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A Long and Winding Road
"Untangling the Knots in Business Valuation and Apportionment Issues"

William D. Bishop*

Over the last four years, I have had the opportunity to be involved in what Frank Pankow has termed "The Mother of All Rueschenberg Cases."[1] The cast of characters included myself on behalf of Husband, Mervyn Braude on behalf of Wife, Husband's expert Frank Pankow, Wife's expert Lynton Kotzin, and Husband's expert Aris Gallios. The amount at issue in this case was substantial, which meant that there were few restrictions to the number of legal and financial issues explored.

Fortunately, my opposing counsel in this case, "Charming Mervyn," was the ultimate professional. If one is going to spend over four years in a case, one can only hope to have opposing counsel who is flexible, cooperative, and entertaining to litigate with.

The major focus of this article is to explore apportionment issues, i.e., the community's claim to a portion of the increase in value to a sole and separate business. However, any such litigation will also involve valuation issues. Apportioning the increased value of business at the dissolution of a marriage is often complex and time consuming. Arizona case law on this issue leaves the courts broad discretion to adopt apportionment methods that will "achieve substantial justice," creating no-holds-barred litigation over the appropriate method.[2]

In this article, I will refer to my own recent case to explain the valuation issues and apportionment outcomes.[3] In my case, I represented a sole and separate business owner who wished to establish that the increase in the value of the business was primarily due to inherent or external factors in order to minimize the community claim; however, it is not my intent in this article to take a

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* Partner, Bishop Law Office, P.C., Juris Doctor, 1989, Sandra Day O'Connor College of Law at Arizona State University; B.S., 1984, Willamette University, Certified Family Law Specialist, State Bar of Arizona. Executive Committee - State Bar of Arizona Family Law Section. The author would like to thank Frank Pankow, Jeff Pollitt, Barry Brody, and Mitchell Allee for their review and editing contributions.

[1] *See generally* Rueschenberg v. Rueschenberg, 196 P.3d 852 (Ariz. Ct. App. 2008).

[2] Cockrill v. Cockrill, 601 P.2d 1338 (Ariz. 1979).

[3] Wiegers v. Wiegers, FN2009-002263 (Maricopa Cnty. Super. Ct. 2009).

position one way or the other, especially in light of the fact that my next client may be the non-owner spouse. This article will also explore relevant aspects of business valuation, as they are integral to the understanding of Arizona apportionment litigation. Specifically, sections I and II will discuss the use of experts and special masters.[4] Section III will explore some of the many issues involved in valuation.[5] Finally, sections IV-V will compare different apportionment methods used in Arizona and will present concerns for litigators in *Rueschenberg v. Rueschenberg* type cases.[6]

I. Utilization of Expert Witnesses

There is little doubt that qualified experts are essential in valuation and apportionment cases. If one litigates a case involving the assessment and apportionment of a community interest in the increased value of a sole and separate business, there is a good chance of spending a lot of time with your expert over many months or even years.

There are, of course, many moving parts to a community property business valuation case. However, when the community makes a claim to the increased value of a sole and separate business, the issues increase exponentially. To begin with, the attorney will be dealing with at least two valuations, and possibly more if there exists a dispute regarding the end valuation date.[7] Once the increase in value is determined, the expert must address several apportionment methodologies and potential hybrids of such methodologies.[8]

It is sometimes easy for family law attorneys to defer to experts to simply give the bottom line. However, the best experts equally rely upon the attorney to challenge their opinions, especially when the expert retained by the other party will be doing just that. An attorney who takes on an apportionment case must obtain an intricate knowledge of both the case law and the numerous valuation and apportionment methodologies due to the substantial interplay of legal and valuation concepts. The resolution of each and every issue and subissue may have a substantial impact upon whether the community has a claim to a portion of the increase in value, and if so, the amount to which the community may be entitled.[9]

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[4] *See infra* Parts I & II.

[5] *See infra* Part III.

[6] *See infra* Parts IV & V.

[7] *See infra* Part III.A.

[8] *See infra* Part IV.

[9] *See* Bryan Maudlin, *Identifying, Valuing, and Dividing Professional Goodwill as Community Property at Dissolution of the Marital Community*, 56 Tul. L. Rev. 313(1981).

II. Use of a Special Master

Similar to the *Rueschenberg* case, the parties in our case stipulated to the appointment of a Special Master. The use of a Special Master is highly recommended in an apportionment case. This is not to say that judges are incapable of assessing these types of cases. However, it is often difficult to obtain the trial time necessary to present a very complex case.[10] In our case, my opposing counsel and I initially felt that two days would be sufficient to address the valuation and apportionment issues. After hitting day four, we realized we had "slightly" misjudged the necessary time.

Another advantage of using a Special Master is the ability to present the case in phases.[11] Each phase allows for updated reports by the experts, which in turn helps establish the remaining disputes.[12] In light of the numerous issues that are litigated, it is unimaginable how a trial judge could sift through the various issues and come to a numerical conclusion unless the trial judge simply selects one of the expert's opinions on each and every issue. If a judge decides that one of the experts is more credible on one specific issue, and the other expert is more credible on another issue, it is likely that no corresponding calculation will have been submitted that fits such a scenario. Unless the judge is a valuation expert, follow up calculations will clearly be necessary. In our case, we agreed that the experts would be able to submit supplemental reports based upon the Special Master's initial determinations on specific issues. The ultimate goal was that once the Special Master eventually ruled upon such issues, the two experts' final calculations "should" be identical.

Another consideration to keep in mind is professional liability insurance premiums. By utilizing a Special Master in such a complex case, there is a better chance of filling in the gaps in the event that new sub-issues arise in the middle of trial.[13]

Fortunately, we had a Special Master who was very accommodating and knowledgeable, and a trial judge who was flexible with providing continuances on the inactive calendar as we made our way down the long and winding road.

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[10] See Mark A. Fellows & Roger S. Haydock, *The Role of Special Mastersin the Judicial System: Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 Wm. Mitchell L. Rev. 1269 (2005), for an in-depth discussion of the advantages in efficiency provided by the use special masters.

[11] *See id.* at 1284.

[12] *Id.*

[13] *See id.* at 1285.

III. Valuation Issues

If a company has no goodwill value beyond its parts, an asset-based approach is generally applied (i.e., the value is the net sum of its parts).[14] If a company is the type that can be compared to similar sales in the market place, a market approach may be appropriate.[15] However, for a company that appears to have goodwill value beyond its net assets, but is the type of company that involves limited or no comparable sales, an income approach is generally preferable.[16] Both experts in our case concluded that an income-based valuation was appropriate because of the limited number of sales transactions of companies that could be compared to the company at issue.

A. Valuation Date

The valuation date for purposes of identifying the increase in value to a business may be an important issue. The initial valuation date is usually obvious, i.e., the date of marriage if the business was started before marriage (or the date that the sole and separate business interests were inherited, or were gifted to the business owner as in our case). The date selected for the end valuation can be more problematic.

In *Sample v. Sample*, the Arizona Court of Appeals explained that the valuation date is to be "dictated by largely pragmatic considerations," and that "the equitableness of the result must stand the test of fairness on review."[17] In other words, the trial court is not bound by a specific date for purposes of valuing a business, but should determine a date that is equitable under the circumstances.

Although such a holding makes logical sense, it also leads to various complications, including the submission of more than one valuation based upon different valuation dates. If there are competing experts, the case may involve separate valuations submitted as to each valuation date at issue.[18]

In our case, the business realized a substantial decrease in profits during the litigation which affected the overall value of the company. It was for the most part uncontested that the decrease in profits was a result of Arizona's

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[14] *See* Kenneth Rigby, *Matrimonial Regimes: Recent Developments*, 67 La. L. Rev. 73 (2006) ("An asset-based approach to the valuation of a going business considers the net asset value of tangible and intangible assets of the business. This approach is a more appropriate one for a business with significant tangible assets.").

[15] Maudlin, *supra* note 9, at 334 ("The market value approach sets a value on professional goodwill by establishing what fair price would be obtained in the current open market if the practice were sold.").

[16] *See Id. at* 333.

[17] 17 Sample v. Sample, 731 P.2d 604, 607 (Ariz. Ct. App. 1986).

[18] See Robert S. Steinberg, *Controlling Forensic Accounting Costs,* 29 Fam. Advoc. 38 (Spring 2007), for a more in-depth description of this process.

economy, industry conditions, and other factors outside of the owner's control. Under such circumstances, it is arguably unfair to penalize the sole and separate owner for the decrease in value that took place after the termination of the community. Accordingly, it made sense that a later valuation date be applied. If changes in the company during the litigation are ongoing, it is possible that several valuation updates may be provided until the company stabilizes.[19]

The converse argument could, of course, apply. A valuation after the termination of the community may be desirable to the non-owner spouse if the value of the company has increased as a result of the economy and reasons other than the post-service efforts of the owner spouse.

B. Fair Value versus Fair Market Value

Whether fair value or fair market value is adopted is a significant issue. Most experts provide such valuations in the alternative, at least with regard to companies that are capable of being sold.[20] Arizona has no published case authorities that specify when one valuation premise should be adopted over the other.

If fair market value is adopted, marketability and/or minority discounts should be applied.[21] These discounts can be very substantial, often leading to a 30% to 70% reduction in the overall value (or even more depending upon the circumstances).[22] In the case at hand, we made the argument that a marketability discount should apply because the company was closely-held, which would lead to marketability problems with finding a qualified hypothetical investor who would be willing to purchase the owner's interests in the business. Because my client was a minority owner, we also argued that his interest was non-controlling and that a potential investor would desire a further minority discount.

Wife, of course, argued that fair value should be adopted (i.e., without valuation discounts) for various reasons, including the fact that the business was not being marketed for sale and that no sale was imminent. Wife also contended that the application of such combined discounts would lead to a result that was little more than the value of the hard assets, nullifying any good will value. In the alternative, Wife argued that if a discount was provided, only

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[19] *Id.*

[20] Generally, "fair value" is treated as a broader term than "fair market value." *See* Stephen A. Hess, Annotation, *Use of Marketability Discount in Valuing Closely Held Corporation or Its Stock*, 16 A.L.R.6th 693, § 2 (2006).

[21] This is assuming, of course, that the discount is not precluded by a specific statute. *See id.* at § 3.

[22] *Id.* at § 8.

a marketability discount should apply and not a minority discount because such discounts would be cumulative and based upon the same circumstances.

In this case, one can see some overlap between a marketability discount and a minority discount. It is possible that a marketability discount may be appropriate because the owner has a minority interest, and, because of the lack of control, it would be difficult to market such interest. These same facts, of course, give rise to an argument that a minority discount is appropriate because the owner does not possess a controlling interest and an investor would require a discount in light of such lack of control.[23] In that case, the court may be inclined to apply only a marketability discount in order to avoid providing separate discounts based upon the same circumstances.

There is limited discussion in Arizona case law regarding what premise of value (i.e., fair value versus fair market value) is appropriate, other than to apply a method that will achieve "substantial justice."[24] There does appear to be a disconnect to the extent that fair value is generally applied to professional practices (such as law firms), which are not capable of being sold.[25] An argument can certainly be made that it is unfair that a company that is capable of being sold may be eligible for such discounts, while a company that cannot be sold is not.

C. Capitalization Rates

One of the most significant issues litigated pursuant to income-based valuation cases is the appropriate capitalization rate ("cap rate"). The cap rate is the number used to convert a benefit stream (e.g., income stream) into a company's value.[26] The cap rate equals the discount rate (the yield necessary to attract investors to a particular investment given the risks associated with the investment) less the expected growth of the company (generally 2-3% as a rule of thumb).[27] The determination of the appropriate cap rate must assess the risk associated with a company's historical income stream recurring in the future.[28] The greater the risk, the less an investor will be willing to pay. Valuation experts look to various publications to determine an appropriate cap rate. In

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[23] See generally *Id.*, for a more detailed discussion on marketability discounts versus minority discounts in property valuation.

[24] *See* Cockrill v. Cockrill, 601 P.2d 1334 (Ariz. 1979) (holding "that the trial court is not bound by any one method, but may select whichever will achieve substantial justice between the parties.").

[25] *See generally* Mitchell v. Mitchell, 152 Ariz. 317, 320, 732 P.2d 208, 211 (1987); *see also* In re Marriage of Molloy, 888 P.2d 1333, 1340 (Ct. App. 1994).

[26] *See* 2 Valuation and Distribution of Marital Property ch. 25 § 25.04[3][a] (Matthew Bender).

[27] *See Id.* at § 25.04[2][b].

[28] *See Id.* at § 25.04[3][b][i].

simple terms, the greater the risk associated with the company, the higher the cap rate, and the lower the value.

The importance of cap rates can be exponential in a sole and separate business apportionment case because cap rates are being applied to both the beginning and end values.[29] For example, if the cap rate applied to the initial valuation (generally the date of marriage) is too high, the starting value would be artificially low.[30] If the cap rate applied to the end valuation is too low, the end value would be artificially high.[31] Under this scenario, the increase in value during marriage would be inflated on both ends. The reverse scenario could, of course, apply, i.e., an artificially low cap rate applied to the beginning valuation and an artificially high cap rate applied to the ending valuation could dramatically reduce the amount subject to the community's claim.

Litigation involving the appropriate cap rate can therefore be substantial in light of the impact that cap rates have on the overall value and the resulting increase in value during the marriage, if any. Even a few percentage points can have a substantial impact.

When litigating the issue of the appropriate cap rate, the attorney who is arguing a higher cap rate (i.e., a lower value) should be prepared to present evidence regarding the risks associated with the business and the possibility that the historic stream of income may not continue in the future. The attorney who is arguing a lower cap rate (i.e., a higher value) should, of course, be prepared to present the opposite, i.e., that the company is very stable, and that there is a high probability that the company will continue to realize equal or greater profits in the future.

D. Operating Assets Versus Excess Cash and Other Non-Operating Assets

Another major issue in many business valuation cases is the determination of how the funds in the company accounts and the company investments should be treated. The treatment of "operating assets" and "non-operating assets" can create variances in an income-based valuation.[32]

For purposes of income-based valuations, the cash on hand that is necessary to continue operation of the business is already included in the overall valuation of the company.[33] Cash that is necessary to generate such income

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[29] *See Id.* at § 24.04(4)(a) ("Fair market value determined by the Income Capitalization Method is highly sensitive to changes in cap rates.").

[30] *Id.*

[31] *Id.*

[32] *See* Id. at § 21.07[1] ("If the appraiser uses the income approach, it is important that income and expenses be stabilized and a determination made of the most typical or likely expenses.").

[33] *See Id.* at § 22.04(1).

falls within the category of "operating assets" (i.e., necessary for the ongoing operations of the business).[34] Operating assets also include equipment, inventory, etc. that is necessary to produce the income upon which the valuation is based.[35] Accordingly, it is improper to add the value of operating assets to an income-based valuation.

Non-operating assets, on the other hand, are those assets that are not necessary to produce the income upon which the valuation is based.[36] Our case involved substantial litigation over what portion of the cash in the company accounts was necessary to generate the income upon which the valuation was based, versus the amount of cash that could arguably be distributed to the shareholders without affecting the operations of the business. The cash that is not necessary to operate the business is called "excess cash."[37] Because excess cash is not necessary to operate the business, it is generally added to the value of the business after capitalizing the stream of income.[38]

In our case, the company had other real property investments. Because the company did not invest in real estate as part of its operations, these were passive investments. Passive investments constitute additional non-operating assets and would be added to the value of the business.

Although these principles are standard in a valuation case, an apportionment case may change such analysis. An interesting twist in our case involved Wife's argument that the excess cash and other non-operating assets should not be added to the value of the company, but rather should have been treated as undistributed assets which still needed to be divided. This issue is further addressed in section V.F below.[39]

IV. Apportionment Case Law

Once the Court determines the increase in value to a sole and separate business during the marriage, the Court must determine what portion of such increase, if any, constitutes sole and separate property, and what portion of such increase, if any, constitutes community property.[40] The general concept involved is that the sole and separate owner should retain any portion of the increase in value that was not created pursuant to community efforts, and that

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[34] *Id.*

[35] *Id.*

[36] See 137 Am. Jur. Proof of Facts 3d 267 (2013), for further discussion on the valuation of tangible and intangible assets.

[37] *Id.* at § 15

[38] *Id.*

[39] *See infra* Part V.F.

[40] *See generally* H.D. Warren, Annoation, *Profits from business operating on spouse's separate capital as community or separate property*, 29 A.L.R.2d 530 (1953).

the community should receive any portion of the increase in value attributable to community efforts.[41] As illustrated by the alternate apportionment methods and numerous sub-issues described below, this is easier said than done.

The apportionment litigation stage can be much more subjective than the business valuation stage. The business valuation expert has numerous publications, sources, etc. to rely upon in order to substantiate his or her valuation. That is not true once one enters the apportionment stage of the case.[42] There are no authoritative publications on how to apportion the increase in the value of a sole and separate business. Although Arizona has a few published court cases, including the 2008 *Rueschenberg* decision, such cases often create more questions than answers.

A. Cockrill v. Cockrill

The seminal Arizona business apportionment case is *Cockrill v. Cockrill*.[43] In *Cockrill,* the Supreme Court of Arizona addressed two non-exclusive methods that may be applied to apportion the increase in value to a business between the sole and separate owner and the community, i.e., the *Fair Compensation Method*, and the *Fair Return Method.*[44] Although cases issued after *Cockrill* have changed the landscape considerably, the *Fair Compensation Method* and the *Fair Return Method* are still addressed by experts as two of the possible methods for the court to adopt. The main conclusion that resonates from *Cockrill* is that the trial court has substantial discretion to adopt an apportionment method "that will achieve substantial justice between the parties."[45] Accordingly, any attempt to argue that one method is predominant in all cases is unsupportable.

The *Fair Compensation Method* addresses whether the community received reasonable compensation during the marriage.[46] If the owner spouse did not receive reasonable compensation for his or her services, the community would have a claim to a portion of the increase in value up to the amount that the community should have received.[47] This method does not appear to be a true apportionment of the increase in value as it only measures whether the community received reasonable compensation for its efforts, and thus any

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[41] *Id.* at § 2[a] ("Although divorcing spouses retain right to separate property, there is a strong presumption that profits or increases in value of such property are community in nature.").

[42] See Warren*, supra* note 41, at § 3[b], for a discussion of the methods courts use during the apportionment stage.

[43] *See generally* Cockrill v. Cockrill, 601 P.2d 1338 (Ariz. 1979).

[44] Id. at 1338.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 1336.

remaining increase in value would automatically revert to the sole and separate business owner. It goes without saying that the *Fair Compensation Method* is generally favorable to the sole and separate business owner. Although still a valid argument, no Arizona published opinions issued subsequent to *Cockrill* have adopted the *Fair Compensation Method* as the determinative approach.

The *Fair Return Method* is essentially the flip side of the *Fair Compensation Method.* With the *Fair Return Method,* the sole and separate business owner is provided a "reasonable rate of return" pursuant to his or her sole and separate ownership interest in light of the associated risk (i.e., the higher the risk, the higher the rate of return).[48] Once a rate of return is apportioned to the sole and separate owner, the entire remaining sum of the increase in value is attributed to the community.[49] This method is generally favorable to the community depending upon the selected rate of return. One of the most significant issues that is litigated pursuant to a *Fair Return Method* approach is the rate of return to apply. Even small adjustments to the rate of return will have a major impact on the overall apportionment as applied over a long term marriage.[50] Similar to the *Fair Compensation Method*, no published opinions issued subsequent to *Cockrill* have adopted the *Fair Return Method* as the determinative approach.

B. Rowe v. Rowe & Roden v. Roden

The next major published opinions to address the apportionment issues were *Rowe v. Rowe* in 1987 and *Roden v. Roden* ten years later.[5152] In both cases, the courts neither adopted the *Fair Compensation* nor the *Fair Return* method, but rather apportioned the increase in value and earnings received by the community based upon community efforts versus other external factors.[53] The courts then determined whether the community was already compensated for its share of the increase in value as a result of its receipt of compensation during the marriage.[54] In other words, the courts found that a portion of the compensation received by the community was a result of external factors rather than community efforts, and that if the community had already received its fair share of the increase in value as a result of its receipt of the sole and separate

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[48] *Id.* at 1338.

[49] *Id*.

[50] See *Principles of the Law of Family Dissolution: Analysis and Recommendations*, 8 DUKE J. GENDER L. & POL'Y 1 (2001), for helpful illustrations of how this works.

[51] *See* Rowe v. Rowe*,* 744 P.2d 717 (Ariz. Ct. App. 1987).

[52] *See* Roden v. Roden, 949 P.2d 67 (Ariz. Ct. App. 1997).

[53] *See Rowe,* 744 P.2d at 722; *See also Roden*, 949 P.2d at 71.

[54] *See Rowe*, 744 P.2d at 722; *See also Roden*, 949 P.2d at 71.

owner's share of the earnings, the community would not be entitled to further compensation. As noted in *Rowe*:

> The court admitted that it could not precisely quantify the overlapping contributions. It did determine that at least two-thirds of the responsibility for the post-marital growth of JRA was due to the community contribution and that at least one-quarter of the growth was attributable to a return on the inherent value of the pre-marital company. The court concluded that a fair ratio to apply would be three-fourths/one fourth. Because the community had received, through distribution and pension and profit-plan contributions, more than 75% of the sum of net distributable earnings and (assumed) goodwill, the court held that the community had been fairly compensated for all of its contributions to the growth of JRA.[55]

The *Roden* court reached a similar conclusion:

> Here, the trial court found that the increase in value of Desert Subway, Inc., which resulted from community efforts, was offset by the amount of compensation – community property – that each party received during the marriage.[56]

Many practitioners misunderstand *Rowe* and *Roden* as applying the *Fair Compensation Method*, i.e., if the community received reasonable compensation, it is not entitled to further funds. However, these decisions were not based upon such method. Rather, the courts concluded that the community essentially received excess compensation (the portion that the sole and separate owner would be entitled to pursuant to an apportionment), and that this excess compensation adequately compensated the community for its share of the increase in value to the business during the marriage.

C. Rueschenberg v. Rueschenberg

And then along came *Rueschenberg v. Rueschenberg*.[57] In 2008, the *Rueschenberg* court adopted the Special Master's rulings, which were affirmed by the trial court.[58] *Rueschenberg* then went on to provide a history lesson regarding apportionment cases throughout the years, and went to great lengths to dispel the husband's arguments that the community had already been adequately

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[55] *Rowe*, 744 P.2d at 721.

[56] *Roden,* 949 P.2d at 71.

[57] Rueschenberg v. Rueschenberg, 196 P.3d 852 (Ariz. Ct. App. 2008).

[58] *Id.* at 854.

compensated for the community's efforts and that the trial court lacked the discretion to award the wife anything further.[59]

In short, *Rueschenberg* addressed four general methods of apportionment: (1) the *Fair Compensation Method* addressed by *Cockrill*, (2) the *Fair Return Method* addressed by *Cockrill*, (3) the apportionment methodology applied in *Rowe* and *Roden*, and (4) the hybrid methodology that was applied by the Special Master and adopted by the *Rueschenberg* trial court.[60]

1. Affirmation of Trial Court's Rulings (Hybrid Method)

The Special Master's apportionment rulings in *Rueschenberg* took the apportionment analysis to a new level by applying a hybrid of the *Fair Return Method* addressed in *Cockrill,* and an apportionment type analysis as addressed in *Rowe* and *Roden*.[61] The Special Master first applied an annual fair rate of return from the initial valuation date, which was apportioned to the business owner as his sole and separate property.[62] The analysis, however, did not end there. Rather, the Special Master applied a *Rowe/Roden* type of apportionment analysis to the remaining increase in value.[63] The Special Master determined that two-thirds of the remaining increase in value was a result of community efforts, and one-third of the remaining increase in value was a result of inherent or external factors that should be retained by the sole and separate business owner.[64] This analysis makes sense to the extent that it may be unjust to merely assume that anything above and beyond a fair rate of return is based upon community efforts. Rather than relying on that assumption used in the *Fair Compensation Method*, the Special Master apportioned the "left overs" pursuant to a determination of the percentage of increase in value attributed to community efforts versus other inherent or external factors.[65] The Special Master, however, did not completely adopt a *Rowe/Roden* approach; the excess income received by the community was not set off against the community's share of the increase in value (this issue will be further explored later in this article).[66]

The hybrid methodology adopted by the Special Master in *Rueschenberg* is arguably a reasonable compromise between the different methodologies. It benefitted the owner-husband to the extent that the increase in value above and

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[59] *Id.* at 857-62.
[60] *Id.* at 858-60.
[61] *Id.*
[62] *Id.* at 854.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *See infra* Part IV.C.

beyond a fair rate of return was not apportioned entirely to the community. It benefitted the community to the extent that its receipt of "excess compensation," the sole and separate owner's share of the income that was not derived from community efforts, was not offset against the increase in value.

The *Rueschenberg* court, in its decision, spent little time addressing the trial court's adoption of the Special Master's rulings, and simply held that the rulings were within the discretion of the court.[67] Instead, most of the *Rueschenberg* opinion addresses the husband's various arguments that the trial court's rulings were erroneous and that the community had no claim to a portion of the increase in value of the business as a result of the compensation it had already received during the marriage.[68] The bottom line holding by the *Rueschenberg* court is that the trial court "is not bound by any one method [of apportionment], but may select whichever will achieve substantial justice between the parties."[69]

2. *Rueschenberg's* explanation of apportionment methodologies

After the *Rueschenberg* court affirmed the trial court's adoption of the Special Master's methodology, the court turned its attention to the husband's arguments against the ruling of the trial court.[70]

The first major issue addressed by the court was the husband's argument that the community was not entitled to share in both the profits and increase in value to a sole and separate business.[71] In short, the *Rueschenberg* court rejected the husband's arguments and held that the community is entitled to a portion of both the profits and increase in value attributable to community efforts "to the extent substantial justice requires it."[72] Although the ruling leaves open the possibility that the courts may continue to apply the *Fair Compensation Method*, as previously addressed, the language could be interpreted to limit such possibility.[73]

The next related issue addressed by the *Rueschenberg* court regarded the husband's argument that if the community received a fair salary for the community's labor, the inquiry should end and no further apportionment is permitted.[74] In rejecting the husband's argument, the *Rueschenberg* court explained that *Cockrill* "rejected any requirement that the trial court follow one method of

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[67] *Rueschenberg*, 196 P.3d at 860.
[68] *Id.* at 854-62.
[69] *Id.* at 858 (citing Cockrill v. Cockrill, 601 P.2d 1338 (Ariz. 1979)).
[70] *Id.* at 854.
[71] *Id.* at 855.
[72] *Id.* at 856-57.
[73] *See supra* Part IV.C.1.
[74] *Rueschenberg*, 196 P.3d at 857.

apportionment over another," and that "[t]he clear distinction from *Cockrill* is that the method of apportionment applied must 'achieve substantial justice between the parties.'"[75]

In response to the husband's argument that *Roden v. Roden* supported his position that adequate compensation to the community precluded further apportionment of the increased value of a business, the *Rueschenberg* court explained that the holding in *Roden* does not stand for such proposition.[76] Rather, in the *Roden* case, "the trial court determined that 'the increase in value of [the separate business], which resulted from community efforts was offset by the amount of compensation - community property - that each party received during the marriage."[77] In other words, the inquiry in *Roden* was not whether the community received fair compensation, but rather whether the community received *excess* compensation (a portion of the sole and separate owner's share of the compensation) in a sufficient amount to offset the community's share of the increase in value.

The *Rueschenberg* court explained that this offset analysis was also applied in *Rowe v. Rowe*.[78] In that case, the trial court applied a three-fourths/one-fourth apportionment between the community efforts and sole and separate portion of the increase.[79] Nevertheless, the *Rowe* court found that the entire increase was sole and separate property because:

> [T]he community had received, through distribution and pension and profit-plan contributions, more than 75% of the sum of net distributable earnings and (assumed) goodwill."[80] Accordingly, there was no error in the trial court's conclusion that 'the community had been fairly compensated for all of its contributions to the growth of [a separate business].[81]

In applying the *Rowe/Roden* methodology to the facts at hand, the *Rueschenberg* court went on to state that:

> If, as a result of its receipt of the funds, the community already had received more than its proportionate share of the total profits *and* increase in DMM, and the trial court used the reasonable rate of return method to award the community

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[75] *Id*. at 858 (citing Cockrill v. Cockrill, 601 P.2d 1338 (Ariz. 1979)).

[76] *Id.* at 859 (citing Roden v. Roden, 949 P.2d 67 (Ariz. Ct. App. 1997)).

[77] *Id*.

[78] *Id.* at 861 (citing Rowe v. Rowe, 744 P.2d 717, 721 (Ariz. Ct. App. 1987)).

[79] *Rowe*, 744 P.2d at 722.

[80] *Rueschenberg*, 196 P.3d at 861.

[81] *Id.*

> additional monies, that may violate the fundamental rule from *Cockrill* to apportion the increase equitably.[82]

The *Rueschenberg* court, however, rejected the husband's argument that the community had been adequately compensated for the increase in value based upon procedural deficiencies: "[N]o request was made of the trial court to determine the amount of the net distributable earnings paid to the community. Neither was there a request to determine that the same two-thirds/one-third ratio as to value (goodwill) applied to net earnings."[83]

The *Rueschenberg* court thus held that Mr. Rueschenberg was unable to make such offset argument on appeal, and explained:

> To prevail on this argument, Husband would be required to show at a minimum that the community received more than its pro rata share of the combined total of net distributable earnings and increase in goodwill. Equally, and conversely, he would have to show that he received less than his pro rata share of the earnings as separate property. As pointed out above, the trial court was never asked to determine, and did not determine, the amount of net distributable earnings (income less salary and other expenses) generated during marriage. Because of this, we are unable to determine the combined total of net distributable earnings and increase in value. Thus, there is no factual basis on which to assert error as there is no total figure to which the two-thirds/one-third ratio can be applied to determine - as the court did in Rowe - whether the community has already received its proportionate share of the total and no further moneys were owed.[84]

In making its determination that the husband did not properly raise his arguments or present adequate evidence, the *Rueschenberg* court seems to have raised the bar above and beyond what was reflected in *Rowe* and *Roden*. It is clear from the *Rueschenberg* opinion that the court was provided information regarding the total compensation received by the community.[85] An apportionment analysis was presented, and rulings were issued. Whether the husband argued that the community was adequately compensated, versus arguing that the community was overcompensated and that such overcompensation should be offset against the increase in value, is arguably a distinction without a differ-

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[82] *Id.* (emphasis added).

[83] *Id.*

[84] *Id.* at 862.

[85] *Id.* at 854.

ence. In theory, the court cannot find the existence of adequate compensation without observing any possible overcompensation. Such analysis is further convoluted by the unworkable definition of "net distributable earnings" and footnote 9 of the opinion, which essentially states that the issues of co-mingling, waiver or estoppel may preclude an offset of excess compensation paid to the community against the community's share in the increase in value.[86]

The *Rueschenberg* court could have merely stopped with its holding that the trial court exercised proper discretion by adopting the Special Master's methodology. While *Rueschenberg* provides a certain amount of clarity regarding the various methodologies that may be applied in an apportionment case, it also creates further confusion on many fronts.

V. Litigating the Apportionment Case

After hearing the evidence in our case, the Special Master issued a ruling that an apportionment analysis would be entered based upon the *Rueschenberg* opinion.[87] Thus, a strict application of the *Fair Compensation Method* or *Fair Return Method* was no longer at issue. Therefore, attention was turned to the Special Master's hybrid method and the *Rowe/Roden* apportionment methodology as described in the *Rueschenberg* opinion.

A. Rate of Return Litigation

As noted previously, if the approach applied by the Special Master and adopted by the trial court in *Rueschenberg* is selected, the sole and separate owner is first entitled to a fair rate of return on his investment from the date of marriage or receipt of the interests (compounded annually) prior to an apportionment of the remaining increase in value.[88]

It goes without saying that the application of a high or low rate of return can have a material impact upon whether the community is entitled to any of the increase in the value of a business and, if so, how much. Accordingly, it is always a good idea to obtain a second opinion—even if the clients agree to a mutual expert. In our case, there was a substantial difference (almost 50%) in the rates of return applied by the opposing experts. Such differential was not just based upon use of varying publications, but also embodied differing philosophies regarding what a fair rate of return in an apportionment analysis entails.

In our case, it was Husband's argument that the rate of return must be synonymous with the discount rate applied pursuant to the valuation analysis.[89]

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[86] *Id.* at 861 n.9.

[87] Wiegers v. Wiegers, FN2009-002263 (Maricopa Cnty. Super. Ct. 2009).

[88] *See supra* Part IV.C.

[89] Wiegers v. Wiegers, FN2009-002263 (Maricopa Cnty. Super. Ct. 2009).

In other words, we argued that the sole and separate owner should receive a rate comparable to what a third party investor would require to invest in the company based upon the applicable risk. The *Rueschenberg* opinion notes the relationship between the desired rate of return and the capitalization rate in footnote 2.[90] Such relationship is also addressed in footnote 3 of the recent case *Walsh v. Walsh*.[91]

Wife, on the other hand, essentially contended that a fair rate of return as applied to an apportionment analysis is different than the expected return that an investor would require for purposes of determining a discount rate.[92] Wife submitted data that Husband's requested rate of return far exceeded the average returns that investors realized pursuant to publicly-traded investments, including investments in the subject industry as a whole.[93] The parties disputed whether such average returns were relevant, as they were based upon publicly-held companies, as opposed to a return that an investor would require prior to investing in a small closely-held company.[94] Wife's rate of return applied a buildup method, similar to what was done by Husband's expert, but the differential applied to the risk factors was substantial.[95]

It was also Husband's argument that Wife's lower rate of return was improper because it was based upon the company's established success, as opposed to a rate of return based upon the initial investment.[96] In *Cockrill,* the Arizona Supreme Court explained, "the trial court may simply allocate to the separate property a reasonable rate of return *on the original capital investment*."[97] The *Rueschenberg* court offered similar language: "It arrived at this figure by giving what is considered to be a fair rate of return on the *original* investment of $163,166."[98] Other than those limited references, case law regarding what constitutes a fair rate of return pursuant to an apportionment analysis is sparse.

An additional and interesting argument by Wife was that utilizing the capitalization rate as the rate of return is conceptually incorrect because small businesses typically generate most of their profits in the form of excess compensation, dividends, distributions and other benefits paid to the owners.[99] As such, the owners do not reinvest such profits into the company, which

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[90] *Rueschenberg*, 196 P.3d at 854 n.2.
[91] Walsh v. Walsh, 286 P.3d 1095, 1098 n.3 (Ariz. Ct. App. 2012).
[92] Wiegers v. Wiegers, FN2009-002263 (Maricopa Cnty. Super. Ct. 2009).
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] Cockrill v. Cockrill, 601 P.2d 1338, 1338 (Ariz. 1979) (emphasis added).
[98] Rueschenberg v. Rueschenberg, 196 P.3d 852, 854 (Ariz. Ct. App. 2008) (emphasis added).
[99] Wiegers v. Wiegers, FN2009-002263 (Maricopa Cnty. Super. Ct. 2009).

affects the company's ability to grow and realize capital appreciation. The contrary argument to such position is that it does not matter how the community is compensated (whether it is received as excess income or by having a claim to the increase in value), so long as the community has received its combined share of both.

The argument that a lower rate of return should be applied to a longer term marriage may be persuasive. For example, should an owner in an apportionment case experience the same rate of return that a third party investor would require in order to make the investment? The reason that the third party investor requires a high rate of return is because of the risk. Simply because the investor "requires" a certain rate of return does not mean he or she will actually receive it. If the rate of return equals the discount rate, the owner would essentially be guaranteed that rate of return regardless of risk up to 100% of the increase in value. While on one hand the business owner should arguably be able to realize a rate of return synonymous with what a third party investor would expect, the application of a rate of return synonymous with the discount rate over a long period of time may virtually eliminate the community's claim to any increase in the value of the business. The rate of return applied in *Rueschenberg* (a five year marriage) was 25%, which still allowed for some remaining increase in value to be apportioned.[100] However, if that rate of return is applied over a longer marriage, it may be relatively impossible for a company to experience an increase in value that exceeds such rate of return year after year.

B. Apportionment Litigation

Under either the Special Master's hybrid analysis in *Rueschenberg*, or a *Rowe/Roden* analysis, an apportionment is conducted in which the court must determine what portion of the increase in value is attributed to community efforts, and what portion is attributed to other factors.[101] If the Special Master's methodology is adopted, the apportionment is applied after the sole and separate owner is attributed a fair rate of return.[102] If a *Rowe/Roden* analysis applies, no rate of return is applied prior to the apportionment; however, an offsetting analysis takes place after the apportionment is concluded, as previously discussed.[103]

In *Rueschenberg*, the court determined that at least a portion of the increase in value was attributed to factors other than community efforts.[104] According to

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[100] *Rueschenberg,* 196 P.3d at 854.
[101] *See Id.* at 859 (citing Roden v. Roden, 949 P.2d 67, 71 (Ariz. Ct. App. 1997)).
[102] *See supra* Part IV.C.
[103] *See supra* Part IV.B.
[104] *Rueschenberg,* 196 P.3d at 859.

the court, the husband presented evidence "that the company's increased value was due to an increase in manufacturer marketing and sales assistance, increased customer acceptance of the products, increased research and development by manufacturers, natural population growth in the market area, and other DMM sales personnel expanding the market."[105] Based on such evidence, as noted previously, the Special Master determined that two-thirds of the increase was attributable to the community, and one-third was attributable to other factors.[106]

Which apportionment analysis to apply falls within the wide discretion of the trier of fact and clearly is not subject to precise mathematical calculations.[107] Although one can certainly attempt to present an expert's opinion regarding apportionment, it is questionable whether a CPA or other expert has any greater ability to reach an apportionment conclusion than the trier of fact.

In our case, the company was started by Husband's father.[108] The father gifted separate 33% interests to each of his three children, including Husband, while retaining 1% of the stock. Although the father had limited stock ownership, he secured and maintained the relationship with the company's main client, served as the company's Chief Executive Officer, and either made or was intimately involved in the most important company decisions. Husband served as president of the company, while his siblings both served as vice presidents.

In order to minimize the community claim, it was, of course, Husband's goal to establish that the increase in the value of the business was primarily due to inherent or external factors, i.e., factors that contributed to growth other than Husband's community efforts. Husband submitted evidence that the increase in the company's value first and foremost was the result of Husband's father, his connections, his knowledge of the industry, and his continued relationship with the company's main client. Husband also contended that various other persons had a major role in the success of the company, including Husband's siblings, and the company's Chief Financial Officer. In the same regard, Husband contended that, although he was the president of the company, he was essentially second in command and that his father was still the driving force behind any business decisions that increased the company's value. In addition, the company was very reliant upon the construction industry. Husband submitted evidence that the major factors behind the growth and increased value of the company included population growth in the Phoenix metropolitan area and the dramatic growth in the construction industry in Arizona during the marriage. Husband's contention was further supported by the fact that the decline

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105 *Id* at 854.
106 *Id* at 861.
107 Cockrill v. Cockrill, 601 P.2d 1338, 1338. (Ariz. 1979).
108 Wiegers v. Wiegers, FN2009-002263 (Maricopa Cnty. Super. Ct. 2009).

in the construction industry in Arizona corresponded with declined revenues and profits realized by the company.

Wife raised opposing arguments, including the fact that Husband worked full time, was the president of the company, and thus made decisions regarding the company's daily operations. Wife also submitted evidence that the company's operating agreement allowed the majority of the stockholders to exercise a control position, thus any control exercised by Husband's father was voluntary on the part of Husband and his siblings. However, Wife's arguments were mitigated to a certain extent by the fact that the increase in value all took place while Husband's father was still the President and CEO and that the revenues (and value of the company) had actually decreased after Husband became President.[109] The bottom line is that there are numerous factors that may have led to the increased growth in a business other than the community efforts of the owner.

Similar to the other factors set forth above, the court's ultimate apportionment percentage may have a significant impact upon whether the community is entitled to any portion of the increased value in a sole and separate business, especially if an offsetting analysis (such as conducted in *Rowe* and *Roden)* is applied as described below.

C. Offset Litigation

As noted previously, *Rowe* and *Roden* provided an offset analysis after the apportionment stage was completed.[110] In both cases, the courts found that the earnings received by the community offset any claim that the community had to the increase in value of the business.[111] Under the *Rowe* and *Roden* methods, a court would apply an apportionment percentage to both the increase in value, as well as to the earnings received by the community.[112] The court would then offset the "excess compensation" received by the community (the portion of the earnings that would constitute the sole and separate property pursuant to the apportionment percentage) against the community's share of the increased value.[113] In both *Rowe* and *Roden*, the courts assessed the community's share of the *combined* sum of both the increase in value and the compensation

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[109] *Id.*

[110] *See supra* Part IV.B.

[111] Rowe v. Rowe, 744 P.2d 717, 722 (Ariz. Ct. App. 1987); *See also* Roden v. Roden, 949 P.2d 67, 71(Ariz. Ct. App. 1997).

[112] This could be the same apportionment percentage or a different percentage. The experts in our case both concluded that no distinction should be made based upon our facts. No such distinction was made in *Rowe* and *Roden*, however, footnote 9 to the *Rueschenberg* opinion does address the possibility. Rueschenberg v. Rueschenberg, 196 P.3d 852, 858 n.9 (Ariz. Ct. App. 2008); *Roden*, 949 P.2d 67; *Rowe*, 744 P.2d 717.

[113] *See*, *e.g., Rueschenberg,* 196 P.3d at 862.

received by the community, and then found that the community was already adequately compensated for its interest in the increased value pursuant to its receipt of excess compensation from the business during marriage.[114]

One of the major issues argued during our case was whether overcompensation of earnings received by the community (the sole and separate portion as described above) should be offset against the community's share of the increase in value.[115] Although this is exactly what happened in *Rowe* and *Roden*, the *Rueschenberg* court threw a wrench in the analysis by providing inconsistent language.[116] On one hand, the body of *Rueschenberg* states that such offset is part of a contemporaneous analysis of both the earnings received and increase in value.[117] On the other hand, footnote 9 of the opinion gives rise to the argument that such combined or contemporaneous analysis may arguably not take place if the funds received by the community were co-mingled or if waiver or other equitable considerations preclude the offset.[118]

In support of our position that the offset was warranted, we cited the following language from *Rueschenberg*, which explains:

> Rather, as we describe more fully below, we hold that the trial court *must* equitably apportion *the combined total* of the profits (net distributable earnings) and increase in value (whether goodwill or otherwise) of the separate business if the efforts of the community caused a portion of that increase and substantial justice requires it.[119]

Rueschenberg goes on to say, "*Cockrill*, as explained above, then rejected the all or none rule in favor of an apportionment rule, stating that 'profits [and/or increase], which result from a combination of separate property and community labor, *must* be apportioned accordingly.' "[120]

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[114] *Rowe*, 744 P.2d at 722; *See also Roden*, 949 P.2d at 71.

[115] Wiegers v. Wiegers, FN2009-002263 (Maricopa Cnty. Super. Ct. 2009).

[116] *Rueschenberg*, 196 P.3d 852; *Roden*, 949 P.2d 67; *Rowe*, 744 P.2d 717.

[117] *Rueschenberg*, 196 P.3d at 857.

[118] *Id.* at 861 n.9 ("A hypothetical example may add clarify. Assume that a ratio of two-thirds/one-third was determined to apply to the share due the community and separate property, respectively, for its contribution to the growth of the business. Assume the amount of net earnings was $80 and increase in value was $20. The combined total of the increase is $100. The community would be entitled to $66.67, and the sole and separate property would be entitled to $33.33. If the community had already received $80 from net distributable earnings, it may not be entitled to any further amounts unless issues such as waiver, commingling, or other equitable considerations required otherwise. In fact, under this hypothetical, the sole and separate property owner may claim monies from the community if there are no other pertinent factors."). *Id.*

[119] *Id.* at 857 (emphasis added).

[120] *Id.* at 858 (emphasis added).

Rueschenberg addresses the *Roden* case, and explains that *Roden* did not assess whether the community was adequately compensated pursuant to a fair salary as argued by the husband, but rather determined that "the increase in value of [the separate business], which resulted from community efforts, was offset by the amount of compensation – community property – that each party received during the marriage."[121]

Rueschenberg then goes on to state:

> If, as a result of its receipt of the funds, the community already had received more than its proportionate share of the total profits *and* increase in DMM, and the trial court used the reasonable rate of return method to award the community additional monies, that may violate the fundamental rule from *Cockrill* to apportion the increase equitably.[122]

Similarly, the *Rueschenberg* court explained that *Rowe* did not reach the conclusion that the community was not entitled to additional funds on the grounds that it had already received fair compensation.[123] Rather, the community was not entitled to a share of the increase in value because the community received *excess* compensation that offset its share of the increase in value of the company.[124] The *Rueschenberg* court explains:

> Here, the principle from Rowe teaches that if the two-thirds/one-third ratio allocating growth in DMM applies to both profits (net earnings) and value (here, goodwill) then it could be an abuse of discretion for either the community or the separate property to receive more than its proportionate share of the *combined* total.[125]

This analysis is further shown in the last paragraph of the *Rueschenberg* opinion:

> To prevail on this argument, Husband would be required to show at a minimum that the community received more than it's pro rata share of the combined total of net distributable earnings, and increase in goodwill. Equally, and conversely, he would have to show that he received less than his pro rata share of the earnings as separate property.[126]

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[121] *Id.* at 859 (citing *Roden*, 949 P.2d at 71).
[122] *Id.* at 861 (emphasis added).
[123] *Id.* at 862.
[124] *Id.*
[125] *Id.* at 861 (emphasis added).
[126] *Id*. at 862.

Thus, it was our position that the apportionment analysis must apply to both the earnings received and increase in value, a combined analysis that provides for a contemporaneous offset.[127]

If one were to rely upon the language of the cases cited above, a co-mingling defense pursuant to footnote 9 of *Rueschenberg* makes absolutely no sense. In order for the community to have received excess compensation, there *must* be co-mingling. The alternative scenario is that the sole and separate owner would foresee in the future what a court would determine is the sole and separate versus community portion of his or her earnings, and thus segregate the sole and separate portion of his/her earnings to avoid co-mingling. However, if this had happened, the community would not have received overcompensation and thus the combined analysis discussed in the body of the *Rueschenberg* and *Rowe/Roden* opinions would never take place.

The location of footnote 9 follows the language in the main body of the opinion that it would "be an abuse of discretion for either the community or the separate property to receive more than its proportionate share of the *combined* total."[128] The mathematical analysis set forth by the footnote 9 hypothetical is consistent with the *Rowe* and *Roden* analysis until one reaches the word "unless."[129] Starting with the word "unless," the court addresses "equitable considerations" such as co-mingling, waiver and estoppel.[130] The footnote then goes so far as to state that the sole and separate property owner could even claim reimbursement if the community received more than its fair share.[131][132] Such references are contradictory to the analysis and language in *Rowe* and *Roden*, and directly contrary to the analysis by *Rueschenberg* in the main body of the opinion. This is clearly contrary to an apportionment of the "combined" totals as explained throughout the *Rueschenberg* decision, and as addressed by the *Rowe* and *Roden* opinions.[133] Because this additional language is set forth only at the end of a hypothetical example, and because it would undercut the holdings of the opinions that require a combined analysis, it was our position that the additional language is *dicta.*

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[127] Wiegers v. Wiegers, FN2009-002263 (Maricopa Cnty. Super. Ct. 2009).

[128] *Rueschenberg*, 196 P.3d at 861.

[129] *Id.* at 861 n.9.

[130] *Id.*

[131] *Id.*

[132] Additional reimbursement after such offset to the sole and separate owner is clearly contrary to case law regarding co-mingled funds. Such is entirely different than the analysis of whether the community has been adequately compensated by its receipt of earnings in the manner addressed in *Rowe* and *Roden*. Roden v. Roden, 949 P.2d 67 (Ariz. Ct. App. 1997); Rowe v. Rowe, 744 P.2d 717 (Ariz. Ct. App. 1987).

[133] *See Rueschenberg*, 196 P.3d at 857.

By including the language regarding co-mingling in footnote 9, the *Rueschenberg* court also misses the fact that the co-mingling issue was addressed in the *Rowe* decision. In *Rowe*, the trial court acknowledged that "it could not accurately trace the commingled community contributions."[134] The *Rowe* court, however, found that it was not addressing a co-mingled bank account, and that such tracing rules do not apply to the analysis of whether the community has been adequately compensated from the profits of a sole and separate business.[135]

The co-mingling argument makes sense at first glance – if the funds are co-mingled and cannot be traced, they become community property and thus there is no sole and separate portion to offset.[136] However, this is not what was done in *Rowe* and *Roden*, and it is contrary to the language in *Cockrill* and in the body of *Rueschenberg*.[137]

Without taking a side one way or the other, it is clear that further clarification from the higher courts is necessary. Either co-mingling should preclude a combined analysis, or a combined analysis should take place regardless of co-mingling. The amount of money at issue may be very significant. Until further clarification is provided, practitioners have no choice but to take opposite positions on the issue depending upon whether one represents the owner spouse or non-owner spouse.

D. Potential Hybrid - Application of Special Master Methodology Plus the Rowe/Roden Offset

It is easy to read the *Rueschenberg* opinion as providing for mutually exclusive methods—either, (1) the Special master methodology (rate of return followed by apportionment, with no offset) or (2) a *Rowe/Roden* approach (no rate of return, with apportionment, including the offset).[138] However, a closer review of the *Rueschenberg* opinion makes it clear that its conclusion is not so restrictive.

Similar to what the Special Master did in *Rueschenberg* (a hybrid between the *Fair Return Method* and a *Rowe/Roden* apportionment method), there are

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134 *Rowe*, 744 P.2d at 720.

135 *Id.*

136 If the court determines that an offset is not generally appropriate as a result of co-mingling, waiver or estoppel (i.e. per footnote 9 of *Rueschenberg)*, potential issues may still arise regarding funds which were generated by the business, but not co-mingled. An example is where the owner spouse contributes to a 401K or other retirement account from the business revenues. Another example includes excess cash and other non-operating assets if such are not already included in the valuation. Since such funds or assets are not co-mingled, an argument can be made that such are subject to apportionment.

137 *See* Cockrill v. Cockrill, 601 P.2d 1338 (Ariz. 1979).

138 *See Rueschenberg*, 196 P.3d at 858 (citing *Cockrill*, 602 P.2d at 1338).

any number of additional hybrid possibilities. In our case, we argued that although the Special Master did not provide an offset in *Rueschenberg*, nothing prevented the finder of fact from doing so in our case—even if a rate of return was first provided to the sole and separate owner.[139] As noted above, *Rueschenberg* held that the husband did not present the argument that the excess income realized by the community should be offset against the increase in value, and was thus precluded from doing so on appeal.[140] This, of course, suggests that such argument can and should be made even if the sole and separate owner has already received a fair rate of return before the apportionment analysis is applied.

On the other hand, whether such offset should be provided after a rate of return is applied may also depend upon whether a fair rate of return includes only capital appreciation or both capital appreciation and income. If a fair rate of return is based upon what a hypothetical investor would require (i.e. commensurate with the discount rate), it would arguably include both anticipated capital appreciation and income. Thus, the receipt of both a high rate of return and an offset could arguably constitute double dipping. The sole and separate owner would receive a rate of return, which includes expected income, as well as an offset based upon the income received by the community.

E. Litigation Regarding What Constitutes "Net Distributable Earnings"

Another issue that came up in our case regarded what earnings are subject to an apportionment and offset analysis. The issue came up as a result of ambiguous and, at times, conflicting language in *Rueschenberg* and other decisions regarding the terms "net distributable earnings," "earnings," "compensation," "profits," and other references.

These various terms apply to whether the community received its fair share of the earnings produced by the business pursuant to its community efforts, and whether the community has already been adequately compensated for its share of the increase in value pursuant to its receipt of what would otherwise constitute the sole and separate owner's portion of the earnings during the marriage.[141] This analysis, of course, applies in the event that the court does not find that the commingling of earnings precludes such offset.[142]

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[139] Wiegers v. Wiegers, FN2009-002263 (Maricopa Cnty. Super. Ct. 2009).

[140] *See supra* Part IV.C.2.

[141] *See* Grant D. Wille, *Before Crying Foul: An Incomplete Alignment of Arizona's Community Property Doctrine and the Uniformed Services Former Spouses' Protection Act*, 54 ARIZ. L. REV. 829 (Fall 2012).

[142] *See* 3 Family Law Litigation Guide with Forms: Discovery, Evidence, Trial Practice ch. 34 § 32.02(3)(d)(ii) (LexisNexis 2013).

In our case, it was uncontested that the community received substantially more earnings in the form of salary, bonuses, and shareholder distributions during the marriage than what constituted reasonable or normalized compensation.[143] While it was Husband's position that all earnings received by the community in excess of reasonable compensation were subject to an apportionment and offset analysis, it was Wife's position that *Rueschenberg* defined the term "*net distributable earnings"* in a more restrictive manner, and thus only some of the excess earnings received by the community were subject to an apportionment and offset analysis.[144] Specifically, Wife contended that pursuant to the definition of "net distributable earnings" described in *Rueschenberg*, Husband could only receive credit for the sole and separate portion of income received by the community in the form of shareholder distributions, and should therefore receive no credit for excess compensation received in the form of salary and bonus distributions.[145]

In support of her argument, Wife relied upon the following language from the *Rueschenberg* opinion: "There was no request, however, by Husband to determine the amount of net distributable earnings *(generally, income less salary and other expenses)* generated by DMM during the marriage."[146] Thus, it was Wife's contention that net distributable earnings do not include salary or bonuses received by Husband even if such salary and bonuses were substantially higher than reasonable compensation paid to a third party.[147] Husband's expert, on the other hand, testified that such segregation between salary, bonuses, and shareholders distributions would make no sense as applied to closely-held corporations because the owners have utmost discretion in how much to pay themselves in salary and how much is distributed pursuant to bonuses and other distributions.[148]

As noted previously, *Rueschenberg* is inconsistent with regard to the language it uses to reference the earnings that would be subject to offset or credit against the community's share of the increase in value.[149] In addition to the term "net distributable earnings," *Rueschenberg* refers to the term "profits" or

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[143] Wiegers v. Wiegers, FN2009-002263 (Maricopa Cnty. Super. Ct. 2009).

[144] *Id.*

[145] *Id.*

[146] Rueschenberg v. Rueschenberg, 196 P.3d 852, 854 (Ariz. Ct. App. 2008) (emphasis added).

[147] Wiegers v. Wiegers, FN2009-002263 (Maricopa Cnty. Super. Ct. 2009).

[148] *See* Jay fishman et al., ppc's guide to business valuations 4-25 (23rd ed. 2013) ("Since most closely held businesses are managed by their owners, some of the companies' profits may be included in owner's salary expenses. . . . owners may pay themselves excessive salaries instead of dividends to reduce their total tax liability.").

[149] *See supra* Part V.C.

"total profits."[150][151] *Rueschenberg* also treats the term "net earnings" as synonymous with the terms "net distributable earnings" and "profits."[152][153][154] *Rueschenberg* then only uses the term "earnings," i.e. "*[e]qually, and conversely, he would have to show that he received less than his pro rata share of the earnings as separate property."*[155] In footnote 9, *Rueschenberg* refers to both the terms "net earnings" and "net distributable earnings."[156] In footnote 11, *Rueschenberg* only refers to "net earnings."[157]

Such is further contextualized by *Rueschenberg*'s discussion of "reasonable compensation."[158] *Rueschenberg* held that the receipt of reasonable compensation by itself does not necessarily mean the community has been fully compensated, and that the community should be entitled to its percentage of both profits and increased value based upon the apportionment of community labor.[159] In discussing *Roden*, *Rueschenberg* then goes on to note that *Roden* attributed its offset based upon the amount of "compensation" received by the community (as opposed to net distributable earnings): "This took place as the trial court applied, and this court affirmed, an 'offset of the community's share in the increase in value of the separate property in light of the amount of compensation previously paid the community.' "[160] Thus, while using the term "net distributable earnings" in some parts of its decision, *Rueschenberg* refers to the total amount of compensation received by the community in the body of its opinion as well as in its citation to *Roden*.[161]

Despite their treatment in *Rueschenberg,* these terms are not interchangeable. A query of cases in the United States that use the term "net distributable earnings" results in only five reported cases. Two of them are *Rueschenberg* and *Rowe*. The other three are either bankruptcy or probate cases that have nothing to do with the apportionment of increased value to the business and set forth no definitions of the term.[162]

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150 Rueschenberg, 196 P.3d at 855-57.

151 *Id.* at 860-61.

152 *Id.* at 857.

153 *Id.* at 860.

154 *Id.* at 861.

155 *Id.* at 862.

156 *Id.* at 861 n.9.

157 *Id.* at 862 n.11.

158 *Id.* at 855-57.

159 *Id.*

160 *Id.* at 859 (citing Roden v. Roden, 949 P.2d 67, 71 (Ariz. Ct. App. 1997)).

161 *Id.*

162 *See* Gill v. Phillips*,* 337 F.2d 258 (5th Cir. 1964); Scott v. Comm'r of Internal Revenue, 70 T.C. 71 (1978); Goodwin v. Commissioner, 3 T.C.M. (P-H) 1080 (1944).

The *Rowe* decision refers on only one occasion to the term "net distributable earnings."[163] However, *Rowe* does not directly provide a description of what the term means for purposes of its analysis. In fact, *Rowe* included pension and profit-plan contributions in its analysis of what the community received by way of "net distributable earnings."[164] Rather than making a distinction between salary and other distributions, *Rowe* found that the overall compensation received by the community satisfied its interests in the increased value of the company.[165] Moreover, *Rowe* specifically states "that a community may be fairly compensated by salaries *and* draws received prior to dissolution."[166] Thus, although the *Rowe* court uses the term "net distributable earnings," its analysis included both salaries *and* draws, as well as pension and profit sharing contributions, i.e., *all* forms of compensation to the community.[167]

In *Roden*, the court also looked to the total compensation received by the community and did not distinguish between salary and other types of distributions: "Here, the trial court found that the increase in value of Desert Subway, Inc., which resulted from community efforts, was offset by the amount of *compensation*—community property—that each party received during marriage.[168]

Until further clarification is provided by the higher courts, it appears that the debate over what constitutes compensation subject to an apportionment and offset analysis will continue.

F. Litigation Regarding Whether Excess Cash and Assets Are Included on the Value Side or as Undistributed Distributable Earnings

In *Rueschenberg*, the court found that "the marital community received virtually 100% of net distributable earnings during the marriage."[169] In our case, not all of the earnings had been distributed.[170]

Section III[171] regarded business valuation issues and discussed the fact that operating assets and cash are part of the overall value of the business pursuant to an income approach, which are not added to value, while excess cash and non-operating assets are not included in the base valuation. Thus, non-

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163 Rowe v. Rowe, 744 P.2d 717, 721 (Ariz. Ct. App. 1987).

164 *Id.* at 722.

165 *Id.*

166 *Id.* (emphasis added).

167 *Id.* at 721.

168 Roden v. Roden, 949 P.2d 67, 71 (Ariz. Ct. App. 1997) (emphasis added).

169 Rueschenberg v. Rueschenberg, 196 P.3d 852, 861 (Ariz. Ct. App. 2008).

170 Wiegers v. Wiegers, FN2009-002263 (Maricopa Cnty. Super. Ct. 2009).

171 *See supra* Part III.

operating assets need to be added to value, or, in an apportionment case, either added to value or treated as undistributed assets.

In a case where the court allows for an offset of the sole and separate portion of the income received by the community against the community's share of increase in value, it may not matter if excess cash and non-operating assets are added to the valuation side of the equation or are treated as undistributed assets. If the community has already been adequately compensated, the sole and separate owner would arguably be entitled to retain the undistributed earnings and assets.

If the court follows the methodology adopted by the Special Master in *Rueschenberg*, and does not allow for an offset analysis, this issue may become significant. For example, if the fair rate of return to the sole and separate owner is high enough, the methodology may eliminate any claim by the community—even after adding excess cash and non-operating assets to the value. However, if the excess cash and non-operating assets are not added to the value, but instead treated as undistributed assets or earnings, the community may still receive a portion of the undistributed assets so long as no offset analysis is applied.

VI. Conclusion

In some ways, *Rueschenberg* provides clarification regarding the various methodologies and principals involved in apportionment cases. On other fronts, the opinion creates additional questions and issues.

For those looking for a "bottom line" answer how to solve an apportionment case from the language of the *Rueschenberg* opinion, the bottom line remains: the trial court "is not bound by any one method [of apportionment], but may select whichever will achieve substantial justice between the parties."[172]

[172] *Rueschenberg*, 196 P.3d at 858 (citing Cockrill v. Cockrill, 601 P.2d 1338 (Ariz. 1979)).

Saying Goodbye to Unwanted Guests: The Applicability of the Arizona Residential Landlord Tenant Act to Transient Occupants

David W. Degnan* and Joshua C. Black**

I. Introduction

The Arizona Residential Landlord Tenant Act (the "Act") governs the landlord-tenant relationship and protects tenants in Arizona. The Act specifies that it does not apply to transient occupancy in a hotel, motel, or recreational lodging; however, it never actually defines "transient occupancy."

Case law has suggested, in other contexts, that rental agreements, regardless of length of time, may create a landlord-tenant relationship. This case law has created additional and unexpected uncertainty associated with owning or operating a hotel, motel, or similar establishment, as it seems to imply that under certain conditions a landlord-tenant relationship may be established between the owner of a short term rental property and its guest. This uncertainty leaves the hotel operator in an unenviable position when attempting to oust a non-paying guest. The hotel operator must decide whether he will engage in a formal eviction proceeding, which inevitably will be very costly and time consuming, or simply change the locks on the guest's room, with the knowledge that the guest may later bring a wrongful eviction and attachment lawsuit against him for doing so.

Under the current law, significant uncertainty and potential exposure exist for those who operate hotels, motels, extended stay hotels, campgrounds, and other similar vacation rentals. Not only does this uncertainty affect current owners and operators, it may deter those who would otherwise purchase or invest in hotels, motels, and other vacation rentals. .

This article will discuss the current ambiguities in the law, distinguish Arizona case law and tax law on the issue, and provide possible solutions to clarify the ambiguity that exists within the Act.

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* David W. Degnan is an associate attorney at Titus, Brueckner & Levine, PLC. Mr. Degnan's practice focuses exclusively on handling real estate transaction and litigation matters. If you would like to contact the author, Mr. Degnan may be reached at 480-483-9600 or ddegnan@tbl-law.com.

** Joshua C. Black is a Juris Doctorate Candidate at Arizona Summit Law School, Fall 2014. Joshua has been a member of Arizona Summit Law Review since Spring 2013, and currently serves on the Managing Board as Senior IT Editor for Volume VIII.

A. Hypothetical Case Study

Imagine you own and manage a small but popular extended stay hotel in Phoenix, Arizona. It is 1:00 p.m. on a Monday afternoon, and everything is quiet. The pool area, which was filled with the laughter and splashing of children just twenty-four hours before, is now eerily silent. Most of the vacationing families checked out this morning, and you are now entering into the weekday lull. A maintenance man is painting a hand rail outside the main office, and the housekeeping crew is diligently turning down beds, putting out new towels, and refilling the mini shampoos in the now vacant guestrooms.

As you reconcile the accounts you notice that Mr. Smith—a guest who was scheduled to check out this morning—has not checked out yet. You call Mr. Smith's room and are surprised to learn that not only did Mr. Smith not check out, but he has no intention of doing so. Mr. Smith has canceled the credit card he used to book the room last week and has advised you he likes your hotel and plans to stay indefinitely.

Naturally, you call the police; however, the police advise you this is a civil matter and you should seek advice from an attorney. You then call your counsel, and your counsel provides you with a lengthy opinion that is full of exemptions and caveats, but it provides no real guidance for your immediate situation. You are left to make a decision, either deactivate Mr. Smith's keycard, and face the potential legal exposure if you make the wrong choice, or begin the costly process of formally evicting this holdover guest.

B. The Catch-22

The hotel operator has found himself in a Catch-22, as Arizona law is ambiguous as to whether Mr. Smith is a tenant or a guest. If Mr. Smith is considered a tenant, he must be formally evicted.[1]

A.R.S. § 33-1368 provides processes for Arizona landlords who wish to evict tenants for numerous reasons including, but not limited to, non-payment of rent.[2] Generally, landlords may not use self-help in the eviction process, but must follow the statutory process as presented in the Act to evict any tenant who qualifies for the enumerated protections.[3] Specifically, the landlord must take the following steps to evict a tenant:

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[1] ARIZ. REV. STAT. ANN. § 33-1374 (1995) ("A landlord may not recover or take possession of the dwelling unit by action or otherwise, including forcible removal of the tenant or his possessions . . . except in the case of abandonment, surrender or as permitted in this chapter.").

[2] ARIZ. REV. STAT. ANN. §§ 33-1321, -1368 (1995).

[3] *Id.*

- Deliver a five[4] or ten[5] day written notice;
- Draft a summons and complaint;[6]
- Serve the summons and complaint upon the tenant;[7]
- Wait three to six days after serving the summons and complaint;[8]
- Attend a hearing;
- Obtain a judgment against the tenant;[9] and
- Wait five more days for the tenant to remove his possessions and belongings.[10]

This is the standard process to evict a tenant in Arizona and may take between fifteen (15) and thirty (30) days. These procedures are in place to provide due process for tenants and to ensure they are treated fairly when a landlord evicts them. .

Should the hotel operator decide Mr. Smith is a guest and not a tenant, he may remove Mr. Smith without resorting to the above judicial process. The hotel operator may revoke Mr. Smith's invitation to stay at the hotel, change the locks, and remove Mr. Smith's possessions without more under Arizona innkeeper laws.[11] In this case, the hotel operator may solve the problem initially, but he may create a significant headache for himself if a court finds the guest was a tenant. Indeed, should the hotel operator wrongfully oust the tenant and throw away his possessions, he may face a wrongful eviction and an attachment lawsuit.

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[4] § 33-1368 (allowing for a five day notice of eviction for failure to pay rent and non-compliance affecting health and safety).

[5] § 33-1368(A) (allowing for 10 day notice for eviction for material falsification of the rental agreement and other breaches that are not curable).

[6] ARIZ. REV. STAT. ANN. § 33-1373 (1995) ("If the rental agreement is terminated, the landlord may have a claim for possession and for rent and a separate claim for actual damages for breach of the rental agreement.").

[7] ARIZ. REV. STAT. ANN. § 33-1377(B) (1973) ("The summons shall be issued on the day the complaint is filed and shall command the person against whom the complaint is made to appear and answer . . . which shall be not more than six nor less than three days from the date of the summons.").

[8] *Id.* (The trial could also be postponed another three to five days.).

[9] *Id.* ("If the defendant is found guilty, the court shall give a judgment for the plaintiff for restitution of the premises, for late charges stated in the rental agreement, for costs and, at the plaintiff's option, for all rent found to be due and unpaid through the periodic rental period.").

[10] ARIZ. REV. STAT. ANN. § 33-1368 (1999).

[11] *See* Woodty v. Weston's Lamplighter Motels, 830 P.2d 477 (Ariz. Ct. App. 1992) (explaining that "innkeeper owes the same duty to a visitor of a registered guest as he owes to an invitee").

II. The Arizona Residential Landlord Tenant Act

A. History and Purpose of the Act

The Act was promulgated in 1973 and is "based on the Uniform Residential Landlord and Tenant Act published by the Commission on Uniform State Laws."[12] The Act's stated purpose is to "simplify, clarify, modernize[,] and revise the law governing the rental of dwelling units and the rights and obligations of landlord and tenant."[13] The Act regulates the landlord-tenant relationship and governs rental agreements for residential dwelling units in Arizona.[14]

B. Applicability to Transient Occupancy

While the Act has broad application to residential rental agreements within the state,[15] the Act has seven exceptions.[16] The Act does not apply to, among other things, "[t]ransient occupancy in a hotel, motel[,] or recreational lodging."[17] The Act provides definitions for specific terms relevant to its application.[18]

Under the statute, a "rental agreement" is defined as "all agreements, written, oral[,] or implied by law, and valid rules and regulations adopted under section 33-1342 embodying the terms and conditions concerning the use and occupancy of a dwelling unit and premises."[19]

A "tenant" is defined as "a person entitled under a rental agreement to occupy a dwelling unit to the exclusion of others."[20]

While the Act clearly defines terms such as "rental agreement" and "tenant," the Act is missing an important definition. The exception to the Act which makes it non-applicable to motels, hotels, and the like, specifies the Act does not apply to "[t]ransient occupancy" in these types of establishments. "Transient occupancy" is not actually defined in the Act.[21] Because there is no definition of transient occupancy, ambiguity exists as to who exactly is exempted from the Act.

By including the word "transient" before the term "occupancy in a hotel, motel[,] or recreational lodging," it can be inferred there may be other types of

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[12] Honorable C. Steven McMurry, et. Al., William E. Morris Institute for Justice, *State Bar of Arizona Annual Convention,* Arizona Landlord and Tenant Law (June 11, 2010).

[13] Ariz. Rev. Stat. ANN. § 33-1302 (1973).

[14] Ariz. Rev. Stat. ANN. § 33-1310(4)(1995).

[15] Ariz. Rev. Stat. ANN. § 33-1307 (1973).

[16] Ariz. Rev. Stat. ANN. § 33-1308 (2003).

[17] § 33-1308(4).

[18] § 33-1310.

[19] § 33-1310(12).

[20] § 33-1310(16).

[21] *Compare* § 33-1310(10), *with* § 33-1308(4).

occupancy, besides transient occupancy, that can occur in these establishments, which may be subject to the Act. Because the statute provides no further explanation or clarification on this issue, hotel operators—as well as their guests—are left in the uncomfortable position of not knowing exactly what their rights and responsibilities are under the Act.

III. Distinguishing Between a Tenant and a Transient Guest

A. Distinguishable Rights and Interests

Traditionally, one of the major differences between a tenant and a transient guest is the types of rights and property interests held by those individuals.[22] Pursuant to Arizona law, tenants have specific property interests in their residences, and due process requirements must be met in eviction proceedings. No such rights have been recognized for transient guests.[23]

For example, A.R.S. § 33-1374 limits a landlord's ability to recover possession of a dwelling unit.[24] The statute protects a tenant from a landlord's forcible removal of the tenant—or his possessions—and prohibits a landlord from "interrupting or causing the interruption of electric, gas, water[,] or other essential service to the tenant."[25] Transient guests do not receive this same protection under Arizona law. When a transient guest's stay ends—be it after one day or several weeks—the hotel operator may simply deactivate the transient guest's keycard and disallow any further access to the dwelling unit.[26]

Similarly, A.R.S. § 33-1367 provides tenants remedies against a landlord for unlawful ouster or exclusion from the rental unit.[27] Under the statute, a tenant is entitled to recover his actual damages sustained from the wrongful

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[22] Arizona Dept. of Revenue v. Havasu Dunes Timeshare Ass'n, 958 P.2d 447 (Ariz. Ct. App. 1998) ("A transient lodger is one who pays fees to sleep on another person's property and does not possess any ownership rights in the property in which he is lodging and is not responsible for the obligations and costs of property ownership.").

[23] The duty of care owed to a transient guest appears to track the common law innkeeper rules. Woodty v. Weston's Lamplighter Motels, 830 P.2d 477 (Ariz. Ct. App. 1992) ("The status of a paying guest of a hotel, motel, inn or other place of temporary lodging is that of an invitee") (citing Wagner v. Coronet Hotel, 458 P.2d 390, 395 (Ariz. Ct. App. 1969)).

[24] Ariz. Rev. Stat. Ann. § 33-1374 (1995) ("A landlord may not recover or take possession of the dwelling unit by action or otherwise, including forcible removal of the tenant or his possessions, willful diminution of services to the tenant by interrupting or causing the interruption of electric, gas, water or other essential service to the tenant, except in case of abandonment, surrender or as permitted.").

[25] *Id.*

[26] *Woodty*, 830 P.2d 477 (Ariz. Ct. App. 1992).

[27] Ariz. Rev. Stat. Ann. § 33-1367 (1973) ("If the landlord unlawfully removes or excludes the tenant from the premises or willfully diminishes services to the tenant by interrupting or causing the interruption of electric, gas, water or other essential service to the tenant, the tenant may recover possession or terminate the rental agreement and, in either case, recover an amount not

ouster, or up to two months' rent, whichever is greater.[28] When a tenant has been wrongfully ousted, he is also able to terminate the rental agreement and recover his full security deposit from the landlord.[29] Again, Arizona law provides no such statutory remedy for transient guests who have been ousted from a rental unit.

B. Defining "Transient"

As previously discussed, "transient occupancy" is not defined in the Act. However, the terms "transient" and "transient lodging" are defined elsewhere in the Arizona Revised Statutes. A.R.S. § 42-5070 defines these terms for the purposes of levying a special tax known as a transaction privilege tax.

Pursuant to A.R.S. § 42-5070(F) a "transient" is "any person who either at the person's own expense or at the expense of another obtains lodging space or the use of lodging space on a daily or weekly basis, or on any other basis for less than thirty consecutive days." This definition would encompass the average guest or individual that is paying for a room on a daily or weekly basis.[30] The statute specifies hotels, motels, campgrounds, and inns are among the types of businesses considered "transient lodging" under the law.

The definitions for "transient" and "transient lodging" found in the tax code can be examined in an effort to provide context for the drafters' intent in A.R.S. § 33-1308(4). In A.R.S. § 42-5070, hotel operators are provided with a definition of a "transient" for tax purposes, indicating a transient is a person who obtains lodging for less than thirty consecutive days. This definition is certainly persuasive, given that hotels are required to pay a separate tax for transient guests, and as a result, the legislature would have a strong interest in clearly defining who is subject to this additional tax. Nonetheless, there is no indication that the legislature intended a reliance on these definitions from the tax statute when interpreting the Act.

Assuming the drafters of the Act intended the phrase "transient occupancy" to mean occupancy by a "transient" as contemplated in the tax statute, A.R.S. § 42-5070(F), the hotel operator or its counsel could reasonably interpret the exclusion "[t]ransient occupancy in a hotel, motel or recreational lodging," as

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more than two months' periodic rent or twice the actual damages sustained by him, whichever is greater. If the rental agreement is terminated the landlord shall return all security recoverable.").

[28] *Id.*

[29] *Id.*

[30] *Compare* ARIZ. REV. STAT. ANN. § 33-1375 (1995) ("The landlord or the tenant may terminate *a week-to-week* tenancy by a written notice given to the other at least ten days prior to the termination."), *with* ARIZ. REV. STAT. § 42-5070 (2005) ("'transient' means any person who either at the person's own expense or at the expense of another obtains lodging space or the use of lodging space on a daily or weekly basis, or on any other basis for less than thirty consecutive days.").

applying to an occupant of a hotel who stayed for less than thirty days and find no obligation to evict such a guest.

Applying the definition of transient occupant from A.R.S. § 42-5070(F), a hotel guest who stayed thirty days or longer would not be a transient. However, if transient occupancy only applies to occupancy of less than thirty days, there must be a different kind of occupancy for hotel guests that stay thirty days or longer.[31] If this is true, than the Act may be interpreted as applying to non-transient guests, which would mean that the operator of a hotel or similar establishment is required to formally evict any non-transient guests that stay in the rental for thirty days or more.

While this conclusion requires one to connect the proverbial dots, and requires interpreting one landlord-tenant statute with another persuasive tax statute, these statutes seem to work together reasonably well. A hotel operator must pay taxes to the Arizona Department of Revenue based on the classification of the individual occupants. It stands to reason that the legal treatment of the occupants should be the same under the Act and the tax statutes so that, at a minimum, the landlord or hotel operator knows how much tax to collect and what legal obligations he has to the occupants.

C. Conflicting Case law

Arizona case law adds another layer of ambiguity to the process of differentiating between tenants and transient guests. The courts in *Horton v. Hartsook* and *State v. Carillo* took entirely different approaches to distinguishing between a tenant and a transient guest.

1. *Horton v. Hartsook*

In *Horton*, the Appellees were a group of homeowners who owned second homes in a residential development known as "Rainbow Cove at the Shores" ("Rainbow Cove"), located in Lakeside, Arizona.[32] Rainbow Cove was a popular vacation destination, and only two of the twenty-four units in Rainbow Cove were occupied full-time by their owners at the commencement of the action in *Horton*.[33] The Appellees were among the property owners who were not full-time occupiers, and they often leased their properties to vacationers when they were not personally using them. The Appellees would lease to indi-

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[31] ARIZ. REV. STAT. ANN. § 33-1304 (1973).

[32] Horton v. Hartsook, No. 1 CA-CV 08-0095, 2009 WL 2244503 (Ariz. Ct. App. July 28, 2009).

[33] *Id.*

viduals and families that wished to stay for a duration of anywhere from a few weeks to only a few days, and rented to groups of up to ten people.[34]

The Hortons, who were also homeowners at Rainbow Cove, brought an action against the Appellees objecting to what they called the "short term motel activity" being conducted by the Appellees, claiming that it violated multiple provisions of the community's Covenants Codes and Restrictions ("CC&R").[35]

The Hortons argued that the Appellees' short-term renters were transients, not tenants, and as such the activity violated the CC&R, as well as Arizona tax law, specifically A.R.S. § 42-5070(F), the transactional privilege tax statute.[36] The Hortons wanted the court to draw a bright-line rule to clarify whether the Appellees' guests—who were using the homes in the community as vacation rentals—were residents or transient occupiers. The Hortons asserted that the status of these guests should be determined by the duration of their stay at Rainbow Cove, however, the *Horton* court was unconvinced. The court stated:

> [T]he Hortons' argument does not provide a sound basis where to draw a line between "resident" and "transient" on the grounds of duration of stay. They ask us to narrowly define "residence" to exclude someone who leases for a few days or a couple of weeks, but to apparently include someone who leases for something approximating thirty days or longer. However, ***a durational foundation to distinguish between resident and transient guest is simply arbitrary***.[37]

Rather than relying on the duration of stay, as the Hortons advocated, the court looked to an Arizona search and seizure case, State v. Carrillo,[38] for guidance on how to differentiate between a tenant and a guest.

2. *State v. Carrillo*

Carrillo was a criminal law case decided by the Arizona Court of Appeals in 1976. In *Carrillo*, a Tucson police officer placed a hotel guest, Carrillo, under arrest for "false hotel registration."[39] After the arrest, the hotel owner advised Carrillo that he was evicting him for being two days behind in his rent.[40] After the police removed Carrillo from the premises, the hotel owner asked the remaining officers to witness an inventory search of Carrillo's room,

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[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* (emphasis added).
[38] State v. Carrillo, 546 P.2d 838, 839 (Ariz. Ct. App. 1976).
[39] *Id.*
[40] *Id.*

and during this inventory search the officers discovered heroin in Carrillo's belongings.[41]

On appeal, Carrillo challenged the trial court's denial of his motion to suppress the heroin as an unlawful search and seizure.[42] The Arizona Court of Appeals did not reach the search and seizure issue because it found that Carrillo had no possessory interest in the property, and as a result, Fourth and Fourteenth Amendment rights did not attach.[43]

The *Carrillo* court distinguished between a tenant and a hotel guest noting among other factors, "[a] guest is a transient who normally stays from day to day without any express contract," whereas a tenant "usually contracts for a specified period of time."[44] While the court did point to this durational factor, it was clear that "[t]he length of stay, however, is only one factor" in the analysis.[45] The *Carrillo* court reasoned that the distinguishing factor between a guest and a tenant is the authority exercised over the dwelling unit. According to the court, "[a] guest has only the right to use the premises, whereas a tenant has exclusive possession and control."[46] According to *Carrillo*, the true distinguishing factors are the rights and interests of the party in the dwelling unit. In this brief opinion, the court quoted an Oklahoma case that provided the following explanation:

> A tenant is deemed to have exclusive legal possession of the demised premises and stands responsible for their care and condition. A guest, on the other hand, has merely a right to the use of the premises while the innkeeper retains his control over them, is responsible for the necessary care and attention and retains the right of access for such purpose. Modern law tends to regard as a guest anyone who is a patron of the inn as such, and receives the same treatment as that accorded to short-term guests.[47]

Thus, the court found that the hotel guest had no control over the premises and therefore was not afforded the same rights as a tenant, as it was the innkeeper who retained control of the hotel room and was primarily responsible for the necessary care of, and attention to, the unit. The court reasoned "[Car-

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41 *Id.*

42 *Id.*

43 *Id.*

44 Horton v. Hartsook, No. 1 CA-CV 08-0095, 2009 WL 2244503 (Ariz. Ct. App. July 28, 2009); *See also* State v. Carrillo, 546 P.2d 838, 839 (Ariz. Ct. App. 1976).

45 *Carrillo*, 546 P.2d at 839.

46 *Id.* (internal citations omitted) (citing Buck v. Del City Apartments, Inc., 431 P.2d 360 (Okl.1967)).

47 *Id.* (internal citations omitted).

rillo's] contention that due process requires notice and a judicial hearing prior to his loss of the use of the hotel room" was without merit because he was a mere licensee.[48] "He had a right to use the room but had no property right such as that possessed by a tenant."[49] Without these property rights, one has no reasonable expectation of privacy and therefore the due process protections of the Fourth and Fourteenth Amendments do not apply.

The *Carrillo* court seemed to believe a guest never treats a hotel room like they own it, and the hotel does not treat it that way either. However, the authors find little to no support for this conclusion. To the contrary, hotel guests often make use of the fire safe in their room pursuant to A.R.S. § 33-302, use separate privacy locks on the door, and use a "do not enter" sign when they wish to exclude housekeeping or other hotel staff from the room. These actions show an exertion of dominion by the guests and an expectation of privacy akin to that which one expects in a longer-term occupancy arrangement, such as the lease of an apartment or home. Thus, the court's reasoning in *Carillo* that a guest does not exercise control over a hotel room, and that this is what differentiates them from a tenant, seems to be just as "arbitrary" as the bright line rule advocated for in *Horton*.

IV. Unequal Taxation of Transients and Tenants

Another important factor that distinguishes tenants and transients under Arizona law is the rate of taxation imposed on the two groups. While residential leases of over thirty days duration are taxed at a 2% rate, transient occupants are charged at a significantly higher rate of tax due to a special tax called a transaction privilege tax, which is levied on providers of transient lodging such as hotels, motels, and the like by the city, the state, and the county.

A. What is the Transaction Privilege Tax?

Arizona imposes a special tax known as a transaction privilege tax on certain types of business conducted within the state.[50] In addition to the tax imposed by the state, some counties and most cities within the state impose an additional transaction privilege tax as well.[51]

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[48] *Id.*

[49] *Id.*

[50] *Arizona Transaction Privilege Tax Ruling TPR 06-1*, Ariz. Dep't of Revenue, http://www.azdor.gov/LinkClick.aspx?fileticket=1KcIx912AZY= (last visited Mar. 26, 2015).

[51] *Summary of Arizona Taxes*, Ariz. Dep't of Revenue, http://www.azdor.gov/Portals/0/Brochure/010.pdf (last visited Mar. 26, 2015).

For example, "the City of Mesa imposes a 1.75% transaction privilege tax on the gross receipts from various types of business activities,"[52] including retail sale transactions, transactions at restaurants and bars, the renting and leasing of real property, and transient lodging.[53] In addition to the 1.75% transactional privilege tax imposed on these activities, the City of Mesa imposes "an additional 5% transient lodging tax on any hotel, motel, or apartment, charging for lodging space to any person for less than 30 consecutive days."[54] The owner of such establishment must pay this 6.75% transactional privilege tax to the City of Mesa, in addition to the transactional privilege tax owed to the county and the state.[55]

A.R.S. § 42-5008 provides for the levying and collection of the transaction privilege tax by the state, and the amount owed is "measured by the amount or volume of business transacted."[56] A business, such as a hotel, that plans to engage in transient lodging activity, and as a result would be subject to the transaction privilege tax, must apply for a license from the state, as well as the city in which the business will be transacted.

To become licensed to engage in transactions that implicate the transaction privilege tax, a business is required to fill out an application with the Arizona Department of Revenue and pay a state licensing fee of twelve dollars per business location, as well as a separate licensing fee imposed by the city in which the transactions will occur.[57] This city licensing fee varies by municipality.[58] For example, the City of Mesa requires businesses engaged in this type of activity to pay an initial application fee of thirty dollars, and to renew the license once every calendar year for the renewal fee of twenty dollars.[59] Like the state, the City of Mesa requires each business to maintain a separate license for each Mesa location or business name.[60] The application and renewal fees vary by city, and can range from as little as one dollar to as much as two hundred and fifty dollars.[61]

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[52] *Transaction Privilege Tax*, CITY OF MESA, http://www.mesaaz.gov/salestax/privilege.aspx (last visited Oct. 16, 2014).

[53] *Mesa Sales Tax: Hotels & Motels*, CITY OF MESA, http://www.mesaaz.gov/salestax/pdf/hotel_motel.pdf (last visited Mar. 26, 2015).

[54] *Id.*

[55] *City of Phoenix Privilege License (Sales) Tax*, CITY OF PHOENIX, https://www.phoenix.gov/financesite/Documents/d_037816.pdf#search=transient (last visited Mar. 26, 2015).

[56] ARIZ. REV. STAT. § 42-5008 (1999).

[57] *Program Cities Licensing Requirements*, ARIZ. DEP'T OF REVENUE, http://www.azgovernor.gov/TPT/documents/Materials/SLS_080712_LicensingDOR.pdf (last visited Mar. 26, 2015).

[58] *Id.*

[59] CITY OF MESA PRIVILEGE AND EXCISE TAX CODE § 5-10-310(A).

[60] § 5-10-305(C).

[61] *Program Cities Licensing Requirements*, ARIZ. DEP'T OF REVENUE, http://www.azgovernor.gov/TPT/documents/Materials/SLS_080712_LicensingDOR.pdf. Compare the city of Bisbee,

Once properly licensed by both the Arizona Department of Revenue, and the individual city in which business will be conducted, a business may engage in the provision of transient lodging, and may properly calculate and pay the transactional privilege tax it owes based on this activity. This transaction privilege tax is "often passed on to the business' customers as 'sales tax,'" however, this is not a true sales tax.[62] While the business may pass the burden of this tax on to the consumer, the business ultimately is responsible to pay, as the transaction privilege tax is "actually a tax on the vendor for the privilege of doing business in Arizona."[63]

B. Applying the Transactional Privilege Tax to Transient Lodging

As discussed in the proceeding paragraphs, Arizona law imposes the transaction privilege tax on many different classifications of businesses, including those that provide transient lodging.[64] A.R.S. § 42-5070 defines transient lodging as the business of operating a hotel, motel, or similar establishment "for occupancy by transients."[65] A.R.S. § 42-5070(F) defines a "transient" as "any person who either at the person's own expense or at the expense of another obtains lodging space or the use of lodging space on a daily or weekly basis, or on any other basis for less than thirty consecutive days." Because the statutory definition limits a transient lodging arrangement to one that exists for "less than thirty consecutive days" it excludes most traditional lease agreements, as even a "month-to-month" lease exists for thirty days or more. As a result of this cut-off individuals in a traditional landlord-tenant relationship are taxed at a substantially lower rate than those engaged in providing transient lodging, as they are exempted from paying the transaction privilege tax.

Traditional landlords are also not required to navigate the cumbersome and often expensive licensing process that providers of transient lodging must endure under the transactional privilege tax. Indeed, providers of transient lodging must engage in more detailed bookkeeping than traditional landlords, as they are required to differentiate between other business related income, such as that from on-site restaurants and laundry services, from the income derived specifically from occupancy.[66]

Arizona, which charges a $1.00 license fee with Bullhead City, Arizona, which charges a $50.00 licensing fee and up to a $250.00 annual renewal fee. *Id.*

[62] *Transaction Privilege Tax*, CITY OF MESA, http://www.mesaaz.gov/salestax/privilege.aspx (last visited Oct. 16, 2014).

[63] *Summary of Arizona Taxes*, ARIZ. DEP'T OF REVENUE, http://www.azdor.gov/Portals/0/Brochure/010.pdf (last visited Mar. 26, 2015).

[64] ARIZ. REV. STAT. ANN. § 42-5070 (2012).

[65] § 42-5070(A).

[66] *Arizona Transaction Privilege Tax Ruling TPR 06-1*, ARIZ. DEP'T OF REVENUE, http://www.azdor.gov/LinkClick.aspx?fileticket=1KcIx912AZY= (last visited Mar. 26, 2015).

This discrepancy in the rate of taxation between the two groups presents an issue of fairness and equality. It is not equitable to charge higher rates of tax on providers of transient lodging, and still hold them accountable as landlords under the Act. A double detriment is created for providers of transient lodging if tenant rights are extended to transient guests. Not only do providers of transient lodging have to pay higher taxes,[67] under this standard they must also formally evict non-paying guests, incurring additional legal and court fees, which are not typically incurred by providers of transient lodging. Such an arrangement hurts profitability and places added non-traditional burdens on providers of transient lodging.

V. PROPOSAL

The Act's usage of the term "transient occupancy" is confusing and ambiguous. Lacking a definition of this term, providers of transient lodging—as well as the courts—are left without any clear way to invariably determine whether the Act applies. Legislative drafting can correct this problem, and clear up this current uncertainty.

If a definition for the term "transient occupancy" is added to the Act, it will clarify the Act and render it much easier to interpret, as such a definition will illuminate exactly whom the legislature intends to be covered by the Act. For instance, the legislature can adopt the same defining language used in A.R.S. § 42-5070, the transaction privilege tax statute, thereby providing clarity and continuity between the two bodies of law. While an adaptation of the transient definition from A.R.S. § 42-5070 will be helpful for continuity, additional clarification will yet be needed to completely resolve the Act's ambiguity, as there may still be some uncertainty as to what happens to an occupier who begins their stay as a transient, but ends up staying thirty days or more. The transient definition from A.R.S. § 42-5070 does not clearly resolve the question of whether a transient becomes a tenant if the duration of their stay is extended to thirty days or more. Consequently, any effective definition will have to encompass additional language that clarifies when, if ever, a transient occupant becomes a tenant. Adding a clause to the transient definition, which provides that a transient occupier who stays for thirty days or longer is no longer considered a transient occupier, but rather a tenant as contemplated by the Act, should adequately address this issue.

Should the legislature find, for public policy reasons, that individuals staying in transient lodging for periods of thirty days or longer should be covered by the provisions of the Act, additional consideration must be given as to the

[67] Because of the transaction privilege tax, providers of transient lodging in Arizona pay, on average, ten percent more tax than traditional landlords. *See generally Id.*

potential loop-holes that may allow providers of transient lodging to evade the Act's coverage. For instance, if a hotel requires a tenant to "check out" and then "check in" to a different room every twenty-nine days, the hotel may reasonably argue that the a new rental agreement controls and the guest has not become a tenant as contemplated by the Act. Similarly, if a hotel drafts a rental agreement that automatically expires after twenty-four hours, but allows for renewal by the guest not vacating the room, the parties have constructively agree to renew the agreement for another twenty-four hours each time the guest does not vacate. Such an arrangement could continue in perpetuity evading coverage under the Act, as the guest is technically restarting the clock on the rental period every twenty-four hours. If not addressed in the Act directly, these types of arrangements will likely be challenged at some point and require a court opinion to confirm the validity of such arrangements and determine whether they violate the statutory intent of the Act.

In the alternative, if the word "transient" is removed from the Act altogether, the Act will be much clearer and easier to interpret. Without the word "transient," the Act unambiguously exempts all individuals staying in hotels, motels, or recreational lodging from its applicability. Discussion as to duration, control, transient status, and the like, would be unnecessary. The Act would be clear-cut and simple, as all occupancy in hotels, motels, and recreational lodging would fall outside the scope of the Act.

VI. Conclusion

Referring back to Mr. Smith, our hypothetical guest who overstayed his welcome in the introduction of this article, we can began to examine the implications of applying tenants' rights to guests who overstay their welcome at hotels, motels, and the like.

The authors ultimately conclude the Act is not applicable in Mr. Smith's situation, and that a formal eviction would be unnecessary under this set of facts. In the absence of a requirement to evict under the Act, the hotel operator may remove the trespasser at will and dispose of his possessions. The authors acknowledge that the court has reached contradictory conclusions regarding tenants and transients in its decisions in *Horton* and *Carillo*; however, the authors suggest these decisions are distinguishable and limited to the facts of those cases. Revision of the Act is necessary to provide clarity and to ensure continuity with the Arizona tax code. Without such revision, providers of transient lodging—and their guests—are left without clarity as to their rights and responsibilities under Arizona law.

A Concurrence, A School District, and The "I (Heart) Boobies!" Bracelets: The Real Life Confusion School Districts Face When Deciding How to Address First Amendment Issues in Schools.

Joseph M. Rhoades*

I. Introduction

Within the soul of the American dream exists the viewpoint that our children go to school to learn, be shaped into the future leaders of our country, and leave as upstanding citizens. Therefore, educators are often thought of as "the mechanism for molding values for future generations."[1] Ironically, the societal emphasis on individual rights[2] has impeded the notion of the school being the backbone for individual development so clearly expressed by the American dream.[3]

The desire to promote individual expression has inevitably created a school atmosphere in which the student tests the authority of the school administration by continually waiving the "First Amendment card" as a defense to any prohibited action.[4] For instance, in *Baxter v. Vigo Cnty. Sch. Corp.*, 26 F.3d 728 (7th Cir. 1994), a student alleged a First Amendment violation when she was prohibited from wearing shirts that read, "'Unfair Grades', 'Racism', and 'I Hate Lost Creek.'"[5] Similarly, in *Littlefield v. Forney Ind. Sch. Dist.*, 108 F. Supp. 2d 681, 689 (N.D. Tex. 2000), students alleged a district dress code policy

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* Joseph M. Rhoades received his J.D. from Arizona Summit Law School in 2015; B.A. (Secondary Education), 2007, Arizona State University. The premise of this article originates from Mr. Rhoades' experience as a high school educator in Goodyear, Arizona. Mr. Rhoades would like to express his sincere gratitude to Dr. Francine Banner, an Associate Professor of Sociology at the University of Michigan, Dearborn, for the role she played in advising Mr. Rhoades throughout this article, and for providing immeasurable mentorship throughout his law school career. This article is dedicated to Mr. Rhoades' wife, Kristine.

[1] Katherine Say, *Differing Viewpoints Under the First Amendment: Students Versus School Authorities*, 28 Okla. City U. L. Rev. 905 (2003).

[2] *Id.;* Notable examples include Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 591 (1940), *overruled by* W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[3] *Id.*

[4] *Id.*

[5] Baxter v. Vigo Cnty. Sch. Corp., 26 F.3d 728, 730 (7th Cir. 1994).

requiring students to wear uniforms violated their First Amendment right to free speech.[6]

Moreover, the issue of student free speech has outgrown the traditional concept of speech as only what is expressly stated by words or symbolic action by encompassing social and political ideologies, the use of social media, cyber bullying, off-campus free speech, and athletic free speech regulation.[7] Because of this expansion, school districts may have difficulty determining not only what speech may be restricted but also whether there is a First Amendment issue at all.

This paper presents and explores the recent adjudication of the "I (heart) boobies!" bracelets across the country[8] in order to further elaborate on the issues of free speech within the school system that are at an ever-changing crossroad. Unfortunately, the more the Supreme Court decides on issues in the context of schools, the more it establishes new rules and applicable regulatory guidelines regarding free speech of students within a variety of contexts. Thus, school officials are more uncertain about how to proceed when trying to enforce school policy.

Part II of this article will discuss the foundational Supreme Court First Amendment precedent that sets forth the rules which the Court held to be applicable to student free speech in public schools. Additionally, this part will further elaborate on how free speech precedent in public schools has changed and developed over time, portraying how the Court adapted the precedent to various student free speech scenarios. The third part will then analyze the current circuit split regarding how free speech precedent applies to schools in the context of "I (heart) boobies!" bracelets. Specifically, Part III explores the unorthodox desire of the Third Circuit to adopt a concurring opinion as precedent.

Part III will also compare and contrast recent cases involving breast cancer awareness bracelets, including the only case thus far involving the bracelets

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[6] Littlefield v. Forney Ind. Sch. Dist., 108 F. Supp. 2d 681, 689 (N.D. Tex. 2000) *aff'd sub nom.* Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275 (5th Cir. 2001).

[7] Pinard v. Clatskanie Sch. Dist., 467 F.3d 755 (9th Cir. 2006) (students circulated and signed a petition to fire their coach); Killion v. Franklin Reg'l Sch. Dist., 136 F.Supp. 446 (Penn. 2001) (student was suspended from school for making his own version of a David Letterman-like top ten list which "dissed" his school's athletic director); B.H. v. Easton Area Sch. Dist., 725 F.3d 293 (3d Cir. 2013) (students were suspended for wearing breast cancer awareness bracelets); Castorina v. Madison Cnty. Sch. Bd., 246 F.3d 536 (6th Cir. 2001) (student wore a t-shirt baring the confederate flag).

[8] This paper will analyze two "I (heart) boobies!" bracelets cases: *B.H v. Easton Area Sch. Dist.,* the most current federal appeals decision signifying that a school may not prohibit students from wearing the "I (heart) boobies!" bracelets, and *J.A. v. Forte Wayne Cmty. Sch.*, a current district court decision in a separate jurisdiction than that in which *Easton* was decided holding that school districts may prohibit students from wearing such breast cancer awareness bracelets.

that reached a United States Court of Appeals.[9] Additionally, the third part dives deeper into the cases, specifically analyzing how each court came to its conclusion, and how each holding will affect public school teachers, administrators, and school districts.

The fourth part of this article will explore the idea that students and administrators may have a different idea on what constitutes a social movement, and therefore appropriate school speech. Lastly, Part V concludes with exploring the Supreme Court's decision to deny certiorari to the Easton Area School District[10] in its attempt to appeal to the Third Circuit Court of Appeals. Part V will examine the possible reasons why the petition for certiorari was denied, and concludes with a potential argument as to what the Supreme Court may be looking for when determining whether to grant certiorari in the context of newly developed student free speech cases.

II. Monumental Student Free Speech Supreme Court Rulings

A. Tinker and Material Disruptions

On February 24, 1969, the United States Supreme Court decided the first of many student free speech cases. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503 (1969), is the historic case involving students who were suspended from school for wearing black arm bands in protest of the hostilities in Vietnam and in support of a truce.[11] The students filed suit under 1983 of Title 42 of the United States Code[12] and the district court upheld the constitutionality of the school's actions on the "ground[s] that it was reasonable in order to prevent disturbance of school discipline."[13] The Eighth Circuit Court of Appeals confirmed without opinion.[14] The Supreme Court reversed and remanded the previous decisions holding student speech is appropriately prohibited when "substantial disruption of or material interference with school activities, or disturbances or disorders on the school premises occur."[15] *Tinker* became the precedent for free speech in schools until the Supreme Court decided *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).[16]

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[9] B.H. v. Easton Area Sch. Dist., 725 F.3d at 308; J.A. v. Fort Wayne Cmty. Sch., 1:12-CV-155 JVB, 2013 WL 4479229 (N.D. Ind. Aug. 20, 2013).

[10] B.H. v. Easton Area Sch. Dist., 725 F.3d at 293, *cert. denied,* 13-672, 2014 WL 901854 (U.S. Mar. 10, 2014).

[11] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

[12] *Id.*

[13] *Id.* at 505.

[14] *Id.*

[15] *Id.* at 515.

[16] Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).

B. Fraser and Lewd, Vulgar, and Offensive Language

In *Fraser,* a high school student gave a nomination speech on behalf of a fellow student.[17] The speech was given in front of the student body as part of a school sponsored assembly.[18] In his speech, Fraser "referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor."[19] The school suspended Fraser and removed him from the list of potential graduation speakers for violating the school's obscene language rule that read very similar to the holding expressed in *Tinker.*[20] The student filed suit in district court alleging a violation of his First Amendment rights.[21] The court held that the school's obscene language rule was unconstitutionally vague.[22] The Ninth Circuit Court of Appeals agreed and rejected the school district's arguments that the speech had a "disruptive effect on the educational process" and that the district had the responsibility to protect the minors in the audience from "lewd and indecent language."[23] The Supreme Court reversed, creating an exception to the holding in *Tinker*,[24] and stated the First Amendment does not prohibit the school or their administrators from regulating student speech that is determined to be lewd and vulgar.[25] Allowing such speech would "undermine the school's basic educational mission."[26] This exception broadened the scope of First Amendment challenges brought by students claiming free speech violations. The ruling in *Fraser* did not only add an exception to *Tinker*, but created the opportunity for the Court to further elaborate and distinguish their holdings on student free speech in the future.

C. Morse and Drugs

A more current example of the complexity of student free speech and the Supreme Court's desire to make another exception to *Tinker* is the holding in *Morse v. Frederick*, 551 U.S. 393 (2007).[27] In *Morse,* the principal observed a student unfurl a large banner stating "BONG HiTS 4 JESUS" at a school spon-

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[17] *Id.* at 677.

[18] *Id.*

[19] *Id.* at 677-78.

[20] Id. at 678 (The school's obscene language policies read as follows: "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures").

[21] *Id.* at 680.

[22] *Id.*

[23] *Id.*

[24] Refer to Subsection A above.

[25] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986).

[26] *Id.*

[27] Morse v. Frederick, 551 U.S. 393 (2007).

sored event.[28] The principal perceived the banner to be one that suggested illegal drug use and suspended the student from school.[29] Frederick filed suit alleging a violation of his First Amendment rights.[30] The district court found in favor of Morse, holding that she "reasonably interpreted the banner as promoting illegal drug use—a message that 'directly contravened the Board's policies relating to drug abuse prevention.' "[31] The Ninth Circuit reversed, holding the school violated "Frederick's First Amendment rights because the school punished Frederick without demonstrating that his speech gave rise to a 'risk of substantial disruption.' "[32] The Supreme Court reversed creating yet another exception to *Tinker*. The Court held that a school may "restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."[33]

The next part discusses two cases that arose based on the continued efforts by the Supreme Court to clarify the application of the First Amendment in the schools. The next part demonstrates that, in making an effort to clarify the First Amendment doctrine, the Court decisions in fact have led to confusion.

III. The Current Predicament

Within the last year, two federal courts in the United States, the Third Circuit Court of Appeals and the United States District Court of Indiana, have adjudicated cases regarding students wearing "I (heart) boobies!" bracelets. The courts analyzed whether a student's speech delivered a disruptive effect on the student body or whether the message content of such speech had impermissible meaning. These courts reached opposite holdings, approaching the issue with distinct rationales.[34] First Amendment activists will rarely pass the opportunity to remind opponents of the famous words of *Tinker*, "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[35] However, because *Tinker* is still good law and has not been overturned,[36] a current public school

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[28] *Id.*

[29] *Id.* at 396.

[30] *Id.* at 399.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 403.

[34] Baxter v. Virgo Cnty. Sch. Corp., 26 F.3d 728, 730 (7th Cir. 1994).

[35] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S 503, 506 (1969); Erwin Chemerinski, *Students Do Leave Their First Amendment Rights At The School House Gates*, 48 Drake L. Rev., 527, 528 (2000).

[36] Chemerinsky, 48 Drake L. Rev. at 535.

administration must adhere to the holdings of *Tinker, Fraser,* and *Morse*[37] when disciplining their students for possible free speech violations.[38]

These holdings only touch on a small portion of student First Amendment issues that face public schools today.[39] Are school administrators supposed to choose which set of guidelines or tests to use when deciding whether they are legally prohibited from restricting a student's free expression when the facts do not fit any particular holding? Due in part to the multiple student free speech guidelines set forth by the Supreme Court, and the desire of students to freely express themselves, school administrators and school districts find themselves having to follow different standards to regulate student free speech depending on the jurisdiction they reside in.[40] This is exactly the result when deciding how to regulate "I (heart) boobies!" bracelets.

A. Easton and the Strength of a Concurrence

During the 2010-2011 school year, B.H, K.M., and three other students wore the "I (heart) boobies!" bracelets at Easton Area Middle School in Pennsylvania.[41] Teachers from around the school noticed that the students wore the bracelets every day for several weeks, and contemplated taking action.[42] The teachers approached the eighth grade principal in an effort to receive guidance on whether to permit the students to wear the bracelets or have the students remove them.[43] The principal gave authority to the teachers to have the students remove any "wristbands that have the word 'boobie' written on them." This measure appears to have been purely speculative. Because Breast Cancer Awareness month was approaching, the administration feared that the bracelets would "lead to offensive comments or invite inappropriate touching."[44] However, the speculation also appears to be unwarranted as there were no reports of the bracelets causing disruptions or inappropriate behavior.[45] The day before the school was scheduled to observe Breast Cancer Awareness Month, the

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[37] See generally Morse, 551 U.S. at 393; Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); *Tinker,* 393 U.S. at 503.

[38] Clay Calvert, *Mixed Messages, Muddled Meanings, Drunk Dicks, and Boobies Bracelets: Sexually Suggestive Student Speech and the Need to Overrule or Radically Refashion Fraser*, 90 DENV. U. L. REV. 131 (2013) (the author is referring to the holdings of *Tinker, Fraser,* and *Morse.*).

[39] *See* note 2 for a list of student free speech cases that will be discussed later on in the paper.

[40] *Compare* B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293 (3d Cir. 2013), *with* J.A. v. Fort Wayne Cmty. Sch., 2013 WL 4479229, 17 (N.D. Ind. 2013).

[41] *B.H v. Easton Area Sch. Dist. .,* 725 F.3d at 299.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

administration announced, via the public address system on campus, a ban on bracelets having the word "boobies," but encouraged students to partake in Breast Cancer Awareness by wearing the traditional color pink.[46]

Later that day B.H. was asked to remove her bracelet by a security guard and B.H. refused. However, B.H. relented and removed her bracelet and no incident or disruption occurred.[47] The days following the school's announcement of the ban on bracelets containing the word "boobies" were uneventful until, one day during lunch, B.H and K.M were instructed by a security guard to remove their bracelets and refused to do so.[48] The girls invoked their First Amendment right to free speech when confronted by the principal.[49] The school gave each of them one and a half days of in-school suspension and revoked their privilege to attend the Winter Ball.[50] It is clear that the school administration followed the holding set forth in *Tinker* by relying on the stance that a school may prohibit student speech if the speech caused disruption.[51] The school notified each of the students' parents explaining that the students were suspended for "disrespect," "defiance," and "disruption."[52]

Parents sued in the District Court of the Eastern District of Pennsylvania.[53] The District Court applied *Tinker, Fraser,* and *Morse* and ultimately held in favor of the students. The court explained that the bracelets were not "lewd speech under *Fraser* and did not threaten to substantially disrupt the school environment under *Tinker.*"[54] The Third Circuit affirmed in unique fashion by relying on the concurrence by Justice Alito and Justice Stevens in *Morse.*[55] Justice Alito stated in his concurrence that the majority opinion authored in *Morse* "did not permit the restriction of speech that could plausibly be interpreted as political or social speech."[56] Inevitably, the court concluded that the wearing of Breast Cancer Awareness bracelets is part of the promotion of a social issue, and therefore does not fall into the lewd and offensive language category of *Fraser.*[57]

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[46] *Id.*

[47] *Id.* at 300.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (comparing the courts holding regarding the use of arm bands to protest the Vietnam War with the wearing of Breast Cancer Awareness bracelets containing the word "boobies").

[52] *Id.*

[53] B.H. *ex rel.* v. Easton Area Sch. Dist., 725 F.3d 293, 301 (3d Cir. 2013).

[54] *Id.*

[55] *Id.* at 312.

[56] *Id.*

[57] Id. at 320.

B. J.A. and the Other Cases That Find the Word "Boobie" to be Lewd

In 2012, the court in *K.J v. Sauk Prairie Sch. Dist*. came to a different conclusion than the court in *Easton*.[58] In *K.J.,* the principal prohibited middle school students from wearing the "I (heart) boobies!" bracelets due to concerns by both teachers and parents that the slogan was "inappropriate," and "trivialized" breast cancer.[59] The District Court concluded that the "I (heart) boobies!" bracelet was a "sexual innuendo that is vulgar, at least in the context of a middle school."[60] Moreover, the court found that the term "boobies" is a "morally immature and crude term for breasts," upholding the school's discipline of the student for wearing the bracelet.[61]

In a similar case, *J.A. v. Forte Wayne Community Schools*, the District Court of the Northern District of Indiana also held that the phrase "I (heart) boobies!" is vulgar and lewd.[62] In that case, J.A. wore the bracelet after the bracelets had already been banned by school administration.[63] Upon the ensuing litigation, the court determined the *Fraser* standard was the most appropriate standard to review the context of Breast Cancer Awareness bracelets.[64] The court acknowledged Justice Alito's concurrence[65] relied on by the court in *Easton*, but rejected the rationale of the concurrence, noting that the concurrence reflected Justice Alito's personal view on school regulation of student speech and not that of the majority.[66] The current approach to *Fraser* leads the court to agree with the holdings in *K.J.,* relying on the court's interpretation of the word "boobies" to be lewd or vulgar.[67] The court noted that of the three federal courts to analyze this bracelet, only the District Court of Pennsylvania concluded that it was unreasonable for an objective observer to interpret the

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[58] K.J v. Sauk Prairie Sch. Dist., 2012 U.S. Dist. LEXIS 187689 (W.D. Wis. 2012).

[59] *Id.*

[60] J.A. v. Fort Wayne Cmty. Sch. 1:12 CV 155 JVB, 2013 WL 4479229, *17 (N.D. Ind. Aug. 20, 2013).

[61] *Id.* at *17-18.

[62] *Id.*

[63] *Id. at *2.*

[64] *Id.*

[65] *See* Morse v. Frederick, 551 U.S. 393, 422 (2007) (Alito, J., concurring) (creating a new rule/test within his concurrence of the *Morse* decision by stating it "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue.").

[66] *J.A.,* 2013 WL 4479229 at *4 (noting that the Seventh Circuit has also rejected the Third Circuit's adoption of Justice Alito's view on free speech in schools); s*ee also* Snyder v. Phelps, 131 S.Ct. 1207, 1225, (2011) (Alito, J., dissenting) (emphasizing a strong fundamental disagreement from the majority's viewpoint of the First Amendment protection of free speech for a religious protest of a fallen soldier's funeral).

[67] J.A. v. Fort Wayne Cmty. Sch., 1:12 CV 155 JVB, 2013 WL 4479229, *6 (N.D. Ind. Aug. 20, 2013).

bracelet's message as vulgar.[68] The court continued its holding by elaborating, "there is evidence that a reasonable observer could interpret the bracelet as being vulgar."[69]

The view of the court appears to be one analogous to the minds of current public school administrators. Additionally, the court focused on the age and maturation of the students wearing the bracelets and concluded that numerous inappropriate situations existed where male students made references to the word "boobies" in a sexual context rather than in support of Breast Cancer Awareness.[70] Students also wore bracelets different in nature that contained obscene language on them,[71] thus, demonstrating the students had a maturity level closer to that of a middle-school student.[72]

Although these cases are extremely similar in facts and address the same general issue, their holdings depict the problem facing public school administrations today. Public school students, parents, and administrators living in the jurisdiction within the Third Circuit must follow the holding in *Easton,*[73] while those living within the jurisdiction of the Seventh Circuit, and jurisdictions yet to rule on the issue, are to follow an entirely different set of guidelines.[74]

Even Chief Justice Roberts admits that using the analysis of *Frasier* is not clear[75] and free speech activists believe the ruling in *Frasier* " 'added a new, large, fog-like category to unprotected' student expression."[76] It must be understandable and legitimate for school administrations and school districts to have such difficult times trying to protect the student body from specific student speech. On one side of the spectrum rests the idea that Breast Cancer Awareness is a vital part of cancer research and that T-shirts and bracelets are a tool to help promote cancer awareness "allowing young people to engage and start talking about a subject that is scary and taboo and making it positive and upbeat."[77] On the other hand, students wearing or promoting bracelets or

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[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] Holding that a school district may not prohibit students from wearing the "I (heart) Boobies!" bracelets, and any prohibition of the matter is a violation of the First Amendment.

[74] Referring to the holding in *J.A.,* which stated the school may ban the wearing of Breast Cancer Awareness bracelets without infringing on student's First Amendment rights.

[75] Clay Calvert, *Mixed Messages, Muddled Meanings, Drunk Dicks, and Boobies Bracelets: Sexually Suggestive Student Speech and the Need to Overrule or Radically Refashion Fraser,* 90 DENV. U. L. REV. 132.

[76] *Id.*

[77] *Id.* at 136. *See also*, "I Love Boobies!" Campaign, KEEP A BREAST FOUND., http://www.keep-a-breast.org/programs/i-love-boobies (last visited Jan 24, 2014).

clothing that state or depict the word "boobie" is considered lewd when used in the school setting.[78]

The Supreme Court recently denied certiorari, so where are we going? The following part reviews key issues on the horizon as administrators attempt to address issues involving the First Amendment in schools.

IV. Issues of Which Administrators Should be Aware.

A. What is "Lewd" to The Administrator May be A "New Social Movement" In The Eyes of the Student

According to Justice Alito, and later the Third Circuit Court of Appeals, the desire for students to wear the "I (heart) boobies!" bracelets and promote Breast Cancer Awareness is a new type of protected speech that is categorized as a social movement.[79] Specifically, the Third Circuit in *Easton* recognizes the concurring opinion in *Morse* to be precedential and influential law, and holds that while schools can "restrict ambiguous speech that a reasonable observer could interpret as lewd, vulgar, profane, or offensive," the school may not restrict speech that "could also plausibly be interpreted as commenting on a political or social issue."[80] However, what appears to be missing from the Third Circuit analysis in *Easton* is the categorical line that needs to be drawn in order to correctly, sufficiently, and successfully determine what constitutes a social issue.[81] Under this standard applied by the court, surely most, if not all, free speech issues involving students could be argued to apply to some social issue or movement. Ironically, the court further states and quotes part of the holding in *Fraser*[82] that gives the school district, and thus schools themselves, the authority to determine what is acceptable speech by students by elaborating "the determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[83] Is that not exactly what Easton Area School District was trying to accomplish? The Supreme Court itself acknowledges the schools as having the authority to govern what level of speech is appropriate in the school setting.[84] The justices of

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[78] K.J. *et al. v.* Sauk Prairie Sch. Dist. *et al.,* No. 11-cv-622-bbc, 2012 U.S. Dist. LEXIS 187689, (W.D. Wis. Feb. 6, 2012).

[79] B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 308 (3d Cir. 2013).

[80] *Id.*

[81] *Id. (a*ddressing a potential issue with creating precedent using such a broad and undefined rule).

[82] *See* note 12 for the facts and holding on *Fraser.*

[83] *Id.* citing Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986).

[84] *Id.*

the Third Circuit appeared to be infatuated with Justice Alito so much that they failed to see their own words contradict themselves.[85]

The court elaborates by stating it is the job of the judiciary to determine whether the school officials "reasonably conclude[d]" that student speech will substantially disrupt the school."[86] It can be argued that following this standard so closely leads parents and other non-school officials to scrutinize the actions of the administration of a school, effectually restricting the autonomy of the school administration itself. It could also be argued that once the school district or administration makes the decision to prohibit speech, the court should uphold the decision unless the school egregiously misapplies their discretion. Using the ideology of the Third Circuit against itself, one argument exists that if "[s]chool officials know the age, maturity, and other characteristics of their students far better than judges do[,]"[87] then why does the Supreme Court insist on having the courts "determine whether a reasonable observer could interpret student speech as lewd, profane, vulgar, or offensive[?]"[88] In *Pyle v. S. Hadley Sch. Comm*., 861 F. Supp. 157, 162 (D. Mass. 1994), a student wore a shirt that contained the language "See Dick Drink. . . See Dick Drive. . . See Dick Die. . . Don't Be A Dick."[89] The student stated that he had begun to wear questionable T-shirts to "protest censorship and to test the capacity of the administration to distinguish prohibited from permitted messages."[90] Under the reasoning adopted by the Third Circuit, the school district would have lost this battle. Moreover, if a student wears a shirt in protest, the student would be protected under the Alito standard of a "political issue."[91]

The concept of a social issue that requires protection under the Alito standard raises the question of "what if a social issue of free speech contains lewd, vulgar, and disruptive behavior?"[92] The nation is in an "ongoing. . .clash between students and school officials who contend the word 'boobies'—even in the context of cancer awareness—is inappropriate in schools."[93] The Third Circuit would have you believe that the essence of a social issue requires the unbiased protection of free speech, even when the campaign itself-"I (heart) boobies!"-has been "criticized as one of several 'sexy breast cancer' and

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[85] *See generally* section 1 of the opinion in *Easton.*

[86] *Id.* citing Morse v. Frederick, 551 U.S. 393, 403 (2007).

[87] *B.H.*, 725 F. 3d 293 at 308.

[88] *Id.*

[89] Pyle By & Through Pyle v. S. Hadley Sch. Comm., 861 F. Supp. 157, 162 (D. Mass. 1994).

[90] *Id.* The student also wore a t-shirt bearing a gerbil with the tagline " Co-ed Naked Gerbils" on the on the front and on the back the slogan "some people will censor anything."

[91] Referring to the holding of *Easton.*

[92] Combining the holding in *Fraser* and *Easton.*

[93] Tony Marrero, Wearing Their Heart, and More, on Their Wrist, TAMPA BAY TIMES (Fla.), Mar. 18, 2012, at 1.

'[k]ittenish' campaigns that result in 'pathologizing and fetishizing women's breasts at the expense of the bodies, hearts and minds attached to them.'"[94] Not all students wear the bracelets in support of breast cancer awareness.[95] Students from a South Dakota High School admitted wearing the bracelets for reasons other than awareness.[96] Reasons included wearing the bracelets "because it says 'I love boobies' mostly not because of the awareness," or because it is "awesome" the bracelets says "boobies" printed on them.[97] The school itself understands that the bracelets are to address serious issues, but feel as though the bracelets trivialize the issue.[98] Again, the Supreme Court wants the schools to determine the appropriate level of speech within the walls of the school. Although extremely unfair to the students who genuinely wear the bracelets in support of awareness for the disease, the actions of students as described above is precisely why schools seek to prohibit the type of expression and speech found by the wearing of "I (heart) boobies!" bracelets.

The Third Circuit undoubtedly relies and arguably faithfully believes in the Alito concurrence in *Morse*, defending the Justice's stance, as the court interprets the current set of facts involving two middle schools' female students who were suspended from school for wearing the "I (heart) boobies!" bracelets, stating the decision in *Morse* was conditioned on Alito's belief that school may provide "no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue."[99] The belief in Alito continues as the court recognizes reasons that in this condition upon the majority opinion, *Morse* not only conditioned the majority opinion, but that the "limitation is a binding part" of it.[100] Under this approach, it would appear that the court not only determines whether the school district acted appropriately when deciding to limit student speech,[101] but also creates a broad and unhindered approach to student free speech law. It is fair to say that school officials that reside[102] within the Third Circuit are to be forewarned that the balance seems

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[94] Clay Calvert, *Mixed Messages,* Muddled Meanings, Drunk Dicks, and Boobies Bracelets: Sexually Suggestive Student Speech and the Need to Overrule or Radically Refashion Fraser, 90 DENV. U. L. REV. 131, 159 (2012) (citing Peggy Orenstein, The Problem with Boobies, L.A. TIMES, Apr. 19, 2011, at A15).

[95] *See* Associated Press, *Breast-Cancer Bracelets Cause Stir in Schools*, First Amendment Center (Sept. 4, 2010), http:// www.firstamendmentcenter.org/breast-cancer-bracelets-cause-stir-in-schools.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *See generally* B.H. *ex rel*. Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 310 (3d Cir. 2013).

[100] *Id.*

[101] See note 74.

[102] The Third Circuit is composed of New Jersey, Delaware, and Pennsylvania.

to have shifted towards the students, and if the school feels that it is justified in its decision to limit free speech, even arguing the speech in no way is a "political or social issue,"[103] it better hope the judges on the bench (Third Circuit) feel the same way.

The court in *JA* however, could not disagree more. The court facially rejected the Third Circuit argument that the Alito standard is controlling or binding as a branch of the decision held in *Morse.*[104] Further, the court strongly disagreed with the analysis of the Third Circuit, since the Seventh Circuit[105] already had expressly rejected the argument that Alito's opinion controlled *Morse.* The court identified that the Alito standard was merely the Justice's own "view of the permissible scope of [school] regulation [of student speech]", and that Justice Alito's concurring opinion "did not establish new limits on a school's ability to regulate student free speech commenting on political or social issues."[106]

Although Justice Alito seems like an outlier, the majority may not accept the political argument; however, administrators should be cautious that what they perceive as obscene may be deemed political by certain members of the Supreme Court. The next part will demonstrate how the geographic location of the schools and courts, along with the age of the students, played a part in how the courts analyzed the issue of free speech in schools as it related to students wearing the "I (heart) boobies!" bracelets.

B. Demographics May Play A Part

The geographic location of the *JA* court, and its constituents, creates a unique perspective for the court in determining First Amendment issues.[107] In holding for the school district, solidifying the school administrator's own school dress code policy, the court recognized the authority of school administrators to determine what is appropriate for students to wear on their person.[108] It is possible that due to the subconscious viewpoint of the court, the holding

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[103] Referring to Justice Alito's concurrence condition upon the majority holding in *Morse.*

[104] J.A. v. Fort Wayne Cmty. Sch., 1:12-CV-155 JVB, 2013 WL 4479229 (N.D. Ind. Aug. 20, 2013).

[105] The District Court of Indiana is within the Jurisdiction of the Seventh Circuit United States Court of Appeals.

[106] *Id.* The court also mentions that other circuits have also rejected the Alito concurrence standard.

[107] The court is in Indiana. Indiana sits just north of the region of the country referred to as the "Bible Belt." The term was coined by H.L. Meneken. H. L. Mencken letter to Charles Green Shaw, 1927 Dec. 2 . Charles Green Shaw papers, Archives of American Art, Smithsonian Institution. See also, http://www.lettersofnote.com/2011/06/human-race-is-incurably-idiotic.html.

[108] J.A. v. Fort Wayne Cmty. Sch., 1:12-CV-155 JVB, 2013 WL 4479229 *6 (The court held that the bracelets were lewd and vulgar.).

reflects a court view (a view shared by a majority of citizens within its jurisdiction) that the word "boobies" in a school setting is inherently lewd.[109]

The District Court presented an analysis that is completely contrary to the views of the Third Circuit.[110] Perhaps the court, like many of its constituents, has a deeper religious conservative viewpoint that created the fundamental basis for the court's holding. Although, it should be noted, the court does not address religion anywhere in its analysis or holding. In addition to banning the breast cancer bracelets, the school district also enforced its dress code policy[111] by prohibiting the wearing of bracelets that contained slogans such as "I'm a free bitch," "Fuck Off," "Sexy," "Ask Me About My Wiener," "Bad Ass," and "Save the Boobs."[112]

The demographics may have played a more conscious role when, after the court held that a reasonable person could have interpreted the bracelet as being vulgar,[113] the court continued its analysis by addressing the term "boobies" as it relates to the maturation levels of the students referring to the slogan.[114] Interestingly, as the court maneuvered its way around maturity, and the effect maturity has within the contexts of schools, the court dismissed the plaintiff's arguments that "high schoolers are mature enough to be exposed to this slogan."[115] If the argument is made that students are mature enough to handle something—no matter the topic—the argument is conceding that the maturity level applies to all students holistically at a given school. However, even if that was true, how is it legally and practically possible to create rules for schools and students to follow while taking into account the maturity levels of students? Surely, students will fall within a variety of maturity levels, thus it would be impractical to apply one maturity level to all students. The court brilliantly dismissed the plaintiff's arguments by articulating that students do not leave their immaturity behind, and automatically become mature adults when they enter the school.[116]

While the Third Circuit relies on the judiciary as being the platform to determine whether the reasonable observer would consider particular speech

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[109] Referring to note 93.

[110] *See generally* B.H. *ex rel*. Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 308 (3d Cir. 2013).

[111] *J.A.,* 2013 WL 4479229 at *1.

[112] *Id.*

[113] *Id.* at * 6.

[114] *Id.*

[115] *Id.* at *7.

[116] *Id.* (the court seems to almost poke fun at the plaintiff's arguments by referring to the school as not being a "magical place").

lewd or vulgar,[117] admittedly it is still "a school's mission to mold students into citizens capable of engaging in civil discourse, [which] includes teaching students of sufficient age and maturity how to navigate debates touching on sex."[118] According to this theory, the judiciary has no place in interfering with the process. The Easton Area School District was trying to do the very thing that the justices acknowledge as being the "mission" of the school, but the court still held against the district enforcing their policies. Cleary had the facts of *B.H v. Easton* appeared in Indiana, the result would have been overwhelmingly opposite. In fact, in *Easton* the court did not consider maturity as an indicator of whether the "I (heart) boobies!" bracelets are lewd or vulgar.[119] The court at times mentioned maturity in reference to other parts of the analysis, but does not use maturity as an overall factor in its determination for deciding whether the bracelets were lewd. Using the theory of the court itself, if the judiciary is to determine whether the objective observer would find the bracelets lewd, its analysis would be based on "the plausibility of the school's interpretation in light of the competing meanings."[120] This includes the "context, content, and form of the speech; and the age and maturity of the students."[121] Textually, the court lays out how they came to the conclusion that students' rights to free speech were infringed upon by the school district. However, the court did not present any factual or theoretical evidence as to why or why not maturity in the middle school setting, as in *Easton*, played a role in its decision. School administrators residing within the jurisdiction of the Third Circuit obviously feel as though the students should be prohibited from wearing the "I (heart) boobies!" bracelets. The Third Circuit holding that because the "school district has also failed to show that the bracelets threatened to substantially disrupt the school," and because breast cancer awareness is considered a protected speech under a social movement, the school violated the students' First Amendment right, presents at least one question: what if the bracelets do lead to a disruption like the one that occurred in Indiana? As of today, the school is still prohibited from restricting the wearing of the bracelets.

C. At Times Even The Most Patriotic and Symbolic Context of Speech May be Prohibited in Schools

February 27, 2014 marked the day the Ninth Circuit Court of Appeals filed its opinion in *Dariano v. Morgan Hill Unified Sch. Dist*., 11-17858, 2014 WL

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[117] *See generally* B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 309 (3d Cir. 2013), *cert. denied,* 13-672, 2014 WL 901854 (U.S. Mar. 10, 2014).

[118] 725 F.3d 293 at 308.

[119] *See generally* 725 F.3d 293 at 309.

[120] 725 F.3d 293 at 308.

[121] *Id.*

768797 (9th Cir. Feb. 27, 2014). The court held that requiring students to change clothing when they wore clothing to school bearing the American Flag did not violate their First Amendment right to free speech.[122] On the surface, this holding stands out as a clear First Amendment violation. How could an American court tell a person they are prohibited from wearing a shirt with the American Flag on it? However, once one looks closer, one can see the true issue at hand. Just like in *Easton* and *J.A.*, the court in *Dariano* was asked to determine whether a school district had the authority to restrict students' First Amendment rights by prohibiting the wearing of an item the students claimed to be free speech.[123] Factually, *Dariano* is unique and therefore different than both *Easton* and *J.A.*, but the court's use of precedent and analysis proves the cases are not very different.

Dariano takes place in northern California, where gang related violence and racial tension were common.[124] Students at Live Oak High School had a history of physical altercations, including many fights between Caucasian and Hispanic students.[125] Caucasian students wore shirts bearing the American Flag on Cinco de Mayo. The school celebrated the holiday in "spirit of cultural appreciation."[126] The festivities on campus were described as "honoring 'the pride and community strength of the Mexican people who settled this valley and who continue to work here.'" Several Hispanic students approached the Caucasian students wearing the shirts, and word began to spread to administration that physical violence was soon to occur.[127] Due to the history of violence at the school and between the nationalities, the principal told the students wearing the shirts bearing an American Flag, "to turn their shirts inside out or go home and receive an excused absence."[128] The school was clearly trying to protect the safety of its students, and made the decision to prohibit the wearing of shirts depicting the American Flag.

Where *Dariano* and *J.A* differ from *Easton* is that both cases involved alleged free speech violations, where the school argues the speech substantially interferes with the school or is lewd and vulgar language.[129] *Easton* found that "I (heart) boobies!" bracelets were in fact not lewd, and that the school was unable to prove the bracelets disrupted the school setting, as required by

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122 Dariano v. Morgan Hill Unified Sch. Dist., 11-17858, 2014 WL 768797 (9th Cir. Feb. 27, 2014).

123 *See generally* note 114.

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 *See generally* holding of J.A and Dariano.

Tinker.[130] However, it appears that the Ninth Circuit would join the Seventh Circuit in holding that schools may prohibit the breast cancer awareness bracelet. The argument becomes stronger when the school can provide proof that the bracelets are interfering with the education of the students. The way in which the Third Circuit ruled in *Easton* was not based on the same set of standards and common sense used by the courts in the Seventh and Ninth Circuits.

The Ninth Circuit is not new to the student free speech discussion. In *Karp v. Becken*, 477 F.2d 171, 175 (9th Cir. 1973), the court further elaborated on First Amendment rights of students explaining, "the First Amendment does not require school officials to wait until disruption actually occurs before they may act. In fact, they have a duty to prevent the occurrence of disturbances."[131] This appears to be the way the courts should interpret the case law. Although, this particular precedent is limited to the Ninth Circuit, the idea that schools must wait for some sort of distraction to occur before legally being permitted to do their job and protect the education and safety of all the students enrolled in the school, is just backwards thinking. The case could be made, however, that the standard in which the school is held to in determining whether they may prohibit student free speech, is lower. Coincidentally, that is entirely the point the Ninth Circuit made in *Karp* by holding "the level of disturbance required to justify official intervention is relatively lower in a public school than it might be on a street corner."[132] If we were to balance the importance of free speech in schools against the safety and principal of education for all, the scale would lean more toward the side of the schools and education. Of course, protecting the individual rights of students is important and necessary, but do they trump the need of school administration to conduct school in a manner where every student is safe, and uninterrupted? The *Easton* court would have us believe that middle school students using the word "boobies" are only doing it to further breast cancer awareness, and are not causing a disruption around campus. While we see how the Third Circuit interprets lewd language, and what constitutes disruption in the school setting, the Seventh and Ninth Circuits adopt a more common sense realistic approach to schools. Unfortunately, this continual spread of inconsistency has presented the reality that across three separate judicial circuits it is possible to receive three separate and distinct outcomes from the same set of facts.

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[130] B.H. *ex rel*. Hawk v. Easton Area Sch. Dist., 725 F.3d 298 (3d Cir. 2013), *cert. denied*, 13-672, 2014 WL 901854 (U.S. Mar. 10, 2014).

[131] Dariano v. Morgan Hill Unified Sch. Dist., 11-17858, 2014 WL 768797 (9th Cir. Feb. 27, 2014) (citing Karp v. Becken, *4*77 F.2d 171, 175 (9th Cir. 1973)).

[132] *Id.*

V. The Denial of Certiorari

On March 10, 2014, the United States Supreme Court denied certiorari to the Easton Area School District in its appeal from the Third Circuit's decision that a school district will infringe upon students' First Amendment rights if the school prohibits students from wearing "I (heart) boobies!" bracelets.[133] Perhaps the United States Supreme Court agrees with the Third Circuit, or perhaps the Court feels as though it is the responsibility of the school (acting within the bounds of that court's precedent) to mold our students, while maintaining a standard of authority that allows school administrators to determine what speech is appropriate. It is uncertain why the court denied certiorari; however, it is certain that the court did not help school administrators in their quest of determining whether banning "I (heart) boobies!" bracelets violated students' free speech.

Another reason why the Supreme Court denied certiorari could be bad timing. The Third Circuit opinion of *Easton* was filed August 5, 2013.[134] The petition for certiorari was filed on December 3, 2013,[135] in hope of arguing before the Supreme Court in the spring of 2014. The court is scheduled to hear a controversial case in *Tenth Circuit Sebelius v. Hobby Lobby Stores, Inc.,* 134 S. Ct. 678, 187 L. Ed. 2d 544 (2013), and it is possible the court decided it was not going to hear multiple controversial First Amendment cases in the same calendar.

It is also possible that the court agreed with the Third Circuit in that the school district in *Easton* was wrong to prohibit the bracelets, but not for the same reasons the Third Circuit suggested. The true holding of the Third Circuit created an issue for the future. As stated above, if the breast cancer bracelets are considered part of a social movement, and therefore protected speech,[136] so be it. The court further stated, however, that the school district failed to show the bracelets created a disruption in class. Without a disruption, the *Tinker* standard did not apply.[137] Under *Tinker,* school administrators "must be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" in order to prohibit student speech.[138] This quite possibly could be the issue in front of the Court someday. What if the social movement or political speech does create such a disruption where the school administration makes

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[133] *See generally* B.H. *ex rel*. Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 309 (3d Cir. 2013), *cert. denied*, 13-672, 2014 WL 901854 (U.S. Mar. 10, 2014).

[134] *B.H.* 725 F.3d 293 (see headings of the case).

[135] *Id.*

[136] *Id.* at 298.

[137] *Id.*

[138] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

the decision to prohibit the use of breast cancer awareness bracelets on campus? The Supreme Court could still back away from addressing the issue. The absence of a true answer from the justices may never come, but it is just a matter of time before students find another fad to incorporate as social speech in order to express themselves at school. It will most likely be then, and only then, that the court will grant certiorari in an effort to settle the dispute for the last time.

VI. Conclusion

With increased amounts of precedents being created, the schools are finding themselves in situations wondering, "Can I do this?" when determining whether the school has authority to prohibit student speech. Even something as vast and broad as the Fourth Amendment is contained and presented straightforwardly in the context of the school setting.[139] However, students are continually finding ways to broaden the horizon of First Amendment claims within the confines of the educational setting. It is clear by the adjudicating courts across the country that no single standard is being used to address the current predicament of "I (heart) boobies!" bracelets. Currently, depending on the jurisdiction of the court, a school district may be violating students' First Amendment rights of free speech by prohibiting students from wearing breast cancer awareness bracelets. In the meantime, a school district on the other side of the country may be prevailing in its claim to limit student free speech in an identical case containing the same issue and set of facts.

It is unclear why the Supreme Court failed to grant certiorari in *Easton,*[140] and it is further unclear if the Court ever will grant certiorari in the near future to finally discuss the new possible social movement, that is the "I (heart) boobies!" bracelets. What is clear, however is the confusion that exists among educators as to whether current precedent still holds true in regulating free speech within schools or whether the new age approach to students' First Amendment rights, such as the view held by the court in Easton,[141] will become the new normal standard. The significance of the holdings is that the holdings themselves do not reign down from the Supreme Court, but rather

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[139] Referring to *Safford Unified Sch. Dist. v. Redding,* 557 U.S. 364 (2009) (holding "[T]he school search 'will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction[,]'" (citing New Jersey v. T. L. O., 469 U.S. 325, 432 (1985))); Board of Educ. of Indep. Sch. Dist. v. Earls, 538 U.S. 822 (2002) (using a balancing test of the legitimate governmental interests versus Fourth Amendment in order to drug test student athletes).

[140] B.H. *ex rel*. Hawk v. Easton Area Sch. Dist., 725 F.3d 293 (3d Cir. 2013), *cert. denied*, 13-672, 2014 WL 901854 (U.S. Mar. 10, 2014).

[141] *Id.*

from the Third Circuit Court of Appeals and the District Court of Indiana respectfully. The factors of fundamental disagreement among the courts appear to be due to geographical and age demographics, along with individual justices having their own viewpoint and opinion as to what constitutes lewd and vulgar language in the school context. The contradicting and existing precedent that legally binds school districts has created a nationwide inconsistency of how to regulate "I (heart) boobies!" bracelets in schools.

Fighting for Fido: An Analysis of Arizona Animal Cruelty Laws and the Legal Status of Animals

Katelyn Cook*

I. Introduction

"My doctrine is this, that if we see cruelty or wrong that we have the power to stop, and do nothing, we make ourselves sharers in the guilt."[1]

Animal cruelty is a plague that runs rampant in society today. This cruelty is furthered by the inferior legal status that animals have received throughout history. Animals have cognitive abilities that are far more similar to humans than to lamps; accordingly, their legal status as property should be enhanced to help further protect them.

I suggest: (1) the legal status of animals in Arizona should be enhanced, especially when considering the recent findings detailing the extent of their cognitive ability; (2) because of these cognitive abilities, Arizona should increase criminal penalties for animal abuse so that our laws serve as a greater deterrent to animal abuse in the future; and (3) the civil remedies that are available as a result of harm to animals should be expanded.

Arizona's failure to address fully animal cruelty issues stems from the proprietary legal status of animals. Because animals are viewed only as property, the ramifications for abusing and neglecting animals are limited both civilly and criminally.[2] Because the ramifications are limited and are not as harsh as they should be, offenders and the general public are not deterred and the cycle of animal abuse never ends. For this reason, the status of animals must be altered, and Arizona must address this issue in its future court rulings and legislative channels.

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* Katelyn Cook is a 2015 J.D candidate at Arizona Summit Law School. She was born and raised in Rapid City, South Dakota, and received Bachelor's degrees in Chemistry and Spanish from the University of South Dakota. Katie is an avid animal lover who has been enriched by the pets and other animals in her life. She spends her free time traveling, hiking, camping, and relaxing with friends and family. She would like to thank her husband, Trevor, and friends, Meredith and A.J., for their continuous support and encouragement. Finally, Katie would like to recognize and thank her advisor, Lawrence Robinson, for his guidance and invaluable feedback.

[1] Anna Sewell, Black Beauty: The Autobiography of a Horse 217 (Barse and Hopkins Publishers 1911) (1877).

[2] Kaufman v. Langhofer, 222 P.3d 272, 274 (Ariz. Ct. App. 2009).

In Part III, this paper will discuss recent findings regarding animal cognition and their ability to understand, learn, and feel emotion. These abilities tie directly into our idea of what makes us "human," and will help to justify the need for an improved legal status for animals.

Part IV will discuss Arizona's criminal animal cruelty laws and relevant case law. This section will also explain why these laws are not adequate—based on the findings in Part III—and show why these statutes fail to fully address the needs of animals in the state. Additionally, it will detail both past and current proposed legislation to alleviate instances of animal abuse and neglect. Next, it will suggest a new way to help prevent offenders from coming into contact with animals again, as well as discuss the societal benefits that rehabilitation and therapy can bring to help address offenders' underlying issues that cause them to abuse both animals and people. Finally, it will detail how preventing animal abuse can help prevent domestic violence and ensure that children in these environments will not become animal abusers later in life.

Part V, will discuss current Arizona law regarding available civil claims, and discuss the need for the reform of these claims. Only certain claims can be brought when harm is done to animals. This section will discuss some of these claims and detail improvements that should be made to make the civil system more effective and consequential, including a new approach for determining the true value of animals for purposes of damages.

II. BACKGROUND

Society's view on what constitutes property has changed dramatically throughout history.[3] At one point, society regarded women and children as property, and any harm done to them resulted in an award of damages to the father or husband.[4] Looking back, this approach to legal "personhood" seems antiquated and entirely unfair. Unfortunately, there is still a class of living things that is viewed in this same way under the law—animals.[5] This property-based legal status of animals significantly limits the types of civil claims that can be brought for any damage or harm done to them.[6] It also limits criminal repercussions for those who abuse or neglect animals.[7] Arizona is among the

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[3] Yvette Joy Liebesman, *No Guarantees: Lessons from the Property Rights Gained and Lost by Married Women in Two American Colonies*, 27 WOMEN'S RTS. L. REP. 181, 184 (2006).

[4] *Id.*

[5] *Kaufman*, 222 P.3d at 272 (citing Harabes v. Barkery, 348 N.J. Super. 366, 791 A.2d 1142, 1144 (N.J. Super. Ct. Law Div.)); Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy,* 82 NEB. L. REV. 783, 787–803 (2004); Robin C. Miller, *Damages for killing or injuring dog,* 61 A.L.R. 5th 635, § 3[a] (1998 & Supp. 2009).

[6] *Kaufman*, 222 P.3d at 275.

[7] William L. Barnes, Jr., *Revenge on Utilitarianism: Renouncing A Comprehensive Economic Theory of Crime and Punishment*, 74 IND. L.J. 627, 651 (1999) ("it is obvious that no amount of

majority of states that still recognize this legal status for animals.[8] Because of animals' proprietary legal status, the criminal and civil punishments that Arizona law sets forth will never truly accomplish one main goal of punishment: deterrence.[9]

One factor that should be considered in the allocation of rights is our definition of what we consider to be "human." From a philosophical standpoint, being human can mean many things: the ability to feel pain from both physical and mental sources; the capacity to feel affection, and the loss thereof; and many other less-definable characteristics.[10] In order to argue that animals should have an elevated legal status more like that of humans, it is important to analyze whether or not the definition of animals is similar to our definition of "humans." Multiple studies discussed in this paper help solidify the idea that animals are similar to our definition of "human" based on their mental capacity and cognitive abilities.

The theory of "legal personhood" helps harmonize the philosophical definition of humanity with the legal definition of humanity. One definition used for animal legal personhood is "the extent to which animals have characteristics that make them so similar to humans that the law should recognize them as beings with interests that should be legally protected even in cases where protection of those interests conflicts with humans' interests in using animals."[11] The second definition of legal personhood is "having standing as legally 'aggrieved persons' for purposes of bringing lawsuits to enforce laws enacted ostensibly to protect them."[12]

The first definition, contending that animals should be legally protected even when their interests conflict with human interests, may be impractical and difficult to apply because it brings forth a plethora of sub-issues. For example, it implicates questions about the required level of similarity to humans needed for animals to receive legal personhood, the types of feelings and cognitive abilities that must be present for animals to receive personhood, and the likeli-

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money will induce a voluntary exchange of money for life ex ante, while the same is not true for property.").

[8] *Kaufman,* 222 P.3d at 275.

[9] David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1626 (1992) ("One traditional response to this question is the deterrence theory: punishing criminals is morally permissible because it both deters the punished criminals from further offenses (special deterrence) and deters other people from committing crimes (general deterrence)").

[10] Bernard Williams, *The Idea of Equality*, *in* PHILOSOPHY, POLITICS, AND SOCIETY, 2d Ser. 112-117 (Peter Laslett ed., 1962).

[11] Taimie L. Bryant, *Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals As Property, and the Presumed Primacy of Humans,* 39 RUTGERS L.J. 247, 258 (2008).

[12] *Id.* at 259.

hood that certain animals will be used as a food source. This could mean that only certain species of animals would receive this heightened legal status because some animals may not react the same way as others during any given test. Finally, animals are used every day around the world for sustenance, labor, and other by-products. This definition may be workable in an ideal setting but, in the current legal and social environment, it is unlikely that animal rights would ever prevail if it came to a conflict with the "right" of humans to use animals in their day-to-day lives. If animals are still viewed as property, it is hard to conceptualize that their status would be elevated to the level of what is laid forth in definition one.

The second definition which speaks to giving animals legal standing is perhaps more workable based on current societal norms. This definition can be viewed as more of a standing issue: when an animal is injured, a human would be able to go to court and assert the claim on behalf of the animal.[13] This definition is more practicable because it can more easily be viewed as a way to ensure that animal rights are identified, recognized, and more highly protected by courts.[14] This view of legal personhood helps to circumvent the vicious cycle detailed above: if the property status of animals is changed to a status afforded more rights, the ramifications of violating those rights would be worse, and thus the offenders and the general population would be deterred from violating those rights in the future.[15]

III. Recent Findings Regarding Animal Cognition

Science is making leaps and bounds in the world of animal cognition. Not only have scientists determined that animals are capable of feeling emotion, they have also determined that animals are capable of learning and remembering.[16] These breakthroughs in the study of animal cognition support the enhancement of the legal status of animals because they help to establish that animals are capable of many of the same emotions as humans. This is critical in helping to improve animals' legal status. The more that studies substantiate that animals are cognitively more similar to humans than inanimate objects, the more likely it is that courts, and people everywhere, will start to see the logic that goes into better protecting animal rights through their improved legal status.

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[13] *Id. at 254.* This would give the animal standing to appear in front of the court. Currently, when humans sue for animal abuse or neglect, it is one human suing on behalf of his property, not on behalf of the animal and its rights.

[14] *Id*. at 259.

[15] Kent Greenawalt, *Punishment*, 3 Encyclopedia of Crime and Justice 1286-1287 (Joshua Dressler ed., 2002).

[16] John W. Piley, *Meet the Dog Who Knows 1,000 Words*, Time Magazine (Nov. 5, 2013).

Scientists look for key markers to help determine an animal's cognition.[17] These key skills include memory, imitation, creativity, understanding the motives of others, self-awareness, and an understanding of both grammar and symbols.[18] John Piley, a psychology professor at Wofford College, tested the cognitive abilities of his dog, a border collie, named Chaser.[19] At the young age of five months, Chaser was able to conceptualize the fact that different items could have different, unique names—a concept known as one-to-one mapping.[20] After grasping that concept, Chaser also began to understand many-to-one mapping—the idea that one item could have more than one name.[21] Though Chaser learned more slowly than a human child, she learned the unique names of more than 800 cloth animals, 100 different balls, twenty Frisbees, and a multitude of other random toys in a period of just three years.[22] Piley's experiments with Chaser also proved that she was capable of understanding the meaning of different verbs, that she could conceptualize exclusion, and that she could learn and remember information taught to her during training sessions.[23] Though Chaser is nowhere near the level of cognitive development of a nine-year old child, it is clear that the canine species has cognitive abilities greater than previously thought.[24] This demonstration of cognitive abilities supports the contention that animals are more similar to humans than they are to inanimate objects. If animals are similar to humans, it logically follows that they should be legally treated as being similar to humans, thus receiving greater protection both civilly and criminally.

Not only are animals capable of memory, learning, and certain levels of understanding, research confirms that, just like humans, animals are capable of feeling pain and fear.[25] Historically, scientists argued that brain size was pro-

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[17] Frances Gaertner, *New Research Sheds Light on Cognitive Abilities of Animals*, WORLD SOCIALIST WEB SITE, (June 10, 2011), available at http://www.wsws.org/en/articles/2011/06/anim-j10.html.

[18] *Id.*

[19] *See* Piley, *supra* note 16.

[20] *Id.*

[21] *Id.* (For example, a common name for a stuffed turtle could be "toy," while it could also have a proper name like "Thomas.").

[22] *Id.; See* Gaertner, *supra* note 17. Piley was able to show Chaser's ability to understand the different meaning of verbs by teaching her what each word meant, and reinforcing it through training. For example, Chaser learned the difference between the action of "fetching," "pawing," and "nosing" and was able to apply any of the three actions to any of her toys (fetch-Frisbee, fetch-ball, nose-toy, nose-ball, etc.). Her ability to do so showed that she was capable of individually understanding the meaning of each word in the command.

[23] *See* Piley, *supra* note 16.

[24] *Id.*

[25] Symposium, *Distress in Animals: Is it Fear, Pain, or Physical Stress?* AM. BD. OF VETERINARY PRACTITIONERS, (May 17, 2002), http://www.grandin.com/welfare/fear.pain.stress.html.

portional to the ability to feel pain, fear, and suffering.[26] Recent research contradicts this earlier line of thinking and gravitates toward a more structural point of view, finding that all mammals have brains that are structurally sufficient to suffer pain, regardless of the size of the animal or the brain.[27]

Research also comes to an additional conclusion. Studies have shown that animals, when subjected to stressful situations, react both psychologically and physically in a manner similar to humans.[28] Cortisol is a steroid hormone released by the adrenal gland in response to stress.[29] In one study, wild cattle were restrained for branding.[30] Once they the cattle were restrained, their cortisol levels elevated almost as highly as they did for the actual branding process.[31] This result showed that the wild cows were reacting to stress from fear, because they were not actually in pain when originally restrained.[32] This shows that these wild cows felt stress from both fear of branding and from the pain of the branding itself.[33]

Tame cows only had elevated cortisol levels during the actual branding period, but this was because they were accustomed to restraint and had learned not to fear it. These cows' cortisol levels were elevated solely because of the stress from the pain of branding, and not from fear.[34] These results further help to establish that animals are capable of feeling stress from both fear and pain, both separately and at the same time. This ability to feel fear from stress without actually feeling pain is engrained in human psychology, and now research shows that it also is engrained in animal psychology.[35] This provides one more similarity between animal cognition and human cognition.

Similarly, recent studies have shown that animals are capable of feeling empathy, another emotion commonly associated with humans.[36] One such study deals with the phenomenon of "contagious yawning," or yawning when

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[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Cortisol blood test*, MEDLINEPLUS MEDICAL ENCYCLOPEDIA, U.S. NATIONAL LIBRARY OF MEDICINE, NATIONAL INSTITUTE OF HEALTH, (Dec. 12, 2011), http://www.nlm.nih.gov/medlineplus/ency/article/003693.htm.

[30] DC Lay et al., *A Comparative Psychological and Behavioral Study of Freeze and Hot-Iron Branding Using Dairy Cows*, JOURNAL OF ANIMAL SCIENCE, 70, 1121-1125 (1992).

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] DC Lay, ET AL., *A Comparative Psychological and Behavioral Study of Freeze and Hot-Iron Branding Using Dairy Cows*, JOURNAL OF ANIMAL SCIENCE, 70, 1121-1125 (1992).

[36] Teresa Romero et al. ., *Familiarity Bias and Physiological Responses in Contagious Yawning by Dogs Support Link to Empathy*, 8 PLOS ONE 8 (2013), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3737103/pdf/pone.0071365.pdf.

one sees another individual yawn.[37] Recent psychological and neurobiological studies have shown that this phenomenon may have a role in empathy, social interaction, and communication.[38]

In one study, researchers found that dogs were susceptible to contagious yawning. Twenty-nine dogs were shown an experimenter's control face (not yawning or showing any signs of a yawn) and the experimenter's yawning face.[39] Twenty-one of the twenty-nine dogs yawned in response to the experimenter's yawning face, while none of the dogs yawned when shown the experimenter's control face.[40] These results strongly suggest that the dogs yawned in response to the human's actions. Researchers theorize that this yawn contagion relates to empathy because it requires animals to recognize similarities in their own face and implicates parts of the brain normally associated with social cognitive processes.[41] If these theories are found to be valid, they would confirm the fact that certain species of animals are capable of feeling empathy, a rather complex emotion previously thought to be unique to humans and, possibly, apes.[42] This finding further supports the contention that animals are emotionally and psychologically closer to humans than to inanimate objects, thus rendering their proprietary legal status inadequate and ill suited.

Perception is an important cognitive ability. Studies have shown that animals are capable of understanding things from a different perspective than was originally thought—a human's point of view.[43] Scientists put a group of dogs and their owners in a room, and then placed a bowl of treats in the center of the room where the dogs could see them. The dogs were made to understand that they could not touch or eat the treats. Researchers then turned off the lights in the room to see if the dogs would be able to tell that the human's perspective of the treats had changed, and whether the dogs would adapt to that change in

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[37] *Id.*

[38] SM Platek, *Yawn, Yawn, Yawn, Yawn; Yawn, Yawn, Yawn! The Social, Evolutionary and Neuroscientific Facets of Contagious Yawning*, 28 FRONT NEUROL NEUROSCIENCE, 107, 107-12 (2010) (stating that contagious yawning could be an evolutionarily old process that resulted in some species having a higher cognition level); s*ee also* Atsushi Senju, *Contagious Yawning: Developmental and Comparative Perspectives*, THE MYSTERY OF YAWNING IN PHYSIOLOGY AND DISEASE 113-19 (O. Walusinski ed., 2010) (stating that some researchers feel that yawning in non-humans is an index for the capacity to feel empathy).

[39] *See* Senju, *supra* note 38, at 115.

[40] *Id.* at 116.

[41] *See* Platek, *supra* note 38, at 1.

[42] *See* Romero, *supra* note 36, at 1.

[43] Melissa Locker, *Man's Best Friend: Dogs May Understand Human Perspective Better than Previously Thought*, TIME MAGAZINE (Feb. 8, 2013), http://newsfeed.time.com/2013/02/18/mans-best-friend-dogs-may-understand-human-perspective-better-than-previously-thought/.

perspective.[44] Once the lights were off and the humans could no longer see the dogs' behavior, the study found that the dogs were four times more likely to steal treats. This finding shows that the dogs were capable of understanding that when the lights were off, the humans would be unable to see the dogs' bad behavior, thus showing that the dogs were at least partially capable of understanding the human perspective.[45]

The impressive cognitive abilities of animals are not limited to dogs or other domestic animals. In a conservation center in Thailand, an accomplished musician and professor of neuroscience at Columbia University created and gave instruments to elephants to test whether they were capable of creating music.[46] To the disbelief of the professor, the elephants in the study were not just capable of merely playing the instruments; they were capable of avoiding dissonant notes, without receiving any reward or conditioning for doing so, and also capable of coining simple harmonies.[47] The study seems to indicate that in addition to having the ability to play music, elephants also enjoy doing so. This suggests that the ability to enjoy and appreciate the art of music goes beyond solely the human species.[48] The appreciation of art and music is not commonly thought to be a simple emotion. Rather, it is viewed as one indicating the existence of complex cognitive abilities and the ability to understand abstract concepts.[49] This study substantiates the claim that animals are capable of understanding complex topics previously thought to be enjoyed only by the human race. Further, it shows that animals are nothing like property—inanimate objects do not feel any emotion, enjoy art, or learn. It is illogical to put animals into the same legal category as property when these two are not alike in any way.

Many claims in the law are based on a human's ability to feel both fear and stress.[50] In contrast, crimes against property do not hurt any living thing or cause that property to feel any emotion. These crimes only deal with damaged property, trespassed property, and the loss of value of such property. It logically follows that if an animal can feel these raw emotions in the same or similar way that a human can, animals should receive an elevated legal status

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45 *Id.*

46 Richard Hooper, *Elephant Orchestra: Can Animals Make Real Music?* BBC NEWS MAGAZINE, (Nov. 12, 2013), http://www.bbc.com/news/magazine-24400364.

47 *Id.*

48 *Id.*

49 *Id.*

50 *See* Restatement (Second) of Torts §§ 21 (1965) (assault requires an imminent apprehension of fear); *see also* § 46 (intentional infliction of emotional distress requires victim to feel some kind of distress because of the defendant's "outrageous" conduct).

that matches a human's status, and not the status of a piece of land or a stolen vehicle.

IV. The Criminal Ramifications For Animal Abusers Are Not Strong Enough and Do Not Adequately Reflect Animal Cognitive Ability

A. Current Criminal Ramifications

In Arizona, many animals need better protection from the law. The Arizona Humane Society alone takes in about 44,000 animals per year, and it only has locations in Phoenix.[51] These are only two shelters out of the plethora of others in the Phoenix area, which also took in and cared for thousands of other animals.[52] The shelters have to work each day to care for and treat the animals that are admitted, and unfortunately have to euthanize some if they are in an untreatable condition or are a danger to people and other animals.[53] Sadly, not all animals get the chance to go to one of these shelters. When the housing market crashed, many Arizona homes were foreclosed. When this happened, some owners abandoned their pets by leaving them in the foreclosed homes after they moved.[54] This neglect frequently resulted in extremely unsanitary and unhealthy conditions for the animals resulting in the possible death of many animals.[55] This kind of behavior is disgusting and unacceptable. Though the housing market has stabilized in the past few years and the amount of foreclosed homes has lessened, Arizona laws still need to more harshly address situations like these to protect the animals that cannot protect themselves.[56]

In order to accomplish this, Arizona needs to reform its criminal punishments to make them more effective. There are two main theories of punishment: retributivism and utilitarianism.[57] The first, retributivism, is perhaps the more vindictive theory, commonly referred to as the "eye for an eye" approach

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[51] *FAQ*, Arizona Humane Society (Feb. 7, 2014), http://www.azhumane.org/arizona-humane-society-about-us/faqs/.

[52] *About HALO*, HALO Animal Rescue, (Feb. 7, 2014), http://www.halorescue.org/about-halo.aspx.

[53] *Id.*

[54] Catherine Reagor, *Organization Rescues Pets Left in Foreclosed Homes*, The Arizona Republic, Dec. 16, 2011, available at http://archive.azcentral.com/arizonarepublic/business/articles/2011/12/14/20111214organization-rescues-pets-reagor.html.

[55] *Id.*

[56] *Id.*

[57] Guyora Binder and Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 Rutgers L.J. 115, 117 (2000).

to punishment.[58] This theory supports the idea that punishment of an offender is justified because the offender deserves it.[59] Further, society is entitled to punish the offender because the harm that he or she has done results in a debt to society.[60]

On the other hand, utilitarianism is a method of punishment geared toward deterring future crimes.[61] This theory is utilized to help deter not only individual offenders, but also the public.[62] With general deterrence, punishment is meant to help deter the public from committing crimes.[63] If the public has knowledge that punishment will follow if a crime is committed, it ideally will help to deter them from committing that crime.[64] The public will be further deterred if they are aware that any benefit gained by the criminal activity is outweighed by the negative impacts of the punishment that follows it.[65] Individual deterrence functions similarly. With this theory, the actual imposition of punishment creates a fear in the specific offender that if she repeats the act, she will be punished again—and the punishment will be harsher the second time.[66] Further, utilitarianists believe that other forms of risk management, such as imprisonment, parole, or other prohibitions, help to physically prevent offenders from acting upon their dangerous tendencies.[67] Reform is also an important factor in the theory of utilitarian punishment; if the punishment is successful, the offender will be less likely to commit crimes and become more useful to society.[68]

Arizona should consider both of these theories in creating more effective animal cruelty and neglect laws and punishments. This is not to say that Arizona has failed to improve their animal cruelty laws over time. One example of improvement is in the realm of cock fighting. Fifty years ago, roosters and birds were not deemed to be an "animal" and thus not protected in the applicable animal cruelty statute.[69] Today, Arizona has some of the strongest anti-cockfighting legislation in the country.[70] This change in legislation came about

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[58] BLACK'S LAW DICTIONARY 1122 (9th ed. 2009).

[59] Michael S. Moore, *The Moral Worth of Retribution*, RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY (Ferdinand Schoeman ed., 1987) 179-182.

[60] *See* BLACK'S, *supra* note 59.

[61] *See* Binder, *supra* note 58, at 116.

[62] See Dolinko, *supra* note 9, at 1626.

[63] *See* Greenawalt, *supra* note 15, at 1287.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] State v. Stockton, 85 Ariz. 153, 333 P.2d 735 (Ariz. 1958).

[70] *State Rankings 2013*, HUMANE SOCIETY OF THE UNITED STATES, (Feb. 14, 2012), http://www.humanesociety.org/about/state/humane-state-ranking-2013.html?utm_source=tgpost011214

in response to the massive quantities of innocent roosters that were dying every day throughout the state.[71] Advocacy groups supported the change in legislation because they felt that cockfighting was incredibly inhumane, exposed children to unnecessary violence, and desensitized children to the evils of animal cruelty.[72] This argument is pertinent to all types of animal cruelty. If children are raised thinking that animal cruelty is normal and socially accepted, there is a good chance that they could become animal abusers when they grow up. In itself, this anti-cockfighting legislation shows that Arizona has taken progressive steps toward reducing animal neglect and abuse in the state. However, the state has not come far enough.

The primary animal cruelty statute in Arizona is A.R.S. § 13-2910, entitled "Cruelty to animals, interference with working or service animal; classification; definitions." This statute sets forth the criminal penalties for abusing an animal. For a first offender, the maximum penalty is a class six felony, which carries a presumed sentence of one year in prison.[73] This depends on the type of animal cruelty you commit.[74] Within this sentencing criteria, there are mitigating and aggravating circumstances that can respectively lessen or increase the sentence the offender receives.

Lesser types of animal cruelty result in a class one misdemeanor charge, which carries a maximum sentence of six months.[75] The idea of a lesser kind of animal cruelty is itself a paradox because these offenses still require intentional, knowing, or reckless infliction of abuse of animals.[76] Both "intentionally" and "knowingly" infer that the actor is aware of what is happening, and yet the punishment is still only a misdemeanor.

The charge of a misdemeanor for animal cruelty is inadequate. One of the misdemeanor offenses is "intentionally, knowingly or recklessly kill[ing] any animal under the custody or control of another person without either legal privilege or consent of the owner."[77] In comparison, theft of property valued at less than $1000 is also a class one misdemeanor offense. When compared side by side, the offenses of the crimes are not proportional: the animal cruelty misdemeanor results in the death of an innocent and defenseless animal, while the

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&utm_medium=facebook&utm_campaign=winter14&credit=fb_tgpost011314 (last visited February 14, 2012).

[71] Proposition 201: Proposing an Amendment to Title 13, Chapter 29 of the Arizona Revised Statutes Relating to Cockfighting (1998), https://www.azsos.gov/election/1998/info/pubpamphlet/Prop201.html.

[72] *Id.*

[73] ARIZ. REV. STAT. ANN. § 13-2910 (2012); ARIZ. REV. STAT. ANN. § 13-702 (2009).

[74] *See* § 13-2910.

[75] ARIZ. REV. STAT. ANN. § 13-707 (2009).

[76] *See* § 13-2910(A)(1-7, 12).

[77] *Id*. at A(5).

theft misdemeanor only results in someone being deprived of his or her property. Though losing property can be frustrating and emotional, it cannot possibly compare to taking the life of a helpless animal—and yet, Arizona still punishes them the same way. This comparison shows that Arizona law still equates an animal's life to an insignificant amount of property valued at less than $1000. Further, it is a testament to the inadequacy of both the punishment for the crime and the legal status of animals.

Even the punishment for the felony offenses is inadequate. One such offense is killing or harming a working or service animal.[78] For the purposes of the statute, a service animal is defined as "an animal that has completed a formal training program, that assists its owner in one or more daily living tasks that are associated with a productive lifestyle and that is trained to not pose a danger to the health and safety of the general public."[79] Examples of this include seeing-eye dogs that are specially trained to guide blind persons in their daily lives and "hearing animals" that help to signal the hearing impaired.[80] A working animal is defined as a "horse or dog that is used by a law enforcement agency, that is specially trained for law enforcement work and that is under the control of a handler."[81] This clearly pertains to the highly trained dogs that police officers use. Typically, a police dog costs around $8000 to purchase, and an additional $12,000 to $15,000 to train.[82]

Unfortunately, even though these dogs are expertly trained, extremely expensive, and loved by their handlers like a member of their family, Arizona courts still fail to give them the protection that they deserve. In one case, police deployed a police dog named Hunter to help track down and hold a criminal who had fled into a family's home and was firing at officers.[83] Upon Hunter's release, the defendant shot him five times, resulting in Hunter's eventual death. The dog did exactly what he was trained to do, was killed in the process, and still, the trial court only sentenced the defendant to a class one misdemeanor with a six-month sentence (among his other charges that were non-related to animal cruelty).[84] Though the statute does mandate that anyone charged with this offense is liable to the police department for the cost of replacing the animal, the non-economic punishment for the crime is not harsh

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[78] *Id.* at A(10).

[79] *Id.* at H(5).

[80] *Commonly Asked Questions about Service Animals in Places of Business*, U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, DISABILITY RIGHTS SECTION (July 1996), http://www.ada.gov/qasrvc.htm.

[81] *See* § 13-2910 at H(6).

[82] *Frequently Asked Questions*, NATIONAL POLICE DOG FOUNDATION (2012), http://www.nationalpolicedogfoundation.org/faq/faq.html.

[83] State v. Doss, 192 Ariz. 408, 410, 966 P.2d 1012, 1014 (Ariz. Ct. App. 1998).

[84] *Id.* at 410.

enough, especially when it is mitigated down to a class one misdemeanor as it was in this case.

Another instance showing the inadequacies of Arizona's animal cruelty jurisprudence occurred in 1996 (which, incidentally, is not very long ago). In *Campbell v. Superior Court*, the court of appeals determined that animal abuse does not constitute a crime of "moral turpitude."[85] In that case, the prosecution charged the defendant with animal abuse for putting poisoned hot dogs on his lawn to stop dogs from defecating on it and "killing his grass."[86] The defendant's neighbor's cat ingested one of the poisoned hot dogs.[87] The trial court denied the defendant's request for a jury, found the defendant guilty, and sentenced him to one year of probation.[88] On appeal, the defendant argued that animal cruelty offenses are not eligible for a jury trial because they are not crimes involving moral turpitude.[89] The court of appeals defined moral turpitude as "the conduct of a 'depraved and inherently base person,' [and] actions which adversely reflect on the 'honesty, integrity or personal values' of the actor."[90] Apparently, animal cruelty did not fall into the court's definition of immoral. Instead, the court reasoned, some animal cruelty acts are just "simple thoughtless expediency," and therefore, the defendant's actions did not reflect on his honesty, integrity, or personal values.[91] For this reason, the court concluded that an animal cruelty offense did not entitle the defendant to a jury trial.[92]

The holding in *Campbell* perpetuates every incorrect and unacceptable way to think about the crime of animal cruelty. The defendant in that case willingly and intentionally hurt dogs just to keep them from defecating on his lawn. The dissent strongly disagreed with the majority's interpretation of "moral turpitude" stating, "[m]ore to the point, since animals are virtually helpless against humans, the more serious forms of cruelty to animals are depraved or inherently base. Less shocking forms of conduct which constitute such cruelty certainly reflect on a person's personal values."[93] The dissent identified the fact that anyone who voluntarily and intentionally preys on helpless animals clearly

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[85] Campbell v. Super Ct of Maricopa, 186 Ariz. 526, 529, 924 P.2d 1045, 1048 (Ariz. Ct. App. 1996).

[86] *Id.* at 1046.

[87] *Id*. at 1046.

[88] *Id*.

[89] *Id.* at 1048.

[90] *Id.* at 1047 (citing O'Neill v. Mangum, 103 Ariz. 484, 485, 445 P.2d 843, 844 (Ariz. 1968)); State ex rel. Dean v. Dolny, 161 Ariz. 297, 300 n. 3, 778 P.2d 1193, 1196 n. 3 (1989).

[91] Campbell, 924 P.2d at 1048.

[92] *Id.* at 1048.

[93] *Id*. at 1048.

has moral issues, and that Arizona's laws should reflect this point.[94] Ultimately, the laws surrounding this important issue are not adequate and need to be augmented and reformed.

B. Solutions to Arizona's Problem

1. Animal Abuse Registry

These examples show that although Arizona has taken steps in the right direction, there are more steps it can take to help better protect animals. Arizona bases its punishment structure on punishing the guilty, forcing them to serve their sentence, and releasing them. However, as noted above, a court does not always sentence the offender as harshly as he or she should be sentenced, which takes away from the deterrence aspect of punishment. If the punishment does not deter offenders who commit a crime, what is to keep them from committing the same or a similar offense again? One solution to this problem is creating a registry that animal abuse offenders must sign up for, similar to a sex offender registry.

The sex offender registry is a controversial solution to a social problem, but it is effective in one aspect: deterrence.[95] Studies show that sex offender registries reduce the overall frequency of reported sex offenses in the areas where they are employed, and serve to deter those individuals who would potentially commit a sex offense.[96] The social stigma attached to sex offender registries is very high. Because of this high level of stigma, many people question whether the registry results in "shaming" and whether it is constitutional.[97] However, the Supreme Court held that there is no constitutionally protected right in reputation alone; furthermore, committing a sex offense crime results in social stigma on its own, even without the requirement of registering publicly.[98]

A registry for animal abusers could be an effective tool to help deter offenders and advance the legal status of animals. Animals—much like children—are innocent and largely unable to protect themselves. Further, much of society looks at their pet as a member of the family, instead of as a piece of property or a tool to help get work done. Because of these basic similarities between children and animals, it is fair to hypothesize that a registry for animal

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[94] *Id.* at 1048.

[95] J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161, 192 (2011).

[96] *Id.* at 192.

[97] Stephen R. McAllister, *"Neighbors Beware": The Constitutionality of State Sex Offender Registration and Community Notification Laws*, 29 TEX. TECH L. REV. 97, 133 (1998).

[98] *Id.* at 133.

abusers would create the same type of social stigma and serve to deter potential offenders.[99]

Arizona could model an animal abuse registry after its sex offender registry. In Arizona, there are multiple offenses that require someone to register as a sex offender—twenty-one to be precise.[100] If offenders meet the criteria set forth in the statute, within ten days of the conviction, they must register with the sheriff of the county that they intend to live in.[101] If they intend to relocate, they must notify the state within seventy-two hours of their plans and reregister their new address.[102] This process keeps the public informed and elevates awareness of sexual offenses.

Other states are working towards creating a registry for animal abusers. New York contains some of the first jurisdictions to pass this sort of legislation, and many other states are attempting to pass something similar, including Arizona.[103] The bill, in various forms, has been introduced in multiple sessions of the Arizona Legislature in years past, but unfortunately has never been passed, nor even come close to being voted on.[104] This shows that Arizona is not yet ready to accept the fact that animals should be better protected and treated differently from property.

Arizona maintains a sex offender registry. Ideally, Arizona would maintain the animal abuse registry in the same way. The registry could be available to the public so that anyone who is looking to give away, sell, or re-home an animal could check it prior to allowing someone to take the animal. It could even require adoption agencies, like the Arizona Humane Society, or animal breeders, to check the registry before approving someone for an animal adoption. One group that the publicly-accessible registry could target is dog-fighters who systematically troll adoption centers looking for cheap animals to "adopt" while realistically looking for dogs to fight.[105] Another target group is animal hoarders—people who habitually adopt and attempt to care for multiple animals.[106] Though these people may mean well, rescuers usually find the ani-

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[99] Again, the author is not insinuating that animals and children are the same, but is merely pointing out that the base similarity between the two would likely result in a similar social response to a registry.

[100] ARIZ. REV. STAT. ANN. § 13-3821(A)(1-21)(2012).

[101] *Id.* at (A).

[102] ARIZ. REV. STAT. ANN. § 13-3822 (2012).

[103] *Legislative Updates and Background.* ANIMAL LEGAL DEFENSE FUND (Feb. 12, 2010), http://aldf.org/press-room/legislative-updates-background/.

[104] In 2014, the registry is proposed in HB2217; last session it was proposed by SB1161. SB1161 was held in committee.

[105] Chris Green, *NYC Creates City-Wide Animal Abuser Registry*, ANIMAL LEGAL DEFENSE FUND (Feb.5, 2014), http://aldf.org/blog/nyc-creates-city-wide-animal-abuser-registry/.

[106] *Id.*

mals living in deplorable conditions because the owner cannot deal with the mass quantity of animals in the home. As a result, the animals suffer from starvation and neglect.[107] A registry would provide these entities with the information necessary to stop offenders from owning another animal and could save countless animal lives.

In order for the registry to have the intended effect of stigma and deterrence, the state and other agencies would need to find a way to mass market and make it common knowledge. However, if the Arizona legislature acts in the near future and institutes a registry, Arizona would be the first state as a whole to maintain a registry. This would likely result in Arizona making national news, helping to spread the word about the registry and the public's ability to access it. If the state adopted a registry, it would help to show that Arizona is willing to give animals the legal protection that they deserve based on their cognitive abilities and capability to feel emotion. Arizona could be a strong national leader in the movement to protect animals if only it were willing to take a few small steps.

2. Rehabilitation and Counseling as a Solution

In Arizona, after the state releases the animal abuser—assuming he or she even served a jail sentence—there are no rehabilitation or counseling requirements set forth in the law that would apply to the offender.[108] Addressing the underlying issues causing the animal abuse is important because animal abuse and domestic violence usually go hand in hand; where you find an abused woman you will commonly find her abused pet.[109] Further, children who witness this abuse are more likely to become animal abusers themselves, creating a violent cycle of pain and suffering.[110] Thus, strengthening animal abuse laws and creating effective means of rehabilitating offenders can prevent future violence against both animals and humans.[111] Rehabilitation and counseling are effective methods to address the underlying issues causing abuse: if Arizona does not address these issues, no amount of criminal or civil punishment will guarantee that the offender will not abuse animals again.[112]

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[107] *Id.*

[108] ARIZ. REV. STAT. ANN. § 13-2910 (2012).

[109] Joseph G. Sauder, *Enacting and Enforcing Felony Animal Cruelty Laws to Prevent Violence Against Humans*, 6 ANIMAL L. 1, 21 (2000) (citing Frank R. Ascione, *Battered Women's Reports of Their Partners' and Their Children's Cruelty to Animals*, in CRUELTY TO ANIMALS AND INTERPERSONAL VIOLENCE 290, 290-91 (Randall Lockwood & Frank R. Ascione eds., 1998)).

[110] *See* Sauder, *supra* note 105, at 13.

[111] *Id.*

[112] Kimberly L. Patch, *The Sentencing Reform Act: Reconsidering Rehabilitation As A Critical Consideration in Sentencing*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 165, 172 (2013).

The state is capable of imposing rehabilitation and counseling as part of a sentence, and it frequently does so with abusive parents.[113] Based on the connections between children and animals, and animal abuse and domestic violence, it seems that the state would be well within its bounds to require rehabilitation and counseling for animal abusers. Rehabilitation focuses on reducing recidivism and improving offenders by providing them with information and treatment necessary to address the underlying issues that drive their need to commit crimes.[114] Though critics frequently question the effectiveness of rehabilitation as too lenient, recent social science studies indicate that prison-based rehabilitation programs have a significant impact on recidivism when properly tailored to the individual offender's needs.[115] If rehabilitation has a positive impact on the amount of repeat animal abuse offenders, it would make sense to add it to Arizona's criminal animal cruelty procedures, resulting in more protection for animals, as well as humans.

Ultimately, the criminal penalties imposed under Arizona's laws are not harsh enough to fully deter animal abuse. Strengthening these laws and the available criminal punishments would minimize the amount of animal abuse that occurs. Forced enrollment in an animal abuse registry could deter repeat and potential abusers based on the possible social stigma it would carry while also providing notice of their criminal status to the public. Finally, rehabilitation and counseling for these offenders would decrease recidivism and address the underlying problems that result in animal abuse. These solutions would strengthen the laws and help Arizona become a national leader in the fight against animal abuse.

V. The Current Civil Remedies: Why They are not Effective and How They Can be Remedied

A. Arizona's Current Civil Approach to Animal Abuse

The civil remedies available to the owners and families of injured or killed animals are limited, mainly because of animals' legal classification as prop-

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113 Minh T. v. Arizona Dep't of Econ. Sec., 202 Ariz. 76, 79, 41 P.3d 614, 617 (Ariz. Ct. App. 2001).

114 *See* Patch, *supra* note 108.

115 *Id.* (citing Andy Malinowski, 'What Works' With Substance Users in Prison?, 8 J. Substance Use 223, 226 (2003)); *see also* Rhena L. Izzo & Robert R. Ross, Meta-Analysis of *Rehabilitation* Programmes for Juvenile Delinquents, 17 Crim. Just. & Behav. 134 (1990); Mark W. Lipsey, Juvenile Delinquency Treatment: A Meta-Analytic Inquiry into the Variability of Effects, in Meta-Analysis for Explanation: A casebook (Thomas D. Cook, Harris Cooper, David S. Corday, Heidi Hartman, Larry V. Hedges, Richard J. Light, Thomas A. Louis & Frederick Mosteller eds., 1994).

erty.[116] Because of this status, Arizona courts have held that any harm done to an animal cannot be the subject of a personal injury tort, such as negligence or intentional infliction of emotional distress, but instead must be adjudicated as damage done to personal property.[117] Further, in the civil realm, when an animal is killed, the court will only award the fair market value of the animal.[118] For many owners, this award does not even come close to adequately compensating them for their loss. Hypothetically, an owner may go to the local pound or humane society and pay one hundred dollars for a mixed-breed dog. Ideally, that owner will love, nurture, and care for the dog for its entire life, treating him or her as a member of the family. If, however, some other party hurts or kills the animal, the owner will still only be able to recover the fair market value—in this case the hundred dollars. This award will not take into account the animal's true value to the owner—the companionship, love, and comfort that the animal provided as a member of the family.[119] The current civil remedies are insufficient and demonstrate how the legal status of animals is inappropriate, and why the legislature should change it to provide animals with stronger protection.

1. Negligent Infliction of Emotional Distress

Currently, an owner cannot sue for negligent infliction of emotional distress when a party negligently injures or kills his pet.[120] Negligent infliction of emotional distress requires a plaintiff to "witness an injury to a closely related person, suffer mental anguish manifested as physical injury, and be within the zone of danger."[121] The court of appeals' holding in *Roman v. Carroll* evidences the barring of this claim in these situations. In that case, the plaintiff sued the defendant for negligent infliction of emotional distress because she witnessed the defendant's St. Bernard dismember her poodle while she walked it near her home.[122] Though this action caused a significant amount of trauma in the plaintiff's life, the court stated, "[d]amages are not recoverable for negligent infliction of emotional distress from witnessing injury to property."[123]

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[116] *See* ARIZ. REV. STAT. ANN. § 1-215(29) (2013) (defining animals as "personal property").

[117] *See* Roman v. Carroll, 127 Ariz. 398, 399, 621 P.2d 307, 308 (Ariz. Ct. App.1980) ("A dog, however, is personal property.").

[118] *See* Kaufman *supra* note 2 (stating that Arizona law assesses the value of an animal based on its fair market value).

[119] *Id.*

[120] *Id.*

[121] Pierce v. Casas Adobes Baptist Church, 162 Ariz. 269, 272, 782 P.2d 1162, 1165 (Ariz. 1989); State Farm Mut. Auto. Ins. v. Connolly, 212 Ariz. 417, 423, ¶ 23, 132 P.3d 1197, 1203 (Ariz. Ct. App.2006).

[122] Roman, 127 Ariz. at 399.

[123] Id.

The court in *Kaufman v. Langhofer* affirmed *Carroll*, finding that animals are merely property.[124] In *Kaufman*, the plaintiff sued the defendant veterinarian for the death of his pet parrot, Salty.[125] Though the court noted that it previously allowed a claim for a negligent infliction of emotional distress claim to be brought for damage to property, this case was different because in those past cases, "the tortious act directly harmed the plaintiff and affected or burdened a personal, as opposed to an economic or other interest belonging to the plaintiff."[126] The veterinarian's negligence "did not affect or burden a personal right or interest belonging to [Kaufman]," the court said.[127] As such, the court barred Kaufman from bringing his NIED claim for the harm he suffered because of Salty's death. Though both of these holdings seem callous considering the harm that the plaintiffs suffered and the trauma that it brought into their lives, the unfortunate truth is that Arizona law treats animals in this manner.

2. Intentional Infliction of Emotional Distress

Although Arizona courts do not allow for negligent infliction of emotional distress, they seem to be open to the idea of allowing owners to bring a claim of intentional infliction of emotional distress when someone "willfully, maliciously, or recklessly" kills or causes harm to an animal.[128] Though the *Kaufman* court barred the claim of negligent infliction of emotional distress, it did note that its holding was narrow:

> [W]e deal only with the measure of damages for loss of a pet negligently injured or killed. Several states allow damages for the intentional infliction of emotional distress when a pet is injured or killed through intentional, willful, malicious, or reckless conduct. Whether emotional distress damages are available when a pet is injured or killed as a consequence of such conduct is not an issue we decide today.[129]

This holding indicates that the court of appeals would be willing to follow those states that allow for claims of intentional infliction of emotional distress if the issue were ever presented and adequately argued.

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124 *Supra,* note 2. 222 P.3d at 279

125 *Id.*

126 *Id.* at 253.

127 *Id*. at nn. 8-9 (The court did, however, acknowledge that some states would allow an NIED claim to be brought in circumstances such as this, but noted that Arizona was within the majority of states that would not allow it.).

128 Harvey v. Navajo Cnty., 3:10-CV-08025 JWS, 2012 WL 1605854 (D. Ariz. May 8, 2012).

129 *Supra*, note 2 at n.13.

In a recent unreported decision, *Harvey v. Navajo County*, the District Court for the State of Arizona again noted that the question of whether an owner can bring a claim of intentional infliction of emotional distress and recover damages for harm done to a pet is still an open question in Arizona.[130] In *Harvey*, the defendant's officers arrested the plaintiff and had him sign a form giving them permission to allegedly go onto his property to feed and water his dogs while he was incarcerated.[131] Instead of taking care of the animals, the officers went onto the plaintiff's property and heinously shot and killed the dogs, leaving them to rot.[132] The officers then taunted the plaintiff, telling him not to worry about his animals anymore because they were all dead.[133] During an evidentiary hearing, the court stated, "[t]his court is of the opinion that Arizona law would track that of other jurisdictions in situations where the killing is intentional."[134] This supports the reasoning of the Court of Appeals in *Kaufman* about the possibility of bringing a claim of intentional infliction of emotional distress for the death of a pet in a willful or malicious manner.[135]

3. Loss of Consortium or Companionship Damages

Loss of consortium is defined as "loss of capacity to exchange love, affection, society, companionship, comfort, care and moral support."[136] Arizona courts do not allow recovery of loss of consortium for the death of a pet.[137] Again, when considering animals' proprietary legal status, this is not surprising. Only spouses, parents, or children of a decedent can file a claim for loss of consortium.[138] Because an animal is viewed as property, this claim is inapplicable to animal deaths; courts view it with as much disdain as they would if someone tried to bring a loss of companionship claim from the wrongful destruction of a beloved couch or coffee table. Again, this is an entirely inappropriate and antiquated view of animals. The bonds that people form with animals are much deeper than any "bond" they may form with their favorite

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130 Harvey, 2012 WL 1605854, at *1.

131 Complaint at ¶ 21, Harvey v. Navajo Cnty., 2010 WL 8757675 (D.Ariz.).

132 *Id.* at ¶ 20.

133 *Id.* at ¶ 22.

134 Harvey, 2012 WL 1605854 at *1.

135 *Id.*

136 Miller v. Westcor Ltd. P'ship, 171 Ariz. 387, 831 P.2d 386 (Ariz. Ct. App. 1991).

137 *Supra,* note 2.

138 Barnes v. Outlaw, 192 Ariz. 283, 286, 964 P.2d 484, 487 (1998) (spouses); Villareal v. State Dep't of Transp., 160 Ariz. 474, 477, 774 P.2d 213, 216 (1989) (parents); Frank v. Super. Ct., 150 Ariz. 228, 234, 722 P.2d 955, 961 (1986) (children).

piece of furniture, and yet the courts will not recognize a claim of loss of consortium or companionship when a beloved pet dies.[139]

4. Wrongful Death Damages

When a human dies because of a negligent act of a third party, Arizona law allows certain parties to bring a claim for wrongful death damages.[140] Again, only certain parties are entitled to claim these damages—spouses, parents or guardians, children, or the decedent's estate.[141] The analysis for this claim is the same as it is for loss of consortium; until animals are legally recognized as something other than just property, an owner will never be able to recover the damages that adequately compensate them for the loss they suffer.

B. Solutions to the Problem of Insufficient Civil Protections

1. Change the Legal Status of Animals to Allow These Claims

The analysis above strongly suggests that the first step to remedy the inadequacy of the civil protections for animals is improving their legal status. Many of the civil claims that should apply to the wrongful death of a pet are legally disallowed because the court still views pets as property, and as such, they do not die, they are only damaged or destroyed.[142] The legislature could change the classification of animals as personal property set forth in A.R.S. § 1-215. This would allow the claims set forth above (IIED, NIED, loss of consortium, and wrongful death) to be brought when an animal is wrongfully killed. This does not necessarily mean that the legislature must define "animals" and "persons" in an equal manner for every possible claim; it just requires that they acknowledge that a proprietary status for animals is not appropriate.

The court in *Kaufman* expressed concerns that allowing animal-related NIED, or other, claims to be brought would be unreasonable because "such damages cannot be recovered for the injury to or loss of close human friends,

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[139] Morgan v. Kroupa, 167 Vt. 99, 103, 702 A.2d 630, 633 (1997) (The court considered the difficulty in assessing value and the importance of considering the special place that domestic animals have in society, noting that pets "do not fit neatly within traditional property law principles" and "a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property" (quoting Corso v. Crawford Dog & Cat Hosp., Inc., 415 N.Y.S.2d 182, 183 (N.Y. Civ. 1979)). The court noted, "Instead, courts must fashion and apply rules that recognize their unique status, and protect the interests of both owner and finder, as well as the public.").

[140] *See* City of Tucson v. Wondergem, 105 Ariz. 429, 433, 466 P.2d 383, 387 (1970) (allowing for damages for the "anguish, sorrow, stress, mental suffering, pain, and shock resulting from the decedent's death").

[141] ARIZ. REV. STAT. ANN. § 12-612 (1974).

[142] Roman v. Carroll, 127 Ariz. 398, 399, 621 P.2d 307, 308 (App. 1980).

siblings, and nonnuclear family members such as grandparents, grandchildren, nieces, nephews, aunts, and uncles."[143] This analysis is flawed because it shows that the court is still not looking at animals as members of the family. The legislature could easily tailor legislation allowing these claims by strictly defining who may bring such claims in the same manner as wrongful death, loss of consortium, and other similar claims.[144] The legislature could simply limit the claim by only permitting the legal owner of the animal to recover, and bar any claims brought on behalf of an animal never legally registered. It could also limit the type of act that must be witnessed in order to result in a valid negligent or intentional infliction of emotional distress claim.

The court's fears of a "slippery slope" or "Pandora's Box" situation can put to rest by a strict application of the claims above. Further, there is no guarantee that these fears would materialize if Arizona decided to allow these sorts of civil claims. For example, Hawaii is one state that allows owners to bring a negligent infliction of emotional distress claim for owners of animals wrongfully killed.[145] The court specifically addressed the "flood of litigation" concern and noted that since it decided to allow plaintiffs to bring these claims, "there has been no 'plethora of similar cases'; the fears of unlimited liability have not proved true. Rather, other states have begun to allow damages for mental distress suffered under similar circumstances."[146] This shows that, with sufficient limitations, a flood of litigation or "slippery slope" leading to unlimited liability is not a valid concern.

The court in *Kaufman* also expressed concerns that these types of damages would be too hard to quantify and regulate. This argument is weak because the judicial system finds a way to assign a value to other seemingly unquantifiable areas, like the amount of damages that can be awarded in a lawsuit dealing with the wrongful death of a child.[147] If courts can assign a value to the life of a child, it seems logical that they should be able to do the same thing with the life of animal. Further, judges are able to exhibit control over the jury awards in wrongful death cases to help keep them consistent and reasonable in light of the events that lead to the damages, frequently remitting the value appeal to avoid windfalls or unreasonable awards.[148] This further shows that judicial control and discretion could help lay forth the precedent for dealing with these sorts of

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[143] *Supra,* note 2.

[144] *See* Ariz. Rev. Stat. Ann. § 12-612 (1974); *see supra,* note 134, for cases defining who can recover with a loss of consortium claim.

[145] Campbell v. Animal Quarantine Station, 632 P.2d 1066, 1071 (Haw. 1981).

[146] *Id.*; *see also* Logan Martin, *Dog Damages: The Case for Expanding the Available Remedies for the Owners of Wrongfully Killed Pets in Colorado*, 82 U. COLO. L. REV. 921 (2011).

[147] *See* § 12-612 (wrongful death damages statute).

[148] ARIZ. R. CIV. P. 58(b).

claims in the future, helping to both quantify and regulate any damages awarded.

Elevating the legal status of animals would allow owners to bring these claims when the animal is wrongfully injured or killed because animals would no longer be considered as mere "personal property." The ability to bring these claims would better help to return an owner to the place they were prior to the death of the animal. Though it is true that the ability to sue will never bring the beloved pet back, having some civil recourse will serve as a monetary deterrent for abusers.

2. Changing the Legal Status Improves the Amount of Punitive Damage Awards

Punitive damages are "those damages awarded in excess of full compensation to the victim in order to punish the wrongdoer and to deter others from emulating his conduct."[149] Arizona has a high standard for imposing punitive damages, requiring clear and convincing evidence that the offender acted with an "evil mind" and in an aggravated and outrageous manner.[150] The true purpose of punitive damages is for the jury to punish the offender for actions that it views as morally reprehensible.[151] In order to recover punitive damages, a plaintiff must first be awarded compensatory damages—those damages used to compensate for an injury or loss.[152]

Though nothing bars an award of punitive damages for any damage done to property, there are certain limitations to the amount that can be constitutionally awarded.[153] Typically, courts will look at how the punitive damage award compares to the compensatory damage award to determine if an award is excessive.[154] Though there is no exact ratio to be followed in every case, Arizona courts have significantly limited the amount of punitive damages, even going so far as to hold that a one-to-one ratio between compensatory and punitive damages was proper.[155]

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[149] Linthicum v. Nationwide Life Ins. Co., 150 Ariz. 326, 330, 723 P.2d 675, 679 (1986).

[150] *Id.*

[151] Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 446, 121 S. Ct. 1678, 1691, 149 L. Ed. 2d 674 (2001).

[152] Hyatt Regency Phx. Hotel Co. v. Winston & Strawn, 184 Ariz. 120, 131, 907 P.2d 506, 517 (Ariz. Ct. App. 1995); BLACK'S LAW DICTIONARY 355 (9th ed. 2009).

[153] Hudgins v. Sw. Airlines, Co., 221 Ariz. 472, 492, 212 P.3d 810, 830 (Ariz. Ct. App. 2009) (discussing amount of damages that is appropriate); *see also* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 413, 123 S. Ct. 1513, 1518, 155 L. Ed. 2d 585 (2003).

[154] *Id.*

[155] *Id.* (Court invalidated an eight-to-one ratio as being excessive and imposed a one-to-one ratio between compensatory and punitive damages in its place).

This poses a significant problem for cases in which an animal is injured or wrongfully killed. Because of an animal's proprietary status, the only amount that a pet owner could likely claim in compensatory damages upon the pet's death is the fair market value of the animal.[156] As such, punitive damages will be limited because they will have to be proportional to the low compensatory damage amount.[157] Though the court may allow for a higher ratio when dealing with particularly egregious acts against an animal, the low amount awarded for compensatory damages will still limit the amount of monetary punishment a jury can impose.[158] Thus, even if someone commits a particularly heinous act against an animal that causes a jury to want to punish the offender with a high punitive damage award, the proprietary status of animals will hinder the jury's ability to do so because, according to courts, animals are not worth more than their fair market value.

Suppose an animal is valued at one hundred dollars—the amount the owner paid for an adoption fee at the local pound. If that animal were killed, the amount the owner would likely be awarded in compensatory damages would be the original hundred-dollar adoption fee. If the dog was killed in a particularly heinous way, by an offender with an "evil mind," the jury could impose punitive damages. However, these damages would be limited, and based on the one-to-one ratio set forth in *Hudgins*, the owner would receive one hundred dollars in punitive damages, two hundred dollars in total damages. Thus, even if the animal was mutilated and tortured, the worst fine the jury could impose would be some limited ratio, based on the original hundred-dollar fair market value of the dog. Until the legal status of animals is changed and they are no longer considered property, punitive damage awards in this arena will be insufficient and ineffective against offenders.

3. Promoting the Value to Owner Theory over the Market Value Theory

Ideally, the legal status of animals would be heightened to strengthen their legal protection. However, it is clear that this change will not be made overnight; in the interim, Arizona courts should change the way they assign value to animals. One way to allow courts to do this, prior to a legal status change, is by implementing the value to owner theory in place of the market value theory. The value to owner theory still treats animals as property, but allows other

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156 An owner could also try to claim the value of any special training that the animal went through, but this theory will be discussed in more detail in the next section.

157 Hudgins, 221 Ariz. at 492 (discussing amount of damages that is appropriate); *See also* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. at 413.

158 *Id.* at 491.

factors to be considered when assigning a value to them.[159] Under this theory, if "goods have no market value, their actual worth to the owner is the test, and when they have but little or no market value, and are of special value to the owner, he may recover that."[160]

The value to owner theory would address the problem of assigning a value to a pet. The fair market value is the "price a desirous but unobligated purchaser would pay a desirous but unobligated seller after consideration of all uses to which the property is adapted and for which it is capable of being used."[161] As previously stated, the fair market value of a pet does not reflect an owner's emotional or sentimental attachment to the animal.[162] Through the value to owner theory, courts could take into account this emotional value when assigning damage amounts.

The court in *Kaufman* briefly discussed the value to owner theory, but did not apply it because the plaintiff failed to raise it as an alternative method of computing damages. The court acknowledged that several jurisdictions rely on the value to owner theory in assessing the appropriate amount of damages.[163] In those jurisdictions, courts consider training expenses, replacement costs, value to the owner with respect to protection, and stud services.[164] However, the court went on to note that most of those jurisdictions still refuse to look at the emotional or sentimental value of a pet.[165] This is illogical; people own pets for a variety of reasons, and a vast majority of them deal with some sort of emotional or sentimental attachment. The purpose of awarding damages in a case is to try to put the aggrieved party back to where they were before they were disadvantaged by the offender's actions. Disregarding the primary value that an animal brings to an owner's life solely because of the difficulties in attempting to quantify the value is unacceptable and inaccurate. Arizona should be a frontrunner in implementing the value to owner theory and allowing for the sentimental value of a pet to be included in an award for damages. Doing so would compensate owners properly—not for the loss of property as the court thinks, but instead for what it truly is—the loss of a family member.

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159 Jones v. Stanley, 27 Ariz. 381, 385, 233 P. 598, 599 (1925); see also Devine v. Buckler, 124 Ariz. 286, 287, 603 P.2d 557, 558 (Ariz. Ct. App.1979).

160 *Jones*, 27 Ariz. at 385.

161 TCC Enters. v. Estate of Erny, 149 Ariz. 257, 258, 717 P.2d 936, 937 (Ariz. Ct. App. 1986).

162 Kaufman v. Langhofer, 222 P.3d 272 (Ariz. Ct. App. 2009).

163 *Id.* at n.8.

164 *Id.*

165 *Id.* at n.9.

VI. Conclusion

Ultimately, the legal status of animals must be changed. The proprietary status that they currently have is inadequate and antiquated. This fact is supported by numerous scientific studies that show the amazing cognitive abilities that animals possess. Further, these studies evidence the intellectual and emotional similarities between animals and humans and, yet, we still treat them legally as if they were a couch or lamp.

This proprietary legal status directly ties to Arizona's inadequate criminal ramifications associated with the crime of animal abuse and neglect. If the status were elevated to something more fitting, the animal cruelty laws in Arizona could better protect animals by imposing harsher penalties and enacting an animal abuse registry to deter offenders more adequately. Arizona also needs to consider imposing more rehabilitation and counseling as part of animal abusers' sentences to help address the root issues that cause them to harm animals. Addressing these underlying issues would help protect animals and serve to address the vicious cycle of animal cruelty and domestic violence in their homes.

Finally, the civil claims that an owner can make if their pet is wrongfully injured or killed are too limited. Elevating the legal status of animals would give owners more recourse in the civil realm because they would have the ability to bring claims such as intentional infliction of emotional distress and negligent infliction of emotional distress. The solutions to these problems are simple: change the legal status and properly assign value to an animal's life. Doing so would fully embrace the value that animals bring to everyday life and would ensure that the state of Arizona is doing everything in its power to protect those who cannot protect themselves—the animals.

Spousal Support: Domestic Violence Should Not Be Considered

Melissa Benson*

I. Introduction

Arizona Senate Bill 1009 proposes that domestic violence committed during the marriage should be a factor judges must consider when awarding spousal maintenance.[1] This bill proposes to add a provision to the current spousal maintenance statute that will allow courts to consider incidents of domestic violence when awarding spousal maintenance.[2] The courts can currently consider the following factors when awarding spousal maintenance:

> [T]he standard of living established during the marriage; the duration of the marriage; the age, employment history, earning ability and physical and emotional condition of the spouse seeking maintenance; the ability of the spouse from whom maintenance is sought to meet that spouse's needs while meeting those of the spouse seeking maintenance; the comparative financial resources of the spouses, including their comparative earning abilities in the labor market; the contribution of the spouse seeking maintenance to the earning ability of the other spouse; the extent to which the spouse seeking maintenance has reduced that spouse's income or career opportunities for the benefit of the other spouse; the ability of both parties after the dissolution to contribute to the future educational costs of their mutual children; the financial resources of the party seeking maintenance, including marital property apportioned to that spouse, and that spouse's ability to meet that spouse's own needs independently; the time necessary to acquire suffi-

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* Melissa Benson is a 2015 Juris Doctorate candidate at Arizona Summit Law School and Executive Student Scholarship Editor of *Arizona Summit Law Review, Volume VIII*. Melissa worked as a Domestic Violence Advocate for four years prior to attending law school. The author would like to dedicate this article to her parents, Terry and Donna Smith, who always encouraged her to follow her dreams and passion for the law, as well as her husband, Jeffrey Benson, who always provided support and a sounding board when needed.

[1] S.B. 1009, 51st Leg., 2nd Reg. Sess. (Ariz. 2014).

[2] *Id.*

> cient education or training to enable the party seeking maintenance to find appropriate employment and whether such education or training is readily available; excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common; the cost for the spouse who is seeking maintenance to obtain health insurance and the reduction in the cost of health insurance for the spouse from whom maintenance is sought if the spouse from whom maintenance is sought is able to convert family health insurance to employee health insurance after the marriage is dissolved; and all actual damages and judgments from conduct that results in criminal conviction of either spouse in which the other spouse or child was the victim.[3]

The idea of compensating victims of abuse with spousal maintenance to assist with rebuilding their lives is an altruistic one; however, the ambiguity of the bill lends itself to many complications. This bill has many possible negative implications for victims of abuse. It has the potential to delay cases and produce inequitable outcomes, such as victims being required to pay spousal maintenance to abusers. The bill, as it is currently written, is far too ambiguous for the possible positives to outweigh the potential negatives.

II. BACKGROUND

A bill with the exact verbiage as Arizona Senate Bill 1009 was introduced in 2013 with the support of three other senators, Kate Hobbs, Anna Tovar, and Lynne Pancrazi.[4] However, none of the senators who previously supported the bill have signed on to co-sponsor or sponsor this version.[5] This bill is currently assigned to both the Senate General Education Committee and the Rules Committee.[6] At least one committee, as well as the Rules Committee, must vote on a bill, before the full chamber considers the bill.[7] The committee chair decides which bills the committee will hear and when.[8] Arizona Senate Bill 1009

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[3] ARIZ. REV. STAT. ANN. § 25-319 (1973).

[4] S.B. 1111, 51st Leg., 1st Reg. Sess. (Ariz. 2013).

[5] S.B. 1009, 51st Leg., 2nd Reg. Sess. (Ariz. 2014) (stating that the current sponsor is Edward Zachary Ableser, D-Tempe).

[6] *Bill Status Overview*, ARIZONA LEGISLATURE, http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/51leg/2r/bills/sb1009o.asp&Session_ID=112 (last visited Oct. 14, 2014).

[7] *How a bill becomes law in Arizona*, ARIZONA LEGISLATURE, http://www.azpolicy.org/media-uploads/resource-images/How%20a%20Bill%20becomes%20Law-Vertical.pdf (last visited Oct. 17, 2014).

[8] *Id.*

would have needed to be heard in committee before the end of February.[9] The committee did not hear the bill before March.[10] Therefore, it will not be moving forward this legislative session. This bill has been introduced several times in previous years with the same outcome.[11]

III. PROPONENTS

Victims of domestic violence tend to have little or no means of financial support other than the abuser.[12] In my experience as a victim advocate, it was common to be presented with victims of domestic violence who were prevented from working due to economic abuse or the controlling nature of the perpetrator. This was often coupled with fear of being seen with bruises, depending on the severity of the abuse, or the incessant calling of the abuser to verify the victim's whereabouts. When a person is unable to work, that person is put in a position of losing employment experience, which would help the victim gain a job after a divorce.[13] Because arguably the inability to maintain employment is caused by the perpetrator of domestic violence, the victim of the abuse should be entitled to a greater amount in spousal maintenance to compensate for his or her inability to obtain and maintain meaningful employment. However, a court must ensure there have actually been instances of abuse during the marriage and not merely unfounded accusations.

Victims of domestic violence are put in an awkward position when they attempt to leave their abusers, especially when the abuser is their primary financial support. They must weigh the cost of having no financial support against the cost of enduring abuse. Economic dependence on the abuser is one of the obstacles that prevent victims from leaving.[14] Economic abuse can exist with physical and emotional abuse, or it can be the only type of abuse an abuser utilizes.[15] Economic abuse can be overlooked as an issue for victims, and Arizona Senate Bill 1009 addresses some of the issues that may arise when a victim of domestic violence chooses to leave her abuser.

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[9] Interview with Shannon Rich, Public Policy Manager, AZ Coalition to End Sexual and Domestic Violence, in Phoenix, Ariz. (Mar. 3, 2014).

[10] *Id.*

[11] *Id.*

[12] *See NCADV's Financial Education Project*, NAT'L COALITION AGAINST DOMESTIC VIOLENCE, http://www.ncadv.org/programs/financial-education (last visited Mar. 29, 2015).

[13] *Id*.

[14] *Chapter 9: Domestic Violence*, OFF. FOR VICTIMS OF CRIME, https://www.ncjrs.gov/ovc_archives/nvaa2000/I-9-DV.htm (last visited Oct. 17, 2014).

[15] *See Economic Abuse*, CENTER FOR RELATIONSHIP ABUSE AWARENESS, http://stoprelationshipabuse.org/educated/types-of-abuse/economic-abuse/ (last visited Oct. 14, 2014).

IV. Opponents

The bill adds one factor to the many factors courts already consider when determining the amount of spousal support to be issued. There is no indication as to the weight this factor would be given or how the domestic violence would need to be proven.[16] Also, there are different levels of domestic violence. Whether a court would grant greater weight to physical violence than emotional abuse is an issue to consider. Courts already consider many factors including, but not limited to, the standard of living established during the marriage, the duration of the marriage, the comparative financial resources of the spouses, as well as "all actual damages and judgments from conduct that result[ed] in criminal conviction of either spouse in which the other spouse or child was the victim."[17]

Victims of domestic violence often would like to resolve family court matters so that they can "be done with the abuser."[18] This legislation may draw the process out. Judges would likely need to make findings as to whether or not domestic violence has in fact occurred during the marriage, a factor that would probably make the process longer and more expensive for both parties.[19] Victims of domestic violence, especially those not represented by an attorney, would be unlikely to bring the past abuse to the judge's attention due to the added expense and time required to complete the divorce.[20]

Some victims of domestic violence are arrested for defending themselves or because the original aggressor obtained an order of protection against them.[21] Some police agencies have policies that require both parties be arrested during a domestic violence situation. This could require real victims of domestic violence to pay spousal support to their abusers when the victims were merely attempting to defend themselves during the incident in question.[22] The standard of proof required to obtain an order of protection is a very low threshold that could allow those who are not actual victims of domestic violence to get an order as a strategic measure to increase their chance of being awarded a larger amount of spousal maintenance.

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16 Interview with Shannon Rich, Public Policy Manager, AZ Coalition to End Sexual and Domestic Violence, in Phoenix, Ariz. (Mar. 3, 2014).

17 S.B. 1009, 51st Leg., 2nd Reg. Sess. (Ariz. 2014) (As Introduced version).

18 Interview with Shannon Rich, *supra* note 9.

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

V. Conclusion

Summarily, this bill could require real victims of domestic violence to pay spousal support to their abusers, but it could also aid real victims of domestic violence with starting their lives over and ending the cycle of violence. The combination of vague language and freedom for the judge to use their discretion could produce as many problems for victims of domestic violence as solutions should the bill be passed into law. While domestic violence committed during a marriage has the tendency to affect the earning power of the spouse that is abused, the other factors judges consider are able to take this into account. If the abuser has been convicted of abuse, the current statute allows for the harm that led to these convictions to be considered.[23] The current statute also allows for the judge to consider one spouse's ability to obtain meaningful employment.[24] As it is currently written, Arizona Senate Bill 1009 is far too vague for the possible positives to outweigh the potential negatives.

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[23] Ariz. Rev. Stat. Ann. § 25-319 (1973).
[24] Ariz. Rev. Stat. Ann. § 25-319.

Expansion for Animal Rights? Arizona's Push for an Animal Abuser Registry

Brittany Sifontes*

I. Introduction

In another attempt to establish an animal abuser registry, Arizona legislators have introduced several bills to provide more protection for animals.[1] Senator Steve Farley, one of the two sponsors of Senate Bill 1037, explained "[i]t's in everyone's self-interest to stop animal cruelty where it begins."[2] Senator Farley has taken a strong position on animal protection, advocating that animals are an important part of our society, and because they are vulnerable, society needs to protect them.[3] Arizona legislators are following the trend in the United States to establish a registry for animal abusers.[4] In 2013, fifteen states proposed animal abuser registry legislation (three counties in New York have passed such legislation)–Alaska was the first state to introduce legislation in 1996.[5]

An animal abuse registry is similar to a sex offender registry; anyone convicted of the enumerated animal abuses must register with the sheriff of the county in which they are located.[6] Currently, all fifty states have some type of

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* J.D. candidate 2015, Arizona Summit Law School; B.A. (Political Science), 2010, University of Colorado at Boulder. I would like to thank my family for the continued love and support throughout this journey.

[1] *See* DiAngalea Millar, *Republican, Democrat push several bills on animal rights*, Cronkite News (Feb. 13, 2014), http://cronkitenewsonline.com/2014/02/republican-democrat-push-several-bills-on-animal-rights/ (last visited Apr. 6, 2014) (explaining Arizona lawmakers have introduced several bills in order to provide greater protection for animals); see also *2014 Animal Welfare Legislative Initiatives*, Arizona Humane Society, http://www.azhumane.org/arizona-humane-society-about-us/legislative-action/ (last visited Apr. 6, 2014) [hereinafter *2014 Animal Welfare Legislative Initiatives*] (listing eight separate animal welfare initiatives in Arizona).

[2] Millar, *supra* note 1.

[3] *See Id.*

[4] *See* Stacy A. Nowicki, *On the Lamb: Toward A National Animal Abuser Registry*, 17 Animal L. 197, 221-22 (2011).

[5] *Id.*

[6] S.B. 1037, 51st Leg., 2d Reg. Sess. (Ariz. 2014). http://www.azleg.gov/legtext/51leg/2r/bills/sb1037p.htm.

animal cruelty laws.[7] However, most states only apply felony animal cruelty laws to specific types of crimes against certain species of animals.[8]

Part one of this Comment provides a background of animal abuse registries and an explanation of what SB 1037 will implement. Part two explains the benefits of establishing a registry for animal abusers. Finally, part three will explain the drawbacks of implementing a registry.

Arizona has taken greater steps than most states to provide greater protections to animals, and an animal registry would help further the protections for animals. Establishing an animal abuser registry is beneficial for not only the protection of animals; such a registry could also help prevent other violent crimes.

II. BACKGROUND

All states have established sex offender registries[9] but the same is not true for animal abuse registries. As of February 2014, the United States has not created a national animal abuser registry.[10] The only nationwide registry is the sex offender registry.[11]

Under SB 1037, an individual must register if he or she is convicted of the following offenses: bestiality, cruelty to animals, animal fighting, presence at animal fight, cockfighting, presence at cockfight, and equine tripping.[12] For the first conviction, an individual is required to register for one year.[13] However, once an individual has been convicted for one of the listed crimes more than once, the individual must register for the rest of his or her life.[14] The same bill was proposed in 2012, but failed in the House.[15] Additionally, Senator

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[7] Stephen Lannacone, *Felony Animal Cruelty Laws in New York*, 31 PACE L. REV. 748, 748 (2011).

[8] *Id.* at 749; *see, e.g.*, KY. REV. STAT. ANN. § 525.125 (applying cruelty to animals in the first degree to only four-legged animals); N.MEX. STAT. ANN. § 30-18-1 (explicitly excluding insects and reptiles); ALA. CODE § 13A-11-241 (animal cruelty in the first degree only applies to dogs and cats); ARK. CODE ANN. § 5-62-102 (explicitly excluding fish).

[9] Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1889-90 (2006).

[10] Chris Green, *NYC Creates City-Wide Animal Abuser Registry*, ANIMAL LEGAL DEF. FUND (Feb. 5, 2014), http://aldf.org/blog/nyc-creates-city-wide-animal-abuser-registry/.

[11] *Id.*

[12] S.B. 1037, 51st Leg., 2d Reg. Sess. (Ariz. 2014).

[13] *Id.*

[14] *Id.*

[15] Matthew Hendley, *Animal Abuse Registry Proposed By a Pair of Arizona Lawmakers*, PHOENIX NEWTIMES (Jan. 15, 2014 6:00 AM), http://blogs.phoenixnewtimes.com/valleyfever/2014/01/animal_abuse_registry_proposed_arizona.php (last visited Apr. 6, 2014).

Farley proposed the bill last year and had bipartisan support, but never made it past the committees.[16]

As stated above, many states have enacted or proposed similar bills.[17] For example, three counties in New York have passed animal abuser registry legislation.[18] Some states have legislation in particular cities and/or counties; however, no state has passed statewide legislation.[19]

III. Positive Benefits

There are many benefits of adopting an animal abuse registry such as: ensuring animals will be adopted into safe homes, informing neighbors so they can protect their animals, preventing further harm to animals, and even preventing other violent crimes.[20]

There is currently no mechanism to inform the public whether a person has committed abuse against an animal.[21] Because there are numerous ways for a person to obtain an animal, a state-wide animal abuse registry would enable many groups to consult the registry before adopting or selling animals.[22] An animal abuse registry would provide a database for adoption agencies to reference before adopting out animals, and those agencies favor a registry.[23] Arizona Senator Farley has explained, "[t]he public, [and most importantly] animal shelters and pet stores, have [a] right to know if a person has [done anything to] preclude him [or her] from adopting any animals . . . ."[24] Additionally, pet owners should be able to have a database to refer to in order to check if a neighbor is an animal abuser.[25]

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[16] *Id.*; SB 1161, 51st Leg., 1st Reg. Sess. (Ariz. 2013).

[17] *Legislation*, Animal Legal Defense Fund, http://exposeanimalabusers.org/legislation/ (last visited Apr. 6, 2014) (listing fifteen state legislatures that have proposed creating an animal abuse registry).

[18] Ally Bernstein, *Animal Abuser Registry Laws: NY is First, but Shouldn't all States Jump on the Bandwagon?*, Animal Blawg (Nov. 22, 2011), http://animalblawg.wordpress.com/2011/11/22/animal-abuser-registry-laws-ny-is-first-but-shouldnt-all-states-jump-on-the-bandwagon/.

[19] Nowicki, *supra* note 4, at 229.

[20] Bud Foster, *Animal Cruelty Bill in Legislature*, Fox6 (Feb. 7, 2013 5:58 PM), http://www.myfoxal.com/story/20913946/animal-cruelty-bill-in-legislature;avid=o67nzxj5oj0e83ekr0qp2syp.

[21] Lydia O'Connor, *Animal Abuse Registry Created to Track Convicted Offenders*, Huffington Post (Nov. 5, 2013 10:55 PM), http://www.huffingtonpost.com/2013/11/01/animal-abuse-registry_n_4195903.html.

[22] *Id.*; *see also* Foster, *supra* note 20.

[23] Foster, *supra* note 20.

[24] Steve Farley, *The Farley Report from Phoenix #194: 12-17-13*, Friends of Farley (Dec. 17, 2013), http://www.friendsofarley.com/farley_rpt_194.

[25] *Id.*

Many argue that animal abuser registries are important because of the connection between animal abuse and abuse against other humans.[26] Animal League Defense Funds ("ALDF") Executive Director Stephen Wells has maintained, "[a]nimal abuse is not only a danger to our cats, dogs, horses, and other animals, but also to people . . . . Many animal abusers have a history of domestic violence or other criminal activity, and there is a disturbing trend of animal abuse among our country's most notorious serial killers."[27] Senator Farley has also stated that "a lot of the mass shooting suspects have a history of animal abuse."[28]

There are several studies that show a connection between animal abuse and other forms of violence.[29] According to a Colorado Senate General report, "[m]any national research studies in psychology, sociology, and criminology demonstrate that violent offenders often have childhood and adolescent histories of serious and repeated animal cruelty. The research shows consistent patterns of animal cruelty among perpetrators and more common forms of violence, including child abuse, spousal abuse and elder abuse."[30] A study conducted by the Massachusetts' Society for the Prevention of Cruelty to Animals and Northern University found similar results.[31] This 1997 report found "seventy percent of the people who committed violent crimes against animals also had criminal records for violent, property, drug, or disorderly crimes."[32] Additionally,"[p]eople who abused animals were five times more likely to commit violent crimes against people, four times more likely to commit property crimes, and three times more likely to have a record for drug or disorderly conduct offenses."[33]

Not only would an animal abuse registry help inform the public of convicted animal abuser which would help curb future animal abuse, such a registry could also help prevent other forms of violence.

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[26] *See* Nowicki, *supra* note 4; *see also Cruelty to Animals and Other crimes: A Study by the MSPCA and Northern University*, MSPCA 7, http://www.mspca.org/programs/cruelty-prevention/animal-cruelty-information/cruelty-to-animals-and-other-crimes.pdf (last visited Apr. 6, 2014) [hereinafter MSPCA].

[27] *States Urged to Establish Public Registries of Animal Abusers*, ANIMAL LEGAL DEF. FUND (Feb. 18, 2010), http://aldf.org/press-room/states-urged-to-establish-public-registries-of-animal-abusers/ (last visited Apr. 6, 2014).

[28] Foster, *supra* note 20.

[29] Nowicki, *supra* note 4, at 214

[30] S.B. 02-048, 63d Gen. Assembly, 2d Reg. Sess. (Colo. 2002).

[31] MSPCA, *supra* note 26.

[32] *Id.* at 8

[33] *Id.*

IV. Potential Problems

Even though there are many benefits to establishing an animal registry, there are some problems with establishing and maintaining a registry, such as: ineffectiveness, challenges on constitutional grounds, and collateral consequences.[34] Opponents of the registry argue registries do not prevent recidivism.[35] Opponents point to studies that suggest sex offender registries are not an effective method of preventing recidivism—despite the legislative intent behind passing sex offender registration laws.[36] Even though studies suggest registries do prevent recidivism, legislators still often present recidivism rates as a consideration for creating a registry.[37] Furthermore, "statewide studies that compare the recidivism rates of registered and unregistered sex offenders find that differences between the rates of recidivism in these two groups are not statistically significant."[38] Another criticism of registries is they do not foster public safety.[39]

One of the most difficult problems to address when implementing a registry is the costs of maintaining it. For example, Maine lawmakers rejected an animal abuse registry citing the cost of maintaining such a database as prohibitive.[40] Similarly, in 2011, the New Hampshire legislative assembly contemplated an animal abuse registry, but the law was ultimately defeated due to "lack of proven efficacy, *the prohibitive cost*, and the 'potential for invasion of personal privacy.' "[41] However, the ALDF has offered to help fund registries and donate money to offset the costs associated with maintaining the registries.[42]

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[34] Nowicki, *supra* note 4, at 209.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] Nowicki, *supra* note 4, at 209; The Iowa Department of Human Rights Division of Criminal and Juvenile Justice Planning and Statistical Analysis Center conducted a study to determine if the Iowa's Sex Offender Registry had any effect on recidivism rates. The study found there was a 3.5% recidivism rate for the pre-registry sample, and a 3.0% recidivism rate for the registry sample. The authors of the study concluded the difference between the two rates was not statistically significant. Even though the study was found to not be statistical significant, the authors did note "this finding suggests that the Sex Offender Registry may be having more of an impact on the recidivism of felons than it does on the recidivism of misdemeanants." The Iowa Sex Offender Registry and Recidivism, Iowa Department of Human Rts. 19 (Dec. 2000), http://www.humanrights.iowa.gov/cjjp/images/pdf/01_pub/SexOffenderReport.pdf (last visited Apr. 6, 2014).

[39] Nowicki, *supra* note 4, at 210.

[40] Molly J. Walker Wilson, *The Expansion of Criminal Registries and the Illusion of Control*, 73 La. L. Rev. 509, 539 (2013).

[41] *Id.* (emphasis added)

[42] According to the ALDF's website, the ALDF "offered start-up grants to establish state-level registries in Michigan, Texas, and Arizona this year—and offered to donate $10,000 to offset the costs of establishing a registry in New York City." Stephen Wells, *Legally Brief: Christmas*

Another criticism of establishing an animal abuse registry is that it can become a public shaming website.[43] The Humane Society of the United States has opposed such legislation because a large number of animal abusers are people who hurt their own animals and are not a threat to others' pets.[44] The Humane Society has explained that "[s]haming [animal abusers] with a public Internet profile is unlikely to affect their future behavior—except perhaps to isolate them further from society and promote increased distrust of authority figures trying to help them."[45] However, proponents of an animal abuse registry claim animal abuse registries are meant to prevent animal abusers from obtaining more animals, which will protect more animals.[46] Therefore, the ultimate goal is to protect animals, not to shame people.[47] Even though there are some drawbacks of establishing an animal abuser registry, the public should be informed to help protect the animals of Arizona.

V. CONCLUSION

Animal abuse registries are beneficial for society and passing SB 1037 would be a positive change for animal rights. Even though there are some obstacles with implementing an animal abuse registry, SB 1037 is an important and much needed step in order to protect the State's animals and protect other humans as well. The ALDF is willing to help fund registries around the country. Private funding could be a great way to help establish and maintain a state registry, thereby solving the financial problem surrounding registries. Even though this is the third time a similar bill was proposed in Arizona, support for greater animal protection is continuing to grow, as illustrated by the number of bills proposed this legislative term.[48] SB 1037 is a step in the right direction in order to better protect Arizona's animals.

Comes Early for Animals—as Abuser Registry Takes Hold in NYC, ALDF http://aldf.org/blog/christmas-comes-early-for-animals-as-abuser-registry-takes-hold-in-nyc/ (last visited Apr. 6 2014).

[43] O'Connor, *supra* note 21.

[44] Wayne Pacelle, *Reservations About the Animal Abuse Registry*, HUMANE SOCIETY OF THE U.S. (Dec. 3, 2010), http://hsus.typepad.com/wayne/2010/12/animal-cruelty-registry-list.html (last visited Apr. 6, 2014).

[45] *Id.*

[46] O'Connor, *supra* note 21.

[47] *Id.*

[48] *See* Millar, *supra* note 1; *see also 2014 Animal Welfare Legislative Initiatives*, *supra* note 1.