cakeshop*, No. 14CA1351, 2015 WL 4760453 (Colo. App. 2015).

⁴⁹ *Id.*

If private business owners are required to check at least some of their religious beliefs when they go to work, it would seem that judges who have the discretion to perform actual marriage ceremonies would as well. Can a judge in Arizona refuse to marry a same-sex couple? Yes, but only if that judge wants to stop performing all wedding ceremonies.

On March 9, 2015, the Arizona Judicial Ethics Advisory Committee issued an opinion that makes it clear that even though judges perform marriages as a discretionary function, they only have the ability to do so based on statutory authority. Consequently, it has the same legal significance as any other judicial duty. In short, “a judge cannot refuse to perform same-sex marriages if the judge is willing to perform opposite-sex marriages.”⁵⁰ This is the majority rule.⁵¹ However, one major state is going in a different direction.

⁵⁰ *Judicial Obligation to Perform Same-Sex Marriages*, Ariz. Jud. Ethics Adv., Op. 15-01, (Mar. 9, 2015). The opinion clearly states, that even a judge with a sincerely held religious belief cannot refer a same-sex couple to another judge (e.g. in the same building) if that judge continues to marry traditional couples. The only limited exception is that a judge who opposes same-sex marriages can ethically conduct traditional marriage ceremonies for close friends and for relatives.

⁵¹ N.C. GEN. STAT. § 51-5.5 (2015) (Allowing judges to recuse themselves from performing all marriages based on a sincerely held religious belief); Wis. Jud. Cond. Adv. Comm., Op. No. 15-1 (Aug. 18, 2015); Ohio Bd. of Prof. Cond., *Judicial Performances of Civil Marriages of Same-Sex Couples*, Op. 2015-1, Aug. 7, 2015; Neb. Adv. Op. 2015-1 (June 29, 2015); La. Comm. on Jud. Ethics (July 15, 2015); Pa. Jud. Comm., *Newsletter* (Summer 2014); *In re Tabor*, Case No. 7251-F-158, Wash. St. Comm. on Jud. Cond. (Oct. 4, 2013) (providing judge was admonished for creating an appearance of impropriety by stating opposition to same-sex marriages and subsequently refusing to perform all marriages). *Cf.* N.Y. Adv. Comm., Op. 11-87 (Dec. 8, 2011) (stating a judge can adopt a policy that distinguishes between performing same-sex and opposite-sex marriages as long as doing so is in conformity with governing law).

Two days after the *Obergefell* decision, the Attorney General of Texas issued an opinion that stated judges could essentially request a religious exemption from performing same-sex weddings.⁵² Attorney General Ken Paxton's opinion noted:

In recognizing a new constitutional right in 2015, the Supreme Court did not diminish, overrule, or call into question the rights of religious liberty that formed the freedom in the Bill of Rights in 1791. This newly minted federal constitutional right to same-sex marriage can and should peaceably coexist with longstanding constitutional and statutory rights, including the rights to free exercise of religion and freedom of speech.⁵³

Therefore, in his opinion, judges could claim that the government “cannot force” them “to conduct same-sex wedding ceremonies over their religious objections” if other judges, who have no objection to performing gay marriages, are available to do so.⁵⁴

V. RELIGIOUS FREEDOM ACTS

In response to a U.S. Supreme Court case holding that an incidental burden on the free exercise of religion did not violate

⁵²*Rights of Government Officials Involved with Issuing Same-Sex Marriage Licenses and Conducting Same-Sex Wedding Ceremonies*, Tex. Atty. Gen. Op. KP-0025, (June 28, 2015).

⁵³ *Id.*

⁵⁴ *Id.* In a language that appears prepared for litigation, the opinion noted that allowing judges who object to gay marriage, to find substitute judges who do not, was consistent with constitutional law because to do otherwise is “not the least restrictive means of the government ensuring the [same-sex] ceremonies occur.”

the First Amendment, Congress passed and President Bill Clinton signed, the Religious Freedom Restoration Act (RFRA).⁵⁵ The statute declares that the federal government cannot “substantially burden a person’s exercise of religion” unless doing so is required by a “compelling governmental interest.”⁵⁶ The legislation was not controversial. In fact, it passed the U.S. Senate on a vote of ninety-seven to three. However, the most recent case interpreting this statute was very controversial.

Hobby Lobby is an Oklahoma-based, for-profit, closely held corporation where a husband, wife, and their children retain exclusive control. Each family member signed a pledge to run the businesses in accordance with the family’s religious beliefs and to use the family assets to support Christian ministries. Although it is structured as merely a family business, there are more than 500 Hobby Lobby stores and over 13,000 employees.

The family was willing to include, as part of its employees’ healthcare plan, sixteen of the required twenty types of contraceptives mandated by federal law. They objected to the remaining four, based on a belief that they were abortive agents. In *Burwell v. Hobby Lobby*, the U.S. Supreme Court held that the contraceptive mandate substantially burdened the family’s free exercise of its religious faith under the RFRA.⁵⁷ Prior to the

⁵⁵ See generally, 42 U.S.C. § 2000(b) (1993). The congressional purpose of the legislation was clearly stated. 42 U.S.C § 2000(bb). Congress did not like the standard in *Employment Division v. Smith*, 494 U.S. 872 (1990) and desired to return to the prior compelling interest standard from *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Sherbert v. Verner*, 374 U.S. 398 (1963).

⁵⁶ 42 U.S.C § 2000(bb)-1 (1993).

⁵⁷ Little Sisters of the Poor v. Burwell, 794 F.3d 1151 (10th Cir. 2015) (federal healthcare regulations on contraception did not substantially burden a religious organization’s exercise of religion under RFRA), cert. granted 136 S.Ct. 446 (2015). In a case that relied on a federal law similar to the RFRA, a devout Muslim prisoner challenged an Arkansas prison policy that prohibited prisoners from wearing beards. The Supreme Court held that the policy violated federal law in part because it was not the least restrictive

Hobby Lobby case, nineteen states, including New Mexico and Arizona, passed similar state versions of the RFRA.

In *Elane Photography*, the studio attempted to raise New Mexico's statute as a defense. However, the New Mexico Supreme Court held that the New Mexico Religious Freedom Restoration Act only prohibits a government agency from restricting someone's free exercise of religion.⁵⁸ Consequently, it generally has nothing to do with a contract between private parties.

In response to the *Elane Photography* case, and before the U.S. District Court ordered Arizona to allow gay marriages, conservatives in the Arizona legislature attempted to amend Arizona's religious freedom statute to include cases "regardless of whether the government is a party to the proceeding."⁵⁹ It did not go well.

While S.B. 1062 passed both the House and Senate, it triggered nationwide negative attention towards Arizona. It was widely declared to be anti-gay legislation and its opponents often viewed anyone attempting to defend any aspect of it as bigoted.⁶⁰ Public perception became reality and even Republicans

means available to prevent prisoners from concealing contraband. *Holt v. Hobbs*, 135 S. Ct. 853 (2015); *See generally*, Volokh, *Religious Law (Especially Islamic Law) in American Courts*, 66 OKLA. L. REV. 431 (2014).

⁵⁸ *Elane*, 284 P.3d 444. *Contra*, Shruti Chaganti, *Note, Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 VA. L. REV. 343 (2013).

⁵⁹ S.B. 1062, 51st Leg., 2d Reg. Sess. (Ariz 2014).

⁶⁰ Cindy Carcamo, *Gay Rights Activities in Uproar over Arizona 'Religious Freedom' Bill*, L.A. TIMES, (Feb. 20, 2014), <http://articles.latimes.com/2014/feb/20/nation/la-na-nn-ff-gay-rights-arizona-bill-20140220>. House Minority Leader Rep. Chad Campbell (D-Phoenix) compared the passage of the legislation to the treatment of gays in Russia. He wrote, "The world is upset with how Russia has treated gay rights...I think it's time for that same anger to be directed towards Arizona." *Id.*; *See also*, Sanchez, *Arizona Lawmakers Pass Controversial Anti-Gay Bill*, CNN, (Feb. 21, 2014).

ended up requesting that Governor Jan Brewer veto the bill. She did so on February 26, 2014.

An argument can be made that S.B. 1062 was attempting to solve a problem that did not exist. In connection with the veto, Governor Brewer noted, "I have not heard one example in Arizona where a business owner's religious liberty has been violated."⁶¹ Perhaps the next most significant potential example of a state RFRA issue arose in Kentucky.

After the *Obergefell* decision, the Governor of Kentucky ordered all Kentucky County Clerks to also issue marriage licenses to same-sex couples.⁶² One elected court clerk, a Democrat named Kim Davis, objected to doing so and stated that her Christian faith prohibited her from endorsing same-sex marriages by issuing a marriage license with her name on it to same-sex couples.⁶³ In order to avoid disparate treatment, she stopped issuing all marriage licenses.⁶⁴ She rejected a proposal that would have allowed her deputy court clerks to issue licenses, was found in contempt of court, and was ordered into custody.⁶⁵ However, an easy but perhaps controversial accommodation

⁶¹ Bill Chappell & Mark Memmott, *Arizona Gov. Brewer Vetoes Controversial Bill*, NAT'L PUB. RADIO, (Feb. 26, 2014). In contrast, Indiana did amend its' version of the RFRA. IND. CODE § 34-13-9 (2015).

⁶² *Davis v. Miller*, No. 15A250, Emergency Application to Stay Preliminary Injunction Pending Appeal, (U.S. Sup. Ct. Aug. 28, 2015).

⁶³ *Id.* at 8.

⁶⁴ *Id.* at 9.

⁶⁵ Alan Blinder, *Clerk in Kentucky Chooses Jail Over Deal on Same-Sex Marriage*, N.Y. TIMES, (Sept. 3, 2015), http://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html?_r=0. A law professor at UCLA, Eugene Volokh, provided an analysis of this case in the context of accommodation for religious beliefs in other employment law settings. Volokh, *When Does Your Religion Legally Excuse You from Doing Part of Your Job?* WASH. POST, (Sept. 4, 2015). See also, Editorial, *My Old Kentucky Double Standard*, WALL STREET J., (Sept. 3, 2015) (Actions of court clerk are a type of civil disobedience).

was rejected. Through her attorney, she said that she would be satisfied with “[m]odifying the prescribed Kentucky marriage license form to remove the multiple references to Davis’ name, and thus to remove the personal nature of the authorization that Davis must provide on the current form.”⁶⁶ Doing so arguably required a statutory change; but, in any event, she was released after five days because her deputy court clerks agreed to issue marriage licenses “to all legally eligible couples.”⁶⁷ Similar issues next appeared in Georgia.

In contrast to the Arizona legislation, in 2016, both chambers of the Georgia legislature passed the Free Exercise Protection Act, which was designed to protect pastors, churches, and religious schools.⁶⁸ Under the proposed law, pastors and reli-

⁶⁶ Application, *supra* note 62, at 40, 133, 139. While refusing to issue marriage licenses likely violates state law, requesting an exemption to keep from issuing licenses with her name on them would seem to follow Kentucky’s RFRA. Ky. Rev. Stat. Ann. § 446.360 (2013). Thus, by requesting such an exemption, the court clerk would actually be following state law. See also, Pekman, *The Kentucky Religious Freedom Act: Neither A Savior for the Free Exercise of Religion Nor A Monstrous Threat to Civil Rights*, 103 KY. L.J. 127 (2015).

⁶⁷ *Miller v. Davis*, No. 15-44-DLB, (E.D. Ken. filed Sept. 8, 2015). The federal judge’s order also stated that the court clerk “shall not interfere in any way, directly or indirectly, with the efforts of her deputy clerks to issue marriage licenses to all legally eligible couples.” A new governor of Kentucky subsequently issued an executive order stating that the name of the county clerk is no longer required to appear on a marriage license. Andrew T. Walker, *Bevin Signs an Executive Order in Kentucky, Resolving the Dispute over Religious Liberty*, NAT’L REV. (Dec. 22, 2015, 6:11 PM), <http://www.nationalreview.com/article/428928/kim-davis-matt-bevin-gov-ernor-resolves-same-sex-marriage-license-conflict>.

⁶⁸ H.B. 757, 2015-2016 Reg. Sess. (Ga. 2016) (vetoed). The final version of the legislation passed the Georgia House of Representatives 104 to sixty-five with eleven not voting. It passed the Georgia State Senate on the same day thirty-seven to nineteen with one not voting. *2015-2016 Regular*

gious officials would be protected from being required to perform marriages that conflict with their own faith. In addition, religious organizations would not be required to rent their facilities for purposes that they found objectionable. The legislation was also labeled as being anti-LGBT and various corporations, including Disney and the National Football League, threatened boycotts of Georgia.⁶⁹ Companies with large workforces or headquarters in Georgia, including Coca-Cola, Delta Airlines, and Home Depot, also openly opposed the legislation.⁷⁰ Somewhat predictably, Georgia Governor Nathan Deal vetoed the bill.⁷¹ Mississippi ignored similar threats and on April 5, 2016, adopted a comprehensive statute titled, “The Protecting Freedom of Conscience from Government Discrimination Act.”⁷² It is very broad and will likely generate litigation.⁷³

Session - HB 757 Domestic relations; Religious Officials Shall Not be Required to Perform Marriage Ceremonies in Violation of their Legal Right; Provide, GA GEN. ASSEMB. (Mar. 28, 2016), <http://www.legis.ga.gov/legislation/en-US/Display/20152016/HB/757>.

⁶⁹ Jackie Wattles, *Georgia's anti-LGBT Bill: These Companies are Speaking Out the Loudest*, CNN MONEY (Mar. 25, 2016 11:21 AM ET), <http://money.cnn.com/2016/03/25/news/companies/georgia-religious-freedom-bill/>.

⁷⁰ *Id.*

⁷¹ The governor's veto statement noted that he was not aware of any cases of churches or pastors being required to participate in same-sex marriage ceremonies against their will. Nathan Deal, Governor, Press Release (Mar. 28, 2016), transcript available at <https://gov.georgia.gov/press-releases/2016-03-28/transcript-deal-hb-757-remarks-0>.

⁷² H.B. 1523, 2016 Reg. Sess. (Miss. 2016).

⁷³ The Mississippi statute protects any person or organization who believes in traditional marriage, that sexual relations should be restricted to married couples, or that gender is determined at birth. People and organizations in these categories are protected from state “discriminatory action” in nearly every possible context, including employment-related decisions, housing, foster care, adoption, almost anything in connection with a wedding, gender reassignment surgery or treatment, or gender specific bathrooms. *Id.*

VI. SOME ADDITIONAL QUESTIONS AND CONCLUSIONS

Whether the general concepts that are now applied to the separation of church and state are, or should be, applied to something resembling a separation of church and private business is debatable. In short, should a small business owner be required to do something against his or her religion in order to stay in business? For now, the best answer might be, “Maybe.” For judges, a newspaper editorial in response to the Texas Attorney General’s opinion embraced the concept that “[t]he exercise of free religious beliefs ends at government employees’ office doors.”⁷⁴

A likely area of future litigation concerning same-sex marriage could focus on whether religious schools, and perhaps churches, should be required to change their view of what constitutes an endorsement of sin. For example, should a faith-based university be required to accept same-sex marriage in order to receive government research grants or in order for its’ students to receive Pell Grants?⁷⁵

Discriminatory action is defined to include almost any state police power including taxing, imposing fines, or withholding, reducing, or terminating a state benefit. *Id.* The act becomes effective July 1, 2016. *Id.*

⁷⁴ *Editorial: Public Servants’ Religious Beliefs do not Trump Same-sex Couples’ Rights*, THE DALLAS MORNING NEWS, (June 29, 2015), <http://www.dallasnews.com/opinion/editorials/20150629-editorial-do-public-servants-religious-beliefs-trump-same-sex-couples-rights.ece..> The editorial board also wrote, “State employees do not have discretion to selectively embrace constitutional protections they agree with while rejecting those they object to, even on religious grounds. Constitutionally, governments – including their employees – must present themselves as religiously neutral.”

⁷⁵ See generally, EJ Montini, *Is Discrimination a ‘Christian Value’ at GCU?*, THE ARIZ. REPUBLIC, (Aug. 24, 2015), <http://www.azcen->

If there is a coming conflict between LGBTQ (lesbian, gay, bisexual, transgender, and questioning) civil rights and religious liberty, a partial remedy may be for religious institutions to divest themselves from receiving government benefits to the extent possible.⁷⁶ Doing so may make litigation less likely, but what about taxes?

Whether churches may be required to change their practices in order to maintain their tax exempt status is an open question. Some courts have noted that same-sex couples have a right to seek a civil marriage but not a religious marriage ceremony. The Iowa Supreme Court stated that while the state constitution required inclusion of same-sex couples in the civil institution of marriage, “[a] religious denomination can still define marriage as a union between a man and a woman.”⁷⁷ The Connecticut

tral.com/story/opinion/op-ed/ejmontini/2015/08/24/grand-canyon-university-same-sex-marriage-discrimination-benefits/32267573/. (Editorial columnist stated faith-based university had a “particular prejudice” in not recognizing same-sex marriages). A few months later, Grand Canyon University announced that it continued to have a “sincerely held religious belief that the Bible is clear about marriage being a sacred union between a man and a woman” and that that belief “would continue to be espoused throughout the University’s curriculum and classrooms.” Even so, the university extended employee health benefits to married same-sex couples. *Grand Canyon University Extends Benefits to Married Same-Sex Couples*, ABC15.COM (Nov. 13, 2015, 6:25 PM), <http://www.abc15.com/news/region-phoenix-metro/west-phoenix/grand-canyon-university-extends-benefits-to-married-same-sex-couples>.

⁷⁶ Tom Gjelten, *Same-Sex Marriage Ruling Raises Questions of Religious Rights, Tax Status*, NAT’L PUB. RADIO, (July 17, 2015).

⁷⁷ *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009) (holding that A state statute defining marriage as a union between a man and a woman violated the Iowa Constitution). See also, Gulino, *A Match Made in Albany: The Uneasy Wedding of Marriage Equality and Religious Liberty*, 84 N.Y. S. BAR. J. 38 (Jan. 2012) (including a discussion of the religious exemptions to New York’s Marriage Equality Act).

Supreme Court reached a similar conclusion and wrote, “Religious freedom will not be jeopardized by the marriage of same sex couples because religious organizations that oppose same sex marriage as irreconcilable with their beliefs will not be required to perform same sex marriages or otherwise to condone same sex marriage or relations.”⁷⁸

In a perfect world, either everyone would get along with each other or market forces (e.g. boycotts or rallies in support of various businesses) would resolve the issues.⁷⁹ Until that time, there has perhaps been a role reversal and people of faith may find themselves asking for the level of tolerance that the LGBTQ community requested not that long ago.

The New Mexico Supreme Court obviously ruled against the photography studio, but Justice Richard Bosson, in a concurring opinion, took some time to note the complexity of the issues in the case. It provides perhaps the best example of how Freedom of Religion is being redefined to mean only Freedom of Worship. After discussing the historical importance of public accommodation decisions, he directed the following statement to the studio owners.

All of which, I assume, is little comfort to the Huguenins, who now are compelled by law to compromise the very religious beliefs that inspire their lives. Though the rule of law requires it, the result is sobering. It will no doubt leave a

⁷⁸ *Kerrigan v. Comm’r of Pub. Health*, 289 Conn. 135, 250-51, 957 A.2d 407, 475 (2008) (holding that a state statute prohibiting same-sex marriage violated the Connecticut Constitution).

⁷⁹ Jon Murray, *Chick-fil-A Location at DIA Paused after Denver Council Cites Chain’s LGBT Stances*, THE DENVER POST, (Aug. 19, 2015), http://www.denverpost.com/news/ci_28668633/denver-council-hits-pause-chick-fil-at-dia.

tangible mark on the Huguenins and others of similar views.

On a larger scale, this case provokes reflection on what this nation is all about, its promise of fairness, liberty, equality of opportunity, and justice. At its heart, this case teaches that at some point in our lives all of us must compromise, if only a little, to accommodate the contrasting values of others. A multicultural, pluralistic society, one of our nation's strengths, demands no less. The Huguenins are free to think, to say, to believe, as they wish; they may pray to the God of their choice and follow those commandments in their personal lives wherever they lead. The Constitution protects the Huguenins in that respect and much more. But there is a price, one that we all have to pay somewhere in our civic life.

In the smaller, more focused world of the marketplace, of commerce, of public accommodation, the Huguenins have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people. That sense of respect we owe others, whether or not we believe as they do, illuminates this country, setting it apart from the discord that afflicts much of the rest of the world. In short, I would say to the Huguenins, with the utmost respect: it is the price of citizenship.⁸⁰

⁸⁰ *Elane*, 309 P.3d 53, 78-80.

