A DEFENSE BY ANY OTHER NAME: ENTRAPMENT-BY-ESTOPPEL AS A CRIMINAL DEFENSE IN ARIZONA

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Entrapment-by-estoppel is a criminal defense founded in due process. The defense emerged over 50 years ago from the U.S. Supreme Court and has seen steady growth and acceptance. Arizona courts, however, have not yet recognized the defense. The entrapment-by-estoppel defense provides an affirmative defense only in those circumstances where a person, sincerely desirous of following the law, breaks the law after seeking an official opinion regarding the legality of proposed behavior. Acceptance of the defense in Arizona should be driven by both recognition of the constitutional imperative central to the defense and by recognition that the old legal maxim "ignorance is no excuse" becomes less supportable in the face of the state's continual expansion of laws and regulations.

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INTRODUCTION

> *In this country, the sanctimonious maxim that "[i]gnorance of the law is no excuse" puts every citizen at risk. What may have been a sound rule in simpler times, when the catalog of punishable crime was limited to traditional offenses like murder, robbery, rape and larceny, becomes a sinister joke when applied to the five-foot shelf of the U.S. criminal code and the even more voluminous statutes of individual states.*
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> —Charles Maechling, Jr.[1]

Following an anonymous 911 call, Officer Jones, on downtown bicycle patrol, investigated a reported argument between two men in a nightlife district and the possibility that someone brandished a gun.[2] As he approached the different people in the area to talk to them about the reported incident, Officer Jones asked people whether or not they were armed. For those armed, he asked them to hand over the weapon for the duration of the interview, returning the weapon when he was finished.

The investigation proved fruitless, and the anonymous report was dismissed. One of the interviews, with Marion Smith, who was carrying a handgun in her backpack, struck Officer Jones as different. Later that afternoon, at the station, he ran the name and address from his notebook and discovered that Marion had a juvenile felony record. Two days later, after confirming that Marion's civil rights had not been successfully restored,[3] Officer Jones and his partner arrested her and charged her as a prohibited possessor.[4]

Marion had purchased the gun six months earlier, after being hired to work in the back office at a local retail store with the periodic task of taking deposits to the bank. Marion's attorney determined that not only had Marion applied for the restoration of her civil rights, but she had purchased the firearm at the Handy Gun Store after completing the required documentation and submitting to a federal background check.[5] The problem was that Marion had applied too

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1. Charles Maechling, Jr., *Truth in Prosecuting*, 77-JAN A.B.A. J. 58, 62 (1991).

2. This scenario is entirely fictitious.

3. A felony conviction in Arizona results in the loss of: (1) the right to vote; (2) the right to hold public office of trust or profit (including occupational licenses); (3) the right to serve as a juror; (4) any civil right the suspension of which is necessary for the security of a confining facility or the reasonable protection of the public; and (5) the right to possess a gun or firearm. ARIZ. REV. STAT. ANN. § 13-904(A)(1)–(5) (2012).

4. Arizona defines a prohibited possessor as, among other things, someone "who has been adjudicated delinquent for a felony and whose civil right to possess or carry a firearm has not been restored." ARIZ. REV. STAT. ANN. § 13-3101(A)(7)(b) (2012). Prohibited possession is a Class 4 felony. ARIZ. REV. STAT. ANN. § 13-3102(A)(4), (L) (2012).

5. The Brady Act, P.L. 103-159, 107 Stat. 1536, 18 U.S.C. §§ 921–22, requires a federally licensed firearms dealer to submit a customer-completed ATF Form 4473 to the FBI-operated National Instant Background Check System. 28 C.F.R. § 25.6 (2012). The

early for the restoration of her civil rights, and the Juvenile Court had denied the restoration.[6] Marion did not realize that submitting the request even one day before she was eligible was adequate grounds for denial.[7] Marion was unaware of the denial. The court notices were mailed to her mother's address, but she had a falling out with her mother soon after applying for the restoration. Marion incorrectly assumed that no news was good news.

Given that prohibited possession is a strict liability offense—meaning that Marion's knowledge of her civil rights status is irrelevant, provided she is aware that she is in possession of a firearm[8]—does Marion have a defense against the charge of prohibited possession? Perhaps. A due process defense called entrapment-by-estoppel should provide a viable defense. Entrapment-by-estoppel emerged as a criminal defense over the last fifty years in contravention of the legal maxim that ignorance of the law is no excuse.[9] Under the entrapment-by-estoppel defense, when ignorance of the law is caused by reasonable reliance on the guidance of a government agent or official, the fundamental fairness of due process requires relief from criminal responsibility.[10]

This Note advocates for the acceptance of the entrapment-by-estoppel defense in Arizona criminal courts. Entrapment-by-estoppel should be accepted because a shared sense of justice and fairness demands it. The factual circumstances that could make entrapment-by-estoppel a viable defense are rarely encountered, and the defense is difficult to prove. But when those circumstances are encountered, the integrity and correctness of the Arizona criminal justice system will be enhanced by the availability of this defense. The value of the defense will likely grow as the administrative state continues to expand. Businesses and individuals with a sincere desire to follow the law increasingly look to government officials to provide legally valid guidance on correct conduct. When that advice is later deemed incorrect by a law enforcement agency, individuals who attempted to comply with the law and sought appropriate guidance should not be held criminally liable.

Part I of this Note discusses the three U.S. Supreme Court cases that laid the groundwork for the entrapment-by-estoppel defense. Part II then traces the development of entrapment-by-estoppel within the Ninth Circuit, other circuits, and other states. Because entrapment-by-estoppel is a due process defense, Part III examines the adoption of federal due process jurisprudence by Arizona courts.

FBI provides dealers with one of three responses: proceed, delayed, or denied. *Id.* at § 25.6(c)(1)(iv)(A)–(C).

6. *See* ARIZ. REV. STAT. ANN. § 13-912.01(A) (2012). The civil rights restoration statute provides that a person adjudicated delinquent for felony offenses may not *file* for the restoration of their right to possess a firearm until two years after discharge from probation or the age of thirty, depending on the nature of the offense(s). *Id* § 13-912.01(C).

7. *Id.* § 13-912.01(C).

8. ARIZ. REV. STAT. ANN. §§ 13-105(10)(b) (2012), 13-3102(A)(4) (2012).

9. John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1, 3, 6–13 (1997).

10. *See infra* Part II.

Finally, Part IV advocates for acceptance of entrapment-by-estoppel as a complete criminal defense in Arizona courts.

I. ENTRAPMENT-BY-ESTOPPEL EMERGES FROM THE SUPREME COURT

The U.S. Supreme Court has spoken three times on the due process defense of entrapment-by-estoppel.[11] The first case was about contempt, the second about compliance, and the third about contamination. In each case, the Supreme Court found that when a party reasonably relies on advice or opinion from a government official regarding the legality of conduct, the fundamental fairness of due process relieves that party of responsibility for the legal consequences of those actions. This Part will describe the development of the entrapment-by-estoppel defense through these three cases.

A. Raley v. Ohio*: When is Contempt Un-American?*

In 1959, *Raley* came before the U.S. Supreme Court on appeal from Ohio, which had affirmed the convictions of four members of the state's labor movement for refusing to answer questions posed to them by the Un-American Activities Commission of the State of Ohio.[12] During the Commission meetings in question, the Chairman either advised or gave the impression that the witnesses were entitled to invoke their privilege against self-incrimination under both the United States and Ohio Constitutions.[13] The Chairman was in error, however, because an Ohio statute granting the witnesses immunity also removed the privilege to not answer questions.[14] The Ohio Supreme Court upheld the witnesses' convictions for refusing to answer the Commission's questions on the grounds that the convictions were valid because the privilege did not exist at the time it was invoked.[15] Essentially, the Ohio Supreme Court determined that the statements, conduct, or demands of the Chairman were not relevant to a finding of contempt—the only thing that mattered to the contempt conviction was that the witnesses refused to answer on grounds of a privilege that did not exist when invoked.[16]

In an 8–0 decision, the U.S. Supreme Court held that, under the Due Process Clause of the Fourteenth Amendment, upholding the convictions "would be to sanction the most indefensible sort of entrapment."[17] The Court did not find that the Chairman intentionally deceived the witnesses.[18] Rather, the Court found

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11. *See* United States v. Pa. Indus. Chem. Corp., 411 U.S. 655 (1973); Cox v. Louisiana, 379 U.S. 559 (1965); Raley v. Ohio, 360 U.S. 423 (1959).

12. *Raley*, 360 U.S. at 424 & n.1. Three defendants were convicted of contempt and the fourth was convicted under a law that required those called before legislative committee to answer pertinent questions. *Id.*

13. *Id.* at 426–31.

14. *See id.* at 431–32.

15. *See id.* at 433–34.

16. State v. Morgan, 133 N.E.2d 104, 119–20 (Ohio 1956), *vacated by* Morgan v. Ohio, 354 U.S. 929 (1959).

17. *Raley*, 360 U.S. at 438.

18. *Id.*

that criminal sanctions could not adhere where contradictory commands are given.[19] While the Chairman did not deceive the witnesses, he did actively mislead the witnesses regarding the availability of immunity in a legally erroneous manner while serving as the voice of the state.[20]

B. Cox v. Louisiana*: But I Stood Where You Told Me.*

Elton Cox was convicted of violating a Louisiana statute banning demonstrations near courthouses, which was enacted to ensure judicial proceedings remained free from mob influence.[21] The statute was arguably vague regarding the definition of the word *near*.[22] The Supreme Court held that because Mr. Cox discussed the appropriate location for the demonstration with the Chief of Police—an authorized government official who affirmatively directed the location chosen—any ambiguity in the statute was resolved.[23] The Court, citing *Raley*, found that allowing Cox's conviction to stand under the circumstances "would be to sanction an indefensible sort of entrapment" and reversed the convictions based on the Due Process Clause.[24]

C. United States v. Pennsylvania Industrial Chemical Corporation*: Don't Drink the Water.*

The Monongahela River runs through western Pennsylvania and northern West Virginia.[25] In 1970, two teachers from Pennsylvania State University collected water samples near a discharge pipe at the Pennsylvania Industrial Chemical Corporation ("PICCO") plant along the Monongahela.[26] Tests confirmed the existence of pollutants.[27] PICCO was openly discharging into the river in continued reliance on a long-standing Army Corps of Engineering interpretation of section 13 of the Rivers and Harbors Act of 1899.[28] In the subsequent federal trial,

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19. *Id*. (citing United States v. Cardiff, 344 U.S. 174, 176–77 (1952)).

20. *Id.* at 438–39.

21. *See* Cox v. Louisiana, 379 U.S. 559, 560–562 (1965); *See* Cox v. Louisiana 379 U.S. 559, 585–589 (1965) (Clark, J., dissenting). Mr. Cox, Field Secretary of the Congress of Racial Equality at Southern University in Baton Rouge, led 2000 protestors to a location near a courthouse where the cases of 23 students arrested the previous day would be heard. *Cox*, 379 U.S. at 539–40 (majority opinion). At the conclusion of the protest, when Mr. Cox began to encourage the demonstrators to dine at segregated lunch counters, the Sheriff informed the crowd it was time to disperse, and the crowd was soon broken up with tear gas. *Id.* at 542–44.

22. *Cox*, 379 U.S. at 568.

23. *Id.* at 569–71.

24. *Id.* at 571 (citing Raley v. Ohio, 360 U.S. 423, 426 (1959)).

25. United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 657 n.4 (1973).

26. United States v. Pa. Indus. Chem. Corp., 461 F.2d 468, 470–71 (3d Cir. 1972).

27. *See Pa. Indus. Chem. Corp*., 411 U.S. at 658 n.3. The pollutants were "identified as iron, aluminum, and compounds containing these chemicals, and chlorides, phosphates, sulfates, and solids." *Id.* (internal quotation marks and citation omitted).

28. *Id*. at 671–674. In *United States v. Standard Oil Co.*, the United States Supreme Court established that § 13 of Rivers and Harbors Act, 30 Stat. 1151, 33 U.S.C.

PICCO was prevented from presenting its reliance on the Corps of Engineers as a defense.[29]

The Supreme Court held that PICCO possessed a right to look to the authoritative government agency, the Corps of Engineers, for guidance, and "to the extent that the regulation deprived PICCO of fair warning as to what conduct the Government intended to make criminal, . . . there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution."[30] The Court rejected the Government's argument that such reliance by PICCO was not reasonable and instead remanded to the trial court to determine whether: (1) the reliance actually occurred, and (2) the reliance was reasonable under the circumstances.[31]

Although the Supreme Court in *PICCO* did not use the words "due process" in its opinion or directly cite *Raley* or *Cox*,[32] the invocation of notions of fairness implicate due process, and due process was a strong theme in the circuit court ruling.[33] The Supreme Court did cite favorably to an academic article, written in the infancy of the Administrative Procedure Act, identifying a growing recognition that the U.S. government was beginning to allow an estoppel defense within the administrative state, under which a recipient of bad advice from an authoritative source could gain immunity from criminal sanction if reliance on the advice was reasonable.[34]

With these three cases, the Supreme Court set a course for development of entrapment-by-estoppel within the circuits, as well as by some states. In none of the three cases was the term *entrapment-by-estoppel* used, but that is the name now attached to what has also been called a reliance defense.[35] Because the goal of this Note is to advocate for the acceptance of entrapment-by-estoppel within Arizona courts, the following discussion about the development of the defense will focus on Ninth Circuit jurisprudence, with other circuit and state case law mixed in to provide completeness and accuracy.

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§ 407, applied to pollutants. 384 U.S. 224, 228–30 (1966). Prior to 1966, discharges were only banned if they affected navigation. *Pa. Indus. Chem. Corp*., 411 U.S. at 672.

29. *See Pa. Indus. Chem. Corp.*, 461 F.2d at 479.

30. *Pa. Indus. Chem. Corp*., 411 U.S. at 674 (citation omitted).

31. *Id.* at 673–74.

32. *See id*. at 674.

33. *See id*. at 661.

34. *Id.* at 674 (citing Frank C. Newman, *Should Official Advice be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law*, 53 COLUM. L. REV. 374 (1953)).

35. 2 PAUL H. ROBINSON ET AL., CRIMINAL LAW DEFENSES § 183 (2012); *but see* Jeffrey F. Ghent, *Criminal Law: "Official Statement" Mistake of Law Defense*, 89 A.L.R.4th 1026 (2012) (describing the affirmative defense without using the labels "reliance" or "entrapment-by-estoppel").

II. THE CURRENT STATE OF THE ENTRAPMENT-BY-ESTOPPEL DEFENSE

Since the Supreme Court began developing its entrapment-by-estoppel jurisprudence, the circuit courts have developed the entrapment-by-estoppel defense to varying degrees. This Part will examine those developments and look at the current state of the defense.

The Ninth Circuit has arguably developed the most mature jurisprudence regarding entrapment-by-estoppel. An early foray into the issue started with the case of James Lansing, who was convicted in a federal court for refusing induction into the Armed Forces.[36] Lansing claimed he was misled by his local draft board into abandoning his application for conscientious objector status.[37] The board sent Lansing a letter indicating that, due to not receiving the necessary form from him within the ten days stated on the form for its completion, no change would be made to his status.[38] In fact, his application would have to have been considered at any time up until his induction notice was sent.[39] Uncertain what to call Lansing's proposed defense, the Ninth Circuit did not find the defense adequate in this case, but held that "there exists a narrowly limited class of cases where misleading governmental activity constitutes a good defense to a criminal charge."[40] The Ninth Circuit contemplated that the defense could exist where someone "sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries."[41]

The *Lansing* holding became the basis for the fifth of five elements to the entrapment-by-estoppel defense—that reliance on an official statement must be reasonable—most recently articulated in a federal case, *United States v. Batterjee*, out of Arizona regarding the purchase of a firearm.[42]

A. The Ninth Circuit Test for Entrapment-by-Estoppel

Due to a change in the federal firearms laws in 1998, Abdulraouf Shahir Batterjee, though legally present as a nonimmigrant on a work visa, was no longer authorized to possess a firearm in the United States when he used a Phoenix gun store to facilitate the transfer of a .45 caliber pistol from its manufacturer in 2001.[43] Mr. Batterjee correctly identified his immigration status when he completed the ATF Form 4473 in support of the transaction—which had not been updated following a 1998 change in the law—and provided the store owner with additional supporting documentation regarding the duration of his residency.[44] The

36. *See* United States v. Lansing, 424 F.2d 225, 226 (9th Cir. 1970).
37. *Id.*
38. *Id.*
39. *See id.*
40. *Id.* The term "entrapment-by-estoppel" had not yet emerged.
41. *Id.* at 227.
42. 361 F.3d 1210, 1212, 1216–17 (9th Cir. 2004).
43. *Id.* at 1212–15.
44. *Id.* at 1213–14.

FBI background check was done, and the sale was completed.[45] The storeowner later testified that he understood the instructions on the back of the form regarding additional residency information to be the complete requirements at the time of the transaction.[46]

In November 2001, concerned that Mr. Batterjee was illegally present in the country, ATF agents searched his residence and recovered the firearm.[47] After the search, the affidavit on which the warrant was based was determined to have been erroneous.[48] After the immigration concerns evaporated, federal prosecutors filed charges against Mr. Batterjee for possession of a firearm and ammunition while "being an alien admitted to the United States under a non[-]immigrant visa."[49] The district court rejected Mr. Batterjee's offered defense of entrapment-by-estoppel and found him guilty, specifically expressing concern about the due process nature of the entrapment-by-estoppel defense in nonscienter crimes, particularly when used "in the context of [a] licensed firearms dealer."[50]

The Ninth Circuit reversed the trial court and held that entrapment-by-estoppel was an entirely viable defense.[51] The *Batterjee* court noted that the outdated ATF Form 4473 that Batterjee filled out when he purchased the gun did not provide adequate notice and that a federally licensed firearms dealer made an incorrect representation that the transaction was legal.[52] Of particular note, the court held that because it is founded in the fundamental fairness concept of due process, entrapment-by-estoppel equally applies to strict liability crimes.[53]

In the *Batterjee* decision, the court provided a five-element test to establish the entrapment-by-estoppel defense.[54] In the Ninth Circuit, a defendant must prove that: (1) an authorized government official empowered to render the claimed erroneous advice; (2) who had been made aware of all relevant historical facts; (3) affirmatively told defendant the proscribed conduct was permissible; (4) the defendant relied on this false information; and (5) this reliance was reasonable.[55] The five elements of the defense are developed more fully below.

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45. *Id.* at 1214.
46. *Id.* at 1214–15.
47. *See id.*
48. *Id.*
49. *Id.* (internal quotation marks and citation omitted) (brackets in original). Batterjee was indicted pursuant to 18 U.S.C. § 922(g)(5)(B) (1998), which states in pertinent part that: "It shall be unlawful for any person . . . admitted to the United States under a nonimmigrant visa . . . to ship or transport in interstate . . . commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."
50. *Id.* at 1215–16.
51. *Id.* at 1219.
52. *Id.* at 1217.
53. *Id.* at 1218 (citations omitted).
54. *Id.* at 1216–17.
55. *Id.*

1. Element One: Erroneous Advice Given by a Government Official

The first element of the test establishes that the official relied on for advice must be an authorized government official.[56] In *United States v. Brebner*, a district court in Idaho found Greg Brebner guilty of several federal firearms violations.[57] The court denied Mr. Brebner the opportunity to present an entrapment-by-estoppel defense.[58] Brebner claimed reliance on information from two federally licensed firearms dealers and information from local law enforcement officials, all of whom were aware that his prior state convictions for firearms violations were expunged.[59] The Ninth Circuit upheld the trial court's denial of the entrapment-by-estoppel defense because the elements of the defense were not established.[60] The circuit court found that the state and local law enforcement officials were not competent authorities to provide advice on federal firearms laws.[61] The court also found that Brebner's claim of advice from federally licensed firearms dealers was controverted by the dealers themselves.[62]

2. Element Two: Official Who Gave Bad Advice Was Aware of All Relevant Facts.

The second element of the test requires a defendant to establish that the official giving erroneous advice has been made aware of all relevant historical facts.[63] Upon completion of a period of probation, Walter Tallmadge's state-felony conviction for possession of a machine gun was reduced to a misdemeanor, and the charges were dismissed.[64] At the dismissal hearing, Tallmadge was informed that he must still disclose his conviction on licensure applications and that he was not permitted to possess *concealable* weapons under California law.[65] His status under federal law was not discussed.[66]

Four years later, Tallmadge was convicted under federal firearms laws for receiving six rifles and failing to disclose his prior conviction.[67] The Ninth Circuit overturned the convictions, finding that Tallmadge had relied on information

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56. *Id.*

57. 951 F.2d 1017, 1019–1020 (9th Cir. 1991). Brebner was convicted of unlawful receipt and possession of firearms, and for making false statements in the purchase of firearms. *Id.*

58. *Id.* at 1020. Brebner pled conditionally guilty after the district court granted a government motion in limine to prevent, among other issues, presentation of Brebner's planned entrapment-by-estoppel defense. *Id.*

59. *Id*. at 1023–24.

60. *Id.* at 1026.

61. *Id.*

62. *Id.*; *see also* United States v. Tallmadge, 829 F.2d 767, 774 (9th Cir. 1987) ("Clearly, the United States Government has made licensed firearms dealers federal agents in connection with the gathering and dispensing of information on the purchase of firearms.").

63. United States v. Batterjee, 361 F.3d 1210, 1216 (9th Cir. 2004).

64. *Tallmadge*, 829 F.2d at 769–70.

65. *Id.* at 769.

66. *Id.* at 770.

67. *Id.* at 768.

provided to him by his experienced criminal lawyer, by the federally licensed firearms dealer, and by the judge at his dismissal hearing for his belief that he was legally authorized to possess rifles.[68] The court specifically noted that Tallmadge disclosed all relevant information to a licensed federal firearms dealer responsible for gathering and dispensing information regarding the purchase of firearms.[69]

3. Element Three: Official Affirmed That Conduct in Question Was Legal.

The third element of the test requires that the informed official affirmatively told the defendant that the actions in question were legal.[70] The Ninth Circuit found this element lacking in *United States v. Ramirez-Valencia*.[71] Deportation documentation provided to Jose Ramirez-Valencia stated both that he had to get permission from the U.S. Consulate to return to the United States and that returning within five years was a felony affording certain punishments.[72] In his subsequent trial for being a deported alien found in the United States, Ramirez-Valencia argued entrapment-by-estoppel in that the form misled him to believe it was permissible to return to the United States after five years.[73] In upholding the conviction, the Ninth Circuit held that the form did not expressly state that reentry would be legal after five years—thus failing to provide the type of affirmative guidance necessary to support a claim of entrapment-by-estoppel.[74]

Similarly, in *Brebner*, the Ninth Circuit found that Brebner's conversations with two federal firearms dealers about past convictions were insufficient to establish reliance on their later sale of guns to him as guidance on the legality of his possession of firearms.[75] The court found that where the dealers failed to connect the dots and ask the right questions to make a determination, the dealers' failures did not qualify as the type of affirmative statement of the legality of conduct required under the entrapment-by-estoppel defense.[76]

Tallmadge, however, demonstrated a situation where officials did provide confusing advice.[77] Both the court, when it reduced his conviction to a misdemeanor, and his experienced defense attorney affirmatively informed Tallmadge that he was allowed to possess non-concealable firearms.[78] More importantly, having been put in a frame of mind that some possession was permissible, Tallmadge then received guidance from a federally licensed firearms

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68. *Id.* at 775.
69. *See id.* at 774.
70. United States v. Batterjee, 361 F.3d 1210, 1216 (9th Cir. 2004).
71. United States v. Ramirez-Valencia, 202 F.3d 1106, 1109–10 (9th Cir. 2000).
72. *Id.* at 1108 (9th Cir. 2000).
73. *Id.* at 1109.
74. *Id.*
75. United States v. Brebner, 951 F.2d 1017, 1026 (9th Cir. 1991).
76. *See id.*
77. *See supra* notes 64–69 and accompanying text.
78. United States v. Tallmadge, 829 F.2d 767, 770 (9th Cir. 1987).

dealer indicating that it was legal to possess a firearm because his felony had been reduced to a misdemeanor.[79]

4. Element Four: Actual Reliance on the Erroneous Advice.

The fourth element of the test requires that the defendant rely on the information provided.[80] When the court in *Tallmadge* described the requirement that a defendant actually rely on advice provided by a legitimate government authority, it cited another Ninth Circuit case, dealing with a conscientious objector interacting with his draft board, *United States v. Timmins*.[81] Based on contemporaneous news reports of a U.S. Supreme Court decision, Harry Timmins mistakenly believed that multiple types of forms existed to request a change to conscientious objector status.[82] Timmins interpreted the form he received as requiring formal religious training, and he exchanged multiple letters with his draft board stating his mistaken understanding of the form and asked for the form for those with moral objections to service, which did not actually exist.[83] Incorrectly believing that he had no avenue to request a change in status to conscientious objector, Timmins reported for his induction appointment but refused induction.[84] The Ninth Circuit overturned Timmins's conviction for refusing induction into the Armed Forces.[85] The court discussed the fact that the draft board clearly understood both Timmins's confusion and his reliance on their guidance, yet the board did not adequately fulfill its obligation to provide clear guidance.[86]

Reliance was also an issue in a more recent case involving medical marijuana. When husband and wife, Dale Schafer and Marion Fry, began growing marijuana to help with the side effects of Fry's chemotherapy, they informed the local police and were even inspected by them.[87] Over time, Schafer and Fry's marijuana growing operation turned into a business that attracted the interest of the Drug Enforcement Agency.[88] The Ninth Circuit upheld Schafer and Fry's convictions, in part by rejecting their appeal of the trial court's denial of their entrapment-by-estoppel defense.[89] The court found that the couple could not have relied on an official interpretation.[90] Specifically, Fry testified to her understanding

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79. *Id.*

80. United States v. Batterjee, 361 F.3d 1210, 1216 (9th Cir. 2004).

81. *Tallmadge*, 829 F.2d at 774; United States v. Timmins, 464 F.2d 385, 386 (9th Cir. 1972).

82. *Timmins*, 464 F.2d at 386.

83. *Id*.

84. *Id.*

85. *Id.*

86. *Id.* at 387–88. The Court found that the local draft board "[h]aving thus failed to correct an important misimpression of appellant, of which it was fully aware, the board prevented or discouraged appellant from fully developing his claim." *Id.* at 387.

87. United States v. Schafer, 625 F.3d 629, 633 (9th Cir. 2010).

88. *Id.*

89. *Id.* at 637–38.

90. *Id.* at 638. When the district court granted the government's motion to exclude the entrapment-by-estoppel defense, it stated that the "[defendants] could not

of the illegality of the sale of marijuana.[91] Moreover, sales literature used throughout the duration of the business contained disclaimers addressing the illegality of the medical use of marijuana under federal law.[92] This clearly indicated that there was no possible reliance by Fry and Schafer on any government official's interpretation that the business was legal.[93]

5. Element Five: Reliance on the Official Advice Was Reasonable.

The fifth element of the test requires that the defendant's reliance be reasonable.[94] Under *Lansing*, this requires that someone "sincerely desirous of obeying the law would have accepted the information as true[] and would not have been put on notice to make further inquiries."[95] This requirement limits potential abuse of the defense by allowing its use only where the actor appears blameless.[96] For example, in *Ramirez-Valencia*, the Ninth Circuit did not find it reasonable for the defendant to rely on the portion of the INS form that said returning to the United States within five years is a felony with certain defined punishments as affirmative guidance that returning after five years was legal, especially because the preceding sentence on the form stated that any return to the United States must begin by contacting the American Consular Office.[97] A deported person sincerely desirous of obeying the guidance of the U.S. government would read the entire paragraph in context and could only reasonably conclude that legal entry after five years would still require permission.[98]

The Ninth Circuit has arguably developed the entrapment-by-estoppel defense in more depth than any of the other circuits. Only the Ninth Circuit provides for a five-element test.[99] A handful of circuits provide four-element tests that tend to cover the same ground as the Ninth Circuit, and one circuit provides a two-element test.[100] Other circuits provide for a description of the test without going into as much depth or being as structured as the five-element test, and a few of the circuits have mentioned the existence of the defense of entrapment-by-estoppel but have not yet issued an opinion upholding such a defense.[101] The next

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identify an authorized federal government official who erroneously told them it was permissible to sell marijuana." *Id.* at 635 (internal quotation marks omitted).

91. *Id.* at 638.

92. *Id.* at 637–38.

93. *Id.* at 638.

94. United States v. Batterjee, 361 F.3d 1210, 1216 (9th Cir. 2004).

95. United States v. Lansing, 424 F.2d 225, 227 (9th Cir. 1970).

96. ROBINSON ET AL., *supra* note 35.

97. United States v. Ramirez-Valencia, 202 F.3d 1106, 1109–10 (9th Cir. 2000).

98. *See id.* at 1109 ("Even if defendant reasonably believed that returning after five years was not a felony, the form did not expressly tell him that returning without permission to the United States after five years was lawful. To the contrary, the form stated that defendant must write . . . the American Consular Office . . . to obtain permission to return after deportation.") (internal quotation marks omitted).

99. *Compare supra* notes 50–55 and accompanying text, *with infra* notes 103–115 and accompanying text.

100. *See infra* notes 102–109 and accompanying text.

101. *See infra* notes 112–114 and accompanying text.

Section of this Part briefly addresses the status of the entrapment-by-estoppel defense in other circuits and then briefly discusses the use of the defense in state courts and legislatures.

B. Entrapment-by-Estoppel in the Other Circuits and the States

Other circuit courts, state courts, and state legislatures have also developed or recognized the entrapment-by-estoppel defense to varying degrees. Some circuits have developed defined element tests similar to that established by the Ninth Circuit, but none use all five elements. Other circuits have only discussed the defense without providing definitive tests. This section will briefly discuss the use of the defense in those other venues.

1. Circuits with Elements Tests.

The First,[102] Third,[103] and Sixth[104] Circuits have four-element tests to establish the entrapment-by-estoppel defense. The First and Sixth Circuits' tests are nearly the same and—unlike the Third Circuit—actually require a determination that prosecution would be unfair.[105] What these circuits do not address, and what the Ninth Circuit requires, is that the government official who provides the advice must have been made aware of all the relevant historical facts.[106] The Third Circuit's approach, however, does provide some basis for determining when reliance may or may not be reasonable: "in light of the identity of the government official, the point of law represented, and the substance of the official's statement."[107]

The Eighth Circuit provides a two-element test: (1) whether reliance on the government's statement was reasonable; and (2) whether the statement misled

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102. The element test for entrapment-by-estoppel in the First Circuit is: (1) a government official told the defendant that an act was legal; (2) the defendant relied on the advice; (3) the reliance was reasonable; and (4) given the reliance, prosecution would be unfair. United States v. Ellis, 168 F.3d 558, 561 (1st Cir. 1999).

103. The element test for entrapment-by-estoppel in the Third Circuit is: (1) a government official, (2) told the defendant that certain criminal conduct was legal, (3) the defendant actually relied on the government official's statements, and (4) the defendant's reliance was in good faith and reasonable in light of the identity of the government official, the point of law represented, and the substance of the official's statement. United States v. Stewart, 185 F.3d 112, 124 (3d Cir. 1999) (citing United States v. W. Indies Transp., Inc., 127 F.3d 299, 313 (3d Cir. 1997)).

104. The element test for entrapment-by-estoppel in the Sixth Circuit is: (1) a government must have announced that the charged criminal act was legal; (2) the defendant relied on the government announcement; (3) the defendant's reliance was reasonable; and (4) given the defendant's reliance, the prosecution would be unfair. United States v. Levin, 973 F.2d 463, 468 (6th Cir. 1992) (citing United States v. Smith, 940 F.2d 710, 714 (1st Cir. 1991)).

105. *See supra* notes 102–104.

106. *Compare supra* notes 63–69 and accompanying text, *with supra* notes 102–104 and accompanying text.

107. *Stewart*, 185 F.3d at 124 (quoting *W. Indies Transp., Inc.*, 127 F.3d at 313).

the defendant into believing the conduct was legal.[108] The court then allows the defense to apply only when an official assures the defendant that certain conduct is legal, the defendant reasonably relies on that advice, and a government official is guilty of affirmative misconduct.[109] In effect, the Eighth Circuit's two-element test, by the clarifying language provided with the elements, provides nearly the same standard as the other circuit courts with four-element tests.[110] By requiring the official to be guilty of affirmative misconduct, the Eighth Circuit's test comes closest to the Ninth Circuit's requirement that the official be made aware of all relevant facts.[111]

2. Circuit Courts Without Specific Element Tests

The remaining circuit courts do not use element tests but find the defense of entrapment-by-estoppel valid, generally focusing on a government agent actively misleading a person in the interpretation of a law, followed by the person acting in reasonable reliance on that misleading interpretation.[112] The Second Circuit appears to provide more definition to the defense than the other non-element circuit courts, adopting the language of fairness to the defendant.[113] The Second Circuit also adopted language similar to the Ninth Circuit by including a requirement that someone sincerely desirous of compliance would not be put on notice to make further inquiries.[114] The Seventh Circuit ties the entrapment-by-

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108. United States v. Benning, 248 F.3d 772, 775 (8th Cir. 2001) (citing United States v. Austin, 915 F.2d 363, 366 (8th Cir. 1990)).

109. *Id.* (citations omitted).

110. *Compare supra* notes 63–69 and accompanying text, *supra* notes 102–107 and accompanying text, *with supra* notes 108–109 and accompanying text.

111. *Compare Benning*, 248 F.3d at 775 (citing United States v. Bazargan, 992 F.2d 844, 849 (8th Cir. 1993) ("[A] government official must be guilty of affirmative misconduct in order for a defendant to put forth a viable defense of entrapment[-]by[-] estoppel"), *with* United States v. Batterjee, 361 F.3d 1210, 1216 (9th Cir. 2004) (citing United States v. Tallmadge, 829 F.2d 767, 774 (9th Cir. 1987) (stating that the second part of the five-part test to establish entrapment-by-estoppel is that the relevant government official had all of the relevant historical facts).

112. *See, e.g.*, United States v. Apperson, 441 F.3d 1162, 1204–05 (10th Cir. 2006); United States v. Baker, 438 F.3d 749, 755–56 (7th Cir. 2006); United States v. Aquino-Chacon, 109 F.3d 936, 938–39 (4th Cir. 1997); United States v. Spires, 79 F.3d 464, 466–67 (5th Cir. 1996); United States v. Abcasis, 45 F.3d 39, 43–44 (2d Cir. 1995); United States v. Thompson, 25 F. 3d 1558, 1564 (11th Cir. 1994).

113. *Compare Apperson*, 441 F.3d at 1204–05; *Baker*, 438 F.3d at 755–56; *Aquino-Chacon*, 109 F.3d at 938–39; *Spires*, 79 F.3d at 466–67, *and Thompson*, 25 F.3d at 1563–64 *with Abcasis*, 45 F.3d at 44 ("The doctrine depends on the unfairness of prosecuting one who has been lead by the conduct of government agents to believe his acts were authorized.") (citing United States v. Brebner, 952 F.2d 1017, 1025 (9th Cir. 1991)); *see also* United States v. Smith, 940 F.2d 710, 714 (1st Cir. 1991).

114. *Abcasis*, 45 F.3d at 43 (citing United States v. Lansing, 424 F.2d 225, 227 (9th Cir. 1970)).

estoppel defense together with a related defense called "public authority" and focuses on the actual or apparent authority of the government official.[115]

3. State Adoptions of Entrapment-by-Estoppel and the Model Penal Code

Many states have authorized the entrapment-by-estoppel defense.[116] Most have done it through judicial decisions, but a handful of states provide the defense via statutory provision.[117] This Section discusses the adoption of the defense by several states to provide additional understanding of the defense and some of the issues and concerns around its implementation. At the end of this Section, a brief description of the Model Penal Code's treatment of the defense offers additional insight into how this defense fits into criminal defenses in general.

a. State Judicial Acceptance

The State of Washington adopted the entrapment-by-estoppel defense in *State v. Leavitt*, where Leavitt was convicted of illegal possession of a firearm due to a prior conviction.[118] The Washington Court of Appeals found that the trial court in the prior conviction had given Leavitt verbal and written guidance indicating that he was only prohibited from firearms possession during his one-year suspended sentence, whereas the actual state law made the prohibition indefinite.[119] The appropriate section of Leavitt's probation paperwork was also not filled in, further giving the impression that indefinite restrictions did not apply.[120] When the Washington court reversed Leavitt's conviction, it found the entrapment-by-estoppel defense valid.[121] The Washington court cited heavily to a Virginia case, *Miller v. Commonwealth*, which relied on the U.S. Supreme Court cases *Raley* and *Cox*.[122]

In *Miller*, the Virginia Court of Appeals reversed a conviction for prohibited firearm possession, where the defendant had purchased a muzzle-loading rifle after obtaining the opinions of his probation officer, the ATF, and the

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115. *Baker*, 438 F.3d at 753–54. Public authority is a justification defense and is "available when an actor has been specifically authorized to engage in the conduct constituting the offense in order to protect or further a public interest." ROBINSON ET AL., *supra* note 35, § 141. Professor Robinson provides a clear differentiation between public authority and entrapment-by-estoppel defenses: "'Public authority' is an affirmative defense where the defendant reasonably relies on the actual authority of a government official to empower him to engage in what would otherwise be criminal conduct. 'Entrapment by estoppel,' however, applies when the defendant reasonably relies on an official's advice that certain conduct is legal." *Id.* at n.1 (citing United States v. Achter, 52 F.3d 753 (8th Cir.1995)).

116. ROBINSON ET AL., *supra* note 35, at n.1.

117. *See id.*

118. 27 P.3d 622, 623–24, 628 (Wash. Ct. App. 2001).

119. *Id.* at 623, 625.

120. *Id.*

121. *Id.* at 628.

122. *Id.* at 626–28.

state game department.[123] The Virginia appeals court relied on the three U.S. Supreme Court cases regarding the entrapment-by-estoppel defense.[124] The court also provided additional context to the purposes behind the entrapment-by-estoppel defense.[125] The concept that "ignorance is no excuse" developed under the common law because most crimes were viewed as *malum in se*, meaning the actions were inherently and essentially evil regardless of what notice the law has given to the actions.[126] Modern criminal jurisprudence, however, has altered the landscape in favor of crimes that are *malum prohibitum*—wrong because they are prohibited.[127] For the pragmatic purpose of encouraging people to know and comply with the law, the "ignorance is no excuse" policy has largely endured even if it occasionally generates a "seemingly 'unfair' result."[128] In *Miller*, the Virginia court determined that the unfairness was a constitutional due process violation and reversed Miller's conviction under the entrapment-by-estoppel defense.[129]

A Michigan appeals court reversed a conviction for improper election actions by a candidate when it established entrapment-by-estoppel as a valid defense.[130] The court did not reach a decision on the merits but accepted the defendant's argument that the trial court needed to hold an evidentiary hearing on his proposed entrapment-by-estoppel defense to determine whether he could carry the burden as a matter of law.[131] The Michigan court provided the trial court with a five-element test as a basis for its evidentiary determinations.[132] The test combined the four-element test from the Third Circuit[133] but added the fourth element from the Sixth Circuit—fairness[134]—as the fifth element in the Michigan test.[135] Thus, Michigan provided its courts with a degree of clarity in determining the

123. 492 S.E.2d 482, 484 (Va. Ct. App. 1997).

124. *Id.* at 485–87 (citing United States v. Pa. Chem. Indus. Corp. 411 U.S. 655 (1973); Cox v. Louisiana 379 U.S. 559 (1965); Raley v. Ohio, 360 U.S. 423 (1959)); *see also supra* Part I. A–C.

125. *See id.* at 485.

126. *Id.* (citing People v. Studifin, 132 Misc.2d 326, 328–29, 504 N.Y.S.2d 608, 609 (N.Y. Sup. Ct. 1986)).

127. *Id.* (citing *Studifin*, 132 Misc.2d at 328–29, 504 N.Y.S. at 609–10)). The Virginia Court of Appeals cited to a New York case discussing this change: "The emergence of the modern ideological super state with independent needs and rights and an agenda for enforcing them has wrought significant changes in this area of the law. Whereas at common law there was no crime unless an evil act was coupled with an evil intent, now an act or a failure to act as long as done 'knowingly' or 'voluntarily', [sic] could be criminal even where neither the conduct nor its accompanying mental state was 'evil.'" *Studifin*, 132 Misc.2d at 329, 504 N.Y.S.2d at 610.

128. *Miller*, 492 S.E.2d at 485 (citation omitted).

129. *Id.* at 491.

130. People v. Woods, 616 N.W.2d 211, 212–13 (Mich. Ct. App. 2000).

131. *Id.* at 218.

132. *Id.* at 217–18.

133. *See supra* note 103.

134. *See supra* note 104.

135. *Woods*, 616 N.W.2d at 217–18.

reasonableness of a defendant's reliance, while also ensuring the inclusion of an overall fairness assessment.[136]

When Hawaii's Intermediate Court of Appeals accepted the entrapment-by-estoppel defense, it acknowledged the federal constitutional development under the *Raley*, *Cox*, and *PICCO* decisions[137] but grounded its holding in its own state constitution's Due Process Clause.[138] The court's decision did not reach the merits but remanded the case to the trial court with guidance to allow a fact-finder to determine if the defendant could prove that the four-element test was met to the necessary degree of proof.[139]

b. State Legislative Adoptions of Entrapment-by-Estoppel

At least ten state legislatures have enacted statutory provisions that empower criminal defenses based on a reasonable reliance on an official interpretation of the legality of an action.[140] These statutes provide some variation in language and requirements, but generally reflect the language of the Model Penal Code:

> A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:
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> . . .
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> [the defendant] acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in . . . an official interpretation of the public officer or body charged by law with responsibility for the

136. The entrapment-by-estoppel test in Michigan is: (1) a government official; (2) told the defendant that certain criminal conduct was legal; (3) the defendant actually relied on the government official's statements; (4) the defendant's reliance was in good faith and reasonable in light of the identity of the government official, the point of law represented, and the substance of the official's statement; and (5) that given the defendant's reliance, the prosecution would be unfair. *See id.*

137. State v. Guzman, 968 P.2d 194, 204 (Haw. Ct. App. 1998) (citations omitted).

138. *Id.* at 210.

139. *Id.* The test established by the Hawaiian court is: (1) an affirmative representation that certain conduct is legal; (2) by an authorized government official; (3) which the defendant actually believed and acted upon; (4) in reasonable reliance. *Id.* at 207–10.

140. 1 WAYNE R. LAFAVE, ET AL., SUBSTANTIVE CRIMINAL LAW, § 5.6(e)(3) (2d ed. 2012). The states are Colorado, Connecticut, Hawaii, Kentucky, Maine, New Hampshire, New Jersey, New York, Texas, and Utah. COLO. REV. STAT. § 18-1-504(2)(a)–(c) (2012); CONN. GEN. STAT. § 53a-6(b)(2) (2012); HAW. REV. STAT. § 702-220(4) (2012); KY. REV. STAT. ANN. § 501.070(3)(d) (West 2012); ME. REV. STAT. tit. 17-A, § 36(4)(B)(4) (2012); N.H. REV. STAT. ANN. § 626:3(II) (2012); N.J. STAT. ANN. § 2C:2-4(c)(2) (West 2012); N.Y. PENAL LAW § 15.20(2) (McKinney 2012); TEX. PENAL CODE ANN. § 8.03(b) (West 2012); UTAH CODE ANN. § 76-2-304(2)(b) (West 2012).

> interpretation, administration or enforcement of the law defining the offense.[141]

Variations in state statutes include requiring that an official interpretation be made in writing, defining the defendant's burden of proof, and allowing conviction for lesser-included offenses if the defendant would be guilty of the lesser offense based on the mistake of law.[142]

As the foregoing discussion demonstrates, the entrapment-by-estoppel defense has experienced significant and widespread acceptance in both federal and state courts, as well as at least moderate acceptance in state legislative action. But it has not yet arrived everywhere. The key to its acceptance in Arizona will be founded in the Due Process Clause of the Fourteenth Amendment. Because Arizona courts generally accept the due process jurisprudence of the United States, a strong argument can be made that acceptance of entrapment-by-estoppel is not only likely but is, in fact, inevitable. The next Part of this Note will discuss due process within Arizona.

III. ADOPTION OF FEDERAL DUE PROCESS IN ARIZONA

Due process in Arizona affords an individual a fundamentally fair opportunity to defend against the power of the state to deprive one of one's rights.[143] Both the U.S. Constitution and the Arizona Constitution provide people with due process protections, forbidding the state from denying rights and protections to people, the denial of which would be "shocking to the universal sense of justice."[144] In order to advocate for the use of the defense of entrapment-by-estoppel in Arizona, this Part will discuss what due process means in Arizona courts. It argues that the close relationship between the due process requirements of the Arizona and U.S. Constitutions implicates the acceptance of the defense by Arizona courts, and that the concept of fundamental fairness, which underlies the Due Process Clause in both Constitutions, requires that acceptance.

A. The Incorporation of Rights via Due Process

The Fourteenth Amendment of the U.S. Constitution prohibits, *inter alia*, a state from depriving a person of "life, liberty, or property, without due process of law."[145] In practice, the Fourteenth Amendment's Due Process Clause provides federal court review of state criminal prosecution to ensure "respect for those personal immunities which . . . are 'so rooted in the traditions and conscience of

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141. MODEL PENAL CODE § 2.04(3)(b)(iv) (1962).

142. COLO. REV. STAT. § 18-1-504(2)(c) (2012); N.H. REV. STAT. ANN. § 626:3(II) (2012); TEX. PENAL CODE ANN. §§ 8.03(b)(2), (c) (West 2012); UTAH CODE ANN. §§ 76-2-304(2)(b)(ii), (3) (West 2012).

143. State v. Melendez, 834 P.2d 154, 157 (Ariz. 1992) (citing Oshrin v. Coulter, 688 P.2d 1001, 1003 (Ariz. 1984)).

144. *Oshrin*, 688 P.2d at 1003 (quoting Crouch v. J.P. Ct. of Sixth Precinct, 440 P.2d 1000, 1005–06 (Ariz. 1968)) (internal quotation marks omitted); *see also* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 246 (1960).

145. U.S. CONST. amend. XIV, § 1, cl. 2.

our people as to be ranked as fundamental', [sic] . . . or are 'implicit in the concept of ordered liberty.'"[146] In *Rochin v. California*, the U.S. Supreme Court explored the concept of incorporation: the enforcement of the personal rights guarantees of the Bill of Rights to the states.[147] The U.S. Supreme Court has now incorporated most of the Bill of Rights into state criminal courts.[148]

When the U.S. Supreme Court determines that a constitutional right is incorporated, it holds that a state court cannot infringe that right.[149] Some criminal due process rights, however, existed before the doctrine of incorporation, and there are still certain rights, above and beyond those within the Bill of Rights, that are imposed by the federal courts onto Arizona criminal procedure by the "fundamental fairness" doctrine.[150] The U.S. Supreme Court treats those instances where it implicates due process rights beyond those incorporated as narrowly defined and appropriate only when "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[151]

Similar to the U.S. Constitution, the Arizona Constitution affords its people due process protection from state action in nearly identical wording: "No person shall be deprived of life, liberty or property without due process of law."[152] While the wording is extremely similar and the two clauses operate in close parallel, the Arizona Supreme Court has established that the two clauses are not coterminous.[153] It remains the role of the Arizona Supreme Court to determine the meaning of the Due Process Clause of the Arizona Constitution.[154] Although some authorities have argued that state court interpretations create opportunities to

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146. Rochin v. California, 342 U.S. 165, 169 (1952) (citations omitted). In *Rochin*, the U.S. Supreme Court held that illegal police entry into a person's home, and related efforts to extract objects from a defendant's mouth and digestive tract—including involuntary vomit inducement—to recover swallowed evidence, "shock[ed] the conscience." *Id.* at 172.

147. LAFAVE ET AL., *supra* note 140, § 2.4(f).

148. McDonald v. City of Chi., 130 S. Ct. 3020, 3034–35 (2010) (holding that the Second Amendment right to keep and bear arms is fundamental and therefore incorporated to the states but also providing a listing of incorporation decisions).

149. Malloy v. Hogan, 378 U.S. 1, 10–11 (1964).

150. Fundamental fairness is founded on the concept of ordered liberty and presumes both that due process rights are not limited to those rights enumerated in the Bill of Rights and that not all rights provided in the Bill of Rights are fundamental. LAFAVE ET AL., *supra* note 140, § 2.4(a); *see also e.g.*, Schad v. Arizona, 501 U.S. 624, 645–48 (1991) (plurality) (addressing the due process implications of lesser included jury instructions in death penalty cases); Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (requiring defendant to demonstrate "bad faith" on the part of the police in order for failure to preserve potentially useful evidence to become a denial of due process); *Rochin*, 342 U.S. at 169.

151. Patterson v. New York, 432 U.S. 197, 202 (1977) (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958)).

152. ARIZ. CONST. art. II, § 4; *see also* State v. Youngblood, 844 P.2d 1152, 1157–58 (Ariz. 1993) (referring to the existence of "Arizona due process").

153. *Youngblood*, 844 P.2d at 1158 (Feldman, J., concurring in part and dissenting in part).

154. *Id.*; Pool v. Super. Ct., 677 P.2d 261, 271 (Ariz. 1984).

reduce U.S. Supreme Court guarantees of personal rights,[155] the Arizona courts remain the final arbiter of Arizona due process, subject only to the limitations of the U.S. Constitution.[156]

For example, the Arizona Supreme Court provided its own interpretation of a constitutional right—double jeopardy protection[157]—when it decided *Pool v. Superior Court*.[158] The issue in *Pool* was when double jeopardy protection will prevent a retrial where prosecutorial misconduct led to a mistrial.[159] Two years before the *Pool* decision, the U.S. Supreme Court decided *Oregon v. Kennedy*, determining that, in cases of prosecutorial misconduct, double jeopardy would only attach if the prosecutor intended to cause a mistrial as determined by "objective facts and circumstances."[160] Although Arizona followed the U.S. Supreme Court jurisprudence on this issue prior to the *Oregon v. Kennedy* decision, when Arizona's highest court took up *Pool*, it created a slightly different right for Arizonans.[161] The rule in Arizona now is that double jeopardy attaches when a prosecutor's intentional and knowing misconduct is pursued for "any improper purpose" and with "indifference to a significant resulting danger of mistrial," and a mistrial is granted.[162] Here, the Arizona Supreme Court gave Arizonans stronger constitutional protection than that recognized by the U.S. Supreme Court, allowing for double jeopardy protections to remain attached under a broader set of circumstances.

The Arizona Supreme Court has treated personal rights clauses in the United States and Arizona Constitutions as providing similar protections since before the incorporation doctrine of personal rights.[163] In its 1926 decision, *Malmin v. State*, the Arizona Supreme Court considered the appeal of a warrantless search of an automobile under both the Fourth Amendment of the U.S. Constitution and sections eight and ten of the Arizona Constitution.[164] The Arizona Supreme Court opined that, while it clearly did not need to consider U.S. constitutional limitations, as they were not at that time applicable to state law decisions, the two documents were intended to have the same general effect and purpose and therefore federal jurisprudence was "well in point."[165] The court went

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155. *See, e.g.*, Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227, 237–39 (2008).

156. *See* State v. Farley, 19 P.3d 1258, 1260–61 (Ariz. Ct. App. 2001).

157. Double Jeopardy protections are provided by U.S. CONST. amend. V and ARIZ. CONST. art. II, § 10.

158. *See generally Pool*, 677 P.2d at 271–72.

159. *Id.* at 263.

160. 456 U.S. 667, 675–76 (1982) (plurality opinion).

161. *See Pool*, 677 P.2d at 271.

162. *Id.* at 271–72.

163. *See* Malmin v. State, 246 P. 548, 548–49 (Ariz. 1926).

164. *Id.* at 548. Arizona's Constitution states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." ARIZ. CONST., art. II, § 8. Section 10 states: "No person shall be compelled in any criminal case to give evidence against himself or be twice put in jeopardy for the same offense." ARIZ. CONST., art. II, § 10.

165. *Malmin*, 246 P. at 549.

on to follow a then-recently decided federal automobile search decision under the Fourth Amendment.[166]

B. The Due Process Right to Present a Complete Defense

Both Arizona and federal constitutional rights to due process and confrontation guarantee a criminal defendant "a meaningful opportunity to present a complete defense."[167] Arizona's Rape Shield Law was found constitutional in *State v. Gilfillan* under the "complete defense" doctrine's concept of the importance of the defendant's need to examine and present witnesses.[168] The law was found constitutional despite limits it put on the due process right of a defendant to confront victim witnesses because the law provided some procedural protections to the defendant, rather than being arbitrary or providing a per se exclusion.[169] The holding in *Gilfillan* indicates that the ability of courts or the legislature to limit the presentation of a complete defense is narrowly constricted to circumscribed situations and to proportionality.[170]

Another Arizona case, *State v. Abdi*, implicated the due process requirement for the state to prove guilt beyond a reasonable doubt.[171] In *Abdi*, the defendant argued that mandatory jury instructions regarding the victim's "defense of residence" caused a fundamentally unfair shift in the burden of proof where the defendant was claiming justification by self-defense.[172] Because the jury instructions directed that any response to a forceful home entry was presumed reasonable, the jury instructions forced the defendant to prove his actions in claimed self-defense were also reasonable.[173] The standard in Arizona, however, is that the state is required to disprove, beyond a reasonable doubt, a claim of self-defense for which the defendant produces any evidence.[174] Because the jury instructions validated the victim's defense of his home as reasonable and lacked any further clarification, the instructions negated the state's requirement to disprove the defendant's self-defense claim by the constitutionally required burden of proof.[175]

While the number of rights implicated by the concept of due process is not infinite, they are certainly greater than it is reasonable to discuss here. The key point in the context of the entrapment-by-estoppel defense is that, because due process is implicated, the issue rises to the level of constitutional interpretation. An

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166. *Id.* (citing Carroll v. United States, 267 U.S. 132, 153 (1925)).

167. California v. Trombetta, 467 U.S. 479, 485 (1984).

168. 998 P.2d 1069, 1076 (Ariz. Ct. App. 2000). Arizona's Rape Shield Law "generally prohibit[s] a criminal defendant from introducing at trial evidence relating to a victim's reputation for chastity and opinion evidence relating to a victim's chastity." *Id.* at 1074.

169. *Id.* at 1076 (citing Rock v. Arkansas, 483 U.S. 44, 61 (1987)).

170. *See id*.

171. 248 P.3d 209, 213 (Ariz. Ct. App. 2011).

172. *Id.* at 212–13.

173. *Id.*

174. *Id.* at 213.

175. *Id*. at 213–14.

Arizona court considering the validity of the entrapment-by-estoppel defense should analyze the application of the defense within the narrow constraints of Arizona due process jurisprudence. While Arizona's due process jurisprudence is not the exact equivalent of federal due process jurisprudence, the approach of the Arizona courts is that they are generally equivalent with only slight differences—presumably providing stronger protections for Arizonans. It would seem inconsistent with this concept of near equivalence to deny Arizonans the due process-based entrapment-by-estoppel defense when the federal courts have provided for the defense.

IV. ARIZONA SHOULD ACCEPT ENTRAPMENT-BY-ESTOPPEL

Opportunities for defendants to assert the affirmative defense of entrapment-by-estoppel do not appear to be common. In the vast majority of likely circumstances, when a government official or someone authorized to act on the government's behalf provides a person with guidance on the law, that advice is going to be correct. Even when the information is incorrect, the chance of that bad advice ending with a crime being charged is remote. This Part argues that entrapment-by-estoppel does not currently find acceptance in Arizona because of its rarity and because of natural resistance to accepting the concept that, sometimes, ignorance of the law is a valid excuse. Based on Arizona's due process jurisprudence, however, Arizona courts should accept the defense.

A. The Status of Entrapment-By-Estoppel and Affirmative Defenses in Arizona

Arizona jurisprudence reflects resistance to criminal defenses like the kind offered under entrapment-by-estoppel. There are significant indications that neither the Arizona legislature nor its courts are open to considering a defense that appears to excuse ignorance of the law. This Section describes the current state of affirmative defenses in Arizona and then describes an initial attempt at using the entrapment-by-estoppel defense in Arizona. Entrapment-by-estoppel will likely only become established in Arizona as a result of its constitutional nature because affirmative defenses generally must be statutory to be recognized.

In 1997, the Arizona legislature eliminated common law affirmative defenses, allowing only for defenses specifically provided for either in Arizona's criminal code or in another statute or ordinance.[176] To defend against a criminal charge under the current scheme, the statute limits defendants to only specified justification defenses and to demonstrating that the state has failed to meet any one or all of the statutory elements of an offense.[177]

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176. 1997 Ariz. Sess. Laws 298 (codified at ARIZ. REV. STAT. ANN. § 13-103 (2012)).

177. *See* ARIZ. REV. STAT. ANN. § 13-103. The statutory justification defenses in Arizona include: (1) execution of public duty, ARIZ. REV. STAT. ANN. § 13-402(B)(2) (2012); (2) various circumstances where use of force is authorized, ARIZ. REV. STAT. ANN. § 13-403(1)-(6) (2012) (*e.g.*, to prevent a suicide, parental or caretaker discipline, maintenance of order by a responsible individual); (3) self-defense, ARIZ. REV. STAT. ANN.

However, the Arizona legislature did not, and could not, eliminate affirmative defenses available through constitutional due process guarantees.[178] Any defense which was previously available to a defendant, either through incorporation or within the narrow list of the due process defenses that exist as a matter of fundamental fairness, must necessarily continue to exist in order to give federal due process its full weight.[179] If a state could restrict an individual's federally guaranteed due process rights, that part of the Fourteenth Amendment incorporated to the states would essentially become a nullity.[180]

The due process right to present the defense of entrapment-by-estoppel has been recognized in the Federal District Court of Arizona and by the Ninth Circuit.[181] Reported cases in Arizona state courts where the defense has been presented are sparse. In one unreported 2010 case, Joshua Kosatschenko appealed his conviction for prohibited possession of a firearm on the grounds that the trial court erred when it rejected his entrapment-by-estoppel defense.[182] While knowing that the restoration of his right to possess a firearm had been denied, Kosatschenko admittedly lied about juvenile probation on his licensure application to be an armed guard.[183] At his trial, Kosatschenko claimed reliance on the Arizona Department of Public Safety's issuance of a license for him to be an armed guard.[184]

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§ 13-404(A) (2012); (4) duress, ARIZ. REV. STAT. ANN. § 13-412(A) (2012); and (5) necessity, ARIZ. REV. STAT. ANN. § 13-417(A) (2012).

178. *See* Jones v. Sterling, 110 P.3d 1271, 1277 (Ariz. 2005). In *Jones*, the Arizona Supreme Court vacated a denial of expert-witness funding that an indigent defendant had requested. *Id.* at 1277, 1279. The trial court had denied the funding on the basis that selective enforcement of traffic laws was not a defense to drug charges, meaning that the expert fees were not "reasonably necessary to present a defense." *Id.* at 1273 (quoting ARIZ. R. CRIM. P. 15.9(a)). On remand, the Arizona Supreme Court noted that selective enforcement could be a viable, Fourteenth-Amendment-based criminal defense. *Id.* at 1279. The Supreme Court directed the trial court to determine—before deciding whether or not an expert was necessary—if the defense had presented credible evidence of discriminatory effect and intent. *Id.* The Arizona Supreme Court summarily rejected the State's argument that ARIZ. REV. STAT. ANN. § 13-103 could prohibit all defenses not specifically provided for by statute stating: "[it] plainly cannot prevent a defendant from raising *constitutional* defenses to a criminal charge. A selective enforcement claim . . . arises under the Fourteenth Amendment, not under Arizona statutes or the common law." *Id.* at n.7.

179. *See supra* Part III.A.

180. *See* 1 JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 2:2 (3d ed. 2012).

181. *See supra* Part II.A.

182. State v. Kosatschenko, 2010 WL 4888037, at *1 ¶ 1 (Ariz. Ct. App. 2010).

183. *Id.* at *1–2 ¶¶ 2, 7. The opinion found that, while Kosatschenko technically was correct in answering "no" on the application regarding prior convictions because a delinquency finding is distinct from a conviction, answering "no" about having been on probation was a falsehood; one that kept relevant information from the authorities reviewing his application. *Id.* at *2 ¶ 7.

184. *Id.* at *2 ¶ 8.

In upholding Kosatschenko's conviction, the Arizona Court of Appeals passed on the opportunity to determine the validity of the entrapment-by-estoppel defense in Arizona, instead finding the defendant had failed to meet the burden of proof of the defense, regardless of the defense's validity.[185] The court noted that Kosatschenko failed to establish two elements of the defense: (1) that the defendant had provided the government official with all relevant facts; and (2) that reliance on the guidance of the government official was reasonable.[186]

Notably, the Arizona Court of Appeals agreed with the trial court and wrote—in what is arguably dicta—that entrapment-by-estoppel "is not a statutorily recognized defense in Arizona, nor has it been created or recognized by common law."[187] This acknowledgement by the court of appeals as to the status of the entrapment-by-estoppel defense in Arizona contains a potential opening to the future acceptance of the defense. It potentially indicates a misunderstanding of the defense by the Arizona courts. Because all common law defenses in Arizona were eliminated in 1997,[188] the court of appeals's language about common law defenses could be a reference to those defenses that exist or are created by constitutional-due-process jurisprudence, rather than truly meaning common law defenses. This could also mean that the court may equate due-process-driven, affirmative defenses as the equivalent of common law defenses. If that is the case, then Arizona courts should be open to the acceptance of entrapment-by-estoppel once finally faced with a fact pattern that supports both acceptance and a successful use of the defense.

On the opposite side of the scale, Arizona courts may interpret existing case law as indicating that the entrapment-by-estoppel defense is something less than a due process defense. If this interpretation exists, it suggests that the defense will eventually gain acceptance within Arizona courts. Over time, the true nature of the defense can only become clearer. Arizona courts will eventually recognize that—while it could be a statutorily defined or a common law defense—its constitutional nature does not require it to be statutorily defined for it to be a valid defense in Arizona. In the end, whether the Arizona Court of Appeals misunderstood the nature of entrapment-by-estoppel in *Kosatschenko*, or whether the court was merely exhibiting a healthy amount of circumspection about validating a rare and unconventional defense on a bad set of facts, the Arizona Court of Appeals, wisely, did not preclude use of the defense in Arizona.[189]

The Arizona Court of Appeals's statement that the entrapment-by-estoppel defense is not statutorily recognized is questioned by at least one authority, Judge Gerber, who argues that a reliance defense like entrapment-by-estoppel is implied under title 13, section 402(B) of the Arizona Revised

185. *Id.* at *1 ¶ 4.
186. *Id.* at *1 ¶ 5.
187. *Id.* at *1 ¶ 4.
188. *See supra* note 177 and accompanying text.
189. *See Kosatschenko*, 2010 WL 4888037, at *1 ¶¶ 4–8.

Statutes.[190] This section of the Arizona Criminal Code provides a justification defense for reliance on court or police authority for illegal conduct when "[a] reasonable person would believe such conduct is required or authorized."[191] The statute provides the defense to people even in those situations where the reliance is on courts lacking jurisdiction or police having exceeded their legal authority.[192] Citing to both *Raley*[193] and *Cox*,[194] Judge Gerber argues that these provisions "impl[y] that the State may not convict a citizen for exercising a privilege which the State clearly had told him was available."[195] Thus, a connection to the jurisprudential root of the entrapment-by-estoppel defense is arguably made by the Arizona Criminal Code. In order to find acceptance in Arizona by statutory authority, however, the defense of entrapment-by-estoppel will still likely need to overcome at least one more hurdle, Arizona's statutory ban on the use of ignorance or mistake defenses. The next Section discusses this ban.

B. Arizona's Ban on Ignorance or Mistake Defenses Should Not Prevent Acceptance of the Entrapment-by-Estoppel Defense

Unlike some other states that have statutorily authorized the use of some ignorance or mistake defenses,[196] Arizona has statutorily banned ignorance or mistake of law defenses.[197] Although the ban is a valid policy choice, it should not be considered an ironclad maxim of Arizona jurisprudence by the legislature. Growth in the number of laws and regulations that people are subject to should be sufficient justification to find room within the prohibition for a mistake-of-law defense founded on an official misinterpretation. As laws and regulations continue to grow in number and complexity, more people will be at risk of violating the law despite a sincere effort to comply.

Arizona's statutory approach to ignorance or mistake defenses parses very little: "Ignorance or mistake as to a matter of law does not relieve a person of criminal responsibility."[198] The Arizona Supreme Court, in *State v. Morse*, upheld this statute soon after it was enacted.[199] The Arizona Supreme Court favorably cited a criminal law treatise in support of the concept that ignorance of the law is

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190. ARIZ. REV. STAT. ANN. § 13-402(B) (2013); RUDOLPH J. GERBER ET AL., CRIMINAL LAW IN ARIZONA 48–50 (1978) (looking to A.R.S. § 13-402(B)). During the 1970s, Judge Gerber served on the Code Commission Staff that supported the development and enactment of the only comprehensive revision of the Arizona Criminal Code. *Id.* at iii–xi. He published a treatise on the sources of each section of the Criminal Code between the code enactment and implementation. *Id.* at vii–viii. That treatise was revised in 1993 and 2000. *See generally* RUDOLPH J. GERBER ET AL. CRIMINAL LAW IN ARIZ. (2d ed. 2000).

191. ARIZ. REV. STAT. ANN. § 13-402(B) (2012).

192. *Id.*

193. *See supra* Part I.A.

194. *See supra* Part I.B.

195. GERBER ET AL., *supra*, note 190 at 49.

196. ROBINSON ET AL., *supra* note 35, at n.1.

197. ARIZ. REV. STAT. ANN. § 13-204(B) (2012).

198. *Id.*

199. 617 P.2d 1141, 1147 (Ariz. 1980).

no defense.[200] Forty years after that treatise was initially published, one of the authors, Wayne LaFave—who is still a nationally recognized authority on criminal law—maintains that ignorance of the law is "no excuse," but he now offers that there are valid exceptions.[201]

Professor LaFave identifies four different, albeit limited, sets of circumstances where a person's belief in the legality of certain conduct should bar conviction: (1) when the statute specifying the offense has not been reasonably made available; (2) when a person relies on a judicial decision or statute that is subsequently determined by a higher court to be unconstitutional; (3) when there is reasonable reliance on an official interpretation; and (4) when there is reliance on the advice of counsel.[202] According to LaFave, the fundamental reason why these situations may represent an exception to the concept that ignorance is no excuse is that, in each of these situations, a government official or representative acting in an official capacity has assisted or contributed to the person's ignorance or mistake.[203]

Arizona courts should consider an additional factor when confronted with an entrapment-by-estoppel defense. While it is easy to jump to the conclusion that defendants will falsely claim ignorance of the law, where the elements of entrapment-by-estoppel are proven by a preponderance of the evidence, the hazards of false ignorance are overcome by requiring a sincere desire to obey the law and a reasonable effort to carry out that obedience. Concerns with entrapment-by-estoppel becoming an ever-enlarging loophole should be alleviated by the difficultly of establishing the defense in the first place.

Another Arizona case addressed the unacceptability of the ignorance of the law defense, this one in the context of lack of notice of the law. In *State v. Soltero*, the defendant challenged his conviction on extreme DUI, arguing that when the legislature dropped the blood alcohol content limit from 0.18 to 0.15 by emergency legislation, his subsequent conviction was unconstitutional.[204] Soltero's due process argument was that because emergency legislation becomes effective immediately upon signature of the governor, he lacked sufficient notice prior to when the law would have become effective under normal legislative rules—the 91st day after the legislative session ended.[205] In rejecting Soltero's defense, the appeals court cited Judge Gerber's seminal treatise, *Criminal Law in Arizona*,[206] stating that the underlying assumption of Arizona's decision to deny ignorance of the law defenses is that the "the content of the criminal law approximates the

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200. *Id.* at 1148 (citing W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW, § 47 at 356–57 (1972)).

201. LAFAVE, *supra* note 140, § 5.6(a).

202. *Id.* § 5.6(e)(1)–(4).

203. *Id.* at § 5.6(e).

204. 71 P.3d 370, 371 (Ariz. Ct. App. 2003).

205. *Id.*

206. GERBER ET AL, *supra* note 190.

average person's actual assessment of tolerable behavior and that the people know everything needed to obey the law."[207]

Even this holding, while seeming toward the absolute, also holds out room for the entrapment-by-estoppel defense. The underlying theme of Judge Gerber's justification, and the assumption of the "ignorance is no excuse" statute, is that laws generally lie within a person's view of acceptable conduct. In an environment of ever-increasing laws and rules, that assumption is stretched. The presumption that any person knows or *can* know all the laws they need to know in order to remain law-abiding steadily dissolves under the weight of rule and law making. The entrapment-by-estoppel doctrine provides some small amount of flexibility to the application of such a hard stricture. It shifts away from the hard line to provide relief to those who appear to truly desire to be compliant but fall short because of reliance on authority.

C. Arizona Should Adopt the Ninth Circuit's Entrapment-by-Estoppel Five-Element Test but Define the Elements Using Arizona Due Process.

As a point of departure, this Note advocates for the implementation of the five-part test from the Ninth Circuit. The test should be legislated as a necessary update to valid statutory defenses in light of the changing regulatory environment. The Arizona courts—even in the absence of legislative action—must authorize the defense when the inevitable case arises that meets the constitutional due process imperative.

The Ninth Circuit test provides the clearest possible version of the defense. To recap, to obtain the protection of the entrapment-by-estoppel defense, the defendant must prove that: (1) an authorized government official empowered to render the claimed erroneous advice; (2) who had been made aware of all relevant historical facts; (3) affirmatively told the defendant the proscribed conduct was permissible; (4) the defendant relied on this false information; and (5) this reliance was reasonable.

This test gives Arizona the ability to define this defense in two basic ways. First, Arizona will be able to define who qualifies as a government official authorized to render advice. The court could decide that only certain levels of government officials are capable of providing the advice. Second, the entrapment-by-estoppel defense would gain an Arizona voice by defining "reasonable reliance." In the end, the Fourteenth Amendment's implication of due process jurisprudence means that the defense should be accepted in Arizona.

CONCLUSION

In the end, providing Arizona courts with justifications to move away from the legal maxim that ignorance is not a defense for violating the law may not be the most effective way to gain acceptance of the entrapment-by-estoppel defense. Even strong arguments that there should be exceptions to the strict rule

207. *Soltero*, 71 P.3d at 372 (discussing ARIZ. REV. STAT. ANN. § 13-204(B) (2012).

and that reliance on an official opinion should be one of them may not be as effective as making the due process argument. While it would seem appropriate for the legislature to modify the statutory restrictions on mistake of law defenses, Arizona's due process jurisprudence of fundamental fairness demands acceptance of the defense.

Arizona's due process jurisprudence incorporates individual rights and protections as they are articulated and determined by the U.S. Supreme Court. The Arizona Supreme Court does not just rubber-stamp U.S. Supreme Court decisions regarding the rights of Arizonans. The Arizona court has a responsibility to ensure that the due process rights of people under the Arizona Constitution are also protected. While executing the responsibility of providing that assurance, the Arizona Supreme Court does not deviate significantly from the U.S. Constitution's due process guarantees. Any differences in application between federal due process and Arizona due process provide greater protection to individual rights under Arizona jurisprudence than that required under federal law.

It offends one's sense of justice to hold a person criminally liable under conditions where the entrapment-by-estoppel defense would become operative. A person, wanting to act in compliance with the law, seeks and receives an opinion from a government official or authorized representative regarding what conduct will allow the person to remain within the law. Fundamental fairness demands that there be no criminal liability for that person when the advice turns out to be erroneous. Looked at from a different angle, by what moral standard could anything more be asked of the person in such a situation?

It is precisely the fundamental fairness argument that makes the entrapment-by-estoppel defense a due process requirement that can and should apply under both the U.S. Constitution and the Arizona Constitution. Entrapment-by-estoppel provides people the right to present a complete defense when facing a potential loss of liberty. Arizona courts should embrace entrapment-by-estoppel as yet another aspect of providing a fundamentally fair opportunity for the criminal justice system in Arizona to find the right answer in most cases.

Arizona may choose to implement the entrapment-by-estoppel defense in a way that does not give Marion Smith relief from her prohibited possession charge. It may be that reliance on an FBI background check is not deemed reasonable grounds to affirm return of the right to firearm possession. It may also be that, within Arizona jurisprudence, a federally licensed firearms dealer facilitating that background check is not treated as a government representative. Firearms possession, however, is just one of many situations where people rely on the advice and opinions of government officials and their agents. As the size and scope of Arizona government continues to grow and the areas of activity subject to government regulation continue to grow, the fundamental fairness of the entrapment-by-estoppel defense is compelling.