RECENT DECISIONS

I. CONSTITUTIONAL LAW

FOURTH AMENDMENT RIGHTS FOR PRISONERS: AN UNREASONABLE EXPECTATION?

In *Hudson v. Palmer*[1] the United States Supreme Court decided that prisoners do not have a reasonable expectation of privacy in their prison cells and therefore are not entitled to fourth amendment[2] protection against unreasonable searches and seizures.[3] At issue in *Hudson* was a search of Palmer's cell by Officer Hudson and a fellow officer. Palmer brought a *pro se* action in United States District Court under 42 U.S.C. § 1983 claiming that Hudson searched Palmer's cell solely to harass him.[4]

The Supreme Court granted certiorari in order to determine whether the fourth amendment's proscription against unreasonable searches and seizures applies to prison cell searches. The Court, in an opinion written by Chief Justice Burger, decided that privacy expectations cannot be reconciled with the realities and goals of the prison setting; therefore, prisoners have no fourth amendment protections in their cells.

The History of Prison Search Cases

Historically, the legality of prison searches was based on the belief that prisoners forfeited freedom and all constitutional rights upon being incarcerated. In the nineteenth century, prisoners were considered "slaves of the state."[5] Although the slave theory did not persist, the denial of fourth amendment rights for prisoners continued until the mid-twentieth century.[6]

In 1962 the Supreme Court, in *Lanza v. New York*,[7] held that a prisoner could not claim the protections of the fourth amendment in a jail cell. The Court concluded that for constitutional purposes a jail cell is not equivalent

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1. 104 S. Ct. 3194 (1984).

2. The fourth amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . ." U.S. CONST. amend. IV.

3. *Hudson*, 104 S. Ct. at 3202.

4. Another issue raised by Palmer was that his fourteenth amendment rights were violated when prison officials allegedly destroyed his personal property during the search. The Court held that the state of Virginia provided Palmer with an adequate post deprivation remedy, and therefore Palmer's fourteenth amendment rights were not violated. *See generally Hudson*, 104 S. Ct. at 3202. A discussion of this issue is beyond the scope of this Casenote.

5. Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).

6. *See* Stroud v. United States, 251 U.S. 15 (1919), which rejected, without discussion, a claim that a prisoner's letters obtained by prison officials were protected by the fourth amendment.

7. 370 U.S. 139 (1962).

to a person's house, office, or automobile; therefore, the cell is not a place where fourth amendment protection may be claimed.[8]

Lanza was the definitive law on prison search challenges until the Supreme Court decided *Katz v. United States*[9] in 1967. *Katz* did not involve a prison setting and thus is not directly controlling in this context. However, the Court's broad language has been applied in many cases other than those with parallel facts.[10] In *Katz* the Court held that if a person seeks to preserve something as private, even in a place that is clearly accessible to the public, his or her privacy is constitutionally protected. In determining that the fourth amendment protects people, not places, the Court revised a substantial amount of fourth amendment law. Justice Harlan, concurring in *Katz*,[11] proposed a two-prong test for the evaluation of reasonableness of the search: 1) did the person have a legitimate subjective privacy expectation in the place searched, and 2) would society recognize the expectation as reasonable.[12] Subsequently, the first prong of the test was largely abandoned,[13] leaving the legitimacy of the privacy expectation to be determined by societal standards.

In 1974 the Supreme Court, in *Wolff v. McDonnell*,[14] decided that although the extent of prisoners' constitutional rights may be diminished by the exigencies and inherent needs of the prison setting, prisoners are not completely stripped of their rights upon incarceration.[15] The Court stated that "there is no iron curtain drawn between the Constitution and the prisons of this country."[16]

In response to the liberal attitude of *Katz* and *Wolff* toward search and seizure issues and prisoners' rights issues, the federal courts of appeals began to accord some fourth amendment rights to prisoners in their cells. In fact, a majority of the circuits decided that prisoners do not relinquish all fourth amendment rights upon being incarcerated.[17]

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8. *Id.* at 143. The Court relied upon the fact that since a jail is not a private place, because "official surveillance [is] the order of the day," no fourth amendment rights attach in that setting.

9. 389 U.S. 347 (1967).

10. *See, e.g.*, Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 329 (1979) (a retail store had a reasonable expectation of privacy from governmental intrusion even though the public was invited to enter); United States v. Chadwick, 433 U.S. 1, 7 (1977) (defendants had a reasonable expectation of privacy in their footlocker which was locked and had been taken to a federal building).

11. Justice Harlan's test in *Katz* has become the accepted method of evaluating privacy expectations. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974).

12. 389 U.S. at 361 (Harlan, J., concurring).

13. *See* J. GOBERT & N. P. COHEN, RIGHTS OF PRISONERS 170 (1981); Giannelli and Gilligan, *Prison Searches and Seizures: Locking the Fourth Amendment Out of Correctional Facilities*, 62 VA. L. REV. 1045, 1060 (1976). Even Justice Harlan, who created the two-prong test, later criticized the subjective prong. *See* United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

14. 418 U.S. 539 (1974). The majority in *Hudson* briefly addressed *Wolff* when explaining that prisoners do retain some constitutional rights. The majority did not, however, attempt to reconcile *Hudson* with *Wolff*.

15. *Wolff* dealt with three issues, none of which was based on fourth amendment grounds. At issue in *Wolff* was (1) whether prison disciplinary proceedings complied with the Due Process Clause, (2) whether the inmate legal assistance program met constitutional standards, and (3) whether regulations concerning the inspection of mail to and from inmates were unconstitutionally restrictive. *Id.*

16. *Id.* at 555-56.

17. *See* Lyon v. Farrier, 727 F.2d 766, 769 (8th Cir. 1984) (prisoners retain some fourth amendment rights but these rights are limited by institutional security needs and the reduced privacy ex-

The Supreme Court decided another significant prison search case, *Bell v. Wolfish*,[18] in 1979. *Bell* dealt with a cell search and a body-cavity search.[19] The Court suggested that a separate test should be applied to each type of search. In regard to the room search, the Court said that any expectation of privacy in a cell is diminished due to the very fact of incarceration and therefore the expectation need not be respected.[20] When addressing the body-cavity search, however, the Court emphasized the importance of balancing the need for the search against the invasion of rights it entails.[21] The latter test is used in most fourth amendment reasonableness determinations[22] and is practically indistinguishable from the test proferred by the dissent in *Hudson*.[23] The majority in *Bell*, however, did not attempt to reconcile the two tests, nor did it give a comprehensive explanation of when each is to be used.

The Hudson v. Palmer *Decision*

In *Hudson* the Court applied a balancing test, but not in the traditional case-by-case manner.[24] Rather, the Court used the balancing approach in a broad way to determine the privacy rights of prisoners as a group. The two interests which the court weighed were society's interest in the security of its prisons and the prisoners' privacy interests in their cells.[25] The majority stated that prisoners' privacy interest is minimal due to the exigencies of the prison setting.[26] When the prisoners' privacy interest is weighed against the interest in security, it is overwhelmed.[27]

The four dissenting justices[28] conceded that prison cell searches warranted a lower standard than that which applies to searches involving the population at large. The dissent, however, questioned the majority's sweep-

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pectations of prisoners); United States v. Mills, 704 F.2d 1553, 1560-61 (11th Cir. 1983) (although the scope of a prisoner's fourth amendment protection is not identical to that which would exist if he/she were not incarcerated, the government must show a penological need for a search and demonstrate that it was conducted reasonably); United States v. Chamorro, 687 F.2d 1, 4 (1st Cir. 1982) ("a prisoner retains some residium of fourth amendment protection"); United States v. Hinckley, 672 F.2d 115, 129 (D.C. Cir. 1982) ("prisoners retain some remnant of fourth amendment rights consistent with the legitimate demands of prison security"); Bonner v. Coughlin, 517 F.2d 1311, 1317 (7th Cir. 1975) (a prisoner enjoys fourth amendment protection, at least to some minimal extent), *aff'd on rehearing*, 545 F.2d 565 (1976) (en banc), *cert. denied*, 435 U.S. 932 (1978); United States v. Savage, 482 F.2d 1371, 1372 (9th Cir. 1973) (a "prisoner is entitled to the fourth amendment's protection from unreasonable searches and seizures").

18. 441 U.S. 520 (1979).

19. Since body-cavity searches are not at issue in *Hudson*, they are not discussed at length in this Casenote.

20. 441 U.S. at 557.

21. *Id.* at 559.

22. *See* Terry v. Ohio, 392 U.S. 1 (1968).

23. Justice Stevens dissenting in *Hudson* stated: "Questions of Fourth Amendment reasonableness can be resolved only by balancing the intrusion on constitutionally protected interests against the law enforcement interests justifying the challenged conduct." 104 S. Ct. at 3211 (Stevens, J., dissenting).

24. *Hudson*, 104 S. Ct. at 3200-02.

25. *Hudson*, 104 S. Ct. at 3198.

26. *Id.*

27. The *Hudson* court of appeals recognized the importance of searches in maintaining security. That court, however, suggested that fourth amendment interests and security can exist side by side. Palmer v. Hudson, 697 F.2d 1220, 1224 (4th Cir. 1983).

28. Justices Stevens, Marshall, Brennan, and Blackmun dissented in *Hudson*.

ing statement that society is not willing to recognize any privacy interest of a prisoner in a cell.[29] Because the fourth amendment is of general application and requires that each search or seizure be scrutinized for reasonableness, the dissent proposed using the balancing test on a case-by-case, rather than a categorical, basis. The considerations to be balanced, according to the dissent, are law enforcement interests and prisoners' privacy expectations.[30] This balancing approach evaluates reasonableness and is substituted for a warrant requirement or a probable cause determination.[31]

The Scope of Hudson

In *Hudson v. Palmer*, the Supreme Court delineated the rule which will be applied to all prison cell searches. The rule provides that prisoners have no reasonable expectation of privacy in their prison cells and, therefore, they have no fourth amendment rights in that setting.[32] Implicit in this rule is the conclusive presumption that all prison cell searches are inherently reasonable.[33] Because all prison cell searches are considered reasonable under *Hudson*, authorities need no reason to search a cell; they need not have a suspicion of contraband.[34]

The prison cell search rule does not apply to other searches in the prison setting. For instance, a body cavity search remains subject to a case-by-case evaluation.[35]

An Analysis of the Hudson *Decision*

In *Hudson* the Supreme Court stated that a society's treatment of its prisoners indicates the essential nature of that society.[36] If this is true, what does the *Hudson* decision say about American society? In order to answer this question, one must examine the priorities of corrections philosophy in the United States.

The Supreme Court has recognized rehabilitation as a goal of prison administration.[37] The Court has also listed discipline and security as important factors in maintaining prisons.[38] The *Hudson* Court decided that security is the most important goal of prison administration, even though rehabilitation has historically been a primary consideration in American

29. Justice Stevens pointed to the fact that the majority's perception of what society is willing to recognize as reasonable is not supported by any empirical data. *Hudson*, 104 S. Ct. at 3212.

30. *Id.* at 3211 (Stevens, J., dissenting).

31. *Id.*

32. *Id.* at 3201-02.

33. *Id.* at 3216 (Stevens, J., dissenting).

34. The *Hudson* majority emphasizes, however, that prison attendants will not be able to "ride roughshod" over prisoners' rights with impunity because of the limitations of the eighth amendment's protections against cruel and unusual punishment. 104 S. Ct. at 3202.

35. *See* Bell v. Wolfish, 441 U.S. 520, 559 (1979).

36. *Hudson*, 104 S. Ct. at 3199.

37. Procunier v. Martinez, 416 U.S. 396 (1974). The *Procunier* Court said, "The identifiable governmental interests at stake . . . are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of prisoners." *Id.* at 412.

38. *Id.*

prison policy.[39] Although the effect of a denial of privacy rights on rehabilitation is not completely clear, a deprivation of fourth amendment rights in prison cells may have a negative impact on the rehabilitative process.[40]

In Search of a More Flexible Solution

If the Supreme Court wants to facilitate rehabilitation, the Court can accomplish this end and yet remain within the framework of the balancing approach.[41] The balancing test, when used on a case-by-case basis, is flexible and can protect some privacy rights of prisoners in their cells while yielding to the needs of the correctional setting.

By requiring adherence to a case-by-case balancing approach, the Court can create a policy whereby prison officials do not have to obtain warrants to search cells. Such a policy could also control arbitrary, possibly malicious searches.[42] This application of the case-by-case balancing approach is the same as the test suggested by the dissent in *Hudson*. The interest of society is weighed against the privacy interest of prisoners to determine whether a given search is reasonable. The reasonableness determination is the sole test, as the requirement of probable cause or a warrant in a prison setting is generally cumbersome and impractical.[43]

Using solely a reasonableness determination would not be a new route for the Court; similar approaches were used in *Terry v. Ohio*[44] and *New Jersey v. T.L.O.*[45] In those cases the Court applied the reasonableness test but did not require a warrant. In *Terry* a warrant was not required because

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39. Most states have statutorily endorsed the goal of rehabilitation. *See, e.g.*, CAL. PENAL CODE §§ 2002, 2022, 2032 (West 1982); R.I. GEN. LAWS § 42-56-1 (1984). *See also* 28 C.F.R. §§ 544.20-72 (1979). *See generally* NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS STANDARDS § 2.9 (1973); DEPARTMENT OF JUSTICE FEDERAL STANDARDS FOR PRISONS AND JAILS §§ 17.01-04 (1980).

40. As the Supreme Court recognized in *Procunier v. Martinez*, an important objective of a penal system is the rehabilitation of prisoners. Without the privacy and dignity provided by fourth amendment coverage, an inmate's opportunity to reform, as small as it may be, will further be diminished. It is anomalous to provide a prisoner with rehabilitative programs and services in an effort to build self respect while simultaneously subjecting him to unjustified and degrading searches and seizures.

Gianelli and Gilligan, *supra* note 13, at 1069. *See also Hudson*, 104 S. Ct. at 3214 (Stevens, J., dissenting).

41. Gianelli and Gilligan assert that the balancing approach "avoids the rigid all-or-nothing model of justification and regulation that has led in most prison search cases to nothing for the inmate." Gianelli and Gilligan, *supra* note 13, at 1070.

42. Professor Amsterdam stated that "to exclude any particular police activity from coverage is essentially to exclude it from judicial control and from the command of reasonableness, whereas to include it is to do no more than to say that it must be conducted in a reasonable manner." Amsterdam, *supra* note 11, at 393.

43. *See* Bell v. Wolfish, 441 U.S. at 557.

44. 392 U.S. 1 (1968). In *Terry* a warrantless "pat-down" search of defendant's outer clothing was held reasonable where the officer concluded in light of his experience that criminal activity might be afoot and that the defendant might be armed and dangerous. The significance of *Terry* to prison search cases is that the Court held that certain types of searches are not subject to the warrant requirement or the standard of probable cause. Instead, the Court analyzed whether the officer's conduct was reasonable. *Id.* at 20.

45. 105 S. Ct. 733 (1985). In *T.L.O.* a search of a high school student's purse was held reasonable because the school official was searching for cigarettes pursuant to a report that the defendant had been smoking in a forbidden area. The discovery of rolling papers, according to the Court, gave rise to a reasonable suspicion that the defendant possessed marijuana. *Id.* at 745-47.

under the circumstances it was impractical and the search was limited in scope.[46] The search was allowed on the basis of a reasonable suspicion that the men involved were armed. The Court permitted a warrantless search, and said that in limited circumstances a search may be legally accomplished with less than probable cause.[47] In *New Jersey v. T.L.O.*, a recent high school search case, the Court held that the warrant requirement is not suited to the school setting.[48] The Court also decided that the school environment necessitates modification of the level of suspicion needed to justify a search.[49] The majority said that "probable cause is not an irreducible requirement of a valid search."[50]

The administrative search is also analagous to the *Hudson* situation. In the seminal administrative search case of *Camara v. Municipal Court*,[51] the Court stated that in analyzing whether an exception to the warrant requirement should be created, the question is not whether public interest justifies the search, but whether the search should be accompanied by a warrant.[52] This determination, in turn, was said to depend upon whether the burden of getting a warrant is likely to defeat the governmental purpose behind the search.[53] Ultimately, the Court required that warrants be obtained in administrative search cases, but not exclusively on a showing of probable cause.[54]

The Supreme Court has also applied the balancing test in the prison setting. In *Bell v. Wolfish*[55] the Court used the balancing test to determine whether a body cavity search was reasonable. Thus, the balancing test is not foreign to the prison environment.

The Uniform Law Commissioners' Model Sentencing and Corrections Act provides that a warrant is not required for a prison cell search, but "a confined person has a protected interest in freedom from unreasonable searches."[56] The Act also provides a scheme for these searches which limits

46. *Terry*, 392 U.S. at 20, 26.
47. *Id.* at 22.
48. *T.L.O.*, 105 S. Ct. at 743.
49. *Id.*
50. *Id.*
51. 387 U.S. 523 (1967). In *Camara* the Court held that a warrant was required for a municipal health inspector to search a private home. The importance of *Camara* lies in its recognition of the fact that there are "carefully defined classes of cases" in which a search warrant is not necessary. The Court also decided that the condition of the area was sufficient to justify a search of a particular dwelling. *Id.* at 538.
52. *Id.* at 533.
53. *Id.*
54. *Id.* at 538-39. The Court in *Camara* held that "reasonableness is still the ultimate standard" by which to gauge whether a search is constitutional. While the Court stated that probable cause is required, it is a less particularized form of probable cause than that which is generally used in search and seizure cases.
55. 441 U.S. 520 (1979).
56. UNIFORM LAW COMMISSIONERS' MODEL SENTENCING AND CORRECTIONS ACT § 4-119 (1978). The Act specifies that:
   a) A confined person has a protected interest in freedom from unreasonable searches.
   b) Searches within facilities are subject to the following limitations:
      (1) Searches must be conducted solely to detect contraband, prohibited material, or evidence of a crime;
      (2) The frequency and scope of random or general searches of facilities or confined persons must conform to a plan approved in advance by the director as providing

their scope and frequency, while allowing prison officials discretion in conducting the searches.[57]

Conclusion

Cases in which the Supreme Court has analyzed other fourth amendment problems indicate that the Court is willing to be flexible in applying the warrant requirement to situations where a warrant is not appropriate. These cases continue to recognize fourth amendment rights while looking to new ways of protecting those rights.[58] Two of these approaches, which have been applied independently and jointly, are to disregard the warrant requirement and to use a standard which is lower than probable cause.[59]

Clearly in some prison circumstances there are dangers that render a warrant requirement impractical.[60] This does not mean, nor has the Court in similar circumstances held it to mean, that fourth amendment rights should not be recognized.[61] Rather, this situation calls for the Court's creativity in constructing standards which allow limited privacy rights and minimize malicious searches while respecting the needs of the institution. This can be achieved in part by using the balancing test on a case-by-case basis in prison cell searches.[62] The use of the case-by-case application of the balancing test as suggested by Justice Stevens' dissent in *Hudson* allows for a range of different solutions to fit the various problems posed. It is also possible to cater to the needs of the prison setting by requiring an evaluation of reasona-

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the least intrusive invasion of privacy necessary to the safety of the public and security and safety within the facility. The plan may include provisions for search of confined persons upon admittance to a facility, upon leaving and returning to a facility and upon entering or leaving designated areas. The plan need not be published or adopted in compliance with the procedures governing the adoption of rules or other measures.

c) Searches other than those authorized by the plan and directed at living quarters or a particular confined person must be conducted only upon obtaining reliable information that a search is necessary to detect contraband, prohibited material, or evidence of a crime. Except in an emergency, prior authorization to conduct such a search must be obtained from the chief executive officer or supervisory level correctional employees to whom the chief executive officer has delegated the responsibility to authorize searches.

57. *Id.*

58. *See supra* notes 43-53 and accompanying text.

59. *Id.*

60. *See supra* note 42 and accompanying text. The fourth amendment does not specify when a warrant must be sought; it merely states that a warrant shall not issue except upon probable cause, that a warrant must be supported by oath or affirmation, and that it must particularly describe the place to be searched, and the person or things to be seized. It is, therefore, not apparent from the text of the amendment that impracticality is a sufficient reason to refrain from upholding the warrant requirement. The Supreme Court has shown, however, a willingness to circumvent this requirement when necessary. *See, e.g.*, Chimel v. California, 359 U.S. 752 (1969) (search incident to arrest); Terry v. Ohio, 392 U.S. 1 (1968) ("pat-down" search); Camara v. Municipal Court, 387 U.S. 523 (1967) (condition of the area); Warren v. Hayden, 387 U.S. 294 (1967) (exigent circumstances). The Supreme Court has said, however, that absent a warrant, a search is per se unreasonable, "subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967). Gobert and Cohen suggest that the absence of a warrant does not mean that prison searches are immune from judicial review. Instead, warrantless searches will be evaluated under the reasonableness clause rather than the warrant clause. J. GOBERT & N. P. COHEN, *supra* note 13, at 175.

61. *See supra* notes 43-53 and accompanying text.

62. The Court has applied the balancing test on a case-by-case basis in most fourth amendment areas. *See supra* notes 33-54 and accompanying text.

bleness instead of a warrant requirement and probable cause standard. The Uniform Law Commissioners' suggestions are useful in this regard as they apply structure without the rigidity of the *Hudson* approach. The balancing approach, in conjunction with the process suggested by the Uniform Law Commissioners and the lower standards for the searches, is a reasonable approach to the prison search problem. The balancing approach addresses the exigencies inherent to the prison setting and avoids the implication that incarcerated Americans lack fourth amendment rights.

Abigail L. Jones

II. COPYRIGHT

WHOSE IDEA IS IT ANYWAY: THE COPYRIGHT TO THE TANGIBLE EXPRESSION OF ONE'S IDEAS

The United States Constitution allows Congress to provide copyright protection for authors and their works.[1] Congress has delineated the scope of this protection in the copyright acts, the most recent of which is the Copyright Act of 1976.[2] This Act extends copyright protection to all original works that are expressed in any tangible medium,[3] and allows an infringement action against works that are "substantially similar" to the protected work. In *Landsberg v. Scrabble Crossword Game Players, Inc.*[4] the Ninth Circuit Court of Appeals applied a twofold standard for "substantial similarity," noting that the standard varied with the context of the work.

In *Landsberg*, Mark Landsberg, an acknowledged *Scrabble* expert, prepared a manuscript entitled "Championship Scrabble Strategy," which described a system he developed for playing the game. In 1972 Landsberg took steps to publish this manuscript and requested permission to use the word "Scrabble" from Selchow and Righter Co. (S & R), the owner of the *Scrabble* trademark and the producer of *Scrabble* brand crossword games. S & R requested that Landsberg supply them with a copy of his manuscript, and he

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1. The power of Congress to grant copyright protection is provided in the Constitution of the United States, article 1, § 8, clause 8, which states that Congress has the power "to promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Congress has exercised this power four times in revising copyright laws—in 1831, 1870, 1909, and 1976. The meanings of such terms as "writings," "limited times," and "authors" have undergone new definition over time. "Writings" originally referred only to literary works; however, eventually Congress included musical compositions, 4 Stat. 436 (1831), paintings, statutes, and fine art, 16 Stat. 198 (1870), choreography, 17 U.S.C. § 102(a)(4) (1976), and computer programs, 17 U.S.C. § 117 (1980). The 1976 Act extended protection to practically anything expressible in tangible form. *See* 17 U.S.C. § 102(a) (1982).

Copyright protection, prior to the 1976 Act, was granted for specific time periods (except for the "common law copyright," *see infra* note 5 and accompanying text), usually in multiples of 14 years in keeping with the constitutional language of "limited times." The 1909 Act provided for a statutory protection period of 28 years followed by a possible 28-year renewal—a total of 56 years. See 17 USCA § 24 (Supp. 1985) (Appendix). The 1976 Act limited all copyrights subsequently granted to the lifetime of the author plus 50 years. *See* 17 U.S.C. § 302(a) (1982).

"Author" has traditionally been held to mean the individual(s) who supplied the creative, intellectual, or aesthetic labor to produce the work, *see* Goldstein v. California, 412 U.S. 546 (1973), but may also mean an employer if it is a work-for-hire, *see* 17 U.S.C. § 203 (1982).

2. 17 U.S.C. §§ 101-510 (1982).

3. 17 U.S.C. § 102(a) (1982) states:

> Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
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> (1) literary works;
> (2) musical works, including any accompanying words;
> (3) dramatic works, including any accompanying music;
> (4) pantomimes and choreographic works;
> (5) pictorial, graphic, and sculptural works;
> (6) motion pictures and other audiovisual works; and
> (7) sound recordings.

4. 736 F.2d 485 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 513 (1985). The facts of *Landsberg* are set forth 736 F.2d at 486-87.

did so. In 1976 S & R published its own strategy book, borrowing heavily from Landsberg's manuscript. Landsberg then sued S & R for infringement of common law copyright.[5] The district court determined that S & R's handbook was substantially similar to Landsberg's manuscript and granted judgment and damages to Landsberg.[6] S & R ignored this judgment, however, and continued to produce and sell its handbook. Landsberg filed a second action against S & R, under the Copyright Act of 1976,[7] for infringement subsequent to the prior judgment. Based on its previous holding, the district court granted summary judgment and damages for Landsberg but declined to award exemplary damages.[8] Both sides appealed.

The Ninth Circuit Court of Appeals agreed that Landsberg possessed a common law copyright, but found no infringement.[9] The court based its holding on a determination that Landsberg's manuscript represented an "idea" and ideas could not be copyrighted. The court of appeals held that the district court construed the extent of "substantial similarity" between Landsberg's work and S & R's handbook too broadly and failed to consider that copyright law protects expression of unprotectable ideas only insofar as is possible without protecting the ideas themselves.[10]

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5. The California Copyright Act (Cal. Civ. Code § 980 (1982) and Cal. Civ. Proc. § 338(1) (1982)) followed the federal Copyright Act of 1909. *See also* Weitzenkorn v. Lesser, 40 Cal. 2d 778, 256 P.2d 947 (1953); Williams v. Weisser, 273 Cal. App. 2d 726, 78 Cal. Rptr. 542 (1969); Italiania v. M.G.M., 45 Cal. App. 2d 464, 114 P.2d 370 (1941).

Under the 1909 Act, a common law copyright existed for an author's unpublished creations. This was essentially a property right which enabled the author to exclude all others from his unpublished work. It existed from the moment the work was created. As long as the work was not published by an authorized individual, the common law copyright prevented others from copying the work. If the author published the work, the copyright was transformed into a statutory copyright, which existed for a set term of years. *See* Hemingway's Estate v. Random House, Inc., 53 Misc.2d 462, 279 N.Y.S.2d 51 (1967).

6. Damages are authorized under 17 U.S.C. § 505 (1982).

7. The Copyright Act of 1976 took effect on January 1, 1978. *See* 17 U.S.C. §§ 203(a), 302(a) (1982).

8. 736 F.2d at 487. Liability and willfulness on the part of S & R were adjudicated based upon collateral estoppel from the first judgment.

9. 736 F.2d at 488-89.

10. *Id.* The court relied on Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977) in which fanciful character-puppets created by the plaintiff were copied and used by the defendant. The *Krofft* court accorded copyright protection because these were developed characters in which the "idea" and "expression" were inseparably linked. In *Landsberg*, the court held that the manuscript represented an "idea" that could not be accorded protection under California law. The court held that while in *Krofft* the defendants "could choose from myriad ways to create puppets," *Landsberg*, 736 F.2d at 488, it "[could] not see how anyone could state Landsberg's ideas without also being held to have infringed." *Id.* at 489.

The court suggested that fraud existed and offered the possibility that Landsberg may have a valid claim under California contract law for breach of an implied contract. *See* Cal. Civ. Code §§ 1619, 1621 (1982); *see also* Firchau v. Diamond Nat'l Corp., 345 F.2d 269 (9th Cir. 1965) ("contract implied in fact" is not expressed in words but is implied from the promissor's conduct); Blaustein v. Burton, 9 Cal. 2d 161, 88 Cal. Rptr. 319 (1970) (contract implied for the conveyance of an idea); Donahue v. United Artists Corp., 2 Cal. 3d 794, 83 Cal. Rptr. 131 (1969) (recovery for plagiarism on theory of contract implied in fact); Bush v. Lane, 161 Cal. 2d 278, 326 P.2d 640 (1958) (an "implied contract" is inferred from the conduct, situation, or mutual relations of parties). *See generally* Oddi, *Product Stimulation and Contributory Trademark Infringement: A Right Suggests a Wrong*, 25 ARIZ. L. REV. 601 (1983); Robison, *The Confidence Game: An Approach to the Law About Trade Secrets*, 25 ARIZ. L. REV. 347 (1983).

The tortious misappropriation by S & R of Landsberg's manuscript would probably establish a cause of action grounded in unfair competition. Since this was information communicated for a limited purpose, S & R's actions may be deemed violative of an implied-in-fact contract with Lands-

The facts of *Landsberg* thus raised two principal issues: the degree of protection afforded a work and the standards for the substantial similarity test. As noted by the court, an original work can receive copyright protection for the expression of an idea only to the extent that protection is not accorded to the idea itself. Further, the court noted that the degree of substantial similarity necessary to constitute a copyright infringement varies with the context of the work.[11]

Copyright Law

Copyright law protects only the expression of ideas and not the ideas themselves.[12] This principle is embodied in both the 1909 and 1976 Copyright Acts.[13] The basic tenet of the copyright laws has been to accord protection to an author's work.

The 1909 Act granted a common law copyright in unpublished works.[14] This common law copyright was perpetual as long as the work was not published by the author. When the work was published it was given statutory protection for twenty-eight years.[15] The 1976 Act abandoned the distinction between common law and statutory copyright and accorded unified protection to all works as soon as they were memorialized.[16]

The principle requirement for copyright protection under both Acts is originality. "Originality" means that the author has invested his own creative work in the production, even if others have produced similar works. He may not derive his work from that of others.[17] For example, photographs are copyrightable;[18] although anyone is free to capture the scene (idea) on film, the fact that the photograph is the work of a single person makes it copyrightable.[19] Even a directory of names is copyrightable if the author utilizes original effort in its production.[20]

A principal distinction imposed upon copyrightable work is whether the work is functional, whereby it may be protected by patent, or non-functional.[21] Generally, works are given copyright protection only if they are not patentable. However, when a work possesses both functional and non-

berg. *Cf.* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974); Timely Prod. Corp. v. Arron, 523 F.2d 288 (2d Cir. 1975); Clark v. Bunker, 453 F.2d 1006 (9th Cir. 1972). *See also* Restatement (Second) of Torts §§ 875-79 (1965).

11. 736 F.2d at 489.

12. Miller v. Universal City Studios, 650 F.2d 1365, 1368 (5th Cir. 1981); Ricker v. General Elec. Co., 162 F.2d 141 (2d Cir. 1947).

13. *See infra* note 21 and accompanying text.

14. *See supra* note 5 and accompanying text.

15. *See supra* note 1.

16. *See supra* note 3 and accompanying text.

17. *See infra* notes 20 and 25 and accompanying text.

18. *See, e.g.*, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884).

19. *See* Bleistein v. Donaldson Lithographic Co., 188 U.S. 239 (1903); *see also* Soptra Fabrics Corp. v. Stafford Knitting Mills Inc., 490 F.2d 1092 (2d Cir. 1974) (while several persons may copy a particular subject, each reproduction is an original work and is protected); Time Inc. v. Bernard Geis Assoc., 293 F. Supp. 130 (S.D.N.Y. 1968) (the fortuitous filming of the assassination of President Kennedy is protected).

20. *See* New York Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 212 (N.J. 1977).

21. In Mazer v. Stein, 347 U.S. 201 (1954), copyright protection was granted to a statue lamp base. The Court emphasized that when a work is the expression of an idea, copyright protection would not depend upon whether the work was "purely aesthetic" or whether it possessed some

functional characteristics, copyright protection may be provided.[22]

The 1976 Act enables a copyright holder to prevent the production of another work that is derived from his work.[23] This contrasts with the earlier law that held many derivations not to be copyright infringements.[24]

A prima facie case for copyright infringement requires the plaintiff to establish: "[T]hat he owns the copyright in the work in question, that the defendant had access to the copyrighted work, and that there is substantial similarity, not only of the general ideas [of the works] but of the expression of those ideas as well".[25]

The Ninth Circuit addressed "substantial similarity" in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*[26] *Krofft* laid out a two-step inquiry, which determined that a copyright infringement exists if an idea is copied, and the copying is an unlawful appropriation.[27]

The first prong of this inquiry is satisfied if the work is taken significantly from the copyrighted material.[28] The second prong depends on whether the form of expression has been copied. When the manner in which the original idea was expressed is also taken by the subsequent publication, copyright infringement has occurred.[29] The expression need not be taken verbatim; paraphrasing and rearranging do not avoid infringement.[30]

Some works have been considered infringements if they were merely influenced by a protected work and did not intentionally copy it.[31] This has

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useful quality. Thus the fact that a particular work may be utilized for some practical or functional purpose does not alone have copyright protection.

Under the 1909 Act, while blueprints were copyrightable, the construction of a building that duplicated these plans did not violate the copyright; *see, e.g.*, Imperial Homes Corp. v. Lamont, 458 F.2d 895 (5th Cir. 1972). However, under the 1976 Act a building may be construed as a tangible expression of the plans and could be accorded copyright protection. *See, e.g.*, Schuchart & Assoc. v. Solo Serve, CCH Copyright Law Reports P25, 593 (W.D. Tex. 1983) 220 U.S.P.Q. 170 (1983).

22. Mazer v. Stein, 347 U.S. at 217.

23. 17 U.S.C. § 106(2) accords exclusive rights "to prepare derivative works based upon the copyrighted work." 17 U.S.C. § 101 defines a "derivative work" as

> a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any form in which a work may be recast, transformed or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship. . . .

24. 17 U.S.C. §§ 7-12 (Supp. 1985) (Appendix). *See also* Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930) (no infringement for the copying of ideas expressed in a work); G. Ricordi & Co. v. Mason, 201 F. 182 (S.D.N.Y. 1911) (no infringement for publication of plot outlines of plays); Roy Export Co. Estab. v. Trustees of Columbia Univ., 344 F. Supp. 1350 (S.D.N.Y. 1972) (no infringement for noncommercial performance of play without author's permission).

25. *Landsberg*, 736 F.2d at 488 (quoting Sid & Marty Krofft Television Prods. Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977)).

26. 562 F.2d 1157 (9th Cir. 1977).

27. *Krofft*, 562 F.2d at 1164-65.

28. *Id.* at 1165.

29. *Id.* at 1166.

30. *See supra* note 25 and accompanying text.

31. 3 NIMMER ON COPYRIGHT § 13.03(A) (1982) (comprehensive nonliteral similarity: similarity short of verbatim copying is still copyright infringement). *See* Bright Tunes Music Corp. v. Harrisongs Music Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976) (the unconscious plagiarism by "Beatle" member George Harrison in the song "My Sweet Lord" of "He's So Fine," by the Chiffons, constituted infringement; even though Harrison did not deliberately copy the song, his subconscious mind was aware of the tune).

led the courts to define "substantial similarity" so as to accord protection only against the usurpation of the author's work and not usurpation of the author's ideas.

Landsberg *Explained*

The *Landsberg* decision focused on the degree of substantial similarity necessary to cause a copyright infringement. Applying the two-step inquiry of *Krofft*, the *Landsberg* court determined that S & R had significantly copied both Landsberg's manuscript and ideas.[32] However, the court was unable to determine how anyone could state Landsberg's ideas without being held to have infringed his copyright. Thus, despite the substantial similarity of the works, and the lower court's determination that S & R had unlawfully appropriated the material, the court held that there was no copyright infringement.[33] The court reasoned that the substantial similarity inquiry varies according to the context in which it is applied. The 1976 Act contains a provision denying copyright protection to any idea embodied in protected works.[34] Since the S & R handbook merely appropriated the ideas in Landsberg's manuscript, and not the manner in which they were expressed, there was no copyright infringement.

To illustrate how varying the context affects the substantial similarity test, the court contrasted fictional and non-fictional works.[35] Fictional works can express the same idea in multiple ways. A new work, therefore, need only slightly resemble a prior work to be substantially similar and thus constitute infringement. Ideas in non-fictional works, however, may be expressed only in limited ways. Thus, factual works require a verbatim reproduction or very close paraphrasing before infringement occurs.[36]

The *Landsberg* court cited *Miller v. Universal City Studios*[37] and *See v. Durang*[38] to illustrate the verbatim reproduction standard. In *Miller*, an author sued a film maker and alleged that a particular movie infringed upon the author's copyrighted account of an actual kidnapping that occurred in Atlanta in 1968. The Fifth Circuit Court of Appeals stated that although copyright protection extends only to an author's expression of ideas and not to the ideas themselves,[39] the movie sufficiently appropriated the author's expression of ideas to warrant a finding of infringement under correct theories of copyright law.[40]

In *See v. Durang*, an author brought a copyright infringement action which charged that a play was substantially similar to his own copyrighted

32. *Landsberg*, 736 F.2d at 489.
33. *Id.*
34. 17 U.S.C. § 102(b): "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."
35. *Landsberg*, 736 F.2d at 488.
36. *Id.*
37. 650 F.2d 1365 (5th Cir. 1981).
38. 711 F.2d 141 (9th Cir. 1983).
39. *Miller*, 650 F.2d at 1368.
40. *Id.* at 1367.

work.[41] The court said that the only similarities were in common scenes and held that there is no infringement if the second author reproduces verbatim the first author's expression of ideas, if that expression constitutes "stock scenes or scenes that flowed necessarily from common unprotectable ideas."[42]

The court in *Landsberg* found that, while there was similarity between Landsberg's manuscript and the S & R handbook, this similarity was unavoidable within the context of a book on game strategy.[43] The court reasoned that the S & R handbook rearranged the ideas in Landsberg's manuscript and was not a verbatim copy,[44] thus applying a higher standard for the substantial similarity test.

Scope of the Case

The court's discussion in *Landsberg*, that the substantial similarity inquiry will vary with the context to which it is applied, is a traditional application of copyright law. The court recognized two principal standards for the substantial similarity determination in its discussion of fictional and nonfictional works. In fictional works, a mere resemblance to the original work is sufficient to establish copyright infringement. Any similarities constitute infringement, despite the differences which may also exist.[45] The court adopts the view that the mere duplication of the expression of a general idea from a fictional work is infringement.[46]

In *Universal City Studios v. Film Ventures International*[47] the California District Court observed that the standards, which the Ninth Circuit has indicated are to be employed on the question of substantial similarity, are predicated upon the initial determination of what is a "general idea" and what is the expression of such an idea.[48] The *Universal City* court accepted as the "general idea" for a full length motion picture the following example: "a terror fish attacking a coastal town on the Atlantic seaboard."[49] The taking of this "general idea" would be an infringement.

The scope of copyright protection for nonfictional works is often significantly narrower than for fictional works because there is a narrower range of materials from which to draw.[50] Limitations also exist with regard to the format presented by prior treatment of the subject matter[51] and by any jargon associated with the subject.[52] In nonfictional works, it is the particu-

41. See v. Durang, 711 F.2d at 143.
42. *Id.*
43. *Landsberg*, 736 F.2d at 489.
44. *Id.*
45. Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354 (9th Cir. 1947) (there is copyright infringement even though only twenty percent of the original work is taken).
46. *Landsberg*, 736 F.2d at 488.
47. 214 U.S.P.Q. 865 (C.D. Cal. 1982).
48. *Id.* at 869.
49. *Id.*
50. *Landsberg*, 736 F.2d at 488.
51. McGraw-Hill, Inc. v. Worth Publishers, Inc., 335 F. Supp. 415 (S.D.N.Y. 1971) (no infringement for similarities in "pattern" of plaintiffs' economics textbook).
52. Lapsley v. American Institute of Certified Public Accountants, 246 F. Supp. 389 (D.D.C. 1965) (infringement requires more than hypercritical dissection of sentences and phrases).

lar arrangement of words used by the author to express his ideas that is protected by copyright,[53] and not the ideas themselves.

The nonfiction standard, as expressed in *Landsberg*, necessitates nearly verbatim copying to infringe. The court appears to hold that ideas are in the public domain and that even though an author has discovered or created the idea or method, he cannot appropriate it.[54]

Following *Landsberg*, the determination of whether one work constitutes an infringement of another is based upon the court's application of the appropriate standard of substantial similarity. Although the result in *Landsberg* may seem harsh based upon the facts involved, the court correctly applied the copyright law. While a copyright remedy is not available to *Landsberg*, the court suggests that relief may be possible under contract law in a suit for breach of an implied-in-fact contract.[55]

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53. Holmes v. Hurst, 174 U.S. 82 (1899) (serial publication of the excerpts of a book by Oliver Wendell Holmes, Jr. vitiates subsequent copyright).

54. *Landsberg*, 731 F.2d at 489; *see also* Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904 (3d Cir. 1975) (no infringement for copying a wall chart; substantial similarity to show that the original work has been copied is not the same as substantial similarity to prove infringement); Ricker v. General Elec. Co., 162 F.2d 141 (2d Cir. 1947) (reproduction of the scientific material from a copyrighted book is not an infringement short of plagiarism); Greenbie v. Noble, 151 F. Supp. 45 (S.D.N.Y. 1957) (novel about an historical figure does not infringe copyright of figure's biographer).

55. *See supra* note 11.

III. CRIMINAL LAW

A. *ARIZONA V. RUMSEY*: IMPLIED ACQUITTAL AND THE BIFURCATED CAPITAL MURDER PROCEEDING

The double jeopardy clause of the United States Constitution[1] has long stood as a bar to the government's continued prosecution of a defendant who is acquitted at trial. Recent developments, however, have extended the application of the double jeopardy principle to another context, namely to pre-sentencing hearings which are not trials, but which follow a trial and conviction for capital murder.

In *Arizona v. Rumsey*,[2] the United States Supreme Court decided whether, on remand for resentencing, a defendant convicted of capital murder may receive a harsher sentence than the one imposed after the original pre-sentencing hearing. Following *Bullington v. Missouri*,[3] the Court concluded that where the pre-sentencing hearing in a bifurcated capital proceeding resembles a trial on the issue of guilt or innocence, imposition of a lesser penalty impliedly acquits the defendant of all allegations that might have occasioned a greater one.[4] Consequently, imposition of a greater sentence on retrial or resentencing is impermissible under the double jeopardy clause.

This Casenote will explore some of the possible ramifications of both *Rumsey* and its predecessor, *Bullington*. *Rumsey* is significant because it clarifies the implied acquittal doctrine[5] and definitively rules out the imposition of a heavier sentence upon resentencing in certain capital murder cases. Nonetheless, it raises questions concerning the true scope of double jeopardy protection. Furthermore, *Rumsey* impairs the effectiveness of Arizona's permissive cross-appeal statute,[6] yet fails to pass on its constitutionality as a

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1. The Fifth Amendment to the United States Constitution reads in pertinent part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

2. 104 S.Ct. 2305 (1984).

3. 451 U.S. 430 (1981). *See infra* notes 42-49 and accompanying text.

4. *Rumsey*, 104 S.Ct. at 2308. In Furman v. Georgia, 408 U.S. 238 (1972), the divided Court was unable to conclude that infliction of the death penalty is unconstitutional per se. The Court agreed, however, that limits must be placed upon the discretion of the sentencer so that a "meaningful basis" exists to distinguish cases in which the death sentence is imposed from those in which it is not. 408 U.S. at 313. The Court summarized this portion of *Furman* in Gregg v. Georgia, 428 U.S. 153 (1976). "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave [as the imposition of the death penalty], that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189. Following *Furman*, legislatures rewrote their death penalty laws so as to limit the scope of the sentencer's discretion. The answer for many states, including Arizona and Missouri, proved to be a bifurcated proceeding—a trial split into two phases—one phase on the issue of guilt or innocence, and a second, separate proceeding on the question of sentencing. A sentencing hearing following a conviction of first-degree murder typically involves the presentation of evidence of aggravating and mitigating circumstances to the trier of fact. The trier weighs these circumstances against each other in determining which of a limited number of sentences to impose. In both Arizona and Missouri, there are but two sentences available in capital cases: life imprisonment without possibility of parole for 25 and 50 years respectively, and death. The peculiarities of presenting aggravating and mitigating circumstances are discussed more fully *infra* notes 10 and 53-56 and accompanying text.

5. The implied acquittal doctrine is discussed more fully *infra* notes 38-41, and 49-52 and accompanying text.

6. ARIZ. REV. STAT. ANN. § 13-4032(4) (Supp. 1984-85) states: "An appeal may be taken by

whole, thereby leaving the statute's status unclear. Moreover, the decision may invite further testing of implied acquittal principles in contexts outside of the capital murder proceeding. Finally, *Rumsey* may encourage lawmakers to toughen capital murder statutes and may create incentives for judges to favor the state's position when doubts arise involving pivotal questions of law.

FACTS OF *ARIZONA V. RUMSEY*

Dennis Wayne Rumsey was convicted of armed robbery and first-degree murder in June of 1980.[7] After a pre-sentencing hearing he was sentenced to twenty-one years in prison on the robbery count and to life imprisonment for the murder.[8] Rumsey appealed the sentences, challenging their consecutive nature.[9] The State of Arizona, arguing the existence of aggravating circumstances which would require that Rumsey be sentenced to death,[10] cross appealed.[11] The state's contentions arose out of the trial judge's construction of a portion of Arizona's death penalty statute. The disputed section describes murder committed "in expectation of the receipt . . . of anything of pecuniary value" as an aggravating circumstance which must be weighed against any mitigating circumstances presented by the defense.[12] The outcome of this weighing process determines whether a capital offender receives a life sentence or the death penalty. The trial judge ruled that Rumsey had not committed the murder for gain within the meaning of the statute.[13] Under the judge's interpretation, the statute applied only to

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the state from: . . . A ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment." The statute is discussed more fully *infra* text accompanying note 59.

7. The facts of *Rumsey* are set forth at 104 S. Ct. at 2307-09 (1984). *See also* Arizona v. Rumsey, 136 Ariz. 166, 665 P.2d 48 (1983); Arizona v. Rumsey, 130 Ariz. 427, 636 P.2d 1209 (1981); Arizona v. Rumsey, Cause No. CR-109802 (1980). In November of 1979, Rumsey was charged with the armed robbery and murder of George Koslosky. Rumsey's companion testified that Koslosky had picked up Rumsey and the companion while they were hitchhiking, and that upon learning that Koslosky had some three hundred dollars in his wallet, Rumsey plotted to rob him. Rumsey shot and robbed Koslosky, and deposited his body in the desert about twenty miles south of Phoenix.

8. First degree murder in Arizona carries the possibility of two sentences: life imprisonment without possibility of parole for 25 years, and the death penalty. ARIZ. REV. STAT. ANN. § 13-703(A) (Supp. 1984-85). For a detailed discussion of the consecutive sentencing issues raised by this case, see generally Casenote, *Double Jeopardy and Consecutive Sentencing: What Does It Mean in Arizona?*, 25 ARIZ. L. REV. 202 (1983).

9. Arizona v. Rumsey, 130 Ariz. 427, 636 P.2d 1209 (1981).

10. ARIZ. REV. STAT. ANN. § 13-703(C-G) (Supp. 1984-85). The pertinent portion of the statute provides: "Aggravating circumstances to be considered shall be the following: . . . The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." ARIZ. REV. STAT. ANN. § 13-703(F)(5). For a more complete discussion of Arizona's capital sentencing scheme, see *infra* note 27, and see generally State v. Gretzler, 135 Ariz. 42, 659 P.2d 1 (1983). *See also* Note, *The Aggravating Circumstances of Arizona's Death Penalty Statute: A Review*, 26 ARIZ. L. REV. 661 (1984).

11. ARIZ. REV. STAT. ANN. § 13-4032(4) (Supp. 1984-85) permits such a cross-appeal. *See supra* note 6.

12. ARIZ. REV. STAT. ANN. § 13-703(F)(5) (Supp. 1984-85). *See supra* note 10.

13. The judge apparently regarded the robbery as having been committed in expectation of pecuniary gain however, since robbery not so committed carries a maximum 14-year sentence. ARIZ. REV. STAT. ANN. §§ 13-701(B), 13-702(B) (Supp. 1984-85). Rumsey received a 21-year sentence on the robbery charge, which is the maximum sentence available when the expectation of pecuniary gain is involved. ARIZ. REV. STAT. ANN. § 13-604(G) (Supp. 1984-85).

the "hired killer" situation and not to murders committed during the course of a robbery.[14]

On appeal, the Arizona Supreme Court rejected both Rumsey's challenge to the consecutive sentences and the trial judge's construction of the statute.[15] The court held that the statute does contemplate murders committed in furtherance of a robbery.[16] Consequently, the supreme court set aside the life sentence and remanded the case for redetermination of aggravating and mitigating circumstances and resentencing.[17]

On remand, the trial judge found that Rumsey had committed murder for pecuniary gain under the supreme court's definition of the term. Additionally, as had been the case at the original pre-sentencing hearing, the judge found no mitigating circumstances.[18] As required by state law,[19] the trial judge thereupon sentenced Rumsey to death. The sentence was automatically appealed.[20]

Ironically, the Arizona Supreme Court again set aside Rumsey's sentence, holding that at the first sentencing hearing the trial judge had impliedly acquitted Rumsey of all charges which could have raised his sentence to death.[21] As such, the court concluded that to again expose Rumsey to the death penalty for this particular crime violated the federal Constitution's double jeopardy provision.[22] The court reinstated Rumsey's original life sentence.[23]

The United States Supreme Court granted the state's petition for certiorari[24] and affirmed the life sentence, holding that its 1981 decision, *Bullington v. Missouri*,[25] controlled the disposition of the case.[26] The Court concluded that the sentencing portions of both Missouri's and Arizona's bifurcated murder proceedings are much like a trial on the issue of guilt or innocence.[27] Under this view, a lesser sentence operates to impliedly acquit

14. In so ruling, the trial judge expressly rejected the Arizona Supreme Court's construction of the statute made a few months earlier in State v. Madsen, 125 Ariz. 346, 609 P.2d 1046, *cert. denied*, 449 U.S. 873 (1980), wherein the supreme court held that the statute required only that the hope of receiving money be a cause of the murder. *Rumsey*, 130 Ariz. at 431, 636 P.2d at 1213.

15. *Rumsey*, 130 Ariz. at 427, 636 P.2d at 1209. *See also* Casenote, *supra* note 8, for a detailed discussion of the court's holding on consecutive sentencing.

16. *Rumsey*, 130 Ariz. at 431-32, 636 P.2d at 1213-14.

17. *Id.* at 432, 636 P.2d at 1214.

18. Arizona v. Rumsey, Cause No. CR 109802 (1980). The defense offered youth (Ramsey was 19 at the time of the murder) and incapacity due to excessive alcohol and drug consumption in mitigation. The trial judge rejected both.

19. ARIZ. REV. STAT. ANN. § 13-703 (Supp. 1984-85). *See supra* note 10 and accompanying text.

20. ARIZ. REV. STAT. ANN. § 12-120.21 (1974) and 17 ARIZ. REV. STAT. RULES OF CRIM. PROC., Rule 31.2(b) require the Arizona Supreme Court to review all sentences of life imprisonment or death imposed by the state's trial courts.

21. Arizona v. Rumsey, 136 Ariz. at 174-75, 665 P.2d at 56-57. An acquittal, no matter how erroneously given, is final. United States v. Scott, 437 U.S. 82, 98 (1978). For a brief analysis of the implied acquittal concept see *infra* notes 38-41 and accompanying text.

22. *Rumsey*, 136 Ariz. at 175, 665 P.2d at 57. *See supra* note 1.

23. *Rumsey*, 136 Ariz. at 175, 665 P.2d at 57.

24. Arizona v. Rumsey, 104 S.Ct. 697 (1983).

25. 451 U.S. 430 (1981). *Bullington* is discussed more fully *infra* notes 42-49 and accompanying text.

26. *Rumsey*, 104 S. Ct. at 2307.

27. *Id.* at 2309-10. Missouri's capital sentencing scheme is similar to Arizona's in that both require that first-degree murder cases be tried in two phases: first, a trial is held to the jury on the

the defendant of all allegations that might have led to the imposition of the death penalty. Therefore, subsequent imposition of the heavier sentence directly violates the fifth amendment's double jeopardy prohibition.

THE DOUBLE JEOPARDY CLAUSE

Development of the General Rule

Simply stated, the double jeopardy clause provides that a defendant, once acquitted of a crime, may never again be re-tried for the same crime.[28] The general rule with regard to sentencing is that receipt of a lesser of several possible sentences does not impliedly acquit the defendant of any greater sentences which might have been imposed.[29]

In *North Carolina v. Pearce*,[30] the Supreme Court held that when a defendant is granted a new trial through the appellate process, the "slate has been wiped clean."[31] As such, the previous sentence is not a bar to the imposition of a heavier sentence on retrial. In so holding, the Court relied upon *United States v. Ball*,[32] wherein it had ruled that a defendant who succeeds in having a conviction set aside may be retried for the same offense. Carrying the *Ball* rule into the sentencing context, the *Pearce* Court held that double jeopardy protections impose no restrictions on the severity of a sentence given upon reconviction.[33]

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issue of guilt or innocence; second, a separate sentencing hearing is held to determine whether death is the appropriate penalty. At this hearing, evidence of mitigating and aggravating circumstances is adduced in a somewhat trial-like proceeding so that the trier of fact (the jury in Missouri, the judge in Arizona) may weigh the circumstances as prescribed by statute. *See* ARIZ. REV. STAT. ANN. § 13-703(C-G) (Supp. 1984-85), MO. REV. STAT. § 565.006 (1984) and § 565.012 (*repealed* 1983), and *supra* note 10.

28. "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense . . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." United States v. DiFrancesco, 449 U.S. 117, 127-28 (1980), *citing* Green v. United States, 355 U.S. 184, 187-88 (1957).

29. The rule has its roots in *Ex Parte* Lange, 85 U.S. (1 Wall.) 163 (1874), wherein the Court reserved the right to increase a sentence previously handed down, so long as the sentence was modified during the same term of court in which it was imposed. The judiciary's ability to increase a sentence was reiterated in Bozza v. United States, 330 U.S. 160 (1947), where a federal judge erroneously imposed less than the mandatory minimum sentence at the original sentencing hearing and later sought to correct the mistake. The Supreme Court rejected the defendant's appeal, which was based on double jeopardy principles, stating that "[t]he Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *Id.* at 166-67.

30. 395 U.S. 711 (1969).

31. *Id.* at 721.

32. 163 U.S. 662 (1896).

33. *Pearce*, 395 U.S. at 720. The *Pearce* Court also cited its similar holding in Stroud v. United States, 251 U.S. 15 (1919). Stroud, also known as the "Birdman of Alcatraz," was convicted of the first-degree murder of a prison guard. He was sentenced to life imprisonment, but obtained a new trial on confession of error by the Solicitor General. The new trial, however, culminated in the imposition of the death sentence. The Supreme Court upheld the heavier sentence, stating that a corollary of the *Ball* rule is the state's power, on retrial, to impose any legal sentence on the reconvicted offender, regardless of whether it is greater than the sentence imposed at the original trial. Later, in Chaffin v. Stynchcombe, 412 U.S. 17 (1973), the Court had the opportunity to review the

Just a few months before it handed down *Bullington*, the Court reaffirmed the *Pearce* rule in *United States v. DiFrancesco*.[34] In *DiFrancesco*, the government appealed under the "dangerous special offender" section of the Organized Crime Control Act of 1970,[35] seeking an enhanced sentence for a convicted defendant. In upholding the government's right to appeal the sentence, the Court stated that where there is no threat of successive prosecutions, the government's appeal of the sentence does not violate the double jeopardy clause simply because it might possibly deprive the defendant of a more lenient sentence.[36] Addressing the issue of "whether a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal," the Court concluded that sentences carry no such finality.[37]

Exceptions to the General Rule

While the *Pearce* rule clearly represents the general state of both resentencing and reconviction law, significant exceptions to the general rule exist. In 1957, the Supreme Court employed the implied acquittal concept to overturn a first-degree murder conviction in *Green v. United States*.[38] Green was convicted of second-degree murder at his original trial. At a new trial, he was convicted of first-degree murder. The Court overturned the first-degree murder conviction, holding that the previous conviction of the lesser-included offense had impliedly acquitted the defendant of the greater one.[39]

The Court later extended the implied acquittal doctrine to cases in which the defendant obtains a reversal on grounds of insufficient evidence to convict. In *Burks v. United States*,[40] the Court contrasted the reasons for the general rule with the actual effect of a reversal for insufficient evidence. It pointed out that while reversal for error implies nothing with respect to the defendant's guilt or innocence, reversal for lack of sufficient evidence necessarily implies that the prosecution had one fair opportunity to convict and failed. The Court reasoned that an appellate ruling which bars everything but an acquittal should be accorded the same finality as a jury's acquital.[41] Thus the defendant, impliedly acquitted by the appellate court, is effectively acquitted without a trial verdict to that effect.

The Court's latest exceptions to the *Pearce* rule started with *Bullington v. Missouri*,[42] wherein the Court expressly recognized the implied acquittal doctrine as an exception to *Pearce*. *Bullington* first announced the prohibition found in *Rumsey*: a defendant convicted of first-degree murder and

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Stroud and *Pearce* holdings. In *Chaffin*, the defendant had succeeded in having his conviction and 15-year sentence set aside on habeas corpus, only to be reconvicted and sentenced to life imprisonment on retrial. The Court, relying on *Stroud* and *Pearce*, allowed the higher sentence to stand. *Chaffin* at 23-24.

34. 449 U.S. 117 (1980).
35. Organized Crime Control Act of 1970, 18 U.S.C. §§ 3575, 3576 (1970).
36. *DiFrancesco*, 449 U.S. at 132.
37. *Id.*
38. 335 U.S. 184 (1957). The facts of *Green* are set forth at 355 U.S. at 185.
39. *Id.* at 194 n.14.
40. 437 U.S. 1 (1978).
41. *Id.* at 15-16.
42. 451 U.S. 430 (1981).

sentenced to life imprisonment in a typical bifurcated capital murder proceeding may not receive a harsher sentence on retrial.[43]

A Missouri trial jury convicted Bullington of capital murder for the abduction and death of a young woman.[44] According to Missouri's statutory scheme for capital murder proceedings, a second hearing was then held before the same jury to determine whether Bullington would be sentenced to life imprisonment or to death. At this second hearing, both sides presented evidence to establish the presence (and absence) of statutorily enumerated aggravating and mitigating circumstances.[45] The jury sentenced Bullington to life in prison.[46]

On appeal, both the conviction and the sentence were vacated and the case was remanded.[47] Prior to the new trial, the prosecution announced its intent to again seek the death penalty. The defense resisted the state's attempts by a series of motions to the Missouri courts. When the Missouri Supreme Court denied its motion, the defense appealed to the United States Supreme Court.[48]

On certiorari, the Supreme Court announced that the original jury's imposition of life imprisonment had impliedly acquitted Bullington of all aggravating circumstances that might have raised his sentence to death. Having been acquitted of those circumstances, Bullington could not be required to face the death penalty again without violating the double jeopardy clause. The Court acknowledged its departure from the general rule and credited the exception to the unique trial-like nature of the pre-sentencing hearing. Bullington could be sentenced to no more than life imprisonment at his pending trial.[49]

Four years later in *Rumsey*, the Supreme Court drew directly upon the *Bullington* rationale to formulate its decision.[50] The Court held that the imposition of a life sentence at a bifurcated proceeding's separate pre-sentencing hearing constitutes a final judgment sufficient to impliedly acquit the defendant of any and all facts and circumstances which might have invoked the heavier sentence.[51]

In relying on *Bullington*, the *Rumsey* Court disregarded the differences between Arizona's and Missouri's capital sentencing schemes. By making the new exception effective in pre-sentencing proceedings which are "like a trial,"[52] the Court also disregarded several obvious differences between Ari-

43. *Id.* at 446.
44. *Id.* at 435.
45. *See* MO. REV. STAT. § 565.006 (1984) and § 565.012 (*repealed* 1983), and *supra* note 27 and accompanying text.
46. *Bullington*, 451 U.S. at 435-36.
47. Bullington's trial was apparently in progress when the Supreme Court handed down its decision in Duren v. Missouri, 439 U.S. 357 (1979). Prior to *Duren*, Missouri allowed women an automatic exemption from jury service, which often resulted in heavily- or even all-male juries. The Court ruled that the *Duren* defendant was deprived of sixth and fourteenth amendment rights to a jury which represented a fair cross-section of the community. Bullington's original conviction was overturned on the basis of *Duren*. 451 U.S. at 436.
48. *Bullington*, 451 U.S. at 436-37.
49. *Id.* at 446.
50. *Rumsey*, 104 S. Ct. at 2307.
51. *Id.* at 2310.
52. *Id.* at 2311.

zona's pre-sentencing hearing and a trial on the issue of guilt or innocence. For example, in an Arizona pre-sentencing hearing, the defense is not governed by rules of evidence in presenting its mitigating factors.[53] Also, evidence presented at the original trial need not be re-introduced to be considered for sentencing.[54] Furthermore, in an Arizona pre-sentencing hearing there are no juries and no closing arguments.[55] Finally, in another break from standard trial procedure, the trial judge must render a written opinion as to each aggravating circumstance enumerated in Arizona's death penalty statute, stating whether the particular provision applies to the defendant.[56] These differences are apparently irrelevant to whether a proceeding is "like a trial" for implied acquittal purposes. That irrelevance at least hints that the Court's "like a trial" language can be construed rather broadly.[57]

Other differences between *Bullington* and *Rumsey* could have formed the basis for a narrower exception. For example, Bullington received a new trial, while Rumsey only received a new pre-sentencing hearing. In *Bullington*, the Court considered an appeal by a defendant; in *Rumsey*, the Court faced a rare appeal of a sentence by the state.[58] These are significant differences that the Court could have relied upon to distinguish the two cases and thereby delimit the scope of the new exception. In adopting its *Bullington* rationale wholesale to decide *Rumsey*, however, the Court failed to even note these differences. The Court could have easily decided *Rumsey* on the issue of who makes the appeal, ruling that the implied acquittal doctrine prevents a state from appealing for the heavier sentence, but that the *Pearce* rule controls when a defendant appeals. By so ruling, the Court could have overruled *Bullington*, thereby achieving the desired result in *Rumsey*, while making the implied acquittal exception narrower than it apparently is now.

THE SCOPE OF *ARIZONA V. RUMSEY*

Although *Rumsey* undeniably lays to rest any contention that imposition of heavier sentences on retrial or resentencing in capital murder cases is

53. ARIZ. REV. STAT. ANN. § 13-703(C) (Supp. 1984-85).
54. *Id.*
55. *Id.* at § 13-703(B) and (C).
56. *Id.* at § 13-703(D).
57. *But see infra* notes 61-62 and accompanying text, asserting that the exception is not really as broad as it might appear.
58. The Court has not directly addressed the issue of whether a difference exists between new trials obtained by the defendant and new trials obtained by the state. It has, however, cited defendants' involvement in obtaining the new trials in upholding the harsher sentences sometimes imposed therein. In Chaffin v. Stynchcombe, 412 U.S. 17 (1973), the defendant obtained a new trial on his own appeal. The Court drew no distinction between a defendant's appeal and other appeals in ruling that the defendant could receive a heavier sentence on retrial, but it did point out that in both *Chaffin* and *Pearce* the defendants sought the new trials. In fact, the *Pearce* Court framed the issue in that case thus: "When *at the behest of the defendant* a . . . new trial [has been] ordered, to what extent does the Constitution limit the imposition of a harsher sentence after conviction upon retrial?" 395 U.S. at 713. (emphasis added). The Court held that the Constitution allows the state "to *retry a defendant who has succeeded in getting his first conviction set aside* . . . . [a]nd . . . to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction." *Id.* at 720 (emphasis added). Alternatively, in United States v. DiFrancesco, 449 U.S. 117 (1980), the Court allowed an appeal, this time made by the Government, again drawing no distinction between a state's and a defendant's appeals.

permissible, it may have other, farther-reaching effects. *Rumsey* calls into question the validity of Arizona's permissive cross-appeal. Furthermore, the decision leaves unclear whether its implied acquittal doctrine will eventually be applied to other contexts or crimes. Finally, *Rumsey* could precipitate action by state lawmakers and trial judges designed to avoid the harsh consequences of the *Bullington/Rumsey* exception.

One of the uncertainties generated by *Rumsey* is its effect on Arizona's statutory cross-appeal.[59] Arizona permits the prosecutor to appeal rulings of law adverse to the state any time the convicted defendant appeals a conviction or sentence. The cross-appeal statute thus allows the state to appeal erroneous sentences. It also permits the state to challenge or to obtain clarification of state court rulings. Such rulings may not only have damaged the state in the case at bar, but may also carry precedential value detrimental to the state's interest during subsequent prosecutions. *Rumsey* impairs the statute's effectiveness to the extent that the statute once allowed the state to challenge an erroneous sentence imposed after a pre-sentencing hearing. *Rumsey* fails to completely emasculate the statute, however, and it appears that government attorneys may still utilize it to challenge erroneous rulings of law and thereby avoid the establishment of unfavorable precedents. Whether prosecutors will be inclined to make such challenges when the heavier sentence cannot be imposed remains to be seen.

Another question raised by *Rumsey* is what limits will be placed on the use of implied acquittal as a defense. Both *Bullington* and *Rumsey* involved bifurcated capital murder proceedings. Arguably, the Court's reference to the trial-like nature of the proceeding as a key to the attachment of double jeopardy protection opens the door to implied acquittal defenses in proceedings outside of the capital murder context. It is conceivable that other proceedings which will lend themselves to the exception's application may exist or may be created in the future.[60]

In determining what other types of proceedings might come within the exception, one must recognize that the "trial-like" criterion is not the only key to the new rule. The Court mentioned three specific factors that brought *Rumsey* within the exception. The trial-like nature of the hearing was the first. The second was the limit placed on the sentencer's discretion. The *Rumsey* Court reasoned that because the sentencer had but two options, life imprisonment or death, its imposition of a life sentence was in fact a determination that the prosecution failed to prove its case for the death sentence.[61] Hence implied acquittal comes into play, bringing double jeopardy

59. ARIZ. REV. STAT. ANN. § 13-4032(4) (Supp. 1984-85). *See supra* note 6.

60. A detailed review of all criminal proceedings being used in the United States is outside the scope of this Casenote. In determining whether any proceeding which might fit the exception exists, however, a good starting point might be the bifurcated insanity proceeding. Although its use is declining (*see, e.g.*, Arizona v. Shaw, 106 Ariz. 103, 471 P.2d 715 (1970), ruling that the split insanity proceeding violates due process), the bifurcated insanity proceeding is still used in California and other states. CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-6.7 comment (1984). It is similar to the bifurcated capital murder proceeding in that (1) the insanity hearing is somewhat like a trial; (2) the trier of fact is limited to two verdicts: sane or insane; and (3) the prosecution may be required to prove certain facts (allocation of the burden of proof is apparently the subject of dispute). *Id. See generally infra* text accompanying note 61.

61. *Rumsey*, 104 S. Ct. at 2309. The Court's assertion that imposition of the life sentence is

protections for the defendant along with it. Third, the Court referred to the state's requirement that the prosecution prove certain facts beyond a reasonable doubt.[62] This requirement of proof makes the pre-sentencing hearing look like a full-fledged adversary proceeding, thus invoking double jeopardy principles. In the absence of any of these three elements, a judicial proceeding presumably would not fall within the exception. Similarly, states whose capital murder statutes and proceedings vary significantly from the Arizona and Missouri schemes presumably fall within *Pearce*'s general rule rather than the *Bullington/Rumsey* exception.

In states where the exception governs, however, it should quickly become clear that imposition of the heavier penalty in the first instance always makes both sentences available on remand or resentencing. In other words, a defendant receiving the death sentence the first time around may be sentenced to either life or death following appellate resolution of disputed questions of law. Conversely, if a life sentence is imposed after the first pre-sentencing hearing, the defendant is then protected by the exception. That defendant will escape appropriate punishment if the appellate court ultimately resolves disputed issues of law in favor of the state. The resulting punishment's inadequacy may well raise concern among state legislatures whose death penalty statutes are thus circumvented.

Once lawmakers understand the "advantages" of having the death penalty imposed after the original pre-sentencing hearing, they may seek to make imposition of the death penalty easier. Legislatures might even attempt to change their state statutes to avoid falling within the factual frameworks of the *Bullington* and *Rumsey* cases. In states having enumerated aggravating and mitigating circumstances,[63] for example, legislatures might amend the sentencing statutes to lighten the requirements for finding aggravating circumstances or to increase the burden for proving mitigating circumstances. In a state like Arizona, where the defense is neither governed by rules of evidence nor limited to enumerated mitigating circumstances at the pre-sentencing hearing,[64] such advantages might be legislatively revoked. In a state like Missouri, where the statute limits the prosecution to enumerated aggravating circumstances only,[65] a legislative amendment might allow the prosecution to dredge up any fact which could tend to be an aggravating circumstance. Since Missouri's sentencing statute requires a jury (as op-

equivalent to a judgment that the prosecution has not proven its case is inapplicable here. Rumsey's original life sentence was imposed not because the prosecution failed to prove its case, but because after the prosecution had proven its case, the trial judge made an erroneous ruling of law in analyzing that proof. This was the thrust of Justice Rehnquist's dissent. *Id.* at 2311-12. The majority did, however, address the error issue later in the opinion. The Court admitted that the implied acquittal was wrought in reliance on an error of law. It stated, however, that such reliance does not change the effect of an acquittal under double jeopardy principles. *Id.* at 2310-11, *citing* United States v. Scott, 437 U.S. 82, 98 (1978).

62. *Rumsey*, 104 S.Ct. at 2309.

63. *See supra* notes 4, 10, and 27 and accompanying text.

64. ARIZ. REV. STAT. ANN. § 13-703(C) (Supp. 1984-85). At a capital murder pre-sentencing hearing in Arizona, the prosecution must comply with all rules of evidence and procedure when arguing the presence of aggravating circumstances. The defense, on the other hand, is exempt from compliance with the rules of evidence at this hearing. *See also supra* note 27 and accompanying text.

65. MO. REV. STAT. § 565.006 (1984), and § 565.012 (*repealed* 1983). *See also supra* note 27 and accompanying text.

posed to a judge in Arizona) to impose the sentence,[66] a defendant faced with a courtroom full of easily-impressed jurors would be at a clear disadvantage.

Another possible legislative change is abolition of the bifurcated trial scheme.[67] In a state like Arizona, such a move would prove disastrous to defendants who would presumably lose the benefit of presenting evidence in mitigation without regard to rules of evidence.[68] Additionally, in a single-proceeding scheme, all evidence of aggravating and mitigating circumstances would presumably be presented to the jury prior to its deliberation on the issue of guilt or innocence. Knowledge of those circumstances might easily confuse a jury in its attempts to decide the issue of guilt or innocence without prejudice.

Legislators are not the only ones who might be tempted to change the rules. *Rumsey* presents a problem to the sentencing judge who recognizes that imposition of a life sentence effectively destroys the possibility of imposing a death sentence following appellate resolution of disputed questions of law. Thus, the trial judge who is unsure as to a particular point of law may feel pressed to resolve doubts against the defendant. Surprisingly perhaps, this type of approach seems to be what the Supreme Court recommended in *DiFrancesco*.[69] Its suggested change would require the imposition of a mandatory sentence that might later be reduced by an appellate court, but only upon recommendation of the trial court.[70] Until such a system is enacted, however, *Rumsey* leaves judges with something of a dilemma. They will have to decide whether to violate neutrality principles in analyzing the law, or risk the possibility that an offender will defeat the judiciary's power to impose fair and adequate sentences. These judges will be acutely aware that erroneous imposition of a life sentence may allow a defendant to escape an otherwise mandatory death sentence via the exception. Faced with this quandry, a trial judge, knowing that the supreme court must hear the case in Arizona and many other states on automatic appeal,[71] might feel inclined to simply impose the death penalty in a "close" case. This temptation to abdicate to the state supreme courts in all but the most cut-and-dried capital murder cases presents a problem that must be resolved by future double jeopardy jurisprudence.

Conversely, the exception may invite judicial misconduct aimed at de-

66. MO. REV. STAT. § 565.006 (1984).

67. Because the bifurcated trial scheme in capital murder proceedings was a direct outgrowth of the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972) (*see supra* note 5), there exists some question as to the constitutionality of anything but a split trial in the case of capital crimes. However, while the Court has approved the constitutionality of the bifurcated trial, it has not held that such a proceeding is the exclusive method of recourse against capital offenders. Presumably then, clever legislators might still devise a sentencing scheme that would eliminate the two-step proceeding now being used without running afoul of *Furman* principles.

68. ARIZ. REV. STAT. ANN. § 13-703(C) (Supp. 1984-85).

69. 449 U.S. 117. *DiFrancesco* involved sentencing under the "special offender" section of the Organized Crime Control Act of 1970, 18 U.S.C. § 3575 (1970). *See supra* notes 34-37 and accompanying text.

70. *DiFrancesco*, 449 U.S. at 142.

71. ARIZ. REV. STAT. ANN. § 12-120.21 (1974); 17 ARIZ. REV. STAT. RULES OF CRIM. PROC., Rule 31.2(b).

feating a state's death penalty statute. As capital punishment is a volatile issue, one may imagine a scenario in which a trial judge, perhaps one who strenuously opposes the death penalty, enters a judgment of life imprisonment in disregard of the law. The *Bullington/Rumsey* exception will now allow that judge to circumvent the statute by entering a final judgment imposing a life sentence, which judgment even the United States Supreme Court is powerless to overturn. Even though acquittal of the death penalty clearly runs afoul of the purpose and intent of the law in a particular case, the judgment of life imprisonment forecloses the possibility of imposing the proper sentence on remand.

Finally, the exception impedes the making of judicial good-faith challenges to statutes requiring imposition of the death penalty. Prior to *Rumsey*, a trial judge could challenge an appellate ruling by denying the ruling's applicability in a particular situation or by questioning its continued viability in general. This forced the state's appellate courts to reconsider the law in light of distinguishing facts or changing attitudes. If the challenge were unsuccessful, the case could simply be remanded for proper disposition. Under the *Pearce* rule, no restrictions were placed on the availability of statutory sentences on remand or resentencing.[72] Under the exception, however, a trial judge must now consider the risk involved in challenging a death penalty law. If a challenge is rejected, the defendant will have received a sentence that is inadequate under the law. The judicial system must deal with this impediment to challenges along with all the other questions and uncertainties engendered by *Rumsey*.

CONCLUSION

While *Rumsey* resolves at least some of the questions surrounding double jeopardy protections, it has raised several more. In years to come, the judicial system is likely to encounter challenges to the *Pearce* rule and attempts to broaden the scope of the double jeopardy clause based upon the trial-like nature of other judicial and perhaps even quasi-judicial proceedings. It is also clear that *Rumsey* seriously impairs the effectiveness of Arizona's permissive cross-appeal.

Rumsey also poses a problem for trial judges whose doubts in a particular case might otherwise lead them to prefer imposition of a lighter penalty, pending the outcome of disputed questions of law in the appellate courts. These judges will be painfully aware of the irreversible nature of that judgment, leaving them to wrestle with the dilemma of whether to resolve doubts neutrally or in favor of the state. Trial judges who oppose the death penalty for non-judicial reasons will be faced with the temptation to breach their duty of neutrality and foreclose the possibility of ever imposing the death penalty on defendants who may otherwise deserve it. And no trial court will be able to make a good-faith challenge to laws requiring imposition of the death penalty without letting the defendant permanently escape a penalty which the appellate courts may later decide the defendant deserves. The

72. *See supra* notes 29-37 and accompanying text.

judicial system must resolve these problems raised by *Rumsey*, if the scope of the implied acquittal doctrine is ever to become completely clear.

Gregory K. Stapley

B. *POOL V. SUPERIOR COURT*: ARIZONA ADOPTS BROAD DOUBLE JEOPARDY PROTECTIONS FOR CRIMINAL DEFENDANTS IN THE AFTERMATH OF *OREGON V. KENNEDY*

The double jeopardy clauses of the United States Constitution[1] and the Arizona Constitution[2] state that no defendant in a criminal case shall be twice placed in jeopardy for the same offense. The clauses prevent the state from repeatedly attempting to convict an individual for an alleged offense and protect the individual from the embarrassment, expense, ordeal, and anxiety that accompany repeated prosecutions.[3]

Where the defendant's initial trial ends in a mistrial, the defendant might raise the defense of double jeopardy in two situations.[4] First, the initial trial may be terminated by the motion of the judge or the prosecutor regardless of the defendant's objection. In this situation, retrial of the defendant is not barred if, taking into account all of the circumstances surrounding the mistrial, the declaration of a mistrial was necessary to serve the ends of public justice.[5] Second, the initial mistrial may be declared on the defendant's own motion.[6] When a defendant moves for mistrial, the general rule is that he may be tried again on the same charges.[7] The defendant is voluntarily relinquishing his right to have the first jury selected decide his guilt or innocence,[8] and therefore, the defendant's motion for mistrial is viewed as consent to a new trial.[9] A narrow exception to the general rule bars retrial when certain actions of the court or prosecutor cause the defendant to move for a mistrial.[10]

This Casenote focuses on the exception to the general rule and specifically discusses *Pool v. Superior Court*.[11] In *Pool*, the Arizona Supreme Court considered what type of prosecutorial misconduct bars a retrial.[12] The *Pool* court rejected the federal court standard by which retrial is barred only

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1. U.S. CONST. amend. V reads: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

2. "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.

3. Pool v. Superior Court, 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984) (citing Green v. United States, 355 U.S. 184, 187-88 (1957)).

4. *See* Oregon v. Kennedy, 456 U.S. 667, 672-73 (1982); *see generally* Ponsoldt, *When Guilt Should Be Irrelevant: Governmental Overreaching as a Bar to Reprosecution Under the Double Jeopardy Clause after* Oregon v. Kennedy, 69 CORNELL L. REV. 76, 79 (1983).

5. United States v. Perez, 22 U.S. (9 Wheat. 579, 580) (1824); *see also* Arizona v. Washington, 434 U.S. 497 (1978); Illinois v. Somerville, 410 U.S. 458 (1973); Wade v. Hunter, 336 U.S. 684 (1949).

6. *See* United States v. Scott, 437 U.S. 82 (1978); Lee v. United States, 432 U.S. 23 (1977); United States v. Dinitz, 424 U.S. 600 (1975).

7. United States v. Dinitz, 424 U.S. 600, 607-08 (1976); United States v. Jorn, 400 U.S. 470, 485 (1971).

8. Oregon v. Kennedy, 456 U.S. 667, 672 (1982) (citing United States v. Dinitz, 424 U.S. at 607-10).

9. United States v. Dinitz, 424 U.S. at 610.

10. *Id.* at 611; United States v. Jorn, 400 U.S. at 485.

11. 139 Ariz. 98, 677 P.2d 261 (1984).

12. *Id.*

when the prosecutor intends to provoke the defendant's motion.[13] Instead, the court adopted a standard whereby retrial is barred when the prosecutor intends to provoke the defendant's motion or when the prosecutor knowingly engages in misconduct for any improper purpose and is indifferent to the danger of a mistrial.[14]

The circumstances leading to *Pool* began when Steven Randall Pool was charged with stealing jewelry in violation of Arizona Revised Statutes section 13-1802.[15] At trial, the prosecutor, laboring under a defective indictment,[16] cross-examined the defendant in a questionable manner.[17] For example, the prosecutor, in a series of improper questions, characterized the defendant as a "cool talker", a knowledgable witness and a "good buddy" of defense counsel.[18] The supreme court noted that such questions were argumentative, grossly improper, and designed to prejudice jurors.[19]

After the cross-examination, the trial judge allowed the prosecution to amend the defective indictment. In response, defense counsel complained about the prosecutor's questions and general conduct and thereupon moved for mistrial. The trial judge denied the motion.[20]

On the next day of trial, the prosecutor presented an amended indictment which charged the defendant with having stolen and/or controlled

13. *Id.* at 108-09, 677 P.2d at 271-72.

14. *Id.*

15. *Pool*, 139 Ariz. at 100, 677 P.2d at 263. The facts of *Pool* are set out in 139 Ariz. at 100-02, 677 P.2d at 263-65. Arizona Revised Statutes § 13-1802 lists five classifications of theft in Arizona. The state's indictment did not specify which classification was used. ARIZ. REV. STAT. ANN. § 13-1802(A) (1984). Before the 1982 amendment to the section, Arizona Revised Statutes § 13-1802 also classified theft of property with a value of more than $1000 as a class 3 felony. ARIZ. REV. STAT. ANN. § 13-1802(c) (1978). Theft of property with a value of more than $100 but not more than $1000 was a class 4 felony. ARIZ. REV. STAT. ANN. § 13-1802(C) (1978).

16. The state's indictment of Pool was plagued by errors. The first indictment, which charged that Pool "stole" jewlery on August 2 in violation of Arizona Revised Statutes § 13-1802, should have accused Pool and a co-defendant, Phillips, of having "control[led] property of another with the intent to deprive him of such property," ARIZ. REV. STAT. ANN. § 13-1802(A)(1) (1984), and that on or about August 3, the defendants " control [led] property of another knowing or having reason to know that the property was stolen." ARIZ. REV. STAT. ANN. § 13-1802(A)(5) (1984). *See Pool*, 139 Ariz. at 100, 677 P.2d at 263. The indictment also did not describe the stolen property accurately. For example, allegedly stolen gold rings were described as silver. Furthermore, an appraisal of the jewelry that Pool was accused of having stolen was $1000 but the man who bought the jewelry testified that its value was less than $1000. *Pool*, 139 Ariz. at 100, 677 P.2d at 263. The significance of this fact is that theft of property with a value of more than $1000 was a class 3 felony. ARIZ. REV. STAT. ANN. § 13-1802 (C) (1978). Theft of property worth less than $1000 was a class 4 felony. ARIZ. REV. STAT. ANN. § 13-1802(C) (1978). Pool, however, had been charged only with the class 3 felony. *Pool*, 139 Ariz. at 100, 677 P.2d at 263. In these circumstances, a mistrial declared on the defendant's motion would have given the state a chance to cure the defects in the indictment before returning to retry the defendant.

17. *Pool*, 139 Ariz. at 101, 677 P.2d at 264. Verbatim examples of the prosecutor's cross-examination are included in an appendix to the opinion at 139 Ariz. at 109-11, 677 P.2d at 272-74.

18. *Id.* at 102-03, 677 P.2d at 265-66.

19. *Id.* The court also noted the following examples of the prosecutor's improper questioning: 1) references made of handling a gun while intoxicated, and of the drinking habits of the defendant and his acquaintances that were irrelevant and prejudicial; 2) questions that characterized the evidence, that asked the witness for his view of the evidence received and for his expectations of evidence that would be given; 3) questions that invited the witness to speculate on testimony that might have been given by someone who had claimed the fifth amendment; 4) suggestion by question or innuendo of unfavorable matter not in evidence at the time and that would have been irrelevant; and 5) unwarranted abuse of opposing counsel or his client. *Id.*

20. *Pool*, 139 Ariz. at 101, 677 P.2d at 264.

property, after which the defense objected on three grounds. First, the defense attorney had received no notice under the original indictment that his client would be charged with anything other than stealing property. Second, the amended indictment contained different elements because of the differing mental states involved in the two crimes.[21] Third, the defense case had rested on the lack of one of those mental states but not the other. In conference, the trial judge determined that the prosecutor was attempting to charge the defendant with two separate offenses. On his own motion, the judge revisited and granted the defense's mistrial motion from the previous day. The prosecutor voiced concern that the court thought that he intended to mistry the case. The judge replied that he did not think the prosecutor had mistried the case but noted that it was not the proper time to rule on any double jeopardy issue.[22]

After two more trips to the grand jury, the prosecutor returned to court with a new indictment. The defense moved to dismiss the indictment, arguing that since the motion for mistrial was the result of misconduct on the part of the prosecutor, jeopardy attached and Pool could not be retried.[23] The trial court judge denied the motion based upon the initial trial judge's finding that the combined inexperience of both lawyers, rather than the intentional actions of the prosecutor, created the situation in which the defendant moved for mistrial.[24] From the denial of his motion to dismiss on grounds of double jeopardy, Pool brought his special action before the Supreme Court of Arizona.[25]

The Legal Background of Pool v. Superior Court

The Arizona Supreme Court noted that the procedural history and the prosecutor's trial conduct allowed the court to analyze the two standards by which misconduct can be measured to bar retrial.[26] The federal standard, adopted by the United States Supreme Court in *Oregon v. Kennedy*,[27] bars retrial only when the prosecutor acts with the intent to provoke a mistrial.[28] A second, and broader standard was adopted by the Supreme Court of Oregon under the Oregon Constitution in *State v. Kennedy*.[29] Under the Oregon standard, retrial is barred if the prosecutor acts with the intent to

21. Arizona Revised Statutes § 13-1802(A)(1) requires the mental state of intent to deprive. ARIZ. REV. STAT. ANN. § 13-1802(A)(1) (1984). Arizona Revised Statutes § 13-1802(A)(5) involves control of property knowing or having reason to know it is stolen. ARIZ. REV. STAT. ANN. § 13-1802(A)(5) (1984). The defense stated that it had rested its case on the defendant's lack of intent to deprive. *Pool*, 139 Ariz. at 101, 677 P.2d at 264.

22. *Pool*, 139 Ariz. at 101, 677 P.2d at 264.

23. *Id.* at 102, 677 P.2d at 265.

24. *Id.*

25. *Id.* at 100, 102, 677 P.2d at 263, 265.

26. *Id.* at 104-05, 677 P.2d at 267-68.

27. 456 U.S. 667 (1982).

28. *Id.* at 675-76, 679.

29. 295 Or. 260, 666 P.2d 1316 (1983). The United States Supreme Court remanded *Oregon v. Kennedy* to the Oregon courts. Oregon v. Kennedy, 456 U.S. at 679. The resulting opinion in *State v. Kennedy* follows a suggestion by Justices Brennan and Marshall in *Oregon v. Kennedy* that the state court could decide that Kennedy's trial would be barred under the double jeopardy clause of the Oregon Constitution. Oregon v. Kennedy, 456 U.S. at 680-81 (Brennan, J. and Marshall, J. concurring). Although State v. Kennedy was decided under the Oregon Constitution, the Oregon

provoke a mistrial or with indifference to a resulting mistrial.[30] The two standards are based upon divergent views of the interests of a criminal defendant protected by the double jeopardy clause. In *Pool v. Superior Court*, the Arizona Supreme Court discussed both standards and their theoretical foundations before adopting the broader Oregon standard.[31]

The Federal Intent Standard

In *United States v. Jorn*[32] and *United States v. Dinitz*,[33] the Supreme Court articulated the standard for measuring prosecutorial misconduct. In *Jorn*, the Court recognized the general rule that reprosecution is usually not barred after the defendant moves for a mistrial.[34] The *Jorn* Court implied, however, that overreaching conduct by the judge or prosecutor which causes a defendant to move for a mistrial would bar reprosecution.[35]

United States v. Dinitz[36] refined the overreaching standard implied in *Jorn*. The *Dinitz* Court acknowledged two types of misconduct that bar retrial of a defendant who has successfully moved for a mistrial. Both conduct intended to provoke a defendant into moving for a mistrial and "bad faith" conduct by a judge or prosecutor intended to harrass or prejudice the defendant bar retrial.[37]

In *Oregon v. Kennedy*,[38] the Court clarified and narrowed the ambiguously stated standard of *Dinitz*. The *Oregon v. Kennedy* standard bars retrial only when misconduct is intended to provoke the defendant into moving for a mistrial.[39] The federal intent standard is based on a defendant's protected interest in having his trial completed by the first jury impaneled to try him.[40] Viewed solely with this interest in mind, the intent standard suits its purpose. If the defendant has only an interest in being tried by the first jury impaneled to try him, then the defendant's motion for mistrial is a deliberate relinquishment of his right.[41] If the defendant can be retried when the judge or prosecutor intended to provoke a mistrial, however, this deliberate elec-

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Supreme Court held that the facts of the case did not warrant a retrial bar. State v. Kennedy, 295 Or. at 270-71, 666 P.2d at 1326-27.

30. State v. Kennedy, 295 Or. at 270, 677 P.2d at 1326.

31. *Pool*, 139 Ariz. at 108-09, 677 P.2d at 271-72. For a detailed discussion of the differing opinions of the interests of the criminal defendant protected by the federal double jeopardy clause *see generally*, Note, Oregon v. Kennedy: *Avoiding the Double Jeopardy Bar*, 36 OKLA. L. REV. 697, 704-06 (1983).

32. 400 U.S. 470 (1971).

33. 424 U.S. 600 (1976).

34. 400 U.S. 470, 485 (1971).

35. *Id.* The Court stated that in circumstances "not attributable to prosecutorial or judicial overreaching" the defendant's motion is assumed to remove any barrier to reprosecution. *Id.* at 485. The inference to be drawn from the statement is that prosecutorial or judicial overreaching would create a bar. The issue is addressed more positively in footnote 12 of *Jorn*: "Conversely, where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred." *Id.* at 485 n. 12; *see also* Note, *supra* note 31, at 699.

36. 424 U.S. 600 (1976).

37. *Id.* at 611; *see* Oregon v. Kennedy, 456 U.S. at 674.

38. 456 U.S. 667, 674 (1982).

39. *Id.* at 679.

40. *Id.* at 673, 676; *see also* Note, *supra* note 31, at 705.

41. Oregon v. Kennedy, 456 U.S. at 676 (citing United States v. Scott, 437 U.S. 82, 93 (1978)).

tion becomes a hollow choice between continuing with a tainted trial and possibly facing a conviction or preparing for a new trial.[42]

The United States Supreme Court found that the intent standard is more definite than a standard measuring prosecutorial overreaching or harrassment.[43] The intent standard requires only a finding of fact based upon objective facts and circumstances.[44] Furthermore, the Court hypothesized that the broader "overreaching" standard would not help defendants as a class; judges might be reluctant to grant a mistrial under the broader standard if they know it will result in attempts to bar a second trial.[45]

The federal intent standard, however, met with several criticisms from members of the Court. First, the defendant's burden of proving intent to provoke a mistrial is too great to offer the defendant real protection.[46] Second, the Court's "intent" exception is too narrow. Both misconduct designed to avoid an acquittal or to gain a conviction and misconduct intended to provoke a mistrial leave the defendant with hollow choices,[47] but only the latter misconduct bars retrial.[48] Finally, since it is the rare situation in which the defendant invokes the double jeopardy bar after succesfully motioning for mistrial, four concurring justices favored a broader standard that could be utilized in future exceptional cases.[49]

The Oregon Standard

The Oregon Supreme Court in *State v. Kennedy*[50] adopted a broad standard to measure prosecutorial misconduct. Under the double jeopardy clause of the Oregon Constitution, retrial is barred when a prosecutor's misconduct is either intended to provoke a mistrial or engaged in with indiffer-

42. Oregon v. Kennedy, 456 U.S. at 673, 676.

43. *Id.* at 674-75.

44. *Id.* at 675. Justice Powell, concurring in the opinion, stresses that the determination of whether the prosecutor had the requisite intent to provoke a mistrial, thereby preventing retrial of the defendant, be drawn from objective facts and circumstances. *Id.* at 680 (Powell, J. concurring).

45. *Id.* at 676-77.

46. *Id.* at 688 (Stevens, J. concurring). The defendant's burden is great for two reasons. First, the standard would require that the very person who was accused of misconduct take the stand and explain his trial strategy and train of thought prior to making a serious error. *Id.* at 688 n. 25. Second, the finding of the trial judge of prosecutorial misconduct of the order described in the intent standard could open the prosecutor to charges of violation of standards of professional conduct, contempt of court, and possibly federal civil rights charges. State v. Kennedy, 295 Or. at 269-70, 666 P.2d at 1325-26. A trial judge might well be reluctant to grant a motion to dismiss when such a finding must be made. State v. Kennedy, 295 Or. at 269-70, 666 P.2d at 1325-26.

47. Oregon v. Kennedy, 456 U.S. at 689 (Stevens, J., concurring).

48. *Id.*

49. *Id.* at 691-92. One such exceptional case could be Commonwealth v. Lam Hue To, 391 Mass. 301, 461 N.E.2d 776 (1984). In *Lam Hue To*, the prosecutor did not disclose his knowledge of the existence of a knife found at the scene of a fatal stabbing. The knife could possibly have exonerated the defendant. When the existence of the knife was disclosed, the defense moved for a mistrial. While it found that the prosecutor had acted improperly, the Supreme Judicial Court of Massachusetts stated: "Impropriety of late disclosure of exculpatory evidence in a murder trial does not support a finding that the prosecutor sought to goad the defendant into seeking mistrial." *Id.* at 309, 461 N.E.2d at 784 (1984). From the defendant's point of view, the prosecutor's misconduct, no matter what the intent behind it, left the defendant in the same dilemma. He could either continue with the first tainted proceeding which could result in a conviction, or he could go through the time, expense, and anxiety of preparing for a new trial.

50. 295 Or. 260, 666 P.2d 1316 (1983).

ence to a possible mistrial.[51] This standard has its roots in the United States Supreme Court's minority opinion in *Oregon v. Kennedy*.[52] The Oregon court interpreted the double jeopardy clause as protecting the defendant from the expense and harassment of multiple trials.[53] Consequently, Oregon bars retrial of a defendant when a prosecutor engages in misconduct which he knows to be improper and prejudicial, and which is intended to provoke a mistrial or is engaged in with indifference to a mistrial or reversal.[54]

Pool v. Superior Court

Prior to *Pool*, Arizona law was unsettled as to when prosecutorial misconduct would bar a retrial after a court declared a mistrial on a defendant's motion.[55] While one case indicated that Arizona should follow the federal intent standard,[56] another held that Arizona's standard protected against any intentional conduct designed to harass or to oppress the defendant.[57] This ambiguity occurred in part because the Arizona Supreme Court had not confronted *Pool*-type facts.[58] In *Pool*, the defendant's initial motion for mistrial was granted as a result of prosecutorial misconduct intended to avoid probable acquittal or to harass the defendant rather than to provoke a mistrial.[59]

The *Pool* court settled this area of the law.[60] In analyzing the double jeopardy issue, the court first compared the prosecutor's conduct in *Pool* to the conduct in three previous cases and to the conduct in *State v. Kennedy*.[61]

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51. *Id.* at 270, 666 P.2d at 1326.

52. *See supra* note 29.

53. State v. Kennedy, 295 Or. at 268, 666 P.2d at 1324 (objective of double jeopardy clause is to protect defendants against harassment and risk of successive prosecutions for the same offense).

54. *Id.* at 270, 666 P.2d at 1326.

55. *Pool*, 139 Ariz. at 105, 677 P.2d at 268.

56. State v. Marquez, 113 Ariz. 540, 558 P.2d 692 (1977). In *Marquez*, the court followed the *Dinitz* standard and declared Arizona case law similar to the federal cases in holding that intentional judicial or prosecutorial overreaching designed to cause a mistrial will result in a bar to further prosecution. *Id.* at 542-43, 558 P.2d at 694-95.

57. State v. Wright, 112 Ariz. 446, 543 P.2d 434 (1975). In *Wright*, the court found no evidence that the state engaged in any intentional misconduct or that the defendant was in any way subjected to harrassment or oppression by being tried a third time on the same charges. *Id.* at 450, 543 P.2d at 438.

58. *Pool*, 139 Ariz. at 105, 677 P.2d at 268.

59. *Id.*

60. *Id.* at 108, 677 P.2d at 271.

61. *Id.* at 106, 677 P.2d at 269. In State v. Wright, 112 Ariz. 446, 543 P.2d 434, the prosecutor asked the witness on redirect and over the defense's objection why the witness would like to see the defendant convicted. 112 Ariz. at 449, 543 P.2d at 437. Defense moved for a mistrial and the motion was later granted when the state agreed that its conduct could not be cured by means short of mistrial. *Id.* The court in *Pool* distinguished *Wright* by both the timeliness of the defendant's objection in *Pool*, and the differences in the extent of the prosecutor's improper questions. *Pool*, 139 Ariz. at 106, 677 P.2d at 269. The court distinguished State v. Marquez, 113 Ariz. 540, 558 P.2d 692 (1977), on the bases that the error in the trial in *Marquez* took place outside the presence of the jury, and the prosecutor was not attempting to avoid acquittal. *Pool*, 139 Ariz. at 106, 677 P.2d at 269. The court also distinguished State v. Wilson, 134 Ariz. 551, 658 P.2d 204 (Ct. App. 1982), on the grounds that the questions asked in that case were arguably proper and harmless. *Pool*, 139 Ariz. at 106, 677 P.2d at 269. Finally, the court distinguished in several ways the conduct in Oregon v. Kennedy, 456 U.S. 667 (1982), in which the prosecutor asked the witness on redirect if the reason he had never done business with the defendant was "because he was a crook." 456 U.S. at 670. In *Kennedy*, there was no sequence of overreaching prior to the single prejudicial question, the prosecutor was surprised by the motion for mistrial and resisted it, and the meaning of the comment could

The earlier cases dealt with fact situations involving simple judicial and prosecutorial errors.[62] Often the defendant's initial motion for mistrial resulted from an arguably proper line of questioning or a single improper question.[63] *Pool*, by contrast, involved the cumulative effect of numerous improper questions which were serious enough to require at least two bench conferences and one court admonishment.[64]

The *Pool* trial judge found that the prosecutor did not intend to provoke a mistrial. The supreme court suggested that the trial judge may have based his finding on intuitive feelings about the prosecutor's subjective motives and intentions.[65] Conversely, *Oregon v. Kennedy* requires that a finding of prosecutorial intent be based primarily upon objective facts and circumstances.[66] After its own analysis of the *Pool* record, the Arizona Supreme Court found that nothing therein justified an inference that the prosecution had a proper purpose in mind when cross-examining the defendant.[67] Accordingly, the court rejected the trial court's finding and found that inferences could be drawn from the uncontroverted record supporting one of the following conclusions: 1) The prosecutor intentionally engaged in improper conduct for the purpose of forcing the defendant to seek a mistrial, thereby offering the state an opportunity to procure a new indictment; 2) the prosecutor sought to avoid a serious danger of acquittal by using whatever method, proper or improper, available to convict the defendant; 3) the prosecutor, because of anger at the defendant or defense counsel, intended to harass the defendant regardless of the risk of mistrial; or 4) the prosecutor intended to retaliate, without thought of a resulting mistrial, for what he perceived as improper conduct of defense counsel.[68]

On the basis of this substituted finding, the court discussed the proper standard for determining whether retrial was barred.[69] The court rejected the federal intent standard and found a broader standard under the double jeopardy clause of the Arizona Constitution.[70] Under the Arizona standard, when a defendant successfully moves for mistrial, retrial is barred if a prosecutor knowingly and intentionally engaged in improper conduct for any improper purpose and with indifference to the danger of a mistrial.[71] The cumulative effect of such conduct must rise above the level of simple legal error or mistake and the prejudice to the defendant must be curable only by

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have been fairly elecited from the witness. *Pool*, 139 Ariz. at 106, 677 P.2d at 269 (quoting Oregon v. Kennedy, 102 S. Ct. at 2086 (Powell, J., concurring) and at 2098 (Stevens, J., concurring)).

62. *See supra* note 61.

63. *See supra* note 61.

64. *Pool*, 139 Ariz. at 106, 677 P.2d at 269.

65. *Id.*

66. *Id.* at 106-07, 677 P.2d at 269-70.

67. *Id.* at 107, 677 P.2d at 270. Fact finding is not normally the role of a reviewing court. In People v. Franklin, 119 Ill. App. 3d 899, 902, 904, 457 N.E.2d 1005, 1008, 1010 (1983), the court stated that since the trial court had made no factual findings as to whether the prosecutor intended or did not intend to provoke a mistrial, the reviewing court could not "without improper speculation determine . . . the intent underlying the prosecutors conduct." *Id.* The court therefore vacated and remanded to the trial court to make such findings.

68. *Pool*, 139 Ariz. at 107, 677 P.2d at 270.

69. *Id.*

70. *See supra* note 2.

71. *Pool*, 139 Ariz. at 108-09, 677 P.2d at 271-72.

declaration of a mistrial.[72]

Applying the Arizona standard to the facts of *Pool*, the supreme court found that the prosecutor had acted knowingly and with at least indifference to the possibility of a mistrial, if not with intent to provoke a mistrial by prejudicing the defendant.[73] Thus, double jeopardy attached and retrial of the defendant was barred.[74]

Analysis of the Arizona Standard

The objective of the Arizona standard is to protect the defendant from multiple trials and to protect the defendant's right to complete his trial before the original tribunal.[75] Thus, Arizona's view of the protections afforded a defendant under the double jeopardy clause is very similar to Oregon's view in that it expands upon the federal standard.[76] The Arizona Supreme Court, however, answered some questions that the Oregon Supreme Court left unanswered. First, the Arizona standard requires the trial court to determine the prosecutor's knowledge or intent on the basis of objective factors. One objective factor is the prosecutor's own explanation of his knowledge and intent.[77] Second, whether jeopardy attaches depends upon the prosecutor's conduct as a whole and not upon isolated misconduct.[78] Finally, no particular purpose or purposes behind a prosecutor's misconduct is necessary to bar a retrial under Arizona's standard.[79] The specific intent required to bar retrial is limited only in that it must impact the defendant's interests in being free from multiple trials and in completing his trial before the original tribunal.[80]

Arizona and Oregon are decidedly in the minority on this issue. Since the United States Supreme Court's decision in *Oregon v. Kennedy*,[81] the highest courts of nine states have addressed the issue.[82] Only Oregon and Arizona have refused to adopt the federal standard.[83]

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72. *Id.*

73. *Id.* at 109, 677 P.2d at 272.

74. *Id.*

75. *Id.*

76. *Compare Pool*, 139 Ariz. at 108-09, 677 P.2d at 271-72 *with* State v. Kennedy, 295 Or. at 270, 666 P.2d at 1326. Under both standards mere negligence on the part of the prosecutor is not enough to create the double jeopardy bar; prejudicial conduct can be either intended to cause a mistrial or the prosecutor may act merely with indifference to the possibility of a resulting mistrial. Also, in order to bring in the double jeopardy bar the prejudice injected into the trial must be curable only by declaration of a mistrial.

77. *Pool*, 139 Ariz. at 105 n.8, 108 n.9, 677 P.2d at 268 n.8, 271 n.9.

78. *Id.* at 108-09, 677 P.2d at 271-72. The totality factor will avoid the situation in which the misconduct in question amounts to only one isolated question, the answer to which could have properly been drawn from the witness. *See, e.g.*, cases cited *supra* note 66.

79. *Pool*, 139 Ariz. at 109, 677 P.2d at 272.

80. *Id.* at 108, 677 P.2d at 271.

81. 456 U.S. 667. The opinion was issued on May 24, 1982.

82. *See Pool*, 139 Ariz. 98, 677 P.2d 261 (1984); People v. Espinoza, 666 P.2d 555, (Colo. 1983); State v. Sharp, 104 Idaho 691, 662 P.2d 1135 (1983); State v. Chase, 335 N.W.2d 630 (Iowa 1983); Stamps v. Commonwealth, 648 S.W.2d 868 (Ky. 1983); Ticknell v. State, 297 Md. 432, 468 A.2d 1 (1983); Commonwealth v. Lam Hue To, 391 Mass. 301, 461 N.E.2d 776 (1984); State v. Berry, 124 N.H. 203, 470 A.2d 881 (1983); State v. Kennedy, 295 Or. 260, 666 P.2d 1316 (1983).

83. *Pool*, 139 Ariz. at 108-09, 677 P.2d at 271-72; State v. Kennedy, 295 Or. 260, 269, 666 P.2d 1316, 1325 (1983); *compare* People v. Espinoza, 666 P.2d 555, 559 (Colo. 1983) (record does not support a finding of prosecutorial misconduct animated by an intent to cause a mistrial); State v.

Problems Remaining after Pool v. Superior Court

In light of the *Pool* decision, several questions remain for the Arizona courts. First, does the standard provide workable guidelines for lower court application?[84] The careful articulation of the standard by the Arizona Supreme Court indicates that it will be a useful guide. Second, will the facts of *Pool* guide trial court judges in measuring future prosecutorial misconduct? The mistrial in *Pool* was declared after a long series of improper questions, two bench conferences, and one court admonishment.[85] While *Pool* will not offer much help to trial judges addressing less serious circumstances in future cases, they may at least draw comparisons of conduct. Third, after *Pool*, to whom does the standard apply? The *Pool* decision is based on prosecutorial misconduct.[86] The Supreme Court of Oregon in *State v. Kennedy* made it clear that the Oregon standard would apply to any state official in a position to "wreak havoc" with a defendant's trial.[87] Future Arizona decisions must determine whether the *Pool* standard will apply to other courthouse officials.[88]

The adoption of the Oregon and Arizona standards has made one point definitely clear. The United States Supreme Court's decision in *Oregon v. Kennedy* has not resulted in uniformity of application of the double jeopardy

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Sharp, 104 Idaho 691, 693-94, 662 P.2d 1135, 1137-38 (1983) (following intent standard, court finds no intent to force the defendant to ask for a mistrial); State v. Chase, 335 N.W.2d 630, 632 (Iowa 1983) (principles in *Oregon v. Kennedy* applicable to the Iowa Constitution); Stamps v. Commonwealth, 648 S.W.2d 868 (Ky. 1983) (*Oregon v. Kennedy* applicable to the double jeopardy clause of the Kentucky Constitution); Ticknell v. State, 297 Md. 432, 436, 470 A.2d 1, 5 (1983) (court's intentional provocation of defendant's motion will bar retrial); Commonwealth v. Lam Hue To, 391 Mass. 301, 308, 461 N.E.2d 776, 783 (1984) (retrial barred only when governmental conduct in question is intended to goad defendant into moving for a mistrial); State v. Berry, 124 N.H. 203, 206, 470 A.2d 881, 884 (1983) (defendant did not allege that trial judge, in failing to give instruction on a lesser included offense, intended to prejudice the defendant or to provoke the defendant into requesting a mistrial).

Opinions from the intermediate appellate courts of five states indicate that these states will also follow the federal intent standard. *See* Barajas v. Superior Court, 149 Cal. App. 3d 30, 32, 196 Cal. Rptr. 599, 601 (1983) (prosecutor did not intentionally act in order to provoke a mistrial); Lipman v. State, 428 So. 2d 733, 736 (Fla. Dist. Ct. App. 1983) (prosecutor's conduct not intentionally designed to provoke mistrial), *but see* State v. Howe, 432 So. 2d 795, 796 (Fla. Dist. Ct. App. 1983) (retrial not generally barred after defendant's mistrial motion except where there is showing that mistrial was based on bad faith prosecutorial or trial court conduct and citing state cases following *Dinitz*); People v. Franklin, 119 Ill. App. 3d 899, 904, 457 N.E.2d 1005, 1010 (1983) (appropriate standard to apply is that propounded in Oregon v. Kennedy); Commonwealth v. Riffert, 322 Pa Super. 230, 232, 469 A.2d 267, 269 (Pa. Super. Ct. 1983) (Oregon v. Kennedy standard applicable whether the defendant invokes the protection of the United States or Pennsylvania Constitution); Lozano v. State, 658 S.W.2d 201, 202 (Tex. Crim. 1983) (where defense moves for mistrial, second trial is not barred unless it was the intention of the prosecutor to provoke the defendant into moving for a mistrial).

An opinion from the Court of Appeals of North Carolina contains language indicating either an intent standard or an overreaching standard. State v. Cuthrell, 66 N.C. App. 706, 707, 311 S.E.2d 699, 700 (1984).

84. Justice Rehnquist criticized the broader standard as having virtually no standard for application. Oregon v. Kennedy, 456 U.S. at 674 (1982).

85. *See supra* note 64 and accompanying text.

86. *Pool*, 139 Ariz. at 108-09, 677 P.2d at 271-72.

87. State v. Kennedy, 295 Or. at 269, 666 P.2d at 1325 (citing State v. Rathbun, 287 Or. 421, 433, 600 P.2d 392, 404 (1979) (applied the double jeopardy bar to the misconduct of a court bailiff).

88. State v. White, 26 Ariz. App. 505, 549 P.2d 600 (1976) gives an indication of how this issue will be resolved. In *White* it was held that the actions of a police officer that were not intended to help the prosecutor would not bar retrial.

laws. As state after state decides to accept or reject the federal standard, several differing standards may emerge.[89]

Kip Martin

89. *See* Oregon v. Kennedy, 456 U.S. at 674-79.

C. *STATE V. WUSSLER*: AN UNFORTUNATE CHANGE IN ARIZONA'S LESSER-INCLUDED OFFENSE JURY INSTRUCTION

In *State v. Wussler*,[1] the Arizona Supreme Court addressed as an issue of first impression the appropriate procedure by which a criminal jury may consider a lesser-included offense[2] of a charged crime. The trial judge instructed the *Wussler* jurors that they were prohibited from considering a lesser-included offense unless they unanimously agreed that Wussler was not guilty of the charged offense. On appeal, the Arizona Supreme Court held that the instruction was not fundamental error.[3] The court stated that this particular procedural requirement "provides a more logical and orderly process for the guidance of the jury in its deliberations," and "is the better rule."[4] *Wussler* appears to require both a dramatic change in the practice of Arizona Superior Court judges and a new interpretation of the relevant Recommended Arizona Jury Instructions (R.A.J.I.).[5]

In *State v. Wussler*, defendant John Wussler and the victim, Ray Gonzales, spent the evening of February 14, 1982 drinking and socializing with a group of friends.[6] After the crowd left, the two began to argue. Gonzales attacked and threatened Wussler and eventually ordered him out of the apartment. Wussler left the apartment, found a loaded gun at a friend's house, and returned to Gonzales' apartment where he entered through an unlocked screen door and fatally shot the sleeping Gonzales. Wussler was charged with first-degree murder and first-degree burglary. At the end of Wussler's trial, the judge instructed the jury on the lesser-included offenses

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1. 139 Ariz. 428, 679 P.2d 74 (1984).

2. In Arizona a lesser-included offense is defined as follows: "To constitute a lesser-included offense, the offense must be composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one." State v. Celaya, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983), *citing* State v. Malloy, 131 Ariz. 125, 639 P.2d 315 (1981).

A lesser-included offense jury instruction is proper in Arizona if "on the facts of the case there are issues that would enable the jury rationally to find that although the elements of the crime charged were not proved, all the elements of another or lesser offense had been." State v. Malloy, 131 Ariz. 125, 129, 639 P.2d 315, 319 (1981). *See also* 17 ARIZ. REV. STAT. ANN., ARIZ. R. CRIM. P. 23.3 (1973).

3. *Wussler*, 139 Ariz. at 430, 679 P.2d at 76. Since Wussler did not object to the particular jury instruction at trial, a reversal of his conviction would have been justified only if giving the instruction constituted fundamental error. *See* 17 ARIZ. REV. STAT. ANN., ARIZ. R. CRIM. P. 21.3(c) (1973). *See also* State v. Zaragoza, 135 Ariz. 63, 66, 659 P.2d 22, 25 (1983). *See also infra* note 9 in which it is argued that the judge precluded Wussler's opportunity to object to the particular instruction.

4. *Wussler*, 139 Ariz. at 430, 679 P.2d at 76.

5. Arizona Supreme Court adopted Recommended Arizona Jury Instructions [hereinafter R.A.J.I.] (criminal) 1.03 (1980) entitled "Lesser Included Offense" provides in pertinent part:

> The crime of ———— includes the less serious crime(s) of ————. The state may prove ————, but fail to prove the more serious crime(s) of ————. You are permitted to find the defendant guilty of the less serious crime(s) of ————:
>
> 1. if the evidence does not show beyond a reasonable doubt that the defendant is guilty of ————; and
> 2. if the evidence does show beyond a reasonable doubt that the defendant is guilty of ————.

6. *Wussler*, 139 Ariz. at 429, 679 P.2d at 75. The facts of *Wussler* are set forth 139 Ariz. at 429, 679 P.2d at 75.

for both of the charged crimes.[7] The instruction read:

> Again, you will consider the lesser offenses if you determine that the Defendant is not guilty of the greater offense. If you determine that the Defendant, for example, is guilty of first-degree murder you stop right there.
>
> If you find him not guilty of second degree murder then you will consider manslaughter, whether he is guilty or not guilty of that.[8]

Wussler did not object to this instruction[9] and the jury found him guilty of first-degree murder and first-degree burglary.

Wussler appealed his conviction to the Arizona Supreme Court claiming that the lesser-included offense instruction used by the trial judge "improperly invaded the province of the jury by impeding proper consideration of lesser-included offenses and, in so doing, denied him a fair trial and due process of law."[10] The Arizona Supreme Court examined both the instruction given to the Wussler jury, which requires a unanimous vote of not guilty on the highest charge before the jury can address the lesser offense, and another commonly used instruction, which allows the jury to address the lesser offense upon mere disagreement as to the defendant's guilt of the higher offense.[11] The court concluded that it favored the *Wussler*-type instruction[12] and that its use by the trial judge did not constitute fundamental error.[13]

This Casenote examines the two commonly used lesser-included offense

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7. The lesser-included offenses for murder are second-degree murder and manslaughter. ARIZ. REV. STAT. ANN. § 13-1104, § 13-1103 (1984-85). The lesser-included offenses for burglary are burglary in the second-degree and burglary in the third-degree. ARIZ. REV. STAT. ANN. § 13-1507, § 13-1506 (1984-85).

8. *Wussler*, 139 Ariz. at 429, 679 P.2d at 75.

9. Neither party objected to the instruction during trial, but Wussler asserts that the trial court obviated any chance he had to object. Appellant's Reply Brief at 2-4, State v. Wussler, 139 Ariz. 428, 679 P.2d 74 (1984). Wussler notes that there are two times that objection to a particular instruction is appropriate: during the jury instruction conference (*see* 17 ARIZ. REV. STAT. ANN., ARIZ. R. CRIM. P. 21.3 (1973)), and between the time the jury instructions are given and the jury is retired (*see* 17 ARIZ. REV. STAT. ANN., ARIZ. R. CRIM. P. 21.3(c) (1973)). Wussler claims that the first opportunity was not available because the trial judge did not volunteer the objectionable instruction during the conference. The trial judge foreclosed the second opportunity, according to Wussler, by retiring the jury and then asking counsel if they had any objection to the instruction.

10. Appellant's Opening Brief at 19, State v. Wussler, 139 Ariz. 428, 679 P.2d 74 (1984). Wussler also appealed his conviction on three other grounds: (1) the trial court coerced the jury into returning a verdict; (2) the trial court committed reversible error by refusing to sever appellant's trial from that of his co-defendant; and (3) the trial judge committed reversible error by refusing to allow appellant to present evidence of the victim's character. *Wussler*, 139 Ariz. at 429, 679 P.2d at 75. The Arizona Supreme Court found no merit in these three claims. This Casenote addresses only whether the trial judge's instruction to the jury—that it could not consider lesser-included offenses until it had reached a unanimous decision on the charged offense—was improper.

11. Throughout this Casenote, the instruction given to the *Wussler* jury is referred to as the "acquittal-first" instruction. This term was used in United States v. Roland, 748 F.2d 1321, 1324 (1984). This instruction has also been called the "step" and "graduated" instruction. Note, *Criminal Procedure—Recognizing the Jury's Province to Consider the Lesser Included Offense*: State v. Ogden, 58 OR. L. REV., 572, 578 n.33 (1980).

The instruction that licenses the jury to address the lesser offense when they reach disagreement on the highest charge is referred to as the "disagreement instruction." This term was used in Craig, *Improving Jury Deliberations: A Reconsideration of Lesser Included Offense Instruction*, 16 U. MICH. J.L. REF. 561 (1982-83). This instruction has also been referred to as the "hung jury" instruction. *Roland*, 748 F.2d at 1324.

12. *Wussler*, 139 Ariz. at 430, 679 P.2d at 76.

13. *Id.*

jury instructions. The theoretical view of the Anglo-American jury trial that each instruction respectively represents is explored as well as the practical benefits and drawbacks of each. Finally, this Casenote argues that the particular instruction favored[14] by the *Wussler* court has a more detrimental effect on jurors, the criminal defendant, and the state than the instruction previously used in Arizona.

The Lesser-Included Offense Doctrine

The *Wussler* jurors were told that they could convict Wussler on an offense less severe than the one he was officially charged with only after they unanimously acquitted him of the higher offense.[15] While the issue of what procedure the jury's deliberations were to follow had not been decided in Arizona,[16] obtaining a conviction of a defendant on a "lesser-included offense" is well established in the state.

The essence of the lesser-included offense doctrine is that some of the elements that make up a charged offense define a less severe offense. The defendant may be convicted of the less severe offense if the prosecution sustains the burden of proving beyond a reasonable doubt only some of the elements alleged and if those elements make up the lesser offense.[17] In this way, the defendant is validly convicted of a crime not named in the indictment or information.

Typically, one of the parties must affirmatively act and request that the judge instruct the jury that it has the option of convicting of a lesser-included offense, although some states require the judge to give the instruction regardless of the parties' action.[18] Traditionally, the prosecution has requested a lesser-included offense instruction. This instruction facilitates a conviction even if the jury finds that the state had overcharged or failed to prove an element of the greater offense.[19] More recently, defendants have requested the instruction because it allows the jury to "temper justice with

14. *See infra* note 26 for a discussion of whether the language in *Wussler* is mere dictum or whether it creates a rule of law.

15. *Wussler*, 139 Ariz. at 429, 679 P.2d at 75.

16. The conclusion that *Wussler* addresses an issue of first impression is inferred from the language of the opinion. For example, Justice Holohan states: "The appellant urges that the issue be considered because it has not previously been addressed in this state." *Id.* at 430, 679 P.2d at 76. One commentator suggests that State v. Dippre, 121 Ariz. 596, 592 P.2d 1252 (1979), implicitly accepts the acquittal-first instruction. *See* Craig, *supra* note 11, at 66. In *Dippre*, the Arizona Supreme Court held that it was not erroneous for the judge to submit verdict forms to the jury consisting of "guilty/not guilty" for each offense. The court further stated that the "procedure has the advantage of insuring that the jury will consider and reach a conclusion as to each offense separately." *Dippre*, 121 Ariz. at 599, 592 P.2d at 1255.

17. *See supra* note 2.

18. California, Missouri, North Carolina, Oklahoma and Tennessee permit lesser-included offense instructions to be given *sua sponte*. *See* Stone v. Superior Court, 31 Cal. 3d 503, 517, 646 P.2d 809, 819, 183 Cal. Rptr. 647, 657 (1982); State v. Herron, 349 S.W.2d 936, 940 (Mo. 1961); State v. Hicks, 241 N.C. 156, 159-60, 84 S.E.2d 545, 547-48 (1954) (citing N.C. GEN. STAT. § 15-169 (1978)); Provo v. State, 549 P.2d 354, 357-58 (Okla. Crim. 1976), *aff'd*, 565 P.2d 719 (Okla. Crim. 1977), *cert. denied*, 434 U.S. 1071 (1978); Strader v. State, 210 Tenn. 669, 679, 362 S.W.2d 224, 228 (1962) (citing TENN. CODE ANN. § 40-18-110(a) (1982)).

19. *See* 3 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 515, at 20 (1983); *see also* Beck v. Alabama, 447 U.S. 625, 633 (1980); Keeble v. United States, 412 U.S. 205, 208 (1973).

mercy by acquitting the defendant of the offense charged and find him guilty of a lesser offense."[20] Jurisdictions differ on the particular procedure that the jury must follow when addressing the degrees of the offense. Most jurisdictions have adopted either the acquittal-first instruction or the disagreement instruction.[21]

The Acquittal-First Instruction

The acquittal-first instruction, first mentioned by the Oregon Supreme Court in *State v. Steeves*,[22] is the favored instruction in most state[23] and federal[24] courts. Using the acquittal-first instruction, the judge instructs the jurors that they must begin their deliberations by addressing the charged offense. They must discuss only the charged offense until they reach a unanimous decision on that charge.[25] If the jurors unanimously decide that the defendant is guilty of the charged offense, their deliberations are at an end. If they unanimously decide that the defendant is not guilty of the charged offense, they must then address the lesser offense. Jurors are to deliberate on the lesser offense in the same manner. The *Wussler* court adopted the acquittal-first instruction.[26]

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20. 3 C. WRIGHT & A. MILLER, *supra* note 19, § 515, at 20.

21. A third type of instruction is the "reasonable doubt" instruction. With this instruction the jurors are told: "[i]f you are not satisfied beyond a reasonable doubt that the defendant is guilty of the offense charged, or if you entertain a reasonable doubt of the defendant's guilt, you may then consider a lesser-included offense." People v. McGregor, 635 P.2d 912, 914 (Colo. App. 1981). *See generally* Craig, *supra* note 11, at 569. Craig notes that while courts adopting this instruction claim that it does not require the jury to reach unanimity on the highest offense for continued deliberations, the instruction is interpreted by the jury as such.

22. 29 Or. 85, 96, 43 P. 947, 953 (1896).

23. *See* Lindsey v. State, 456 So.2d 383, 388 (Ala. App. 1982); Nell v. State, 642 P.2d 1361, 1367 (Alaska Ct. App. 1982); Stone v. Superior Court, 31 Cal. 3d 503, 519, 646 P.2d 809, 820, 183 Cal. Rptr. 647, 658 (1982); People v. Padilla, 638 P.2d 15, 18 (Colo. 1981); Middlebrooks v. State, 156 Ga. App. 319, 321, 274 S.E.2d 643, 644 (1980); Commonwealth v. Edgerly, 13 Mass. App. Ct. 562, 582-83 (1982); State v. Wilkins, 34 N.C. App. 319, 320, 274 S.E.2d 643, 644 (1980); State v. McNeal, 95 Wis. 2d 63, 68, 288 N.W.2d 874, 876 (1980); Ballinger v. State, 437 P.2d 305, 309-11 (Wyo. 1968). *See also* Craig, *supra* note 11, at 566 n.27 (listing the states that have impliedly accepted the acquittal-first instruction).

24. *See* United States v. Jackson, 726 F.2d 1466, 1469 (9th Cir. 1984); Pharr v. Israel, 629 F.2d 1278, 1281-82 (7th Cir. 1980), *cert. denied*, 449 U.S. 1088 (1981); United States v. Hanson, 618 F.2d 1261, 1265-66 (8th Cir. 1980), *cert. denied*, 449 U.S. 854 (1980); United States v. Tsanas, 572 F.2d 340, 346 (2d Cir. 1978), *cert. denied*, 435 U.S. 995 (1978); Catches v. United States, 582 F.2d 453, 458-59 (8th Cir. 1978); United States v. Butler, 455 F.2d 1338, 1340 (D.C. Cir. 1971); Fuller v. United States, 407 F.2d 1199, 1227-32 (D.C. Cir. 1968) (en banc), *cert. denied*, 393 U.S. 1120 (1968). *See also* E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 18.05 (3d ed. 1977) entitled *Verdict—Lesser Included Offense.*

25. For purposes of this Casenote, it is assumed that acquittal or conviction requires a unanimous vote. Although the United States Supreme Court has held that nonunanimous juries are constitutional in state criminal cases, *see* Apodaca v. Oregon, 406 U.S. 404, 410-12 (1972) (upholding a 10-2 verdict), only five states allow less-than-unanimous final jury verdicts in criminal cases. *See* IDAHO CONST. art. 1, § 7 (1984); LA. CONST. art. I, § 417 (1977); OKLA. CONST. art. II, § 19 (1981); OR. CONST. art. I, § 11 (1983); TEX. CONST. art. V, § 13 (1955). With the exception of Louisiana and Oregon, nonunanimous verdicts are allowed only in certain circumstances, i.e., for minor offenses. Nonunanimous verdicts for six-person juries, however, are not constitutional. *See* Burch v. Louisiana, 441 U.S. 130, 134 (1979).

26. *Wussler*, 139 Ariz. at 428, 679 P.2d at 74. Since the outcome of *Wussler* did not depend on the resolution of which jury instruction is the best instruction, or which one should be used by Arizona Superior Court judges, the language suggesting a preferred instruction is dictum. The language does give a strong indication, however, of how the court would decide a subsequent case. A valid holding would emerge from a case where a defendant argues that giving the jury the disagree-

The Disagreement Instruction

The disagreement instruction is favored by a minority of jurisdictions.[27] Justice Feldman, in his concurring opinion in *Wussler*, recommended the disagreement instruction. The judge instructs the jurors that they are first to consider the charged offense[28] and can consider the lesser offenses once they disagree on the issue of guilt as to the highest offense.[29] The distinctive feature of this instruction is that it allows the jury to consider the lesser-included offense without having first agreed upon the defendant's guilt or innocence under the charged offense.

The disagreement instruction was commonly given in Arizona before *Wussler*.[30] Arizona Superior Court judges routinely instruct juries with R.A.J.I. section 1.03.[31] The *Wussler* majority contends that section 1.03 is an acquittal-first instruction, but this contention is of questionable merit. Several Superior Court judges have stated, without hesitation, that section

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ment instruction was error and the court agrees. The language in *Wussler* foreshadows the outcome of such a case, and therefore, Superior Court judges and Supreme Court justices consistently interpret the language as binding. For example, Judge Thomas Meehan said: "It's new law in Arizona. There is no question about that." Interview with Thomas Meehan, Arizona Superior Court Judge, in Pima County, Tucson, Arizona (August 20, 1984). Arizona Supreme Court Justice Feldman stated: "When it says 'We hold the better rule to be,' that means that is the one that is going to be followed." Interview with Stanley G. Feldman, Justice of the Arizona Supreme Court, in Phoenix, Arizona (August 29, 1984).

27. Only Michigan and Oregon have expressly adopted the disagreement instruction. *See* People v. Mays, 407 Mich. 619, 623, 288 N.W.2d 207, 208 (1980); State v. Ogden, 35 Or. App. 91, 97, 580 P.2d 1049, 1051 (1978). *See also* State v. Krup, 36 Wash. App. 454, 462, 676 P.2d 507, 512 (1984) (the Washington State Constitution does not require the jury to unanimously agree on innocence concerning the greater offense before considering the lesser-included offense). *See also Jackson*, 726 F.2d at 1469 (defendant may choose either instruction); *Tsanas*, 572 F.2d at 346 (same); *Catches*, 582 F.2d at 458-59 (same). *See also* Craig, *supra* note 11, at 574 (listing federal courts that arguably accepted the disagreement instruction by using it to break deadlocked juries).

28. It has been argued that the requirement that the jurors address the major charge before addressing a lesser-included one "places undue emphasis on that charge, shows a prosecutorial bias, and impermissibly sets an agenda for jury deliberations." Craig, *supra* note 11, at 579. *See also* Judge Johnson's concurrence in State v. Ogden, 350 Or. App. 91, 580 P.2d 1049 (1978) in which it is stated:

> The premise underlying the lesser-included offense doctrine is that the jury will reach a verdict on one of the offenses submitted and that the selection of the appropriate offense is wholly within its province. The manner and order in which the offenses are considered by the jury is for it to decide.

Id. at 102, 580 P.2d at 1055.

29. *Wussler*, 139 Ariz. at 433, 679 P.2d at 79 (Feldman, J., specially concurring). Sometimes the language of the particular disagreement instruction directs the jurors to consider the lesser offense when they are "hung" on the highest charge. There is a potential problem with such language because "traditionally it has been the province of the trial court, not the jury, to determine when the jury is 'hung'." *Ogden*, 35 Or. App. 91, 102, 580 P.2d 1049, 1055 (Johnson, J., specially concurring).

30. Justice Feldman notes this fact in his concurring opinion in *Wussler*, 139 Ariz. at 432, 679 P.2d at 79. Arizona Superior Court judges corroberate this observation. Judge Colter stated:

> What R.A.J.I. is saying is that if all 12 of you are not convinced beyond a reasonable doubt that he is guilty, then you can consider the lesser-included. It does not say that all 12 of you must agree that he is not guilty of the greater—which is what this new rule says.

Interview with James H. Colter, Superior Court Judge, in Maricopa County, Phoenix, Arizona (August 19, 1984). Judge Meehan said:

> The law has always been before, and R.A.J.I. is approved by the Arizona Supreme Court, that if you cannot find beyond a reasonable doubt the defendant guilty or not guilty of the first, then consider the second, not that they have to find him not guilty before they could consider the lesser-included.

Interview with Judge Thomas Meehan, *supra* note 26.

31. *See supra* note 5.

1.03 is a disagreement instruction.[32] In addition, other R.A.J.I. sections make sense only if the judge has previously instructed the jury with the disagreement instruction. For example, R.A.J.I. 11.032(b) states: "If you determine that the defendant is guilty of either second degree murder or manslaughter but you have reasonable doubt as to which it was, you must find the defendant guilty of manslaughter."[33] A jury instructed with the acquittal-first instruction could not have reasonable doubt as to the degree of guilt since the jurors could not even address a lesser charge until they have agreed that the defendant is not guilty of the higher charge.[34]

The differences between the disagreement and acquittal-first instructions may seem insignificant. However, the two instructions reflect radically different theories of the role of the jury in the Anglo-American criminal trial and promote different results in the jury's deliberations and verdict.

Theoretical Arguments on the Jury's Role in the Criminal Trial

There are two common interpretations of the jury's role in the criminal trial. At one end of the spectrum is the "fact-finding" jury model.[35] According to this interpretation, the jury's role is strictly that of "a fact-finding agency."[36] The jury reaches its verdict by mechanically applying the law to the facts of the case. "Of no consequence are its own sentiments concerning the law's justness, either generally or as applied to a specific case; its own conceptions of the law's meaning; or its own estimate of the force of any mitigating circumstances not comprehended in the law."[37]

While the "fact-finding" jury model recognizes that the jury has the power to acquit a legally "guilty" defendant,[38] it also recognizes that this power should be restricted. This power to nullify the law is thought to be based "on an unworkable and essentially irresponsible theory . . . born of anarchy and destructive of democracy and any other form of government

32. *See supra* note 30.

33. R.A.J.I. 11.032(b) entitled *Manslaughter-Sudden Quarrel or Heat of Passion—Lesser Offense.*

34. R.A.J.I. 11.04 entitled *Second Degree Murder,* presents a similar dilemma. "If you determine that the defendant is guilty of either first degree murder or second degree murder but you have a reasonable doubt as to which it was, you must find the defendant guilty of second degree murder."

35. "Fact-finding" jury model is used in this Casenote to refer to the theory described in the text.

36. M. KADISH & S. KADISH, DISCRETION TO DISOBEY, A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES 56 (1973).

37. *Id.* at 57.

38. The power of the jury to return a verdict of not guilty when the facts blatantly demonstrate the contrary is commonly referred to as an act of jury nullification. For a history of the jury's nullification power see generally Sparf v. United States, 156 U.S. 51 (1895); M. KADISH & S. KADISH, *supra* note 36, at 45-55; Becker, *Jury Nullification: Can a Jury be Trusted,* 16 TRIAL 41 (Oct. 1980); Simson, *Jury Nullification in the American System: A Skeptical View,* 54 TEX. L. REV. 488-507 (1976); Trubitt, *Patchwork Verdicts, Different-Jurors Verdicts, and American Jury Theory: Whether Verdicts are Invalidated by Juror Disagreement on Issues,* 36 OKLA. L. REV. 473, 490-96 (1983); Scheflin & Dyke, *Jury Nullification: The Contours of a Controversy,* 43 LAW & CONTEMP. PROBS. 56-68 (1980).

The power of the jury to disregard the judge's instructions was legally sanctioned in the Bushnell's Case, 6 Howell's St. Tr. 999, 124 Eng. Rep. 1006 (1670) (jurors forced to spend months in jail for refusing to follow the judge's instructions that would result in the defendant's conviction).

with justice under law."[39]

The lesser-included offense doctrine and the acquittal-first instruction are consistent with the "fact-finding" jury model. A commonly recognized purpose of the lesser-included offense doctrine is to enable the jury to "correlate more closely the criminal act with the criminal conviction."[40] The doctrine allows the jury to apply the law to the facts and convict of the offense they believe the defendant actually committed, regardless of the offense charged by the state.[41]

In addition, the acquittal-first instruction dramatically reduces the possibility of non-evidentiary factors influencing the jury's decision and therefore facilitates verdicts viewed as proper under the "fact-finding" jury model. Requiring jurors to focus their attention only on the facts of the case and the elements of the offense prevents the jurors from responding to appeals for sympathy or from being influenced by their personal views of the applicable law and the defendant's actions.[42]

On the other end of the spectrum is the "justice reaching" jury model.[43] This interpretation of the jury's role is almost the reverse of the first. Instead of requiring the jury to follow the judge's instructions and reach the verdict by a rational application of the law to the facts, the jury is authorized and encouraged to "bring to bear on the criminal process a sense of fairness and particularized justice."[44] It is within the jury's power[45] to incorporate into

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39. McBride, *The Jury is not a Political Institution*, 11 JUDGES 37, 38 (1972). For further discussion consistent with this model see Simson, *supra* note 38, at 512-21.

40. Koenig, *The Many-Headed Hydra of Lesser-Included Offenses: A Herculean Task for the Michigan Court*, 1 DET. C.L. REV. 41, 52 (1975). There is a tendency for jurors to convict on the charged offense because the jury believes that the defendant is guilty of something and not because the state has proved all elements of the charged offense beyond a reasonable doubt. The lesser-included offense diminishes this tendency. *Id.*

41. Koenig has labelled this the "fundamental fairness" approach. *Id.*

> The outcome is fundamentally fairer to the defendant. It is fairer to the state, too. Although the defendant might not have committed all of the elements of the charged crime, he may have committed some of the elements which themselves form a statutorily distinct crime. He should be held accountable for this, instead of being acquitted altogether. The lesser included offense doctrine allows for this result.

Id.

42. The judge could further reduce the chances of nonevidentiary factors playing a role in the deliberation by instructing the jury on only one offense at a time. The *Wussler* opinion does not expressly preclude such a procedure. Nonetheless, there are two arguments against its usage. First, instructing on only one offense at a time (waiting until the jury returned a not guilty verdict to instruct on the elements of the lesser-included offense) creates an inconsistency between the jury instructions and the closing arguments. In the closing arguments, both attorneys discuss all of the offenses: the defense emphasizing the lesser charge, the prosecution the greater. If the judge instructs only as to the greater offense, this would confuse the jury and place undue emphasis on the highest charge.

In addition, it can be argued that such a procedure is, for all practical purposes, an instruction for the jury to return a special verdict. The special verdict is a procedure whereby the jury is to answer questions about the facts at issue in the case. The trial judge then applies the law to the determined facts. *See generally* Trubitt, *supra* note 38, at 496-505. While special verdicts are still used in civil cases, *id.* at 496, it is generally agreed that they are improper in criminal cases. In fact, the practice of using special verdicts in American criminal cases has virtually died out. *Id.* The reason this practice has died out is that "our tradition demands that the [jury's nullification] power not be impaired in criminal cases." *Id.*

43. "Justice reaching" jury model is used in this Casenote to refer to the theory described in the text.

44. United States v. Dougherty, 473 F.2d 1113, 1142 (D.C. Cir. 1972).

45. The legal *power* of the jury to nullify is universally recognized. *See supra* note 38. Despite

the deliberations their view of the law's application to the particular defendant[46] or opinions about the correctness of the applicable law.[47] The jury thus serves as the community and defendant's safeguard "against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge."[48] Statutes, regulations, and judicial instruction of the law are merely factors that the jury can use in reaching its verdict.

The lesser-included offense doctrine and the disagreement instruction are consistent with the "justice reaching" jury model. Although the lesser-included offense doctrine originated to assist the prosecution in obtaining a conviction,[49] it also provides the jury with inherent power to pardon the defendant.[50] The disagreement instruction allows the jury to consider varying degrees of the charged offense, which seems to facilitate utilization of the jury's nullification power. With the knowledge that a "not guilty" finding on the charged offense—in the face of facts to the contrary—will merely reduce the defendant's sentence, the jurors are understandably more susceptible to exercising their power.[51]

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this, the United States Supreme Court has consistently stated that the jury does not have the *right* to disregard the law as instructed by the court. *See* Sparf v. United States, 156 U.S. 51 (1895). "Public and private safety alike would be in peril if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court, and become a law unto themselves." *Id.* at 101. *But see* IND. CONST. art. I, § 19 (1978) and MD. CONST., Declaration of Rights art. 23 (1981) (two state constitutions recognizing the right to an instruction informing the jury of its power to disregard the law when applied to the facts).

46. Becker, *supra* note 38, states: "[J]ury nullification provides a refuge for those who may have technically violated the letter, yet not the spirit of the law, and for those who might violate unjust or obsolete laws." *Id.* at 43. John Henry Wigmore, in his article *A Program for the Trial of Jury Trial*, 12 J. AM. JUD. SOC'Y 166 (1929) described the function of the jury as follows:

> Law and justice are from time to time inevitably in conflict. . . . Law—the rule—must be enforced—the exact terms of the rule, justice or no justice . . . now this is where the jury comes in. The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case . . . . It supplies that flexibility of legal rules which is essential to justice and popular contentment . . . . The jury, and the secrecy of the jury room, are the indispensable elements in popular justice.

Id. at 170.

47. "The jury, acting as a cross-section of the population, is more likely to be in touch with community values and can by its acts provide an important mechanism for legislative reform by electing to nullify unpopular laws." Becker, *supra* note 38, at 43.

48. Duncan v. Louisiana, 391 U.S. 145, 153 (1968). For further discussion by supporters of this model see Wigmore, *supra* note 46; Becker, *supra* note 38; Howe, *Juries as Judges of the Criminal Law*, 52 HARV. L. REV. 582, 590-91 (1939); Pound, *Law in Books and Law in Action*, 44 AM. U. L. REV. 12 (1910); Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972); Scheflin & Dyke, *supra* note 38, at 85-111.

49. Keeble v. United States, 412 U.S. 205, 208 (1973).

50. State v. Ogden, 35 Or. App. 91, 97, 580 P.2d 1049, 1053. *See also* People v. Clemente, in which the New York Supreme Court, Appellate Division stated:

> It is the policy of the law to allow juries a latitude which is not hemmed in by absolute logic. Many considerations enter a jury's verdict which cannot be itemized and weighed in a chart of legal instructions. A jury is expected to stay within the bounds of reason, yet they may indulge tender mercies even to the point of acquitting the plainly guilty. Similarly they may, on almost any excuse, convict of a lower degree of crime although conviction of a higher degree is clearly warranted.

People v. Clemente, 285 A.D. 258, 264, 136 N.Y.S.2d 202, 207 (1954), *aff'd*, 309 N.Y. 890, 131 N.E.2d 294 (1955).

51. In the study discussed *infra* note 70, mock jurors who had only two options (guilty of first-degree murder or not guilty) convicted the defendant of first-degree murder in 46% of the cases, yet when jurors had four options (guilty of first-degree murder, or second-degree murder, or manslaughter, or not guilty) they convicted of first-degree murder in only 8% of the cases.

The disagreement instruction provides the jury with great freedom in deciding whether to convict of the charged offense or a lesser offense and when and how to make that selection.[52] With such flexibility, nonevidentiary factors are easily incorporated into the deliberation. It is this combination of evidentiary and nonevidentiary influences that the "justice reaching" jury model deems ideal.

Practical Implications of the Wussler *Instruction*

Three arguments support the acquittal-first instruction: (1) it insures a thorough deliberation of the offenses,[53] (2) it produces a conclusive decision on each offense,[54] and (3) it promotes a verdict that is consistent with the evidence.[55] Critics of the acquittal-first instruction point out that the instruction produces results by coercing minority jurors.[56] In comparison, allowing the jury to view the offenses collectively under the disagreement instruction results in just verdicts[57] and fewer unwarranted hung juries.[58]

Thorough Deliberations

Supporters of the acquittal-first instruction contend that requiring a unanimous decision on the charged offense before moving to the lesser assures that the jury will fully deliberate on each offense. The disagreement instruction, however, licenses the jury to "make too little effort toward reaching unanimity on the greater offense and move too quickly to the lesser one,"[59] and opinions of minority jurors are thus not given full attention.[60]

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52. One student has criticized the acquittal-first instruction as fettering the role of the jury as the exclusive trier of fact with "arbitrary procedural restrictions." Comment, *The Lesser Included Offense Instruction—Problems with its Use*, 3 LAND & WATER L. REV. 587, 595 (1968). The acquittal instruction is described as analogous to handing a peg to one who is told to fit the peg into one of three holes, none of which fit the peg perfectly. If he must decide on the first hole before considering the other two, a strong bias is demonstrated as to the first hole. *See id.*

The disagreement instruction invades the province of the jury as the ultimate fact-finder, but to a much lesser extent than the acquittal instruction. With both instructions, the jury can only address the lesser offense after addressing the greater. *See supra* note 28. Also, the jury cannot even consider lesser offenses unless the judge decides that sufficient evidence has been introduced from which the jury could find the defendant guilty of the lesser crime. *See supra* note 2 for the evidentiary requirement in Arizona. One commentator considers any withholding of lesser-included instructions, regardless of evidence, "as a back-door invasion of the province of the jury." Comment, *supra* at 593.

53. *See infra* notes 59-62 and accompanying text.

54. *See infra* notes 63-65 and accompanying text.

55. *See infra* notes 77-87 and accompanying text.

56. *See infra* note 69 and accompanying text.

57. *See infra* notes 84-85 and accompanying text.

58. *See infra* note 70 and accompanying text.

59. United States v. Tsanas, 572 F.2d 340, 345 (2d Cir. 1978). Studies of nonunanimous final jury verdicts support the hypothesis that allowing the jury to cease deliberating on the highest charge upon disagreement will reduce the amount of time and degree of thoroughness given to the highest charge. Professors H. Kalven and H. Zeisel compared the nonunanimous verdict rate of majority verdict juries (25%) with the national hung jury rate of unanimous verdict juries (5%) and concluded that the discrepancy was the result of juries ceasing deliberations after reaching the requisite majority. Kalven & Zeisel, *The American Jury: Notes for an English Controversy*, 48 CHI. B. REC. 195, 201 (1967). Professor Saks did a similar comparison of unanimous verdict juries and majority verdict juries and concluded that "unanimous juries, in comparison to quorum juries, deliberate longer, are more likely to hang, and when convicting are more certain of the defendant's guilt." M. SAKS, JURY VERDICTS 105 (1977).

60. *See* M. SAKS, *supra* note 59. Saks, in an attempt to determine whether, under a

These objections have an obvious prosecution orientation. First, only the state is concerned about the thoroughness of the discussion of the highest charge. The defendant is insured that a conviction is the result of a full discussion because only total agreement creates such a result. But that guarantee does not extend to the state because conviction of a lesser offense is an implied acquittal of all higher offenses[61] regardless of whether unanimity was actually reached.

In addition, the only jurors who can possibly be affected by the choice of instruction are those who favor conviction, particularly when those jurors are in the minority. With the acquittal-first instruction, a minority number of jurors for conviction will be heard because further deliberation is dependent on a change in their vote. Where that same jury is instructed with the disagreement instruction, there is a possibility of reduced attention to a juror favoring conviction.[62] The progress of the deliberation is not dependent on their vote, and a majority vote for conviction of a lesser offense will probably satisfy their desire to convict. Therefore, the minority for conviction on the higher charge may not have the opportunity to fully represent their thoughts. In contrast, jurors who believe that the defendant is not guilty will be heard regardless of which instruction is used because a change in their vote is a prerequisite for conviction. The impetus for the argument, then, is the prosecution's fear that the defendant's guilt as to those acts that differentiate the higher from the lesser offense will not be fully discussed.

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nonunanimous decision rule, minority arguments are given less attention, looks to a study done by Professor Schacter (Schacter, *Deviation, Rejection, and Communication*, 46 J. ABNORMAL & SOC. PSYCH. 190-207 (1951)) and states:

> [Schacter] found that significantly more communication, increasing with time, was directed toward deviants than nondeviants—in an effort to bring their views into conformity with the majority. But as discussion continued, the amount of communication dropped off sharply—once it appeared that continued communication would not bring about the desired change. Toward the latter part of deliberation, then, in nonunanimous juries the majority could perfect its tendency to reduce the level of communication to the minority by terminating discussion altogether and delivering the verdict.

See M. SAKS, *supra* note 59 at 22-23. *But see* Kessler, *The Social Psychology of Jury Deliberations*, in THE JURY SYSTEM IN AMERICA 67 (R.J. Simon ed. 1975) (using experimental studies on majority rule juries the author noted that, although a jury had reached a verdict, the majority continued to press for an explanation of why the minority members disagreed and the majority continued to press for unanimity). *See also* the results from a study performed with a sample of juries from Franklin County Court. The results showed that the presence of minority jurors after the necessary votes are identified in quorum juries causes continued deliberation and occasional further votes. M. SAKS, *supra* note 59, at 92-94.

A defendant could be harmed by an instruction not requiring a unanimous verdict on the charged offense before moving to the lesser. The majority in United States v. Tsanas, 572 F.2d 340 (2d Cir. 1978), demonstrates the advantages and disadvantages of the disagreement instruction for the defendant as follows:

> From the defendant's standpoint the balance is reversed; the advantage gained by giving the jury an option between a conviction on the greater charge and setting him free is counterbalanced by the danger that a juror who could on no account have been persuaded to convict on the greater and is not truly convinced beyond a reasonable doubt of all elements of the lesser offense may nevertheless convict of the latter.

Id. at 345.

61. Green v. United States, 355 U.S. 184 (1957). *See* State v. Steeves, 29 Or. 85, 111, 43 P. 947, 953 (1896) ("If one is tried upon an indictment which either expressly charges or impliedly includes different degrees of the same crime it is held . . . that a conviction of one degree is an implied acquittal of all higher degrees, and bars their prosecution upon a new trial").

62. *See infra* note 67.

Conclusive Results

Under the acquittal-first instruction, jurors must conclusively decide whether the defendant is guilty of the highest offense before deliberating on the lesser-included offense. If the disagreement instruction is given, the jury can avoid reaching a conclusive decision on each offense. When jurors find themselves unable to agree on the degree of a crime, they often resolve the disagreement by voting for the middle offense.[63] Because conviction of a lesser offense is an implied acquittal of all greater offenses,[64] electing this compromise verdict allows the jury to complete its deliberation without reaching agreement on the higher charges.[65] Supporters of the disagreement instruction argue that the costs of guaranteeing a conclusive decision on the highest charge outweigh its benefits.

These costs are discussed in Justice Feldman's concurrence in *Wussler*. When the jury is instructed with the acquittal-first instruction, a minority juror has three options upon deadlock: (1) persuade the majority to change its opinion, (2) change his or her vote, or (3) hold out with the knowledge that a hung jury will result.[66] It has been shown that only in a rare situation can a minority persuade a majority to change its mind.[67] Most likely, then, either the minority relinquishes its free will,[68] changing its mind, or the jury hangs. The supposed benefit of supplying only these options is that the jury is forced to reach an otherwise unobtainable agreement.[69]

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63. For a discussion of the different ways in which a jury can reach a verdict of guilty to a lesser crime see Comment, *Compromise Verdicts in Criminal Cases*, 37 NEB. L. REV. 802 (1958).

64. Green v. United States, 355 U.S. 184, 190 (1957).

65. H. KALVEN & H. ZEISEL, THE AMERICAN JURY, 477 n.4 (1966). *See also* Johnson v. Louisiana, 406 U.S. 356, 377 (1972) (Powell, J., concurring) ("[T]he rule that juries must speak with a single voice often leads, not to full agreement among the twelve, but to agreement by none and compromise by all, despite the absence of a rational basis for such compromise.") For a discussion of how the compromise verdict is inconsistent with the universally recognized view of the jury as a democratic institution committed to the principal of individualism see Trubitt, *supra* note 38, at 476-90.

66. *Wussler*, 139 Ariz. at 433, 679 P.2d at 79 (Feldman, J., concurring).

67. In a study of 816 experimental jurors, the researcher found that in only 10% of the jury cases did the minority succeed in convincing the majority to change its vote. She found that among the 10% "the size of the minority was most often five." R.J. SIMON, THE JURY: ITS ROLE IN AMERICAN SOCIETY 64 (1980). H. Kalven and H. Zeisel, *supra* note 65, at 488, had similar findings using real juries.

68. *See generally* Kessler, *supra* note 60, at 84-86 (explaining influences on minority jurors during deliberations); *see also* M. SAKS & R. HASTIE, SOCIAL PSYCHOLOGY IN COURT 85, 96-98 (1978) (explaining the majority/minority interaction after impasse is reached).

In Simon's study, the results obtained when comparing jurors' individual verdicts as reported immediately before deliberations with the final verdicts demonstrated that 55% of the jurors held on to their initial vote, and that vote was consistent with the majority. Sixteen percent were in hung juries, yet did not change their vote as a result of the group discussion. Of the remaining 23% who changed their vote to join the majority, 70% went along "probably because they wanted to avoid a hung jury," and 30% "shifted their verdicts in such a manner as to question whether they understood what was happening." R.J. SIMON, *supra* note 67, at 63-64. Using these findings she concluded that "in slightly more than one out of three juries the group verdicts differed from those which the jurors would have reported if they were polled individually immediately following the trial." *Id.*

69. Judges realize that the acquittal-first instruction causes pressure to minority jurors, and therefore some judges maximize the effect by giving the instruction supplementally when the jury is deadlocked. *See* Craig, *supra* note 11, at 571 n.45 citing as instances when the judge used the instruction supplementally: People v. Harmon, 54 Mich. App. 393, 221 N.W.2d 176 (1974); People v. Ray, 43 Mich. App. 45, 204 N.W.2d 38 (1972); State v. Ogden, 35 Or. App. 91, 580 P.2d 1049

A disagreement instruction alleviates some of the coercion implicit in a minority/majority clash by minimizing the ramifications of a hold-out minority. If the minority favors a lesser offense conviction, the minority need not fear that its view precludes the discussion of the lesser offense. In addition, the majority need not coerce the minority jurors to change their minds for fear of a hung jury.

An increase in the number of unnecessary hung juries is an additional price paid for a conclusive vote on the charged offense. With the acquittal-first instruction, the jury has at a time only one offense available on which agreement must be reached. With the disagreement instruction, however, the jury can consider all of the offenses. Studies tend to prove that increasing the number of options available for discussion facilitates agreement.[70] Accordingly, one can conclude that an acquittal-first instruction often makes an agreement unreachable and causes, instead, a hung jury.

The actual harm a hung jury has on the legal system and society is debatable. A positive view of the hung jury phenomenon is that it is, in reality, "a reaffirmation of the system's integrity insofar as it serves to protect the minority's dissent."[71] In the same vein, "a mistrial from a hung jury is a safeguard to liberty. In many areas it is the sole means by which one or a few may stand out against an overwhelming contemporary public sentiment. Nothing should interfere with its exercise."[72] Despite these positive aspects, the hung jury is an undesirable conclusion to a criminal trial.

Three options are available for the parties after a hung jury verdict. The state may choose to reprosecute the defendant;[73] the prosecution and defense may settle on a guilty plea;[74] or the state may dismiss the

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(1978); Ballinger v. State, 437 P.2d 305 (Wyo. 1968). Craig points out that in each of these cases the jury ultimately returned a jury of "guilty" on the charged offense. *Id.*

70. *See generally* Craig, *supra* note 11, at 574 n.54. Craig cites, for example, a study done by Vidman, *Effects of Decision Alternatives on the Verdicts and Social Perceptions of Simulated Jurors*, 22 J. PERSONALITY & SOC. PSYCH. 211 (1972). In that study, in 54% of mock homicide trials, the jury acquitted when the choice was guilty or not guilty of first-degree murder. When the jury was given four options, they returned verdicts of first-degree murder in 8% of the cases, second-degree murder in 63%, manslaughter in 21%, and not guilty in 8%. *Id.* at 115. Interpreting these findings Craig notes:

> [O]ne can infer that the disagreement instruction can reduce hung juries. If mock jurors are choosing from a range of verdicts and reaching agreement, this indicates that more options change the substance of deliberations and that new discussion on the lesser offense can lead to an otherwise unobtainable unanimity.

Craig, *supra* note 11, at 575.

71. Flynn, *Does Justice Fail When the Jury is Deadlocked?*, 61 JUDICATURE 129, (1977).

72. Huffman v. United States, 297 F.2d 754, 759 (5th Cir. 1962) (Brown, J., concurring in part, dissenting in part), *cert. denied*, 370 U.S. 955 (1962).

73. Reprosecution occurs in an estimated 26% of hung jury cases. Flynn, *supra* note 71, at 133. Reprosecution is often on a lesser offense. *See* Fried, Kaplan & Klein, *Juror Selection: An Analysis of Voir Dire*, in THE JURY SYSTEM IN AMERICA 47, 54 (R.J. Simon ed. 1975) (noting that the prosecutor usually will not "push a case beyond two hung juries," but will instead reduce the charges after one). Because the disagreement instruction allows jurors to make that same decision, but in the course of the first trial, the use of the acquittal-first instruction causes the state to spend unnecessarily millions of dollars and crowd the courts. Flynn's study of the 10 California felony trial courts found that out of 8,021 trials 978 ended in hung juries. Flynn, *supra*, at 130. It is estimated that 978 hung juries "consumed a total of 2,912 court days, about 10 percent more time than trials which resulted in verdicts . . . [and] cost about $6,683,000 during [the] three-year period." *Id.* at 133.

74. Settlement on a guilty plea occurs in an estimated 34% of the hung jury cases. Flynn, *supra* note 71, at 133. In most instances, unless the jury was hung by a vote of at least 10-2, and those

charges.[75] A strong argument can be made that the repercussions of all of these options are more detrimental than the possible benefits of the acquittal-first instruction.[76]

A "Just" Result

Determining what is a just result in a criminal jury trial depends to a large extent on the particular theory of the role of the jury in the Anglo-American criminal trial.[77] Under the "fact-finding" jury model, jury compromises are inappropriate and should be discouraged.[78] Under the "justice reaching" jury model, compromises are essential to the legal system as a whole and should be promoted.[79]

While acknowledging that the chances of reaching compromise verdicts are enhanced when the jury is given an increased number of options,[80] and that only the disagreement instruction allows the jury such freedom, a relevant question is whether compromise verdicts are a valid concern. Post deliberation interviews with jurors,[81] conclusions from sample juries,[82] and experimental studies with mock juries[83] indicate that nonevidentiary factors do play a part in a juror's verdict selection. At the same time, analysis of the content of mock jury deliberations reveals that jurors perform their task in a conscientious manner.[84] In addition, in a study of more than 3,500 judges'

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holding out were doing so for unusual nonevidentiary reasons, the prosecution and the defense will ultimately work out a plea on a lesser offense. Both parties know that the defendant could not be convicted of the higher charge on retrial. *See* H. KALVEN & H. ZEISEL, *supra* note 65, at 462, inferring that even if the final hang was by a vote of 10-2 or even 11-1, the figure represents a much larger initial split. Unless the ultimate vote demonstrated a dissent of small magnitude and the dissenters were holdouts for uncommon, nonevidentiary reasons, both parties know that the result will be repeated.

75. Dismissal occurs in an estimated 40% of the hung jury cases. Flynn, *supra* note 71, at 133. Because three out of five hung juries favored conviction, and more than 40% favor conviction by a vote of at least 9-3, "for the technically 'guilty' but legally free defendants, a hung jury provides an unwarranted exemption from the penal functions of the criminal justice system." In Flynn's study, 62.6% of the hung juries favored conviction, 42.1% by at least a vote of 9-3. *Id.* at 131-32. Kalven and Zeisel reported similar findings: 63% favored conviction, and 44% favored the conviction by 9-3 or more. H. KALVEN & H. ZEISEL, *supra* note 65, at 460. *See also* Craig, *supra* note 11, at 563-64.

76. *See supra* notes 73-75.

77. *See supra* notes 35-52 and accompanying text.

78. *See supra* notes 35-42 and accompanying text.

79. *See supra* notes 43-52 and accompanying text.

80. *See supra* note 70 and accompanying text.

81. *See* Craig, *supra* note 11, at 578-79 n.70 (noting that juror's decision is, at times, based on such things as a desire to be finished with the trial).

82. H. KALVEN & H. ZEISEL, *supra* note 65, found that of 3,500 sample trials, about 17% were cases in which the jury acquitted but the judge would have convicted. *Id.* at 56. These authors determined that "jury sentiment on the law" accounted for or contributed to half of all the judge-jury disagreements. *Id.* at 115.

83. *See* Craig, *supra* note 11, at 579-80 n.72. *See also* Stephan, *Selective Characteristics of Jurors and Litigants: Their Influences on Juries' Verdicts*, in THE JURY SYSTEM IN AMERICA 95, 99-117 (R.J. Simon ed. 1975) in which trial and experimental data were used to examine the effect of the litigant's sex, socioeconomic status, moral character, level of physical attractiveness, race, and attitudinal similarity to the simulated juror on the jury's verdict. The study also examines the effect of particular jurors' sex, socioeconomic status, various demographic variables, attitude toward capital punishment, authoritarianism, and the foreman's leadership style on the jury's verdict.

84. R.J. SIMON, *supra* note 67, at 52 notes that "jurors spent most of the time reviewing the court record . . . The most consistent theme that emerged from listening to the deliberations was the seriousness with which the jurors approached their job and the extent to which they were concerned that the verdict they reached was consistent with the spirit of the law and with the facts of the

responses to a questionnaire asking for a judgment on each case, the judges reported agreement with jury verdicts in 80% of the cases.[85] These findings are significant and were used by the United States Supreme Court in *Duncan v. Louisiana*[86] to affirm its belief that the jury decides cases correctly and rationally and therefore require the state to maintain the defendant's right to a jury trial in criminal cases.[87]

Conclusion

State v. Wussler encourages criminal judges to instruct jurors to begin their deliberation by addressing the greatest charge and not to let their discussion stray to the lesser offense until they reach unanimous agreement on the higher offense. This application of the acquittal-first instruction, in theory, guarantees a thorough, conclusive deliberation on each offense and thereby produces a result that is a rational application of the law to the facts. These results occur, however, at the risk of coerced deliberations and an increased chance of a hung jury. More importantly, not allowing the jury discretion to address the available offenses restricts its ability to "stand between the accused and a potentially arbitrary or abusive government that is in command of the criminal sanction."[88] Judges on the Arizona criminal bench should continue to instruct juries with the Arizona Supreme Court-adopted disagreement instruction as provided in R.A.J.I. section 103. Reaffirmation of the R.A.J.I. disagreement instruction instead of adoption of an acquittal-first instruction would have been the sounder outcome of the *Wussler* case.

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case." *See also* R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY 230 (1983) who conclude from the findings of numerous studies that juries perform efficiently and accurately. Jurors' efforts to reconstruct testimony and narrative schemes to condense the trial evidence are thorough and precise.

See R. HASTIE, S. PENROD & N. PENNIGNTON, *supra*, addressing the issue of the content of mock jury deliberations, noting that"more than 80% of the mock juries' discussions were judged relevant to their decisions, and most of their discussions were of 'high quality' in the eyes of attorneys, law students, and social scientist observers." *Id.* at 28. *But see* James, *Status and Competence of Jurors*, 64 AM. J. SOC. 563 (1959) (finding that 30% of the comments during deliberations were expressions of opinions or recountings of personal experiences; 15% of the time was spent on testimony; 25% was spent on procedural issues; and 8% was spent on judge's instructions).

85. H. KALVEN & H. ZEISEL, *supra* note 65, at 56. One commentator, however, notes that experimental studies of mock jurors do not sufficiently demonstrate the deliberation and results of actual juries. *See* Craig, *supra* note 11, at 580. *See also* R. HASTIE, S. PENROD & N. PENNINGTON, *supra* note 84, at 39-47 (analyzing the advantages and disadvantages of studying mock juries as opposed to real juries).

86. 391 U.S. 145 (1968).

87. *Id.* at 157.

88. United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977).

IV. DEFAMATION

CARLSON V. PIMA COUNTY: A LOOK AT THE PUBLIC RECORDS LAW AND THE PRIVILEGE TO DEFAME IN ARIZONA

In *Carlson v. Pima County*,[1] the Arizona Supreme Court elucidates Arizona's public records case law and statutes.[2] In most Arizona public records disclosure cases, a plaintiff seeks and is denied access to a public record.[3] A court then determines if the denial of access was proper in light of Arizona's public records laws, which provide the public with a qualified right to view "public records or other matters." *Carlson*, however, presents the issues in a different light. In *Carlson*, a public officer released allegedly defamatory information. The issues presented in *Carlson* are whether a privilege protects an officer who releases defamatory information and, if so, what the nature of that privilege is.[4]

This Casenote examines the *Carlson* decision and the public's qualified right to view public records under Arizona's open records statutes. This Casenote also analyzes how the public's right to inspect gives rise to a qualified privilege which protects the officer who releases the public records. The two privileges applied in *Carlson*, the duty-to-communicate-based privilege and the executive privilege afforded a public officer, are discussed in this Casenote. Finally, this Casenote evaluates the possible consequences of the *Carlson* holding.

LEGAL BACKGROUND

The Communication Privilege

The common law recognizes a variety of situations in which a defamation defendant is protected against liability by a privilege.[5] However, the privilege only provides protection when the defendant has acted in a reasonable manner and for a proper purpose.[6] In *Roscoe v. Schoolitz*,[7] the Arizona Supreme Court recognized that a qualified privilege protects a defendant

1. 141 Ariz. 487, 687 P.2d 1242 (1984).

2. ARIZ. REV. STAT. ANN. §§ 39-121, -121.01, -121.02 (1956 & Supp. 1975). The 1956 statute provides: "Public records and other matters in the office of any officer at all times during office hours shall be open to inspection by any person." ARIZ. REV. STAT. ANN. § 39-121. Additional public record statutes were enacted in 1975 and are relevant to the *Carlson* case. ARIZ. REV. STAT. ANN. §§ 39-121.01 to 121.02.

3. *See, e.g.*, Moorehead v. Arnold, 130 Ariz. 503, 637 P.2d 305 (Ct. App. 1981); Little v. Gilkinson, 130 Ariz. 415, 636 P.2d 663 (Ct. App. 1981).

4. The public records law was in disarray before *Carlson*. In addition to the public records statute, ARIZ. REV. STAT. ANN. § 39-121 (1956), which provided access to information which is a "public record or other matter," an interest-balancing test enunciated in Mathews v. Pyle, 75 Ariz. 76, 251 P.2d 893 (1952), was the prevailing method used to determine if disclosure was proper. *See infra* notes 14-15 and accompanying text. However, in 1975 the amendments to the public records statute, ARIZ. REV. STAT. ANN. §§ 39-121.01, 121.02 (Supp. 1975), were enacted. *Carlson* is significant to Arizona's public records law due to the reconciliation of case law with these statutorial developments.

5. *See generally infra* note 9.

6. *Id. See also* RESTATEMENT (SECOND) OF TORTS § 592A topic 3 (1976).

7. 105 Ariz. 310, 464 P.2d 333 (1970).

against liability for defamation. Whether a privileged occasion exists is a question of law for the court.[8] To show that a privileged occasion arose, the defendant must establish the existence of circumstances which imposed a duty to communicate.[9] If the defendant establishes by a preponderance of the evidence that a privileged occasion arose, the plaintiff may defeat the privilege by proving that it was abused. A privilege may be abused by publishing excessively or with malice.[10]

If the public has the right to inspect a public record, the public officer has a duty to communicate. This duty creates an occasion that is protected by a qualified privilege under *Roscoe*.[11] Because there are occasions when the public does not have the right to view a public record, it is necessary to examine the nature of the public's right of inspection.

The Public's Right to Inspect

Arizona's public record disclosure statute states that "public records and other matters in the office of any officer at all times during office hours shall be open to inspection by any person."[12] The public record statutes[13] appear to provide the public with a broad right of inspection. The extent of that right is unclear, however, because Arizona courts have infrequently in-

8. *Id.* at 313-14, 464 P.2d at 336-37.

9. *Id.* at 313, 464 P.2d at 336. *See* W. PROSSER & W. P. KEETON, THE LAW OF TORTS § 111, at 771-73, § 115, at 825-30 (5th ed. 1984). In addition to the constitutional privilege imposed by New York Times Co. v. Sullivan, 376 U.S. 254 (1976), at common law there are generally five types of interests which are protected by a qualified privilege to communicate: 1) Interest of publisher—protects publications necessary to defend one's own reputation; 2) Interest of others—protects publications for the protection of another person's interest; 3) Common interest—protects publications to one with a common interest and which protects or furthers that common interest; 4) Communications to one who may act in the public interest—a) public interest privilege protects publications made to those in a position to protect a public interest, b) discharging official duty privilege protects publications from one public officer to another pursuant to an official duty; and 5) Fair comment on matters of public concern—protects opinions on matters of public concern. W. PROSSER & W.P. KEETON, § 115, at 825-30.

10. A privilege is defeated by a showing of "actual" malice: with knowledge it was false or with reckless disregard of the truth. Selby v. Savard, 134 Ariz. 222, 655 P.2d 342 (1982); RESTATEMENT (SECOND) OF TORTS §§ 600, 604 (1976). In a non-privileged situation the defendant is also protected by the "actual" malice standard when a "public official or figure" plaintiff is defamed. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the United States Supreme Court held that the first amendment to the United States Constitution imposes a requirement that public official plaintiffs must prove by clear and convincing evidence that the defendant published false statements with " 'actual malice'—that is with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. *See* RESTATEMENT (SECOND) OF TORTS § 580A (1976) for a detailed discussion of the *Sullivan* rule. The "actual malice" standard was extended to include public figures as well. Curtis Publishing Co. v. Butts, 338 U.S. 130 (1967). The *Sullivan* standard is inapplicable to *Carlson* because the plaintiff is neither a public official nor a public figure. A private plaintiff must prove that the defendant acted with some form of fault. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). The standard of fault is defined by the individual states. *Id.* at 347. The negligence standard has been adopted in Arizona. Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 560 P.2d 1216 (1977). *Peagler* adopted the RESTATEMENT (SECOND) OF TORTS § 580B to define the minimal-level of fault required in order to impose liability under the *Gertz* rule. 114 Ariz. at 315, 560 P.2d at 1222.

11. 141 Ariz. at 491, 687 P.2d at 1246.

12. ARIZ. REV. STAT. ANN. § 39-121 (1956).

13. ARIZ. REV. STAT. ANN. §§ 39-121, 121.01, 121.02, 122 (1956 & Supp. 1975). *See also* Note, *Public Access to Governmental Records and Meetings in Arizona*, 16 ARIZ. L. REV. 891, 906-14 (1974).

terpreted the statutes. The leading case is *Mathews v. Pyle*,[14] in which a newspaper publisher sought disclosure of investigative reports submitted to the Governor by the Arizona Attorney General. In *Mathews*, the Arizona Supreme Court found that while the investigative reports did not constitute a "public record" for inspection purposes, they might be subject to inspection as "other matters." The court conditioned the right to inspect "other matters" on whether or not "they are confidential, or of such a nature that it would be against the best interests of the state to permit a disclosure of their contents."[15] The court remanded the case to the trial court for an application of this interest-balancing test.

An addition to Arizona's public record statutes was enacted in 1975, which considerably amended the public record statutes.[16] Although these newer provisions do not define "public records or other matters," they do define a public officer's responsibilities with respect to public records.[17] In response to the 1975 enactment, the Arizona Attorney General issued an opinion prescribing the proper test to use when considering requests for information.[18] The opinion dispenses with the "public record or other matter" characterization in favor of a test which solely weighs the effects of disclosure.[19]

In 1979, the Arizona Court of Appeals followed this Attorney General opinion in *Church of Scientology v. City of Phoenix*.[20] The Church of Scientology sought disclosure of records from the City of Phoenix Police Department. The court dispensed with the "public records or other matters" characterization and adopted a test based on whether the release of the information would have a harmful and important influence upon the duties of the official or agency. Finding a clear statutory policy in favor of disclo-

14. 75 Ariz. 76, 251 P.2d 893 (1952). The publisher based its claim on Arizona's public record statute, ARIZ. CODE ANN. § 12.412 (1939), which is very similar to the 1956 revision. *See supra* note 2.

15. 75 Ariz. at 80, 251 P.2d at 896. As the court in *Carlson* points out, it could be argued that *Mathews*' balancing test only applied to "other matters" and not "public records." 141 Ariz. at 490, 687 P.2d at 1245. Since *Carlson* obliterates the public records or other matters characterization, this point is now moot. *See Carlson*, 141 Ariz. at 491, 687 P.2d at 1246.

16. ARIZ. REV. STAT. ANN. §§ 39-121.01, 121.02 (1975).

17. The revised Arizona statute requires that officers "maintain all records reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities which are supported by funds from the state or any political subdivision thereof." ARIZ. REV. STAT. ANN. § 39-121.01(B) (1975).

18. Op. Ariz. Att'y Gen. 76-43 (1976).

19. *Id.* The Attorney General opinion states:

> Following passage of the 1975 provisions, the proper way to view all requests for information is not to determine whether or not a record is technically a public record or other matter, but instead to determine if release of the information would have an important and harmful effect upon the official duties of the official or agency.

Id.

20. 122 Ariz. 338, 594 P.2d 1034 (Ct. App. 1979). The court in *Church of Scientology* also relied on the federal open records statute, the Freedom of Information Act (FOIA), as a guideline. Freedom of Information Act, 5 U.S.C. § 552 (1970). The FOIA test determines disclosure based on the scope of permissible discovery by a party in litigation with that agency. For a discussion see Koch, *The Freedom of Information Act: Suggestions for Making Information Available to the Public*, 32 MD. L. REV. 189 (1972); Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.-C.L. L. REV. 1 (1970); and Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 COLUM. L. REV. 895 (1975). In ordering disclosure, the court in *Church of Scientology* found that the materials were discoverable under the FOIA guidelines. 122 Ariz. at 340, 594 P.2d at 1036.

sure, with no important and harmful effects on the police department, the court ordered disclosure.[21]

ANALYSIS OF *CARLSON*

Lawrence Carlson, a Pima County Jail inmate, sued the Pima County Sheriff[22] for defamation, based upon the release of information about Carlson to a reporter. The information had been included in an "offense report" containing details of an assault Carlson had allegedly committed.

The Arizona Supreme Court found that an "offense report" is a "public record" and is therefore presumed open to public inspection under Arizona public records statutes. Because the court found the policy of disclosure was not outweighed by countervailing interests, it held that the Sheriff had a duty to communicate, and was thus protected by a privilege.[23] The court also held that the Sheriff had an executive privilege as a police officer.[24] The court held further that both privileges are qualified: they protect the public officer only if there is no showing of ill-will or malice.[25] The court found the qualified privileges were not defeated and affirmed the judgment entered on the directed verdict for the Sheriff.[26]

The Arizona Supreme Court found it necessary to interpret public records law in order to characterize the privilege which protects a public officer who releases information. Arizona case law recognizes a qualified privilege protecting a person who has a duty to communicate.[27] Because the public's right to inspect creates an obligation on a public officer to communi-

21. 122 Ariz. at 340, 594 P.2d at 1036. In 1981 the Arizona Court of Appeals again dealt with the public record statutes in Little v. Gilkinson, 130 Ariz. 415, 636 P.2d 663 (Ct. App. 1981). The appellees sought disclosure of a police file dealing with the appellee's son's murder and the release of the son's personal effects. The police department contended that the disclosure of the file was improper, and the public record statutes inapplicable, because the file was not a "public record or other matter." The court found that *Church of Scientology* was controlling and implicitly held that whether the file is a "public record or other matter" is irrelevant. 130 Ariz. at 416-17, 636 P.2d at 664-65.

22. Other defendants in the suit were Pima County, the individual members of the Pima County Board of Supervisors, and the Pima County Corrections Director. The facts of *Carlson* are set forth at 141 Ariz. at 488-89, 687 P.2d at 1243-44. The trial court directed a verdict at the end of the plaintiff's case for all of the defendants except the Sheriff. At the close of all the evidence, a directed verdict was entered for the Sheriff. Carlson appealed the judgment. Division Two of the Arizona Court of Appeals affirmed the trial court's directed verdict. The court held that the Sheriff was a public officer and the offense report was a public record. Thus, under Arizona's public record statutes, the court concluded that the public right of inspection applied, and that the Sheriff had a duty to communicate; thus the release of information was privileged. Carlson v. Pima County, 141 Ariz. 517, 687 P.2d 1272 (Ct. App. 1983).

23. 141 Ariz. at 491, 687 P.2d at 1246.

24. *Id.* at 492, 687 P.2d at 1247, *citing* Portonova v. Wilkinson, 128 Ariz. 501, 503, 627 P.2d 232, 234 (1981) ("The police officers in our state, as we have indicated, are protected by a qualified privilege.").

25. 141 Ariz. at 492, 687 P.2d at 1247. In a defamation action a qualified privilege protects the defendant from liability only if the defamatory statement is published without actual malice, while an absolute privilege renders the defendant absolutely immune from civil liability. *See supra* note 10. *See also* Martinez v. Cardwell, 25 Ariz. App. 253, 255, 542 P.2d 1133, 1135 (1975).

26. 141 Ariz. at 492, 687 P.2d at 1247.

27. "In Arizona an occasion for a publication is conditionally or qualifiedly privileged where circumstances exist which cast upon a defendant the duty of making a communication to certain other persons to whom he makes such communication in the performance of such duty." Roscoe v. Schoolitz, 105 Ariz. 310, 313, 464 P.2d 333, 336 (1970) (citations omitted).

cate, the court found that a public officer who releases a report is protected against a defamation action by a privilege.[28] The court held, however, that the public has a right to inspect—and a public officer has a duty to communicate—only when the policy of disclosure outweighs the "countervailing interests of confidentiality, privacy or the best interests of the state."[29]

In *Carlson*, the Sheriff was protected from liability for defamation by two privileges. First, the supreme court determined that a privilege arising from a duty to communicate protected the Sheriff.[30] The court based this determination on the public's right to view the offense report. Second, the court found that an executive privilege protected the Sheriff.[31] Finally, the court held that the privileges protecting the Sheriff were not abused; there was no showing of ill-will or malice.[32]

Communication Privilege Analysis

The court in *Carlson* began its analysis with an examination of Arizona's public records statutes to determine what constitutes public records or other matters for the purposes of the public's right of inspection.[33] The court indicated that the 1975 amendment of Arizona's public records statutes implies a broad definition of public records. This broad definition led the court to dispense with the initial determination of whether a document is either a "public record or other matter," thus affirming the analysis of *Church of Scientology v. City of Phoenix*. The court found that the offense report was within the "public record or other matters" definition for purposes of the public's right to inspection.[34]

Having found the offense report to be a public record, the court examined the nature of the public's right to inspect the report. The court held that the public's right to inspect records is qualified.[35] Although the court found that the current statutory scheme evinces a clear policy favoring disclosure, it held that the statutory scheme does not overrule the *Mathews v. Pyle* interest-balancing test.[36] Thus, the court cited *Mathews* for the proposition that qualifications on open disclosure are based on the conflict between the public's right to governmental openness and disclosure which harms the

28. 141 Ariz. at 491, 687 P.2d at 1246.
29. *Id.*
30. *Id.* at 491-92, 687 P.2d at 1246-47.
31. *Id.*
32. *Id.* at 492, 687 P.2d at 1247.
33. *Id.* at 489, 687 P.2d at 1244. The court noted in a footnote that the court's definition of "public record" was only applicable for right of access or disclosure purposes. *Id.* at 489 n.1, 687 P.2d at 1244 n.1.
34. *Id.* at 491, 687 P.2d at 1246. The court of appeals found the "offense report" was a public record which the Sheriff had a duty to make. It based its reasoning on a finding that the Sheriff was a "public officer" who must receive all persons committed to the jail and provide them with necessities, keep the peace, and that he must "take charge of and keep the county jail and the prisoners therein." Carlson v. Pima County, 141 Ariz. at 518, 687 P.2d at 1273.
35. 141 Ariz. at 491, 687 P.2d at 1245. In discussing statutory exceptions the court listed the following non-open access statutory provisions: adoption records, ARIZ. REV. STAT. ANN. §§ 8-120 to 8-121 (1956); consumer fraud investigations, ARIZ. REV. STAT. ANN. § 44-1525 (1984); and Department of Health Services records, ARIZ. REV. STAT. ANN. §§ 36-105, -136G(18), -340, -509, -714(B)(1) (1956). *See also* 66 AM. JUR. 2D *Records and Recording Laws* § 12 (1973).
36. 141 Ariz. at 490, 687 P.2d at 1245.

state's interest.[37] Significant public policies concerning confidentiality of information and privacy of persons also qualify the public's right to inspection.[38]

After finding the offense report to be a public record and the public's right of inspection to be qualified, the court next analyzed the release of the report. Because the public has a right to inspect public records, the public officer has a duty to communicate. Thus, the Sheriff had a duty to communicate the information contained in the offense report because the report was a "public record" within the meaning of Arizona's public record statutes. Applying the *Roscoe* occasion test, the court found this duty created an occasion which was protected by a qualified privilege.[39] The court held that in *Carlson*, because the plaintiff failed to show ill-will or malice, the qualified privilege was not defeated.[40]

Executive Privilege Analysis

In *Carlson*, the court stated there is no absolute privilege in Arizona for public officers and employees of the state and its political subdivisions, but granted the Sheriff a qualified privilege.[41] In Arizona, public officials, as members of the executive branch of government, have a qualified privilege protecting them against liability for acts within the scope of their duties.[42]

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37. *Id.*
38. *Id.*
39. *Id.* at 491, 687 P.2d at 1246.
40. *Id.* at 492, 687 P.2d at 1247.
41. The trial court held the Sheriff was protected by an absolute privilege whereas the court of appeals held the Sheriff was protected by a privilege without stating whether it was qualified or absolute. 141 Ariz. at 491-92, 687 P.2d at 1246-47. *See also* 141 Ariz. at 519, 687 P.2d at 1274.
42. Grimm v. Arizona Bd. of Pardons and Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977). *See also* Note, *Public Official Immunity in Arizona—The Grimm Case*, 21 ARIZ. L. REV. 219 (1979). In *Grimm*, the Arizona Supreme Court abolished the absolute immunity which previously protected public officials while performing discretionary acts. The *Grimm* court also held that a public official is liable for discretionary decisions if the plaintiff establishes: 1) a duty was owed to that plaintiff, 2) the required standard of care was breached, and 3) a resulting injury proximately caused by that breach. 115 Ariz. at 266, 564 P.2d at 1233.

In 1948, the Arizona Supreme Court began to grant public officials an absolute privilege based on a quasi-judicial rationale. Wilson v. Hirst, 67 Ariz. 197, 198, 193 P.2d 461, 462 (1948). This absolute privilege was then applied by one of the Arizona Courts of Appeals to a state public administrator in a defamation suit in Long v. Mertz, 2 Ariz. App. 215, 407 P.2d 404 (1956).

Defamation at common law was a strict liability tort. W. PROSSER & W.P. KEETON, *supra* note 9, § 111, at 771-72. The doctrines of absolute and qualified privileges emerged as a response to this strict liability status. *See* Note, *The Constitutional Fault Test of* Gertz v. Welch, Inc. *and the Continued Viability of the Common Law Privileges in the Law of Defamation*, 20 ARIZ. L. REV. 799 (1978); Note, *Absolute Privilege of Executive Branch Officials for Defamatory Statements*, 20 ARIZ. L. REV. 1100 (1978). A qualified privilege is a privilege which may be defeated by actual or common law malice, *see infra* text accompanying notes 57-59, while an absolute privilege can not be defeated by malice. In White Mountain Apache Indian Tribe v. Shelley, 107 Ariz. 4, 480 P.2d 654 (1971), the Arizona Supreme Court granted absolute immunity to public officials based on a scope of official duties test. However, the court was dealing with "federal" immunity of Indian tribes rather than a state official; thus its application to state officials was unclear. The scope of official duties test was followed by the courts in Bugarin v. Wilson School District No. 7, 17 Ariz. App. 541, 499 P.2d 119 (1972) and S.H. Kress and Company v. Self, 22 Ariz. App. 230, 526 P.2d 754 (1974).

In 1975, Division Two of the court of appeals granted only a qualified privilege to a public official for defamatory statements made within the scope of his official duties. Martinez v. Cardwell, 25 Ariz. App. 253, 542 P.2d 733 (1975). The court expressly declined to follow Long v. Mertz, 25 Ariz. App. at 256, 542 P.2d at 1136.

In 1977, both Division One and Division Two of the Arizona Court of Appeals dealt with the

The Arizona Supreme Court has recognized that this qualified privilege extends to police officers.[43] In a defamation action, the qualified privilege protects the officer when a duty to communicate is within the scope of his authority.[44] Again, based on the absence of ill-will or malice, the court held the privilege in *Carlson* was not defeated.[45]

EVALUATION OF *CARLSON*

Nebulous Balancing Guidelines

The *Carlson* decision clarifies much of the public records law and the privilege to defame in Arizona. However, this decision is not faultless. The court set forth ambiguous disclosure balancing guidelines that fail to adequately protect the public's right to inspect records. Also, these guidelines do not provide a measurement for the individual's right to privacy. Finally, while discussing the privilege to defame, the court did not accurately define the standard which is to be used to defeat a qualified privilege.

Although the court in *Carlson* clearly intended to apply a test which favors disclosure,[46] the balancing test may not always have this effect.[47] Neither the court nor the statutes indicate precisely what interests should be weighed. "Confidential," "private," and "best" are vague and ambiguous terms when used to determine the nature of the right of inspection.[48] The term "state interest" provides a further example of ambiguous terminology. What qualifies as a "state interest"? What amount of "state interest" is required to defeat a person's right to inspect? Assuming the government is the servant of the public, "state interest" is synonomous with public interest. Disclosure of information is thus favored because the government can only refuse inspection in the event public scrutiny will harm the public as a whole. An obvious example of withholding information to benefit the public is the withholding of defense strategies. However, disclosure is not favored if a self-serving state agency is able to withhold information that is detrimen-

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privilege afforded a public official in a defamation suit. The Division One court held that Tax Commission officials, acting within the scope of their official duties, had an absolute privilege to make libelous statements. Grande v. State, 115 Ariz. 394, 565 P.2d 900 (Ct. App. 1977). The Division Two court held an absolute privilege was applicable to members of the university board of regents and various university employees in a defamation action. Petroni v. Board of Regents, 115 Ariz. 563, 566 P.2d 1038 (Ct. App. 1977).

43. Paterson v. City of Phoenix, 103 Ariz. 64, 436 P.2d 613 (1968).

44. *See supra* note 27 and accompanying text. In Portonova v. Wilkinson, 128 Ariz. 501, 627 P.2d 232 (1981), the Arizona Supreme Court refused to grant an absolute privilege and applied a qualified privilege to a police officer. The privilege is qualified in that it protects a police officer from liability when acting within the scope of his authority. The defendant police officer released defamatory statements about the plaintiff, a juvenile probation officer, to a news reporter. Although the court recognized police officers may be protected by a qualified privilege, it held that the defendant's repeating of unverified statements made by a juvenile known to be a fabricator was not protected by the privilege. The *Portonova* court also held that the defendant was not protected by the privilege because he had not established the existence of the occasion required by *Roscoe*. *Id.* at 503, 627 P.2d at 234.

45. 141 Ariz. at 492, 687 P.2d at 1247.

46. "[W]e do think that the combined effect of 39-121, and 39-121.01; 121.02 and 122 evince a clear policy favoring disclosure." *Id.* at 490, 687 P.2d at 1245. *See also id.* at 491, 687 P.2d at 1246.

47. See Note, *Freedom of Information in Arizona: An Antidote for Secrecy in Government*, 1975 ARIZ. ST. L.J. 111, 125-132.

48. 141 Ariz. at 490, 687 P.2d at 1245.

tal to the agency because its own interest—state interest—outweighs the public's right to inspect. Nebulous guidelines restrict the public's right to inspect records.

The court also fails to indicate any specific guidelines for measuring the individual's right to privacy under the *Mathews* interest-balancing test. The federal courts and some western state courts have utilized a privacy-interest test[49] to determine if information qualifies as an exception under the public record statutes. These courts balance the individual's need to keep the information private against the public's need to have access to the information. The Restatement (Second) of Torts' definition of "invasion of privacy"[50] provides these courts with guidance in measuring the individual privacy interest.[51] An Arizona court reviewing an officer's use of discretion would be greatly assisted by these guidelines.[52] The court in *Carlson*, however, neglected to adopt any privacy-interest guidelines.

Judicial Remedies Offer Little Protection Against Abuse of Discretion

To support the use of the interest-balancing test, the court in *Carlson* emphasizes that the officer's or custodian's decision to restrict or refuse inspection is subject to judicial review. If the court finds that the officer abused his discretion, then specific statutory remedies are available.[53] These remedies, however, are not always effective, especially for persons such as

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49. Department of Air Force v. Rose, 425 U.S. 352 (1976) (relied on by the Arizona Court of Appeals in Moorehead v. Arnold, 130 Ariz. 503, 637 P.2d 305 (Ct. App. 1981)); Church of Scientology v. United States Dept. of the Army, 611 F.2d 738 (9th Cir. 1979); Bringaman v. Brennan, 98 N.M. 109, 645 P.2d 982 (1982); Morrison v. School District No. 48, Washington County, 53 Or. 148, 631 P.2d 784 (1981); Cowles Pub. Co. v. Murphy, 96 Wash. 2d 584, 637 P.2d 966 (1981). The FOIA also utilized an invasion of privacy balancing test. *See* Department of Air Force v. Rose, 425 U.S. at 352 and cases cited therein. In *Carlson* the appellant urged the court to adopt this privacy-interest test. Reply Brief for Appellant at 2, Carlson v. Pima County, 141 Ariz. 487, 687 P.2d 1242 (1984).

50. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public.

Id. § 652D at 383.

51. Reply Brief for Appellant at 6, *Carlson*. This privacy-interest analysis was adopted in Hearst Corp. v. Hoppe, 90 Wash. 2d 123, 130, 580 P.2d 246, 253 (1978).

52. The Utah Supreme Court held that the public's right to have access to salary information of state employees outweighed the employees' privacy rights in Redding v. Brady, 606 P.2d 1193 (Utah 1980). *See also* Redding v. Jacobsen, 638 P.2d 503 (Utah 1981). The Kansas Supreme Court held that the public's right to have an accounting of public funds outweighed the public fund receiver's privacy rights in Stephen v. Harder, 230 Kan. 573, 641 P.2d 366 (1982).

53. *See* ARIZ. REV. STAT. ANN. §§ 39-121.02(A) to 121.02(C) (1975). The statutory remedies allow a person who is denied access to the records to appeal this denial through a special action. In the event a denial is determined to be wrongful and that the records custodian acted in bad faith, or in an arbitrary or capricious manner, the court may award the petitioner's legal costs, including reasonable attorney's fees. The statute also allows a cause of action against the officer or public body for any damages resulting from the wrongful denial of access to public records. Furthermore, even where a reviewing court finds that the public's right to inspect is outweighed by the competing interests, a member of the public may still view the records. The court describes several alternatives to absolute denial that have been utilized by the courts in the past. The court discusses deleting personal identifying information and the use of *in camera* court inspections as alternatives to absolute denial. *Carlson*, 141 Ariz. at 490-41, 687 P.2d at 1245-46.

journalists who are faced with time constraints when seeking information.[54] Also, the high expense of a court action precludes many persons from using judicial remedies.[55] Disclosure is not favored and an officer's abuse of discretion is not controlled by these problematic remedies.

Ill-Will or Malice: Which One?

In *Carlson*, the court states that a public officer's qualified privilege to defame may be defeated by ill-will or malice.[56] "Malice" has two meanings in the law. At common law, malice means spite or ill-will.[57] In *New York Times v. Sullivan*,[58] the United States Supreme Court redefined "malice" and adopted an "actual malice" standard. This standard allows a qualified privilege to be defeated when the defendant publishes a false statement with knowledge of its falsity or with a reckless disregard for the truth.[59]

The *Carlson* court's use of the words "malice or ill-will" does not specify which kind of malice is required to defeat the privilege. The use of "or" may mean that malice and ill-will are alternatives. Thus, "malice," as used by the court in *Carlson*, does not mean "ill-will"—a requisite to common law malice—but must mean "actual malice." If this is true, then either actual malice or ill-will defeats the privilege. On the other hand, the court may have used "ill-will" as merely an alternative way of expressing the concept embodied in "malice." If the two terms have the same meaning, then the court was referring only to common law malice.

In *Carlson*, if the court intended to require a plaintiff to prove common law malice to defeat a qualified privilege, then the court had radically deviated from its previous decisions. The court has previously required a showing of "actual malice" to defeat a common law qualified privilege.[60] In *Antwerp Diamond Exchange v. Better Business Bureau*,[61] the court held that the defendant had a common law qualified privilege to publish a report made in good faith and upon probable cause. The court, adopting the Restatement (Second) of Torts' position, stated that a conditional privilege is abused when the publisher: (a) knows the matter to be false, or (b) acts in reckless disregard as to its truth or falsity.[62]

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54. *See* Note, *supra* note 47, at 130-32 for a discussion of the ineffectiveness of these remedies.

55. ARIZ. REV. STAT. ANN. § 39-121.02(C) (1975) provides a cause of action to any person wrongfully denied access to public records. ARIZ. REV. STAT. ANN. § 39-121.02(B) (1975) provides for an award of legal costs, including reasonable attorney's fees, in the event of a wrongful denial. However, this award is only available when the custodian acted in bad faith or in an arbitrary or capricious manner in denying inspection. *Id.*

56. 141 Ariz. at 492, 687 P.2d at 1247.

57. Phillips v. Bradshaw, 167 Ala. 199, 52 So. 662 (1910); Tanner v. Stevenson, 138 Ky. 578, 128 S.W. 878 (1910); Hemmens v. Nelson, 138 N.Y. 517, 34 N.E. 342 (1893); Gerlach v. Gruett, 175 Wis. 354, 185 N.W. 195 (1921).

58. 376 U.S. 254, 279-80 (1964).

59. The use of the "actual malice" standard to determine if a qualified privilege is defeated is used by many courts. *See, e.g.*, Antwerp Diamond Exchange v. Better Business Bureau, 130 Ariz. 523, 637 P.2d 733 (1981); Sewell v. Brookbank, 119 Ariz. 422, 581 P.2d 267 (Ct. App. 1978); Glynn v. Kissimmee, 383 So.2d 774 (Fla. Dist. Ct. App. 1980); Tosti v. Ayik, 386 Mass. 721, 437 N.E.2d 1062 (1982); Bender v. City of Seattle, 99 Wash.2d 582, 664 P.2d 492 (1983).

60. *See supra* note 10.

61. 130 Ariz. 523, 637 P.2d 733 (1981).

62. *Id.* at 528, 637 P.2d at 738.

The *Carlson* court's failure to discuss the *Antwerp* standard confuses the law of defamation in Arizona. When is a qualified privilege abused? Is "actual malice" necessary to defeat a qualified privilege, or is ill-will now required? If by the use of the term "ill-will" the court intended to apply a common law malice standard, while retaining *Antwerp's* "actual malice" standard, the difference may be explained by the different sources of the privileges in *Antwerp* and *Carlson*. The *Antwerp* court's standard was applied to a person protected by a common law interest-based qualified privilege.[63] In contrast, the *Carlson* court's standard was applied to a person protected by both an interest-based qualified privilege—duty to communicate—and an executive privilege as a police officer.[64] The court in *Carlson* may have intentionally refused to adopt the Restatement position when an executive privilege is invoked. Nonetheless, refinement and clarification of the rule are needed.

CONCLUSION

The problem with the *Carlson* decision is primarily the court's incomplete analysis. Future decisions must provide more concrete balancing guidelines which will ensure protection of both the public's right to inspect records and the individual's right to privacy. Also, future decisions must clarify whether the qualified privilege to defame may be defeated by ill will or actual malice.

Cynthia T. Kuhn

63. *See supra* note 9.

64. It is not clear why the court in *Carlson* invoked the duty to communicate privilege when the executive privilege provides sufficient protection against liability. Perhaps the court envisioned future cases where the person releasing the public records information would not be afforded an executive privilege.

V. ETHICS

IN RE SWARTZ: JUDICIAL REGULATION OF EXCESSIVE CONTINGENT FEES IN ARIZONA

> In fixing fees, it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.[1]

Judicial regulation of excessive contingent fee agreements is an unpredictable and controversial aspect of the American legal profession.[2] The questions of when an attorney has charged a clearly exorbitant contingent fee and what the appropriate sanction for such conduct should be are not easily answered since every disciplinary proceeding concerning excessive fees must be determined on its particular facts.[3] The Arizona Supreme Court addressed these questions in *In re Swartz*[4] and reasserted its powers to regulate excessive contingent fees and apply sanctions commensurate with the severity of the offending attorney's conduct. *Swartz* provides guidance to Arizona attorneys and furnishes them with some of the relevant factors weighed by the court when determining whether a contingent fee is excessive.

On September 7, 1979, Steven Sarge was severely injured while working on the Black Canyon Freeway. He was admitted to Good Samaritan Hospital in critical condition and eventually his left leg was amputated.[5] Sarge's mother and brother[6] entered into a one-third contingent fee agreement with John F. Swartz to represent Sarge in claims resulting from the accident.[7] The tortfeasor's liability carriers offered to pay their policy limits in settlement within three months of the accident.[8] Swartz accepted the offer on his client's behalf.[9] It was apparent at settlement that a State Compensation

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1. ABA CANONS OF PROFESSIONAL ETHICS, Canon 12 (1908).

2. The contingent fee agreement allows the client to receive legal services with either no outlay or a nominal outlay. The attorney's compensation is a specified percentage of the recovery and is wholly dependent upon the outcome of the case. *See* Aronson, *Attorney-Client Fee Arrangements: Regulation and Review*, 68 A.B.A.J. 284, 286 (1982). The Aronson article is a condensed version of a study the author conducted for the Federal Judicial Center.

3. *In re* Swartz, 141 Ariz. 266, 272-73, 686 P.2d 1236, 1242-43 (1984). The court stated that "DR 2-106 may be violated even though no court in this state has set any particular percentage as appropriate for contingent fees. It is no more possible to set such percentages in advance than it would be to set a single fixed fee for all divorce cases or all real estate litigation." *Id.*

4. 141 Ariz. 266, 686 P.2d 1236 (1984). The facts of *Swartz* are set forth in 141 Ariz. at 268-70, 686 P.2d at 1238-40.

5. Respondent's Opening Brief at 3, *In re* Swartz, 141 Ariz. 266, 686 P.2d 1236 (1984).

6. Sarge was comatose at the time the one-third contingent fee agreement was executed by Sarge's mother and brother. Respondent's Opening Brief at 3, *In re* Swartz, 141 Ariz. 266, 686 P.2d 1236 (1984).

7. Swartz was retained to represent Sarge in a worker's compensation claim and a personal injury claim. 141 Ariz. at 269, 686 P.2d at 1239. These concurrent remedies are allowed by ARIZ. REV. STAT. ANN. § 23-1023 (1983).

8. The driver was covered under two policies. Since the driver was not the owner of the car, one policy covered the driver while the other covered the owner of the car and extended coverage to the negligent driver. The respective limits of the policies were $100,000 and $50,000. 141 Ariz. at 269, 686 P.2d at 1239.

9. Swartz never filed a tort action. The settlement was entered into after minimal negotiation

Fund lien would greatly exceed Sarge's net recovery. As industrial carrier, the State Compensation Fund has a lien against the net recovery of an injured worker's third-party tort claim for the amount of any past benefits paid the worker. The worker retains the net recovery in excess of the lien, but this amount is credited against future benefits which the worker would otherwise receive from the State Fund.[10] Hence, the practical effect of the Sarge settlement was that after reimbursing the State Fund and paying attorneys fees, Sarge received no compensation.[11]

The State Bar disciplinary proceedings against Swartz began pursuant to Steven Sarge's letter to the State Bar.[12] In response, a local administrative committee of the Arizona State Bar filed a complaint alleging that Swartz's excessive fee violated DR 2-106, Code of Professional Responsibility,[13] and

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between Swartz and the insurance carriers. Swartz subsequently testified that the settlement involved "a tremendous amount of work," but an expert witness testified that Swartz could not have spent more than 20-30 hours handling the claim. *Id.*

10. ARIZ. REV. STAT. ANN. § 23-1023(c)(1983). If there is no chance that a tort recovery will exceed the attorney's fees and costs, the State Fund lien, and the future benefit credit, the claim should not be brought since the injured worker will receive no benefit. An exception exists if the worker's attorney can persuade the State Fund to reduce the lien. Whether the worker's attorney will reduce the fee he intends to charge his client is one of the key factors used by the State Fund in determining whether to reduce the lien. Swartz did not attempt such a compromise. *Swartz*, 141 Ariz. at 269, 686 P.2d at 1239. This aspect of the case is discussed *infra* at note 63 and accompanying text.

11. The breakdown of the settlement was as follows:

Gross settlement	$150,000.00
Attorney's fees	($50,000.00)
Costs	($83.20)
Net Proceeds	$99,916.80

After repaying the State Fund out of the net proceeds, paying court costs, and the fee to Swartz, Sarge received approximately $10,000. This amount was put into a trust account for future medical expenses. The money was credited by the State Fund to offset future benefits. The practical result was that Sarge received no money from the settlement. It should be noted that Swartz also attempted to charge $1,320 for his work on the conservatorship proceedings. The probate court awarded him $350. *See infra* note 52. Swartz also charged Sarge 15% of his worker's compensation award for work done on that case. 141 Ariz. at 269-70, 686 P.2d at 1239-40.

12. Respondent's Opening Brief at 1, *In re* Swartz, 141 Ariz. 266, 686 P.2d 1236 (1984). Prior to filing his complaint with the State Bar, Sarge retained new counsel and sued Swartz for malpractice. The action was filed in Maricopa County Superior Court and summary judgment was entered in Swartz's favor. This record was entered into evidence at the local administrative hearing, but the committee gave it no weight. 141 Ariz. at 270, 686 P.2d at 1240.

13. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1984) provides:

Fees for Legal Services

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
(3) The fee customarily charged in the locality for similar legal services.
(4) The amount involved and the results obtained.
(5) The time limitations imposed by the client or by the circumstances.
(6) The nature and length of the professional relationship with the client.
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
(8) Whether the fee is fixed or contingent.

Rule 29(b)(1) of the Rules of the Arizona Supreme Court.[14] An amended complaint further charged a violation of DR 1-102(A)(5).[15] When the local administrative committee issued its findings and conclusions, it recommended that Swartz be suspended from the practice of law for six months.[16] Swartz objected to the State Bar Disciplinary Board, which agreed with the committee but modified its disciplinary recommendation to suspension from the practice of law for one month. Swartz then appealed to the Arizona Supreme Court.[17]

The Arizona Supreme Court rejected Swartz's contention that he had merely entered into a customary one-third contingent fee agreement with his client and had done nothing unethical. The supreme court held that: 1) contingent fees are subject to regulation by the supreme court and, 2) if an originally reasonable contingent fee agreement becomes clearly excessive at the end of the attorney's services, the attorney must reduce the fee to a reasonable level.[18]

This Casenote briefly explores the history of the contingent fee and summarizes pertinent Arizona excessive contingent fee decisions prior to *Swartz*. The supreme court's rejection of Swartz's arguments and the court's application of the disciplinary rules of the Model Code of Professional Re-

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(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

At the time of the *Swartz* decision, ethical determinations in Arizona were governed by the MODEL CODE OF PROFESSIONAL RESPONSIBILITY. Effective February 1, 1985, Arizona adopted the MODEL RULES OF PROFESSIONAL RESPONSIBILITY and as a result there have been numerical and substantive changes. None of the substantive changes would affect the supreme court's decision in *Swartz*. DR 2-106 is now Rule 1.5 under the ARIZONA RULES OF PROFESSIONAL RESPONSIBILITY.

14. 17A A.R.S. Sup. Ct. Rule 29(b)(1) provides in pertinent part: "Grounds for disbarment, suspension or censure of members shall be as follows: 1. Violation of the Code of Professional Responsibility adopted by the American Bar Association, excepting Disciplinary Rules DR 2-105(A)(4) and DR 6-101(A)(1)."

15. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(5) (1984). DR 1-102(A)(5) is found in the ARIZONA RULES OF PROFESSIONAL RESPONSIBILITY under Rules 3.1, 3.2, and 3.4. DR 1-102 provides in pertinent part: "A lawyer shall not . . . engage in conduct that is prejudicial to the administration of justice."

16. State Bar of Arizona's Answering Brief at 3, *In re* Swartz, 141 Ariz. 266, 686 P.2d 1236 (1984).

17. *Id.* The supreme court retained jurisdiction pursuant to Rules 36(d) and 37 of the Arizona Supreme Court. *Swartz*, 141 Ariz. at 268, 686 P.2d at 1238.

18. *Swartz*, 141 Ariz. at 273, 686 P.2d at 1243. The supreme court further found that Swartz had violated DR 1-102(A)(5). *See supra* note 15 and *infra* note 63. The court also made rulings concerning the admission of polygraph results presented by Swartz and the proper use of the malpractice action in which summary judgment was granted in favor of Swartz.

It was Swartz's position that the Disciplinary Committee acted improperly by not taking into consideration the results of his polygraph test without stipulation as is required in Hyder v. Superior Court, 127 Ariz. 36, 617 P.2d 1152 (1980). Since no stipulation was made in *Swartz*, the supreme court did not reach this issue. The court noted that even if stipulation had been made, the Disciplinary Committee would have had complete discretion in admitting or rejecting the evidence. Even after polygraph evidence is admitted, it is still within the Disciplinary Committee's power to accord it little or no weight. *Swartz*, 141 Ariz. at 276, 686 P.2d at 1246.

Swartz also contended that the Disciplinary Committee should have considered the summary judgment entered in his favor in the malpractice action to the extent that issues in the malpractice action related to the disciplinary proceeding. It was the supreme court's opinion that the summary judgment had no evidentiary value in the disciplinary proceedings. The court held that the issues and outcome of the malpractice action were not relevant to the issues that were decided in the disciplinary proceeding and that the Disciplinary Committee acted within its power by refusing to give weight to the result in the malpractice action. *Swartz*, 141 Ariz. at 276-77, 686 P.2d at 1246-47.

sponsibility are analyzed. Finally, the Casenote discusses the scope of the decision and recommends ways for attorneys to avoid disciplinary problems with the contingent fee.

History of the Contingent Fee

The contingent fee agreement is a controversial topic among members of the Bar.[19] Opponents of the contingent fee fear that a monetary interest in the litigation may tempt an attorney to place personal interest ahead of the client's objectives.[20] Also, opponents believe the contingent fee results in successful clients paying a surcharge to compensate the attorney for unsuccessful contingent fee cases.[21] Finally, opponents feel that the agreement increases congestion in an already overburdened court system.[22]

American courts recognize the attorney's right to contract for a contingent fee,[23] although the method is still considered champertous in most countries.[24] Acceptance of the contingent fee by United States courts is based largely on the theory that it is the only means by which lower income people can obtain legal representation.[25] Another reason courts favor the fee is the risk-spreading element it provides the client seeking legal representation.[26] The client is able to avoid both the risks of losing a case and having to pay an attorney for services rendered.[27] The Arizona Supreme Court, agreeing with other courts, praised the merits of the contingent fee in *Swartz*.[28] It appears that, controversial or not, the contingent fee is en-

19. The greatest criticism of the contingent fee is its potential to corrupt the legal profession. Sommerich, *The History and Development of Attorneys' Fees*, 6 THE RECORD 363, 369 (1951). "The lawyer's legitimate fee is payable irrespective of the result, and any contingent interest in the event is necessarily corrupting." *Id.* at 369 (quoting Justice Cooley).

20. *See* Aronson, *supra* note 2, at 286. For early commentaries discussing problems with the contingent fee see Radin, *Contingent Fees in California*, 28 CAL. L. REV. 587, 589 (1940) (incentive to file frivolous appeals); 23 ALBANY L.J. 441 (1881) (temptation to warp evidence, tamper with juries, lobby judges).

21. *See* Aronson, *supra* note 2, at 286.

22. *Id.*

23. Most American courts have allowed the contingent fee from an early date. Illustrative cases are cited in Note, *The Contingent Fee: Disciplinary Rule, Ethical Consideration, or Free Competition?*, 1979 UTAH L. REV. 547.

24. Champerty is defined as "[a] bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered." Schnabel v. Taft Broadcasting Co., Inc., 525 S.W.2d 819, 823 (Mo. App. 1975). Contingent fees are illegal in Great Britain, France, Belgium, Italy, Germany, and Switzerland. Note, *Of Ethics and Economics: Contingent Percentage Fees for Legal Services*, 16 AKRON L. REV. 747, 748 (1983), *citing* American Insurance Association, *Report of Special Committee to Study and Evaluate the Keeton—O'Connel Basic Protection Plan & Auto Accident Reparations*, at 4 (1968).

25. Note, *supra* note 24, at 749 (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1979)). *See also* Note, *Lawyers Tightrope—Use and Abuse of Fees*, 41 CORNELL L.Q. 683 (1956). For more information on this theory, and for early case applications, see Note, *supra* note 23, at 547, *citing* Hollister v. Ulvi, 199 Minn. 269, 271 N.W. 498 (1937) and Gruskay v. Simenauskas, 107 Conn. 380, 383, 140 A. 724, 727 (1928).

26. Note, *supra* note 24, at 749, *citing* Schwartz & Mitchell, *An Economic Analysis of the Contingent Fee in Personal Injury Litigation*, 22 STAN. L. REV. 1125, 1147-54 (1970).

27. *Id.*

28. 141 Ariz. at 272, 686 P.2d at 1242. The court stated that the contingent fee was acceptable as "a poor man's door to the courthouse." *Id.* The court further stated that high litigation costs have caused the contingent fee to become necessary or preferred by both the middle class and the wealthy. *Id.*

grained in the American legal system.

*Pre-*Swartz *Excessive Contingent Fee Decisions*

The Arizona Supreme Court has the inherent power to regulate the practice of law in Arizona and to control the conduct of State Bar members.[29] Predicting how the supreme court will exercise this power in any given case, however, is difficult.[30] Although never explicitly stated by the court, it is apparent that every disciplinary proceeding concerning an excessive fee must be determined on its particular facts.[31] When an attorney appeals the disciplinary decision, the supreme court makes an independent determination of facts,[32] but gives serious consideration to the findings of the Disciplinary Board and the local administrative committee.[33] Clearly, the nature of "excessive" fee determinations precludes the creation of standardized guidelines to aid attorneys seeking insight into excessive contingent fees.[34]

A recent case, *In re Mercer*,[35] illustrates the Arizona Supreme Court's policing of contingent fees. The *Mercer* attorney contracted for a one-third contingent fee to represent his client in matters before the Industrial Commission of Arizona. In determining the figure upon which the fee was to be calculated, the attorney included the sum his client received for unemployment insurance, medical, surgical, and hospital benefits. The attorney had

29. *See In re* Anonymous Member of the Bar, 128 Ariz. 238, 239, 624 P.2d 1286, 1287 (1981); Hunt v. Maricopa County Employees Merit Sys. Comm'n, 127 Ariz. 259, 261-62, 619 P.2d 1036, 1038-39 (1980); State Bar of Arizona v. Arizona Land Title & Trust, 90 Ariz. 76, 88, 366 P.2d 1, 19 (1961). *See also* Covert v. Randles, 53 Ariz. 225, 87 P.2d 488 (1939). In *Covert*, the court established its power to prevent the collection of excessive contingent fees. The court held that if an agreed upon contingent fee is out of proportion to the legal services rendered, it is the court's duty to prohibit fee collection. *Id.* at 230, 87 P.2d at 490. The policy behind such sanctions is to protect the public from unethical attorneys and to deter other attorneys from engaging in similar conduct. *In re* Stout, 122 Ariz. 503, 504, 596 P.2d 29, 30 (1979). *See also In re* Watson, 118 Ariz. 70, 71, 574 P.2d 1289, 1290 (1977); *In re* Lurie, 113 Ariz. 95, 95, 546 P.2d 1126, 1126 (1976); *In re* Moore, 110 Ariz. 312, 315, 518 P.2d 562, 565 (1974).

30. It *is* clear that Arizona case law supports the position that an attorney will be disciplined only on clear and convincing evidence that he has violated his ethical obligation to his client and not simply because he made an error in judgment. Talbot v. Schroeder, 13 Ariz. App. 230, 475 P.2d 520 (1970). The court in *Talbot* noted "an attorney is not liable to a client when acting in good faith, when he makes mere errors of judgment, or, for a mistake as to an unsettled issue of law. Nor is he liable simply because his client becomes unhappy with the result." *Id.* at 231, 475 P.2d at 521.

31. *See In re* Burns, 139 Ariz. 487, 493, 679 P.2d 510, 516 (1984).

32. *In re* Wetzal, 118 Ariz. 33, 34, 574 P.2d 827, 828 (1978); *In re* Dwight, 117 Ariz. 407, 408, 573 P.2d 481, 482 (1977); *In re* Johnson, 106 Ariz. 73, 75, 471 P.2d 269, 271 (1970).

33. *In re* Lurie, 113 Ariz. 95, 546 P.2d 1126 (1976); *In re* Moore, 110 Ariz. 312, 313, 518 P.2d 562, 563 (1974); *In re* Brown, 101 Ariz. 178, 180, 416 P.2d 975, 977 (1966). The standard of review in State Bar disciplinary hearings is that the evidence must be clear and convincing before any action will be taken against an attorney charged with an ethical violation. *In re* Moore, 110 Ariz. 312, 313, 518 P.2d 562, 563 (1974).

34. Basing excessive contingent fee decisions on the particular facts of each case precludes the creation of standardized guidelines in determining the proper sanction to be applied. The result is that courts may hand down varying punishments for factually similar ethical violations. The California Supreme Court has explicitly recognized this proposition in regard to disciplinary cases generally. *In re* Dedman, 130 Cal. Rptr. 504, 506, 550 P.2d 1040, 1042 (1976); Bradpiece v. State Bar, 111 Cal. Rptr. 905, 908, 518 P.2d 337, 340 (1974); Yapp v. State Bar, 44 Cal. Rptr. 593, 598, 402 P.2d 361, 366 (1965).

35. 126 Ariz. 274, 614 P.2d 816 (1980). The facts of *Mercer* are set forth in 126 Ariz. at 274-76, 614 P.2d at 816-18.

not represented the client in the proceedings concerning unemployment benefits before the Arizona Employment Security Commission. Consequently, the court held that the attorney violated ethical rules by charging for services which he did not perform.[36] Further, the court, citing section 23-1069 of the Arizona Revised Statutes[37] and community custom, held that an attorney must exclude amounts paid for medical, surgical, and hospital benefits in a worker's compensation claim when calculating the award upon which to base the contingent fee.[38] Accordingly, the *Mercer* court held that the attorney had charged a clearly excessive contingent fee in violation of the Model Code of Professional Responsibility.[39] The court suspended the attorney from the practice of law for two months.[40]

In re Burns[41] is another recent disciplinary appeal that arose prior to *Swartz*. The *Burns* attorney represented his client on a one-third contingent fee agreement in a personal injury action. The United States Air Force held a lien against the client's ultimate award.[42] The attorney devised a method for the client to deceive the Air Force and avoid the lien. The attorney was thus able to recover a fee higher than that to which he had legally and ethically agreed.[43] The Arizona Supreme Court held that the rules proscribing excessive fees for legal services extend to situations where the fee charged is in excess of the fee agreed to by the parties.[44] The court suspended the attorney for one year from the practice of law.[45]

These pre-*Swartz* cases demonstrate the Arizona Supreme Court's de-

36. *Id.* at 277, 614 P.2d at 819. *See supra* note 13 for the text of DR 2-106.

37. In a footnote, the court also cited ARIZ. REV. STAT. ANN. §§ 23-1062 and 23-901 for support of this position. 126 Ariz. at 274 n.2, 614 P.2d at 816 n.2.

38. *Id.* at 277, 614 P.2d at 819.

39. *Id.* at 278, 614 P.2d at 820. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1985). The court also found that the attorney was in violation of DR 2-106 by retaining an amount of his client's funds in excess of the 25% fee awarded him by the Industrial Commission of Arizona. 126 Ariz. at 277-78, 614 P.2d at 819-20. Further, the court stated that the issues involved and the skill demanded in the case were not novel, difficult, or extraordinary, and the attorney possessed no characteristics that would possibly allow him to charge a fee in excess of community custom. *Id.* at 277, 614 P.2d at 819.

40. *Mercer*, 126 Ariz. at 278, 614 P.2d at 820.

41. 139 Ariz. 487, 679 P.2d 510 (1984). The facts of *Burns* are set forth in 139 Ariz. at 487-91, 679 P.2d at 510-14.

42. The claim was settled in November, 1978, for $24,517.44. Of this amount, $20,000 was to go to the client and $4,517.44 was to be deposited in the attorney's trust account, even though the Air Force had not signed the release or the draft signed by the client. The attorney took one-third of the total proceeds as his fee, less costs, which equaled $8,200. He then presented his client with $11,800.00 and kept the remaining $4,517.44 in his trust account. *Id.* at 488, 679 P.2d at 511.

43. The attorney informed his client that it was possible that the Air Force would never try to enforce the lien and that the lien might also become unenforceable due to the statute of limitations. He also informed his client that the Air Force might attempt to enforce the lien sometime in the future. The attorney advised his client of three alternative ways to handle the money held for the lien. The attorney and client decided to distribute the money between them. Before making this distribution, the attorney took one-third of the $4,517.44 for his fee. In essence, the attorney "double dipped" into the total award granted his client by charging $1,497.52 more than the fee agreed upon. *Id.* at 488-89, 679 P.2d at 511-12.

44. *Id.* at 491, 679 P.2d at 514. The court also held that the attorney violated DR 1-102(A)(6) and DR 7-102(A)(7). *Id.*

45. *Id.* at 493, 679 P.2d at 516. For other examples of court-imposed punishment for ethical violations in Arizona, *see In re* Haggard, 123 Ariz. 27, 597 P.2d 180 (1979) (unpreparedness, neglect, and misrepresentation warrant a six-month suspension); *In re* Larson, 121 Ariz. 199, 589 P.2d 442 (1979) (charging and attempting to collect a clearly excessive fee warrants censure); *In re* Carpenter, 110 Ariz. 395, 519 P.2d 1136 (1974) (appropriate sanction for failing to pay a client his share of

sire to actively regulate the conduct of attorneys making contingent fee agreements. The cases also demonstrate the widely varying factual patterns in contingent fee cases and the resulting disparate sanctions. It was in this setting that the supreme court rendered the *Swartz* decision.

Analysis of the Swartz *Decision*

In *Swartz*, the Arizona Supreme Court held that if an originally reasonable contingent fee agreement becomes clearly excessive at the end of the attorney's services, the attorney must reduce the fee to a reasonable level.[46] Swartz argued that (1) he should be allowed to rely on his fee contract because his fee was customary in the community; (2) judicial and administrative approval of the settlement justified the fee; and (3) he owed no duty to the State Fund, the only party which in his opinion would benefit from a fee reduction.

The Right to Contract Argument

The court rejected Swartz's assertion that because one-third of the net recovery is the customary fee of a reasonable attorney in the community, he should be allowed to stand upon the contract regardless of the end result to the client.[47] While conceding that in the typical business setting a valid contract must be given full effect,[48] the court concluded that a fee agreement between attorney and client is not an ordinary business contract.[49] The fiduciary relationship between attorney and client, which is not present in standard business transactions, precludes an attorney from standing upon a contingent fee contract if at the end of his services the fee has become excessive.[50] In this situation, the attorney must reduce the fee to a reasonable level.[51]

Probate Court/State Compensation Fund Approval Argument

Swartz argued that the "approval" of the settlement by the probate court[52] and the State Compensation Fund[53] justified his fee. The court disagreed and concluded that the testimony from the disciplinary proceedings clearly established that settlement approvals by the probate court commis-

settlement is disbarment); *In re* Tanner, 107 Ariz. 534, 490 P.2d 6 (1971) (unprofessional conduct warrants suspension).

46. *Swartz*, 141 Ariz. at 273, 686 P.2d at 1243.

47. *Id.* at 271, 686 P.2d at 1241.

48. *Id.* at 273, 686 P.2d at 1243. *See* Hale v. Flores, 19 Ariz. App. 236, 506 P.2d 276 (1973).

49. *Swartz*, 141 Ariz. at 273, 686 P.2d at 1243.

50. *Id.*

51. *Id.* The court held that a reasonable fee is determined by the circumstances, including the factors listed in DR 2-106. If a court determines that an excessive fee was charged, the attorney must refund the excessive amount of the collected fee. Initially, the parties should attempt to determine what will be a reasonable fee, but if they are unable to agree, the matter may be turned over to the appropriate Bar committee. *Id.* at 273, 278, 686 P.2d at 1243, 1248.

52. *Swartz*, 141 Ariz. at 274, 686 P.2d at 1244. The probate court had to approve the settlement because a conservatorship had been set up for Sarge due to the seriousness of his injuries. Sarge's mother and brother were appointed co-guardians and co-conservators on November 1, 1979. *Id.* at 269, 686 P.2d at 1239.

53. *Id.* at 274, 686 P.2d at 1244.

sioner are cursory at best.[54] The court also gave no weight to what Swartz termed the "approval" granted by the State Compensation Fund.[55] Testimony established that the State Fund is not in the practice of approving attorneys' fees, never represents itself as approving attorneys' fees, and does not inquire into the fee when signing its standard settlement approval document.[56] Settlement agreements are approved by both entities without any substantive investigation into the propriety of the attorney's fee.[57] Since the approval procedures followed by the probate court and State Fund are merely formalities, the supreme court rejected Swartz's argument.[58]

The "No Duty" Argument

Finally, Swartz argued that he should not be disciplined because a fee reduction would not positively affect his client.[59] The State Fund has a future benefit credit for any money that the injured worker receives due to a reduction in his attorney's fee and the State Fund lien.[60] Swartz argued that he owed a duty to his client, but not to the State Fund.[61] The testimony was contradictory on this matter, but it appeared that if Swartz had attempted to compromise his fee with the State Fund, the Fund's lien probably would have been reduced without creating a higher future benefit credit.[62] Thus, Swartz may have been able to get some of the settlement money to Sarge without subjecting it to State Fund future benefit credits.[63]

Even assuming that a fee reduction by Swartz would have resulted only in a greater recovery to the State Fund, the supreme court still found that Swartz's duty was misplaced in failing to reduce his fee.[64] Swartz was incorrect in assuming that he owed a duty only to his client.[65] An attorney owes "his client, the profession and the judicial system an ethical obligation of charging no more than is reasonable."[66] The fact that Swartz was dealing with the State Fund and not his client did not allow him to escape his profes-

54. *Id.* For more details of the disciplinary proceeding testimony, see State Bar of Arizona's Answering Brief, *supra* note 17, at 13-14.

55. *Swartz*, 141 Ariz. at 274, 686 P.2d at 1244.

56. State Bar of Arizona's Answering Brief, *supra* note 17, at 14-15.

57. *Swartz*, 141 Ariz. at 274, 686 P.2d at 1244. *See infra* note 80 and accompanying text.

58. *Swartz*, 141 Ariz. at 274, 686 P.2d at 1244.

59. *Id.*

60. *See* State Bar of Arizona's Answering Brief, *supra* note 17, at 10.

61. *Swartz*, 141 Ariz. at 274, 686 P.2d at 1244.

62. State Bar of Arizona's Answering Brief, *supra* note 17, at 10-11. The State Bar's testimony showed that a reduction in the State Fund's lien does not necessarily entail a higher credit. Two parties testified that it is a matter of negotiation whether the State Fund, upon agreeing to reduce its lien, will also waive a portion, or all, of the credit to which it is entitled. Often this is the only way an injured worker will receive any money in a settled case where fees, costs, and lien devour the insurance proceeds. *Id.* at 10-13.

63. *Swartz*, 141 Ariz. at 275, 686 P.2d at 1245. The supreme court found that Swartz had indeed failed to attempt a compromise for his client. Swartz was charged with violating DR 1-102(A)(5) ("conduct that is prejudicial to the administration of justice") and the court upheld the Committee's conclusion that Swartz "consciously and willfully took advantage of the system of allowing attorney's fees for third-party claims in workmen's compensation cases so as to maximize his own fees without attempting to obtain any direct monetary benefit to his client." *Id.* at 276, 686 P.2d at 1246.

64. *Id.* at 274, 686 P.2d at 1244.

65. *Id.*

66. *Id.*

sional obligations and ethical responsibilities.[67]

Application of the Disciplinary Rules

The cornerstone for the court's finding that Swartz had charged a clearly excessive fee lies in its application of the disciplinary rules of the Code of Professional Responsibility. Disciplinary Rule 2-106 provides that "an attorney shall not enter into, charge, or collect a clearly excessive fee."[68] This rule applies a reasonable person standard to determine when a fee is excessive and lists eight factors for a court to consider in determining the reasonableness of a fee.[69] The supreme court discussed only those factors relevant to the *Swartz* facts.[70]

The first relevant factor was the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.[71] Expert testimony established that Swartz spent twenty to thirty hours on the Sarge case. There was clear liability, and within three months of the accident, the insurers offered to pay their policy limits in settlement. Swartz never filed a lawsuit and settlement negotiations were minimal. There was no difficult or novel legal question and clearly no special skill was required from Swartz.[72]

The second relevant factor was the fee customarily charged in the locality for similar legal services.[73] The court conceded that Swartz's one-third contingent fee was the customary fee in the community. An attorney's obligation concerning the fee agreement, however, does not end the minute the original fee is set.[74] On the *Swartz* facts it may be as much the community custom to reduce to a reasonable level a fee that becomes excessive as it is the community custom to charge one-third initially.[75] The court found that Swartz followed the community custom only so far as it was personally beneficial.

The final relevant factors were the amount involved and the results ob-

67. *See In re* Swartz, 129 Ariz. 288, 293, 630 P.2d 1020, 1025 (1981); *In re* Dwight, 117 Ariz. 407, 410, 573 P.2d 481, 484 (1977); *In re* Lurie, 113 Ariz. 95, 97, 546 P.2d 1126, 1128 (1976).

68. *See supra* note 13.

69. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B), *supra* note 13.

70. *Swartz*, 141 Ariz. at 271, 686 P.2d at 1241. The court discussed factors (1), (3), (4), and (8). *Id.*

71. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B)(1).

72. *Swartz*, 141 Ariz. at 273, 686 P.2d at 1243.

73. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-106(B)(3).

74. *Swartz*, 141 Ariz. at 273, 686 P.2d at 1243.

75. The testimony of Robert D. Meyers, an expert witness for the State Bar, sums up the attitude of a reasonable attorney concerning the fee charged under the *Swartz* facts. Meyers testified:

> I can say to this Committee in all honesty and candor, that I don't know of a lawyer who regularly does personal injury in this community who would have taken a one-third fee in this case. And, so, the fee customarily charged by lawyers in this community would be substantially less than $50,000.00 in this case. If such a lawyer took into consideration DR2-106—as a matter of fact, I can honestly, fairly, candidly and truthfully say to this Committee that I am outraged by the fact that Mr. Swartz took a $50,000.000 fee in this case. For the amount involved and the results obtained, Mr. Swartz did not obtain any apparent or concrete benefit for his client in this case that I know of. And, so, while the amount involved was significant the results obtained for his client were negligible. The only thing that he accomplished for his client was to reduce the Comp lien and provide $100,000.00 for the State Comp Fund, which needed it like a hole in the head.

State Bar of Arizona's Answering Brief, *supra* note 17, at 16.

tained and whether the fee is fixed or contingent.[76] It was apparent within two months of the case's commencement that the insurance companies would settle for their policy limits and that their combined liability would be minimal. Since recovery was assured, there was no classic contingency present in the case. As to the results obtained, after Swartz and the State Fund were compensated, Steven Sarge received nothing.

The supreme court was justified in disciplining John Swartz. Swartz accepted an easy case, did very little work, received a windfall, and left his client with nothing more than that with which he started.

Scope of the Decision

Swartz exemplifies the proper application of the Code of Professional Responsibility. Courts apply the disciplinary rules concerning excessive fees on a case-by-case basis, making it impossible for the supreme court to establish absolute guidelines on excessive fees. In lieu of absolute guidelines, the *Swartz* application of the disciplinary rules illustrates for practitioners some of the relevant factors that will affect both the excessive fee determination and the imposition of discipline.[77]

The supreme court does not discuss the relative weight courts must give to any of the factors to determine whether a fee has become excessive. It is unclear what the supreme court would have done if Steven Sarge had received some compensation, i.e., if the award was for $1,000,000.00 instead of $150,000.00, or if only two of the eight DR 2-106 factors were deemed relevant to the case. It appears that all relevant factors will be reflected in the court's decision, but to what extent they will affect the court's ruling depends upon their magnitude and the combinations in which they appear. The greatest significance of *Swartz* is that the Arizona Supreme Court demonstrates its unwillingness to tolerate unethical attorney behavior in the charging of fees.

In spite of the court's intolerance, the enforcement of excessive fee disciplinary rules is an inherent problem in the attorney disciplinary system.[78]

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76. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B)(4), (B)(8).

77. For examples of factors aggravating a court's decision to impose discipline see *In re* Burns, 139 Ariz. 487, 679 P.2d 510 (1984) (one-year suspension influenced by misappropriation of funds to a third party and apparent inability to understand or appreciate the seriousness of the ethical violation); *In re* Peterson, 108 Ariz. 255, 495 P.2d 851 (1972) (decision not to reinstate influenced by failure of attorney to make full and frank disclosure); *In re* Myrland, 54 Ariz. 284, 95 P.2d 56 (1939) (three prior ethical reviews influenced decision to disbar).

For examples of factors mitigating a court's decision to impose discipline see *In re* Burns, 139 Ariz. 487, 697 P.2d 510 (1984) (service to public, service in the armed services, and no indication the problem would reoccur); *In re* Couser, 122 Ariz. 500, 596 P.2d 26 (1979) (attorney's mental and emotional disorders); *In re* Watson, 118 Ariz. 70, 574 P.2d 1289 (1977) (twenty years of prior service without a violation and attorney going through period of intense personal difficulties).

78. Disciplinary proceedings concerning excessive fees never arise until someone complains. Hence, an attorney who charges an excessive fee will not be brought before a disciplinary proceeding unless someone with knowledge of the case and the fee initiates a complaint. These persons will normally be the client, fellow attorneys, or the court. One problem is that in the standard excessive fee case the party most intimately aware of the attorney's conduct, the client, will not be cognizant that the fee charged is excessive and as a result will not complain. United States v. Vague, 521 F. Supp. 147 (N.D. Ill. 1981). Even where fee disputes do arise between attorney and client, the matter will often be settled privately, with the client accepting the attorney's assessment of the fee. *Id.* Fellow attorneys could complain, but their effectiveness is limited because they do not generally have

Although Steven Sarge submitted a complaint which proceeded through the disciplinary process, the *Swartz* problem could have been detected and rectified much earlier. The terms of the settlement agreement and Swartz's fee were before the probate court for approval due to the conservatorship previously established on Sarge's behalf.[79] The disciplinary proceeding testimony clearly established that the probate court commissioner approves attorneys' fees without any substantive investigation into the propriety of the fee.[80] The probate court's manner of approval makes *Swartz* particularly troubling. It raises the question whether the probate court, as supervisor of Sarge's affairs, should have taken additional steps to investigate the appropriateness of Swartz's fee. Probate courts protect people who, for a variety of reasons, are unable to protect themselves. This obligation infers an active and investigative role for the probate court in determining the propriety of attorneys' fees. The probate court in *Swartz* failed to protect Steven Sarge by not preventing John Swartz from charging an excessive contingent fee.

The greatest weakness of the supreme court's treatment of *Swartz* is the court's "wrist-slapping" approach to punishment.[81] The court suspended

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information available to them concerning what specific attorneys charge their clients on a day-to-day basis. The third source of complaints is the court. Judges can initiate disciplinary measures against attorneys engaged in unprofessional conduct. CODE OF JUDICIAL CONDUCT Canon 3(B)(3) (1984). The comment to this code section states that the disciplinary measures proposed by the court may include reporting unethical behavior to an appropriate disciplinary body. CODE OF JUDICIAL CONDUCT Canon 3 (commentary) (1984). Most courts are not aware, however, of the fee arrangement between attorney and client and as a result have no knowledge on which to base an excessive fee complaint. Hence, although this method of enforcement is theoretically appealing, its practical effect is limited.

Where a court does have knowledge of the fee arrangement and considers the fee excessive the question arises whether the court may act *sua sponte* and require the offending attorney to reduce the fee to a reasonable level. In United States v. Vague, 521 F. Supp. 147 (N.D. Ill. 1981), the judge found that an $8,000.00 fee was excessive for what he estimated to be forty hours of work on a case involving a guilty plea. *Id.* at 157. The judge reduced the fee to $2,500.00. *Id.* The Seventh Circuit reversed, stating that it is improper for a judge to decide an issue not properly before him. United States v. Vague, 697 F.2d 805, 809 (7th Cir. 1983). Further, the court stated that, by acting *sua sponte* in regard to fees, a judge begins to act as a prosecutor when an adequate remedy is already available—referral of the problem to an ethics committee. *Id.* at 809. *Cf.* Rosquist v. Soo Line R.R., 692 F.2d 1107 (7th Cir. 1982), where the same court upheld a reduction in a contingent fee by the same District Court judge who decided *Vague*. The court allowed the judge to reduce the fee in *Rosquist* because a guardian of the plaintiff children objected to the fee charged, whereas in *Vague* the judge acted entirely on his own initiative in reducing the fee. *Vague*, 697 F.2d at 808 (7th Cir. 1983). *Cf. also* Newman v. Silver, 553 F. Supp. 485 (S.D.N.Y. 1982), where the court concluded that by charging an excessive fee, the attorney breached his duty of loyalty and fairness to his client. *Id.* at 496. The court reduced the fee by $169,300.00. *Id.* at 497. If allowed by the appellate courts, fee reductions by judges *sua sponte* appear to be an effective method of enforcing excessive fee violations.

79. *See supra* note 52.

80. State Bar of Arizona's Answering Brief at 13-14, *Swartz*, 141 Ariz. 266, 686 P.2d 1236 (1984).

81. Rumblings concerning the soft sentences imposed by the court periodically appear in dissenting opinions. Former Chief Justice Struckmeyer provided a notable dissent in *In re* Mercer, 126 Ariz. 274, 278, 614 P.2d 816, 820:

> The Administrative Committee recommended to the Disciplinary Board of the State Bar of Arizona that there be issued a private reprimand to the respondent, Mercer. The Disciplinary Board recommended a two-month suspension. I am of the opinion that two months' suspension is a wholly inadequate and inappropriate punishment for such unconscionable charges. It is alarming to me that both the Administrative Committee and the Disciplinary

Swartz from the practice of law for six months[82] and ordered him to return the excessive portion of the fee.[83] The sanctions imposed by the court appear minimal, but any reprimand or suspension has a practical effect on the attorney's ability to successfully practice law. The supreme court stated two factors that directly influenced the degree of discipline affixed. First, discipline for charging an excessive fee frequently occurs when an attorney is before the court on charges of misconduct in addition to the excessive fee charge;[84] here the court found that Swartz had manipulated the third-party tort claim system to his personal advantage.[85] The court stated that charging a clearly excessive fee, by itself, may warrant nothing more than a brief suspension.[86] However, the excessive fee violation, when compounded with Swartz's manipulation of the third-party tort claim system, struck "to the very heart of a lawyer's obligation to his client."[87] Second, in many cases the attorney being disciplined had previously been punished by the court.[88] This was precisely the situation in *Swartz*.[89] The Arizona Supreme Court had earlier censured Swartz in a case that was, in many respects, similar to the case at bar.[90]

Attorney Safeguards—The Alternative Fees

Attorneys must take preventative steps to avoid charging excessive contingent fees.[91] Alternatives may involve eliminating the traditional contin-

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Board seem to feel that this is a minor violation of the Disciplinary Rules. I do not think so.

Here, in a case in which an injured person's claim is processed almost automatically without the need of a lawyer, Mercer charged a fee of nearly 100% of what his client received as compensation. In this Court respondent still argues that the fee he charged was not excessive. It is obvious that he does not understand the basic concepts of a lawyer's moral obligations to society. The facts of this case at a minimum justify a suspension for two years. The State of Arizona is not a jungle where stragglers are fair game to be picked off by the ruthless.

Id.

82. *Swartz*, 141 Ariz. at 278, 686 P.2d at 1248.
83. *Id. See supra* note 51.
84. Annot., 11 A.L.R. 4th 139 (1982).
85. *Swartz*, 141 Ariz. at 278, 686 P.2d at 1248.
86. *Id.*
87. *Id.*
88. Annot., 11 A.L.R. 4th 140 (1982).
89. *Swartz*, 141 Ariz. at 278, 686 P.2d at 1248.
90. *Id.* Swartz was previously censured in *In re* Swartz, 129 Ariz. 288, 630 P.2d 1020 (1981).
91. Various affirmative actions may prevent an excessive fee violation charge or may cause the court to look favorably upon the attorney in the event such a charge is issued. First, the attorney should obtain written fee agreements. *See generally* Muskinguin County Bar v. Tanner, 29 Ohio St. 2d 21, 278 N.E.2d 21 (1972); Cushway v. State Bar of Georgia, 120 Ga. App. 371, 170 S.E.2d 732, *cert. denied*, 398 U.S. 910 (1969). Written contingent fee agreements were not required under the MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106. With the adoption of the MODEL RULES OF PROFESSIONAL RESPONSIBILITY on February 1, 1985, such contingent fee agreements must be in writing and state the method by which the fee is to be determined. ARIZONA RULES OF PROFESSIONAL RESPONSIBILITY Rule 1.5(c) (1985). Putting the agreement in writing or holding a conference with the client to discuss the pros and cons of the contingent fee does not, of course, protect an attorney if the fee is otherwise excessive. But if explicit enough, either may persuade the court that the attorney thoroughly discussed the situation with his client and that the attorney's actions were in good faith and with the client's complete knowledge. Second, the attorney should maintain accurate time records. *See generally* Florida Bar v. White, 368 So. 2d 1924 (Fla. 1979); *In Re* Marine, 82 Wis. 2d 602, 264 N.W.2d 285 (1978); *In Re* Bach, 278 Or. 24, 539 P.2d 1075 (1975); Florida Bar v. Randolf, 238 So. 2d 635 (Fla. 1970); Potenga v. Oneida County Bar Ass'n, 29 App.

gent fee altogether. For example, the attorney can utilize the traditional contingent fee method but apply a varying percentage.[92] The attorney could set his fee for one-third of the recovered proceeds if the case goes to trial; if the case is settled out of court, the fee would only be one-fourth of the net proceeds. In *Swartz*, this method of compensation would have reduced the fee by almost $13,000 and might have influenced the court's sanction.

A second fee alternative is the "graduated schedule" as applied in New York and New Jersey.[93] For example, under this alternative an attorney is limited to court-imposed fee levels. Under the New Jersey court's rule, an attorney is limited to 50% of the first $1,000 received, 40% of the next $2,000, 33.3% of the next $47,000, 20% of the next $50,000, and 10% of any amount over $100,000.[94] At the very least, this alternative provides attorneys with absolute guidelines as to what constitutes an excessive contingent fee.

A third alternative is the "specific duty" approach applied in Canada.[95] The attorney must put the fee agreement in writing, give the client a copy, inform the client of his right to judicial review of the fairness of the fee, and file the agreement with the court.[96]

These three alternatives are important tools for the practitioner searching for options in order to meet the requirements of ethical responsibility in the contingent fee area. Clearly, however, the most effective way for an attorney to avoid contingent fee problems is to be cognizant of his fiduciary relationship with his client and to review all aspects of every contingency case before charging a fee based upon the parties' initial contract.

Conclusion

In *In re Swartz*, the Arizona Supreme Court held that contingent fees are subject to regulation by the court and that if an originally reasonable

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Div. 2d 213, 287 N.Y.S.2d 138 (1968). Time records are crucial to establishing whether a fee was reasonable. *See supra* note 9; United States v. Vague, 521 F. Supp. 147, 152 (N.D. Ill. 1981). Courts do not favor attorneys who testify that they have spent a significant amount of time on a case but can produce no evidence.

92. This alternative was applied in *In re* Kerrigan, 271 Or. 1, 530 P.2d 26 (1974) where the attorney contracted for a fee of 25% of any settlement made before the case was filed, 33⅓% of any settlement made after the filing. The alternative did not benefit the *Kerrigan* attorney as he overcharged his client by charging 33⅓% for a settlement that was made before the case was filed.

93. *See* Note, *supra* note 23, at 556. *See also* Grady, *Some Ethical Questions About Percentage Fees*, LITIGATION 20, at 52 (1976). The Supreme Court of Arizona discarded Swartz's contention that the one-third fee may be ethically charged as the customary fee until the profession promulgates rules limiting the amount of contingent fees. *Swartz*, 141 Ariz. at 272-73, 686 P.2d at 1242-43. The court agreed with Swartz that the one-third contingent fee agreement was within the customary limits for an initial agreement for this type of case. The court, however, did not agree that the legitimacy of the original agreement should have any bearing on whether or not the fee has become excessive at the conclusion of the attorney's services. *Id.* at 273, 686 P.2d at 1243. The court rejected Swartz's "limiting" theory because the many variables in each case makes a specific fee limitation impractical. *Id.* Exactly what Justice Feldman meant by this statement is not clear. Whether he would welcome proposals such as those adopted in New York or New Jersey in Arizona is open to debate.

94. N.J.C.T.R. 1: 21-7. The New York Counterpart to the New Jersey rule is found in N.Y. C.T.R. § 603.7 (McKinney 1977) (App. Div. 1st Dep't).

95. For a complete discussion of this alternative, see Note, *supra* note 23, at 555.

96. *Id.*

contingent fee agreement becomes clearly excessive at the conclusion of an attorney's services, the attorney must reduce the fee to a reasonable level. *Swartz* puts Arizona attorneys on notice that the court will enforce the disciplinary rules relating to contingent fees and issues a stern reminder of the high duty an attorney owes to clients, the profession, and the legal system. *Swartz* provides no absolute guidelines for attorneys to follow in determining when an originally valid contingent fee agreement becomes excessive. Rather, the case provides the profession with insight into what factors the court considers important when deciding an excessive contingent fee charge. *Swartz* is an effective resource for attorneys grappling with ethical considerations involving contingent fees. Nothing can help an attorney avoid an excessive fee violation, however, if he or she lacks the attorney's greatest resource of all—sound professional and moral judgment.

Timothy Creed Lothe

VI. EVIDENCE

JONES V. PAK-MOR: ARIZONA'S EQUITABLE TREATMENT OF SAFETY HISTORY EVIDENCE

The safety history[1] of a product is an important evidentiary focus in product liability litigation.[2] While lawyers often demonstrate danger or safety of a product through testimony about the accident at issue, the safety history evidence they use is composed of events exclusive of those immediately involved in the litigation. Safety history's evidentiary value, as a type of circumstantial proof, has been the subject of great debate.[3] While courts generally agree that proof of prior accidents is admissible in the judge's discretion,[4] they have been divided on whether to admit evidence of the absence of prior accidents.[5]

In *Jones v. Pak-Mor*,[6] the Arizona Supreme Court considered the admissibility of evidence of the absence of prior accidents. In this product liability case, the defendant manufacturing company was prepared to offer evidence that the truck model which was allegedly defective in design had been in use for twenty-six years without any reported accidents or claims similar to the plaintiff's.[7] The trial court ruled such evidence was inadmissi-

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1. The safety history of a product is the existence or non-existence of similar accidents or injuries prior to the occurrence of the event being litigated. For example, a defendant may wish to demonstrate safety by offering proof that no injuries ever resulted from use of the allegedly harmful product before the plaintiff's accident. A plaintiff may likewise desire to prove a history of similar accidents to support a claim of defective product design or to demonstrate that the defendant had notice of the product's potential danger. The possibility of introducing evidence of accidents or injuries which occur subsequent to the plaintiff's will not be discussed in this Casenote. *See generally* Morris, *Proof of Safety History in Negligence Cases*, 61 HARV. L. REV. 205 (1948).

2. All product liability cases share two essential issues: (1) the product in question must be shown to have been defective or harmful in some way; and (2) the defendant's act or omission with respect to the product must be shown to be causally related to the plaintiff's injury. R. HURSH & H. BAILEY, 1 AMERICAN LAW OF PRODUCTS LIABILITY § 1:6 (2d ed. 1974). One of the modes of proving (1) defectiveness or harmfulness and (2) proximate causation is through evidence of occurrence or nonoccurrence of other injuries. *Id.* at §§ 1:17, 1:21, 1:33, 1:34. *See generally* Phelan & Falkof, *Proving a Defect in a Commercial Products Liability Case*, 24 TRIAL LAW. GUIDE 10 (1980); Rheingold, *Proof of Defect in Products Liability Cases*, 38 TENN. L. REV. 325 (1971).

3. *See* 2 J. WIGMORE ON EVIDENCE § 443, at 528-31 (J. Chadbourn rev. ed. 1979); C. MCCORMICK ON EVIDENCE § 200, at 587-92 (E. Cleary 3d ed. 1984); Sheldon, *Circumstantial Proof in Products Liability Cases: A Dangerous Precedent*, 30 FED'N INS. COUNSEL Q. 265, 269 (1980).

4. R. HURSH, *supra* note 2, at § 1:18. "[E]vidence of other accidents involving the same product is generally admissible to show its dangerous or hazardous nature, if the accidents occurred under the same or substantially similar conditions as that involving the plaintiff, and with reasonable proximity in time." *Id.*

5. L. FRUMER & M. FRIEDMAN, 1A PRODUCTS LIABILITY § 12.01[3] (1984). *See generally*, Annot., 31 A.L.R.2d 190 (1953).

6. No. 17412-PR (Ariz. Jan. 17, 1985). The plaintiff, Jerry Jones, was injured on January 27, 1979, while working on a side-loading refuse compaction and collection truck manufactured by Pak-Mor Manufacturing Company. The truck's design included side fender running boards to accommodate workers riding there between pick-up points. The worker's standing space protruded only four inches from the side of the truck. While the plaintiff rode on the running board, the truck made a sharp right hand turn. Jones was caught between a fence and the truck, seriously injuring his left leg. He sued Pak-Mor Manufacturing Company, alleging improper design of the truck, and seeking recovery in negligence and strict liability. *Pak-Mor* slip op. at 2-4.

7. The defendant also offered to prove that there had been no design change in the relevant part of the truck and that thousands of machines with the same design had been sold and used. *Pak-Mor* slip op. at 5.

ble under Arizona law, and the court of appeals affirmed. The Arizona Supreme Court accepted review. While recognizing that case law had created a per se rule against admissibility, the supreme court stated that Arizona's rule should be compatible with the rules of evidence adopted in 1977. After analyzing the applicable rules of evidence, the court held that in a products liability case involving a claim of defective design, the trial court has discretion under Rule 403 to admit evidence of safety history, including nonoccurrences, provided the necessary foundation is established.[8]

History of the Arizona Per Se Rule

In 1936 the Arizona Supreme Court, in *Fox Tucson Theaters Corp. v. Lindsay*,[9] first considered the admissibility of safety history evidence. The *Lindsay* plaintiff sued for injuries she suffered when she slipped and fell on a dark stairway in the defendant's theater. The trial court excluded the theater manager's proffered testimony concerning other accidents caused by the theater's defective lighting. The *Lindsay* court decided to follow the majority rule that such evidence was inadmissible.[10]

The *Lindsay* decision may be broadly read as banning evidence of both the existence and non-existence of prior accidents,[11] but subsequent Arizona opinions have consistently referred to *Lindsay* as establishing a per se rule of inadmissibility only as to evidence of absence of prior accidents.[12] The Arizona Supreme Court mechanically applied the per se rule in *City of Tucson v. Gallagher*.[13] There, the court held that evidence that no previous accidents had occurred at the accident site was inadmissible in an action against the city for negligently maintaining vacant land.[14] In *Hlavaty v. Song*, both the trial and appellate courts allowed testimony of absence of similar accidents in a negligence action against a restaurant for a patron's slip and fall.[15] The Arizona Supreme Court reversed, holding that such testimony was immaterial and inadmissible.[16]

Under the per se rule, Arizona courts have strictly excluded evidence proffered to show freedom from previous accidents in negligence[17] and strict

8. *Id.* at 16-17.

9. 47 Ariz. 388, 56 P.2d 183 (1936).

10. The court noted disagreement among the different jurisdictions on the issue of admissibility of safety history evidence, and then stated that it would follow the "better" and (then) majority rule of inadmissibility. *Id.* at 394, 56 P.2d at 185.

11. "[W]e think that to allow the question of other accidents to enter the case would be inconsistent with our theory of law." *Id.* at 395, 56 P.2d at 185.

12. *Pak-Mor*, slip op. at 5, 6; Hlavaty v. Song, 107 Ariz. 606, 609, 491 P.2d 460, 463 (1971). *See also* Buchanan v. Green, 73 Ariz. 159, 238 P.2d 1107 (1951), where the court said that evidence of prior similar accidents is generally admissible to show the defendant's notice or knowledge of the condition, but that *Lindsay* held that evidence is not admissible to show freedom from previous accidents. *Id.* at 160-61, 238 P.2d at 1108-09; Padilla v. Southern Pac. Transp. Co., 131 Ariz. 533, 642 P.2d 878 (Ct. App. 1982).

13. 108 Ariz. 140, 493 P.2d 1197 (1972).

14. *Id.* The city argued that photographs of the accident site showed tire tracks which tended to suggest other accidents must have taken place; therefore, it should have been allowed to prove absence of other accidents. *Id.* at 143, 493 P.2d at 1200.

15. 107 Ariz. at 609, 491 P.2d at 463.

16. *Id., citing* Fox Tucson Theaters Corp. v. Lindsay, 47 Ariz. 388, 56 P.2d 183 (1936).

17. *See* City of Tucson v. Gallagher, 108 Ariz. 140, 493 P.2d 1197 (1972); Hlavaty v. Song, 107

liability[18] actions, as well as actions under the Federal Employers' Liability Act.[19] Conversely, the admission of evidence of prior accidents is left to the trial court's discretion.[20]

Policy Reasons Behind the Rule of Inadmissibility

One of the main reasons courts exclude evidence of prior nonoccurrences is that such evidence tends to confuse the main issue being litigated.[21] The court in *Fox Tucson Theaters Corp. v. Lindsay* noted that confining offered evidence to disputed issues directly affecting the cause of action is proper.[22] It reasoned that admission of safety history testimony might introduce numerous collateral issues, thus protracting the trial and distracting from the central issue. Also, jurors may be impressed by a defendant's good safety record and fail to examine whether the defendant disregarded standards of care or caution in the present situation.[23]

The *Lindsay* court also considered the additional expense a defense of good safety history imposes upon a plaintiff. The defendant is attempting to prove a negative fact[24] which the plaintiff must then counter. Since negative facts are harder to prove than positive ones[25] and are not as probative,[26] the

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Ariz. 606, 491 P.2d 460 (1971); Buchanan v. Green, 73 Ariz. 159, 238 P.2d 1107 (1951); St. Gregory's Church v. O'Connor, 13 Ariz. App. 421, 477 P.2d 540 (1971).

18. *See* Tucson Indus., Inc. v. Schwartz, 108 Ariz. 464, 501 P.2d 936 (1972). In a strict liability action for injuries from exposure to contact cement fumes, the court stated that evidence of absence of prior similar accidents was immaterial and inadmissible in all strict liability cases. *But see infra* note 36 and accompanying text.

19. *See* Padilla v. Southern Pac. Transp. Co., 131 Ariz. 533, 534, 642 P.2d 878, 879 (Ct. App. 1982). In an action under the Federal Employers' Liability Act § 1 *et seq.*, 45 U.S.C.A. §§ 51-60, for failure to provide a safe work environment, adequate equipment to perform work assigned, or adequate assistance, the court held evidence of lack of other injuries was inadmissible to show the challenged conditions were safe.

20. *See* Burgbacher v. Mellor, 112 Ariz. 481, 543 P.2d 1110 (1975) (not error for the trial court to admit evidence of prior slips and falls at or near site of plaintiff's fall); Slow Dev. Co. v. Coulter, 88 Ariz. 122, 353 P.2d 890 (1960) (employee's testimony as to previous accidents on same floor when wet held admissible); Purcell v. Zimbelman, 18 Ariz. App. 75, 500 P.2d 335 (1972) (in a medical malpractice case, the court allowed evidence of prior accidents and lawsuits resulting from the same doctor performing a similar act).

21. J. WIGMORE, *supra* note 3, § 443, at 528-29.

> The notion here is that, in attempting to dispute or explain away the evidence thus offered, new issues will arise as to the occurrence of the instances and the similarity of conditions, new witnesses will be needed whose cross examination and impeachment may lead to further issues; and that thus the trial will be unduly prolonged, and the multiplicity of minor issues will be such that the jury will lose sight of the main issue, and the whole evidence will be only a mass of confused data from which it will be difficult to extract the kernel of controversy.

Professor Wigmore, however, does not think this is a forceful argument for per se exclusion, and that it is best to leave admissibility to the trial court's discretion. *Id.* at 530-31. *See also* Morris, *supra* note 1, at 209-10; Gilbert v. Bluhm, 291 S.W.2d 125 (Mo. 1956); Dill v. Dallas County Farmers' Exch. No. 177, 267 S.W.2d 677 (Mo. 1954).

22. 47 Ariz. 388, 395, 56 P.2d 183, 185 (1936).

23. Morris, *supra* note 1, at 210-11. Morris notes this problem, but states that "[n]one of the reasons given for the exclusion of safety-history evidence is sufficient to justify an absolute interdiction of its use in all cases." *Id.* at 211.

24. L. FRUMER & M. FRIEDMAN, *supra* note 5, at 254.40.

25. "It is harder to prove that something did not happen than to prove that it did happen." *Pak-Mor*, slip op. at 11.

26. "In asserting the lack of prior accidents the problem has always been that the manufacturer is really saying that it has no record of complaints. That allegation, alone, does not exclude the possibility of accidents which were not reported to the manufacturer." Phelan & Falkof, *supra* note

value of the evidence may be too slight to justify the expense of both presenting and rebutting it.[27]

Although not discussed in *Lindsay*, courts also exclude good safety history evidence to protect plaintiffs from unfair surprise. Litigants know in advance about the principal accident and are prepared to answer to the expected evidence, but they may not be ready to answer to a safety history defense or to inaccurate testimony about other accidents.[28] Safety history is something that the defendant usually knows much more about than the plaintiff.[29] The plaintiff may thus be unprepared to meet the defendant's proof of nonoccurrences.[30] The danger of a judge or jury relying on safety history evidence which is not open to exposure by the plaintiff's rebuttal renders that evidence inadmissible.[31]

Breakdown of the Per Se Rule

The Arizona Rule

Rayner v. Stauffer Chemical Co.[32] weakened Arizona's distinction between the treatment of existence and nonexistence of prior injury or accident. In *Rayner*, the court admitted evidence of the defendant's prior experience with the chemical Eptam, which was the subject of the litigation.[33] The prior experience evidence included experiments in which Eptam caused no injuries when used under circumstances similar to those at issue. The court cautioned that it admitted the evidence to demonstrate Eptam's behavior and effect and not to show absence of mishaps.[34] Nonetheless, the decision made a crack in the strict per se rule by allowing evidence of ab-

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2, at 22. *See also* M. UDALL & J. LIVERMORE, ARIZONA LAW OF EVIDENCE 120 (2d ed. 1982); L. FRUMER & M. FRIEDMAN, *supra* note 5, at 254:41. *But see* J. WIGMORE, *supra* note 3, § 664, at 907-15. Professor Wigmore discusses negative testimony and states that it embodies no inherent weaknesses, that at times it may be a stronger source than positive impression. He observes that "[n]evertheless, from some source not traceable, there lingers in the judicial mind, in many quarters, an antiquated notion that *negative impressions are not so probative* as affirmative impressions. . . ." *Id.* at 914 (emphasis in original).

27. Morris, *supra* note 1, at 209-10 discusses the unduly expensive argument and says that it "is valid for some of the simpler cases in which safety-history evidence is likely to be too time-consuming to justify its minimal value. But . . . safety-history evidence can be of signal value in some cases. If intelligent trial judges are permitted to use their discretion when ruling . . . , they can exclude it when its value is likely to be too low to justify its cost . . . ." *Id.*

28. *Id.* at 210. *But see supra* note 23.

29. Rheingold, *supra* note 2, at 343.

30. J. WIGMORE, *supra* note 3, at 528.

31. *Id.* Additionally, some cases have excluded negative safety history evidence on hearsay grounds. *See* Blackwell v. J.J. Newberry Co., 156 S.W.2d 14 (Mo. Ct. App. 1941); George W. Saunders Live Stock Comm'n Co. v. Kincaid, 168 S.W. 977 (Tex. Ct. App. 1914). Modern cases appear to avoid the hearsay issue altogether. Other cases have rejected such evidence as having no reasonable tendency to prove safety. *See* Gilbert v. Bluhm, 291 S.W.2d 125 (Mo. 1956); Dill v. Dallas County Farmers' Exch. No. 177, 267 S.W.2d 677 (Mo. 1954).

32. 120 Ariz. 328, 585 P.2d 1240 (Ct. App. 1978).

33. *Id.* at 332-33, 585 P.2d at 1244-45. The plaintiff potato growers had brought an action in negligence, strict liability, and breach of express warranty against the defendants, manufacturers and distributors of the herbacide Eptam, alleging that Eptam had destroyed their potato crop. The defendants were permitted to introduce evidence of experiments which showed Eptam's use on potatoes had no adverse effects.

34. *Id.* at 332, 585 P.2d at 1244.

sence of injuries or accidents through the vehicle of experiments and documentation.

The Arizona Supreme Court also diluted its strict per se exclusion in *Tucson Industries, Inc. v. Schwartz* when it stated that evidence of prior absence of accidents is material in negligence actions, but immaterial in strict liability actions.[35] As *Tucson Industries* was purely a strict liability action, the court's comment pertaining to negligence actions was dictum.[36] Nonetheless, *Tucson Industries* may well have indicated that Arizona was moving away from its strict per se exclusionary rule.

National Trends

One of the earliest recorded admissions of good safety history evidence is an 1891 Alabama Supreme Court case which allowed the defendant to present proof that vehicles were constantly crossing the street railway tracks without suffering accidents.[37] There has been no consistency among jurisdictions on this issue.[38] The modern trend, however, appears to be toward admissibility. Recent decisions applying a general rule of exclusion are rare.[39] Many contemporary decisions on both the state and federal level support discretionary admission.[40] These cases include not only products liability actions,[41] but negligence actions as well.[42]

Recent case law and scholarly comment[43] suggest that although the Federal Rules of Evidence[44] do not specifically refer to proof of absence of prior accidents, this evidence is admissible under the rules of relevancy.[45] In

35. 108 Ariz. 464, 468, 501 P.2d 936, 940 (1972).

36. The appeals court in Jones v. Pak-Mor, No. 2 CA-CIV 4801 (Ariz. Ct. App. Jan. 12, 1984), stated that it would not consider *Tucson Industries'* comment about negligence actions as it was *obiter dictum. Id.*, slip op. at 7.

37. Birmingham Union Ry. Co. v. Alexander, 93 Ala. 133, 9 So. 525 (1891).

38. Pippin v. Ranch House South, Inc., 366 A.2d 1180, 1182 (Del. 1976); 31 A.L.R.2d 190, 195 (1953). *See also* 65A C.J.S. *Negligence* § 234(8) (1966). *See generally* Morris, *supra* note 1.

39. "A large number of cases recognize that lack of other accidents may be admissible. . . ." C. MCCORMICK, *supra* note 3, at 591. *See also* 29 AM. JUR. 2D EVIDENCE § 310, at 355-58; *infra* notes 40-46, 82-87 and accompanying text.

40. *See* Schwartz v. American Honda Motor Co., 710 F.2d 378 (7th Cir. 1983); DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (3rd Cir. 1978); Gravely v. Providence Partnership, 549 F.2d 958 (4th Cir. 1977); Hoppe v. Midwest Conveyor Co., 485 F.2d 1196 (8th Cir. 1973); Pippin v. Ranch House South, Inc., 366 A.2d 1180 (Del. 1976); Stanley v. Schiavi Mobile Homes, Inc., 462 A.2d 1144 (Me. 1983); Raleigh v. Indep. School Dist. No. 625, 275 N.W.2d 572 (Minn. 1978); Reiger v. Toby Enter., 45 Or. App. 679, 609 P.2d 402 (1980); Caldwell v. Yamaha Motor Co., Ltd., 648 P.2d 519 (Wyo. 1982).

41. *See* Walker v. Trico Mfg. Co., Inc., 487 F.2d 595 (7th Cir. 1973); Darrough v. White Motor Co., 74 Ill. App. 3d 560, 393 N.E.2d 122 (1979); Payson v. Bombardier, 435 A.2d 411 (Me. 1981); Belfry v. Anthony Pools, Inc., 80 Mich. App. 118, 262 N.W.2d 909 (1978); Stark v. Allis Chalmers and Northwest Roads, Inc., 2 Wash. App. 399, 467 P.2d 854 (1970).

42. *See* Nance v. Winn Dixie Stores, Inc., 436 So. 2d 1075 (Fla. Dist. Ct. App. 1983); Gallick v. Novotney, 124 Ill. App. 3d 756, 464 N.E.2d 846 (1984); Schuller v. Hy-Vee Food Stores, Inc., 328 N.W.2d 328 (Iowa 1982); Quigley v. School Dist. No. 45J3, 251 Or. 452, 446 P.2d 177 (1968).

43. L. FRUMER & M. FRIEDMAN, *supra* note 5, at 254.41; *see generally* Rheingold, *supra* note 2, at 343.

44. 28 U.S.C. §§ 101-1103 (Supp. V. 1981).

45. L. FRUMER & M. FRIEDMAN, *supra* note 5, at 254.41; *see infra* notes 50-58 and accompanying text. *See generally* Schmertz, *Impact of Federal Rules of Evidence on the Trial of a Products Case*, 13 TRIAL LAW. Q., vol. 2, at 8, 10-11 (1980).

Strum v. Clark Equipment Co.,[46] for example, the court applied the Federal Rules of Evidence to a products liability evidence question. The court noted that evidence of no prior accidents is relevant and admissible, provided the defendant can establish an adequate foundation demonstrating comparable circumstances. *Jones v. Pak-Mor* follows a similar analysis, and reaches a comparable result.

The Jones v. Pak-Mor *Decision*

A Relevancy Analysis

In *Jones v. Pak-Mor*, the Arizona Supreme Court recognized objections to evidence showing a lack of prior accidents, but cited scholarly criticism of the per se rule of inadmissibility in response.[47] The court also noted that recent case law supports the proposition that a per se rule is patently inconsistent with modern evidence principles.[48] Consequently, the court stated that Arizona's position should be consonant with the Arizona Rules of Evidence.[49]

The *Pak-Mor* court characterized the per se exclusionary rule as a rule of relevance.[50] The court thus examined Arizona Rules of Evidence Rule 401, which defines evidence as relevant if it has any tendency to prove or disprove any fact at issue.[51] The issues in a products liability case based on defective design might include existence of defects in the product, foreseeability of danger resulting from use of the product, and unreasonableness

46. 547 F. Supp. 144, 145 (W.D. Mo. 1982), *aff'd*, 732 F.2d 161 (8th Cir. 1984). *See also* Simon v. Town of Kennebunkport, 417 A.2d 982 (Me. 1980).

47. *Pak-Mor*, slip op. at 7. Prior to *Pak-Mor*, Arizona judges used their discretion in admitting evidence of prior similar accidents, yet they could not do so to admit evidence of the absence of similar accidents. Morris Udall and Joseph Livermore label this duplicity of treatment "strange." M. UDALL & J. LIVERMORE, ARIZONA LAW OF EVIDENCE § 85, at 189-90 (2d ed. 1982). Dean McCormick criticizes a general rule against proof of no accidents, stating that if evidence of prior accidents is discretionarily admitted for proof, then evidence of absence of prior accidents should be treated similarly for exculpatory purposes. C. MCCORMICK, *supra* note 3, at 590.

Professor Wigmore also favors admitting negative safety history evidence when it is deemed relevant. He confronts the two "considerations of auxiliary probative policy" voiced against presentation of circumstantial safety history evidence: the reasons of "unfair surprise," *see supra* notes 28-31 and accompanying text, and "confusion of the issue," *see supra* notes 21-23 and accompanying text. Professor Wigmore answers that these considerations usually are minor inconveniences. Litigants are frequently inconvenienced by evidence which is to some extent unforeseen and should expect that this sort of evidence will be used. He does not see safety history evidence creating any greater addition or confusion of issues than that which usually occurs at trial, minor issues being common. Professor Wigmore argues that evidence of absence of prior accidents may be useful and reliable evidence. Radically excluding all of it is too great a price to pay when the solution to preventing the "supposed disadvantages" while keeping the advantages of the evidence is apparent: let the trial court use its discretion. J. WIGMORE, *supra* note 3, at 530-31.

48. *Pak-Mor*, slip op. at 7, *citing* Simon v. Town of Kennebunkport, 417 A.2d 982, 985 (Me. 1980), and Sturm v. Clark Equip. Co., 547 F. Supp. 144, 145 (W.D. Mo. 1982), *aff'd* 732 F.2d 161 (8th Cir. 1984).

49. ARIZ. R. EVID. 101 to 1103 (Supp. 1984).

50. "As a matter of law [the rule] declares the evidence inadmissible either because it lacks probative value with regard to the issues presented or because its probative value is outweighed by the danger of prejudice and the problems associated with inquiry into collateral matters, such as time wasted, expense, and the like." *Pak-Mor*, slip op. at 8.

51. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ARIZ. R. EVID. 401 (Supp. 1984).

of that danger.[52] Safety history meets the de minimus standard of Rule 401 as evidence which may make these relevant facts more or less probable.[53]

The court in *Pak-Mor* held that once safety history is found to be relevant under Rule 401, Rule 403[54] applies.[55] Rule 403 allows the court to exclude offered evidence, despite its relevance, if concerns such as judicial economy, potential unfair prejudice, or confusion of the issues substantially outweigh the evidence's probative value. Rule 403 requires the court to balance the potential dangers of offered evidence against the benefit to be realized by admission.[56] Viewing this balancing as adequate protection,[57] the *Pak-Mor* court held that the trial court has discretion under Rule 403 to admit evidence of both absence and presence of prior accidents with the caveat that the necessary foundation must be established.[58]

Establishing a Foundation for Admitting Safety History Evidence

Establishing an appropriate foundation for admission of safety history

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52. The *Pak-Mor* court arrived at these issues by reasoning that in strict liability actions the plaintiff has the burden of proving a product is both defective and unreasonably dangerous. A factor important in this determination is the likelihood of the product, as designed, causing injury. In a negligence action based upon the defective design of a product, an essential element is that the defendant distributed a product which was foreseeably dangerous due to its design. *Pak-Mor*, slip op. at 9.

53. *Pak-Mor* slip op. at 9, *citing* Schwartz v. American Honda Motor Co. Inc., 710 F.2d 378, 382 (7th Cir. 1983); Darrough v. White Motor Co., 74 Ill. App. 3d 560, 565, 393 N.E.2d 122, 125-26 (1979); Reiger v. Toby Enter., 45 Or. App. 679, 682-83, 609 P.2d 402, 404 (1980); and C. MCCORMICK, *supra* note 3, § 200, at 587-92.

54. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ARIZ. R. EVID. 403 (Supp. 1984).

55. Under Rule 402, "all relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States [or] . . . Arizona, or by applicable statutes or rules . . . ." As no specific statute or rule of evidence dictates exclusion of safety history evidence (compare Rules 404, 407-411), Rule 402 does not render safety history evidence inadmissible. Rule 403 is the one rule that then applies. *Pak-Mor*, slip op. at 9-10. ARIZ. R. EVID. 402, 404, 407-11 (Supp. 1984). *See generally* Schmertz, *supra* note 45, at 10.

56. *Pak-Mor*, slip op. at 10. Rule 403 is a discretionary rule, not a per se rule of inadmissibility. *Id.*

57. In DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (3d Cir. 1978), the court remarked that the negative aspects of proof of absence of prior accidents is applicable to the strength and weight of such evidence and not to the question of whether this type of evidence is admissible. *Id.* at 1202. The *Pak-Mor* court adopted a similar viewpoint in its analysis of safety history proof in products liability cases: the "negative aspects" of using this type of evidence figure into the Rule 403 balancing test. *Pak-Mor*, slip op. at 12.

58. *Pak-Mor*, slip op. at 11. The court cautioned that judges should be aware of the inherent differences between evidence of absence of prior accidents and evidence of existence of prior accidents. It is more difficult to prove a negative fact, that something did not happen, than the positive fact that something did happen. *See also supra* notes 24-26 and accompanying text. The *Pak-Mor* court also noted that judges should consider the "plain nature" of the danger in question. If the danger is an obvious one, evidence of no prior accidents only means the plaintiff was the first to suffer injuries and carries with it a great risk of misleading the jury. *Pak-Mor*, slip op. at 12-13. *See also* Morris, *supra* note 1, at 210.

> A plaintiff cannot prove convincingly that an obviously safe sidewalk is dangerous simply by showing that several people have happened to fall on it. Nor will a defendant who has maintained an underguarded elevator shaft in a dark public place further his cause much merely by showing that the plaintiff was the first to fall down it.

Id.

evidence is not a new idea in Arizona.[59] In order to introduce proof of prior accidents into evidence, the plaintiff must show that the conditions under which the prior accident occurred were "the same or substantially similar" to the circumstances of the accident in issue.[60] Likewise, the *Pak-Mor* foundation requirement for good safety history includes an examination of both product use and period of exposure to the alleged danger.[61] It includes proof that the safety history which the defendant wishes to utilize is extensive enough to encompass sufficient similar situations. Courts will determine foundational strength on a case-by-case basis.[62]

A defendant seeking to introduce absence of accident or injury evidence must also prove that the foundation witness is in a position to know about any prior occurrences.[63] The *Pak-Mor* court indicates this is a "formidable" burden, but not an impossible one.[64] The court suggests ways in which a defendant manufacturer might meet the evidentiary predicate: set up a department to check on product safety; develop a system to follow up on the safety history of products; conduct surveys of customers and users; obtain information from governmental agencies; or work with insurers, distributors, or retailers to compile data.[65] Thus, if the defendant attempts to introduce evidence which consists of more than "we have never heard of any accident claims,"[66] data is available for the opponent's discovery or challenge. This available evidence weights the Rule 403 balancing test toward admission.[67]

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59. *See* Slow Dev. Co. v. Coulter, 88 Ariz. 122, 353 P.2d 890 (1960).

60. *Id.* at 125-26, 353 P.2d at 892. Compare Payson v. Bombardier, Ltd., 435 A.2d 411 (Me. 1981), where the court said that specific proof of substantial similarity of conditions is not essential if the prior safety history "is so extensive as to justify the inference that it included an adequate number of situations like the one in suit." *Id.* at 413.

61. *Pak-Mor*, slip op. at 13. *See also* Darrough v. White Motor Co., 74 Ill. App. 3d 560, 565, 393 N.E.2d 122, 125 (1979); *cf.* Walker v. Trico Mfg. Co., Inc., 487 F.2d 595 (1973) (defendant must show as a foundation that the absence of prior accidents took place with respect to substantially identical machines).

62. The *Pak-Mor* court's discussion of what facts should influence a court's decision as to whether the appropriate foundation is present, clearly demonstrates that the strength of the foundation will be made on a case-by-case basis. *See Pak-Mor*, slip op. at 12-14.

63. *Pak-Mor*, slip op. at 13. Once a defendant is able to prove negative safety history, this does not definitely establish that no accidents or injuries ever happened. The manufacturer's good safety history does not preclude a conclusion that the product was defective and dangerous. Tucson Indus., Inc. v. Schwartz, 108 Ariz. 464, 468, 501 P.2d 936, 940 (1972). *See also* L. FRUMER & M. FRIEDMAN, *supra* note 5, at 254.41 (stating that an absence of recorded prior accidents does not exclude the possibility that accidents did happen and were not brought to the manufacturer's attention). Generally, before courts will admit safety history evidence, it must consist of more than testimony that the witness knows of no reports of prior accidents or injuries. There must be further proof that if an accident or injury had occurred, the witness would have found out about it. *Pak-Mor*, slip op. at 12.

64. *Id.* at 13.

65. *Id.* at 13-14. *See* Payson v. Bombardier, 435 A.2d 411, 413 (Me. 1981), where the witness seeking to testify as to product safety history was an employee in charge of compiling project information reports from dealers and distributors. *See generally* L. FRUMER & M. FRIEDMAN, *supra* note 5, at 254.42.

66. *Pak-Mor*, slip op. at 14.

67. *Id.* at 15. The *Pak-Mor* court also noted that this new rule requiring more than "we never heard of any accidents" will give manufacturers, sellers and distributors an incentive to learn about their products' safety histories, thus promoting the manufacturing and distribution of safe products. *Id.* at 16.

Future Application of the Jones v. Pak-Mor *Decision*

In *Jones v. Pak-Mor* the supreme court specifically holds that "in product liability cases involving a claim of defective design, . . . the trial court has discretion under Rule 403 to admit evidence of safety history concerning both the existence and nonexistence of prior accidents."[68] Safety history evidence is admissible in negligence and strict liability actions[69] to prove whether the design was the cause of the defect, and whether the defect was unreasonably dangerous or the cause of the accident. In negligence cases, safety history may also indicate whether the defendant should have foreseen that the product's design was unsafe for its intended use.[70]

Pak-Mor seems to limit the scope of the new discretionary admission to product liability cases only.[71] Inevitably, however, a defendant will want to introduce evidence of absence of prior accidents for negligent injury to person or property not involving an allegedly defective product. When this happens, the Arizona Supreme Court will probably extend the *Pak-Mor* holding beyond its product liability limit.

Pak-Mor itself contains indications that a broader application is possible. Although the *Pak-Mor* court dealt with a product liability case, the per se rule which the court abrogated was built upon cases involving actions for negligent maintenance of premises.[72] *Fox Tucson Theater Corp. v. Lindsay*, the original per se case, was an action for negligent maintenance of a stairway.[73] Of the prior Arizona cases the *Pak-Mor* court discussed, only one involved a product liability claim.[74] In view of Arizona's historic application of the per se rule, it seems that had the *Pak-Mor* court intended to strictly confine defendants' use of negative safety history evidence to product liability actions, it would have done so. The court was careful to explicitly exclude manufacturing defect cases from the application of the new rule.[75] It remained silent about negligence claims not involving products.

The relevancy analysis *Pak-Mor* uses[76] can easily apply to safety history evidence in any negligence action. Indeed, the court's all-encompassing statement that its position should be consistent with the Arizona Rules of Evidence indicates that any safety history proof that meets the *Pak-Mor* rele-

68. *Id.* at 16.

69. *Id.* The *Pak-Mor* court specifically excludes actions based on manufacturing flaws from the new rule's coverage. These cases involved individual units of a product and not the inherent design or quality of the entire product line, so the safety-history of the entire product line is irrelevant. *Id.* at 16 n.4. Foster v. Marshall, 341 So. 2d 1354 (La. Ct. App. 1977), *cert. denied*, 343 So. 2d 1077 (La. 1977), also separates defective design and manufacturing flaw cases. In defective design cases, safety history is both relevant and probative as all of the products have the identical design. *Id.* 341 So. 2d at 1361.

70. *Pak-Mor*, slip op. at 16-17. *Cf.* Slow Dev. v. Coulter, 88 Ariz. 122, 125, 353 P.2d 890, 892 (1960); Belfry v. Anthony Pools, Inc., 80 Mich. App. 118, 121, 262 N.W.2d 909, 912 (1978). *See generally* R. HURSH & H. BAILEY, *supra* note 2, at § 1:18; Phelan & Falkof, *supra* note 2, at 18.

71. *Pak-Mor*, slip op. at 16. *See supra* notes 68-70 and accompanying text.

72. *See* City of Tucson v. Gallagher, 108 Ariz. 140, 493 P.2d 1197 (1972) (action in negligence for maintaining vacant land such as to create an appearance of an unpaved road); Hlavaty v. Song, 107 Ariz. 606, 491 P.2d 460 (1971) (action in negligence for a patron's slip and fall in a restaurant).

73. 47 Ariz. 388, 56 P.2d 183 (1936).

74. Tucson Indus., Inc. v. Schwartz, 108 Ariz. 464, 501 P.2d 936 (1972).

75. *See supra* note 69.

76. *See supra* notes 50-58 and accompanying text.

vancy test and foundational requirements will be admissible. Whenever presence of a dangerous condition,[77] knowledge of that condition,[78] or foreseeability of harm[79] are in issue, evidence of prior nonoccurrences is potentially relevant. As these issues are not limited to product liability cases, the logic of the new rule is also not so confined.

In discussing the appropriate foundation the defendant must establish, the *Pak-Mor* court makes a further allusion to the limits of its new safety history rule. The court briefly refers to cases involving design or construction of buildings or intersections, observing that the "evidentiary predicate" outlined will weigh heavily against admission of proof of absence of accidents in this context.[80] Although the court mentions it may be difficult to get such evidence admitted,[81] it does not indicate that admission is impossible.

Other jurisdictions permit evidence of nonoccurrences outside of the product liability context. Use of such evidence in the classic "slip and fall" case is especially prevalent,[82] but by no means exclusive.[83] New York,[84] Illinois,[85] Florida,[86] and Oregon[87] are examples of jurisdictions which allow use of good safety history evidence in cases not involving products liability claims. Will Arizona follow these jurisdictions? Arizona allows discretion-

77. *See* Raleigh v. Indep. School Dist. No. 625, 275 N.W.2d 572 (Minn. 1978); Baker v. Lane County, 37 Or. App. 87, 586 P.2d 114 (1978).

78. *See* Pippin v. Ranch House S., Inc., 366 A.2d 1180 (Del. 1976); Quigley v. School Dist. No. 45J3, 251 Or. 452, 446 P.2d 177 (1968).

79. *See* Nance v. Winn Dixie Stores, Inc., 436 So. 2d 1075 (Fla. App. 1983); Raleigh v. Indep. School Dist. No. 625, 275 N.W.2d 572 (Minn. 1978); Baker v. Lane County, 37 Or. App. 87, 586 P.2d 114 (1978).

80. *Pak-Mor*, slip op. at 14-15.

81. *Id.* at 14-15. *See also* Pippin v. Ranch House S., Inc., 366 A.2d 1180, 1183 (Del. 1976) (defendant rarely will be able to prove continuing personal knowledge about the condition of the place in question).

82. *See* Schuller v. Hy-Vee Food Stores, Inc., 328 N.W.2d 328 (Iowa 1982); McCarty v. Village of Nashwauk, 282 Minn. 262, 164 N.W.2d 380 (1969); Stein v. Trans World Airlines, 25 A.D.2d 732, 268 N.Y.S.2d 752 (1966).

83. *See* Wollaston v. Burlington Northern, Inc., 612 P.2d 1277 (Mont. 1980) (railroad crossing accident); Raleigh v. Indep. School Dist. No. 625, 275 N.W.2d 572 (Minn. 1978) (action against a school district and theater for a student's slashed wrist and stolen purse); Quigley v. School Dist. No. 45J3, 251 Or. 452, 446 P.2d 177 (1968) (action for injuries sustained when school gymnasium equipment was left partially installed and fell on a child); Baker v. Lane County, 37 Or. App. 87, 586 P.2d 114 (1978) (action for negligently protecting patrons at a county fair ground).

84. *See* Wozniak v. 110 S. Main St. Land and Dev. Improvement Corp., 61 A.D.2d 848, 402 N.Y.S.2d 69 (1978) (action for fall in parking lot due to faulty construction and negligent maintenance); Alexander v. Am. League Baseball Club of New York, 236 A.D. 715, 258 N.Y.S. 292, *motion denied*, 236 A.D. 783, 258 N.Y.S. 1028 (1932) (defendant found negligent for failure to provide adequate exits and police force to control large crowd).

85. *See* Gallick v. Novotney, 124 Ill. App. 3d 756, 464 N.E.2d 846 (1984) (absence of prior accidents admissible in slip and fall case); Darrough v. White Motor Co., 74 Ill. App. 3d 560, 393 N.E.2d 122 (1979) (negative safety history relevant in product liability action brought under strict liability and defective design claims).

86. *See* Nance v. Winn Dixie Stores, Inc., 436 So. 2d 1075 (Fla. App. 1983) (evidence of nonoccurrences admissible in negligence action against supermarket for patron's slip and fall); Warn Indus. v. Geist, 343 So. 2d 44 (Fla. Ct. App.), *cert. denied*, 353 So. 2d 680 (Fla. 1977) (absence of prior accidents admissible in product liability action).

87. *See* Reiger v. Toby Enter., 45 Or. App. 679, 609 P.2d 402 (1980) (negative safety history admissible as evidence in product liability case); Baker v. Lane County, 37 Or. App. 87, 586 P.2d 114 (1978) (evidence of lack of previous accidents admissible in premises liability action).

ary admission of prior accident proof in non-product liability cases.[88] Logically, given the *Pak-Mor* court's concern with maintaining consistency with the rules of evidence, it seems unlikely that the new *Pak-Mor* rule will be limited to product liability cases.

Conclusion

In *Jones v. Pak-Mor*, the Arizona Supreme Court considered the issue of admissibility of evidence of nonoccurrences. The *Pak-Mor* defendant wished to challenge the plaintiff's claim of defective design by introducing the good safety record of the product in question. The lower courts mechanically excluded the proffered proof, citing a per se rule against introduction of such evidence. The *Pak-Mor* court recognized the modern trend toward admitting good safety history evidence. It also noted evidence scholars' criticism regarding the lack of logic in permitting evidence of prior accidents at the courts' discretion while per se denying absence of accident proof. Taking the logical approach, the court examined safety history evidence under the Arizona Rules of Evidence.

The *Pak-Mor* court concluded that in a product liability case brought under a negligence or strict liability theory, all safety history evidence is admissible at the court's discretion, provided the appropriate foundation is established. The *Pak-Mor* court specified what might constitute the correct foundation. It also described the issues upon which safety history evidence is relevant. The court left unanswered, however, the inevitable question of whether the new rule will apply beyond a product liability limit. Given the Arizona court's concern for consistent treatment of evidence under the rules of evidence, it appears likely that defendants will be able to use safety history evidence whenever dangerous condition, notice, or foreseeability are in issue.

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88. *See* Burgbacher v. Mellor, 112 Ariz. 481, 543 P.2d 1110 (1975) (slip and fall on wet sidewalk); Slow Dev. Co. v. Coulter, 88 Ariz. 122, 353 P.2d 890 (1960) (slip and fall on wet cement).

VII. FAMILY LAW

A CHILD'S RIGHT TO INDEPENDENT COUNSEL IN ARIZONA DEPENDENCY PROCEEDINGS: AN ANALYSIS OF *IN RE THE APPEAL IN YAVAPAI COUNTY JUVENILE ACTION NO. J-8545*

Recently, in *In re the Appeal in Yavapai County Juvenile Action No. J-8545*,[1] the Arizona Supreme Court rendered a decision on a child's right to independent counsel in a dependency proceeding.[2] The supreme court held that although separate representation is not mandated in every case, independent counsel may be required to protect a child's interests in certain situations.[3]

In *Juvenile Action No. J-8545*, Gordon Grilz shot and killed his wife in the presence of his four-year-old son and one-year-old daughter. Pursuant to a petition filed by the Department of Economic Security, the judge declared the children dependent wards of the juvenile court.[4] At the placement hearing, both a paternal aunt and uncle and the maternal grandmother sought custody. The judge awarded temporary custody to the grandmother who resided in California.

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1. 140 Ariz. 10, 680 P.2d 146 (1984) [hereinafter cited as *Juvenile Action No. J-8545*].

2. Under Arizona law, a child is entitled to the basic necessities of life. If the parents fail to furnish these "necessaries," the state is authorized to intervene on the child's behalf by petitioning for dependency. *See In re* the Appeal in Cochise County Juvenile Action No. 5666-J, 133 Ariz. 157, 161, 650 P.2d 459, 463 (1982); *In re* the Appeal in Maricopa County Juvenile Action No. J-75482, 111 Ariz. 588, 590-91, 536 P.2d 197, 199-200 (1975). Dependency adjudication is governed by statute. The pertinent provisions are ARIZ. REV. STAT. ANN. §§ 8-201 to 8-246 (1974 & Supp. 1984-85).

A court will adjudicate a child dependent if certain statutory criteria are met. In Arizona, a dependent child is one who is either: (1) "in need of proper and effective parental care and control" and has no parent or guardian willing or capable of exercising such care and control; (2) destitute or not provided with the "necessities of life" or "whose home is unfit for him by reason of abuse, neglect, cruelty or depravity;" or (3) under the age of eight and has "committed an act that would result in adjudication as a delinquent or incorrigible child if committed by an older child." ARIZ. REV. STAT. ANN. § 8-201(11) (Supp. 1984-85).

Once the juvenile court determines the child is dependent, one of several specific awards of custody may be made. For example, the court may award custody to: the care of the parents, conditioned on state agency supervision; a suitable institution; a reputable citizen of good moral character; a public or private agency; a suitable school; or the child's relatives. ARIZ. REV. STAT. ANN. § 8-241(A)(1) (Supp. 1984-85).

For detailed analyses of the Arizona statutory dependency scheme see Note, *Dependency Adjudication in Arizona: Problems of Vagueness and Overbreadth*, 24 ARIZ. L. REV. 441, 443-48 (1982); Note, *Protecting Children from Parents Who Provide Insufficient Care—Temporary and Permanent Statutory Limits on Parental Custody*, 1980 ARIZ. ST. L. J. 953, 960-65.

3. 140 Ariz. at 16, 680 P.2d at 152. The facts and the lower court's disposition in *Juvenile Action No. J-8545* are set forth in 140 Ariz. at 12-13, 680 P.2d at 148-49.

4. Under Arizona law, parental rights may be terminated when a parent has been convicted of a felony which is of such a nature as to prove the parent is unfit to have future custody, or if imprisonment is of such length that the child will be deprived of a home for a number of years. ARIZ. REV. STAT. ANN. § 8-533(B)(4) (Supp. 1984-85).

The father, Gordon Grilz, was convicted of murder. The court sentenced Grilz to 21 years imprisonment for the murder of Kim Hopfinger and life imprisonment without parole until completion of 25 years for the murder of Linda Grilz. Respondent's Response to Petition for Special Action and Application for Interlocutory Stay of Proceedings (Draft) at 3, *Juvenile Action No. J-8545*. Under the Arizona statutory scheme, Grilz is unfit to regain future custody of his children. The court is statutorily authorized to terminate Grilz's parental rights.

Prior to the scheduled judicial review of placement, the paternal aunt and uncle filed a motion for a change in custody and moved the court to appoint independent counsel to represent the children. They claimed that, pursuant to Arizona Revised Statutes Annotated section 8-225,[5] the children had a statutory right to be represented by an attorney.[6] The judge denied the motion for separate representation.[7] On appeal, the aunt and uncle argued that failure to appoint an independent attorney constituted an abuse of the court's discretion and violated the children's right to due process.[8]

The Arizona Supreme Court found the juvenile court erred in failing to appoint counsel to represent the children.[9] The court, however, refused to order a rehearing without specific facts to indicate that the children's best interests would be served by reinstatement. The court held that a trial court is to appoint independent counsel where counsel would promote the child's best interests by serving an identifiable purpose *or* it is to state why such appointment is unnecessary.[10] The court reasoned that this standard is in accord with the state's statutory scheme and satisfies the requirements of due process.

RIGHT TO COUNSEL CONTROVERSY

The issue in *Juvenile Action No. J-8545* is whether a child has a right to an independent court-appointed attorney in addition to counsel employed to

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5. ARIZ. REV. STAT. ANN. § 8-225 (Supp. 1984-85). *See infra* notes 35, 37, and 38.

6. The children were not represented by independent counsel at any stage of the proceedings. Appellant's Statement of Grounds for Appeal and Memorandum of Authorities at 3, *Juvenile Action No. J-8545*. All interested parties were represented except the children. 140 Ariz. at 12, 680 P.2d at 148.

7. The court denied the motion for separate representation on the grounds that the "logistics of appointing counsel for the children who are located in California would be non-productive for the Foster Care Review Board Hearing and the Judicial Review Hearing." *Juvenile Action No. J-8545*, 140 Ariz. at 12, 680 P.2d at 148 (quoting the lower court's ruling).

At the hearing, the juvenile court granted a motion by the grandmother to institute guardianship proceedings in California. The court ordered termination of dependency upon successful completion of guardianship proceedings. The aunt and uncle appealed both the original order and the subsequent dismissal of dependency. *Id.* at 13, 680 P.2d at 149.

8. Appellant's Statement of Grounds for Appeal and Memorandum of Authorities at 1, *Juvenile Action No. J-8545*. The aunt and uncle argued on appeal that the denial of independent counsel violated the children's right to due process under the United States Constitution. *Id.* The due process clause of the United States Constitution provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

9. *Juvenile Action No. J-8545*, 140 Ariz. at 15, 680 P.2d at 151. Before the Arizona Supreme Court could reach the right to counsel issue, the court had to determine what constitutes a final and appealable order in a dependency proceeding. This was a question of first impression in the state.

The court held that an order disposing of an issue such that it conclusively defines the rights or duties of a party in a dependency proceeding is a final order subject to appeal by the aggrieved party. The court reasoned there is a fundamental right to raise one's children. Each periodic review of a dependency determination is a new determination affecting a fundamental right. As a result, orders declaring a child dependent or reaffirming such findings are final appealable orders. In the instant case, the order dismissing the dependency proceeding pending an award of custody affected a fundamental right and precluded further action by the aunt and uncle. It was, therefore, a final order subject to appeal. *Id.* at 13-15, 680 P.2d at 149-51.

10. *Id.* at 16, 680 P.2d at 152.

represent the state, the parents, or other interested parties.[11] The controversy centers on whether the contending parties can adequately represent the interests of the child.[12]

Courts and commentators opposing mandatory appointment of independent counsel contend that a child's interests are adequately represented by the court and the competing parties. They argue that generally the two major adversaries, the parent and the state, will introduce all relevant facts and viewpoints.[13] The parents represent the child's interests in continuing the parent-child relationship and being free from state intervention.[14] The state represents the child's interests in securing adequate care and freedom from harm.[15] The child's rights are further safeguarded by the court.[16] As a result, counsel for the child often plays only a marginal role in the proceedings.[17] To require independent counsel simply provides unnecessary co-counsel on one side.[18] Critics charge separate counsel may, in fact, hinder the proceedings without producing any significant benefits for the child.[19]

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11. No state prohibits the appearance of private counsel on the child's behalf. Note, *Appointment of Counsel for the Abused Child—Statutory Schemes and the New York Approach, New York State Assembly Select Committee on Child Abuse, Report (1972)*, 58 CORNELL L. REV. 177, 180 n.16 (1972). The issue in *Juvenile Action No. J-8545* is a child's right to a separate court-appointed attorney. Such counsel is responsible for advocating the child's position in the proceedings and owes no allegiance to any other party.

12. *See* Guggenheim, *The Right to be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 127 (1984).

13. Fisher, *Parents' Rights and Juvenile Court Jurisdiction: A Review of Before the Best Interests of the Child*, 1981 AM. B. FOUND. RESEARCH J. 835, 843. It should be noted that *Juvenile Action No. J-8545* differs from the general paradigm. The natural parents are not seeking custody of the children. The mother is deceased and the father is unfit to regain future custody. *See supra* note 4. The custody dispute in the dispositional proceeding is between two private prospective custodians.

14. In *In re Kapcsos*, 468 Pa. 50, 360 A.2d 174 (1976) (superceded by statute, *see In re* Adoption of N.A.G. & A.B.G., 471 A.2d 871, 874 (1984)), the Pennsylvania Supreme Court rejected an incarcerated father's claim that failure to appoint independent counsel for his children in a parental rights termination proceeding violated the children's constitutional rights. The court held that the children were not entitled to appointed counsel because the parties and the court adequately represented their interests. It was noted that the child's interests are advanced by the competing parties in the proceedings: the natural parents who wish to preserve the family unit and the state whose efforts are designed to provide adequate care for the child. Furthermore, the court also has a duty to protect and represent the child's interests. 468 Pa. at 58-59, 360 A.2d at 178.

15. Under the doctrine of *parens patriae*, the government has an interest in protecting the welfare of the child. "According to this parens patriae theory, which had its origins in 18th century English law, the Crown had the power to protect those subjects who were unable to protect themselves, such as mental incompetents and children." Note, *A Case of Neglect: Parens Patriae Versus Due Process in Child Neglect Proceedings*, 17 ARIZ. L. REV. 1055, 1058 (1975). For a more detailed account of the *parens patriae* theory see, Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L. J. 887, 898-99 (1975). *See also Juvenile Action No. 5666-J*, 133 Ariz. at 161, 650 P.2d at 463 (1982) (under Arizona law, the state is responsible for ensuring a child's health and welfare).

16. *See infra* note 58 and accompanying text.

17. Fisher, *supra* note 13, at 843. A recent study of the effects of guardians ad litem on protective proceedings in North Carolina provides support for this argument. The study concluded the presence of guardians had no overall effect on the proceedings. Kelly & Ramsey, *Do Attorneys for Children in Protection Proceedings Make a Difference?—A Study of the Impact of Representation Under Conditions of High Judicial Intervention*, 21 J. FAM. L. 405, 451 (1982-83). Given the highly interventionist character of the jurisdiction, the results of this study may not accurately reflect the impact independent counsel may have on proceedings in other jurisdictions.

18. *Kapcsos*, 468 Pa. at 59, 360 A.2d at 178.

19. Guggenheim, *supra* note 12, at 77, 154-55. Guggenheim asserts appointed counsel is not the "panacea" its proponents suggest. Problems arise when the child is too young to direct the

Advocates of independent counsel argue separate representation is required to protect the child's interests.[20] Commentators assert that once a child's placement becomes the subject of a dispute, independent counsel for the child is essential.[21] At that point, none of the participants have a conflict-free interest in the child's welfare. State policies and practices may directly conflict with the interests of the child. For example, a child care agency may need to safeguard a departmental policy that runs counter to the needs of the child.[22] The state, therefore, cannot be presumed to represent the interests of the child. Nor can it be presumed that the child's interests are represented by any or all of the individuals vying for custody. Each participant has private interests that may conflict with those of the child.[23] A number of courts acknowledge that in certain situations concern for the child's welfare may require the appointment of an independent attorney to represent the minor.[24] Counsel may be necessary to effectuate a child's right to be heard,[25] but such circumstances may not be known in advance of the proceedings.[26] Thus, the child's interests can best be protected by appointing counsel at the outset of each proceeding.

STATUTORY RIGHT TO INDEPENDENT COUNSEL

Statutory Schemes

A growing number of states statutorily provide for the separate representation of a child's interests.[27] There are three general statutory ap-

attorney. Frequently, the lawyer fails to present any additional information regarding the child's wants or needs. The court is only informed of the attorney's values. The result is an outcome heavily dependent on the personal views of the child's attorney. *Id.*

20. Courts and commentators recommend independent counsel for children in a number of situations: mental commitments, divorce litigation involving child custody, paternity suits, actions to compel medical treatment or education, protective proceedings, foster care decisions, and termination of parental rights proceedings. For an overview of the situations in which independent representation is advocated see Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565, 570-83 (1976).

21. J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 65-67 (1979). Goldstein, Freud, and Solnit contend that a child involved in any contested placement should be afforded the right to be represented by counsel. *Id.* at 65.

22. Genden, *supra* note 20, at 575-76. Genden suggests that an agency's position in a proceeding may be affected by factors other than the child's best interests. For example, the agency may be under pressure to reduce the financial costs associated with its foster care program. As a matter of policy, the agency may advocate adoption over foster care placement. In an effort to reduce costs, the agency may ignore other more preferable dispositions that would better serve the child's needs. *Id.*

23. GOLDSTEIN, FREUD, & SOLNIT, *supra* note 21, at 65-67. *See also* Sims v. State Dep't of Pub. Welfare, 438 F. Supp. 1179, 1194 (S.D. Tex. 1977), *rev'd on other grounds sub nom.* Moore v. Sims, 442 U.S. 415 (1979); *In re* Fish, 174 Mont. 201, 207-08, 569 P.2d 924, 928 (1977); *In re* T.M.H., 613 P.2d 468, 470 (Okla. 1980).

24. *See, e.g., In re* Fish, 174 Mont. 201, 207-08, 569 P.2d 924, 928 (1977); *In re* T.M.H., 613 P.2d 468, 470-71 (Okla. 1980); *In re* D, 24 Or. App. 601, 609-10, 547 P.2d 175, 181 (1976), *cert. denied*, 429 U.S. 907 (1976); *Kapcsos*, 468 Pa. at 59, 360 A.2d at 178.

25. *In re* Orlando F., 40 N.Y.S.2d 103, 112, 351 N.E.2d 711, 716 (1976).

26. Long, *When the Client is a Child: Dilemmas in the Lawyer's Role*, 21 J. FAM. L. 607, 629 (1982-83).

27. Recent reform movements in the area of protective proceedings evidence this growing trend toward provision of separate representation for children in designated actions. One commentator estimated that in a six-year period more than forty states revised their laws and court procedures to provide for the independent representation of children who are the subject of protective proceedings. Besharov, *Representing Abused and Neglected Children: When Protecting Children Means Seeking*

proaches.[28] Type one mandates independent counsel for children involved in designated proceedings such as abuse, neglect, or termination of parental rights hearings.[29] Type two follows the approach exemplified in the Uniform Juvenile Court Act[30] and the Model Rules for Juvenile Court.[31] Separate representation is required whenever a parent-child conflict is present or an attorney is necessary to protect the child's interests.[32] Courts have construed these statutes as establishing a per se requirement of independent representation in certain proceedings such as termination of parental rights cases.[33] Type three empowers the court to appoint counsel if a parent-child

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the Dismissal of Court Proceedings, 20 J. FAM. L. 217 (1981-82) (citing *Oversight Hearings on Title I—Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, Before the Subcommittee on Select Education of the House Committee on Education and Labor*, 96th Cong., 2d Sess. 198 (1980) (statement of Cesar A. Perales)).

Federal enactment of the Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101 to 5106 (1982), accelerated the movement to require independent counsel in protective proceedings. *See* Kelly & Ramsey, *supra* note 17, at 409. Regulations implementing the Act require states participating in federal funding to insure the appointment of a guardian ad litem or other individual to protect the child's best interests in abuse and neglect actions. 45 C.F.R. § 1340.14 (1984). A majority of states now provide court-appointed counsel to represent children in these proceedings. For a list of state statutes that provide for counsel in protective proceedings see Kelly & Ramsey, *supra* note 17, at 408 n.9.

28. For a detailed analysis of the various approaches discussed in this section, with specific emphasis on separate counsel in child abuse cases, see Note, *supra* note 11, at 179-84.

Some jurisdictions use a combination of statutory approaches. For example, California law mandates independent representation in abuse and neglect cases. CAL. WEL. & INST. CODE ANN. § 318(a) (West 1984). In other proceedings, the court must appoint separate counsel only if there is a conflict of interest between the parent and the child. *Id.* at § 634 (West 1984).

29. This approach is found in the Wyoming statute that provides: "The court *shall* appoint counsel to represent any child in a court proceeding in which the child is alleged to be abused or neglected." WYO. STAT. ANN. § 14-3-211 (1978) (emphasis added). *See also* CAL. WEL. & INST. CODE ANN. § 318(a) (West 1984) (abuse and neglect proceedings); IDAHO CODE ANN. § 16-1618(a) (Supp. 1984) (proceedings under the Child Protective Act); MD. CHANCERY CODE ANN. Art. 16, § 77B(a)(4) (Supp. 1983) (involuntary termination of parental rights proceedings); MISS. CODE ANN. § 93-15-107 (Supp. 1984) (actions to terminate parental rights); Washington County Dep't of Social Servs. v. Clark, 296 Md. 190, 199, 461 A.2d 1077, 1082 (Ct. App. 1983) (involuntary termination of parental rights proceedings); Luttrell v. Kneisly, 427 So.2d 1384, 1387-88 (Miss. 1983) (termination of parental rights actions); *In re* Child X, 617 P.2d 1078, 1079 (Wyo. 1980) (abuse and neglect proceedings).

30. The *Uniform Juvenile Court Act* states: "Counsel *must* be provided for a child not represented by his parent, guardian, or custodian. If the interests of 2 or more parties conflict separate counsel *shall* be provided for each of them." UNIF. JUVENILE COURT ACT § 26(a), 9A U.L.A. 35 (1968) (emphasis added).

31. The *Model Rules for Juvenile Courts* states: "The courts *shall* appoint counsel for the child if, in its opinion, the interests of the child and those of his parents conflict or if counsel is necessary to meet the requirements of a fair hearing." MODEL RULES FOR JUVENILE COURTS Rule 39 (Council of Judges of the National Council on Crime and Delinquency 1969) (emphasis added).

32. This approach is exemplified in the Alabama statute that provides: "The court *shall* also appoint counsel for the child in dependency cases where there is an *adverse interest* between parent and child." ALA. CODE ANN. § 12-15-63(b) (1977) (emphasis added). *See also* CAL. WEL. & INST. CODE ANN. § 634 (West 1984) (conflict of interest); N. D. CENT. CODE ANN. § 27-20-26(1) (1974) (conflict of interest); OKLA. STAT. ANN. tit. 10, § 1109(B) (West 1984) (to protect the interests of the child); PA. STAT. ANN. tit. 42, § 6337 (Purdon 1982) (conflict of interest); McBurrough v. Dep't of Human Resources, 150 Ga. App. 130, 131, 257 S.E.2d 35, 36 (Ct. App. 1979) (under the Georgia Juvenile Code, where the interest of the child is adverse to that of the parent, all parties including the child should be represented by an attorney); *In re* T.M.H., 613 P.2d 468, 469 (Okla. 1980).

33. The Oklahoma Supreme Court recently found that in all parental rights termination proceedings there is a potential for conflict between the interest of the child and the interests of both the state and the parents. The court held accordingly, that independent counsel must be appointed for the child in all termination proceedings under the statute requiring mandatory representation when necessary to protect the child's interest. *In re* T.M.H., 613 P.2d at 470-71.

conflict exists or a child's interests would otherwise be unrepresented.[34] These statutes leave appointment of counsel to the court's discretion.

Arizona's Statutory Approach

In *Juvenile Action No. J-8545*, the proponents of separate representation claimed the children had a statutory right to independent counsel. The Arizona statute governing a child's right to counsel combines the type two and type three approaches and therefore is subject to several interpretations.

Arizona Revised Statutes Annotated section 8-225 states that a child has a right to be represented in all proceedings conducted pursuant to Title 8 of the Juvenile Code.[35] Title 8 governs adoption, delinquency, dependency, and dispositional proceedings.[36] Section 8-225 then provides that if the child, parent, or guardian is found to be indigent, the court is required to appoint an attorney to represent such persons unless the right to counsel is waived.[37] The judge may appoint a separate attorney for the child in addition to the attorney provided for the parent or guardian.[38] The judge's power to appoint a separate attorney, however, is discretionary and conditioned on the appearance of a conflict of interest between the child and the parent or guardian.[39]

Juvenile Action No. J-8545 raised two questions of statutory construction. First, what constitutes representation of a child's interest? Second, what constitutes a conflict of interest sufficient to warrant separate representation?

Prior to *Juvenile Action No. J-8545, Klahr v. Court of Appeals*[40] was the only case to consider the separate representation provision of section 8-225.[41] In *Klahr*, although the judge appointed independent counsel for the minor in the dependency hearing, the court did not appoint an attorney for the child in the subsequent appeal. On finding the child's interests were

34. This approach is found in the District of Columbia statute that provides: "In any proceeding wherein the custody of a child is in question, the court *may* appoint a disinterested attorney to appear on behalf of the child and represent his best interests." D. C. CODE ANN. § 16-918(b) (1981) (emphasis added). *See, e.g.*, ALASKA STAT. ANN. § 47.10.050(a) (1984) (whenever it appears the welfare of a minor will be promoted); COLO. REV. STAT. ANN. § 19-1-106(e) (Supp. 1984) (when necessary to protect the interest of the child); DEL. CODE ANN. tit. 13, § 721(c) (1981) (when in the interests of the child); MONT. CODE ANN. § 40-4-205 (1983) (at the court's discretion).

35. ARIZ. REV. STAT. ANN. § 8-225(A) (Supp. 1984-85) provides: "In all proceedings conducted pursuant to [Title 8, Juvenile Code] and the Rules of Procedure for the Juvenile Court, a child has the right to be represented by counsel."

36. *See* ARIZ. REV. STAT. ANN. §§ 8-101 to 8-601 (1974 & Supp. 1984-85).

37. ARIZ. REV. STAT. ANN. § 8-225(B) (Supp. 1984-85) provides: "If a child, parent or guardian is found to be indigent, the juvenile court *shall* appoint *an* attorney to represent such *person* or *persons* unless counsel for the child is waived by both the child and the parent or guardian." (emphasis added).

38. ARIZ. REV. STAT. ANN. § 8-225(E) (Supp. 1984-85) provides in part:

> If there appears to be a *conflict of interest* between a child and his parent or guardian including a conflict of interest arising from payment of the fee for appointed counsel . . . the juvenile court *may appoint an attorney for the child in addition to that appointed for the parent or guardian* or employed by the parent or guardian.

(emphasis added).

39. *Id.*

40. 134 Ariz. 67, 654 P.2d 1 (1982).

41. *Juvenile Action No. J-8545*, 140 Ariz. at 15, 680 P.2d at 151.

unrepresented, the Arizona Supreme Court ruled that the child had a right to appointed counsel in all actions ancillary to the juvenile proceeding. The court ordered the appeal halted until the minor had an opportunity to respond through counsel.[42]

The proponents of separate representation in *Juvenile Action No. J-8545* argued that under *Klahr*, juvenile matters may not proceed without independent representation of the child's interests.[43] The Arizona Supreme Court refused to construe section 8-225 to require independent counsel for children in every case. The court limited *Klahr* to its facts, stating that the juvenile in *Klahr* was entitled to independent counsel because her individual interests had not been represented.[44] Thus, the court suggests that in some cases a child's interests may be adequately represented by the other parties involved in the proceeding. The supreme court, however, went on to find that the juvenile court erred in failing to appoint counsel for the children in *Juvenile Action No. J-8545* because the contesting parties could not fully represent the children's interests.[45]

The Arizona Supreme Court noted that section 8-225 was designed to ensure the appointment of independent counsel where conflicts of interest exist such that a child's best interests[46] are not fully explored, advocated, or included in the record.[47] The court observed that an attorney representing prospective custodians could not simultaneously represent the best interests of the child. For example, if an attorney discovers deficiencies in the home of the client, it would be in the child's best interests to bring these deficiencies to the attention of the court. By advancing the child's interests, however, counsel would violate the ethical duty of zealous representation. Given this potential for conflict, the court concluded independent counsel should

42. *Klahr*, 134 Ariz. at 67-69, 654 P.2d at 1-3.

43. Appellant's Statement of Grounds for Appeal and Memorandum of Authorities at 12-13, *Juvenile Action No. J-8545*.

44. *Juvenile Action No. J-8545*, 140 Ariz. at 15, 680 P.2d at 151.

45. *Id.* at 16, 680 P.2d at 152.

46. Judge Cardozo is credited with articulating the "best interests of the child" doctrine. In Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (Ct. App. 1925), he wrote, "[the chancellor] acts as parens patriae to do what is best for the interest of the child." *Id.* at 433, 148 N.E. at 626. One commentator observed that almost every child custody case contains language stating custody must be awarded so as to promote the child's best interests. Such broad statements, however, are too general to be helpful. H. CLARK, LAW OF DOMESTIC RELATIONS 572, 572 n. 2 (1968). Commentators, such as Mnookin, note that any determination of what is "best" for each child is generally indeterminate and speculative. There is a lack of consensus about the values to be used in determining what is in the best interest of the child. This problem is compounded by the fact that, in most cases, it is impossible to predict the effects of alternative custody dispositions. As a result, the court is given little guidance and a great deal of discretion in awarding custody. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROB. 226, 229-30 (1975).

Arizona is among the states employing the "best interest" test. *See, e.g.*, Clifford v. Woodford, 83 Ariz. 257, 262, 320 P.2d 452, 455 (1957) (the primary consideration is the "best interest and welfare of the child"); *In re* Marriage of Gove, 117 Ariz. 324, 328, 572 P.2d 458, 462 (Ct. App. 1977) ("In a custody case the primary duty of the court is to safeguard the best interests and welfare of the children."). In a number of jurisdictions, including Arizona, the doctrine has been codified and specific factors for consideration enumerated. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-332(A) (Supp. 1984-85). For a more detailed analysis of the "best interest" test, see Mnookin, *supra*; Shepherd, *Solomon's Sword: Adjudication of Child Custody Questions*, 8 U. RICH. L. REV. 151, 171-76 (1974).

47. *Juvenile Action No. J-8545*, 140 Ariz. at 16, 680 P.2d at 152.

be appointed to protect the child's interests.[48]

CONSTITUTIONAL RIGHT TO INDEPENDENT COUNSEL

Due Process Considerations

The proponents of separate representation in *Juvenile Action No. J-8545* claimed the court's failure to appoint independent counsel violated the children's right to due process[49] and thereby constituted an abuse of the court's discretion.[50] Due process requires that state proceedings be fundamentally fair.[51] What process is due varies with the character of the interests and the nature of the proceeding.[52]

At common law there was some doubt as to whether children possessed rights independent of their parents,[53] but it is now well established that children are afforded a number of protections under both federal and state constitutions.[54] Under Arizona law, a child is entitled to the basic necessities of life.[55] The Arizona Supreme Court acknowledges that the "bundle of rights" a child possesses does not lend itself to a comprehensive listing.[56] These rights, nonetheless, are said to include "the right to good physical care, adequate food, shelter and clothing, the right to emotional security, the right to be free from injury and neglect and the right to be with his natural parents and siblings."[57]

In proceedings involving the custody of children, the court's stated ob-

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48. This analysis appears to support the proposition that independent counsel is required in all contested custody cases. Child custody litigation arises in a number of contexts. Custody issues develop in conjunction with proceedings involving divorce, guardianship, abuse, neglect, and abandonment. *See* H. CLARK, LAW OF DOMESTIC RELATIONS 572-83 (1968). The court is, however, free to limit its findings specifically to dependency proceedings or to the case at bar. *See infra* note 85.

The unusual factual situation may also limit the case's precedential value. In most custody disputes, a natural parent is a party to the action and actively seeking custody. But in *Juvenile Action No. J-8545* neither parent sought custody. Two private prospective custodians sought custody at the dispositional proceeding. *See supra* note 4. The court could draw upon this factual distinction to limit the holding to cases where no natural parent is seeking custody.

49. *See supra* note 8.

50. Appellant's Statement of Grounds for Appeal and Memorandum of Authorities at 1, *Juvenile Action No. J-8545*.

51. Lassiter v. Dep't of Social Servs., 452 U.S. 18 (1981). In *Lassiter*, Justice Stewart remarked that "[f]or all its consequence, 'due process' has never been, and perhaps can never be, precisely defined." *Id.* at 24. Due process has been labeled an "elusive concept." Its content is said to vary according to the particular factual circumstances. Hannah v. Larche, 363 U.S. 420, 442 (1960).

52. This general proposition was stated by the Supreme Court in Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961): "[W]hat procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Id.* at 895.

53. *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1358 (1980).

54. *Id.* The constitutional guarantees of freedom of expression, equal protection and procedural due process generally apply equally to adults and children. *Id.* at 1358-76.

55. *In re* Appeal in Cochise County Juvenile Action No. 5666-J, 133 Ariz. 157, 160-61, 650 P.2d 459, 462-63 (1982).

56. *Id.* at 161, 650 P.2d at 463 (1982).

57. Hernandez v. State *ex rel.* Arizona Dep't of Economic Sec., 23 Ariz. App. 32, 35, 530 P.2d 389, 392 (1975).

jective is to promote the best interests of the child.[58] Advocates of separate representation contend that decisions concerning custody affect a child's rights.[59] Fundamental fairness therefore requires that the child's interests be protected.[60] Failure to appoint independent counsel denies the child effective participation in the decision and deprives the juvenile of due process.[61]

Arizona's Approach: Case-by-Case Analysis

In *Juvenile Action No. J-8545* the Arizona Supreme Court rejected the argument that due process requires independent counsel for children in every case.[62] Drawing on the analysis of other jurisdictions,[63] the court noted that in many cases separate representation would fail to promote the interests of the child and would unnecessarily complicate the procedure. The court reasoned that due process is not enhanced unless independent counsel would serve an "identifiable purpose."[64] In cases where custody is in serious dispute, the court indicated that circumstances may require the appointment of independent counsel if the child's interests are unrepresented.[65]

The Arizona Supreme Court adopted a flexible case-by-case approach

58. *Juvenile Action No. 5666-J*, 133 Ariz. at 161, 650 P.2d at 463 (1982). See *supra* note 46 for a discussion of the origin and problems associated with a best interest of the child standard.

59. *See In re* T.M.H., 613 P.2d 468, 470 (Okla. 1980).

60. *See* Genden, *supra* note 20, at 582.

61. *See* Appellant's Statement of Grounds for Appeal and Memorandum of Authorities at 8-13, *Juvenile Action No. J-8545*.

62. *Juvenile Action No. J-8545*, 140 Ariz. at 16, 680 P.2d at 152. The court's analysis of the due process issue is discussed at 140 Ariz. at 15-16, 680 P.2d at 151-52.

63. The court cited decisions of the Montana and Oregon courts in support of its position: *In re* Guardianship of Gullette, 173 Mont. 132, 138-41, 566 P.2d 396, 399-400 (1977); *In re* D, 24 Or. App. 601, 606-11, 547 P.2d 175, 179-82 (Ct. App. 1976), *cert. denied*, 429 U.S. 907 (1976).

In re D involved a father who was convicted of killing his child's mother. While the father was in prison, his parental rights were terminated and adoption proceedings were instituted by the grandparents. The father appealed the termination and adoption decree alleging the trial court erred in failing to appoint independent counsel for his one-year-old son. The Oregon Court of Appeals modified a previous ruling which mandated independent counsel in every case where a minor was involved. Instead, the court adopted a flexible approach which permits the trial court, on a case-by-case basis, to determine whether separate counsel is required. 24 Or. App. at 610, 547 P.2d at 181. The court found independent counsel would not have made a significant contribution in the case at bar. The lower court's decision was affirmed. *Id.* at 616, 547 P.2d at 184.

A contested guardianship proceeding formed the basis of the appeal in *Gullette*. The maternal grandmother appealed an order granting guardianship to a maternal aunt and uncle. The grandmother charged the trial court abused its discretion when it failed to appoint counsel to represent the child's interest. The Montana Supreme Court, drawing on the rationale in *In re* D, held "where custody is in serious dispute, the court shall appoint independent counsel for the child or make a finding stating the reasons that such appointment was unnecessary." 173 Mont. at 140, 566 P.2d at 400. A new hearing, consistent with the opinion, was ordered. *Id.* at 141, 566 P.2d at 400.

64. The term "identifiable purpose" was drawn from the Oregon Court of Appeals opinion of *In re* D. The Oregon court provided only two examples of such purposes: (1) serving as an advocate for the child, and (2) ensuring a complete and accurate record. 24 Or. App. at 609-11, 547 P.2d at 180-82. The Montana Supreme Court in *In re* Inquiry into J.J.S., 176 Mont. 202, 577 P.2d 378 (1978), impliedly limited the provision of counsel to the two situations enumerated in *In re* D, 176 Mont. at 205-06, 577 P.2d at 381. The Arizona Supreme Court, in discussing the disposition of *Juvenile Action No. J-8545*, alluded to other and more specific "identifiable purposes" such as providing additional reasons why each prospective custodian should be granted custody and exploring alternative placement. *See infra* text following note 75.

65. The Arizona Supreme Court cited the Montana Supreme Court opinion of *Gullette*, 173 Mont. at 140, 566 P.2d at 400. *See supra* note 63 for a discussion of the *Gullette* case.

that permits the trial court to determine whether independent counsel is required. The supreme court held that the trial court is to appoint independent counsel if such counsel would promote the child's best interests by serving an identifiable purpose.[66] Such purposes include advocating the child's position or guaranteeing the record is complete and accurate. Appointment may be made on the court's own motion or at the request of an interested party. If the trial court does not appoint independent counsel, it is to state why such counsel is unnecessary.[67] The court reasoned this standard would ensure due process by requiring the appointment of a separate attorney whenever the child's interests would be promoted. Even though there is potential for increased access to independent counsel,[68] a number of factors may lessen the impact of this case.

AN EVALUATION OF *JUVENILE ACTION NO. J-8545*

The standard proposed in *Juvenile Action No. J-8545* presents three potential problems. First, the supreme court did not clearly define the identifiable purposes that trigger the separate counsel requirement. Second, the trial judge's authority to deny independent counsel may limit the number of court appointments and serve to deny a child legal representation. Finally, the standard suffers from problems inherent in all flexible case-by-case approaches, such as unpredictability and inconsistent application.

The trial judge's decision to appoint independent counsel is determined by the definition of an "identifiable purpose."[69] The Arizona Supreme Court suggests two identifiable purposes.[70] The first is to advocate the child's position in the dispute. The second is to ensure the record is complete and accurate. In discussing the disposition of *Juvenile Action No. J-8545*, the

66. *Juvenile Action No. J-8545*, 140 Ariz. at 16, 680 P.2d at 152.

67. The Arizona Supreme Court held:

> *[T]he trial court shall appoint independent counsel,* upon request of an interested party or sua sponte, *where such counsel would contribute to promoting the child's best interest by serving an identifiable purpose* such as advocating the child's position in the dispute or ensuring that the record be as complete and accurate as possible, *or it shall state why such appointment is unnecessary.*

Id. (emphasis added) (original emphasis edited). The holding may be viewed as consisting of two parts: (1) the directive that the trial court *shall* appoint independent counsel when certain factors are present (Note the similarity to the "type two" statutory approach discussed *supra* notes 30-33 and accompanying text.); (2) the phrase "or it shall state why such appointment is unnecessary." One issue is the purpose served by this final clause. The phrase may be a directive: (a) designed to impose an affirmative duty on the court to consider appointment; and (b) to force the court to clearly enunciate the factors considered, thereby facilitating review on appeal. These purposes would tend to promote the appointment of separate counsel. The phrase may, however, be a qualification: (a) acknowledging the court's discretionary authority to deny counsel; and (b) simply requiring a statement of reasonable grounds to demonstrate denial was not an abuse of the court's discretion. This interpretation would lessen the impact of the holding. Given the supreme court's disposition in *Juvenile Action No. J-8545*, it appears the trial court's discretionary authority will be upheld absent specific facts to indicate abuse. See *infra* text following note 75 for an analysis of the supreme court's disposition of *Juvenile Action No. J-8545*.

68. The holding and analytical approach advanced in *Juvenile Action No. J-8545* appears applicable to a wide variety of cases involving the interests of minors. For a discussion of the scope of this case see *infra* text accompanying notes 79-85.

69. *See Juvenile Action No. J-8545*, 140 Ariz. at 16, 680 P.2d at 152. *See also supra* note 64 and accompanying text.

70. 140 Ariz. at 16, 680 P.2d at 152.

court alluded to other more specific identifiable purposes, such as providing additional reasons why each prospective custodian should be granted custody and exploring alternative placement.[71] Given these examples, it is conceivable that independent counsel could be required in every case. The appointment of counsel, however, is dependent on the judge's interpretation of this standard.[72] The judge may find that only rarely will a child's interests not be advanced by the court, the state, or the parties involved.[73] The vague standard makes appointment dependent upon the viewpoint of the individual applying the test. The result is an inability to predict whether counsel will be required. It is argued that due process can best be assured by procedural methods that guarantee predictability and uniformity.[74] Therefore, a case-by-case approach does not provide sufficient safeguards. As a result, children may be denied adequate representation.

The disposition in *Juvenile Action No. J-8545* illustrates the problems inherent in the proposed standard. The Arizona Supreme Court found the juvenile court erred in failing to appoint independent counsel for the children. Reinstatement of the proceeding, however, was denied.[75] The court acknowledged that even though the children were too immature to have formed a position, their interests could have been advanced by independent counsel. Counsel could have guaranteed a more complete court record, provided additional reasons why each prospective custodian should be granted custody, explored alternative placement, and ensured that the claims of the contesting parties were accurate. The court recognized that had independent counsel been appointed, the grandmother may have been denied custody, but dismissed this possibility as nothing more than conjecture. Without spe-

71. *Id. See infra* text following note 75.

72. ARIZ. REV. STAT. ANN. § 8-225(E) authorizes the court to appoint separate counsel if there appears to be a conflict of interest between the child and his parent or guardian. The statute does not mandate the appointment of independent counsel. *See* ARIZ. REV. STAT. ANN. § 8-225(E) (Supp. 1984-85), *supra* note 38. The standard proposed in *Juvenile Action No. J-8545* also acknowledges the lower court's discretionary authority. The Arizona Supreme Court held "the trial court shall appoint independent counsel . . . or it shall state why such appointment is unnecessary." *Juvenile Action No. J-8545*, 140 Ariz. at 16, 680 P.2d at 152.

73. A lower court's discretionary ability to deny independent counsel remains unaddressed. In both *Klahr* and *Juvenile Action No. J-8545*, the Arizona Supreme Court found the courts erred in failing to appoint a separate attorney for the children involved, but neither case discussed the scope of the court's discretion. Both appeared to assume if a child's interests were unrepresented, independent counsel should be appointed. The limits of the trial court's discretionary authority is yet to be clearly defined. *See Juvenile Action No. J-8545*, 140 Ariz. at 15-16, 680 P.2d at 151-52; *Klahr*, 134 Ariz. at 67-69, 654 P.2d at 1-3.

74. The arguments against a case-by-case approach are persuasively presented in Justice Blackmun's dissent in Lassiter v. Dep't of Social Servs., 452 U.S. 18, 50-52 (1981) (Blackmun, J., dissenting). Justice Blackmun notes that the case-by-case method implicitly assumes retroactive review can determine whether the proceeding was fundamentally fair. The transcript, however, only shows the most "obvious blunders and omissions." Determining whether counsel would have made a difference is dependent on "imagination, investigation, and legal research focused on the particular case." Assuming the appellate courts have the time and resources to sufficiently review such cases, it is difficult, if not impossible, to conclude whether the typical case has been adequately presented. *Id.*

Justice Blackmun observes that the reinstitution of the case-by-case method is simply a revival of the ad hoc approach rejected by the Court more than 20 years ago in Gideon v. Wainwright. 452 U.S. at 35-36. Fundamental fairness can best be assured by a process that guarantees predictability and uniformity in every case. The case-by-case approach is not an adequate safeguard against "unpredictable and unchecked adverse governmental action." 452 U.S. at 50.

75. *Juvenile Action No. J-8545*, 140 Ariz. at 17, 680 P.2d at 153. The court's disposition and rationale for disposition is set forth at 140 Ariz. at 17-18, 680 P.2d at 153-54.

cific facts to support such speculation, the court declined to order a rehearing.

The Arizona Supreme Court refused to reinstate the proceedings for three reasons. First, since the lower court authorized the California guardianship proceedings, the supreme court stated it was reluctant to interfere without a sound reason. Second, counsel presented no facts to indicate the best interests of the children would be served by reinstatement. Third, the court's finding did not foreclose the petitioners from gaining custody. They could actively oppose the guardianship proceedings in California. The court did not indicate the relative importance of each of these factors. It is, therefore, unclear to what extend the decision was influenced by the availability of another forum.

Due process provides a minimal standard to ensure that judicial proceedings are fundamentally fair, but public policy may require that citizens be afforded greater protections.[76] Even if the guidelines proposed in *Juvenile Action No. J-8545* comport with the requirements of due process, public policy may dictate the adoption of greater procedural protections.[77] To ensure protection of a child's interests, several jurisdictions have statutorily mandated court-appointed counsel for children in designated proceedings.[78] The Arizona legislature should consider following the lead of these jurisdictions, thereby eliminating the problems inherent in the standard set forth in *Juvenile Action No. J-8545.*

SCOPE OF THE DECISION

Juvenile Action No. J-8545 involved a determination of dependency and a concomitant award of custody.[79] The opinion contains several indications that the holding is not limited to dependency proceedings or the case at bar.

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76. In a United States Supreme Court opinion denying an indigent mother court-appointed counsel in a termination of parental rights proceeding, Justice Stewart noted: "In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution." Lassiter v. Dep't of Social Servs., 452 U.S. 18, 33 (1981).

77. As one commentator noted, the more complex the proceeding, the greater the need for separate representation. Because it is difficult, if not impossible, to predict the complexity of a proceeding before it is conducted, fundamental fairness can best be assured by appointing counsel to represent the child at the outset of the proceeding. Long, *supra* note 26.

78. For a discussion of the growing trend to legislatively provide separate representation for children in designated actions see *supra* note 27. For a sample statute and references to other similar statutory enactments see *supra* note 29 and accompanying text.

The belief that a child is entitled to have his or her interests represented, whenever legal custody is at issue, has gained increasing recognition in recent years. There is a significant amount of authority supporting the proposition that there is a need for separate representation. *See generally* J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *supra* note 21 at 65-67; Inker & Perretta, *A Child's Right to Counsel in Custody Cases,* 5 FAM. L.Q. 108, 113 (1971); Johnson, *A Commentary on Independent Representation,* 33 JUV. & FAM. CT. J. 45 (Feb. 1982); Note, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings,* 27 HASTINGS L.J. 917 (1976); Note, *A Case for Independent Counsel to Represent Children in Custody Proceedings,* 7 NEW ENG. L. REV. 351 (1972); Comment, *A Child's Right to Independent Counsel in Custody Proceedings: Providing Effective "Best Interests" Determination Through the Use of a Legal Advocate,* 6 SETON HALL L. REV. 303 (1975); Note, *Due Process for Children: A Right to Counsel in Custody Proceedings,* 4 N.Y.U. REV. L. & SOC. CHANGE 177 (1974).

79. *Juvenile Action No. J-8545,* 140 Ariz. at 14, 680 P.2d at 150.

For example, the Arizona Supreme Court based its holding, in part, on Arizona Revised Statutes Annotated section 8-225.[80] Section 8-225 governs a child's right to counsel in all Title 8 proceedings.[81] Title 8 of the Juvenile Code controls adoption, abuse, neglect, abandonment, termination of parental rights, and dispositional proceedings.[82] The court's statutory references suggest the guidelines proposed are applicable to all Title 8 proceedings. Furthermore, the supreme court broadly framed the issue as "when due process requires that independent counsel be appointed."[83] The court stated that the label placed on a proceeding does not necessarily control what procedural rights should be accorded.[84] Thus, the court indicated that the guidelines proposed may be relevant to other cases where a child's interests may be adversely affected. The court, however, is free to limit its findings specifically to dependency proceedings or the case at bar.[85]

CONCLUSION

In *Juvenile Action No. J-8545*, the Arizona Supreme Court determined that neither the Arizona statute nor due process requires independent counsel for children in every case. The court, however, found that Arizona Revised Statutes Annotated section 8-225 requires separate counsel whenever a child's interests are not adequately represented by the parties involved. The supreme court held that the trial court is to appoint independent counsel where such counsel would promote the child's best interests by serving an identifiable purpose *or* the court is to state why such appointment is unnecessary. The court reasoned that this standard is in accord with the state's statutory scheme and satisfies the requirements of due process.

Even though there is potential for increased access to separate counsel, a number of factors may limit the availability of court-appointed attorneys for children. To ensure representation of a child's interests in all proceedings, Arizona should follow the lead of those jurisdictions that statutorily mandate independent counsel.

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80. *See supra* notes 43-48 and accompanying text.

81. ARIZ. REV. STAT. ANN. § 8-225(A) (Supp. 1984-85); *see supra* note 35.

82. *See* ARIZ. REV. STAT. ANN. §§ 8-101 to 8-601 (1974 & Supp. 1984-85).

83. 140 Ariz. at 15, 680 P.2d at 151.

84. In discussing what constitutes a final and appealable order, the court stated that whether the determination of dependency and the award of custody are considered two separate actions or two parts of a single action is unimportant. The court indicated that it will not spend time on "technical distinctions." What is important is "practical reality" and how the order affects a party's fundamental rights. 140 Ariz. at 14-15, 680 P.2d at 150-51.

85. *See* 140 Ariz. at 16, 680 P.2d at 152. For example, the conflict of interest issue was analyzed in the context of "whether independent counsel should have been appointed in the instant case." *Id.* The court thereby impliedly limited the analysis to dependency proceedings and the case at bar. However, the supreme court never explicitly limited the general holding of the case.

VIII. TAX

A. WISTUBER V. PARADISE VALLEY UNIFIED SCHOOL DISTRICT: ARIZONA ADOPTS AN "EQUITABLE AND REASONABLE CONSIDERATION" TEST TO IDENTIFY GIFTS OF PUBLIC FUNDS TO PRIVATE ENTITIES

United States citizens commonly understand that their tax dollars will be spent for public, not private, purposes. In 1920, the United States Supreme Court held that "the authority of the states to tax does not include the right to impose taxes for merely private purposes."[1] Most states have constitutional provisions which forbid the expenditure of public funds for private purposes.[2] In Arizona, article IX, section 7 of the state constitution prohibits the state and its political subdivisions from making any donations or subsidies to private entities.[3] Although the intent of the provision may seem clear, application of the provision to individual sets of facts requires that a standard be used to determine whether a gift has been made to a private entity. The opportunity for the Arizona Supreme Court to set such a standard arose when the Paradise Valley Unified School District entered into a collective bargaining agreement with the local Classroom Teachers Association.[4] Proposal 98 of that agreement allowed the Association's president to be released from teaching duties in order to perform other specified duties,[5] while the District continued to pay a portion of the president's salary. A group of taxpayers brought suit to declare Proposal 98 invalid for violating article IX, section 7 of the Arizona Constitution. The trial court found for the district, and the plaintiffs appealed. The Arizona Supreme Court took jurisdiction over the case upon a motion to transfer and upheld the trial court's ruling. In *Wistuber v. Paradise Valley Unified School District*,[6] the supreme court adopted the standard set by an appellate court in *City of Tempe v. Pilot Properties Inc.*:[7] if public funds are to be given to a private entity, they may only be given in exchange for a consideration which is not "so inequitable and unreasonable that it amounts to an abuse of discretion."[8]

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1. Green v. Frazier, 253 U.S. 233, 238 (1920). The Court held this to be required by the due process clause of the fourteenth amendment to the United States Constitution.

2. Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. PA. L. REV. 265, 286 (1963); *See* Thaanum v. Bynum Irrigation Dist., 72 Mont. 221, 237, 232 P. 528, 530 (1925).

3. Article IX, section 7 provides:

> Neither the State, nor any county, city, town, municipality, or other subdivision of the State shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the State by operation or provision of law.

ARIZ. CONST. art. IX, § 7.

4. Wistuber v. Paradise Valley Unified School Dist., 141 Ariz. 346, 687 P.2d 354 (1984). The facts of *Wistuber* are set forth 141 Ariz. at 347-48, 687 P.2d at 355-56.

5. *See infra* note 22.

6. 141 Ariz. 346, 687 P.2d 354 (1984).

7. 22 Ariz. App. 356, 527 P.2d 515 (1974).

8. *Id.* at 363, 527 P.2d at 522 (quoting City of Phoenix v. Landrum & Mills Realty Co., 71 Ariz. 382, 388, 227 P.2d 1011, 1014 (1951)). For further discussion of the appellate court's adoption

This Casenote explains the purpose of article IX, section 7 of the Arizona Constitution, and then examines the standard that the *Wistuber* court adopted for determining when the constitutional provision has been violated. Also, recent situations in which an article IX, section 7 violation has been alleged are discussed.

Arizona's Constitutional Prohibition Against Donations of Public Funds to Private Entities

The history of article IX, section 7 of the Arizona Constitution makes clear the purpose of the provision. At its constitutional convention in 1910, Arizona adopted article IX, section 7 directly from the Montana Constitution.[9] Montana had adopted the provision because of exorbitant governmental spending during the 1800s to promote railroad and other industrial growth.[10] The loss of large amounts of public funds, compounded by the fact that such expenditures often yielded no public benefit because projects were frequently left uncompleted, led states to enact constitutional provisions designed to end these gifts of public monies to private organizations.[11]

The primary purpose of article IX, section 7, according to the Arizona Supreme Court, is to avoid the spending of public funds for non-public enterprise.[12] Non-public enterprise, however, may well serve a public purpose.[13] The Arizona Supreme Court has held that if an expenditure is for a public purpose, the fact that some private party may benefit thereby does not automatically invalidate the expenditure.[14] Often an expenditure benefits both a private entity and the public. Therefore, it is necessary to set a standard to determine when an allocation of state funds to a private interest becomes a gift in violation of the constitution.

Arizona courts did not have one standard by which to determine when an outlay of public funds to a private organization violated article IX, section 7 prior to *Wistuber*. In *Heiner v. City of Mesa*,[15] the court of appeals upheld a donation of 10.9 acres of land to a private hospital. The court held that the public benefit provided by the existence of a new hospital consti-

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of what was termed the "abuse of discretion" test in *Pilot Properties see* Note, *Arizona's Constitutional Prohibition Against Municipal Subsidizing of Private Interests: The Public Purpose Doctrine Rejected*, 17 ARIZ. L. REV. 860 (1975).

9. State v. Northwestern Mut. Ins. Co., 86 Ariz. 50, 340 P.2d 200 (1959). The Arizona provision was taken from the Montana Constitution, Art. 13, § 1. *See also* Substitute Proposition No. 106, introduced by Homer C. Wood at the Constitutional Convention, Nov. 16, 1910, on file in the Arizona State Library.

10. Thaanum v. Bynum Irrigation District, 72 Mont. at 222, 232 P. at 530 (1925). States and towns subsidized railway construction projects so that railroads could reach isolated populations. Pinsky, *supra* note 2, at 277.

11. *See* Pinsky, *supra* note 2, at 277-82; *see generally* D. SECREST, AN ECONOMIC ANALYSIS OF THE CONSTITUTIONAL RESTRICTIONS UPON PUBLIC EXPENDITURES IN THE UNITED STATES 13-44, 54-83 (1914); R. WRIGHT, ECONOMIC HISTORY OF THE UNITED STATES 280-86 (1949).

12. Town of Gila Bend v. Walled Lake Door Co., 107 Ariz. 545, 549, 490 P.2d 551, 555 (1971) (*quoting* State v. Northwestern Mut. Ins. Co., 86 Ariz. 50, 53, 340 P.2d 200, 201 (1959)).

13. The public purpose doctrine is an exception to the constitutional prohibition against public funds going to private enterprise. If the private enterprise provides a public service such as water supply or fire prevention, the exception may apply. For a complete discussion of the public purpose doctrine, see Note, *supra* note 8.

14. Industrial Dev. Auth. of Pinal County v. Nelson, 109 Ariz. 368, 509 P.2d 705 (1973).

15. 21 Ariz. App. 58, 515 P.2d 355 (1973).

tuted valid consideration for the land.[16] The *Heiner* court found the consideration to be valid without setting a standard by which other expenditures could be judged. A different panel of the court of appeals did set such a standard in *City of Tempe v. Pilot Properties Inc.*[17] There the question was whether $1.00 a year, plus a promise to build a baseball stadium to revert to the city in thirty years, constituted valid consideration for a donation of city land. The court held that consideration received in return for an expenditure of public funds must be equitable and reasonable so as not to be an abuse of public officials' discretion.[18] Because *Heiner* had not set any requirements concerning the value of consideration received by the state, the Arizona Supreme Court took on *Wistuber* to eliminate the disagreement in the lower courts.[19]

The Arizona Supreme Court Adopts an "Equitable and Reasonable Consideration" Test

In upholding the constitutionality of Proposal 98, the supreme court adopted the language of *Pilot Properties* declaring that the state must receive consideration which is equitable and reasonable in return for funds allocated to private organizations.[20] The court stated that the plaintiffs had the burden to prove that the considerations exchanged were not proportional and found that they had not carried this burden.[21] The plaintiffs contended that it was necessary to remand the case to the trial court to make this determination. The *Wistuber* court rejected this contention and, by examining the president's salary and contractual duties, decided that the considerations exchanged were prima facie proportional.[22]

The court's dicta indicates that courts, especially trial courts, must actually balance the consideration received by the public against that received

16. *Id.* at 64, 515 P.2d at 361. Other Arizona cases have upheld expenditures which benefitted private entities. Industrial Dev. Auth. of Pinal County v. Nelson, 109 Ariz. App. 368, 509 P.2d 705 (1973) (public purpose of limiting pollution exempts county issuance of bonds to finance pollution control project from art. IX, § 7); Town of Gila Bend v. Walled Lake Door Co., 107 Ariz. 545, 490 P.2d 551 (1971) (public purpose of preventing fires exempts financing of water pipes for water company from art. IX, § 7).

17. 22 Ariz. App. 356, 527 P.2d 515 (1974). The *Pilot Properties* court felt that both public control over the expenditure, as well as public purpose were required by *Gila Bend.* 22 Ariz. App. at 361, 527 P.2d at 520.

18. *Id.* at 363, 527 P.2d at 522. The court adopted a standard used to determine the validity of municipal contracts. This standard is criticized in Note, *supra* note 8.

19. 141 Ariz. at 348, 687 P.2d at 356.

20. *Heiner* was confined to its facts and distinguished as a special case of a municipal relationship with a non-profit hospital. *Wistuber,* 141 Ariz. at 344 n.4, 687 P.2d at 357 n.4.

21. *Wistuber,* 141 Ariz. at 350, 687 P.2d at 358.

22. *Id.* The *Wistuber* majority believed the consideration received by the district to be substantial; however, Justice Cameron disagreed and filed a dissenting opinion. *Id.* at 350-53, 587 P.2d at 358-61 (Cameron, J., dissenting). In return for a $19,200 salary, the president must, by contract, represent teachers at school board meetings, provide communication between teachers and administrators and the school board to help alleviate potential problems, assist teachers in processing teacher grievances, gather information of concern to teachers, and meet with the Assistant Superintendent for Personnel monthly, logging time with the superintendent's office equal to fifteen hours per week once every two weeks. The benefit of a smooth running relationship between teachers and administrators is of vital importance to the district and to the community. The district argued that if the president did not perform these services, it would be necessary to hire a Director of Employee Relations at a greater cost to the district. *Id.* at 348, 687 P.2d at 356.

by the private organization and must find equity and reasonableness in order to uphold a challenged expenditure. "Equitable" and "reasonable" are the fundamental terms in the court's test, which has previously been called "the abuse of discretion" test.[23] Critics of the "abuse of discretion" test have argued that courts will show too great a deference to state or city officials, and will not actually engage in balancing the considerations exchanged.[24] Under the Arizona standard, however, public officials receive only limited deference in that the bargain must be shown to be equitable and reasonable. More importantly, courts do actually balance the considerations exchanged. *Pilot Properties* was remanded for just such a determination, with the appellate court suggesting what facts should affect the balancing.[25] The Arizona Supreme Court did the balancing itself in *Wistuber*.[26] The standard set by the court in *Wistuber* is thus not an "abuse of discretion" test; instead it is an "equitable and reasonable consideration" test.

The Effect of the Standard

The equitable and reasonable consideration standard provides valuable assistance to legislators and administrators allocating public funds, as well as to judges called upon to decide if expenditures amount to gifts to private entities. Policy makers can be assured their expenditures will not be overturned as unconstitutional if the public is receiving adequate consideration. In a recent case with facts similar to *Wistuber*, Phoenix Union High School District needed to know if a Classroom Teachers Association representative could, under article IX, section 7, receive pay for duties other than teaching.[27] The Arizona Attorney General informed the district that this was proper so long as the school board determined that the representative was carrying out "legitimate educational objectives of the district."[28] Faced with similar situations in the future, school boards will know that so long as the services they are purchasing constitute equitable consideration and are

23. Note, *supra* note 8, at 863. This name was used in the context of challenges to sales and leases of municipal property and reflected the deference that courts showed the judgments of city officials.

24. *Id.* Courts examining private contracts cannot ascertain the value of the consideration to the parties because the court does not know of a private party's capabilities, opportunities, and plans. Conversely, with a governmental expenditure, the value of the goods or services rendered to the public can accurately be judged with adequate information.

25. 22 Ariz. App. at 363, 527 P.2d at 522. The trial court was instructed to determine the fair market value of the property which was leased to a major league baseball team. Also, the court was to judge the value of the benefit of having a new stadium in the city, and the value of the stadium when it reverts to the city.

26. Justice Cameron, dissenting, undertook the same balancing and reached an opposite result, 141 Ariz. at 352, 687 P.2d at 360 (Cameron, J., dissenting). The dissent believed that the contract mainly benefitted the Classroom Teachers Association, with the Board receiving little benefit. Actually, the president's duties which benefit the Association benefit the district and the community at the same time. Better employee-management relations mean better schools. In addition to disagreeing with the outcome of the balancing, the dissent disapproved of the test itself. *Id.* A "primary/incidental benefit" test was suggested as an alternative. Under this test, adopted by the Massachusetts Supreme Court, whenever a private entity receives the primary benefit of a public contract, the expenditure is unconstitutional. *See* Allydone Realty Co. v. Holyoke Housing Auth., 304 Mass. 288, 292-93, 23 N.E.2d 665, 667 (1939).

27. Op. Ariz. Att'y. Gen. I79-121 (R78-141) (1979).

28. *Id.* at 4 of letter from Attorney General Bob Corbin to Q. Dale Hatch.

within the statutory authority of the board,[29] they are legal.

Another set of circumstances in which the *Wistuber* balancing test has been applied is the sale or lease of a state-owned hospital. In January, 1985,[30] the Arizona Board of Regents began leasing the University Medical Center in Tucson to a non-profit corporation for ten dollars a year.[31] The Arizona Attorney General issued an opinion concluding that the *Wistuber* balancing test applies to determine if the lease is constitutional.[32] The test will resolve whether the public benefit derived from the lease constitutes equitable consideration for the lease of a facility valued at fifty million dollars.[33] Without sufficient facts concerning details of the lease and the operation of the new non-profit University Medical Center Corporation, the Attorney General was unable to decide whether the public will receive equitable consideration.[34] Taking into account what Justice Feldman has termed "the judiciary's long held accordance of a special status to hospitals as charitable institutions operated solely for the public good,"[35] a court may well find equitable and reasonable consideration upon a showing of improved service or lower health-care costs to the public, or perhaps even the continued operation of the hospital.

The "equitable and reasonable consideration" test provides a simple framework for answering the determinative question: does the challenged expenditure amount to a gift of public monies? The balancing test of *Wistuber* gives Arizona a workable standard to effectuate the policies underlying the constitutional provision. Under our legal system, taxpayers not only have the right to know how their tax dollars are spent, but they also have the right to a judicial determination of the propriety of any particular expenditure.

Scott Meyer

29. ARIZ. REV. STAT. ANN. §§ 15-343(A) and 15-502(A) (1981) cover the authority that school boards have to hire persons for services other than teaching.
30. *Ariz. Daily Star*, Jan. 4, 1985, at 1B, col. 5.
31. *Ariz. Daily Star*, Dec. 22, 1984, at 1E, col. 5.
32. Op. Ariz. Att'y Gen. I84-159 (R84-058) (1984) at 4.
33. *Ariz. Daily Star*, Dec. 22, 1984, at 1E, col. 5.
34. Op. Ariz. Att'y. Gen. I84-159 (R84-058) (1984) at 5.
35. *Wistuber*, 141 Ariz. at 349 n.4, 687 P.2d at 357 n.4.

B. I.R.C. SECTION 74 AND *JONES V. COMMISSIONER OF INTERNAL REVENUE*: AN AWARD-WINNING DECISION

Section 74 of the Internal Revenue Code includes prizes and awards in the recipient's gross income unless the recipient satisfies a three-part test: 1) the recipient receives the prize or award in recognition of "religious, charitable, scientific, educational, artistic, literary or civic" achievement; 2) the recipient is selected without any action on his or her part; and 3) the recipient is not required to render substantial future services in consideration for the award.[1] Treasury Regulation 1.74-1(a)(1) adds the restriction that an award given by an employer to an employee in recognition of employment-related achievement is included in gross income.[2] Recently, in *Jones v. Commissioner of Internal Revenue*,[3] the Ninth Circuit Court of Appeals ruled that this regulation is inconsistent with the Code and the intent of Congress. The *Jones* court determined that an employee can exclude an award from gross income if the employer bestowed the award to honor, to pay respect to, or to admire the employee's meritorious service.

The Jones *Facts*

On February 19, 1976, Robert Jones, a noted scientist, received a $15,000 award from his employer, the National Aeronautics and Space Administration (NASA), "for the totality of his scientific contribution to the conduct of NASA programs in aeronautics and space, and to the advancement of scientific knowledge."[4] NASA presented the award to Jones along with a volume of sixty-four technical papers authored by Jones, which NASA published in celebration of his sixty-fifth birthday. Jones excluded the $15,000 award from gross income on his 1976 federal income tax returns. The Commissioner determined a deficiency of more than $7,000.[5]

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1. I.R.C. § 74 (Prentice-Hall 1984) provides:
   (a) General Rule.—Except as provided in subsection (b) and in section 117 (relating to scholarships and fellowship grants), gross income includes amounts received as prizes and awards.
   (b) Exception.—Gross income does not include amounts received as prizes and awards made primarily in recognition of religious, charitable, scientific, educational, artistic, literary or civic achievement, but only if—
      (1) the recipient was selected without any action on his part to enter the contest or proceeding; and
      (2) the recipient is not required to render substantial future services as a condition to receiving the prize or award.
2. Treas. Reg. § 1.74-1(a)(1) (1960) provides:
   Section 74(a) requires the inclusion in gross income of all amounts received as prizes and awards, unless such prizes or awards qualify as an exclusion from gross income under subsection (b), or unless such prize or award is a scholarship or fellowship grant excluded from gross income by section 117. Prizes and awards which are includable in gross income include (but are not limited to) amounts received from radio and television giveaway shows, door prizes, and awards in contests of all types, as well as any prizes and awards from an employer to an employee in recognition of some achievement in connection with his employment.
3. 743 F.2d 1429 (9th Cir. 1984).
4. *Id.* at 1431. The facts of *Jones* are set forth at 743 F.2d at 1430-32.
5. Jones v. Commissioner, 79 T.C. 1008 (1982), *rev'd*, 743 F.2d 1429 (9th Cir. 1984).

In Tax Court, Jones argued that the award was intended to honor him for his lifetime of scientific achievements rather than to compensate him for any one of those achievements.[6] The award, according to Jones, was therefore an excludable award, rather than compensation for services. In addition, Jones argued that Treasury Regulation 1.74-1(a)(1) should not be interpreted as excluding from section 74 every award given by an employer to an employee. The Tax Court upheld the deficiency determination. The Internal Revenue Service and Jones had stipulated that the requirements for exclusion from income in section 74(b)(1) and (2) had been satisfied, and that the achievements for which Jones received the award constituted scientific achievements for purposes of section 74(b). In spite of these stipulations, the Tax Court reasoned that because Jones received the award in recognition of achievements arising out of his employment, Treasury Regulation 1.74-1 controlled the determination that the $15,000 was includable in income.[7]

The Ninth Circuit Court of Appeals reversed, holding that the regulation is overly broad as written and "devours the statute it was intended to interpret."[8] The court affirmed the primacy of section 74 and determined that "when an employer makes an award out of a desire to honor, or to show respect or admiration for, an employee, and the award is not compensation for some recent benefit to the employer, the award should be excluded under section 74 if it otherwise qualifies for exclusion."[9]

Background to the Jones *Decision*[10]

Prior to 1954, the Internal Revenue Code provided the taxpayer who received a prize or award with only limited protection from taxation. A taxpayer who wished to exclude a prize or award had to rely on section 22(b)(3), the statutory predecessor of section 102,[11] which related to gifts.

6. In addition to the NASA award, Jones has received the following awards and honors: Sylvanus Albert Reed Awards of the Institute of Aeronautical Sciences (1946); Honorary Doctor of Science degree, University of Colorado (1971); Ludwig Prandtl-Ring Award of the Deutsche Gesellschaft Fur Luft-und Raumfahrt e.V. (German Aerospace Society) (1978); President's Award for Distinguished Federal Civilian Service (1981); and the Langley Medal of the Smithsonian Institution (1981), one of only 17 such awards presented in this century. *Id.* at 1431.

7. *Jones*, 79 T.C. at 1012.

8. *Jones*, 743 F.2d at 1433.

9. *Id.*

10. A comprehensive discussion of the history of I.R.C. § 74 is beyond the scope of this Casenote. For a detailed analysis, see 1 B . BITTKER, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS § 11.1, at 11-1 to 11-6 (1981), and J. SNEED, THE CONFIGURATION OF GROSS INCOME 157-60 (1967).

11. Formerly section 22(b)(3), section 102 provides:

GIFTS AND INHERITANCES.

(a) General rule.—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

(b) Income.—Subsection (a) shall not exclude from gross income—

(1) the income from any property referred to in subsection (a); or

(2) where the gift, bequest, devise, or inheritance is of income from property, the amount of such income.

Where, under the terms of the gift, bequest, devise, or inheritance, the payment, crediting, or distribution thereof is to be made at intervals, then, to the extent that it is paid or credited or to be distributed out of income from property it shall be treated for purposes of paragraph (2) as a gift, bequest, devise, or inheritance of income from property. Any

In *Robertson v. United States*,[12] the United States Supreme Court held that the gift exclusion was not applicable to a taxpayer who entered a contest and won a cash award from an unrelated sponsor.[13] The Court observed that a contestant and a sponsor of a contest have a contractual relationship and that the sponsor's performance of its contractual duty was not a gift. Under *Robertson*, the gift exclusion did not extend to prizes and awards unless they were given in recognition of previous accomplishments or existing abilities.[14]

Congress enacted Internal Revenue Code section 74 in 1954. Section 74(a) states that all prizes and awards are taxable income unless exempted by section 74(b) or section 117, which relates to scholarships.[15] Section 74(a) includes what are known as "money-rain" type cases. These cases involve recipients who do nothing to enter a contest, but receive prizes nonetheless as part of, for example, a promotional campaign. Under pre-1954 law, some of these prizes qualified as tax-free gifts.[16] Section 74(b) is the

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amount included in the gross income of a beneficiary under subchapter J shall be treated for purposes of paragraph (2) as a gift, bequest, devise, or inheritance of income from property.

I.R.C. § 102 (Prentice-Hall 1984).

12. 343 U.S. 711 (1952).

13. *Id.* at 713-14. The taxpayer, a composer, entered a contest sponsored by a philanthropic industrialist. The sponsor had hoped to further a spirit of understanding among individuals of North, Central, and South America.

14. *Id.*

15. *See supra* note 1. Section 117 provides for the exclusion of certain types of scholarships. Section 74(a), by implication, prohibits a prize or award from being considered a tax-free gift, even if the prize or award would have been an excludable gift under pre-1954 law, section 22(b)(3).

16. S. REP. NO. 1622, 83rd Cong., 2d Sess. (1954) states:

Section 74. Prizes and awards

This is a new section which includes in gross income all prizes and awards with certain specified exceptions. It is intended to eliminate some existing confusion in court decisions over whether a prize is income or a gift and would overrule both the *Pot O'Gold* case (*Washburn v. Commissioner* (1945) 5 T.C. 1333) and the *Ross Essay Contest* case (*McDermott v. Commissioner* (C.A.D.C. 1945) 150 F.2d 585) insofar as each held prizes were not income under the 1939 Code. A cross reference to section 117 (relating to scholarships and fellowship grants) is inserted to preclude taxing such awards under this section.

Subsection (b) excludes from income those prizes and awards which are made primarily to recognize past achievements of the recipient in one of the specified fields, provided the recipient was selected without any action on his part to enter the contest or to submit his works in the proceeding and provided he is not required to render any substantial future services as a condition to receiving the prize or award. Thus, such awards as the Nobel prize would be excluded under this section. Subsection (b) is not intended to exclude prizes or awards from an employer to an employee in recognition of some achievement in connection with his employment, such as having the largest sales record or best production record during a certain period. Amounts received from radio and television giveaway shows, or as door prizes, or in any similar type contest would also not be covered by subsection (b).

See also Campeau v. Commissioner, 24 T.C. 370 (1955) (prize given by radio show "Hollywood Calling—Film of Fortune" to person who answers telephone number picked at random and who answered correctly two questions found to be an excludable gift); Washburn v. Commissioner, 5 T.C. 1333 (1945) (prize awarded by radio show "Pot O' Gold" to person who answers telephone number picked at random is excludable). In Glenn v. Bates, 217 F.2d 535 (6th Cir. 1954), the court reached the same result as in *Campeau* and *Washburn*, even though the prize winner went to an automobile dealer's showroom and registered for a drawing for a new automobile. Prizes won for participating in quiz shows were also not considered income. I.T. 3987, 1950-1 C.B. 9 (1930).

Section 74(a) includes in gross income many prizes and awards. *See, e.g.*, Simmons v. United States, 308 F.2d 160, 163 (4th Cir. 1962) (individual taxed on $25,000 prize awarded for catching banded fish in Third Annual American Beer Fishing Derby; I.R.C. § 74(b) requires "genuinely meritorious achievement").

exception clause; the section 74(b) criteria allow exclusions for prizes such as the Nobel and Pulitzer.[17] In addition, if the prizewinner's meritorious achievement occurs in the course of employment, but the grantor is not the employer, the award is excluded from income by section 74(b).[18] Although the statute does not require inclusion of all awards given by employers, Treasury Regulation 1.74-1(a)(1) does.[19] Treasury Regulation 1.74-1(a)(1)'s interpretation of section 74(b) is supported in part by the legislative history of section 74.[20] The *Jones* court held, however, that the legislative history does not support the regulation's application to Jones's award.[21]

The Jones *Decision*

To determine whether Congress contemplated the effects of Treasury Regulation 1.74-1(a)(1), the Ninth Circuit Court of Appeals looked first at the language and legislative purpose of section 74. The court found that section 74 was not meant to allow exclusion of an award that an employer presents to an employee in recognition of outstanding work-related performance.[22] Congress's purpose in enacting section 74 was to include in income any prize or award payments that are incentive bonuses or real compensation for services rendered. Having defined the purpose of section 74, the *Jones* court held that prizes and awards for scientific or other meritorious achievement are not disguised compensation. According to the court, the legislative history of section 74 only partially supports the treasury regulation requirement.[23] Nowhere in the legislative history is there an intent to require inclusion in income of *all* employer provided awards.

After reviewing the legislative history of section 74, the Ninth Circuit distinguished *Jones* from three leading cases applying section 74.[24] In *Rogallo v. United States*,[25] the Fourth Circuit held that an award from NASA, made pursuant to the same statute as Jones's award,[26] was compensation. In *Rogallo*, however, the employees received the $35,000 award not primarily for their act of invention, but rather for their act of contributing the invention to NASA.[27] Receipt of the award was contingent on the inventors contributing the invention, which they had created in their spare

17. *See* Treas. Reg. § 1.74-1(b)(3) (1960), which excludes the Nobel and Pulitzer awards.

18. Rev. Rul. 61-92, 1961-1 C.B. 11 (Rockefeller Public Service Award to outstanding federal employees); Rev. Rul. 62-89, 1962-1 C.B. 19 (same); *see also* Denniston v. Commissioner, 41 T.C. 667, 673 n.7. The *Denniston* court agrees that it is a vitally different situation when someone other than the employer gives an award to an employee in recognition of achievement in connection with the employee's employment.

19. *See supra* note 2.

20. *See supra* note 16.

21. *Jones*, 743 F.2d at 1433.

22. *Id.* at 1432.

23. *Id.*

24. In its 30 years of existence, section 74 has produced very few court cases. Id.

25. 475 F.2d 1 (4th Cir. 1973).

26. Section 306 of the National Aeronautics and Space Act of 1958 authorizes monetary awards "for any scientific or technical contribution to [NASA] which is determined . . . to have significant value in the conduct of aeronautical and space activities." 42 U.S.C.A. § 2458 (West 1973).

27. *Rogallo*, 475 F.2d at 7. 42 U.S.C.A. § 2458(b) (West 1973) which authorizes monetary awards, provides in relevant part:

time, to NASA and executing a royalty-free irrevocable license to NASA. Jones's award was not contingent on his executing a license or releasing any claims for compensation.[28] In addition, the *Jones* court noted that Jones's award was based on a lifetime of achievement that was valuable not only to NASA, but to the entire scientific community.[29]

The Ninth Circuit Court of Appeals also distinguished *Jones* from *Denniston v. Commissioner*[30] and *Griggs v. United States*.[31] In *Denniston*, a United States government employee received a $3,000 cash award under the Government Employees' Incentive Awards Act.[32] The employee, Denniston, received his award for developing cost reductions for the federal government. Denniston argued to the Tax Court that his award should have been excluded from his gross income under Code section 74(b). The Tax Court held, for several reasons, that Denniston's award was taxable compensation for special services rendered.[33] The Tax Court first determined that the purpose of the Government Employees' Incentive Act, as its name implies, is to provide government employees with an incentive to render outstanding services to the government. Second, Denniston received the award in recognition of achievements in connection with, and as a part of, his employment. In contrast to *Denniston*, NASA awarded Jones the $15,000 not to provide an incentive to others, but rather to honor and recognize Jones's lifetime of achievement.[34] Moreover, Jones received the award not only in honor of the totality of his scientific contribution to NASA, but also in honor of his advancement of scientific knowledge of the world.[35]

In *Griggs v. United States*,[36] an employee of the Department of Defense received almost $8,000 from his employer. Griggs, like Denniston, received his award under the Government Employees' Incentive Awards Act. The Department of Defense provided the award for Griggs's development of a rate formula used in fixing proper railroad freight charges for transporting rockets and projectiles. The United States Court of Claims held that the award was taxable income.[37] The *Griggs* court determined that formulating, proposing, and negotiating freight rates were duties outlined in Griggs's job description. In this sense, Griggs's work was an accomplishment only in connection with his employment. In addition, Griggs's accomplishment was

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No award may be made under subsection (a) of this section with respect to any contribution—

(1) unless the applicant surrenders, by such means as the Administrator shall determine to be effective, all claims which such applicant may have to receive any compensation other than the award made under this section for the use of such contribution or any element thereof at any time by or on behalf of the United States, or by or on behalf of any foreign government pursuant to any treaty or agreement with the United States, within the United States or at any other place.

28. *See infra* note 41.
29. *Jones*, 743 F.2d at 1433.
30. 41 T.C. 667 (1964), *aff'd and decision adopted*, 343 F.2d 312 (D.C. Cir. 1965).
31. 314 F.2d 515 (Ct. Cl. 1963).
32. 5 U.S.C. §§ 4502, 4503, and 4505 (1982).
33. *Denniston*, 41 T.C. at 672.
34. *Jones*, 743 F.2d at 1433.
35. *Id.*
36. 314 F.2d 515 (Ct. Cl. 1963).
37. *Id.* at 517.

of a technical rather than a scientific nature. In contrast, both the Internal Revenue Service and Jones stipulated that the achievements for which Jones received the award constituted scientific achievements for purposes of section 74(b).[38] The *Jones* court distinguished the monies Griggs and Denniston received, stating that their awards were thinly disguised compensation for services.[39]

After determining that the regulation and the leading cases were inapplicable to *Jones*, the Ninth Circuit applied its section 74 analysis to Jones's award.[40] The pivotal question under this analysis is whether the employer intended to honor or to compensate the employee. Three factors influenced the court's consideration of this question. First, Jones did not receive additional compensation for any particular discovery.[41] Second, NASA did not have a legal obligation to give Jones additional money. Third, even if NASA had a moral obligation because NASA does not have an awards program, which the IRS never suggested, there was no nexus between the awards program and any of Jones's inventions. The court concluded that NASA's decision to present Jones on his sixty-fifth birthday with the $15,000 award and the copy of Jones's *Collected Works* was made out of desire to honor rather than compensate.[42]

Jones *in Practice: The Probable Impact*

In assessing the probable impact of the *Jones* decision, it is helpful to note what the Ninth Circuit did not do. The Ninth Circuit did not completely reject Treasury Regulation 1.74-1(a)(1). The court merely declined to uphold the regulation as it applied in *Jones* because the employer's purpose in making the award was not to compensate the employee.[43] The Ninth Circuit's decision reiterates and makes paramount the original intent of the legislature. The legislature intended that awards for meritorious achievement not subject the recipient to tax liability. The *Jones* decision is limited. A recipient must still satisfy the three prongs of section 74, and if the recipient is an employee of the donor, the recipient must prove that the employer's intent was to honor rather than to compensate.

This decision raises the question of the continued validity in the Ninth Circuit of Revenue Ruling 57-460.[44] This ruling states that a professor must

38. *Jones*, 743 F.2d at 1432.
39. *Id.* at 1433.
40. *Id.*
41. *Id.* The court noted that whether Jones had previously released or assigned his rights with respect to some or all of his achievements was not clear.
42. *Id.*
43. *Id.*
44. Rev. Rul. 57-460, 1957-2 C.B. 69. An educational institution received a substantial gift from someone who wanted to reward deserving faculty for outstanding performance. The donor stipulated the time frame: each year the institution must select deserving faculty, basing the selection process on performance during the past year. The selection process consisted of recommendations from department heads to an executive committee for final approval. The awards served to supplement regular salaries.

Such awards must be included in gross income, according to the Revenue Ruling. When awards supplement regular salaries, even if the awards derive from a donation, the ruling applies. It encompasses all faculty members whose employer-educational organization honors them for outstanding performance.

include in gross income an award received from an employer-educational organization in recognition of outstanding performance in connection with the professor's employment. After *Jones*, if a professor can satisfy the three prongs of section 74, and show that an award paid at the close of a one-year period as a supplement to a regular salary is not disguised compensation, the professor may be able to exclude the award from gross income.[45] This approach, while not as simple as the regulation's bright-line approach, furthers Congress's intent.

In summary, the *Jones* court reaffirmed the goal of I.R.C. section 74 by determining that if the recipient of an award is an employee, the award will not automatically be included in taxable income if the employer desired to honor or admire the employee's meritorious achievements. The Ninth Circuit also held, however, if the award is compensation for some recent benefit to the employer, the award must be included in the employee's taxable income. This rule serves to further the government's desire to bestow a tax-free honor upon an individual who has performed a meritorious service, without unduly compromising the government's goal of raising revenue for the country.

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45. Based on the facts in the Revenue Ruling, 57-460, 1157-2 C.B. 69, it may be difficult for a professor to prove that such an award is not disguised compensation. The circumstances surrounding the ruling resemble the facts of *Rogallo, Griggs*, and *Denniston*: an employee receives an award in recognition of outstanding performance during a one-year period. The facts of *Jones* support the professor if the professor receives the award in recognition of a significant contribution to the educational community and a lifetime of excellence.