BORDER CROSSING, CLUB HOPPING, AND UNDERAGE "POSSESSION" OF ALCOHOL: AN ANALYSIS OF THE LAW ENFORCEMENT RESPONSE TO THE PROBLEM OF CROSS-BORDER UNDERAGE DRINKING IN SOUTHERN ARIZONA

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I. INTRODUCTION

Legislation regulating the possession and consumption of alcohol by those considered too young to drink is not new. In some states, laws banning the sale of alcohol to minors have been on the books in one form or another since the early 1800s.[1] Although most of these early statutes regulated only the sale of alcohol to young people, by the 1880s, many states had passed legislation prohibiting the actual consumption of alcohol by minors.[2] In fact, in the period following prohibition, every jurisdiction in the United States proscribed drinking by individuals falling below a certain age,[3] although that age often varied greatly from state to state.[4] Today, however, the situation is different. Largely as a result of increased public concern and successful federal legislative efforts during the 1980s,[5] the minimum drinking age today is set at twenty-one in every state.[6]

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1. *See* Michael Phillip Rosenthal, *The Minimum Drinking Age for Young People: An Observation*, 92 DICK. L. REV. 649, 652 (1988).
2. *See id.* at 652.
3. *See id.*
4. *See id.* at 652–53.
5. *See id.* at 655–56. Several states passed statutes raising the minimum drinking age in response to legislation passed by Congress in 1984 requiring the Secretary of Transportation to withhold federal transportation funds if a state's legal drinking age was less than twenty-one. *See id.*
6. *See* Al Stamborski, *Brewery Chief Questions Age-21 Drinking Laws; August A. Busch III Suggests Law Contributes to Campus Alcohol Abuse*, ST. LOUIS POST-DISPATCH, Oct. 12, 2000, at A1.

Despite this recent increase in awareness and uniformity, all indications suggest that higher drinking ages and stricter enforcement have done little to ameliorate the problem of underage drinking. A recent national survey reported that 29.4% of Americans between the ages of twelve and twenty qualified as "current users" of alcohol.[7] The survey also reported that of those approximately 10.4 million adolescent "current users," nearly 7 million had engaged in "binge" drinking at least once during the thirty days preceding the subject's interview.[8] Despite the report's finding that "current use" and "binge drinking" rates remained unchanged from the previous year,[9] the sheer prevalence of illegal alcohol use by American minors demonstrates both the scope and severity of what has become a very serious national problem.

The ubiquity of underage drinking renders the enforcement of underage alcohol statutes a formidable task in every state. However, the problem presents unique and difficult challenges in those states that border Mexico. For years, minors[10] in Arizona, California and Texas have embarked on the "perilous road trip" to the bars and nightclubs south of the border where the legal drinking age is eighteen.[11] Upon observing the number of border-crossing youth increase with each passing year, law enforcement agencies in many border communities began taking steps to prevent the dangerous excursions. For example, in August of 1998, law enforcement agencies in California initiated "Operation Safe Crossing" in an attempt to combat the problem.[12] Taking advantage of a California law requiring a parent's consent for a minor to cross the border,[13] participating officers began successfully preventing persons under the age of eighteen from consuming alcohol in Mexico by simply preventing them from leaving the country.[14] In Texas, officials in border towns such as El Paso have attempted to curb the phenomenon through the use of occasional operations whereby officers deployed to the border

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7. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., DEP'T OF HEALTH & HUMAN SERVS., SUMMARY OF FINDINGS FROM THE 1999 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE (2000). The report defined "current use" of alcohol as the consumption of at least one alcoholic beverage within the thirty days preceding the survey participant's interview. *See id.*

8. *See id.* For purposes of the survey, "binge drinking" was defined as the consumption of five or more alcoholic beverages on at least one occasion during the previous thirty days. *See id.*

9. *See id.*

10. For convenience, the term "minor" will be used throughout this Note to refer to all individuals below the age of twenty-one.

11. Tim Stellar, *Perilous Road Trip Deaths Mount as Youths Cross Border to Drink*, ARIZ. DAILY STAR, Feb. 3, 2000, at 1A.

12. *See id.*

13. *See id.*; *see also* CAL. WELF. & INST. CODE § 1500 (Deering 2001).

14. Although useful as a device to keep youth below the age of eighteen from consuming alcohol in Mexico, such a strategy is nonetheless ineffective as a means of keeping individuals above the age of eighteen, but younger than twenty-one, from crossing the border to drink.

are instructed to issue citations to minors found in violation of curfew and drunk driving statutes.[15]

In some parts of Southern Arizona, however, officials decided to address the problem in a unique way.[16] In February 2000, the Southern Arizona DUI Task Force, a group of law enforcement officers from different agencies around Southern Arizona, began deploying officers to the border to issue citations for underage possession of alcohol to any person under the age of twenty-one who had consumed alcohol in Mexico.[17] Although the citations resembled an attempt to prohibit conduct occurring outside the jurisdictional reach of the state, officials justified the practice on the theory that the presence of alcohol in a person's body is sufficient to constitute "possession" under Arizona law.[18] Significantly, the Southern Arizona DUI Task Force is not the only Arizona law enforcement agency to issue citations for underage possession of alcohol based on the presence of alcohol in the minor's body. Officials in Nogales, Arizona have issued "border possession" citations to minors returning from Mexico for years as a way of managing the problem.[19] Likewise, police officers in the Southern Arizona towns of Marana and Sahuarita frequently issue citations for underage possession of alcohol, even in the absence of a container, as long as a blood alcohol test reveals that the minor has alcohol in his or her system.[20]

This Note analyzes the propriety of issuing citations for underage possession of alcohol, based solely on the presence of alcohol in a minor's body, where the actual consumption has occurred in a foreign jurisdiction. Part II of the Note discusses the scope of the cross-border underage drinking problem in Southern Arizona and introduces the law enforcement response at issue. Part III argues that the practice of charging individuals who consume alcohol in Mexico with possession of alcohol results in the criminalization of conduct that is not

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15. *See* Stellar, *supra* note 11, at 1A.

16. *See* Thomas Stauffer, *104 Cited in Underage-Drinking Sting at Border*, ARIZ. DAILY STAR, Feb. 21, 2000, at 2B.

17. *See id.*

18. *See id.*; *see also* ARIZ. REV. STAT. ANN. § 4-244(9) (West 2000) (providing that it is unlawful for "a person under the legal drinking age to buy, receive, have in the person's possession or consume spirituous liquor").

19. *See* Stellar, *supra* note 11, at 1A.

20. Telephone Interview with Diane Lalosh, Town Prosecutor for the Towns of Marana and Sahuarita, Arizona (Sept. 13, 2001). According to Ms. Lalosh, her office sees approximately six underage possession of alcohol citations per month where the minor merely had alcohol in his or her body. Ms. Lalosh also stated that some, but not all, of these cases involve teens who had consumed alcohol in Mexico. Although this Note focuses on the validity of citations issued to minors returning from Mexico, most of the arguments contained herein are equally applicable to the situation where an officer issues such a citation without knowledge of where the actual consumption took place. Significantly, Ms. Lalosh added that she has yet to see a minor charged under this theory of possession contest such a citation at trial, commenting that after explaining that the language of the applicable statute is broad enough to cover "alcohol in the body," most minors elect either to plead guilty or participate in a first-time offender diversion program.

proscribed by statute.[21] This analysis focuses on the plain meaning of the language used in relevant Arizona statutes and the construction of similar language by the courts of Arizona and other jurisdictions. Part IV analyzes the propriety of the practice in light of several Arizona criminal code provisions and case law, such as the requirement that penal statutes "give fair warning of the nature of the conduct proscribed."[22] Part V of the Note addresses federal constitutional concerns raised by the application of Arizona's underage possession statute to minors who consume alcohol in Mexico, concluding that the citations likely violate the Due Process Clause of the Fourteenth Amendment. The concluding section identifies several law enforcement approaches that could be employed as an alternative to the current practice and argues that these approaches would constitute an equally effective response to the problem.

II. SCOPE OF THE PROBLEM AND THE LAW ENFORCEMENT RESPONSE

Although the cross-border underage drinking phenomenon is hardly a recent development, the issue caught the attention of the media, government agencies, and concerned citizens following a string of fatal automobile accidents involving American teens who had consumed alcohol in Mexico.[23] Shortly thereafter, officials from around Southern Arizona resolved to put a stop to the dangerous excursions, although several impediments stood in the way of an effective solution.

A. Obstacles Impeding Attempts to Curb Cross-Border Underage Drinking

The most obvious and significant obstacle hampering an effective response to the problem was the probability that any direct attempt to prohibit underage alcohol use by Americans in Mexico would likely run afoul of the settled rule that "Arizona has no jurisdiction over offenses committed outside of its territorial limits."[24] Although Arizona's extraterritorial jurisdiction statute provides for limited exceptions to this general rule,[25] a recent Arizona case suggested that

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21. *See* ARIZ. REV. STAT. ANN. § 4-244(9).

22. ARIZ. REV. STAT. ANN. § 13-101(2) (West 2000).

23. On January 8, 2000, two Sierra Vista, Arizona teenagers were killed when their vehicle rolled over while returning from a trip to Mexico. Two weeks later, two more American teenagers were killed in an alcohol-related accident in Nogales, Mexico. *See* David J. Cieslak, *Operation Targets Teen Drinkers*, TUCSON CITIZEN, Feb. 19, 2000, at 1B.

24. State v. Scofield, 438 P.2d 776, 784 (Ariz. Ct. App. 1968).

25. *See* ARIZ. REV. STAT. ANN. § 13-108 (West 1989). One such exception provides that jurisdiction may be proper if "any element of the offense or a result of such conduct occurs within this state." *Id.* at § 13-108(A)(1). One could argue that the state may proscribe the consumption of alcohol by American minors in Mexico by virtue of the "results" of such conduct occurring within the state. However, it is unlikely a court would accept such an argument in light of the courts' discussion of the question contained in recent Arizona opinions. *See, e.g.*, Knoell v. Cerkvenik-Anderson Travel, Inc., 891 P.2d 861 (Ariz. Ct. App. 1994), *vacated*, 917 P.2d 689 (Ariz. 1996). Furthermore, even if the

an attempt to make unlawful the consumption of alcohol by American minors in Mexico would be improper. In *Knoell v. Cerkvenik-Anderson Travel, Inc.*,[26] the plaintiffs brought a wrongful death action alleging that the defendant had negligently supplied alcohol to their eighteen year-old son during a vacation in Mexico organized by the defendant.[27] In response, the defendant sought refuge in Arizona's social host immunity statute, which provides immunity from civil liability to social hosts who serve alcohol, provided that the person to whom alcohol was served was of the "legal drinking age" at the time of the events giving rise to the cause of action.[28] Because the decedent's consumption of alcohol took place in Mexico, the defendant argued that the legal drinking age of Mexico, rather than that of Arizona, should apply for purposes of the statute, thus immunizing the defendant from liability.[29] In holding that the minimum drinking age of Mexico should apply in determining whether the decedent was of the "legal drinking age," the court noted that:

> While it is appropriate to apply the conflicts-of-laws analysis to determine which state's tort laws should apply, such analysis should accept the legitimacy of a person's acts if those acts were legal where they occurred. Here, [the decedent's] consumption of alcohol in Mexico was legal in Mexico. Arizona cannot enforce its legal drinking age on other states, let alone other countries. Laws regarding a minimum drinking age are territorial in nature, and *a state has no right to regulate the sale or consumption of liquor outside of its own territory.*[30]

On appeal, the Supreme Court of Arizona vacated the opinion of the Court of Appeals, applying instead Arizona's drinking age for purposes of the social host immunity statute.[31] Significantly, however, nothing in the Supreme Court's opinion suggests that the lower court incorrectly asserted that the State could not criminalize the extraterritorial consumption of alcohol by minors.[32] A close examination of the two opinions reveals that the Arizona Supreme Court's opinion rested not on an assertion that Arizona *could* regulate the extraterritorial consumption of alcohol, but rather that if the defendant wished to invoke the

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state could prohibit the consumption of alcohol by minors in other countries, that fact would not cure the due process and statutory construction problems discussed *infra* in Parts III and IV.

26. 891 P.2d 861 (Ariz. Ct. App. 1994), *vacated*, 917 P.2d 689 (Ariz. 1996) (*Knoell II*).

27. *See id.* at 863.

28. *See Knoell II*, 917 P.2d at 691; *see also* ARIZ. REV. STAT. ANN. § 4-301 (West 1995).

29. Recall that the legal drinking age in Mexico is eighteen. *See Knoell*, 891 P.2d at 863.

30. *Id.* at 868 (emphasis added).

31. *See Knoell II*, 917 P.2d at 691.

32. *See id.*

protections of an Arizona statute, it must "take the statute as it finds it."[33] Accordingly, the court held that the application of Arizona's drinking age for purposes of the statute would not constitute an impermissible extension of jurisdiction, commenting that "[n]o one suggests that Arizona has the power to make [the decedent's] conduct in Mexico unlawful."[34]

B. The Southern Arizona DUI Task Force Response

Presumably due to the foregoing jurisdictional limitations, and a perception that the indirect approaches employed in other states would prove only marginally successful in preventing minors from drinking in Mexico,[35] officials from the DUI Task Force decided to attempt to curb the weekend excursions by organizing "sweeps" at the Nogales, Arizona port of entry.[36] Officers were instructed that as long as a minor had consumed any alcohol in Mexico, the minor was in violation of Title 4, section 244, subsection 9 of Arizona Revised Statutes, which makes it a crime, *inter alia*, for a minor to be in possession of a "spirituous liquor."[37] Commenting on the theory behind the citations, an Arizona Department of Public Safety spokesperson justified the practice by stating that "[i]f it is in their body, that's possession, and if they're underage, that's illegal...even though you consumed it legally in Mexico, as soon as you're back in the U.S., you're breaking the law."[38]

Since the sweeps began, the Southern Arizona DUI Task Force has issued citations to over one-hundred minors on the theory that the presence of alcohol in one's body constitutes "possession" of alcohol under Arizona law.[39] Although the severity of the consequences attending such a conviction fall well short of those

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33. *Id.* at 691. Because the statute makes reference to the "legal drinking age," the court's command that a defendant "take the statute as it finds it" effectively conditions the statute's protections on compliance with Arizona's drinking age of twenty-one. *Id.*

34. *Id.* Although the Arizona Supreme Court's language in *Knoell II* can be characterized as dicta in that it did not *specifically* hold that the State could not make underage consumption of alcohol in Mexico unlawful, the courts' comments in both opinions are certainly instructive as to how an Arizona court would answer the question in a case where the State's power to do so was directly at issue.

35. The arrest of minors entering the United States for curfew violations would be effective only as to those under the age designated by the applicable curfew statute. Similarly, arrests of only those minors found driving under the influence of alcohol would do nothing to deter cross-border underage drinking by minors who elect to either walk across the border or employ the use of a designated driver.

36. Although the February 2000 border sweeps were the first such operations carried out by the Southern Arizona DUI Task Force, the Nogales, Arizona police Department has reportedly engaged in similar operations for years. *See* Stellar, *supra* note 11, at 1A.

37. ARIZ. REV. STAT. ANN. § 4-244(9) (West 2000).

38. Stauffer, *supra* note 16, at 2B.

39. Telephone Interviews with Sergeant Ed Slechta, Field Sergeant, Arizona Department of Public Safety and President of the Southern Arizona DUI Task Force (Oct. 6, 2000; Aug. 13, 2001; Sept. 5, 2001).

accompanying the commission of felony offenses, they are far from insignificant. Title 4, section 246, sub-section (B) of Arizona Revised Statutes provides that an individual convicted of underage possession of a "spirituous liquor" is guilty of a class 1 misdemeanor.[40] For adult offenders,[41] a court may impose up to six months imprisonment[42] or a fine of "not more than two thousand five hundred dollars."[43] For juveniles[44] who contravene the statute's proscriptions, a court may impose a "monetary assessment" of up to five hundred dollars or "equivalent community service."[45]

Significantly, of the 109 minors cited in the February 2000 sweeps, nearly ninety percent elected to plead guilty and either participate in a first-time offender diversion program, pay a fine, or perform community service.[46] Only ten percent of the minors cited elected to contest the legality of the citations at trial.[47] Not surprisingly, the courts' treatment of the citations has been inconsistent.[48] To date, at least two courts have upheld the validity of the citations, while others have dismissed the charges on various grounds.[49]

In light of the uncertainty created by Arizona courts' varied handling of the citations, the president of the Southern Arizona DUI Task Force proposed an amendment to the aforementioned statute, which prohibits minors from buying, receiving, possessing, or consuming "intoxicating liquor."[50] The amendment, which was introduced in the Arizona State legislature as House Bill 2095, would have made it a crime for a person "under the age of twenty-one years to have in the person's body any spirituous liquor."[51] In this way, proponents of the bill

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40. *See* ARIZ. REV. STAT. ANN. § 4-246(B) (West 2000).

41. Note that because the legal drinking age in Arizona is twenty-one, both "adults" and "juveniles" are subject to the State's underage possession of alcohol statute. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-201(3) (West 2000) (defining an "adult" as a person "eighteen years of age or older").

42. *See* ARIZ. REV. STAT. ANN. § 13-707(A)(1) (West 2000).

43. ARIZ. REV. STAT. ANN. § 13-802(A) (West 1989).

44. "Juvenile" is defined as "an individual who is under the age of eighteen years." ARIZ. REV. STAT. ANN. § 8-201(6).

45. ARIZ. REV. STAT. ANN. § 8-341(J) (West 2000).

46. *See* Interview with Sergeant Ed Slechta, *supra* note 39.

47. *See id.*

48. *See id.*

49. *See id.* Unfortunately, Sergeant Slechta could not recall the grounds relied upon by those courts holding the citations invalid. Furthermore, extensive research and interviews with superior court and justice court officials proved fruitless due to the difficulty of locating misdemeanor and justice court case records where either the defendant's name or citation number is unknown.

50. *See id.*

51. H.R. 2095, 45th Leg., 1st Reg. Sess. (Ariz. 2001). A thorough examination of whether such a statute would pass constitutional muster is beyond the scope of this work. However, it is important to note that a statute with language such as that contained in House Bill 2095 could conceivably violate the Eighth Amendment's prohibition on crimes that punish a person for their status rather than their conduct. *See* Robinson v. California, 370 U.S. 660 (1962). In *Robinson*, the Court held that a state statute criminalizing the status of

reasoned, the border citations could be sustained on statutory grounds independent of whether the presence of alcohol in the minor's body constituted "possession" under the existing statute.[52]

Although law enforcement officials had high hopes that House Bill 2095 would be passed into law, the House Transportation Committee effectively quashed those hopes by deciding to hold the bill rather than report it to the next committee.[53] Consequently, when the 1st Regular Session of the 45th Legislature came to an end on May 10, 2001, so too did House Bill 2095. Undeterred, supporters of the measure have already made arrangements to have the bill reintroduced when the 2nd Regular Session of the 45th Legislature convenes on January 14, 2002.[54]

As of this writing, the last border operation organized by the Southern Arizona DUI Task Force occurred in June 2001.[55] Due to the risk that some courts may refuse to enforce the citations, however, the Task Force decided not to organize further sweeps while the fate of the proposed amendment to Arizona's underage possession statute is being decided.[56] Although the Task Force has no

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being addicted to a narcotic drug inflicted a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *See id.* at 666–67. Inasmuch as the language of House Bill 2095 can be characterized as criminalizing the condition of being "under the influence" of a controlled substance, it can be argued that such a statute would violate Robinson's prohibition on the prosecution and punishment of "crimes" defined solely by reference to the offender's condition or status.

Although several states have rejected the argument that statutory language prohibiting a person from being "under the influence" of a narcotic violates *Robinson, see, e.g.*, State v. Brown, 440 P.2d 909 (Ariz. 1968), an Illinois appellate court recently held to the contrary in a case where the state attempted to prosecute a defendant for possession of cocaine based solely on the presence of the drug in her bloodstream. *See* People v. Chatman, 696 N.E.2d 1159, 1162 (Ill. App. Ct. 1998). Significantly, the court there held that if it interpreted the statute so as to encompass the condition of merely having cocaine in one's body, it would violate the status crime doctrine pronounced in Robinson. *See id.*; *see also* People v. Davis, 188 N.E.2d 225 (Ill. 1963); Richard C. Boldt, *The Construction of Responsibility in Criminal Law*, 140 U. PA. L. REV. 2245, 2301 n.209 (noting that although the "status of being an addict" cannot constitutionally be prohibited, "[t]here is considerably less certainty about the constitutionality of punishing an individual for the 'condition' of being under the influence of intoxicants").

52. *See* Interview with Sergeant Ed Slechta, *supra* note 39.

53. H.R. 2095, Bill Status Overview, ALIS Online, *at* http://www.azleg.state.az.us/legtext/45leg/1r/bills/hb2095o.htm. (last visited September 7, 2001). Interestingly, the House Transportation Committee made short work of the Bill, taking only eleven days to decide to hold it. *See id.*

54. *See* Interview with Sergeant Ed Slechta, *supra* note 39.

55. *See id.*

56. *See id.* During the August 13, 2001 telephone interview with Sergeant Slechta, he stated that the decision not to organize further border sweeps was informed by a desire to avoid wasting "manpower" issuing citations that some judges may not enforce, rather than a belief that the practice is inconsistent with Arizona law. Also bearing on the decision was a steadfast belief that House Bill 2095 would be passed into law upon

current plans to issue citations to minors who have consumed alcohol in Mexico, there are several reasons why the practice nonetheless continues to merit a close examination. First and foremost, the Southern Arizona DUI Task Force is by no means the only Arizona agency to employ such a strategy as a way of managing the underage drinking problem in Southern Arizona. As noted above, officials in the towns of Marana, Nogales, and Sahuarita have also issued citations to minors based solely on the presence of alcohol in their bodies.[57] Secondly, because no appellate court has ruled on the issue, nothing currently prevents other law enforcement agencies from employing the strategy to deal with the problem in other parts of Arizona. Likewise, if the proposed amendment to Arizona's underage possession of alcohol statute once again fails to be enacted by the legislature, the Southern Arizona DUI Task Force may well recommence the border sweeps.[58] Furthermore, the very fact that lower courts have reached inconsistent conclusions regarding the validity of the citations demonstrates the need for an analysis of the practice. Lastly, a careful evaluation of the problem could serve as a useful framework for evaluating the legality of citations issued in similar situations: such as where a minor is cited for possession of alcohol and the arresting officer has observed only that the minor is intoxicated, and thus cannot positively determine where the prohibited conduct occurred.[59]

III. STATUTORY CONSTRUCTION ANALYSIS

It is axiomatic that to constitute a criminal act, an individual's conduct must fall within the statutory language proscribing that conduct.[60] In fact, several recent Arizona cases have both dismissed criminal charges and reversed

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reintroduction, and that at such time, citations would once again be issued to minors who had consumed alcohol in Mexico.

57. *See* Stellar, *supra* note 11 at 1A; Interview with Diane Lalosh, *supra* note 20.

58. Admittedly, the belief that the Task Force may resurrect the practice if the Bill once again fails to be passed into law is speculation. However, in light of the zeal of those in favor of the practice, and the continued belief that the citations are consistent with Arizona law, it would hardly be surprising if such citations were once again used in an attempt to prevent and deter the common weekend excursions. *See* Interview with Sergeant Ed Slechta, *supra* note 56.

59. This situation may commonly arise where an arresting officer has neither observed the minor consume alcohol nor is able to locate a container of any kind. The validity of citations given under such circumstances, which according to one Southern Arizona town prosecutor are fairly frequent, Interview with Diane Lalosh, *supra* note 20, would be amenable to an analysis similar to that contained in this Note. *See generally* Utah v. Sorenson, 758 P.2d 466 (Utah Ct. App. 1988) (discussing without deciding whether the presence of alcohol in a minor's body is sufficient to constitute possession of alcohol under Utah law, where the arresting officer only observed that the minor defendant was under the influence of alcohol).

60. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-101(3) (West 2000) (providing that one of the general purposes of the State's criminal provisions is "to define the act or omission and the accompanying mental state which constitute each offense and *limit the condemnation of conduct as criminal when it does not fall within the purposes set forth*") (emphasis added).

convictions upon determining that the statute applied did not proscribe the accused's conduct.[61] Furthermore, Arizona law provides that the State's criminal statutes "must be construed according to the fair meaning of their terms to promote justice and effect the objects of the law...."[62] Consequently, the threshold inquiry in assessing the propriety of the current practice is whether the issuance of citations for underage possession of alcohol based solely on the presence of alcohol in a minor's body is consistent with the Arizona statute purportedly prohibiting that conduct.

In determining whether a criminal statute applies to an individual's conduct, courts in Arizona attempt to determine "what conduct the legislature has proscribed"[63] through an analysis of the statutory language at issue as well as the intent of the legislature.[64] Consequently, the sections that follow discuss these two methods of statutory interpretation to determine whether the described manner of preventing the consumption of alcohol by minors in Mexico is consistent with Arizona's statute proscribing underage possession of alcohol.

A. The "Plain Language" of the Arizona Statute

1. The Definition of "Possession"

Title 4, section 244, subsection 9 of the Arizona Revised Statutes provides that it is unlawful "for a person under the legal drinking age[65] to buy, receive, have in the person's possession or consume[66] spirituous liquor."[67]

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61. *See* Reinesto v. Superior Court, 894 P.2d 733, 735 (Ariz. Ct. App. 1995) (holding that Arizona's child abuse statute did not extend to cover a mother's ingestion of heroin during pregnancy which resulted in the birth of a heroin addicted baby); Vo v. Superior Court, 836 P.2d 408, 413 (Ariz. Ct. App. 1992) (holding as a matter of law that a defendant cannot be convicted of first-degree murder for causing the death of a fetus under Arizona's homicide statutes); State v. Womack, 847 P.2d 609, 612 (Ariz. Ct. App. 1992) (holding that defendant's flight from police officers did not constitute "resisting arrest" because the legislature did not intend to proscribe the defendant's conduct under the statute applied).

62. ARIZ. REV. STAT. ANN. §13-104 (West 1989).

63. *Reinesto*, 894 P.2d at 735.

64. *See id.*

65. In Arizona, the "legal drinking age" is defined as "twenty-one years or older." ARIZ. REV. STAT. ANN. § 4-101(16) (West 2000).

66. Obviously, an intoxicated minor has clearly "consumed" alcohol. However, in the cross-border underage drinking context, because that consumption has taken place in Mexico, the issuance of citations for underage consumption would be even more problematic than the possession citations at issue in this Note.

67. ARIZ. REV. STAT. ANN. § 4-244(9) (West 2000). For purposes of the statute, "spirituous liquor" is defined as "alcohol, brandy, whiskey, rum, tequila, mescal, gin, wine, porter, ale, beer, any malt liquor or malt beverage, absinthe...alcohol bitters, bitters containing alcohol, any liquid mixture or preparation, whether patented or otherwise, which produces intoxication, fruits preserved in ardent spirits, and beverages containing more than one-half of one per cent of alcohol by volume." ARIZ. REV. STAT. ANN. § 4-101(29).

Accordingly, an analysis of the legality of the described method of enforcing the statute must focus on whether the presence of alcohol in a person's body constitutes "possession" of alcohol for purposes of the statute. Although the provision at issue neither defines the operative term nor elaborates on its meaning, the term "possession" is in fact defined in the "definitions" section of Arizona's criminal code.[68] Section 105, Title 13, sub-section (30) defines "possession" as "a voluntary act if the defendant knowingly exercised dominion or control over property." Accordingly, in the controlled substance context, "possession" can occur only where the putative possessor has the ability to control or exercise dominion over the substance.[69] Several judicial opinions construing the term in the illicit drug context have affirmed this approach. For example, in *State v. Cota*,[70] the Supreme Court of Arizona stated that "[p]ossession requires only that the defendant exercise control over the drug, have knowledge of the drug's presence, and know that the substance is in fact [an illegal drug]."[71]

Although there are no Arizona cases further defining the terms "control" or "dominion," even a cursory analysis of these terms and their meanings reveals that a person who has ingested a consumable substance no longer "controls" that substance. Significantly, several jurisdictions have expressly adopted such an analysis in holding that the presence of a substance in a person's body does not constitute "possession." For example, in *State v. Flinchpaugh*,[72] the Supreme Court of Kansas observed:

> Once a controlled substance is within a person's system, the power of the person to control, possess, use, dispose of, or cause harm is at an end. The drug is assimilated by the body. The ability to

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68. While it is true that the term is not defined in the statute proscribing underage possession of alcohol, it can be argued that inasmuch as the underage possession of alcohol constitutes a criminal offense, *see* ARIZ. REV. STAT. ANN. § 13-105(6) (West 2000) (defining a "crime" as a "misdemeanor or a felony"); ARIZ. REV. STAT. ANN. § 4-246(B) (West 2000) (designating a violation of the minor in possession statute as a class one misdemeanor), the criminal code's definition of "possession" should control the interpretation of the term as used in the minor-in-possession statute. Because the criminal definition applies to the possession of illicit drugs and other substances that are also designed to be ingested, the application of the definition in the underage possession of alcohol context is logically unproblematic. Furthermore, the application of criminal code provisions to crimes codified under different titles is not without precedent. *See, e.g.*, State v. Parker, 666 P.2d 1083, 1084 (Ariz. Ct. App. 1983) (applying the rules of construction articulated in the criminal code to automobile offenses codified under a different title).

69. *See generally* ARIZ. REV. STAT. ANN. §13-105(30) (West 2000).

70. 956 P.2d 507 (Ariz. 1998).

71. *Id.* at 509 (citing State v. Murphy, 570 P.2d 1070, 1074 (Ariz. 1977)). It should also be noted that Arizona case law has recognized that in the controlled substance context, possession may be either "actual" or "constructive." However, to the extent that both types of "possession" turn on whether an individual has "exercised dominion or control over [the substance]," the distinction between actual and constructive possession is irrelevant for purposes of the present analysis. State v. Alvarez, 745 P.2d 991, 992 (Ariz. Ct. App. 1987).

72. 659 P.2d 208 (Kan. 1983).

> control the drug is beyond human capabilities. The essential element of control is absent. Evidence of a controlled substance after it is assimilated in a person's blood does not establish possession or control of that substance.[73]

As the foregoing illustrates, a person who has consumed alcohol, or any other food or drink for that matter, no longer "controls" that substance. Indeed such a person cannot voluntarily dispose of the substance, retrieve it, restrict its movement, or control its effects.[74] These observations, coupled with the requirement that the provisions of the State's criminal code be construed "according to the fair meaning their terms,"[75] emphatically support the conclusion that one does not "possess" alcohol that has been ingested. Indeed, this conclusion is also consistent with the non-legal definition of "control," which is commonly defined by reference to the power to direct, supervise, or dominate.[76]

2. "Property" as Necessary for "Possession"

Although the foregoing constitutes a strong argument that one does not possess a substance that is present only within the confines of the body, other grounds exist that support the conclusion that the law enforcement practice at issue is inconsistent with the statutory language proscribing underage possession of alcohol. The definition of "possession" set forth in section 105 of Title 13 can be characterized as laying out a four-part test to determine possession. "Possession" for purposes of the statute exists where the conduct at issue constitutes 1) "a voluntary act"[77] whereby the defendant 2) "knowingly,"[78] 3) "exercises dominion or control,"[79] 4) "over property."[80] Under the fourth prong of the test, "possession" of a substance cannot occur where that substance cannot be characterized as

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73. *Id.* at 211. For other cases reaching the same result, see City of Logan v. Cox, 624 N.E.2d 751, 754–55 (Ohio Ct. App. 1993) (accepting the defendant's argument that the presence of alcohol in the body is insufficient to constitute possession); State v. Lewis, 394 N.W.2d 212, 217 (Minn. Ct. App. 1986) (stating that "principles of construction constrain this court from interpreting the term 'possession' to include mere presence of morphine within a person's body"); State v. Hornaday, 713 P.2d 71, 75 (Wash. 1986) (holding that presence of alcohol in a minor's body does not constitute "possession"). *See also* United States v. Blackston, 940 F.2d 877 (9th Cir. 1991); Jackson v. State, 833 S.W.2d 220 (Tex. App. 1992).

74. This situation can be contrasted with the situation where one has ingested a substance intending to retrieve it. For example, a person who swallows a cocaine-filled balloon obviously "controls" that substance by virtue of the ability to eventually retrieve it.

75. ARIZ. REV. STAT. ANN. § 13-104 (West 1989).

76. *See, e.g.*, OXFORD DESK DICTIONARY & THESAURUS 159 (Am. ed. 1997) (defining "control" as the "power of directing" and listing as synonyms the words "guidance," "supervision," and "domination"); *see also* BLACK'S LAW DICTIONARY 130 (7th ed. 1999).

77. ARIZ. REV. STAT. ANN. §13-105(31) (West 2000).

78. *Id.*

79. *Id.*

80. *Id.*

"property." Accordingly, even if the essential element of control could be established, the presence of a substance in a person's body is insufficient to constitute possession where the substance purportedly possessed cannot be characterized as "property."

Although the legislature's definition of the term leaves much to be desired, section 105 of Title 13 defines "property" as "anything of value, tangible or intangible."[81] The operative term in the definition is "value," and although that word is not defined, there is nothing to suggest that the legislature intended the term's meaning to deviate from the recognized definition of "value" as the monetary worth of an object or interest.[82] Although only a small number of cases have discussed exactly what constitutes "property" in the criminal context, at least one Arizona case has suggested that the proper method to determine whether something has "value," and thus constitutes "property," is by an analysis of whether the thing at issue in fact has "monetary" value. In *State v. Johnson*,[83] the defendant challenged his conviction for trafficking in stolen property on the ground that the stolen credit cards found in his possession did not constitute "property" within the meaning of the relevant statute.[84] Significantly, the court rejected the defendant's argument, holding that the cards had "value," and thus constituted "property," because the defendant was able to obtain a sum of forty dollars for their sale.[85]

In determining whether the credit cards had value, thus satisfying the definition of "property," the court focused on whether the cards could demand a price in an open market transaction. Under such an analysis, alcohol that has been ingested cannot be said to have "value" in the same manner as the credit cards in *Johnson*. Indeed, alcohol within a person's body is incapable of being alienated or conveyed for consideration; both because no one would purchase such a substance, and because a seller would likely have considerable difficulty retrieving it.[86] Although one could argue that alcohol within a person's body has "value" to the consuming individual due to the physiological effects and sensations which accompany the alcohol's presence, the applicability of such an argument would depend on a case-by-case inquiry into the reasons for each individual's alcohol consumption. Moreover, such an argument would certainly fall short as to those

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81. *Id.* § 13-105(32).

82. *See generally* BLACK'S LAW DICTIONARY 1549 (7th ed. 1999) (defining "value" as the "monetary worth or price of something").

83. 693 P.2d 973 (Ariz. Ct. App. 1984).

84. *See id.* at 979.

85. *See id.*

86. Although medical procedures such as stomach pumping may render the extraction of alcohol from a person's body physically possible, it is questionable whether a substance excised under such circumstances would even qualify as a "spirituous liquor" under the applicable statutory definition. *See* ARIZ. REV. STAT. ANN. § 4-244(9) (West 2000).

minors who consume alcohol for purely social as opposed to physiological reasons.[87]

As the foregoing illustrates, the plain meaning of the term "property" suggests that because alcohol present only in a person's body does not have "value," such a substance does not constitute "property." Accordingly, because the fourth requirement of the test for possession is not satisfied where the purported object of possession is alcohol that has been ingested, it follows that the mere presence of alcohol in one's body is insufficient to constitute "possession" of that substance.

B. The Intent of the Legislature

The intent of the legislature in drafting a statute is also relevant to the determination of how a penal statute should be interpreted and enforced.[88] One way to ascertain such intent is through a comparison of the words used in a particular provision with those used in the text of another.[89] As a matter of logic, when a lawmaker desires to attach the same meaning to the specific language of two or more provisions, typically the same or at least substantially similar terminology will be employed in both provisions. Consequently, the fact that different words are selected can be considered indicative of an intent to assign a different meaning to the passages' respective language. For example, in *Reinesto v. Superior Court*,[90] the Arizona Court of Appeals considered whether a mother could be prosecuted under Arizona's child abuse statute where she gave birth to a heroin-addicted baby as a result of her heroin use during pregnancy.[91] The court held that the statute's plain language, which spoke in terms of "physical harm to a *child*,"[92] should not be construed to include harm to a fetus.[93] Significantly, the court also held that such a construction was contrary to the intent of the legislature as revealed by an analysis of the language used in other Arizona statutes.[94] In so holding, the court cited several other Arizona statutes wherein the term "unborn

87. For such adolescents, it is very possible that the actual presence of alcohol in their bodies is not valued at all. Rather, for youth who fall into this category, it would probably be more accurate to say that they drink for the social rewards that they perceive as accompanying the consumption of alcohol. This observation is particularly likely in light of the undesirable side-effects of alcohol consumption such as illness, physical impairment, increased risk of injury or accident, and the possibility of criminal sanctions.

88. *See* Reinesto v. Superior Court, 894 P.2d 733, 735 (Ariz. Ct. App. 1995).

89. *See, e.g.*, Vo v. Superior Court, 836 P.2d 408, 414 (Ariz. Ct. App. 1992) (stating that "another indication of legislative intent is the way in which the legislature has referred to a fetus in other sections of the criminal code.").

90. 894 P.2d at 733.

91. *See id.* at 734.

92. *Id.* at 735 (emphasis added).

93. *See id.*

94. *See id.* at 735–36.

child" was used in lieu of the word "child."[95] Accordingly, the court found that the legislature did not intend for the child abuse statute to apply to situations where harm was inflicted on unborn children, observing that "when the legislature has intended to refer to an unborn child or fetus, the legislature has done so specifically."[96]

Nearly identical reasoning was employed in the case of *Vo v. Superior Court*.[97] In *Vo*, the Arizona Court of Appeals decided whether the killing of a fetus could constitute first degree murder under the state's homicide statute.[98] As in *Reinesto*, the court relied heavily on the fact that the legislature defined homicide as the killing of "another person,"[99] while defining the offense of manslaughter to include "recklessly causing the death of another person" *or* "the death of an unborn child."[100] Consequently, the court held that the legislature did not intend to criminalize the killing of an unborn child under the homicide statute, and that the state could charge the defendant only with manslaughter in connection with the death of the unborn child in the case.[101]

The statutory language of Arizona's underage possession of alcohol statute is amenable to an analysis identical to that employed in *Reinesto* and *Vo*. Indeed, the same section that criminalizes the possession of alcohol by minors also provides that it is unlawful "for a person under the age of twenty-one years to drive or be in physical control of a motor vehicle *while there is any spirituous liquor in the person's body*."[102] Certainly, if the legislature had intended to create a criminal offense prohibiting minors from having alcohol in their bodies, it would have specifically used such language in drafting the statute. Furthermore, like the numerous statutory references to "unborn children" noted in *Reinesto* and *Vo*, Arizona statutes are replete with examples of provisions which specifically refer to the presence of alcohol in the body, or to the condition of being "under the influence."[103] Obviously, the legislature was aware of the substantive distinction between "possession" of a substance and the presence of a substance in a person's body. Furthermore, the selective and calculated use of those terms in different contexts demonstrates an intent to maintain the distinction rather than simply

95. *See id.* The court noted that the legislature specifically used the term "unborn child" or equivalent language in drafting the state's manslaughter statute, the statute dealing with aggravating factors in the criminal sentencing context, the provisions setting forth the certificate filing requirements for fetal deaths, and the definitions section of the Uniform Anatomical Gift Act. *See id.*

96. *Id.* at 735.

97. 836 P.2d 408 (Ariz. Ct. App. 1992).

98. *See id.* at 408.

99. *Id.* at 414.

100. *Id.*

101. *See id.* at 419.

102. ARIZ. REV. STAT. ANN. § 4-244(33) (West 2000) (emphasis added).

103. *See, e.g.*, ARIZ. REV. STAT. ANN. § 5-395(A)(1) (West 2000) (prohibiting the operation of a motorized watercraft "while under the influence of intoxicating liquor"); ARIZ. REV. STAT. ANN. § 28-1381(1)–(3) (West 2000) (proscribing the act of driving while "under the influence," or with a number of defined substances "in the person's body").

endow the courts and law enforcement officials with discretion to use the terms as though they were interchangeable.[104]

The analysis of both the intent of the legislature and the plain meaning of the terms of the statute demonstrates that the practice at issue is inconsistent with the statutory provision proscribing underage possession of alcohol. Consequently, enforcement of the underage possession of alcohol statute in a manner that extends the statute's reach to minors who merely have alcohol in their system clearly constitutes the criminalization of conduct that is not proscribed by statute.

IV. ARIZONA STATE LAW CONCERNS

In addition to the statutory construction arguments discussed above, there are several other reasons why the described method of dealing with the cross-border underage drinking problem in Arizona is inconsistent with Arizona law. The following subsections briefly discuss these reasons.

A. Public Policy Considerations and the "General Purposes" of Arizona's Criminal Code Provisions

The introductory section of Arizona's criminal code sets forth the public policy and "general purposes" of the Title's provisions.[105] Significantly, the second enumerated purpose of the state's criminal statutes is to give "fair warning of the nature of the conduct proscribed and of the sentences authorized upon conviction."[106] Similarly, the third purpose listed in the section is to "define the act or omission and the accompanying mental state which constitute each offense and limit the condemnation of conduct as criminal when it does not fall within the purposes set forth."[107] In light of the problematic reasoning informing the state's "border possession" theory, a strong argument can be made that the present law enforcement practice violates the public policy of Arizona. Because both the "fair warning" and "definition of crimes" requirements articulated in section 101 are closely related to the due process void-for-vagueness doctrine, those considerations will be addressed in the subsequent section addressing federal constitutional implications of the current law enforcement practice. However, the designation of these purposes as the public policy of Arizona reinforces the conclusion that as a matter of Arizona law, the practice constitutes an impermissible method of preventing adolescents from drinking in Mexico.

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104. Indeed, one reason courts invalidate statutes determined to be "vague" is because such laws "may authorize and even encourage arbitrary and discriminatory enforcement." City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)). See *infra* Part V for a discussion of the void-for-vagueness doctrine.

105. ARIZ. REV. STAT. ANN. § 13-101 (West 2000).

106. *Id.* § 13-101(2).

107. *Id.* § 13-101(3) (emphasis added).

B. Separation of Powers Concerns

Title 13, Section 103 of the Arizona Revised Statutes provides, "All common law offenses or affirmative defenses are abolished" and that "[n]o conduct or omission constitutes an offense...unless it is an offense or an affirmative defense under this title or under another statute or ordinance."[108] Several recent Arizona cases have explained that as a result of this provision, Arizona is a "code state" in regards to its criminal law,[109] and that consequently, courts are "legislatively precluded from creating new crimes by expanding the common law through judicial decision."[110] Similarly, the court in *State v. Womack*[111] stated that "[d]efining criminal behavior and establishing penalties for violating criminal laws are functions of the legislature, *not* the judiciary."[112]

The clear implication of the courts' interpretation of Section 103 is that only the legislature may "create" crimes, and that neither judicial nor executive action may infringe on that authority. As discussed at length in Part III, the practice of citing minors for possession of alcohol based solely on the presence of alcohol in the body constitutes criminalization of conduct that is not proscribed by statute. Consequently, the current practice can be characterized as a de facto attempt to re-write the statute so as to prohibit a minor from being under the influence of alcohol or having alcohol "in the body." Certainly, had the legislature intended to criminalize such conduct, it could have employed language manifesting that intent. Consequently, both the law enforcement agencies with whom the "border possession" theory originated, as well as the courts that have upheld such convictions, have contravened the prohibition articulated in Section 103 of Title 13. Significantly, the court in *Vo* noted that any redefinition of the word "person" to include "unborn children" must be left to the legislature, and that any judicial attempt to do so would raise "serious questions of separation of powers between [the judiciary] and the legislature."[113] Likewise, any redefinition of the term "possession" by law enforcement officials (or courts through judicial approval of the practice) so as to criminalize the condition of merely having alcohol in one's body would similarly offend the principle of separation of powers.

C. The Rule of Lenity

Also relevant to the analysis of whether the current law enforcement practice is consistent with Arizona law is the so-called "rule of lenity." Although

108. ARIZ. REV. STAT. ANN. § 13-103(A) (West 2000).

109. *See* Vo v. Superior Court, 836 P.2d 408, 411 (Ariz. Ct. App. 1992) (noting that "[b]ecause of [A.R.S. § 13-103], Arizona is a 'code state' as far as its criminal law is concerned").

110. *Id.* at 417.

111. 847 P.2d 609 (Ariz. Ct. App. 1992).

112. *Id.* at 613 (emphasis added).

113. *Vo*, 836 P.2d at 416 (quoting State v. Anonymous, 516 A.2d 156, 159 (Conn. Super. Ct. 1986)).

the general common-law rule that criminal statutes must be strictly construed in favor of the defendant has been abolished in Arizona,[114] several cases have held that where a criminal statute is susceptible to more than one interpretation, "the rule of lenity dictates that any doubt should be resolved in favor of the defendant."[115] Although the statute at issue appears unproblematic on its face, the strained interpretation given it by law enforcement officials clearly introduces an element of doubt and uncertainty as to what exactly the statute proscribes. Indeed, if a court were to accept the definition of "possession" offered by law enforcement officials as reasonable or even correct, that acceptance would not eliminate the fact that such an interpretation is nonetheless ambiguous from the perspective of the individuals to whom the statute is directed. To argue otherwise would be to argue that the average person, upon reading the statute, would understand it to mean that one "possesses" alcohol that has already been consumed. However, the arguments developed in this Note forcefully establish that such an interpretation is by no means the sole reasonable interpretation emerging from the statute's language. Because a court under such circumstances should resolve any doubt concerning the statute in favor of the defendant, the rule of lenity would require a finding that the statute does not in fact criminalize the condition of being under the influence of alcohol consumed beyond the jurisdictional reach of the state.

V. FEDERAL CONSTITUTIONAL CONCERNS

In addition to the arguments grounded in principles of statutory construction and Arizona law, federal constitutional principles likewise establish the impropriety of the manner in which some law enforcement officials have chosen to deal with the problem of cross-border underage drinking.[116] Although Arizona courts have adopted the common law rule that a court should not reach constitutional questions if a case can be "fairly decided on nonconstitutional grounds,"[117] the constitutional principles implicated by the current practice remain relevant for several reasons. First, from a theoretical standpoint, they serve to buttress the conclusion that the current practice is an inappropriate method of dealing with the cross-border underage drinking problem. Second, in a case challenging the law enforcement practice at issue, constitutional arguments would

114. *See* ARIZ. REV. STAT. ANN. § 13-104 (West 1989); State v. Pena, 683 P.2d 744, 748–49 (Ariz. Ct. App. 1983).

115. *Pena*, 683 P.2d at 748–49. *See also Vo*, 836 P.2d at 413.

116. It should be noted that several of the arguments advanced in this part of the Note would be equally valid as a matter of Arizona constitutional law. *See, e.g.*, ARIZ. CONST. art. II, § 4 (stating that "[n]o person shall be deprived of life, liberty, or property without due process of law"). For purposes of simplicity, however, this Note will measure the validity of the "possession-by-consumption" theory against United States constitutional requirements as articulated in leading United States Supreme Court cases.

117. R.L. Augustine Constr. Co. v. Peoria Unified Sch. Dist., 936 P.2d 554, 556 (Ariz. 1997) (citing Petolicchio v. Santa Cruz County Fair, 866 P.2d 1342, 1345 (Ariz. 1994)).

become highly relevant were a court to reject the state law arguments discussed at length in the preceding sections.[118]

A. The Void-For-Vagueness Doctrine

The Due Process Clause of the Fifth and Fourteenth Amendments decrees that no person shall be deprived of "life, liberty, or property, without due process of law."[119] Although this broad constitutional proscription has been applied in a wide variety of contexts, it has been stated that one "basic principle" of this important provision is that "an enactment is void for vagueness if its prohibitions are not clearly defined."[120] In the criminal statute context, what has come to be known as the "vagueness" doctrine has been characterized as requiring the invalidation of statutes that fail to give "fair warning" to a person of "ordinary intelligence" that a particular course of conduct is proscribed.[121] Elaborating on this idea, the United States Supreme Court has explained that the underlying principle informing the doctrine is that "no man shall be held criminally responsible for conduct which *he could not reasonably understand to be proscribed.*"[122]

The idea that laws which fail to give notice of prohibited conduct run afoul of the constitutional requirement of due process is certainly not new. For example, in 1926, the Supreme Court in *Connally v. General Construction Co.*[123] considered the constitutionality of an Oklahoma statute requiring contractors to pay employees "not less than the current rate of per diem wages in the locality

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118. Although this section explores only those constitutional arguments grounded in the Due Process Clause, other constitutional arguments may also establish the impropriety of the current practice. One such argument concerns the "status crime" doctrine as articulated in *Robinson v. California*, 370 U.S. 660 (1962). For a brief analysis of *Robinson* and subsequent cases, see *supra* note 51 and accompanying text.

119. U.S. CONST. amends. V, XIV, § 1. Although the substantive effect of the "due process" language in both amendments is identical, inasmuch as the statutory language at issue is contained within a state criminal statute, this section will refer only to the Due Process Clause of the Fourteenth Amendment. Of course, the Due Process Clause of the Fifth Amendment applies where the constitutionality of a federal statute or regulation is at issue. *See* Munn v. Illinois, 94 U.S. 113, 124 (1876).

120. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). *See also* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (holding that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); Keeler v. Superior Court, 470 P.2d 617, 626 (Cal. 1970) (noting that "[t]he first essential of due process is fair warning of the act which is made punishable as a crime").

121. United States v. Harriss, 347 U.S. 612, 617 (1954). *See also* Rose v. Locke, 423 U.S. 48, 49 (1975) (referring to the fair-warning requirement as "settled" and "embodied in the Due Process Clause").

122. *Harriss*, 347 U.S. at 617 (emphasis added).

123. 269 U.S. 385 (1926).

where the work is performed...."[124] Commenting that the line that separates legal and illegal activity "cannot be left to conjecture,"[125] the Court held that the statute was unconstitutionally vague due to the indefinite nature of the phrase "current rate of wages," and lack of criteria for determining the relevant "locality" from which that rate was required to be derived.[126] Similarly, in *Papachristou v. City of Jacksonville*,[127] the Court held unconstitutional a city vagrancy ordinance making it a crime to be, among other things, a "rogue," "vagabond," "habitual loafer," "nightwalker," or person "living upon the earnings of [his wife] or minor children."[128] Again, in holding that the statute was impermissibly vague, the Court reiterated the familiar principle that "all persons are entitled to be informed as to what the State commands or forbids" and that the law must give "fair notice of the offending conduct."[129]

As the foregoing illustrates, the constitutional standard for determining the point at which a statute becomes void for vagueness has been articulated in several different ways. However, the leading cases establish that the determinative question is simply whether it would be "fair" to charge a criminal defendant with notice that the course of conduct pursued was in fact proscribed. Further, these cases indicate that such an inquiry requires an assessment of whether the applicable statute provides "the type of notice that will enable ordinary people to understand what conduct it prohibits."[130]

B. Due Process Analysis of the Current Practice

Applying the above standard, it is clear that the practice at issue violates the Due Process Clause of the Fourteenth Amendment. Although it is unlikely that one could successfully challenge the statute as vague on its face,[131] it is equally clear that the otherwise valid statute is rendered unconstitutionally vague when applied to minors with alcohol present only within their bodies.[132] In light of the

124. *Id.* at 388.

125. *Id.* at 392–93 (quoting United States v. Capital Traction Co., 34 App. D.C. 592, 598 (1910)).

126. *Id.* at 393–95.

127. 405 U.S. 156 (1972).

128. *Id.* at 158 n.1, 162.

129. *Id.* at 162 (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)).

130. City of Chicago v. Morales, 527 U.S. 41, 56 (1998) (Stevens, J., plurality opinion).

131. No case could be located entertaining the suggestion that a statute simply prohibiting the possession of alcohol by minors is unconstitutionally vague on its face. Indeed, Arizona's statute employs terms that are neither technical in nature nor incapable of being easily and accurately understood by those untrained in the law.

132. Although most Supreme Court opinions discussing the vagueness doctrine have involved facial challenges to the validity of statutes, *see* Bouie v. City of Columbia, 378 U.S. 347 (1964), several Supreme Court cases have established that even where a statute is sufficiently precise and narrow on its face to satisfy constitutional requirements, such a statute may nonetheless be vague "as applied" by virtue of an expansive or novel interpretation and application. *See id.* at 351, (acknowledging that in "typical applications"

language of the statute, the "ordinary person" would not likely understand that the mere presence of alcohol in the body is sufficient to violate the statute. First, the unique interpretation of "possession" upon which law enforcement officials and a few trial courts[133] have relied is at odds with the common, everyday usage of the term. Indeed, it could not be rationally argued that most "ordinary" people would understand that the phrase "have in...possession"[134] applies to food or drink that has been consumed. Even the non-legal definition of the word depends on the notion of control or dominion over some object or interest.[135] Because it is doubtful that many individuals would consider themselves capable of controlling a substance present only within their bloodstream or stomach,[136] it can hardly be argued that the state's interpretation of "possession" is consonant with the manner in which ordinary people would understand the term. In fact, several newspaper articles published in the wake of the first border sweeps documented the astonishment of those cited under the statute. One such article commented that "many of the underage drinkers arrested for possession of alcohol were surprised to find out that possessing the alcohol in their stomachs was all it took to merit a citation."[137] Similarly, another article quoted police officers as remarking that even many of the parents summoned to retrieve their children at the border were surprised by the citations.[138]

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of the vagueness doctrine, "the uncertainty as to the statute's prohibition result[s] from vague or overbroad language in the statute itself"), 355 (holding that the "admirably precise" state statute at issue, as expansively construed by the South Carolina Supreme Court, gave "no notice whatsoever" that the conduct at issue was proscribed); *see also* Rabe v. Washington, 405 U.S. 313, 315 (1972) (holding that the Supreme Court of Washington's construction of a state obscenity statute rendered it "impermissibly vague as applied to petitioner"); Coates v. City of Cincinnati, 402 U.S. 611, 618 (1971) (White, J., dissenting) (noting that a statute which is not vague on its face "may be vague as applied in some circumstances"); Flanagan v. Munger, 890 F.2d 1557, 1570 (10th Cir. 1989) (holding that police regulations at issue were not vague on their face but remanding for consideration of the issue of "whether the statute is vague as applied").

133. Recall that some courts across the state have in fact upheld the validity of the citations. *See supra* note 49 and accompanying text.

134. ARIZ. REV. STAT. ANN. § 4-244(9) (West 2000).

135. *See, e.g.*, WEBSTER'S NEW COLLEGIATE DICTIONARY 890 (8th ed. 1981) (defining "possession" as "[t]he act of having or taking into control").

136. Due to the unsurprising lack of survey or research data bearing on the question of whether average people consider themselves capable of controlling consumed substances, no authority could be located directly supporting this proposition. However, the judicial opinions that have consistently held that the essential element of control is missing where a substance is present only within the confines of one's body validate this observation. *See generally* State v. Flinchpaugh, 659 P.2d 208 (Kan. 1983); State v. Lewis, 394 N.W.2d 212 (Minn. Ct. App. 1986); City of Logan v. Cox, 624 N.E.2d 751 (Ohio Ct. App. 1993); State v. Hornaday, 713 P.2d 71 (Wash. 1986); *supra* notes 72–73 and accompanying text.

137. Stauffer, *supra* note 16, at 2B.

138. *See* Cieslak, *supra* note 23, at 1B.

Second, the statutory construction arguments advanced in the preceding sections also establish that the statute in question, as applied to those engaged in cross-border underage drinking, utterly fails to give the type of notice necessary to enable the "ordinary" person to understand that his or her conduct is prohibited. As discussed above, the same section of the Arizona code that criminalizes the possession and consumption of alcohol by minors[139] also makes it a crime for a minor to operate a motor vehicle with any alcohol "in the person's body."[140] The fact that the legislature chose not to use the latter phrase in drafting the provision prohibiting the possession of alcohol by minors illustrates that the drafters intended that different standards govern in the two very different situations. There is an obvious difference, apparent to legal professionals and laymen alike, between the concept of "possession" and the notion of merely having a substance in one's body. It is that rather obvious distinction that establishes why an "ordinary" person, or even one trained in the law,[141] would have no reason to suspect that the passive condition resulting from the prior ingestion of alcohol is tantamount to "possession."

1. Bouie v. City of Columbia *and the Effect of an Expansive Construction of a Facially Narrow Statute*

The foregoing analysis does much to expose the constitutional infirmity of the manner in which some law enforcement agencies have chosen to enforce Arizona's minor-in-possession statute. However, the Supreme Court's opinion in *Bouie v. City of Columbia*[142] reveals that the government conduct currently at issue may result in an even greater deprivation of the rights of defendants than in the typical void-for-vagueness situation involving a facially vague statute.[143]

In *Bouie*, petitioners were convicted of violating a South Carolina trespass statute prohibiting "entry upon the lands of another...*after* notice from the owner or tenant prohibiting such entry...."[144] On appeal, the South Carolina Supreme Court affirmed the convictions, even though all agreed that petitioners received no *prior* notice that their entry into the white-only lunch counter area of a drug store was prohibited.[145] In so holding, the South Carolina Supreme Court expansively construed the statute so as to also prohibit the act of remaining on

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139. *See* ARIZ. REV. STAT. ANN. § 4-244(9).

140. ARIZ. REV. STAT. ANN. § 4-244(33).

141. Ironically, it is entirely possible that a lawyer would be even more surprised than one without legal training to learn that the statute had been so construed and applied. Indeed, the application of methods of statutory interpretation known within the profession reveals that the legislature did not contemplate enforcement of the statute under a possession-by-consumption theory. *See supra* Part III.A–B.

142. 378 U.S. 347 (1964).

143. *See id.* at 351.

144. *Id.* at 349 (emphasis added).

145. *See id.* at 350.

another's property *after* being asked to leave.[146] The United States Supreme Court reversed, holding that the defendants did not have fair warning of the prohibition under which they were convicted.[147] The court stated that:

> [p]etitioners did not violate the statue as it was written; they received no notice before entering either the drugstore or the restaurant.... So far as the words of the statute were concerned, petitioners were given not only no 'fair warning,' but no warning whatever that their conduct...would violate the statute. [148]

Notwithstanding the "admirably narrow and precise"[149] terminology of the statute, which at first blush appeared to distinguish the case from the bulk of Supreme Court cases discussing the vagueness doctrine, the Court noted that such precision did not compel a holding affirming the convictions.[150] On the contrary, the Court held that the very fact that the statute was facially precise worked to produce an even greater deprivation of the "right to fair notice" than would have occurred had the statute been vague or overbroad on its face.[151] Elaborating on that observation, the Court stated that:

> When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice...that it may be held to cover his contemplated conduct. When a statue on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required "to speculate as to the meaning of penal statutes"...*the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question.*[152]

2. Application of Bouie *to the Current Practice*

Although the expansive interpretation in *Bouie* occurred at the hands of the judiciary rather than law enforcement officials, that difference does not diminish the applicability of the Court's comments to the current situation.[153] Just

146. *See id.* at 349–350.
147. *See id.* at 361.
148. *Id.* at 355.
149. *Id.* at 351–352.
150. *See id.*
151. *See id.*
152. *Id.* at 352 (emphasis added).
153. To date, no appellate court in Arizona has addressed the propriety of the practice. Regardless of the source of the statutory interpretation, however, the fact remains that the effect on those prosecuted under an expansive construction of a criminal statute is

as the judicial interpretation in *Bouie* can be characterized as an expansive and unforeseeable construction of a facially precise statute, so too can the law enforcement interpretation and enforcement of Arizona's minor-in-possession statute be viewed as an unwarranted enlargement of the scope of a facially narrow statute. In light of the foregoing, it is easy to see how the Arizona statute, coupled with the creative interpretation and enforcement at issue, violates the "first essential" of due process.[154] Indeed, the current law enforcement practice renders Arizona's minor-in-possession statute amenable to the same criticism as the statute applied in *Bouie*; namely, that it tends to lull would-be offenders into a "false sense of security giving [them] no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction."[155]

VI. ALTERNATIVE RESPONSES

The purpose of this Note has been to describe the method various law enforcement agencies in Southern Arizona have chosen to deal with the cross-border underage drinking problem and argue that this practice constitutes an improper response to the problem. However, this Note would not be complete without at least a brief discussion of a few of the possible approaches that could be employed as an alternative to the current practice.

First, there are some approaches that could be utilized that would have the effect of indirectly curbing the dangerous excursions. Most of the methods employed by other states fall into this category. As mentioned in the introductory section of this Note, officials in Texas have resorted to strictly enforcing laws that deal with drunk driving, curfews, and disorderly conduct.[156] Similarly, Arizona has laws on the books that criminalize drunk driving[157] and public intoxication,[158] as well as laws that permit counties and municipalities to enact curfew regulations.[159]

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the same whether or not an appellate court has explicitly sanctioned the approach taken by law enforcement officials.

154. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

155. *Bouie*, 378 U.S. at 352. For yet another case establishing that an otherwise constitutional statute may be rendered unconstitutional by virtue of an expansive construction, see *Sagansky v. United States*, 358 F.2d 195, 201 (1st Cir. 1966) (holding that the court could not accept the defendants' interpretation of the criminal statute applied because "such a construction would make the statute so vague as to render it unconstitutional").

156. *See* Stellar, *supra* note 11, at 1A.

157. *See* ARIZ. REV. STAT. ANN. § 28-1381(1) (West 2000).

158. *See* ARIZ. REV. STAT. ANN. § 36-2026 (West 1993) (authorizing peace officers to transport persons who are "incapacitated" by alcohol to alcohol reception centers, or to "detention facilities" if such a person is in public and "poses a danger to himself or others").

159. Although Arizona has not enacted a curfew statute with state-wide application, both municipalities and counties may pass such ordinances within their jurisdictions. *See, e.g.*, ARIZ. REV. STAT. ANN. § 11-251(40) (West 2000) (authorizing counties to prescribe "reasonable curfews in unincorporated areas" for persons under the

Clearly, regular and vigorous enforcement of these laws at the border could have a significant impact on the number of young people engaging in cross-border underage drinking. For example, curfew laws could be used to prevent those under a certain age from leaving the country if they are attempting to do so during a time when a curfew is in effect.[160] Furthermore, even as to minors attempting to cross the border before the curfew, officers would more often than not have an opportunity to issue citations to those individuals upon their return to the United States.[161] There is no reason to suspect that the issuance of citations for curfew violations would be any less effective at stemming the tide of cross-border underage drinkers than the current practice. Indeed, one of the goals of the current practice is to deter alcohol-motivated border crossings by "getting the word out" that doing so will be rewarded with a criminal citation and a call to parents.[162] Nothing suggests that the same goal could not be achieved if minors knew that their presence at the border for any reason after a certain time would result in a similar criminal sanction.

Arizona law also prohibits individuals under the age of twenty-one from operating a motor vehicle with *any* alcohol in their body.[163] Obviously, vigorous enforcement of this proscription could constitute an extremely effective means of dealing with the very aspect of the cross-border underage drinking problem that officials find most disturbing.[164] The state could also enact a statute similar to the provision in force in California that prohibits minors from leaving the country without parental consent.[165] Although such a law would not preclude those between the ages of eighteen and twenty-one from entering Mexico, it would nonetheless work to prevent cross-border underage drinking by those adolescents who pose perhaps the greatest danger to themselves and others.[166]

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age of eighteen); ARIZ. REV. STAT. ANN. § 9-240(28) (West 2000) (setting forth generally the powers of city councils within city limits and authorizing the council to make all ordinances that are "necessary or proper for the carrying into effect of the powers vested in the [municipal] corporation").

160. The "curfew approach" to the problem has been employed on occasion with good overall results in Douglas, Arizona. During one such sweep, officers cited thirty-two juveniles at the border for curfew violations. *See* Stellar, *supra* note 11, at 1A.

161. *See, e.g., Lure of Tijuana; Underage Drinking, Driving—and Death*, SAN DIEGO UNION-TRIB., Oct. 31, 2000, at B10 (observing that many of the bars frequented by American minors are open as late as 5:00 a.m.).

162. *See* Cieslak, *supra* note 23, at 1B.

163. *See* ARIZ. REV. STAT. ANN. § 4-244(34) (West 2000).

164. Several newspaper articles reporting on the border sweeps demonstrate that one of the core concerns of law enforcement officials is the fact that drinking in Mexico is often accompanied by drunk driving. *See e.g.*, Cieslak, *supra* note 23, at 1B (quoting a Department of Public Safety spokesperson as saying that the department is "trying to save lives"); Stauffer, *supra* note 16, at 2B; Stellar, *supra* note 11, at 1A.

165. *See* CAL. WELF. & INST. Code § 1500 (Deering 2001).

166. Few could argue with the proposition that generally speaking, drivers below the age of eighteen are less experienced, and thus more dangerous, than those above eighteen, just as those below twenty-one are more dangerous than those who may legally

In addition to the indirect methods discussed above, state lawmakers could pass legislation that addresses the problem in a much more direct manner. An obvious example of such an approach would be an amendment similar to that advanced by the proponents House Bill 2095.[167] Obviously, an amendment prohibiting minors from having alcohol in their body would certainly negate any argument that such conduct does not constitute a cognizable crime in Arizona. Moreover, inasmuch as such a law would clearly indicate "what conduct it prohibits,"[168] language of that nature would also allay the due process concerns of notice and fair warning discussed in Part V. As discussed above,[169] however, because such a law would target the passive condition of being under the influence of alcohol, rather than the voluntary conduct implicated when one actually consumes or possesses alcohol,[170] a measure such as House Bill 2095 may constitute a violation of the status-crime doctrine articulated in *Robinson v. California*.[171] However to ensure that such a law would survive a challenge based on *Robinson*'s prohibition on the punishment of "status crimes,"[172] the legislature could draft the provision so as to limit its proscriptions to the act of entering the United States from another country with alcohol "in the body." In that way, the state could argue that the statute imposes criminal sanctions not because of the offender's status, but rather for an act performed in combination with that status or condition, thus rendering inapplicable the prohibition on status crimes articulated in *Robinson v. California*[173] and its progeny.

VII. CONCLUSION

In light of the serious and often deadly consequences of the cross-border underage drinking trend, it is obvious that the problem warrants a considerable amount of law enforcement attention and resources. Consequently, this Note does

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consume alcohol. *See, e.g.*, Rosenthal, *supra* note 1, at 658 (noting that "it appears that the 'crash risk' of young drivers is higher after they drink than it is for drivers from other age groups").

167. *See* discussion *supra* Part II.B; *supra* note 51.

168. City of Chicago v. Morales, 527 U.S. 41, 56 (1998) (Stephens, J., plurality opinion).

169. *See supra* note 51.

170. Obviously, the condition of being under the influence of alcohol is a direct result of voluntary acts properly characterized as conduct. However, in the cross-border underage drinking context, the conduct giving rise to the minor's intoxication has taken place outside of the jurisdictional reach of the state.

171. 370 U.S. 660 (1962).

172. *See supra* note 51 and accompanying text.

173. 370 U.S. at 660. Although the exact contours of the doctrine were the subject of lively debate in the years following the decision, the "act-status" dichotomy became firmly established as a means of distinguishing between constitutional and unconstitutional punishment in *Powell v. Texas*, 392 U.S. 514 (1968). In *Powell* the Supreme Court held that the state could punish the crime of public intoxication, even where the defendant was addicted to the use of alcohol, because the relevant statute punished the act of being in public while intoxicated, observing that the doctrine articulated in *Robinson* is "limited to the situation where no conduct of any kind is involved...." *Id.* at 530.

not contend that efforts to prevent and deter the "perilous road trips" should be abandoned. However, even where the objective of a particular law enforcement practice is legitimate and even desirable, such does not justify the use of any and all means that might conceivably be employed to accomplish that end. In protecting and serving society, those charged with enforcing the state's criminal statutes must take care to act within the constraints imposed by both the statutes themselves and the constitutional safeguards designed to prevent arbitrary, oppressive, and unfair government conduct. By so enforcing Arizona's minor-in-possession statute, some law enforcement agencies in Southern Arizona have exceeded both of these important checks on the power of the state to prohibit conduct it deems harmful to society and its members.[174] Although underage drinking in Mexico undoubtedly harms many social interests, it is equally clear that the practice of issuing citations for possession of alcohol based solely on the presence of alcohol in a minor's body unnecessarily substitutes that harm for one with equally far-reaching, even if more subtle, consequences for society as a whole.

174. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-101(1) (West 2000) (declaring that the public policy of the state and the general purposes of its criminal provisions are to "proscribe conduct that unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests").

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