I. CONSTITUTIONAL LAW

RONWIN V. SHAPIRO: FEDERAL JURISDICTION AND THE ELEVENTH AMENDMENT DEFENSE

For a case to proceed in federal court there must be subject matter jurisdiction.[1] The Constitution grants Congress the authority to confer jurisdiction on federal courts to adjudicate all cases arising under the Constitution, laws, and treaties of the United States, controversies between citizens of different states, and controversies between a state and citizens of another state.[2] In accordance with its power to regulate the courts,[3] Congress has limited federal court jurisdiction to federal questions[4] and diversity jurisdiction.[5] Absent a federal question, there must be diversity of citizenship between the parties for a federal court to have jurisdiction.

When a state is sued by an individual in federal court, there are several defenses which the state may raise to deprive the court of jurisdiction. One defense, raised in the absence of a federal question, is that there exists no diversity of citizenship between the parties.[6] A state is not a citizen within the meaning of the diversity statute.[7] Therefore, when a citizen files suit against a state in federal court based on the diversity statute, the suit must be dismissed for lack of jurisdiction.[8] This resolves the issue of federal jurisdiction on statutory grounds.[9]

Another defense that may be raised by a state sued by an individual in federal court is the eleventh amendment. The eleventh amendment prohibits individuals from suing a state in federal court.[10] This protection

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1. Jackson v. Seaboard Coast Line R. Co., 678 F.2d 992, 1000 (11th Cir. 1982) (jurisdiction determines a court's competency to consider cases); Shamrock Dev. Co. v. City of Concord, 656 F.2d 1380, 1384 (9th Cir. 1981) (a federal court can only decide a case if it has subject matter jurisdiction). See FED. R. CIV. P. 12(h)(3) which provides: "[W]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

2. U.S. CONST. art. III, § 2, cl. 1. Judicial power also extends to cases affecting ambassadors and other public ministers, cases of admiralty and maritime, cases where the United States is a party, and cases between two states; however, these are beyond the scope of this Casenote.

3. U.S. CONST. art. III, § 2, cl. 2.

4. 28 U.S.C. § 1331 (West Supp. 1982) provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

5. *Id.* § 1332(a) (1976) provides:

> The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
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> (1) citizens of different States;
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> (2) citizens of a State and citizens or subjects of a foreign state;
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> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
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> (4) a foreign state, . . . as plaintiff and citizens of a State or of different States.

6. *See infra* notes 7-9 and accompanying text.

7. Moor v. County of Alameda, 411 U.S. 693, 717 (1973); Postal Tel. Cable Co. v. Alabama, 155 U.S. 482, 487 (1894); Roberson v. Dale, 464 F. Supp. 680, 686 (M.D.N.C. 1979).

8. Delong Corp. v. Oregon State Highway Comm'n, 233 F. Supp. 7, 10-11 (D. Or. 1964), *aff'd*, 343 F.2d 911 (9th Cir.), *cert. denied*, 382 U.S. 877 (1965).

9. 28 U.S.C. § 1332 (1976). For text of this statute, see *supra* note 5.

10. U.S. CONST. amend. XI provides:

from suit in federal court extends not only to states, but to state agencies or agents when they are considered the alter ego of the state.[11] A suit dismissed because of the eleventh amendment resolves the issue of federal jurisdiction on constitutional grounds.

It is well established that courts should avoid deciding a case on constitutional grounds where the case can be resolved on statutory grounds.[12] Thus, a federal court should determine whether jurisdiction is supported by the federal question or diversity statutes before considering a constitutional defense to federal jurisdiction, such as the eleventh amendment. By finding that there is no federal question or diversity jurisdiction to support a suit in federal court, the court is able to dismiss the suit on statutory grounds without reaching the constitutional issues.

Some courts, however, have determined the validity of the eleventh amendment defense before establishing that the statutory requirements of federal jurisdiction have been satisfied.[13] The Ninth Circuit, in *Ronwin v. Shapiro*,[14] adopted this approach. Thus, the *Ronwin* court did not adhere to the well-settled principle that whenever possible a case should be resolved on statutory rather than constitutional grounds.[15]

The petitioner in *Ronwin*, Mr. Ronwin, a citizen of Iowa, had applied for admission to the Arizona State Bar.[16] The Arizona Supreme Court denied Ronwin's application,[17] concluding "that Ronwin ha[d] failed to demonstrate that he [was] mentally able to engage in the active and continuous practice of law."[18] The *Arizona Law Review* published a law student casenote analyzing the court's decision and quoting language from the court's opinion.[19] Ronwin demanded that the law review retract the case-

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The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The eleventh amendment was proposed in response to Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), in which the United States Supreme Court held that a state could be sued in federal court by a citizen of another state. The amendment was declared ratified by the legislatures of three-fourths of the states on January 8, 1798. *See* Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 227 (1968); *see also* Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1977).

11. *See infra* notes 55-108 and accompanying text.

12. Wood v. Strickland, 420 U.S. 308, 314 (1975); Hagans v. Lavine, 415 U.S. 528, 549 (1974).

13. *See, e.g.*, Ronwin v. Shapiro, 657 F.2d 1071, 1073 (9th Cir. 1981); O'Neill v. Early, 208 F.2d 286, 289 (4th Cir. 1953).

14. 657 F.2d 1071, 1073 (9th Cir. 1981).

15. Since the court did not clearly distinguish lack of diversity jurisdiction from the eleventh amendment defense, it proceeded to determine whether Arizona had waived its eleventh amendment immunity. *Id.* This discussion not only confused the issues but also left open the possibility that if the court had found a waiver of the immunity, the suit would have been allowed to proceed without jurisdiction.

16. *In re* Ronwin, 113 Ariz. 357, 358, 555 P.2d 315, 316 (1976), *cert. denied*, 419 U.S. 967 (1977).

17. *Id.* at 360, 555 P.2d at 318.

18. *Id.* at 359, 555 P.2d at 317. The court found "significant expert testimony in the record to indicate that Ronwin has a 'paranoid personality' which is characterized by hypersensitivity, rigidity, unwarranted suspicion, excessive self-importance and a tendency to blame others and ascribe evil motives to them." *Id.*

19. *See* Casenote, *Admission to the Bar: Mental Fitness Requirements in Arizona*, 19 ARIZ. L. REV. 672, 673 (1977).

note or publish an article that Ronwin had prepared to vindicate himself.[20] The editor-in-chief of the law review refused both alternatives. Ronwin filed a defamation claim in federal district court based on diversity jurisdiction naming the Arizona Board of Regents, the casenote writer, and the editor-in-chief as defendants.[21] The district court dismissed the suit against all the defendants holding that the eleventh amendment barred the action.[22] Ronwin appealed.

On appeal, the Ninth Circuit addressed the eleventh amendment defense before establishing that the federal court had jurisdiction, reasoning that it would be without jurisdiction if the eleventh amendment prohibition applied.[23] The *Ronwin* court held that the Arizona Board of Regents was protected by the eleventh amendment because it was the alter ego of the state.[24] The Ninth Circuit also held that the eleventh amendment did not protect the individual defendants,[25] but affirmed the district court's dismissal because of the privilege of fair report of judicial proceedings.[26]

This Casenote will focus on the process involved in determining jurisdiction in cases brought in federal court against state agencies and agents. It will first examine the distinction between jurisdictional requirements under the federal diversity statute and the eleventh amendment defense. It will then discuss the tests used to decide whether the state is the real party in interest and the application of those tests to state agents and to state agencies, particularly state colleges and universities. Finally, this Casenote will analyze the method in which the jurisdictional issue was approached by the Ninth Circuit in *Ronwin v. Shapiro*.

I. DISTINCTION BETWEEN THE DIVERSITY STATUTE AND THE ELEVENTH AMENDMENT

The distinction between lack of jurisdiction under the diversity statute and a defense to jurisdiction under the eleventh amendment is critical to federal jurisdiction.[27] A state is not a citizen within the meaning of the

20. Ronwin v. Shapiro, 657 F.2d 1071, 1072 (9th Cir. 1981). In his rebuttal article, *Amplifying Comment on In re Ronwin*, Ronwin contended, among other things, that "the Note fail[ed] to admit that the record [was] steeped in fraud and perjury on the part of the few witnesses for the Bar. . . ." Exhibit "A" of Response to Defendant's Motion for Summary Judgment [and] Motion for Partial Summary Judgment, Excerpt of Record at 81. He further asserted: "Equally objectionable [was] the confusion in the Note between the term, 'paranoia,' (footnote 65, p. 679) [sic] and the 'paranoid personality' label which the Arizona Supreme Court applied to Ronwin." *Id.* at 87. Finally, he concluded that *In re Ronwin*, "reduced to its essence [was] probably the first instance of anti-Semitic advocacy ever to appear in a decision of an American jurisdiction." *Id.* at 89.

21. 657 F.2d at 1072.

22. *Id.*

23. *Id.* at 1073.

24. *Id. See infra* notes 55-92 and accompanying text.

25. 657 F.2d at 1074-75.

26. *Id.* at 1075. The court stated, "the report contained in the law review casenote is not only accurate, the bulk of it is a verbatim republication of language from the Arizona Supreme Court's opinion." *Id.*

For information on the privilege of fair report, see Curry v. Walter, 126 Eng. Rep. 1046 (P.C. 1796); RESTATEMENT (SECOND) OF TORTS § 611 (1977); Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U. L. REV. 469, 521-45 (1979).

27. Johnson v. Texas Dep't of Corrections, 373 F. Supp. 1108, 1109 (S.D. Tex. 1974); Delong

diversity statute.[28] If the case is in federal court solely due to diversity jurisdiction, a determination that the state or an alter-ego of the state is being sued completely destroys the basis for jurisdiction.[29] Since the diversity requirements cannot be waived, a litigant's failure to raise the lack of jurisdiction defense is not fatal.[30] Therefore, the case may be dismissed for lack of jurisdiction at any time.

The eleventh amendment is a defense to jurisdiction and not a basis for it. If federal question or diversity jurisdiction exists, the state can raise the eleventh amendment defense.[31] However, the state may also waive its eleventh amendment immunity totally or consent to a specific suit so that the case will continue in federal court.[32] Thus, while eleventh amendment immunity can be waived, the diversity requirement when there is no federal question cannot.

A case illustrating the distinction between diversity jurisdiction and the eleventh amendment defense is *Roberson v. Dale*.[33] In *Roberson* the only arguable basis for federal jurisdiction was diversity.[34] Finding the agency to be an alter ego of the state,[35] the case was dismissed for lack of jurisdiction.[36] The defendants, in addition to arguing lack of diversity jurisdiction, contended that the eleventh amendment barred the action.[37] The court correctly noted, however, that they did not need to consider whether the eleventh amendment immunity had been waived because diversity jurisdiction had not been established.[38] Thus, the case was resolved on statutory grounds.

A case in which a court did not properly distinguish between lack of diversity jurisdiction and the eleventh amendment is *O'Neill v. Early*.[39] Instead of beginning its analysis with diversity jurisdiction, the court dis-

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Corp. v. Oregon State Highway Comm'n, 233 F. Supp. 7, 10 (D. Or. 1964), *aff'd*, 343 F.2d 911 (9th Cir.), *cert. denied*, 282 U.S. 877 (1965).

28. *See supra* note 7 and accompanying text.

29. Ronwin v. Shapiro, 657 F.2d 1071, 1073 (9th Cir. 1981); Harris v. Pennsylvania Turnpike Comm'n, 410 F.2d 1332, 1333-34 n.1 (3rd Cir. 1969), *cert. denied*, 396 U.S. 1005 (1970); Kansas Turnpike Auth. v. Abramson, 275 F.2d 711, 713 (10th Cir.), *cert. denied*, 363 U.S. 813 (1960).

30. Whitten, Jr., Inc. v. State Univ. Constr. Fund, 493 F.2d 177, 179 n.2 (1st Cir. 1974); Roberson v. Dale, 464 F. Supp. 680, 686 n.13 (M.D.N.C. 1979).

31. *See supra* notes 10-11 and accompanying text.

32. *Cf.* Edelman v. Jordan, 415 U.S. 651, 673 (1974) (a state's waiver of immunity should be narrowly construed); Kennecott Copper Corp. v. Tax Comm'n, 327 U.S. 573, 577-78 (1946) (consent to be sued in state court does not necessarily imply consent to be sued in federal court).

In Ronwin v. Shapiro, 657 F.2d 1071, 1073 (9th Cir. 1981), the court considered whether Arizona had waived eleventh amendment immunity by abolishing sovereign immunity, which allows the state to be sued in state court. The court found that "consent to be sued in state court does not necessarily imply consent to be sued in federal court" and that Arizona had not waived the eleventh amendment defense. *Id.* at 1073-74.

33. 464 F. Supp. 680 (M.D.N.C. 1979).

34. *Id.* at 685. The court found that claims alleging violations of the commerce clause and the right to travel were "patently ridiculous" and there was no other basis for federal question jurisdiction. *Id.*

35. *Id.* at 687. For a discussion on how the court determined that the agency was the alter ego of the state, see *infra* note 87 and accompanying text.

36. 464 F. Supp. at 689.

37. *Id.* at 686.

38. *Id.* at 686 n.12. This is consistent with the practice of deciding statutory questions before constitutional questions. *See supra* note 12 and accompanying text.

39. 208 F.2d 286 (4th Cir. 1953) (action against a county superintendent of schools and a

missed the acton because it was brought in contravention of the eleventh amendment.[40] The *O'Neill* court stated that the agent was sued in his official capacity and the purpose of the suit was to obtain a judgment payable out of public funds.[41] Therefore, the eleventh amendment barred the suit. The court noted that even if the state had waived its eleventh amendment immunity, the suit could not continue because there was no diversity jurisdiction.[42]

Moreover, many courts do not even distinguish between lack of diversity jurisdiction and the eleventh amendment defense.[43] This general inconsistency demonstrates the need for a standard approach that courts can use to resolve this problem.

II. An Approach When Both the Diversity Jurisdiction and Eleventh Amendment Immunity are Involved

In a case in which both diversity jurisdiction and the eleventh amendment are at issue, the analysis should begin with diversity jurisdiction,[44] so that the courts can avoid deciding the constitutional issue if possible.[45] When the statutory issue is treated first, a conclusion that the agency is an arm of the state would result in dismissal under the diversity statute, and the constitutional jurisdictional issue need not be addressed.[46] Where the court decides that the agency is not an alter ego of the state and is therefore a citizen for diversity purposes, the eleventh amendment will not bar the suit because the same tests which determine that the agency was not an alter ego of the state for diversity jurisdiction[47] also determine that the defendant is not protected by eleventh amendment immunity.

Until the court determines whether the agency is an alter ego of the state, a discussion of the state's waiver of eleventh amendment immunity is superfluous.[48] When the agency is an alter-ego of the state, a waiver of the

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county school board by a former teacher for alleged beach of contract arising from failure to reemploy).

40. *Id.* at 288. The court in Ronwin v. Shapiro, 657 F.2d 1071, 1073 (9th Cir. 1981) followed the same mode of analysis.

41. 208 F.2d at 288. Public funds satisfying the judgment is a factor that courts often look at in determining whether the agency or agent is the alter ego of the state. *See infra* notes 65-67 and accompanying text.

42. 208 F.2d at 289. There was no federal question jurisdiction either. *Id.* See Ronwin v. Shapiro, 657 F.2d 1071, 1074 n.3 (9th Cir. 1981) for the same analysis.

43. The distinction between lack of diversity jurisdiction and the eleventh amendment defense has been alternatively ignored, *see* Florida State Turnpike Auth. v. Van Kirk, 146 F. Supp. 364, 365 (S.D. Fla. 1956), noted but treated as one and the same, *see* O'Neill v. Early, 208 F.2d 286, 289 (4th Cir. 1953), noted but held irrelevant because the result would be the same, *see* Krisel v. Duran, 258 F. Supp. 845, 848 (S.D.N.Y. 1966), *aff'd*, 386 F.2d 179 (2d Cir. 1967), *cert. denied*, 390 U.S. 1042 (1968), and occasionally treated successfully as separate issues, *see* Roberson v. Dale, 464 F. Supp. 680, 686 (M.D.N.C. 1979); Delong Corp. v. Oregon State Highway Comm'n, 233 F. Supp. 7, 10 (D. Or. 1964), *aff'd*, 343 F.2d 911 (9th Cir.), *cert. denied*, 392 U.S. 877 (1965).

44. *See* Roberson v. Dale, 464 F. Supp. 680 (M.D.N.C. 1979). The court found diversity jurisdiction lacking so did not decide on the eleventh amendment issue. *Id.* at 686, 686 n.12.

45. *See supra* note 12 and accompanying text.

46. *See supra* note 44 and accompanying text.

47. Ronwin v. Shapiro, 657 F.2d 1071, 1073 (9th Cir. 1981); Roberson v. Dale, 464 F. Supp. 680, 686 n.12 (M.D.N.C. 1979).

48. Harris v. Pennsylvania Turnpike Comm'n, 410 F.2d 1332, 1333-34 n.1 (3rd Cir. 1969),

eleventh amendment immunity cannot create diversity jurisdiction. When the eleventh amendment issue is addressed prior to that of diversity jurisdiction, the possibility exists that upon finding a waiver of eleventh amendment immunity, a court may mistakenly allow a case to continue in federal court without jurisdiction. Since a lack of jurisdiction may be raised at any time,[49] a great deal of litigation expense could be wasted by a subsequent dismissal for lack of jurisdiction.

An example of a court properly resolving the statutory jurisdictional issue first is *Johnson v. Texas Department of Corrections*.[50] Relying on state court decisions[51] and state statutes,[52] the court determined that the action was really a suit against the state.[53] Noting that a waiver of eleventh amendment immunity still could not create diversity jurisdiction, the court dismissed the action without passing on the eleventh amendment issue.[54] This approach avoids unnecessary analysis of constitutional defenses and promotes clarity and judicial efficiency. However, as the foregoing cases indicate, before diversity jurisdiction or the eleventh amendment defense can be determined, the court must decide whether the state is the real party in interest.

III. TESTS FOR WHETHER THE STATE IS THE REAL PARTY IN INTEREST

A. *State Agencies*

If the state agency is an arm or alter ego of the state, there is no jurisdiction under the diversity statute.[55] The eleventh amendment would also act as a bar to jurisdiction.[56] In determining whether an agency is an alter ego of the state, courts generally examine the powers or characteristics of that agency to see if it possesses state attributes of sovereignty.[57] Relevant

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cert. denied, 396 U.S. 1005 (1970); S.J. Groves & Sons Co. v. New Jersey Turnpike Auth., 260 F. Supp. 568, 571 (D.N.J. 1967).

49. Amfac Mortg. Corp. v. Arizona Mall of Tempe, Inc., 583 F.2d 426, 430, 430 n.5 (9th Cir. 1978). The defense of lack of jurisdiction over the suit may be asserted by the parties or the court at trial or appellate level. *See* Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 467 (1945) (jurisdictional defenses may be raised for the first time in the United States Supreme Court and will still be considered).

50. 373 F. Supp. 1108 (S.D. Tex. 1974). Action by a widow of a prison escapee killed in a plane crash which occurred when prisoner was being returned to prison. The wrongful death action was brought against the Department of Corrections and the estates of the two deceased pilots.

51. *Id.* at 1109 (citing Texas Prison Bd. v. Cabeen, 159 S.W.2d 523, 525 (Tex. Civ. App. 1942)).

52. *Id.* at 1110 (citing TEX. CIV. REV. STAT. ANN. art. 6166a-6203 (Vernon 1970) as standing for the proposition that the department performs a basic governmental function of the state).

53. *Id.* The agency was found to be an alter ego of the state because it performed a basic governmental function. *Id.*

54. *Id.*

55. Roberson v. Dale, 464 F. Supp. 680, 686 (M.D.N.C. 1979).

56. Ronwin v. Shapiro, 657 F.2d 1071, 1073 (9th Cir. 1981); Brennan v. University of Kansas, 451 F.2d 1287, 1290 (10th Cir. 1971).

57. *See, e.g.*, Whitten, Jr., Inc. v. State Univ. Constr. Fund, 493 F.2d 177, 179-80 (1st Cir. 1974); Roberson v. Dale, 464 F. Supp. 680, 686 (M.D.N.C. 1979); Krisel v. Duran, 258 F. Supp. 845, 849 (S.D.N.Y. 1966), *aff'd*, 386 F.2d 179 (2d. Cir. 1967), *cert. denied*, 390 U.S. 1042 (1968). *See also* Comment, *The Eleventh Amendment as Applied to State Agencies: A Survey of the Case and a Proposed Model for Analysis*, 22 VILL. L. REV. 153, 161-62 (1976).

factors include: the agency's ability to sue and be sued;[58] the agency's performance of governmental or proprietary functions;[59] the agency's status with respect to incorporation;[60] the agency's degree of autonomy over its operations;[61] the name in which the agency holds property;[62] the status of such property with regard to immunity from taxation;[63] and the state's financial responsibility for agency operations.[64] The factor most heavily relied upon when deciding whether the state is the real party in interest is the source of funds used to pay the judgment.[65] If payment of a judgment against the agency would be made from the state treasury, then the state is usually held to be the real party in interest.[66] If the agency has the funds or the power to satisfy the judgment itself, then the state is usually not held to be the real party in interest.[67]

Courts have used these criteria to determine whether a variety of state

58. *See* Soni v. Board of Trustees of Univ. of Tenn., 513 F.2d 347, 353 (6th Cir. 1975) (Board of Trustees found not to be an alter ego of the state because charter provides that the board may "sue and be sued," *cert. denied*, 426 U.S. 919 (1976); Krisel v. Duran, 258 F. Supp. 845, 849 (S.D.N.Y. 1966) *aff'd*, 386 F.2d 179 (2d Cir. 1967) (Economic Development Administration of Puerto Rico that could not sue and be sued was held to be an alter ego of the state), *cert. denied*, 390 U.S. 1042 (1968).

59. *See* Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 393 (1894) (railroad commissioners acting in a proprietary function of running a railroad were held not to be alter ego of the state); Florida State Turnpike Auth. v. Van Kirk, 146 F. Supp. 364, 365 (S.D. Fla. 1956) (turnpike authority performing the governmental function of facilitating traffic statewide was held to be an alter ego of the state).

60. *See* Kansas Turnpike Auth. v. Abramsom, 275 F.2d 711, 713 (10th Cir.) (turnpike authority created as a body corporate to perform corporate functions without any obligation on the state to satisfy judgments against it was held not to be an arm of the state), *cert. denied*, 363 U.S. 813 (1960); Department of Highways v. Morse Bros. & Assoc., Inc., 211 F.2d 140, 144 (5th Cir. 1954) (highway department, created as a body corporate with the power to sue and be sued, was held not to be an arm of the state).

61. This factor is occasionally mentioned when considering other factors. *See* Aerated Prods. Co. v. Department of Health, 59 F. Supp. 652, 660 (D.N.J. 1945) (health department, part of executive branch of state government, held to be an arm of the state), *aff'd*, 159 F.2d 851, 853-54 (3d Cir. 1947).

62. Aerojet-General Corp. v. Askew, 453 F.2d 819, 829 (5th Cir. 1971) (Florida State Board of Trustees of the Internal Improvement Trust Fund and the Florida State Board of Education were held not to be arms of the state where title to land vests in Boards and not in state), *cert. denied*, 409 U.S. 892 (1972); Brennan v. University of Kansas, 451 F.2d 1287, 1290 (10th Cir. 1971) (state university held to be an arm of the state where property belongs to the state).

63. *See* Pennsylvania Turnpike Comm'n v. Welsh, 188 F.2d 447, 450 (3d Cir. 1951) (turnpike commission was held to be an arm of the state where immune from tax).

64. *See* Harrison Constr. Co. v. Ohio Turnpike Comm'n, 272 F.2d 337, 339 (6th Cir. 1959) (where state immune from financial responsibility for operations of the turnpike commission, the commission was held not to be an arm of the state; Pennsylvania Turnpike Comm'n v. Welsh, 188 F.2d 447, 450 (3d Cir. 1951) (state immune from financial responsibility for operations, tending to show agency is not an arm of the state).

65. Ronwin v. Shapiro, 657 F.2d 1071, 1073 (9th Cir. 1981); *see also* Edelman v. Jordan, 415 U.S. 651, 664-65 (1974); Highway Comm'n v. Utah Constr. Co., 278 U.S. 194, 199 (1929).

66. *See* Edelman v. Jordan, 415 U.S. 651, 663 (1974) (in suit against officials administering federal and state aid programs, funds would have come from state treasury so the suit was barred by eleventh amendment); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945) (in a suit for a refund of allegedly illegally collected taxes, funds would have come from state treasury; suit dismissed for want of consent by state to the suit).

67. The eleventh amendment was originally proposed to protect state treasuries from Revolutionary War debts. For a history of the eleventh amendment, see generally Mathis, *supra* note 10, at 224-30. Thus, a suit by private parties is barred by the eleventh amendment if it seeks to impose a liability which must be satisfied by public funds in the state treasury. Edelman v. Jordan, 415 U.S. 651, 663 (1974).

agencies, including political subdivisions,[68] school districts,[69] highway commissions,[70] a treasury department,[71] and state colleges and universities,[72] are arms or alter egos of the state.[73] In the case of colleges and universities many federal cases hold that they are alter egos of the state and so enjoy eleventh amendment immunity.[74] Each state college or university, however, exists within a unique governmental framework and must be considered within the context of its own circumstances.[75] This requires the courts to analyze both the state laws and the individual circumstances to determine these questions of federal jurisdiction.[76] The determination of whether the state is the real party in interest, which in turn decides whether the defenses to jurisdiction based on a lack of diversity or the eleventh amendment apply, is considered a federal question.[77] The state court decisions and statutes regarding the relationship of the agency to the state, however, are highly significant.[78] The importance of state law and individual circumstances in this determination of federal jurisdiction is shown clearly in the variety of results reached by different courts.

One case where state court decisions were significant in *Brennan v. University of Kansas*.[79] In *Brennan*, the Tenth Circuit found that the Kan-

68. Markman v. Newport News, 292 F.2d 711, 716-17 (4th Cir. 1961) (a state statute restricting tort actions against a city to state courts was not effective to prevent federal diversity jurisdiction for enforcement of state-created rights); N.M. Paterson & Sons, Ltd. v. Chicago, 176 F. Supp. 323, 324 (N.D. Ill. 1959) (since Chicago was a separate entity from the state and could fully satisfy a judgment, it was held not to be an arm of the state).

69. Hutchinson v. Lake Oswego School Dist. No. 7, 519 F.2d 961, 966-67 (9th Cir. 1975) (school district funding which came mostly from local sources held not to be an arm of the state), *vacated on other grounds*, 429 U.S. 1033 (1977); Harris v. Toele County School Dist., 471 F.2d 218, 220 (10th Cir. 1973) (school district held to be arm of state where judgment would ultimately reduce state funds).

70. State Highway Comm'n v. Utah Constr. Co., 278 U.S. 194, 199 (1929) (highway commission held to be an arm of the state where it had no separate funds or ability to satisfy a judgment); S.J. Groves & Sons v. New Jersey Turnpike Auth., 268 F. Supp. 568, 579 (D.N.J. 1967) (turnpike authority held not to be an arm of the state where it had substantial fiscal and managerial autonomy).

71. Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 463 (1945) (state treasury held to be an arm of the state in a suit to obtain a refund of taxes).

72. Hopkins v. Clemson Agriculture College, 221 U.S. 636, 648 (1911) (college held not to be an alter ego of the state where it took private property for its proprietary purpose without compensation); Brennan v. University of Kansas, 451 F.2d 1287, 1290 (10th Cir. 1971) (university held to be an alter ego of the state where it was exclusively under state control and its properties belong to the state); Hamilton Mfg. Co. v. Trustees of State Colleges, 356 F.2d 599, 601 (10th Cir. 1966) (trustees held to be arms of the state since the judgment would have to be satisfied out of state funds).

73. *See* Comment, *supra* note 57, at 160-63 (a study of cases applying the eleventh amendment to state agencies).

74. *See, e.g.*, Brennan v. University of Kansas, 451 F.2d 1287, 1290 (10th Cir. 1971) (action by a professor to recover his work product and to prevent publication); Walstad v. University of Minn. Hosps., 442 F.2d 634, 641-42 (8th Cir. 1971) (action against a university hospital and physicians alleging negligent care and treatment); Scott v. Board of Supervisors of La. State Univ., 336 F.2d 557, 558-59 (5th Cir. 1964) (action alleging third party malpractice against the university).

75. Soni v. Board of Trustees of Univ. of Tenn., 513 F.2d 347, 352 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976).

76. *See id.*

77. Johnson v. Texas Dep't of Corrections, 373 F. Supp. 1108, 1110 (S.D. Tex. 1974).

78. Delong Corp. v. Oregon State Highway Comm'n, 233 F. Supp. 7, 10 (D. Or. 1964), *aff'd*, 343 F.2d 911 (9th Cir.), *cert. denied*, 382 U.S. 877 (1965).

79. 451 F.2d 1287 (10th Cir. 1971). In this case a university professor brought an action against the university and the University Press of Kansas for damages and to prevent publication

sas Supreme Court considered state colleges and universities to be under exclusive state control.[80] This was considered determinative that the state was the real party in interest and thus not a citizen under the diversity statute. Although there was no diversity, a federal question did exist and federal jurisdiction was properly established. Therefore, the eleventh amendment was invoked as a defense to the suit.[81]

State constitutions and statutes have also been relied upon for the determination of whether the college or university is the alter ego of the state. In *Walstad v. University of Minnesota Hospitals*[82] and *Scott v. Board of Supervisors of Louisiana State University*,[83] the courts found state constitutional provisions which specifically extended state immunity to the universities, thus barring the suits from federal court for lack of diversity jurisdiction.[84] In *Roberson v. Dale*,[85] a case involving a suit against the University of North Carolina at Chapel Hill,[86] the court analyzed the state statutes regarding the characteristics and powers of the university to determine whether or not the state itself was the real party in interest.[87] Finding the university to be an alter ego of the state,[88] the case was dismissed for lack of diversity jurisdiction.[89]

In some cases state law dictates that the agency is an independent body. *Soni v. Board of Trustees of University of Tennessee*[90] involved a due process claim so there was federal question jurisdiction. The Sixth Circuit found that the Tennessee legislature had consented to the university's abil-

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of his "intellectual work product." *Id.* at 1288. The plaintiff, who resided in Italy, sued in federal court alleging a violation of his fourth and fourteenth amendment rights by a search conducted in Italy. *Id.*

80. *Id.* 1290. The court cited Board of Regents v. Hamilton, 28 Kan. 268, 270 (1882) and Murray v. State Bd. of Regents, 194 Kan. 686, 401 P.2d 898 (1965), in which the Kansas Supreme Court had held that a Kansas state agricultural college was exclusively under state control and its properties belonged to the state.

81. 451 F.2d at 1290. Since the court found no waiver of the immunity the suit was dismissed by virtue of this defense. *Id.* at 1291.

82. 442 F.2d 634 (8th Cir. 1971) (an action against the university hospital and physicians alleging negligent care and treatment).

83. 336 F.2d 557 (5th Cir. 1964) (action alleging third party malpractice against the university).

84. In *Walstad*, 442 F.2d at 641, the court relied on MINN. CONST. art. VIII, § 3 which provides that the university is an instrumentality of the state and retains state immunities, and in *Scott*, 336 F.2d at 559, the court used LA. CONST. art. III, § 35, and art. XIX, § 26 which provide that the university is a special agency that is immune from suit without consent by the state.

85. 464 F. Supp. 680 (M.D.N.C. 1979).

86. Plaintiff alleged a breach of an employment contract by the university. *Id.* at 683.

87. *Id.* at 687 (discussing N.C. GEN. STAT. § 116-1 *et seq.* (1978). Although the university's purpose was to coordinate higher education in the state and it was made "a body politic and corporate" able "to sue and be sued in all courts whatsoever," the university was governed by a Board of Governors, whose members were elected by the state legislature. *Id.* The Board of Governors was to prepare a long range plan and present it to the state government in a "single, unified recommended budget." *Id.* Although the university could acquire, hold and dispose of property, this power had to be exercised in accord with statutes regulating management of state monies and property. *Id.* The university's property was tax exempt, and no statute exempted the state from the university's debts or liabilities. *Id.*

88. 464 F. Supp. at 689.

89. *Id.*

90. 513 F.2d 347 (6th Cir. 1975). A terminated professor alleged that he had not been accorded due process. *Id.* at 348.

ity to sue and be sued "in any court of law or equity."[91] Thus, the eleventh amendment defense was waived and did not bar the suit.[92] Courts also examine the power and characteristics of a state agent when determining whether a state agent is the alter ego of the state.

B. *State Agents*

Historically, the courts have been less likely to find that the state is the real party in interest when state agents rather than state agencies are involved.[93] In *Osborn v. Bank of the United States*,[94] the United States Supreme Court held that a suit was not one against the state unless the state was a party of record. Four years later, in *Governor of Georgia v. Madrazo*,[95] the Court overruled its decision by holding that the state may be considered a party in a suit against a state officer based entirely upon his official character. If the state is considered a party, then the court must address the diversity statute and the eleventh amendment.[96]

The determination of whether diversity jurisdiction exists or the eleventh amendment should apply to cases involving state agents is similar to that for state agencies. The inquiry remains whether the state is the real party in interest and the individual solely a nominal party.[97] The courts look to state constitutional provisions and statutes to make this determination.[98] The test enunciated in *Ford Motor Co. v. Department of Treasury*,[99] states "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." The United States Supreme Court, however, has placed limitations on the eleventh amendment's application to state agents if a state agent is acting pursuant to an unconstitutional law,[100] or is acting beyond the scope of his authority.[101] When state agents act pursuant to an unconstitutional law or commit common law torts, they are acting in their individual capacities and are personally responsible for their actions.[102] The Court has said that since "immunity from suit is a high attribute of sovereignty" it should not be availed of by state agents when sued for their

91. *Id.* at 353.
92. *Id.* (relying on TENN. CONST. art. I, § 17).
93. *See infra* notes 94-96 and accompanying text.
94. 22 U.S. (9 Wheat.) 738, 850-59 (1824).
95. 26 U.S. (1 Pet.) 110, 123-24 (1828). For more history see generally, Mathis, *supra* note 10.
96. *See supra* notes 26-43 and accompanying text.
97. *See* Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 463 (1945); Delong Corp. v. Oregon State Highway Comm'n, 233 F. Supp. 7, 10 (D. Or. 1964), *aff'd*, 343 F.2d 911 (9th Cir.), *cert. denied*, 282 U.S. 877 (1965).
98. *See* Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 53 (1944). *See also* cases cited *supra* note 97.
99. 323 U.S. 459, 464 (1945).
100. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 859 (1824). *See also* Truax v. Raich, 239 U.S. 33, 37 (1915).
101. Louisville & Nashville R.R. v. Greene, 244 U.S. 522, 528 (1917); Pennoyer v. McConnaughly, 140 U.S. 1, 19 (1891).
102. Sterling v. Constantin, 287 U.S. 378 (1932); Public Service Co. v. Corboy, 250 U.S. 153 (1919); Johnson v. Lankford, 245 U.S. 541 (1918); Truax v. Raich, 239 U.S. 33 (1915).

own torts.[103]

Even though the most important criterion for determining whether the state is the real party in interest is funding,[104] the fact that money damages against a state agent *may* be paid from public funds does not necessarily destroy diversity jurisdiction or invoke the eleventh amendment defense.[105] While one court has suggested that damage awards against state agents might violate the eleventh amendment if the agent is indemnified by the state,[106] other courts have disagreed.[107] At least on commentator has said that a state's voluntary assumption of a state agent's liability, such as an indemnification system, ought to be insufficient to invoke the eleventh amendment defense.[108]

IV. APPLICATION OF THE DIVERSITY STATUTE AND THE ELEVENTH AMENDMENT TO *RONWIN V. SHAPIRO*

Ronwin v. Shapiro[109] presented the problems of lack of diversity jurisdiction and the eleventh amendment defense. Instead of establishing a basis for jurisdiction and then considering the eleventh amendment defense, the court first addressed eleventh amendment immunity.[110] Relying primarily upon the fact that the state treasury would have to satisfy the judgment, the court concluded that the Board of Regents was an arm of the state.[111] Thus, the court held that the eleventh amendment bar to suit in federal court applied, and dismissed the suit. The court defended its resolution of the case on constitutional instead of statutory grounds, reasoning that it would be without any jurisdiction if the eleventh amendment prohibition applied.[112]

The court did not clearly distinguish the issues of the eleventh amendment and diversity jurisdiction. Once the court found the Arizona Board of Regents to be an arm of the state, the diversity jurisdiction of the court

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103. Hopkins v. Clemson Agriculture College, 221 U.S. 636, 642-43 (1910).

> The 11th Amendment was not intended to afford [public agents] freedom from liability in a case where, under color of their office, they have injured one of the State's citizens. To grant them such immunity would be to create a privileged class free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to be put above the law.

Id. at 643.

104. *See supra* notes 65-67 and accompanying text.

105. Palmer v. Penn-Ohio Road Materials, Inc., 470 F. Supp. 1199, 1203 (W.D. Pa. 1979).

106. Hallmark Clinic v. North Carolina Dep't of Human Resources, 380 F. Supp. 1153, 1159-60 n.12 (E.D.N.C. 1974), *aff'd*, 519 F.2d 1315 (4th Cir. 1975).

107. *See* Ronwin v. Shapiro, 657 F.2d 1071, 1074-75 (9th Cir. 1981); Downing v. Williams, 624 F.2d 612, 626 n.22 (5th Cir. 1980), *vacated on other grounds*, 645 F.2d 1226 (5th Cir. 1981); Palmer v. Penn-Ohio Road Materials, Inc., 470 F. Supp. 1199, 1203 (W.D. Pa. 1979).

108. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 132-33 n.22 (1978). This would be tantamount to turning a "purely intramural arrangement . . . into an extension of sovereign immunity." *Id.* "Alternatively, [Tribe suggests that] the state's voluntary extension of indemnification could be construed as a waiver of eleventh amendment immunity" insofar as the payments are made voluntarily. *Id. See* Ronwin v. Shapiro, 657 F.2d 1071, 1074 (1981).

109. 657 F.2d 1071, 1073 (9th Cir. 1981).

110. *Id.*

111. *Id.*

112. *Id.*

was destroyed.[113] Thus, the court could have dismissed the suit for lack of jurisdiction since the claim alleged was a state law claim.[114] Instead, the court went on to discuss the eleventh amendment defense and whether Arizona waived that defense.[115] Although Arizona had established sovereign immunity,[116] the court found that it did not extend to a waiver of eleventh amendment immunity.[117] This holding was unnecessary because the court could have dismissed the suit for lack of diversity jurisdiction.[118] Since the suit had failed to meet federal jurisdictional requirements, the court should not have reached the question of defenses.

Addressing the individual defendants in *Ronwin*, the Ninth Circuit Court of Appeals noted that the plaintiff brought suit against them in their individual capacities, alleging defamation, a common law tort.[119] Since the plaintiff could have attempted to satisfy a judgment against the writer and editor personally, there was no need for the funds to come from the state treasury.[120] The court assumed, without deciding, that the state indemnification program would cover a judgment against the individual defendants.[121] Citing and agreeing with Professor Laurence Tribe, the court found that this would not relieve the individual defendants of their primary responsibility.[122] Therefore, the court held that the writer and editor were not protected by eleventh amendment immunity.[123]

The court did not discuss the diversity statute in regard to the individual defendants. The court should have at least acknowledged that since these defendants were sued for common law torts they were acting in their individual capacities and so remained citizens within the meaning of the diversity statute.[124]

V. CONCLUSION

Federal courts need to establish a basis for jurisdiction before dealing with jurisdictional defenses. When an individual sues a state in federal court, the state may prevent the court from obtaining jurisdiction by asserting that a state is not a citizen within the meaning of the diversity statute, or by raising the eleventh amendment defense which prohibits an individual from suing a state in federal court without the state's consent. This protection from suit in federal court also extends to state agencies and

113. *Id.*
114. *See supra* notes 47-49 and accompanying text.
115. 657 F.2d at 1073.
116. *See* Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 387, 381 P.2d 107, 109 (1963) (the doctrine of sovereign immunity was abolished for tort liability so that Arizona could be sued in state court without its consent).
117. 657 F.2d at 1073-74. *See supra* note 32 and accompanying text.
118. The diversity jurisdiction requirement cannot be waived. *See supra* note 30 and accompanying text.
119. 657 F.2d at 1074.
120. *Id.*
121. *Id.* at 1074 n.5.
122. *Id.* at 1074. *See supra* note 108 and accompanying text.
123. 657 F.2d at 1075. However, the court found that the privilege of fair report of judicial proceedings applied so the suit was also dismissed against the individual defendants. *Id.*
124. *See supra* notes 101-03 and accompanying text.

agents when they are considered to be the alter ego of the state. It is well established that courts should avoid deciding constitutional issues when statutory issues are determinative. Thus, if there is no federal question involved, a suit in federal court brought against a state should be dismissed for lack of diversity jurisdiction, rather than on eleventh amendment grounds.

The Court in *Ronwin v. Shapiro* dismissed a defamation suit against the Arizona Board of Regents because it was barred by the eleventh amendment. Instead, the case should have been dismissed for lack of diversity jurisdiction. By dealing with the issues in an improper order, the ninth circuit has helped perpetuate the confusion between the diversity statute and the eleventh amendment.

Heidi Rib Brent

II. COUNSEL MISCONDUCT

COUNSEL MISCONDUCT IN ARIZONA: A NEW FACTOR TO CONSIDER ON APPELLATE REVIEW

The traditional standard of appellate review in cases where counsel misconduct occurs at trial is one of deference to the trial court's discretion.[1] In *Grant v. Arizona Public Service Co.*,[2] the Arizona Supreme Court applied this traditional standard of review.[3] The court, however, added a new factor to be considered by appellate courts when assessing counsel misconduct cases.[4]

Grant was a wrongful death action which resulted in a jury verdict for the plaintiffs.[5] On appeal, defendant alleged that plaintiffs' counsel had engaged in misconduct during trial which caused the jury to return a prejudicial verdict.[6] The Arizona Supreme Court ruled that the alleged misconduct had indeed occurred.[7] The court found that plaintiffs' counsel had acted improperly in final argument by drawing improper inferences from the evidence,[8] introducing facts not in evidence,[9] and repeatedly interjecting his personal views and comments.[10] Although the court condemned counsel's conduct,[11] it deferred to the trial court's ruling that no prejudice had resulted from this misconduct.[12] In affirming the trial court's refusal to grant a new trial, however, the court also ruled that the presence or absence of other substantial error in the record was relevant in

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1. *See infra* notes 15-25 and accompanying text.

2. 133 Ariz. 434, 652 P.2d 507 (1982). In response to numerous amicus briefs urging a rehearing, the court included a supplemental opinion with its initial opinion. *Id.* at 453, 652 P.2d at 526.

3. *Id.* at 451, 652 P.2d at 524. *See infra* notes 15-25 and accompanying text.

4. The court ruled that in the event counsel misconduct did not lead to reversible error, the court could nevertheless find that the trial court abused its discretion if the record contained another substantial error. 133 Ariz. at 452-53, 652 P.2d at 525-26. *See infra* notes 58-72 and accompanying text.

5. 133 Ariz. at 437, 652 P.2d at 510. Koy Grant was electrocuted while working near a crane that came into contact with Arizona Public Service Co. (APS) power lines. *Id.* at 439, 652 P.2d at 512. The trial court entered judgment for the plaintiffs on a jury verdict of $1,000,000 for Mrs. Grant and $250,000 for each of her two children. *Id.* at 437, 652 P.2d at 510.

6. *Id.* at 450-51, 652 P.2d at 523-24.

7. *Id.* at 451, 652 P.2d at 524.

8. *Id.* When arguing about exhibit number 22, an APS memo outlining power line accidents that had occurred from 1972 to 1974, counsel referred at various times "to '124 overhead serious incidents,' 124 deaths, [and] 124 acts of negligence by APS." *Id.* Further, he urged the jury to award punitive damages to prevent the 125th death. *Id.* In criticizing this conduct, the court stated that "[u]nder no stretch of the imagination could it be said that exhibit No. 22 contains information indicating 124 deaths, 124 cases of negligence, or even 124 accidents involving contact with overhead lines. . . ." *Id.* The court characterized the inferences as "far beyond those which were legitimate." *Id.*

9. *Id.* Plaintiff's counsel told the jury it should consider the fact that decedent's wife had not had a date since the death of her husband and that she would not remarry. *Id.* In condemning this conduct, the court ruled that the evidence did not support this speculation, and that evidence of the possibility of remarriage is in any event irrelevant in a wrongful death case. *Id.*

10. *Id.* For example, counsel once asserted that he " 'knew that [testimony] wasn't true.' " *Id.*

11. *Id.* at 453, 652 P.2d at 526.

12. *Id.* at 451, 652 P.2d at 524.

determining whether the trial court abused its discretion.[13] This "other substantial error" test is a new factor the court will consider in reviewing cases where counsel misconduct may have prejudiced the verdict.[14]

This Casenote will discuss the traditional standard applied in Arizona to determine whether a trial court abused its discretion in deciding if counsel misconduct warranted a new trial. It will then examine the application of this standard in *Grant* and set out examples of how other courts have applied the same standard. This Casenote will also discuss the "other substantial error" standard enunciated in *Grant*. Finally, this Casenote will examine the court's refusal to grant a new trial solely for the purpose of disciplining counsel.

Traditional Deference Standard

The traditional standard concerning the prejudicial effect of counsel misconduct applied by Arizona courts is characterized by deference to the trial court's discretion.[15] Rule 59 of the Arizona Rules of Civil Procedure provides that a trial judge may grant a new trial for misconduct of the prevailing party which materially affects the rights of the aggrieved party.[16] Further, the trial judge may grant a new trial when the verdict results from passion or prejudice.[17] When a trial court decides that misconduct has occurred, whether warranting a new trial or not, appellate courts will defer to its decision absent a clear showing of abuse of discretion.[18] The Arizona Supreme Court has ruled that as the "thirteenth juror," the trial judge has the best opportunity to decide the effect of possible counsel misconduct.[19] Moreover, even if counsel's misconduct is serious, the court will refuse to hold the misconduct reversible error for purely punitive reasons.[20]

Although "abuse of discretion" is a general term, Arizona courts have enunciated a standard of review which purportedly prevents arbitrary court orders.[21] When a trial court orders a new trial, it must state with

13. *Id.* at 452-53, 652 P.2d at 525-26.

14. *See infra* notes 58-72 and accompanying text.

15. *See* Taylor v. Southern Pac. Transp. Co., 130 Ariz. 516, 521, 637 P.2d 726, 731 (1981); Waid v. Bergschneider, 94 Ariz. 21, 24, 381 P.2d 568, 570 (1963); Selaster v. Simmons, 39 Ariz. 432, 439, 7 P.2d 258, 260 (1932).

16. ARIZ. R. CIV. P. 59(a)(2).

17. *Id.* 59(a)(7). Counsel misconduct materially affects a party's rights when it causes the jury to return a verdict resulting from passion or prejudice, rather than a fair consideration of the facts. Taylor v. Southern Pac. Transp. Co., 130 Ariz. 516, 520-21, 637 P.2d 726, 730-31 (1981); Taylor v. Dirico, 124 Ariz. 513, 518, 606 P.2d 3, 8 (1980); Hales v. Pittman, 118 Ariz. 305, 313, 576 P.2d 493, 501 (1978).

18. Taylor v. Southern Pac. Transp. Co., 130 Ariz. 516, 521, 637 P.2d 726, 731 (1981); Porterie v. Peters, 111 Ariz. 452, 458, 532 P.2d 514, 520 (1975); Selaster v. Simmons, 39 Ariz. 432, 439, 7 P.2d 258, 260 (1932).

19. Reeves v. Markle, 119 Ariz. 159, 163, 579 P.2d 1382, 1386 (1978); *see also* City of Glendale v. Bradshaw, 114 Ariz. 236, 238, 560 P.2d 420, 422 (1977).

20. Zugsmith v. Mullins, 86 Ariz. 236, 238, 344 P.2d 739, 740 (1959). The *Grant* court reaffirmed this principle, holding that "a new trial on grounds of misconduct is never granted 'as a disciplinary measure but only to prevent a miscarriage of justice.'" 133 Ariz. at 451, 652 P.2d at 524. *See infra* notes 73-83 and accompanying text.

21. *See* Reeves v. Markle, 119 Ariz. 159, 164, 579 P.2d 1382, 1387 (1978); Estabrook v. J.C.

particularity the reasons for the order.[22] When reviewing such an order, the appellate court decides whether substantial evidence exists to sustain the trial court's finding.[23] In its supplemental opinion, the *Grant* court set forth a similar standard for reviewing an order denying a new trial, ruling that a trial court's order must have both legal and evidentiary bases.[24] In applying this standard, appellate courts rarely reverse a trial court's grant or denial of a new trial because of counsel misconduct.[25]

The Grant *Decision*

In *Grant v. Arizona Public Service Co.*, the Arizona Supreme Court first applied the traditional deference standard in determining whether counsel's misconduct caused reversible error.[26] The court held that the trial court has broad discretion to determine whether to grant a new trial because of counsel misconduct.[27] In deciding whether the trial court abused its discretion, the court ruled that the "prime factor" to consider was whether the record clearly established that the misconduct caused the jury to return a verdict based on passion and prejudice.[28] The court then

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Penney Co., 105 Ariz. 302, 305, 464 P.2d 325, 328 (1970); State *ex rel.* Morrison v. McMinn, 88 Ariz. 261, 262, 355 P.2d 900, 901 (1960).

22. ARIZ. R. CIV. P. 59(m) provides that: "No order granting a new trial shall be made and entered unless the order specifies with particularity the ground or grounds on which the new trial is granted."

23. Reeves v. Markle, 119 Ariz. 159, 164, 579 P.2d 1382, 1387 (1978); Estabrook v. J.C. Penney Co., 105 Ariz. 302, 305, 464 P.2d 325, 328 (1970); State *ex rel.* Morrison v. McMinn, 88 Ariz. 261, 262-263, 355 P.2d 900, 901-902 (1960).

24. 133 Ariz. at 456, 652 P.2d at 529. The court listed four specific factors to determine misconduct caused a jury verdict based on "passion and prejudice." *See* text accompanying *infra* note 29. The court also held that where other substantial error occurs at trial it may conclude that the trial court abused its discretion. *Id. See infra* notes 29-39, 58-72 and accompanying text.

25. The court has found reversible error for counsel misconduct in very few cases. *See, e.g.*, Taylor v. Cate, 117 Ariz. 367, 573 P.2d 58 (1977); Elledge v. Brand, 102 Ariz. 338, 429 P.2d 450 (1967); Sisk v. Ball, 91 Ariz. 239, 371 P.2d 594 (1962). Where the court has reversed for abuse of trial court discretion, the misconduct has been extremely serious or even malicious. *See, e.g.*, Taylor v. Cate, 117 Ariz. 367, 573 P.2d 58 (1977); Elledge v. Brand, 102 Ariz. 338, 429 P.2d 450 (1967); Sisk v. Ball, 91 Ariz. 239, 371 P.2d 594 (1962).

In *Taylor*, counsel asserted that the opposing party was hiding valuable evidence. 117 Ariz. at 368, 573 P.2d at 59. The court ruled that counsel's action could be explained only by his intention to leave the jury with the false impression that the defense was hiding a damaging statement. *Id.* In *Elledge*, an assault and battery case, plaintiff's counsel improperly introduced evidence that defendant's bar catered to homosexuals. 102 Ariz. at 339, 429 P.2d at 451. Moreover, during closing arguments he said that the sole issue in the case was whether the jury wanted homosexual bars in the city. *Id.* The court, ordering a new trial, held his behavior improper and prejudicial, finding that the result of counsel's actions was to prejudice the jury. *Id.* at 340, 429 P.2d at 452. In *Sisk*, defendant's counsel argued that plaintiff would have another day in court to sue the doctor who testified in her behalf. 91 Ariz. at 243, 371 P.2d at 596. The trial court allowed this argument to continue over objection. *Id.* A new trial was ordered due to the trial court's error in allowing this improper argument, which had no foundation in the evidence and tended to arouse the jury's passion and prejudice. *Id.* at 245-46, 371 P.2d at 597-98.

The appellate courts will readily affirm a trial court's order of a new trial because of counsel misconduct. *See, e.g.*, Taylor v. Southern Pac. Transp. Co., 130 Ariz. 516, 637 P.2d 726 (1981); Sanchez v. Stremel, 95 Ariz. 392, 391 P.2d 557 (1964); Reed v. Hyde, 15 Ariz. App. 203, 487 P.2d 424 (1971). The courts, however, will more closely scrutinize an order denying a new trial. *See* Sanchez v. Stremel, 95 Ariz. 392, 394, 391 P.2d 557, 559 (1964); Zugsmith v. Mullins, 86 Ariz. 236, 237, 344 P.2d 739, 740 (1959).

26. 133 Ariz. 434, 451, 652 P.2d 507, 524 (1978).

27. *Id.*

28. *Id.* at 451, 652 P.2d at 525. According to the court, a clear showing of prejudice means

set out four specific factors to examine in making this determination: 1) whether there has been an error of law committed in reaching the discretionary conclusion; 2) whether the discretionary conclusion was reached without consideration of the evidence; 3) whether other substantial error of law has occurred as a part of or in addition to the misconduct, and 4) whether there is a substantial basis for the trial court's discretionary finding.[29]

In assessing the trial court's actions, the court examined two of the four factors: whether there was a substantial basis for the trial court's discretionary finding,[30] and whether any other substantial error of law occurred as a part of or in addition to the misconduct.[31] The court held that the trial court did not abuse its discretion in finding that counsel's misconduct had not produced a prejudicial verdict.[32]

In determining whether a substantial basis existed for the trial court's finding, the court relied on the fairness of the verdict to hold that the jury was not misled by counsel's arguments.[33] Noting that the "main thrust" of the improper conduct was the attorney's argument on punitive damages,[34] the court reasoned that since the jury awarded no punitive damages the trial court did not lack substantial support for its finding of no prejudice.[35] Moreover, the court ruled that the jury's award of fair and reasonable compensatory damages further supported the trial court's ruling.[36] Finally, the court refused to presume prejudice from the trial court's failure to instruct the jury to disregard the misconduct.[37] Only in extraordinary situations where the trial court lost control of the proceedings would the court presume prejudice.[38] In any other case, the court will reverse a denial of a new trial only on an unambiguous showing of prejudice.[39]

Thus, the court held that, at least in a case such as *Grant* where improper arguments concern damages, the court will find a substantial basis for the trial court's denial of a new trial if the jury returns a fair verdict.[40] If the court's examination of the result applies to counsel misconduct

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the record must have no alternate reasonable meaning. If the record justifies either a conclusion of prejudice or no prejudice, the supreme court will affirm the trial court's finding. *Id.* at 455, 456-57, 652 P.2d at 528, 529-30.

29. *Id.* at 456, 652 P.2d at 529.

30. *Id.*

31. *Id.* For a discussion of the "substantial error" standard, see *infra* notes 58-72 and accompanying text. While the court used the term "serious error" in the original opinion, it used the term "substantial error" in the supplemental opinion. 133 Ariz. at 452, 456, 652 P.2d at 525, 529.

32. 133 Ariz. at 451, 652 P.2d at 524.

33. *Id.* at 452, 456, 652 P.2d at 525, 529.

34. *Id.* at 452, 652 P.2d at 529.

35. *Id.* at 452, 456, 652 P.2d at 525, 529. In its motion for rehearing, APS maintained that the improper arguments "went to the very heart of the *liability* issue." Appellant's Motion for Rehearing at 3 (emphasis in original). APS stated that a key issue on liability was whether APS had notice that the crane was working close to the power lines. *Id.* at 4. If the jury believed that APS had committed 124 past acts of negligence regarding contact with power lines, APS argued that it could have found, as it did, that APS had notice and was consequently liable. *Id.* at 3-4.

36. 133 Ariz. at 452, 456, 652 P.2d at 525, 529.

37. *Id.* at 456, 652 P.2d at 529.

38. *Id.*

39. *Id.* at 528, 529-30.

40. *Id.* at 452, 456, 652 P.2d at 525, 529.

aimed at other elements of the verdict, such as liability, little review of what actually took place during trial will occur.[41] Rather, the court will review the result to decide whether it was fair.[42] If the result is unfair, the court may then find an abuse of discretion for a denial of a new trial.[43] If the court finds the verdict fair, however, it will defer to the trial court without closely examining the nature of the misconduct.[44]

Other courts, also purporting to use a deferential standard of review, have more closely examined counsel's conduct during trial.[45] For example, the court in *County of Maricopa v. Maberry*[46] found counsel misconduct so serious as to necessitate a presumption that it influenced the jury in some way.[47] The court listed several factors used to determine whether the influence was significant enough to warrant reversal.[48] These factors were whether the misconduct was intentional, well-planned, serious, and done in a way that would achieve counsel's purpose.[49]

The *Maberry* court concluded that counsel's misconduct constituted reversible error.[50] After reviewing the record and questioning the offending attorney during oral arguments, the court found that the question posed by the attorney was an intentional and well-planned act.[51] The court further examined the record and found that the improper evidence revealed was "highly devastating" to the defense.[52] Moreover, counsel designed the question in such a way as to put before the jury the improper

41. The court acknowledged that there was misconduct. *Id.* at 450-51, 652 P.2d at 523-24. The court examined the misconduct sufficiently to decide that the trial court did not lose control of the trial. *Id.* at 456, 652 P.2d at 529.

42. *See id.* at 452, 456, 652 P.2d at 525, 529.

43. *See id.* at 456, 652 P.2d at 529.

44. *See id.* at 452, 456, 652 P.2d at 525, 529.

45. *See, e.g.*, County of Maricopa v. Maberry, 555 F.2d 207 (9th Cir. 1977) (applying Arizona law); City of Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749 (6th Cir. 1980).

46. 555 F.2d 207 (9th Cir. 1977).

47. *Id.* at 219. The court decided that because counsel testified to something not in the record, it was impossible to conclude the jury was not influenced in some way. *Id.* The misconduct in this case occurred when counsel attempted to ask an improper question. *Id.* at 217. Opposing counsel objected, but plaintiff's counsel nonetheless continued the question in a way suggesting the answer:

> Q. Doctor, at the time that your deposition was taken, I will ask you this, sir, isn't it a fact that at one point you interrupted and said: "off the record. Come on, Ken—
>
> Mr. Cracchiolo [for defendant]. Your Honor, I object.
>
> Q. "Come on, Ken. You've got a damned good case and you know it." You said that, didn't you Doctor?
>
> A. I don't recall.

Id.

48. *Id.* at 219.

49. *Id.* at 219, 222-23. The court considered the following factors: "whether the error was planned or accidental; whether intentional or otherwise; whether a risk deliberately taken by one side, or created by forces, unexpected or otherwise, beyond the perpetrator's ability to control or eliminate." *Id.* at 219. The court also examined whether the conduct was carefully planned, considered, and done in such a way as to achieve counsel's purpose. *Id.* at 222-23.

50. *Id.* at 219.

51. *Id.* at 219-23. The court questioned the lawyer as to his conduct at trial. *Id.* at 222 n.18. First, the lawyer maintained the question slipped out inadvertently. *Id.* After further questioning, he stated that he had consulted the best trial lawyers in Phoenix to verify whether the question was proper. *Id.* Based on this information the court ruled that counsel had planned to put improper evidence before the jury. *Id.* at 222-23.

52. *Id.* at 219.

evidence.[53]

Instead of reviewing the results of the trial, the *Maberry* court examined the intent and purpose of counsel, the nature and manner of the misconduct, and its possible effect on the jury.[54] Accordingly, the court ruled that even where substantial evidence supports a jury verdict, reversal is warranted when serious and prejudicial misconduct occurs.[55] Thus, unlike the court in *Grant*, the *Maberry* court refused to give predominance to whether an apparently fair verdict was reached in the case.[56] Rather, under the *Maberry* analysis, the court primarily examines the facts surrounding the misconduct to decide if the jury was improperly influenced in reaching its verdict.[57]

The "Other Substantial Error" Standard

In applying the deferential standard of review, the *Grant* court added a new factor to consider in counsel misconduct cases.[58] In addition to holding that the trial court had a substantial basis for making its decision,

53. *Id.* at 222-23. In addition, the court found that the question was irrelevant to the case and was asked of an expert witness concerning a subject not within his expertise, and was an attempt to impeach a witness with a statement alleged to have been taken during depositions but which did not appear in the record. Further, it was never shown that the alleged statement was made. *Id.* at 222.

54. *Id.* at 217, 219, 222-23.

55. *Id.* at 224. The *Maberry* court quoted language from Love v. Wolf, 226 Cal. App. 2d 378, 38 Cal. Rptr. 183 (1964) as appropriate there:

> Misconduct of plaintiff's trial counsel, egregious beyond any in our experience or that related in any reported case brought to our attention has resulted in an unfair trial, a miscarriage of justice and requires us to reverse the judgment. Substantial evidence supported the verdict and judgment against the doctor (had the case been fairly presented). A new trial will be necessary against him.

655 F.2d at 224 (quoting Love v. Wolf, 226 Cal. App. 2d 378, 382, 38 Cal. Rptr. 183, 184 (1964)). In its supplemental opinion, the *Grant* court analyzed *Love* as a case where the trial court lost control of the proceedings. 133 Ariz. at 456, 652 P.2d at 529. The court found that *Grant* presented no such situation, but indicated that if it had, the court would "have no hesitancy in finding that denial of a motion for a new trial was an abuse of discretion." *Id.*

56. 555 F.2d at 219. The court never considered the fairness of the verdict in *Maberry* as a factor in deciding that misconduct was reversible error. *Id.* at 222-23.

57. *Id.* at 219, 222. A consideration of factors such as counsel's intent and planning may imply that the court is acting to punish counsel, which is improper in Arizona. 133 Ariz. at 451, 652 P.2d at 524; Zugsmith v. Mullins, 86 Ariz. 236, 238, 344 P.2d 739, 740 (1959). Further, when the *Maberry* court examined the planning and intent of the attorney, the court was attempting to determine whether counsel achieved his improper purpose in his misconduct. 555 F.2d at 222-23. While the *Maberry* court specifically held it was following Arizona law, because it so closely examines counsel's misconduct it is questionable whether the *Maberry* analysis truly reflects the Arizona deferential standard of review.

For another example of a case which thoroughly reviews counsel misconduct, see City of Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 756-60 (6th Cir. 1980), where the court purportedly followed a standard of deference to the trial court's discretion regarding counsel misconduct. The appellate court still examined such factors as "the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, the strength of the case (e.g. whether it is a close case), and the verdict itself." *Id.* at 756. For further discussion of *Kiewit*, see Note, *Improper Argument of Counsel*: City of Cleveland v. Peter Kiewit Sons' Co., 12 U. TOL. L. REV. 761 (1981).

58. In past counsel misconduct cases reversed for abuse of trial court discretion, the fact that other substantial error occurred at trial as a part of or in addition to counsel misconduct was never explicitly stated as a factor by the court. *See* Taylor v. Cate, 117 Ariz. 367, 573 P.2d 58 (1977); Elledge v. Brand, 102 Ariz. 338, 429 P.2d 450 (1967); Sisk v. Ball, 91 Ariz. 239, 371 P.2d 594 (1962).

Grant stated that the lack of other substantial error as a part of or in addition to the misconduct justified the trial court's decision not to grant a new trial.[59] The court formulated this standard based on its reading of previous Arizona cases involving counsel misconduct which were reversed for abuse of trial court discretion.[60] The *Grant* court said that in those cases the misconduct was accompanied "almost invariably" by other substantial error, the cumulative effect of which compelled the conclusion that there was prejudice.[61] While it is not clear in those cases that other substantial error was necessary to the reversal,[62] other substantial errors did occur.[63]

Although a reading of the previous Arizona cases may lead to the "other substantial error" standard, the standard announced by *Grant* is unclear because the court failed to define the meaning of the term "substantial error."[64] Logically, substantial error must be less than reversible error, because a reversible error takes effect without any support from another error.[65] Based on the facts of *Grant*, however, substantial error is more than the type of erroneous instruction given by the trial court.[66]

Further, the cases the *Grant* court cited to formulate the "other substantial error" standard do not clarify the meaning of a substantial error. While the court in each of those cases found several errors, each error was found to be reversible.[67] Since only reversible errors took place in the past cases, they are not instructive in defining what constitutes a substantial

59. 133 Ariz. at 452-53, 456, 652 P.2d at 525-26, 529. In the supplemental opinion, the court acknowledged that its original opinion may have given the impression that other serious error was necessary to find that misconduct justified a new trial. *Id.* at 456, 652 P.2d at 529. The *amici* feared that this was the case, and objected to such a holding. *Id.* The court ruled that other serious error is not needed to reverse for misconduct but that such error combined with misconduct might indicate an abuse of trial court discretion in denying a motion for a new trial, even though either error considered alone might not constitute reversible error. *Id.*

60. *Id.* at 452-53, 456, 652 P.2d at 525-26, 529.

61. *Id.* at 452, 652 P.2d at 525.

62. *See* County of Maricopa v. Maberry, 555 F.2d 207 (1977); Elledge v. Brand, 102 Ariz. 338, 429 P.2d 450 (1967); Sisk v. Ball, 91 Ariz. 239, 371 P.2d 594 (1962). In *Maberry*, while an improper instruction on last clear chance itself necessitated reversal, the court explicitly held that counsel misconduct alone required reversal. 555 F.2d at 217, 222. In *Elledge*, the court regarded counsel's misconduct as itself warranting reversal. 102 Ariz. at 339-40, 429 P.2d at 451-52. The *Elledge* court also ruled that the introduction of evidence that defendant's bar catered to homosexuals was itself reversible error. *Id.* The *Grant* court saw the introduction of that evidence as the other substantial error. 133 Ariz. at 453, 456, 652 P.2d at 526, 529. The *Grant* court claimed that *Sisk* involved other error in the introduction of new theories of liability that occurred as part of counsel's improper arguments. *Id.* at 456, 652 P.2d at 529. It is not clear from a reading of *Sisk*, however, that the *Sisk* court separated the misconduct and the introduction of new theories of liability that occurred as part of the misconduct. 91 Ariz. at 243-46, 371 P.2d at 596-98.

63. *See supra* note 62.

64. *See* 133 Ariz. at 452-53, 456, 652 P.2d at 525-26, 529.

65. Note, however, that the other substantial errors in the cases cited by the *Grant* court in formulating the substantial error test were, in fact, reversible. *See supra* note 62.

66. The *Grant* court found error in the following instruction: "The power company may exercise reasonable care for the protection of lives of others, and to do that which would give reasonable promise of preserving life *regardless of the difficulty or expense*. In the observance of such duties, the degree of care increases as the danger increases. [Emphasis added]" 133 Ariz. at 446, 652 P.2d at 519. The court held this instruction erroneous, stating that "[the 'difficulty or expense' in taking preventative measures may be relevant in determining whether the defendant acted reasonably." *Id.* The court said, however, that the error was not reversible because APS waived objection and because APS never argued it was unfeasible to take preventative measures. *Id.* at 446-47, 657 P.2d at 519-20.

67. *See supra* note 62.

error.[68]

Thus, the court has formulated a standard whereby two ambiguous though not reversible, errors can cumulatively have the effect of a reversible error.[69] At least in counsel misconduct cases, the court can identify another error as substantial and reverse the case when neither the misconduct nor the other error constituted reversible error.[70] This standard may give the court more latitude in reviewing cases where counsel misconduct occurs, because it allows the court to examine the record to consider the extent of counsel misconduct and the presence of other serious error to determine their cumulative effect on the validity of the trial.[71] At the same time, however, the ambiguity of the "other substantial error" standard has the potential to lead the court to choose to find other substantial error when it is convenient to do so. While the court may believe the trial court acted reasonably in denying a motion for a new trial grounded upon counsel misconduct, the court could find other substantial error to reverse merely when it dislikes the conduct of counsel. Similarly, if the court finds that counsel had reasonable excuses for his actions, it could more easily find that no other substantial error existed in the record. While the court may disavow any such method of review,[72] an undefined standard such as "other substantial error" at least leaves open the possibility that the reviewing court will rule more on the basis of its agreement with the trial court's order than according to a standard of deference to the trial court.

The Discipline Issue

After finding no abuse of trial court discretion, the court reconsidered whether it could reverse a case in which counsel misconduct occurred to punish the offending attorney.[73] The court ruled in *Grant*, however, that it would not reverse a case in which counsel misconduct occurred for punitive reasons.[74] Responding to the amici, who urged a departure from this rule,[75] the court held that reversing the case for the sole purpose of disciplining counsel would improperly punish the client.[76] Moreover, granting a new trial on appeal to discipline the lawyer would be a summary adjudication of the lawyer's conduct without affording the lawyer proper procedure.[77] The court ruled that if a lawyer had engaged in misconduct,

68. *Id.*

69. 133 Ariz. at 452-53, 456, 652 P.2d at 525-26, 529.

70. Apparently, the court held that whether or not it led to reversible error, misconduct constituted error. The court's use of the term other substantial error supports such an interpretation. *See id.*

71. *See id.* at 456, 652 P.2d at 529.

72. The court found it unsatisfactory to define "abuse of discretion" in a way permitting an appeals court to reverse cases it disagreed with and affirm those it was pleased with. *Id.* at 455, 652 P.2d at 528.

73. The long-standing rule in Arizona is that an appellate court cannot reverse a case merely to punish an attorney who has engaged in misconduct. *See supra* note 20 and accompanying text.

74. 133 Ariz. at 451, 453, 457, 652 P.2d at 524, 526, 530.

75. *Id.* at 457, 652 P.2d at 530.

76. *Id.*

77. *Id.* To illustrate the need for a hearing, the court noted that the offending lawyer may have had an explanation for his conduct. *Id.* n.2. Counsel pointed out that his arguments pertained to exhibits 23 and 29 which showed 124 previous accidents resulting from overhead contact

proper disciplinary proceedings under the applicable rules of the court should be initiated.[78] The court ruled it would not decide whether the attorney's behavior warranted discipline until such a proceeding took place.[79]

By indicating to the legal community that lawyers must discipline themselves,[80] the court has promoted fairness both to lawyers suspected of misconduct warranting discipline and to clients who have retained such lawyers.[81] The court preserved the lawyer's procedural rights of notice and hearing, which allow a lawyer suspected of disciplinary violations opportunity to explain and justify actions.[82] In addition, the court's ruling guarantees that clients' rights will be decided based on the substantive issues in the case. If a lawyer has engaged in misconduct not affecting the rights of the parties, the courts will not subject innocent clients to a retrial of the action. Instead they will give the bar the opportunity and responsibility of improving the judicial system through proper action designed to deter and punish misconduct.[83]

Conclusion

In *Grant v. Arizona Public Service Co.*, the Arizona Supreme Court applied the traditional standard of deference to the trial court's discretion in granting or denying a motion for a new trial grounded upon a claim of counsel misconduct. In determining whether the trial court had a substantial basis for its denial of a new trial, the court primarily reviewed the result of the case. Deciding that the result was fair, the court ruled that the trial court had a substantial basis for deciding that counsel misconduct had no prejudicial effect on the jury. Other courts have purported to use a

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and leading to serious injury or death. *Id.* The court held, however, that it was improper for counsel to draw inferences from the exhibit about 124 deaths, 124 cases similar to Grant, or even 124 previous acts of negligence. *Id.* Counsel also attempted to justify his comments on Mrs. Grant's marital status, asserting that such evidence had entered the proceedings without objection. *Id.* The court ruled that although counsel's speculation as to Mrs. Grant's future marital plans was improper, it was not necessarily punishable misconduct when there were facts in the evidence indicating Mrs. Grant's present marital status. *Id.*

In a formal disciplinary hearing, a lawyer has ample procedural opportunity to justify his actions. *See* Rule 32(c) of the Rules of the Supreme Court, providing that:

> Any person against whom a formal complaint has been filed shall have the right to defend against the charge by the introduction of evidence, the right to be represented by counsel, and the right to examine and cross-examine witnesses. He shall also have the right to have subpoenas issued for the attendance of witnesses to appear and testify or produce books and papers.

ARIZ. SUP. CT. R. 32(c).

78. 133 Ariz. at 457 n.1, 652 P.2d at 530, n.1.

79. *Id.* at 458, 652 P.2d at 531.

80. *See id.* at 457-58, 652 P.2d at 530-31; Zugsmith v. Mullins, 86 Ariz. 236, 238, 344 P.2d 739, 740 (1959).

81. *See infra* note 83; *Grant*, 133 Ariz. at 457-58, 652 P.2d at 530-31.

82. 133 Ariz. at 457-58, 652 P.2d at 530-31.

83. *See* Rule 29(a) of the Rules of the Supreme Court (DR 1-103) providing that: "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." ARIZ. SUP. CT. R. 29(a) [DR-1-103]. In addition, see Note, *The Lawyer's Duty to Report Professional Misconduct*, 20 ARIZ. L. REV. 509 (1978).

similar deferential review, but they have examined counsel's misconduct closely while putting the results of the case in the background.

Grant also enunciated a new factor to consider in counsel misconduct cases. The court held that the presence of other substantial error as a part of or in addition to counsel misconduct would allow the court to find that the trial court abused its discretion, though neither the misconduct nor the other error alone could warrant reversal. The court, however, failed to define or characterize a substantial error. Unless the court more clearly defines what constitutes a substantial error, this standard could lead the reviewing court to find other substantial errors where it merely disagrees with the trial court's decision, rather than deferring to the trial court's discretion.

Finally, the court refused to depart from the traditional rule of not disciplining a lawyer for misconduct by reversing a case on the appeal of the substantive issues. The court strongly indicated the bar must take the responsibility for disciplining lawyers who have engaged in misconduct.

Peter Akmajian

III. CREDITORS REMEDIES

APPLYING A CHANGE IN THE STATUTORY RATE OF INTEREST TO PREEXISTING JUDGMENTS IN ARIZONA

Arizona provides by statute that judgments obtained at law shall earn interest from the date of entry until payment is made.[1] The purpose of the statute is to disallow the judgment debtor any benefit from dilatorious payment.[2] Although this provision rarely creates controversy, problems do arise when, in an attempt to keep the statutory rate near that prevailing in the marketplace, the legislature changes the rate of interest payable on judgments. Amending the interest statute is particularly problematic when it occurs between the time of entry and satisfaction of a judgment.[3] In those cases the court must decide whether to apply the old rate of interest until the judgment is satisfied or to allow interest to accrue at the new rate from the effective date of the amendment. The Arizona Supreme Court faced this question in *McBride v. Superior Court*.[4]

The plaintiffs in *McBride* obtained a large personal injury judgment against Milne Truck Lines, Inc. on January 24, 1979.[5] The judgment ordered Milne to pay six percent interest on the judgment, as then required by section 44-1201 of the Arizona Revised Statutes,[6] from the date of entry until paid.[7] Milne appealed the judgment.[8] While the appeal was pending, an amendment to section 44-1201, effective December 14, 1979, raised the rate of interest payable on judgments to ten percent except where a different rate was agreed to in writing.[9]

On March 4, 1981, after losing its appeal and having its petition for rehearing denied, Milne tendered payment of the judgment.[10] The sum included the amount of the original judgment plus six percent interest from January 24, 1979.[11] The McBrides refused the tender and on March 11, 1981 moved in the superior court for judgment in an amount reflecting the original judgment plus interest of six percent until the effective date of

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1. ARIZ. REV. STAT. ANN. § 44-1201(A) (Supp. 1981-82) states: "Interest on any loan, indebtedness, *judgment* or other obligation shall be at the rate of ten per cent per annum, unless a different rate is contracted for in writing, in which event any rate of interest may be agreed to." (Emphasis added.)

2. *See, e.g.*, Farmer v. Stubblefield, 297 Ky. 512, 512, 180 S.W.2d 405, 405 (1944); Moscow Fire Ins. Co. v. Hecksher & Gottlieb, 260 A.D. 646, 651, 23 N.Y.S.2d 424, 428-29 (1940); Yancey v. North Carolina State Highway Comm'n, 222 N.C. 106, 109, 22 S.E.2d 256, 259 (1942).

3. *See, e.g.*, cases cited *supra* note 2.

4. 130 Ariz. 193, 635 P.2d 178 (1981).

5. *Id.* at 193, 635 P.2d at 178.

6. ARIZ. REV. STAT. ANN. § 44-1201(A) (1967) (amended 1979).

7. 130 Ariz. at 193, 635 P.2d at 178.

8. *Id.*

9. ARIZ. REV. STAT. ANN. § 44-1201(A) (Supp. 1981-82) was amended effective December 14, 1979. It previously provided: "Interest for any legal indebtedness shall be at the rate of six dollars upon one hundred dollars for one year, unless a different rate is contracted for in writing." *Id.* § 44-1201(A) (1967). See *supra* note 1 for the text of the current statute.

10. Petition for Special Action at app. G. (Plaintiff's Motion for Judgment on Mandate at 4).

11. *Id.*

the amended statute and ten percent thereafter.[12] The superior court denied the McBrides' motion and ordered judgment with interest only at the lower rate.[13] The McBrides then petitioned the Arizona Supreme Court for special action to order judgment specifying interest at the higher rate from December 14, 1979 to the date of satisfaction.[14]

The Arizona Supreme Court heard the special action and held that when the interest rate on a judgment is changed by statute, the rate of interest on preexisting judgments is also changed.[15] Consequently, the court found that the McBrides were entitled to six percent interest until December 14, 1979 and ten percent therafter.[16] The court based its decision on a determination that judgments are statutory rather than contractual obligations and that applying the amended rate to a preexisting judgment does not constitute a retroactive application of the new law.[17]

This Casenote will first review decisions characterizing judgments as contractual versus statutory obligations. Next, the argument that the application of a new rate of interest to preexisting judgments is retroactive will be discussed. The *McBride* decision will then be examined in light of these considerations. Finally, this Casenote will discuss possible implications of the court's decision that judgments are not contractual.

Judgments as Contractual Versus Statutory Obligations

The Arizona Supreme Court recognized in *McBride v. Superior Court*[18] that the effect of new statutes on preexisting judgments often turns on whether the judgment is considered a statutory or a contractual obligation. If a judgment is considered contractual the statute will generally not be applied to it.[19] But if a judgment is considered a statutory obligation courts are more willing to make the judgment subject to the new statute.[20]

Judgments have long been considered contractual obligations.[21] However, most decisions so holding have arisen in contexts not involving interest.[22] In *Higgins v. McFarland*,[23] for example, the Virginia Supreme

12. *Id.*
13. Petition for Special Action at app. H. (Judgment on Mandate).
14. *Id.* at 3.
15. 130 Ariz. at 194, 635 P.2d at 179.
16. *Id.*
17. *Id. See infra* notes 64-77 and accompanying text.
18. 130 Ariz. at 193-94, 635 P.2d at 178-79. This is not the only basis for deciding whether or not to apply a new statute to preexisting judgments. See *infra* notes 48-59 and accompanying text for a discussion of the argument that, regardless of how judgments are classified, the application of a new statute to preexisting judgments is impermissibly retroactive.
19. *See infra* notes 21-33 and accompanying text. In large part this is because of the provision in the Constitution that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST. ART. I, § 10, CL. 1.
20. *See infra* notes 34-37 and accompanying text.
21. 2 W. BLACKSTONE, COMMENTARIES *465. (Blackstone described a judgment as a contract of the highest nature). *See also* Texas & Pac. R. Co. v. Anderson, 149 U.S. 237 (1893) (applying Texas Law); Johnson v. Butler, 2 Iowa 535 (1856); Cox v. Marlatt, 36 N.J. L. 389, 13 Am. Rep. 454 (1873).
22. California Packing Corp. v. Sun-Maid Raisin Growers, 165 F. Supp. 245 (S.D. Cal. 1958); Minor v. Minor 175 Cal. App. 2d 277, 345 P.2d 954 (1959); Higgins v. McFarland, 196 Va. 889, 86 S.E.2d 168 (1955). Since there is no right to judgment interest absent a statute, City of East Orange v. Palmer, 52 N.J. 329, 332, 245 A.2d 327, 330 (1968); D. DOBBS, HANDBOOK ON THE LAW

Court declared that a judgment is a contract of the highest order in finding for the plaintiff in an action to enforce a property settlement against her former husband's estate. The court thought such a determination was particularly justified since the decree was entered by consent of the parties.[24] Similarly, in *Minor v. Minor*,[25] a suit involving the amount due under a divorce judgment, a California Court of Appeals reiterated an earlier California decision[26] that an action based on a judgment is an action based on a contract.[27] The court reasoned that the judgment debtor is obligated to pay the judgment and the law implies a contract requiring him to do so.[28] Finally, in *California Packing Corp. v. Sun-Maid Raisin Growers*,[29] involving the sale of a trademark, a United States District Court held that a judgment is in a sense a contract. There an injunction obtained by the holder of one trademark restricting another company's use of its own mark increased the value of the unenjoined trademark.[30] When the unenjoined mark was sold the purchase price reflected the value added by the injunction.[31] The judgment granting the injunction was deemed to be a contract and was, thus, assignable to the new owner of the unenjoined trademark.[32] The court was probably more willing to find that the earlier judgment here was in the nature of a contract because the successors to the litigants had agreed to the restriction on which the injunction was based.[33]

The contrary view adopted by many jurisdictions is that judgments and interest are not matters of contract but are wholly statutory obligations.[34] Such a position was taken by the Supreme Court of Idaho in

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OF REMEDIES 174 (1973), decisions not applying changes in interest rates to preexisting judgments are more commonly based on state provisions disapproving retroactive laws. *See infra* notes 49-59 and accompanying text.

23. 196 Va. 889, 893, 86 S.E.2d 168, 172 (1955).

24. *Id.* In *McBride*, Milne similarly argued that the parties agreed to six percent interest on the judgment. *See infra* notes 62-63 and accompanying text. But in *McBride* there was no agreement on the judgment itself, and at the time Milne could not insist on another rate of interest as long as the McBrides demanded the then legal rate of six percent. See *supra* note 9 for the text of the interest rate statute then in effect.

25. 175 Cal. App. 2d 277, 345 P.2d 954 (1959).

26. Grotheer v. Meyer Rosenberg, 11 Cal. App. 2d 268, 272-73, 53 P.2d 996, 998 (1936).

27. 175 Cal. App. 2d at 278, 345 P.2d at 955.

28. *Id.* (quoting *Grotheer*, 11 Cal. App. 2d at 272-73, 53 P.2d at 998). This is contrary to the general notion that a money judgment, unlike a contract, does not personally compel the debtor to act. *See infra* notes 66-67 and accompanying text.

29. 165 F. Supp. 245, 251 (S.D. Cal. 1958). A judgment is never really considered a true contract since there are important differences between them. *See infra* notes 66-71 and accompanying text. The question the courts must answer, then, is whether a judgment is sufficiently in the nature of a contract to allow it to be enforced as such.

30. 165 F. Supp. at 251.

31. *Id.* The injunction was assigned to the purchaser as part of the goodwill of the trademark being sold. *Id.*

32. *Id.*

33. *Id.* at 247. The court relied on the statement by the United States Supreme Court that a "judgment is only a contract because it is evidence of a debt or obligation" and that it "presupposes, and is founded on, some antecedant obligation or contract." *Id.* at 251 (quoting Blount v. Windley, 95 U.S. 173, 176 (1877)). *McBride* can be distinguished since the original cause of action there was in tort and, thus, there was no underlying obligation between the parties.

34. *See* Harris v. Commissioner, 340 U.S. 106, 110 (1950) ("A decree is not a 'promise or agreement' in any sense."). There is also historical support for this view. Lord Mansfield noted that a judgment is not a contract. Bidleson v. Whytel, 3 Burrows 1545, 1548, 97 Eng. Rep. 972, 974 (1764).

Idaho Gold Dredging Corp. v. Boise Payette Lumber Co.[35] The plaintiffs in *Idaho Gold* won a tort judgment which specified the payment of seven percent interest which was the legal rate at the time.[36] While an appeal of the judgment was pending the Idaho state legislature lowered the rate of interest payable on judgments to six percent.[37] The supreme court, in applying the change to the preexisting judgment, held that judgment interest is not contractual and that courts have no authority to provide for interest at other than the legal rate.[38] The court did not consider the nature of judgments generally.[39] The specification of seven percent interest in the judgment did not represent an agreement by the parties, but was simply a restatement of the existing, though alterable statutory rate.[40] Consequently the court found that the judgment bore seven percent interest from entry until the effective date of the amendment and six percent thereafter.[41]

Similarly, the Supreme Court of Illinois concluded that judgments are purely statutory obligations in *Noe v. City of Chicago*.[42] In *Noe*, the plaintiff won a personal injury judgment against the city when the interest rate on judgments was five percent.[43] Although the interest rate was subsequently raised to six percent, the city's offer of payment included interest only at the lower rate.[44] The plaintiff refused the tender and sued when the city declined to pay the higher rate of interest.[45] The Supreme Court of Illinois, in granting the plaintiff six percent interest from the date of the amended statute, held that judgment interest is a wholly statutory creation changeable by the legislature and applicable from its effective date even to preexisting judgments.[46] The court reasoned that since application of the legal rate does not require assent of the parties, absent a different agreement interest could accrue at each moment only at the legal rate then in effect.[47]

Simply determining if a judgment, or at least the interest thereon, is a matter of statutory or contractual obligation does not end the consideration of whether a new statutory rate should be applied to preexisting judg-

35. 54 Idaho 765, 37 P.2d 407 (1933).

36. *Id.* at 766, 37 P.2d at 408.

37. *Id.* at 770, 37 P.2d at 412 (IDAHO CODE § 26-1904 (1932) *amended* 1933 IDAHO SESS. LAWS. ch. 197).

38. 54 Idaho at 770, 37 P.2d at 412. The statutory position is probably strongest in the case of interest, which is itself a statutory creation, *see supra* note 22, on a tort judgment (there being no underlying obligation) as here. *See infra* notes 53, 58.

39. See *infra* text accompanying notes 78-79 for a discussion of how this approach could have been used by the court in *McBride*.

40. *Id.*

41. *Id.*

42. 56 Ill. 2d 346, 307 N.E.2d 376 (1974).

43. *Id.* at 347, 307 N.E.2d at 377. As in *Idaho Gold*, discussed *supra* notes 35-41 and accompanying text and *McBride* discussed *infra* notes 60-65 and accompanying text, the question before the court was the treatment of interest on a tort judgment. But unlike the court in *Idaho Gold* the court here did consider and discuss the status of judgments.

44. *Id.*

45. *Id.*

46. *Id.* at 349, 307 N.E.2d at 379.

47. *Id.* at 348-49, 307 N.E.2d at 378-79 (restating the rule of Firemen's Fund Ins. Co. v. Western Refrig. Co., 162 Ill. 322, 44 N.E. 746 (1891)).

ments. The amended statute must also reflect a legislative intent that it be applied retroactively.

Retroactive Application of Interest Rate Changes

Although a number of recent decisions have refused to apply interest rate changes to preexisting judgments,[48] those decisions have generally been based on state provisions disapproving retroactive applications of new laws.[49] For a new law to affect situations and transactions that predate it there generally must be a clear showing that the legislature intended the statute to be applied retroactively.[50] Some courts hold that applying a new rate to preexisting judgments is a retrospective application of the interest change since it affects judgments already entered.[51] This was the position taken by the Supreme Court of Oklahoma in *Sunray DX Oil Co. v. Great Lakes Carbon Corp*.[52]

In *Sunray*, a judgment was obtained when the statutory rate was six percent.[53] The interest rate was then raised to ten percent while the appeal was still pending.[54] The Oklahoma Supreme Court, however, refused to apply the higher rate to the preexisting judgment.[55] After scrutinizing the language of the statute the court concluded that it was neither clear nor necessarily implied that the legislature intended for the statute to be applied other than prospectively.[56] The court noted that statutes are given retroactive effect only when an intent is manifested by the legislature and held that applying the new rate to outstanding judgments would be retrospective.[57]

A New Jersey appellate court apparently used the same reasoning in *McKee v. Harris-Seybold Co*.[58] in holding that a statute allowing interest on certain judgments did not create a right to interest on outstanding judg-

48. *See, e.g.*, cases cited *infra* note 51.

49. *See, e.g.*, ARIZ. REV. STAT. ANN. § 1-244 (1974); CAL. CIV. CODE § 3 (West 1982); N.Y. STAT. LAW § 51(b) (McKinney 1971).

50. ARIZ. REV. STAT. ANN. § 1-244 (1974) states: "No statute is retroactive unless expressly declared therein." *See, e.g.*, Gallo v. Industrial Comm'n of Ariz., 83 Ariz. 392, 322 P.2d 372 (1958); Allen v. Fisher, 118 Ariz. 95, 574 P.2d 1314 (App. 1977); Merchants Despatch Transp. Corp. v. Arizona State Tax Comm'n, 20 Ariz. App. 276, 512 P.2d 39 (1973).

51. *See, e.g.*, Butler v. Rockwell, 17 Colo. 290, 29 P. 458 (1892); Inabinet v. State Farm, 262 So. 2d 920 (La. App. 1972); Coastal Indus. Water Auth. v. Trinity Portland Cement, 563 S.W.2d 916 (Tex. 1978).

52. 476 P.2d 329 (Okla. 1970).

53. *Id.* at 344. Here the action was on a contract. Although that fact was not cited as a basis for the decision, it is possible that a court would be more reluctant to apply a new rate to a contract than a tort judgment. The underlying obligation in a contract action presumably contemplates damages for breach, including the interest payable on judgments. There is no such consideration in tort actions. *See supra* note 38; *infra* note 58.

54. *Id.* at 344.

55. *Id.* at 346.

56. *Id.* The statute the court construed reads in part: "All judgments of courts of record shall bear interest from the day on which they are rendered, at the rate of ten percent (10%) per annum . . ." 1968 Okla. Sess. Laws Ch. 71.

57. *Id.* at 346.

58. 118 N.J. Super. 480, 480, 288 A.2d 585, 585 (1972). The action here was in tort; but the court's brief *per curiam* opinion does not reveal whether that fact was considered relevant. Presumably, though, the argument for applying the new rate of interest to outstanding judgments is strongest where the cause of action sounds in tort. *See supra* notes 38, 53.

ments entered before the law's effective date. Neither *Sunray* nor *McKee* discussed the nature of judgments. Likewise, in *Moore v. Travelers Indemnity Co.*[59] the Louisiana Court of Appeals ignored the status of judgments in holding that the plaintiffs in a wrongful death action were entitled only to the statutory rate of interest in effect at the time of judicial demand. Because these courts concluded that applying the new interest statutes to preexisting judgments would be retroactive they did not have to consider whether judgments and interest are statutory or contractual. The Arizona Supreme Court has considered the status of judgments and has reviewed the argument that applying a new statutory rate to outstanding judgments is retroactive.

An Analysis of McBride v. Superior Court

In *McBride v. Superior Court*,[60] the Arizona Supreme Court had to decide how to treat interest on a tort judgment entered when the statutory rate was six percent but still outstanding after the rate was raised to ten percent. The plaintiffs in *McBride* argued that absent an agreement with Milne, the rate of interest payable on the judgment increased from six to ten percent at the effective date of the statute.[61] Milne countered that since the McBrides, as the prevailing party, drafted the judgment[62] they should be bound by its wording, which specified six percent interest and did not refer to the legal rate.[63] This argument may suggest that the McBrides' inclusion of six percent interest and Milne's acquiesence in that figure made that part of the judgment an unalterable agreement, or that the plaintiffs were estopped by their drafting of the judgment from later asking for the higher rate. The *McBride* court, however, did not deem the specification of any particular rate in the judgment to make that rate unalterable.[64] The court held that a judgment is not a contractual obligation, quoting language from *Noe* that the idea that judgments are contracts or in the nature of contracts is unrealistic.[65]

The notion that judgments are contractual is a legal fiction. Indeed, there are serious differences between contracts and judgments. Contracts create a right in one party and a duty in the other[66] while a judgment does not personally compel the debtor to act.[67] Furthermore, unlike a contract[68] a judgment does not demand the free assent of the parties.[69] And by way of enforcement, failure to fulfill a contractual obligation cannot

59. 352 So. 2d 270, 274 (La. App. 1977).
60. 130 Ariz. 193, 193, 635 P.2d 178, 178 (1981).
61. *Id.*
62. The practice is for the prevailing party to draft the judgment for the court. See generally C. SMITH, ARIZONA CIVIL TRIAL MANUAL 467 (1981) on the drafting of judgments in Arizona.
63. Respondent's Memorandum of Points and Authorities at 1.
64. 130 Ariz. at 194, 635 P.2d at 178. *See* Idaho Gold Dredging Corp. v. Boise Payette Lumber Co., 54 Idaho 765, 37 P.2d 407 (1933) (discussed *supra* notes 35-41 and accompanying text).
65. 130 Ariz. at 194, 635 P.2d at 178 (quoting Noe v. City of Chicago, 56 Ill. 2d 346, 349, 307 N.E.2d 376, 379 (1974), discussed *supra* notes 42-47 and accompanying text).
66. 1 S. WILLISTON, WILLISTON ON CONTRACTS 2-3 (1963).
67. D. DOBBS, *supra* note 22, at 10.
68. S. WILLISTON, *supra* note 66, at 5.
69. *McBride*, 130 Ariz. at 194, 635 P.2d at 179.

lead to jail[70] while refusal to comply with a judgment can be so punished.[71]

Milne further argued that applying the higher rate to this judgment would constitute a retroactive application of the new statute.[72] The supreme court did not agree.[73] It held that the law was being given only prospective effect.[74] The *McBride* court agreed with the holding in *Noe* that applying the new interest rate from its effective date does not constitute a retroactive application of the law.[75] This application was instead seen by the court to operate only prospectively—from the effective date of the statute—even though it does apply to preexisting judgments.[76] By holding that the interest rate change as applied here was not retroactive the court avoided deciding whether an amendment to the interest authorizing statute could apply to preexisting judgments from the date of entry.[77]

Although *McBride* decided that judgments are not contractual and concluded that the law here was not being given retroactive effect, the decision has implications in other areas.

Further Implications of the McBride *Decision*

Holding, as the court did in *McBride v. Superior Court*, that judgments are not contractual was, perhaps, unnecessary. Rather than questioning the nature of judgments in general the court could have restricted its decision and analysis to the issue of judgment interest. The Arizona Court of Appeals has held that interest on a legal indebtedness is imposed by statute and not by implied contract.[78] Since all that was in dispute here was the treatment of interest, there was no need to discuss judgments. The court could have held that the law was being given prospective effect and that interest is not contractual since it is allowed only by statute. But the Arizona Supreme Court went further in *McBride* and held that judgments themselves are purely statutory obligations.[79] The effect of that decision could logically extend well beyond cases involving questions of interest. It could, for example, affect the way judgments are enforced.

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70. The Arizona Constitution provides: "There shall be no imprisonment for debt, except in cases of fraud." ARIZ. CONST. ART. II, § 18.

71. S. RAPALJE, CONTEMPT 1, 45 (1981).

72. 130 Ariz. at 194, 635 P.2d at 179.

73. *Id.*

74. *Id.*

75. *Id.* at 193, 635 P.2d at 177. *See supra* notes 42-47 and accompanying text.

76. 130 Ariz. at 194, 635 P.2d at 178.

77. ARIZ. REV. STAT. ANN. § 1-244 forbids statutes from being applied retroactively except where the legislature so authorizes. *See supra* note 50 for the text of the statute. But the Arizona Supreme Court held that this applies only to statutes that affect substantive rights. Bouldin v. Turek, 125 Ariz. 77, 78, 607 P.2d 954, 955 (1979). A statute does have retroactive effect if it involves only procedural changes. *Id.* (statute allowing award of attorney's fees in contract suits substantive and thus not applicable retroactively). Presumably the court would have considered the interest rate change substantive and not applicable retroactively without legislative approval. *See also* Allen v. Fisher, 118 Ariz. 95, 97, 574 P.2d 1314, 1316 (Ct. App. 1977) (rule affecting measure of damages substantive and, thus, not applicable retroactively). In any event the court was not faced with this issue since the McBrides did not argue that the higher rate of interest should apply from the date of judgment.

78. Jarvis v. Jarvis, 27 Ariz. App. 266, 268, 553 P.2d 1251, 1253 (1976).

79. 130 Ariz. at 194, 635 P.2d at 178.

An important difference between contractual and statutory obligations is that failure to perform a contractual obligation cannot be punished by imprisonment, while refusal to fulfill a statutory obligation can be.[80] By drawing such a bold line between statutory and contractual obligations the court may be tacitly sanctioning the wider use of contempt proceedings to enforce judgments of all sorts, even where such means could not be used to enforce rights under a contract.

Such a course may not be that extreme a departure from current practice. Contempt is already seen as a legitimate means of enforcing an alimony judgment.[81] In Arizona, one who is able to pay alimony but refuses to do so, or one who brings about his own inability to pay may be punished for contempt.[82] And more recently the court of appeals has ruled that if a husband's payment to his former wife under a decree of divorce arises out of a legal obligation of support, the obligation may be enforced by contempt proceedings whereas a merely contractual duty to pay may not.[83] Now that the *McBride* court has said that all judgments are wholly legal obligations and not contractual duties[84] one might reasonably extrapolate that the power of contempt is available to enforce all judgments. This would be contrary to the principle that contempt is generally not available to enforce a judgment to pay money.[85]

This is not to suggest that the court has now sanctioned the imprisonment of debtors. The courts already have means to coerce reluctant defendants; courts also use the power of contempt cautiously.[86] Although contempt is an extreme means of enforcing a judgment,[87] the threat of contempt could be a powerful tool in the hands of a judgment creditor.

The threat of contempt could possibly be used to persuade a defendant with assets outside the jurisdiction to bring them to the plaintiff without forcing the latter to find them and file suit in another state.[88] It is questionable whether a court would enforce its orders in a civil suit by

80. *See supra* notes 70-71 and accompanying text. Although the Arizona Constitution forbids imprisonment for debt except in cases of fraud, ARIZ. CONST. ART. II, § 18, a court does have the power to punish as contempt the disobedience of its orders, judgments and decrees. S. RAPALJE, *supra* note 71, at 1, 45.

81. S. RAPALJE, *supra* note 71, at 48. This is the case in a majority of states. *See, e.g.*, Harvey v. Harvey, 153 Colo. 15, 384 P.2d 265 (1963); Adams v. Adams, 218 Ga. 286, 127 S.E.2d 365 (1962); Mitchell v. Mitchell, 270 N.C. 253, 154 S.E.2d 71 (1967).

82. Selph v. Selph, 27 Ariz. 176, 231 P. 921 (1925).

83. Cocke v. Cocke, 13 Ariz. App. 57, 474 P.2d 64 (1970).

84. 130 Ariz. at 194, 635 P.2d at 179.

85. *See, e.g.*, Bahre v. Bahre, 248 Ind. 656, 230 N.E.2d 411 (1967); People v. Person, 44 Mich. App. 630, 205 N.W.2d 610 (1973); Clay v. Eagle Reciprocal Exchange, 368 S.W.2d 344 (Mo. 1963). *See also* D. DOBBS, supra note 22, at 94.

86. ARIZ. R. CIV. P. 69 provides that the process to enforce a judgment for the payment of money shall be by writ of execution unless the court directs otherwise. In aid of the judgment or execution the judgment creditor may use discovery against the judgment debtor. *Rule* 37(b) provides that failure to comply with a discovery order can be treated as contempt. *Id.* 37(b). ARIZ. REV. STAT. ANN. § 12-1556 (1982) provides that a judgment requiring a performance can be enforced by contempt.

87. Haines v. Haines, 35 Mich. 138, 144 (1876).

88. Since it is recognized that a court has the power to determine what type of action will constitute contempt, Beach v. Beach, 79 Ohio App. 397, 402, 74 N.E.2d 130, 134 (1946), a court could hold that the debtor's failure to bring assets necessary to satisfy a valid judgment into the jurisdiction is contemptuous. This would be consistent with Arizona case law which defines con-

such means, but the existence of that possibility may make some judgments easier to collect.

Conclusion

In *McBride v. Superior Court*, the Arizona Supreme Court was faced with the question of how to apply a change in the statutory rate of interest on judgments and, specifically, whether to apply it to preexisting judgments. The court, holding that such interest and judgments generally arise out of a statutory rather than a contractual obligation, concluded that the plaintiffs were entitled to interest at the old rate until the effective date of the change and at the new, higher rate thereafter. This conclusion is not of itself surprising. Judgments do not fit in the mold for contracts; absent an agreement between the parties it is not unreasonable to apply a change in the interest rate from its effective date. But the decision does raise interesting questions about the status and treatment of judgments, particularly about their enforcement.

The court could have reached the same result without discussing the status of judgments. It could have, first, restated an earlier, narrow decision of the court of appeals that judgment interest is a statutory obligation. Then applying that rule, the court could have held that when the interest rate changed, absent any earlier agreement, the legal obligation also changed. The justices could have left for a more appropriate case a decision on the status of judgments generally.

The supreme court effectively skirted the issue of retroactivity. The justices did not discuss whether interest earned under the old rate could be changed but did hold that the rate specified in judgments predating the new statute could be altered from the effective date of the statute. This was considered a prospective application of the new law.

In *McBride*, the rule announced by the court seems simple and just. The purpose of changing the rate of interest payable on judgments is to reflect more accurately the market rate of interest. Applying the new statute from its effective date serves this purpose by denying the judgment debtor any benefit from late payment. But in *McBride*, by speaking in unnecessarily broad language, the court may have confused as much as it clarified the treatment of interest and judgments.

Philip Kimble

tempt as "[a]ny act which is calculated to hinder, obstruct or embarass a court in the administration of justice." Ong Hing v. Thurston, 101 Ariz. 92, 98, 416 P.2d 416, 422 (1966).

IV. CRIMINAL PROCEDURE

A. PROPRIETY OF INQUIRIES INTO THE NUMERICAL DIVISION OF A JURY

In *State v. Roberts*,[1] the Arizona Supreme Court considered the propriety of a trial judge inquiring into the numerical division of a deliberating jury and the coercive effects such an inquiry might have. Concern with whether a jury was coerced into reaching a verdict is a relatively modern phenomenon. In fact, the early common law utilized harsh measures to insure that juries reached a unanimous verdict.[2] Jurors were, "to be kept together without meat, drink, or candle . . . till they . . . all unanimously agreed,"[3] and if they failed to so agree before the circuit judges left for another town, "the judges [were] not bound to wait on them, but [could] carry them . . . [about] in a cart."[4] Today's notions of permissible outside influences upon the jury's deliberative process are drastically different.[5] Judges may not unduly coerce or influence a jury to reach a particular verdict,[6] or to reach any verdict at all.[7]

One aspect of juror coercion was considered in 1926 in *Brasfield v. United States*,[8] where the United States Supreme Court held that a federal trial judge's inquiry into the numerical division of a deliberating jury constituted reversible error,[9] because such inquiry tends to be coercive[10] and brings to bear a "serious . . . improper influence upon the jury."[11] Today, the *Brasfield* ban is controlling in federal courts,[12] but its effect upon state courts has varied.[13] A small minority of jurisdictions has adopted the *Brasfield* rule that a numerical inquiry alone is reversible error.[14] A sec-

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1. 131 Ariz. 513, 642 P.2d 858 (1982).

2. *See* People v. Sheldon, 156 N.Y. 268, 275-76, 50 N.E. 840, 842 (1898). *See also* M. GLEISSER, JURIES AND JUSTICE 41 (1968); R. SIMON, THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW 26 (1975).

3. People v. Sheldon, 158 N.Y. 268, 275, 50 N.E. 840, 842 (1898) (quoting W. BLACKSTONE, COMMENTARIES * 375).

4. *Id. See also* Crist v. Bretz, 437 U.S. 28, 36 n.13 (1978).

5. Wissel v. United States, 22 F.2d 468, 471 (2d Cir. 1927) (stating the general principle that "surrender of the independent judgment of a jury may not be had by command or coercion . . . [so] exerted as to overbear their volition without convincing their judgment"). *See also* People v. Carter, 68 Cal. 2d 810, 815-16, 442 P.2d 353, 356, 69 Cal. Rptr. 297, 300 (1968); Lowe v. People, 175 Colo. 491, 494, 488 P.2d 559, 561 (1971) ("the court cannot . . . authorize the jurors to render a compromise verdict . . . which is reached by some members of the jury sacrificing their conscientious opinions merely for the sake of reaching an agreement").

6. *See* Wissel v. United States, 22 F.2d 468, 471 (2d Cir. 1927); Lowe v. People, 175 Colo. 491, 494-95, 488 P.2d 559, 561 (1971).

7. *See* United States v. Sawyers, 423 F.2d 1335, 1341 (4th Cir. 1970); People v. Carter, 68 Cal. 2d at 814, 442 P.2d at 356, 69 Cal. Rptr. at 300.

8. 272 U.S. 448 (1926).

9. *Id.* at 450.

10. *Id.*

11. *Id.*

12. *See, e.g.*, United States v. Hayes, 446 F.2d 309, 312 (5th Cir. 1971); Jacobs v. United States, 279 F.2d 826, 829, 832 (8th Cir. 1960); Cook v. United States, 254 F.2d 871, 873 (5th Cir. 1958).

13. *See, e.g.*, Ellis v. Reed, 596 F.2d 1195, 1198 (4th Cir.), *cert. denied*, 444 U.S. 973 (1979); Sharplin v. State, 330 So. 2d 591, 595 (Miss. 1976); State v. Loberg, 73 S.D. 301, 304, 42 N.W.2d 199, 200 (1950).

14. *See, e.g.*, People v. Wilson, 390 Mich. 689, 213 N.W.2d 193, 195 (1973); Commonwealth

ond group of states views the inquiry itself as improper and discourages it, but treats the error as harmless unless the cumulative effect of the inquiry was coercion of the jury.[15] This is the approach taken by the Arizona Courts of Appeals, which have previously held that numerical inquiries were not to be condoned,[16] and that they would be scrutinized to determine whether in a given case they combined with other factors to produce a coercive effect upon the jury.[17] Finally, the remaining states which have considered the issue permit numerical inquiries to aid in determining the probability of eventual agreement among jurors and thus the usefulness of continued deliberations.[18]

In *State v. Roberts*,[19] the Arizona Supreme Court dealt with the propriety of a numerical inquiry for the first time. Roberts, the defendant, was tried for kidnapping and extortion.[20] At the end of a four day trial, the jury deliberated approximately six hours over a two day period[21] before advising the court that it was hopelessly deadlocked.[22] The jurors were called into open court; the judge inquired as to their numerical division, learned that they stood eleven-to-one, and ordered them to continue deliberations.[23] The jury returned verdicts of guilty approximately one

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v. Robinson, 102 Pa. Super. Ct. 46, 50, 156 A. 582, 583 (1931); Kersey v. State, 525 S.W.2d 139, 141 (Tenn. 1975).

15. *See, e.g.*, United States *ex rel.* Kirk v. Director, Dep't of Corrections, 678 F.2d 723, 727 (7th Cir. 1982) (Illinois law); Cornell v. Iowa, 628 F.2d 1044, 1048 (8th Cir. 1980) (Iowa law), *cert. denied*, 449 U.S. 1126 (1981); State v. Rickerson, 95 N.M. 666, 668, 625 P.2d 1183, 1185 (1981).

16. *See, e.g.*, State v. Roberts, 131 Ariz. 519, 521-22, 642 P.2d 864, 866-67 (Ct. App. 1981) (reversal required); State v. Corrales, 121 Ariz. 104, 105, 588 P.2d 846, 847 (Ct. App. 1978); State v. Streyar, 119 Ariz. 607, 609, 583 P.2d 263, 265 (Ct. App. 1978) (both *Streyar* and *Corrales* requiring reversal where the trial court's communication with the jury was made in the absence of and without notice to the defendant).

17. State v. Roberts, 131 Ariz. 513, 521, 642 P.2d 858, 866 (Ct. App. 1981).

18. *See, e.g.*, People v. Carter, 68 Cal. 2d 810, 815, 442 P.2d 353, 356-57, 69 Cal. Rptr. 297, 300-01 (1968); Huffaker v. State, 119 Ga. App. 742, 168 S.E.2d 895, 896-97 (1969); Joyner v. State, 484 P.2d 560, 562 (Okla. Crim. App. 1971).

19. 131 Ariz. 513, 642 P.2d 858 (1982).

20. *Id.* at 514, 642 P.2d at 859.

21. *Id.* The jury began deliberations at 4:25 P.M. on February 26, 1980 and was excused for the night at 6:00 P.M. The following day, the jury deliberated from 10:00 A.M. to 1:50 P.M., at which time the jurors were called back into open court. *Id.*

22. *Id.*

23. *Id.* at 515, 642 P.2d at 860. The following colloquy occurred when the jurors were recalled:

THE COURT	:	Ladies and gentlemen, my secretary has advised me that the foreman has indicated that it appears the jury is hopelessly deadlocked. Who is the foreman?
THE FOREMAN:		I am, sir.
THE COURT	:	Sir, does it appear that there is no reasonable probability that the jury can agree on a verdict?
THE FOREMAN:		I posed that question last night, this morning again, and again right after we came back from lunch. We have honestly talked back and forth, deliberated very conscientiously, and we cannot come to a unanimous decision.
THE COURT	:	May I ask, and don't disclose which side it is on, but what is the split, 11 to one, five to five or what?
THE FOREMAN:		11 to one. It has been that way since yesterday evening.
THE COURT	:	Why don't you all give it a little while longer. There is a lot of evidence, so give it a while longer and see if you can't reach a verdict. And if you just can't reach a point where it appears there is no reasonable probability that you can, let us know again.

hour later.[24] On appeal, Roberts contended that the inquiry into the jury's numerical division was reversible error under *Brasfield*.[25] The Arizona Supreme Court disagreed and refused to adopt the *Brasfield* rule;[26] the court held that *Brasfield* constituted merely an exercise of judicial administration promulgated under the United States Supreme Court's supervisory powers over the federal courts, and therefore was not mandatory for state trials.[27] The *Roberts* court nevertheless condemned numerical inquiries,[28] and recommended that the Arizona trial courts confine their questioning of deadlocked juries to the possibility of eventual agreement.[29] To determine whether the inquiry by the trial court in *Roberts* impermissibly coerced the jury, the Arizona Supreme Court adopted a totality of circumstances rule.[30] Reviewing the circumstances of the case, the supreme court held that neither the numerical inquiry[31] nor the inquiry combined with the trial judge's other comments[32] were prejudicial. Accordingly, Roberts' original conviction was affirmed.[33]

This Casenote will analyze the *Roberts* decision. First, it will examine the conclusion that *Brasfield* is a rule of federal judicial administration rather than a constitutionally based mandate applicable to the states. Second, it will assess whether the potentially prejudicial effects of numerical inquiries outweigh the value of any legitimate uses of such inquiries. Third, the totality of circumstances rule will be explored, focusing on its inherent tendency toward ambiguous and inconsistent application, and the consequent need for clear standards and guidelines regarding its use. Finally, an alternative means of assessing the likelihood of agreement of a deadlocked jury will be discussed.

Constitutional Basis of Brasfield and the Ban on Inquiry

The right to trial by an impartial jury in federal criminal prosecutions

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Thank you.

Id. at 514-15, 642 P.2d at 859-60.

24. *Id.* at 515, 642 P.2d at 860.

25. *See id.* at 514, 642 P.2d at 859. The court of appeals in *Roberts* expressly declined to address the issue of whether a numerical inquiry constituted reversible error *per se*. 131 Ariz. 519, 521, 642 P.2d, 864, 866 (Ct. App. 1981), *vacated in part, approved in part*, 131 Ariz. 514, 642 P.2d 858 (1982). Instead, the court stated that the "better practice" would be not to make numerical inquiries, *id.*, and held that the trial judge's inquiry resulted in "a coercive influence upon the jury that requires reversal." *Id.* at 522, 642 P.2d at 867.

26. 131 Ariz. at 515-16, 642 P.2d at 860-61.

27. *Id.* at 515-16, 642 P.2d at 860-61.

28. *Id.* "[T]here is more danger of possible prejudice than any possible good which may result in employing the practice. We therefore condemn the use of such inquiry, and we recommend that there be no inquiry into the numerical division of the jury." *Id.*

29. *Id.* at 516, 642 P.2d at 861. "The inquiry . . . should be limited to asking whether progress has been made toward reaching an agreement and what the likelihood is for future progress." *Id.*

30. *Id.* Under the totality rule, "[w]hat conduct amounts to coercion is particularly dependent upon the facts of each case." *Id.* at 515, 642 P.2d at 860. *See also infra* notes 63-66, 92-120 and accompanying text.

31. 131 Ariz. at 516, 642 P.2d at 861.

32. *Id.*

33. *Id.*

is guaranteed by the sixth amendment.[34] This right was extended to prosecutions in state courts via the fourteenth amendment[35] in *Duncan v. Louisiana*.[36] Fourteenth amendment due process, however, does not require that states adopt every aspect of the federal jury system.[37] Only federal rules which are "an integral part of the constitutional guarantee" are mandatory for the states.[38] While the United States Supreme Court may exercise its supervisory power and adopt rules that are broader than the constitution requires,[39] only the constitutional component of such rules must be adhered to by state courts.[40] For example, states are free to deviate from federal requirements and utilize nonunanimous verdict rules[41] or juries of less than twelve persons.[42] For the *Brasfield* rule to apply to the state courts, numerical inquiry must violate the constitutional right to an impartial jury,[43] otherwise the rule will constitute only an administrative "policy for the federal courts to follow"[44] and the states will remain free to formulate their own guidelines.[45]

The *Brasfield* opinion does not indicate whether the prohibition was

34. U.S. CONST., amend. VI provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

35. U.S. CONST. amend. XIV, § 1 provides in part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

36. 391 U.S. 145, 149 (1968). *Duncan* held that the right to trial by an impartial jury guaranteed by the sixth amendment is "fundamental to the American scheme of justice," and therefore applies to the states. *Id. See also* Ludwig v. Massachusetts, 427 U.S. 618, 624 (1976); Ristaino v. Ross, 424 U.S. 589, 595 (1976).

37. Johnson v. Louisiana, 406 U.S. 356, 363 (1972) (less than unanimous juries do not violate due process clause); Williams v. Florida, 399 U.S. 78, 86 (1970) (trial by jury does not necessarily require twelve member juries).

38. *See* Crist v. Bretz, 437 U.S. 28, 32 (1978). *See also* Apodaca v. Oregon, 406 U.S. 404, 406 (1972); Williams v. Florida, 399 U.S. 78, 86 (1970).

39. *See* McNabb v. United States, 318 U.S. 332, 340 (1943) ("judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure . . . [which] are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' "). *See also* Ballard v. United States, 329 U.S. 187, 193 (1946); United States v. Mitchell, 322 U.S. 65, 68 (1944). *See generally* Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963).

40. *See* Cupp v. Naughten, 414 U.S. 141, 146 (1973) ("Before a federal court may overturn a . . . [state conviction], it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed by the fourteenth amendment."). *See also* Wright v. Smith, 569 F.2d 1188, 1191 (2d Cir. 1978); United States *ex rel.* Dorey v. New Jersey, 560 F.2d 584, 587 (2d Cir. 1977).

41. Johnson v. Louisiana, 406 U.S. 356, 363 (1972). *See also* Apodaca v. Oregon, 406 U.S. 404, 406 (1972); Ellis v. Reed, 596 F.2d 1195, 1199 (4th Cir.), *cert. denied*, 444 U.S. 973 (1979).

42. Williams v. Florida, 399 U.S. 78, 103 (1970). *See also* McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971); Ellis v. Reed, 596 F.2d 1195, 1199 (4th Cir.), *cert. denied*, 444 U.S. 973 (1979).

43. United States *ex rel.* Kirk v. Director, Dep't of Corrections, 678 F.2d 723, 725-26 (7th Cir. 1982). *See* Crist v. Bretz, 437 U.S. 28, 32 (1978); Cupp v. Naughten, 414 U.S. 141, 146 (1973).

44. Ellis v. Reed, 596 F.2d 1195, 1200 (4th Cir.), *cert. denied*, 444 U.S. 973 (1979); *see* United States *ex rel.* Kirk v. Director, Dep't of Corrections, 678 F.2d 723, 725 (7th Cir. 1982); State v. Rickerson, 95 N.M. 666, 668, 625 P.2d 1183, 1185 (1981).

45. *See* cases cited *supra* note 44. For a detailed discussion of the constitutional implications of *Brasfield*, see Note, *Ellis v. Reed: Constitutionality and Coerciveness of Judicial Inquiry Into the Numerical Division of a Jury*, 58 N.C.L. REV., 379 (1980) [hereinafter referred to as Note, *Constitutionality and Coerciveness*]. *See generally* Note, *Constitutional Propriety of State Judges' Inquiries into the Numerical Division of Deadlocked Juries: Ellis v. Reed*, 64 MINN. L. REV. 813 (1980) [hereinafter referred to as Note, *Deadlocked Juries*] (arguing that Brasfield was supervisory only); Note, *Inquiries Into the Numerical Division of Juries: Ellis v. Reed*, 82 W. VA. L. REV. 383 (1979)

constitutionally grounded.[46] Only one state court[47] has characterized the *Brasfield* rule as constitutionally required,[48] and that interpretation was subsequently overruled by the state's supreme court.[49] On the other hand, three federal circuit courts[50] and a number of state courts[51] that have addressed the issue have identified *Brasfield* as an administrative rule only, based on the United States Supreme Court's supervisory power over the federal judicial system. In assessing the constitutional basis of *Brasfield*, courts have typically examined the language of the opinion and the inherent coerciveness of numerical inquiries.

First, although the *Brasfield* opinion contains certain language that arguably supports a constitutional interpretation,[52] the opinion does not expressly cite or rely on any constitutional provisions.[53] Second, the *Brasfield* holding can reasonably be viewed as an elaboration of dicta in *Burton v. United States*,[54] where the United States Supreme Court stated that the

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[hereinafter cited as Note, *Numerical Inquiries*] (suggesting that Brasfield was constitutionally based).

46. 272 U.S. 448 (1926). The relevant portion of the *Brasfield* opinion is as follows:

> We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned.

Id. at 450.

47. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), *cert. denied*, 89 N.M. 206, 549 P.2d 284 (1976), *overruled in part*, State v. Rickerson, 95 N.M. 666, 668, 625 P.2d 1183, 1185 (1981) (court overruled *Aragon*'s finding that *Brasfield* rule was constitutionally grounded).

48. *Id.* at 97, 547 P.2d at 580. The New Mexico Appeals Court held that "because the error goes to a 'fair and impartial' trial, the error violates due process" and the *Brasfield* rule must therefore apply in New Mexico courts. *Id.*

The Arizona Supreme Court in *Roberts* also interpreted People v. Wilson, 390 Mich. 689, 213 N.W.2d 193 (1973), as adhering to a constitutional view of *Brasfield*. 131 Ariz. at 515, 642 P.2d at 860. *Accord* Government of Virgin Islands v. Romain, 600 F.2d 435, 437 (3rd Cir. 1979); Ellis v. Reed, 596 F.2d 1195, 1198 (4th Cir.), *cert. denied*, 444 U.S. 973 (1979). *But see* People v. Lawson, 56 Mich. App. 100, 105, 223 N.W.2d 716, 719 (1974) ("*Wilson* does not clearly indicate whether . . . inquiry is reversible under every set of surrounding circumstances"); Note, *Deadlocked Juries, supra* note 45, at 817-18 n.26.

49. State v. Rickerson, 95 N.M. 666, 668, 625 P.2d 1183, 1185 (1981) ("*Brasfield* . . . was an exercise of the Supreme Court's supervisory power and did not involve substantial constitutional principles").

50. United States *ex rel.* Kirk v. Director, Dep't of Corrections, 678 F.2d 723, 727 (7th Cir. 1982); Cornell v. Iowa, 628 F.2d 1044, 1047 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); Ellis v. Reed, 596 F.2d 1195, 1200 (4th Cir.), *cert. denied*, 444 U.S. 973 (1979).

51. *E.g.*, Sharplin v. State, 330 So. 2d 591, 596 (Miss. 1976); People v. Kirk, 31 Ill. Dec. 835, 76 Ill. App. 3d 459, 467, 394 N.E.2d 1212, 1217 (1979), *cert. denied*, 447 U.S. 925 (1980); State v. Rickerson, 95 N.M. 666, 668, 625 P.2d 1183, 1185 (1981).

52. 272 U.S. 448, 450 (1926). "We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal." *Id.*

53. Cornell v. Iowa, 628 F.2d 1044, 1047 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); Ellis v. Reed, 596 F.2d 1195, 1197 (4th Cir.), *cert. denied*, 444 U.S. 973 (1979).

54. 196 U.S. 283 (1905). *See* United States *ex rel.* Kirk v. Director, Dep't of Corrections, 678 F.2d 723, 726 (7th Cir. 1982); Cornell v. Iowa, 628 F.2d 1044, 1047 (8th Cir. 1980), *cert. denied*,

"proper *administration* of the law"[55] did not permit numerical inquiries into a jury's standing.[56] In this context, the *Brasfield* holding is more properly interpreted as a federal administrative rule only.[57] Third, *Brasfield's per se* ban on numerical inquiries can extend beyond the federal supervisory power and bind the states only if the inquiries themselves are so inherently coercive[58] that they necessarily violate the right to an impartial jury guaranteed by the sixth and fourteenth amendments.[59] In *Brasfield*, the United States Supreme Court did not hold that a numerical inquiry was itself impermissibly coercive,[60] but that, "in general, its *tendency* is coercive."[61] Consequently, most courts have held that the inquiry alone does not impermissibly coerce the jury.[62] Instead, these courts have examined the totality of the circumstances[63] in a given case to determine whether under the particular facts it appears that the jury was coerced.[64]

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449 U.S. 1126 (1981); Ellis v. Reed, 596 F.2d 1195, 1197-98 (4th Cir.), *cert. denied*, 444 U.S. 973 (1979).

55. 196 U.S. at 308 (emphasis added).

56. *Id.* Following *Burton*, the courts of appeals were split over whether a numerical inquiry into a jury's division was itself reversible error. *See* Brasfield v. United States, 272 U.S. 448, 449-50 (1926); Ellis v. Reed, 596 F.2d 1195, 1198 (4th Cir.), *cert. denied*, 444 U.S. 973 (1979). *See also* Note, *Numerical Inquiries, supra* note 45, at 385 n.10; United States *ex rel.* Kirk v. Director, Dep't of Corrections, 678 F.2d 723, 726 (7th Cir. 1982) ("[i]t was to this situation [the disagreement among circuits] that the Court in *Brasfield* addressed itself, and it was no doubt because of the failure of the federal courts to heed its earlier admonition in *Burton* that Justice Stone was so forceful in his condemnation of the practice."); Cornell v. Iowa, 628 F.2d 1044, 1047 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981) (since the *Brasfield* rule was "a vehicle for resolving the conflict then existing among the circuit courts occasioned by . . . *Burton*," the rule should be interpreted in conjunction with and as an elaboration of *Burton*).

57. *See* United States *ex rel.* Kirk v. Director, Dep't of Corrections, 678 F.2d 723, 726 (7th Cir. 1982); Cornell v. Iowa, 628 F.2d 1044, 1047 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981). *But see* Cornell v. Iowa, 628 F.2d 1044, 1049 (8th Cir. 1980) (Bright, J., dissenting) (arguing that the language in *Brasfield* closely resembles the language used in other due process contexts), *cert. denied*, 449 U.S. 1126 (1981); Note, *Constitutionality and Coerciveness*, *supra* note 45, at 387-88 (noting that *Burton*'s discussion of numerical inquiries was only dictum made in passing and arguing that the more forceful language of *Brasfield* should stand alone).

58. "Coercion refers to that which operates to displace deliberation 'in favor of considerations of compromise and expedience.' It deprives the defendant of the benefit of the jury's full and independent consideration of his guilt or innocence . . . ." People v. Peters, 128 Cal. App. 3d 75, 91, 180 Cal. Rptr. 76, 84 (1982) (quoting People v. Gainer, 19 Cal. 3d 835, 850, 556 P.2d 997, 1005, 139 Cal. Rptr. 861, 869 (1977).

59. *See* Crist v. Bretz, 437 U.S. 28, 38 (1978); Cupp v. Naughten, 414 U.S. 141, 146 (1973); United States *ex rel.* Kirk v. Director, Dep't of Corrections, 678 F.2d 723, 727 (7th Cir. 1982). *See also supra* notes 34-38, 40, 43-45 and accompanying text.

60. 272 U.S. 448, 450 (1926).

61. *Id.* (emphasis added). See also United States *ex rel.* Kirk v. Director, Dep't of Corrections, 678 F.2d 723, 727 (7th Cir. 1982), stating "As *Brasfield* also makes clear, however, the inquiry is not inherently coercive; its effect upon a divided jury depends upon circumstances surrounding the case."

62. *See, e.g.*, United States *ex rel.* Kirk v. Director, Dep't of Corrections, 678 F.2d 723, 727 (7th Cir. 1982) ("inquiry is not inherently coercive"); Sharplin v. State, 330 So. 2d 591, 595 (Miss. 1976) (inquiry "does not coerce the jury"); Huffaker v. State, 119 Ga. App. 742, 742, 168 S.E.2d 895, 896 (1969) ("the inquiry is presumptively harmless"); State v. Baker, 293 S.W.2d 900, 905 (Mo. 1956) ("the real question is whether there was any coercion of the jury in connection with it" since the "inquiry is not coercive *per se*").

63. The United States Supreme Court articulated a similar totality of circumstances test concerning jury instructions not involving a numerical inquiry in Jenkins v. United States, 380 U.S. 445, 446 (1965). The Court examined the instruction given to determine whether "in its context and under all the circumstances the judge's statement had the coercive effect attributed to it." *Id. See generally infra* notes 92-121 and accompanying text.

64. *See, e.g.*, Cornell v. Iowa, 628 F.2d 1044, 1048 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126

Accordingly, any infringement of the sixth amendment right to an impartial jury is the product not of the inquiry itself,[65] but of a combination of the inquiry with the particular circumstances surrounding the inquiry's use in a given case.[66]

Balancing the Value Versus the Potential Prejudice

The United States Supreme Court in *Brasfield* stated that a trial court's inquiry into the numerical standing of a deadlocked jury, "serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division," is harmful, and "is not to be sanctioned."[67] Other courts regard numerical inquiry as, "serving a legitimate purpose consonant with the trial judge's broad powers of control over the conduct of a trial: it enables the trial judge to ascertain the likelihood of agreement among jurors."[68] The *Roberts* court, while acknowledging that a numerical inquiry may occasionally serve valid purposes, reasoned that the potential for impermissible coercion of the jury outweighed any possible benefit.[69]

Courts which permit inquiries into the numerical division of a jury generally do so under the theory that inquiries aid in determining if there is a reasonable likelihood of eventual agreement among the jurors.[70] One jurisdiction even regarded the numerical inquiry as the only means available to the trial court to make such a determination.[71] An estimate of the probability of jury agreement assists the court in two ways. First, the court is given a basis upon which to decide whether to order further deliberations or to declare a mistrial when jurors report that they are deadlocked.[72] Second, the court receives information useful to it in determining whether to take other steps which are designed to "nudge" the jurors into reaching

(1981); Ellis v. Reed, 596 F.2d 1195, 1198-99 (4th Cir.), *cert. denied*, 444 U.S. 973 (1980); State v. Rickerson, 95 N.M. 666, 668, 625 P.2d 1183, 1184 (1981). *See also infra* notes 107-20 and accompanying text.

65. United States *ex rel.* Kirk v. Director, Dep't of Corrections, 678 F.2d 723, 727 (7th Cir. 1982); Cornell v. Iowa, 628 F.2d 1044, 1048 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); Ellis v. Reed, 596 F.2d 1195, 1199 (4th Cir.), *cert. denied*, 444 U.S. 973 (1979). *See also* Note, *Constitutionality and Coerciveness, supra* note 45, at 391-92, 392 n.78.

66. United States *ex rel.* Kirk v. Director, Dep't of Corrections, 678 F.2d 723, 727 (7th Cir. 1982); Ellis v. Reed, 596 F.2d 1195, 1199 (4th Cir.), *cert. denied*, 444 U.S. 973 (1979); State v. Rickerson, 95 N.M. 666, 668, 625 P.2d 1183, 1185 (1981). *See also infra* notes 107-20 and accompanying text.

67. 272 U.S. 448, 450 (1926) (inquiry affects the proper relations of the court to the jury and results in improper influence being exerted upon the jury). *See also* People v. Wilson, 390 Mich. 689, 692, 213 N.W.2d 193, 195 (1973) (numerical division does not necessarily reflect the status of deliberations, and inquiry may act to solidify the majority position and coerce the minority); Kersey v. State, 525 S.W.2d 139, 141 (Tenn. 1975).

68. Sharplin v. State, 330 So. 2d 591, 596 (Miss. 1976). *See also* Huffaker v. State, 119 Ga. App. 742, 743, 168 S.E.2d 895, 897 (1969); Joyner v. State, 484 P.2d 560, 562 (Okla. Crim. App. 1971).

69. 131 Ariz. 513, 515, 642 P.2d 858, 860 (1982).

70. *See, e.g.*, Earl v. Commonwealth, 569 S.W.2d 686, 689 (Ky. App. 1978); Sharplin v. State, 330 So. 2d 591, 596 (Miss. 1976); State v. Morris, 476 S.W.2d 485, 489 (Mo. 1971); Joyner v. State, 484 P.2d 560, 562 (Okla. Crim. App. 1971).

71. State v. Loberg, 73 S.D. 301, 304, 42 N.W.2d 199, 200 (1950).

72. Sharplin v. State, 330 So. 2d 591, 594 (Miss. 1976); Linscomb v. State, 545 P.2d 1272, 1273-74 (Okla. Crim. App. 1976).

an agreement, such as giving the jury additional instructions.[73] Although the practice of allowing numerical inquiries presumes that the inquiry itself is not coercive,[74] courts which utilize inquiries are nevertheless sometimes faced with circumstances that combine to produce a coercive effect.[75] These courts must then also employ a totality of circumstances analysis.[76]

Despite the accepted use of numerical inquiries in some jurisdictions,[77] such use is subject to serious criticism.[78] First, one assumption underlying a numerical inquiry for the purpose of assessing the probability of juror agreement is that the more uneven the division, the more likely an eventual agreement.[79] This assumption is not always valid however, since there will be occasions when a jury that is divided eleven-one or ten-two is no more likely to reach a unanimous consensus than is a jury that is more evenly divided.[80]

Second, the tendency of a numerical inquiry combined with its surrounding circumstances to unduly influence the jury is often greater than courts that permit the practice acknowledge.[81] The significant influence of the trial judge himself may be very coercive.[82] Where an inquiry reveals a minority of only one or two jurors, the fact that the court orders further deliberations, "may appear to the dissenter [to indicate] that the judge wants him to agree and will be displeased if he does not."[83] Also, additional comments or conduct by the trial judge may combine with the numerical inquiry to create a coercive influence.[84]

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73. Sharplin v. State, 330 So. 2d 591, 594 (Miss. 1976) (approving an additional instruction urging jurors to deliberate "in view of reaching agreement if you can do so without violence to your individual judgement" through an "impartial consideration of the evidence with your fellow jurors.") (quoting 1 MISS. MODEL JURY INSTRUCTIONS CRIMINAL 50 (1976)). *But see infra* notes 114-17 and accompanying text.

74. Huffaker v. State, 119 Ga. App. 742, 742-43, 168 S.E.2d 895, 896 (1969).

75. *See* People v. Carter, 68 Cal. 2d 810, 819-20, 442 P.2d 353, 359-60, 69 Cal. Rptr. 297, 303-04 (1968); Sharplin v. State, 330 So. 2d 591, 594 (Miss. 1976); White v. State, 95 Nev. 881, 884, 603 P.2d 1063, 1065 (1979).

76. *See* People v. Carter, 68 Cal. 2d 810, 817, 442 P.2d 353, 358, 69 Cal. Rptr. 297, 302; Huffaker v. State, 119 Ga. App. 742, 743, 168 S.E.2d 895, 897 (1969); State v. Baker, 293 S.W.2d 900, 905-06 (Mo. 1956).

77. *See supra* note 18.

78. Cornell v. Iowa, 628 F.2d 1044, 1048 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); Lowe v. People, 175 Colo. 491, 495-96, 488 P.2d 559, 561 (1971); People v. Wilson, 390 Mich. 689, 692, 213 N.W.2d 193, 195 (1973).

79. *See* People v. Wilson, 390 Mich. 689, 691, 213 N.W.2d 193, 195 (1973).

80. *Id.*

81. *See id.* at 692, 213 N.W.2d at 195; People v. Lawson, 56 Mich. App. 100, 105, 223 N.W.2d 716, 719 (1974); State v. Hutchins, 43 N.J. 85, 94-96, 202 A.2d 678, 684 (1964).

82. *See* Starr v. United States, 153 U.S. 614, 626 (1894) ("It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling."); Taylor v. State, 17 Md. App. 41, 48, 299 A.2d 841, 844 (1973) ("jurors are usually responsive to any suggestion made by the presiding judge").

83. State v. Hutchins, 43 N.J. 85, 95, 202 A.2d 678, 684 (1964). The court continued, "it is probably never easy for a juror to stand alone . . . and it must be very much more difficult when it appears to him that his dissent may be looked upon with disfavor by the judge." *Id.*

84. Sharplin v. State, 330 So. 2d 591, 596 (Miss. 1976) (coercion, if any, lies in the trial judge's conduct and comments after he receives the division). *See, e.g.*, People v. Carter, 68 Cal. 2d 810, 820, 442 P.2d 353, 358, 69 Cal. Rptr. 297, 303 (1968) (trial court's questioning of the lone holdout juror in open court, followed by the judge's suggestion that the jury would be locked up for the night if they did not agree within one half-hour, constituted undue pressure upon the dissenting juror); Lowe v. People, 175 Colo. 491, 496, 488 P.2d 559, 561-62 (1971) (court urging further

Finally, an inquiry into a jury's numerical division may impair the deliberation process itself, by placing, "the trial court's imprimatur upon what was but a tentative result."[85] What may have been a flexible division among jurors has now been revealed to the judge, and jurors may be reluctant to retreat from it; as a result, the majority view is hardened and is much more likely to represent any eventual verdict.[86]

In view of the dubious value of numerical inquiries to the court[87] and their serious potential for unduly influencing the jury,[88] their use should be discouraged by appellate courts.[89]

Shortcomings of the Totality of Circumstances Test

Even though a numerical inquiry into a jury's deadlock is not *per se* coercive,[90] circumstances of a particular case will often aggregate to produce impermissible coercion of the jury.[91] A cumulative effect[92] or totality of circumstances[93] test is therefore essential to determine whether the facts of a given case reveal that coercion occurred.[94] Unfortunately, objective and uniform application of such a test to varying factual situations is often a difficult task.[95] To begin with, "[t]he problem is one of proof."[96] As the *Brasfield* court observed, "[the inquiry's] effect upon a divided jury will often depend on circumstances which cannot properly be known to the

deliberations despite foreman's warning that any verdict at that point would necessarily be a compromise of conscientiously held opinions pressured, "the one juror to act against his true beliefs and to abandon a sincere conscientious position"); Taylor v. State, 17 Md. App. 41, 48, 299 A.2d 841, 845 (1973) (trial judge's statement, upon learning that the jury stood eleven-one, that, "it's up to the one to change", clearly, "exerted undue pressure and coercion upon the minority juror"); People v. Wilson, 390 Mich. 689, 691, 213 N.W.2d 193, 195 (1973) (Judge's remark to eleven-one jury that, "that is not very far from a verdict", carried the, "clear implication . . . that only one juror remained to be convinced"). The effects of remarks by the trial judge are part of the totality of circumstances test employed to assess coerciveness. *See infra* notes 113-16 and accompanying text.

85. People v. Lawson, 56 Mich. App. 100, 105, 223 N.W.2d 716, 719 (1974). *See also* People v. Wilson, 390 Mich. 689, 692, 213 N.W.2d 193, 195 (1973) ("an inquiry into the progress of deliberations . . . carries the improper suggestion that the state of numerical division reflects the stage of the deliberations" and "has the doubly coercive effect of melting the resistance of the minority and freezing the determination of the majority"); *supra* note 83 and accompanying text.

86. People v. Wilson, 390 Mich. 689, 692, 213 N.W.2d 193, 195 (1973).

87. *See supra* notes 78-80 and accompanying text.

88. *See supra* notes 82-86 and accompanying text.

89. *See* Cornell v. Iowa, 628 F.2d 1044, 1048 (8th Cir. 1980) ("the trial judge's inquiry in the instant case was unnecessary and unwise"), *cert. denied*, 449 U.S. 1126 (1981); Lowe v. People, 175 Colo. 491, 496, 488 P.2d 559, 561 (1971); State v. Roberts, 131 Ariz. 513, 515-16, 642 P.2d 858, 860-61 (1982).

90. *See supra* notes 60-62 and accompanying text.

91. *See supra* notes 63-66, 84 and accompanying text.

92. State v. Rickerson, 95 N.M. 665, 668, 625 P.2d 1183, 1184 (1981).

93. *See supra* note 63.

94. *See* People v. Carter, 68 Cal. 2d 810, 817, 442 P.2d 353, 358, 69 Cal. Rptr. 297, 302 (1968) ("[t]he basic question . . . is whether the remarks of the court, viewed in the totality of applicable circumstances, operate to displace the independent judgment of the jury in favor of considerations of compromise and expediency"); Huffaker v. State, 119 Ga. App. 742, 743, 168 S.E.2d 895, 897 (1969); State v. Baker, 293 S.W.2d 900, 905-06 (Mo. 1956).

95. *See* Brasfield v. United States, 272 U.S. 448, 450 (1926); United States *ex rel.* Kirk v. Director, Dep't of Corrections, 678 F.2d 723, 727 (7th Cir. 1982); Cornell v. Iowa, 628 F.2d 1044, 1049 (8th Cir. 1980) (Bright, J. dissenting), *cert. denied*, 449 U.S. 1126 (1981).

96. Comment, *Defusing the Dynamite Charge: A Critique of Allen and Its Progeny*, 36 TENN. L. REV., 749, 759 (1969).

trial judge or to the appellate courts and may vary widely in different situations."[97] Under circumstances such as these, an appellate court may often find itself, "inextricably drawn into a thicket where it lacks any reliable map or compass."[98] Without a clear articulation of what facts and circumstances are important, the totality of circumstances test will be especially susceptible to inconsistent, subjective application.[99]

Unfortunately, the Arizona Supreme Court in *Roberts* did not expressly delineate any specific elements in its totality rule.[100] As a result, confusion is likely to ensue. An example of the inconsistent application of a poorly defined totality test is illustrated by the different results in *Roberts* reached by the appeals court and by the Arizona Supreme Court.[101] The court of appeals found that the numerical inquiry and judicial comment[102] combined to produce a "double coercive effect by softening the resistance of the minority and solidifying the determination of the majority,"[103] while the supreme court found that the comment merely reflected the complexity of the case[104] and that the combination of inquiry and comment was not prejudicial.[105] By failing to formulate a more detailed and objective rule, the supreme court has left both itself and the lower courts with little future guidance for judging the coerciveness of numerical inquiries.

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97. 272 U.S. at 450. *See also* Comment, *supra* note 96, at 759, noting that a similar problem accompanies use of the totality test in the context of supplemental jury instructions. Specifically,

> [A]ny coercive effect on the jurors . . . shows up in the jury room during deliberation. Therefore, the coercive effect is not reflected by the court record, and it is difficult, if not impossible to discover. Secondly, since the determination is a subjective one, it is impossible to tell whether an individual juror arrived at his verdict independently, based on an honest conviction, or if he simply acquiesced in the opinion of the majority as a result of the judge's charge.

Id.

98. Cornell v. Iowa, 628 F.2d 1044, 1049 (8th Cir. 1980) (Bright, J., dissenting), *cert. denied*, 449 U.S. 1126 (1981). *See also* Note, *Criminal Procedure—Jury Instructions—ABA Standard Adopted for Instructing Deadlocked Juries*, 42 TENN. L. REV. 803, 814 (1975).

99. *See supra* note 98. See also State v. Thomas, 86 Ariz. 161, 166, 342 P.2d 197, 200 (1959), where in the analogous context of supplementary jury instructions, requiring a similar totality of circumstances analysis, the Arizona Supreme Court stated, "continued use will result in an endless chain of decisions, each link thereof forged with varying facts and circumstances and welded with ever-changing personalities of the appellate court.

100. 131 Ariz. 513, 515, 642 P.2d 858, 860 (1982). The court stated only that, "Under the totality of the circumstances rule, convictions will be reversed if the cumulative effect of the trial court's actions had a coercive influence upon the jury . . . . What conduct amounts to coercion is particularly dependent upon the facts of each case." *Id.* (citations omitted). In affirming Roberts' conviction, the Arizona Supreme Court noted that neither the numerical inquiry alone nor the combination of the inquiry and the trial court's remarks about the evidence resulted in jury coercion. *Id.* at 516, 642 P.2d at 861. *See also infra* notes 102, 104-05.

101. *Compare* State v. Roberts, 131 Ariz. 519, 521-22, 642 P.2d 864, 866-67 (Ct. App. 1981) *with* State v. Roberts, 131 Ariz. 513, 516, 642 P.2d 858, 861 (1982).

102. After receiving the jury's numerical division, the trial court stated in part, "There is a lot of evidence, so give it a while longer and see if you can't reach a verdict." 131 Ariz. at 515, 642 P.2d at 860.

103. 131 Ariz. at 521-22, 642 P.2d at 866-67.

104. *Id.* at 516, 642 P.2d at 861. Specifically, the supreme court noted that the trial had lasted four days and that over thirty exhibits were in evidence, and that both the prosecution and defense had presented substantial closing arguments. *Id.*

105. The supreme court refused to find the comment on the evidence coercive merely because the defense had not presented a separate case, and noted that the defense conducted extensive cross-examination of the state's witnesses and therefore, "the evidence was not all state's evidence." *Id.*

There are a number of factors that, because they are especially likely to combine with numerical inquiries to produce coercive effects upon a jury, should be examined in a totality of circumstances analysis.[106] First, the timing of the inquiry may affect how coercive it is. If the court acts on its own, before a deadlock is reported, in making an inquiry or in giving a supplementary jury instruction,[107] the jurors may perceive that the judge feels a verdict is overdue.[108]

Second, the amount of time that elapses between the inquiry and the jury's verdict may often indicate whether the minority jurors, "reach[ed] a reasoned decision, based upon their individual perceptions of the evidence and the law,"[109] or whether they merely acceded to the opinion of the majority.[110] What constitutes an acceptable lapse of time should vary according to factors such as the length and complexity of the trial and the proportionate amounts of time spent in pre- and post-inquiry deliberations.[111]

Third, the imposition of time limits upon additional jury deliberations tends to coerce the minority jurors, who may perceive insufficient time to convince the majority of their beliefs and may feel they have no choice but to acquiesce.[112] Where failure to meet the time limit will result in the jury

106. Several of these factors have been discussed by courts primarily in the analogous context of evaluating *Allen* instructions, but those discussions are relevant to the issue of numerical inquiry. The *Allen* charge, which originated in Allen v. United States, 164 U.S. 492, 501-02 (1896), basically informed jurors of the cost in time and money of another trial if one should be necessary and urged the jurors to try to reconcile their differences by deliberating openly and by the minority jurors reassessing the reasonableness of their conclusions in light of the majority position. *See generally* Comment, *supra* note 96. Arizona's version of *Allen* was the *Voeckel* charge, urging jurors to deliberate with candor and a proper regard and deference to other jurors, and suggesting that jurors in the minority consider whether their dissent was reasonable in view of the majority's opposition. State v. Voeckel, 69 Ariz. 145, 148-51, 210 P.2d 972, 974-76 (1949). Use of the *Voeckel* instruction was prohibited in State v. Thomas, 86 Ariz. 161, 166, 342 P.2d 197, 200 (1959) as "not in keeping with sound justice." *See also supra* note 99.

107. *See supra* note 106.

108. *See* United States v. Contreras, 463 F.2d 773, 774 (9th Cir. 1972) (interrupting the jury after eight hours of deliberation to give *Allen* charge, where no indication of deadlock, held to be premature and reversible); Comment, *Instructing the Deadlocked Jury: Some Practical Considerations*, 8 J. MAR. J. PRAC. & PROC. 169, 185 (1975).

109. *See* United States v. Beattie, 613 F.2d 762, 765 (9th Cir. 1980). *See also* Comment, *supra* note 108, at 185.

110. Cornell v. Iowa, 628 F.2d 1044, 1048 (8th Cir. 1980) (period of almost five hours between inquiry and *Allen* charge and jury's verdict not indicative of coercion), *cert. denied*. 449 U.S. 1126 (1981); Jones v. Norvell, 472 F.2d 1185, 1185-86 (6th Cir. 1973) (interval of only five minutes between court's learning of numerical division and making remarks and the jury's return of guilty verdicts held part of coercive totality); United States v. Rogers, 289 F.2d 433, 436 (4th Cir. 1961) (time interval of "a few minutes" between *Allen* charge and verdict, "was quite long enough for acceptance of a theory of majority rule, but was hardly long enough to have permitted a painstaking re-examination of the views which the minority had held steadfastly until the charge was given."); *Cf.* Ellis v. Reed, 596 F.2d 1195, 1196-97 (4th Cir.) (period of less than eight minutes between numerical inquiry and *Allen* charge and jury's verdict did *not* indicate coercion, where trial court twice cautioned the jurors not to surrender any conscientious convictions), *cert. denied*, 444 U.S. 973 (1979). *See infra* notes 118-20 and accompanying text.

111. *See* United States v. Cook, 663 F.2d 808, 811 (8th Cir. 1981) (six to seven hours of deliberation over two day period after two day trial, and fifty minute interval between *Allen* charge and verdict, held not coercive); United States v. Smith, 635 F.2d 716, 722 (8th Cir. 1980) (four hours of deliberation over two days after two day trial, coupled with complexity of the case, was not so disproportionate with forty-five minute *Allen*-verdict interval as to raise inference of coercion).

112. *See* People v. Carter, 68 Cal. 2d 810, 820, 442 P.2d 353, 360, 69 Cal. Rptr. 297, 304 (1968);

being sequestered or having to return another day for continued deliberations, minority jurors may also fear being the cause of such inconvenience to the trial judge or to the remaining jurors.[113]

Fourth, when a numerical inquiry reveals a very uneven jury division, subsequent conduct or comment by the trial court creates a heightened danger of coercing the small minority[114] since, "the tendency of the majority to attempt to impose its will on the minority . . . can only be made greater, and therefore more pernicious, by intemperate adjurations from the bench."[115]

Fifth, when the trial court learns which side the jury favors as well as the jury's numerical standing,[116] any subsequent comment by the court is likely to be especially coercive upon the minority. Since the judge is aware toward what verdict the jury is leaning, minority jurors are likely to view verdict-urging instructions or requests for further deliberations as indications of the judge's approval of that verdict and his desire that the minority jurors accept it.[117]

Finally, the potential coerciveness in a given situation may be reduced if the trial court cautions the jury not to surrender any conscientiously held opinions merely for the sake of convenience or expediency.[118] Cautionary

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State v. Rickerson, 95 N.M. 666, 667, 625 P.2d 1183, 1184 (1981) (part of the totality test is, "whether the court established time limits on further deliberations").

113. *See* People v. Carter, 68 Cal. 2d at 818, 442 P.2d at 359, 69 Cal. Rptr. at 303. "[I]t would require unusual stamina in one or more dissenting jurors to hold their views against the remainder, who would naturally be somewhat rebellious at the thought of being locked up for the night . . . ." *Id.* (quoting People v. Crowley, 101 Cal. App. 2d 71, 79, 224 P.2d 748, 753 (1950)).

114. *See* Cornell v. Iowa, 628 F.2d 1044, 1048 (8th Cir. 1980) (combination of *Allen* charge and inquiry not coercive where inquiry revealed near-even division and *Allen* charge, "did not address itself to the minority members of the jury"), *cert. denied*, 449 U.S. 1126 (1981); People v. Carter, 68 Cal. 2d 810, 820, 442 P.2d 353, 360, 69 Cal. Rptr. 297, 303 (1968) (threat to lock up the jury for the night which was directed to lone dissenting juror held coercive); Ransey v. State, 95 Nev. 364, 367, 594 P.2d 1157, 1158-59 (1979) (*Allen*-type charge directed to lone holdout juror without warning not to surrender conscientious opinions was coercive). *See also* Note, *supra* note 98, at 812.

115. People v. Carter, 68 Cal. 2d 810, 820, 442 P.2d 353, 360, 69 Cal. Rptr. 297, 304 (1968).

116. Most courts prohibit inquiry into the direction of a jury's deadlock. *See* People v. Carter, 68 Cal. 2d 810, 815 n.3, 442 P.2d 353, 356 n.3, 69 Cal. Rptr. 297, 300 n.3 (1968) ("The division of the jury in terms of votes for conviction and acquittal has no bearing upon the question of reasonable probability of agreement."); Wilson v. State, 145 Ga. App. 315, 320, 244 S.E.2d 355, 360 (1978) (not a flat prohibition, but a suggestion). However, when the court inadvertently learns the direction of the split, as when the foreman volunteers the direction in response to a request for only the numerical division, courts typically treat the knowledge as one element in the totality of circumstances analysis. *See* People v. Dailey, 120 Cal. App. 3d 363, 174 Cal. Rptr. 539, 545 (1981) (hearing and official publication denied by the California Supreme Court); Huffaker v. State, 119 Ga. App. 742, 743, 168 S.E.2d 895, 897 (1969).

117. *See* People v. Dailey, 120 Cal. App. 3d 363, 174 Cal. Rptr. 539, 545-46 (1981) (court avoided appearing to suggest a particular verdict when ordering further deliberations by cautioning the jury that it was "not trying to put pressure on one or two jurors"); People v. Carter, 68 Cal. 2d 810, 816, 442 P.2d 353, 357, 69 Cal. Rptr. 297, 301 (1968) ("The urging of agreement in such circumstances . . . creates in the jury the impression that the court . . . agrees with the majority of jurors. Coercion of the . . . minority jurors clearly results."); People v. Walker, 93 Cal. App. 2d 818, 825, 209 P.2d 834, 838 (1949) (judge has "duty to be more than careful in his remarks thereafter, so that the jury would clearly understand that he was not urging, or even suggesting a verdict one way or the other"). *See also supra* note 84.

118. *See, e.g.*, Ellis v. Reed, 596 F.2d 1195, 1196-97 (4th Cir.), *cert. denied*, 444 U.S. 973 (1979) (two cautionary instructions given with numerical inquiry and *Allen*-type charge; no coercion found even though jury deliberated less than eight minutes more before reaching a verdict); Peo-

instructions make clear to the jurors in the minority that the court is not trying and does not wish to induce a particular result[119] or to suggest that the minority acquiesce in the decision of the majority.[120]

Alternatives

The trial courts must have means available to ascertain the reasonable probability that a deadlocked jury will eventually agree.[121] *Brasfield v. United States* proscribed numerical inquiries in part because of the availability of other "questions not requiring the jury to reveal the nature and extent of its division."[122] Rather than asking for the jury's numerical standing, a court may instead, "make inquiry as to whether any progress has been made toward reaching an agreement and what the likelihood is for such future progress."[123] Although this alternative has been criticized as "not produc[ing] the same kind of objective information as asking the jury's numerical division,"[124] its value and efficacy are nevertheless demonstrated by its acceptability and use in federal courts[125] and in courts of states which do not tolerate numerical inquiries.[126] The Arizona Supreme Court adopted this alternative method in *State v. Roberts*, admonishing the trial courts to confine their inquiries to the progress that has been made and the likelihood of future progress.[127]

Conclusion

States v. Roberts concluded, in accordance with most other state courts, that the *Brasfield* prohibition of numerical inquiry into the division of a deadlocked jury was an exercise of the federal supervisory power and

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ple v. Dailey, 120 Cal. App. 3d 363, 174 Cal. Rptr. 539, 545-46 (1981) (judge cautioned jurors that he was not trying to pressure them by ordering further deliberations; no coercion indicated even though trial court was aware of numerical division and direction of split); Ransey v. State, 95 Nev. 364, 367, 594 P.2d 1157, 1158 (1979) (*Allen*-type charge given when only one juror dissenting without caution that, "jurors should not surrender conscientiously formed opinions" was coercive); State v. Rickerson, 95 N.M. 666, 667, 625 P.2d 1183, 1184 (1981) (part of the totality test is, "whether the court failed to caution a jury not to surrender honest convictions, thus pressuring hold-out jurors to conform").

119. People v. Dailey, 120 Cal. App. 3d 363, —, 174 Cal. Rptr. 539, 545-46 (1981).

120. *See* Ramsey v. State, 95 Nev. 364, 367, 594 P.2d 1157, 1158 (1979).

121. *See supra* notes 72-73 and accompanying text.

122. 272 U.S. 448, 450 (1926).

123. Lowe v. People, 175 Colo. 491, 495-96, 488 P.2d 559, 561 (1971). *See also* Wells v. State, 378 So. 2d 747, 753 (Ala. Crim. App. 1979); Kersey v. State, 525 S.W.2d 139, 141 (Tenn. 1975).

124. Note, *Deadlocked Juries, supra* note 45 at 827 n.84 (arguing that non-numerical inquiries, "would not inform the judge of any fact other than the jurors' opinions, and the jurors do not have the responsibility of declaring a mistrial"). *See* State v. Loberg, 73 S.D. 301, 304, 42 N.W.2d 199, 200 (1950) (numerical inquiry is "the only means the trial judge has" of determining the possibility of agreement).

125. *See, e.g.*, United States v. See, 505 F.2d 845, 851 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975); Carlton v. United States, 395 F.2d 10, 11 (9th Cir. 1968), *cert. denied*, 393 U.S. 1030 (1969); United States v. Mack, 249 F.2d 321, 324 (7th Cir. 1957).

126. *See, e.g.*, People v. Dietrich, 87 Mich. App. 116, 141-42, 274 N.W.2d 472, 483 (1978); People v. Luther, 53 Mich. App. 648, 650-51, 219 N.W.2d 812, 814 (1974) (allowing the court clerk to inquire privately as to the probability that the jury will reach agreement); Kersey v. State, 525 S.W.2d 139, 141 (Tenn. 1975) ("The only permissible inquiry is as to progress and the jury may be asked whether it believes it might reach a verdict after further deliberations").

127. 131 Ariz. 513, 516, 642 P.2d 858, 861 (1982). *See supra* note 29.

not a constitutional mandate that the states were bound to follow. *Roberts* also determined that the potentially coercive effects of numerical inquiries outweighed any questionable utility that inquiries might have. Since use of the totality of circumstances test to discover jury coercion is likely to be difficult in the context of numerical inquiries, the *Roberts* court's failure to articulate clear and unambiguous standards regarding use of the test will make objective and consistent application of the totality rule unlikely. Finally, in light of the questionable value of the inquiry and its significant potential for prejudice, the difficulties with the totality of circumstances rule, and the availability of a suitable noncoercive alternative, Arizona's appellate courts should be forceful in their efforts to discourage further use of numerical inquiries by the state's trial courts.

Phillip R. Malone

B. "PROSPECTIVE SEARCH WARRANTS" IN ARIZONA: THE REASONABLENESS OF A SEARCH WARRANT BASED ON EVIDENCE OF A PROBABLE FUTURE CRIME

The United States Supreme Court has held that probable cause under the fourth amendment exists "when the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed."[1] This general definition encompasses both probable cause to search and probable cause to arrest.[2] Probable cause for a search of certain premises requires a showing that property related to a criminal offense[3] will probably be found on the specified premises at a specified time.[4] Probable cause to arrest, by contrast, must include a finding that the person who is to be arrested has probably committed a specified offense.[5]

A fourth amendment interpretation issue[6] arises when a law enforcement agency seeks a warrant based on some probable future event. In such a case, the defendant typically contends that probable cause can exist, and a valid warrant can therefore issue, only when a crime already has been or presently is being committed, and only when items sought by the police are presently located on the premises to be searched.[7] A defendant

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1. Berger v. New York, 388 U.S. 41, 55 (1967); Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

2. *See* C. WHITEBREAD, CRIMINAL PROCEDURE § 5.03(a) (1980).

3. ARIZ. REV. STAT. ANN. § 13-3912 (1978) (formerly § 13-1442) specifies what items may be seized pursuant to a search warrant. The statute provides in pertinent part:

> A search warrant may be issued on any of the following grounds:
> 1. When the property to be seized was stolen or embezzled.
> 2. When the property or things to be seized were used as a means of committing a public offense.
> 3. When the property or things to be seized are in the possession of a person having the intent to use them as a means of committing a public offense or in possession of another to whom he may have delivered it for the purpose of concealing it or preventing it being discovered.
> 4. When property or things to be seized consist of any item or constitute any evidence which tends to show that a particular public offense has been committed, or tends to show that a particular person has committed the public offense. . . .

4. *See* State v. Lewis, 115 Ariz. 530, 532, 566 P.2d 678, 680 (1977); State v. Moody, 114 Ariz. 365, 366, 560 P.2d 1272, 1273 (Ct. App. 1977). *See generally* KAMISAR, LAFAVE & ISRAEL, BASIC CRIMINAL PROCEDURE 268 (5th ed. 1980).

5. State v. Nelson, 129 Ariz. 582, 586, 633 P.2d 391, 395 (1981); State v. Griffin, 117 Ariz. 54, 55-56, 570 P.2d 1067, 1068-69 (1977).

6. U.S. CONST. amend IV 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, and particularly describing the place to be searched, and the persons or things to be seized.

7. *E.g.*, United States *ex rel.* Beal v. Skaff, 418 F.2d 430, 432-33 (7th Cir. 1969) (allegation in affidavit that marijuana "will be" on the premises to be searched held sufficient to make out probable cause to support the warrant); Alvidres v. Superior Court, 12 Cal. App. 3d 575, 579-80, 90 Cal. Rptr. 682, 685 (1970) (court found it "immaterial" that delivery of contraband had not been made when the warrant issued); People v. Glen, 30 N.Y.2d 252, 258-59, 282 N.E.2d 614, 616-17, 331 N.Y.S.2d 656, 660-61 (court rejected defendants' argument that the warrants were invalid because the defendants were not in possession of contraband at the time of issuance of the war-

may also argue that a warrant issued prospectively violates the "reasonableness" requirement of the fourth amendment.[8] In *State v. Berge*,[9] the Arizona Supreme Court addressed these issues in the context of a "controlled delivery" of contraband to a defendant's residence.[10]

This Casenote will examine the *Berge* decision and the Arizona precedents from which it was derived. Prospective warrant cases from other jurisdictions will also be discussed. Finally, an alternative line of reasoning which could have been applied to uphold the warrant in *Berge* will be suggested, and the consequences for law enforcement of the court's decision will be considered.

The Berge *Opinion*

In November 1979, the Phoenix Police Department received information from a confidential informant indicating that the defendant Berge was receiving marijuana through the United Parcel Service (UPS) for purposes of sale in Phoenix.[11] When a package addressed to Berge was received at the UPS office, the police opened it pursuant to a valid search warrant,[12] and found marijuana and $275 in cash.[13] The contents of the package were marked with a flourescent powder, rewrapped, and delivered by a police officer posing as a UPS driver.[14]

In the meantime, while the package was still in the hands of the police, a magistrate issued a second warrant authorizing a search of the defendant's person and his residence.[15] After officers observed the defendant accept delivery of the package and then leave in his automobile, they executed the warrant and discovered incriminating evidence.[16] The police did not recover the package itself, but they found the marked money when they searched the defendant upon his return.[17]

Berge moved to suppress all of the evidence seized from his residence

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rant), *cert. denied*, 409 U.S. 849 (1972). *See generally* 1 W. LAFAVE, SEARCH AND SEIZURE § 3.7(c) (1978).

8. New Jersey v. Mier, 147 N.J. Super, 17, 23, 370 A.2d 515, 518 (1977) (warrant held not "inherently unfair or violative of public policy" where postal authorities possessed the contraband as of the time of the application for the warrant); People v. Glen, 30 N.Y.2d 252, 258-59, 282 N.E.2d 614, 617, 331 N.Y.S. 656, 661 (prospective warrant held not to create a risk of an unreasonable search simply because the executing officer has some discretion to decide whether and when to execute it), *cert. denied*, 409 U.S. 849 (1972).

9. 130 Ariz. 135, 634 P.2d 947 (1981).

10. In a "controlled delivery," the police supervise delivery to the addressee of contraband discovered in transit. *See* People v. Superior Court, 27 Cal. App. 3d 404, 407-08, 103 Cal. Rptr. 874, 876-77 (1972). In *Berge*, a search warrant issued for the defendant's home and person before the delivery was made. *Id.* at 135, 136, 634 P.2d at 948. For a complete discussion of the facts, see *infra* notes 11-17 and accompanying text.

11. *Berge*, 130 Ariz. at 135, 634 P.2d at 947.

12. *Id.* at 136, 634 P.2d at 948. The validity of the warrant to search the parcel was not an issue on appeal. The warrant was based on the informant's tip, and on a trained narcotics dog's identification of the package from among several other packages. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* The court declined to consider the validity of the search of the defendant's person. By the time of the search, the defendant had been arrested. If that search had been permissible, it would have been as a search incident to the arrest, since the warrant which authorized a search of

on the ground that the warrant was prospective and therefore invalid.[18] The trial court denied the motion;[19] a jury subsequently convicted Berge of transportation and possession of marijuana.[20] On appeal, the Arizona Supreme Court reversed the conviction.[21] The court held that, on the facts of the particular case before it, an anticipatory search warrant violated the reasonableness standard of the fourth amendment.[22] The court noted that the defendant had not committed a crime at the time the warrant was issued.[23] Further, the court emphasized that the incriminating package was in the hands of the police when they sought the warrant.[24] Consequently, "[a]t the time the warrant issued, the police knew not only that a crime was not being committed, but that it could not be committed until they made it possible for the defendant to do so."[25] The court refused to sanction warrants issued under those circumstances.

Arizona Precedent

Two Arizona cases prior to *Berge, State v. Cox*[26] and *State v. Vitale*,[27] considered the question whether a showing that a crime probably will be committed in the future satisfies the fourth amendment probable cause requirement.[28] The Arizona Supreme Court analogized *Berge* to *Vitale*,[29] and distinguished *Cox*.[30]

In *Cox*, a search warrant for the defendant's car was issued in Coconino County on the basis of information from a confidential informant that the car, carrying marijuana, would enter the county later that evening.[31] The Arizona Supreme Court upheld the warrant, stating that "an anticipatory or delayed execution warrant" is the only practical way for a magistrate to authorize a search under those circumstances.[32] The court

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the defendant's residence and his person) was held invalid. The question whether the illegal search of the residence tainted the subsequent arrest is beyond the scope of this Casenote.

18. *Id.* The court declined to consider the validity of the search of the defendant's person. *Id.* at 138, 634 P.2d at 950. By the time of the search, the defendant had been arrested. If that search was permissible, it would have been as a search incident to the arrest, since the second warrant (which authorized a search of the defendant's residence and his person) was held invalid. The question of whether the illegal search of the residence tainted the subsequent arrest is beyond the scope of this casenote.

19. *Id.* at 136, 634 P.2d at 948.

20. *Id.* at 135, 634 P.2d at 947 (citing ARIZ. REV. STAT. ANN. §§ 36-1002.07, 36-1002.05 (1978)).

21. *Id.* at 138, 634 P.2d at 950.

22. *Id.* at 136, 634 P.2d at 949. The court stated, "We do not believe that it is reasonable to base a warrant upon future acts that can only come into being by actions of the persons seeking the warrant." *Id.*

23. *Id.* Some courts have concluded, in similar factual settings, that the evidence made out probable cause to believe that a crime had been committed *and* that the defendant had committed it. *See infra* notes 67-72 and accompanying text.

24. *Berge*, 130 Ariz. at 137, 634 P.2d at 949.

25. *Id.* at 137, 634 P.2d at 950.

26. 110 Ariz. 603, 522 P.2d 29 (1974).

27. 23 Ariz. App. 37, 530 P.2d 394 (1975).

28. This type of future probable cause must be distinguished from probable cause to believe that seizable items will be found in a certain place at some future time. *See infra* note 58.

29. *Berge*, 130 Ariz. at 137, 634 P.2d at 949.

30. *Id.*

31. 110 Ariz. 603, 605, 522 P.2d 29, 31 (1974).

32. *Id.* at 608, 522 P.2d at 34.

acknowledged prior cases which had disavowed search warrants issued before an offense had been committed,[33] but distinguished them by pointing out that in the instant case the crime of transportation of marijuana was being committed when the magistrate acted, "albeit not in Coconino County."[34] The *Cox* court then went on to say in dictum,

> [b]ut even if the cases cited by the defendant were on all fours, this court would, absent a United States Supreme Court case to the contrary, reject the holding therein . . . . As long as the magistrate is fully and fairly apprised of the facts, it is reasonable to issue a warrant to be served at some time not unreasonably distant for a crime, as here, that is in progress or it is reasonable to assume will be committed in the near future.[35]

In *Vitale*, on the other hand, the Arizona Court of Appeals refused to sanction a prospective warrant to search a pawnshop, issued on the basis of a police scheme in which an informant sold the shop owner a purportedly stolen television set.[36] The evidence presented to the magistrate did not make out probable cause to believe that a crime had been or presently was being committed.[37] Accordingly, the police intended to execute the warrant only after hearing through concealed listening devices that the illegal purchase had been made.[38] The court, however, held the warrant invalid on the ground that section 13-3912 of the Arizona Revised Statutes,[39] which delineates the circumstances in which a search warrant may issue, "clearly refers to seizing property where the criminal offense has already occurred."[40]

Vitale left open the possibility that some prospective search warrants might be permissible even though they issue before a crime has been committed. The *Vitale* court distinguished *Cox* by pointing out that in *Cox*, the affidavit established probable cause to believe that a crime presently was being committed.[41] That distinction, however, fails to reconcile the reasoning underlying *Vitale*, which appears flatly to prohibit issuance of a warrant where no crime has yet been committed,[42] with the dictum in *Cox*

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33. *Id.* (citing United States *ex rel.* Campbell v. Rundle, 327 F.2d 153, 162 (3d Cir. 1964); State v. Guthrie, 90 Me. 448, 453, 38 A. 368, 369-70 (1897)).

34. *Cox*, 110 Ariz. at 608, 522 P.2d at 34. In fact, the warrant in *Cox* was anticipatory only in the sense that the car had not yet arrived in Coconino County when a justice of the peace approved the warrant. *Id.* The justice of the peace was informed that the crime of transportation was already being committed, and that evidence of that offense was presently located in the automobile to be searched. *Id.* at 607, 522 P.2d at 33.

A subsequent case has held that the jurisdiction of an Arizona justice court to issue search warrants is not limited to the issuance of search warrants relating to premises located within the precinct boundaries. State v. Reed, 120 Ariz. 58, 62, 583 P.2d 1378, 1382 (Ct. App. 1978).

35. 110 Ariz. at 608, 522 P.2d at 34.

36. 23 Ariz. App. 37, 40, 530 P.2d 394, 397 (1975).

37. *Id.* "The informant had not yet approached appellant regarding the television set at the time the telephone search warrant was issued; also, there had not been any recent dealings between informant and appellant" to establish the informant's credibility, as required by Spinelli v. United States, 393 U.S. 410 (1969). *Vitale*, 23 Ariz. App. at 40, 530 P.2d at 397.

38. *Vitale*, 23 Ariz. App. at 39, 530 P.2d at 396.

39. Formerly § 13-1442. For text of this statute, see *supra* note 3.

40. 23 Ariz. App. at 40, 530 P.2d at 397.

41. *Id.* Note that the same rationale was used in *Cox* to distinguish earlier cases which disapproved anticipatory warrants. *See supra* notes 34-35 and accompanying text.

42. The *Vitale* court said that ". . . the search warrant issued in the instant case was invalid

which approves warrants issued for crimes that "it is reasonable to assume will be committed in the near future."[43] Instead of attempting to resolve the conflict, the *Vitale* court decided that the *Cox* language did not apply because the informant's statement implicating the pawnshop owner merely created "speculation" that the pawnshop owner might commit a crime in the future.[44]

In *Berge*, the Arizona Supreme Court declared that the circumstances were "more akin to *State v. Vitale* . . . than to *State v. Cox*."[45] As the court framed the issue, "[t]he question is not one of an anticipatory warrant [as in *Cox*], but whether there was reasonable ground to believe a crime was being committed."[46] The court determined that the facts before the magistrate did not demonstrate that the defendant had committed or was committing a crime.[47]

In *Vitale*, the fact that no crime had been committed was decisive because, according to the court of appeals interpretation of section 13-3912, evidence of a crime which has not yet been committed does not qualify as seizable under that statute.[48] In *Berge*, however, the contraband discovered in the UPS package indicated that *someone* already had committed a crime involving possession or transportation of marijuana when the search warrant issued. Contraband presumably may be seized under section 13-3912(4) of the Arizona Revised Statutes as "evidence which tends to show that a particular public offense has been committed . . . ."[49] Had the *Berge* court chosen the mere existence or absence of a present criminal offense as the point of comparison with *Vitale, Vitale* should have been distinguished and the search in *Berge* held lawful.

The analogy between *Berge* and *Vitale* becomes clear only when the facts of the two cases are compared in detail. In both cases, the authorities

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because there was no probable cause to believe a crime had been committed." 23 Ariz. App. at 40, 530 P.2d at 397.

43. *Cox*, 110 Ariz. at 608, 522 P.2d at 34.

44. 23 Ariz. App. at 41, 530 P.2d at 398.

45. 130 Ariz. at 137, 634 P.2d at 949.

46. *Id.* at 137-38, 634 P.2d at 949-50.

47. *Id.*

The elements of possession of marijuana, a violation of Ariz. Rev. Stat. Ann. § 36-1002.05 (1978), include exercise of dominion or control by the defendant over a substance, knowledge of its presence, and knowledge that the substance is marijuana. *See* State v. Arce, 107 Ariz. 156, 160 483 P.2d 1395, 1399 (1971) (elements of possession of narcotics). Possession may be actual, or constructive, meaning that the defendant maintains some control or right to control over contraband in the physical possession of another. State v. Carroll, 111 Ariz. 216, 218, 526 P.2d 1238, 1240 (1974) (actual possession of baggage claim checks held sufficient to establish possession of suitcases containing marijuana). The elements of transportation of marijuana, a violation of ARIZ. REV. STAT. ANN. § 36-1002.07 (1978), are similar. *Carroll*, at 218, 526 P.2d at 1240. Though the *Berge* court did not discuss the issue, it is logical to assume that the evidence was thought insufficient to establish knowledge on the part of Berge that the package contained marijuana. Berge argued in this regard that the state had failed to present evidence that he had caused the package to be sent, or that he intended to accept it. Appellant's Opening Brief at 13. *But see infra* notes 65-69 and accompanying text for a brief discussion of cases which reject that argument.

48. *See supra* notes 37-41 and accompanying text.

49. *See* Alvidres v. Superior Court, 12 Cal. App. 3d 575, 580-81, 90 Cal. Rptr. 682, 685 (1970) (attache case containing marijuana held seizable under CAL. PENAL CODE § 1524(4) (1970), which is virtually identical to ARIZ. REV. STAT. ANN. § 13-3912(4) (1978)).

received a tip from an informant that an individual was dealing in proscribed goods.[50] In neither case did the tip link the suspect with criminal activity conclusively enough to create probable cause that the suspect had committed a crime.[51] Accordingly, the police devised plans by which they hoped to catch each suspect with the goods and thereby make out probable cause to arrest him.[52] A warrant to search for the goods was then issued, before the respective plans had been carried out.[53]

In the context of those facts, *Berge* may be interpreted as holding that evidence of a future crime will not support a search warrant when the police intend to place such evidence in the hands of a suspect for the purpose of implicating him.[54] A prospective warrant is unreasonable in that situation, and thus in violation of the fourth amendment.[55] Where the police create the circumstances in which the suspect will commit the crime, law enforcement authorities must have present probable cause to believe that the particular suspect has committed a crime. They must demonstrate that a crime probably already has been committed, and that the person at whom the search is directed probably has committed it.

Prospective Warrants in Other Jurisdictions

In most other jurisdictions, both state and federal, the courts have upheld anticipatory search warrants issued under circumstances similar to those before the Arizona court in *State v. Berge*.[56] Many of those courts, however, have failed to consider, or have considered only in a cursory fashion, what principles justify the seizure of items which are, at best, tenuously linked to any criminal suspect. At times, they seem not to have distinguished "anticipation" that a crime will occur in the future, from "anticipation" that seizable items will be on the premises to be searched.[57]

50. *Berge*, 130 Ariz. at 135, 634 P.2d at 947; *Vitale*, 23 Ariz. App. at 38, 530 P.2d at 395.
51. *See Berge*, 130 Ariz. at 137, 634 P.2d at 949; *Vitale*, 23 Ariz. App. at 40, 530 P.2d at 397.
52. *Berge*, 130 Ariz. at 136, 634 P.2d at 948; *Vitale*, 23 Ariz. App. at 39, 530 P.2d at 396.
53. *Berge*, 130 Ariz. at 136, 634 P.2d at 948; *Vitale*, 23 Ariz. App. at 39, 530 P.2d at 396.
54. *See Berge*, 130 Ariz. at 137-38, 634 P.2d at 950-51.
55. *Id.* But see State v. Mier, 147 N.J. Super. 17, 23, 370 A.2d 515, 518 (1977), where the court found "nothing inherently unfair or violative of public policy so as to dictate . . . [invalidation of an anticipatory warrant] merely because the contraband was in possession of the postal authorities as of the time of the application for the warrant."
56. *E.g.*, United States *ex rel.* Beal v. Skaff, 418 F.2d 430, 433-34 (7th Cir. 1969); Johnson v. State, 617 P.2d 1117, 1124 (Alaska 1980); Alvidres v. Superior Court, 12 Cal. App. 3d 575, 582, 90 Cal. Rptr. 682, 686 (1970); Russell v. State, 395 N.E.2d 791, 797-800 (Ind. Ct. App. 1979); Commonwealth v. Soares, — Mass. —, —, 424 N.E.2d 221, 223-25 (1981); State v. Mier, 147 N.J. Super. 17, 23, 370 A.2d 515, 518 (1977); People v. Glen, 30 N.Y.2d 252, 256, 282 N.E.2d 614, 615, 331 N.Y.S.2d 656, 659, *cert. denied* 409 U.S. 849 (1972).
57. In general, the prospective warrant cases have addressed the fourth amendment issue raised when a warrant is sought for (presumably seizable) items that are expected to arrive in a certain place at some time in the future. In that situation, the courts are nearly unanimous in holding that prospective search warrants do not offend the fourth amendment, as long as there is evidence setting forth probable cause that at the specified future time contraband will be found at the location named in the warrant. *See* cases cited *supra* note 57. *See also* United States v. Goff, 681 F.2d 1238, 1240 (9th Cir. 1982) (upholding warrant issued in San Francisco while suspects were en route from Miami). *Contra* United States v. Roberts, 333 F. Supp. 786, 787 (E.D. Tenn. 1971) (dictum).

In Arizona, the question of the validity of warrants based on the future presence of seizable items has arisen only in the unusual fact situation of *Cox*. At the time the warrant issued in that

Among those courts which have attempted to define the circumstances in which evidence of a future crime can authorize a search warrant, a number of different approaches have been taken.

A few courts have disapproved, on fourth amendment grounds, all warrants to search for evidence of a crime that has not yet been committed.[58] Instead of searching for probable cause to connect the object of the search with some crime, these courts focus on the nature of probable cause itself.[59] For example, the Third Circuit has written that "[t]he Constitution and the statutes enacted pursuant thereto necessarily contemplate that the facts warranting the conclusion of probable cause must exist at the time of such judicial finding, not that they will or may come into existence thereafter."[60] Under that analysis, probable cause cannot encompass future crimes under any circumstances.

Unlike the other cases which have invalidated search warrants that anticipate criminal activity, *State v. Gerardi*,[61] a Florida case in which a prospective warrant was quashed, resembles *Berge* closely on its facts.[62] The holding of that case, however, was based, not on the fourth amendment, but rather on a Florida statute authorizing issuance of warrants to search private dwellings only under specified circumstances.[63] The pertinent provision of that statute authorizes a search warrant for a private dwelling when "the law relating to narcotics or drug abuse is being violated [in the dwelling.]"[64] Strictly construing the statute, the Florida District Court of Appeals held that an affidavit reciting future delivery of a parcel containing narcotics was insufficient to meet the statutory requirement.[65]

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case, the contraband already was in the car that the police intended to search. 110 Ariz. 603, 608, 522 P.2d 29, 34 (1974). *Cox*, then, probably cannot be said to have decided what the result would be if the contraband arrived after issuance of the warrant. In a dictum, however, the court implies that evidence of future events can establish probable cause. *See supra* note 36 and accompanying text. Since there is no "reasonableness" objection to a warrant that anticipates the arrival of seizable items, as long as the issuing magistrates ensures that the warrant will not be executed prematurely, that kind of prospective warrant arguably is permissible in Arizona.

58. United States *ex rel.* Campbell v. Rundle, 327 F.2d 153, 162-63 (3d Cir. 1964) (decision reached on alternative grounds); United States v. Roberts, 333 F. Supp. 786, 787-88 (E.D. Tenn. 1971) (dictum); State v. Guthrie, 90 Me. 448, 453, 38 A. 368, 369-70 (1897) (dictum); Simmons v. State, 286 P.2d 296, 298 (Okla. Crim. App. 1955) (dictum).

59. The issue is whether "probable cause" encompasses probable future events, or only the probable involvement of individuals in present events. *See* United States v. Roberts, 333 F. Supp. 786, 787-88 (E.D. Tenn. 1971).

60. United States *ex rel.* Campbell v. Rundle, 327 F.2d 153, 162 (3rd Cir. 1964) (quoting State v. Miller, 329 Mo. 855, 46 S.W.2d 541 (1932)).

61. 307 So.2d 853 (Fla. App. 1975).

62. A customs search of a mailed package disclosed a bottle containing hashish. The police marked the bottle, repackaged it, and sent it on to the addressee. A warrant was obtained prior to delivery. Upon confirmation by a deputy sheriff on surveillance duty that the package had been delivered, the police executed the warrant. *Id.* at 854.

63. FLA. STAT. ANN. § 933.18 (West 1971).

64. *Id.* The Arizona search warrant statute does not include any analogous requirement of a current criminal violation on the premises to be searched. *See supra* note 3. State v. Vitale, 23 Ariz. App. 37, 40, 530 P.2d 394, 397 (1975), limited the scope of the Arizona statute to past and present offenses, however. *See supra* notes 40-41 and accompanying text. For a possible alternative interpretation of the Arizona statute, *see infra* note 82.

65. *Gerardi*, 307 So.2d at 855. Massachusetts has declined to adopt a similarly literal interpretation of its statute defining seizable property. Commonwealth v. Soares, — Mass. —, —, 424

Other courts, addressing fact situations similar to the one in *Berge*, have found present probable cause to support search warrants.[66] These courts have inferred from the existence of a package containing drugs and addressed to a certain individual that the individual probably has committed a drug-related crime.[67] Most notable is a series of California cases beginning with *People v. Superior Court*[68] which approved warrants to search, not only for seizable drugs which had been discovered in the mail and sent on to the addressee via controlled delivery, but also for other drugs, drug paraphernalia, and correspondence related to drug transactions.[69] The California courts' analysis, however, is not entirely satisfactory, because logically it should permit searches conducted immediately upon discovery of contraband in the mail, regardless of whether the contraband has been delivered to the address or accepted by the occupants.[70] Most courts have requested some assurance that the items in transit will arrive at their destination before the warrant is executed.[71]

N.E.2d 221, 224-25 (1981). The Massachusetts statute provides that a warrant may issue on a showing of probable cause to believe that specified kinds of property, including "property or articles the possession or control of which is unlawful," "are concealed" on certain premises. MASS. GEN. LAWS ANN. ch. 276, § 1 (West 1980). The Massachusetts Supreme Judicial Court in *Soares* held that the statute does not require the actual presence of seizable items on the premises to be searched at the time the warrant issues. —Mass. at —, 424 N.E.2d at 225.

66. *E.g.*, People v. Superior Court, 27 Cal. App. 3d 404, 411-14, 103 Cal. Rptr. 874, 878-80 (1972); State v. Waits, 185 Neb. 780, 781-85, 178 N.W.2d 774, 776-78 (1970); People v. Singer, 44 A.D.2d 730, 731, 354 N.Y.S.2d 178, 179-80 (1974); *aff'd*, 36 N.Y.2d 1006, 337 N.E.2d 126, 374 N.Y.S.2d 612 (1976); *contra* United States v. Swede, 326 F. Supp. 533, 537 (S.D.N.Y. 1971) (dictum discussing probable cause to arrest).

67. *See* cases cited *supra* note 67, *infra* note 69.

68. 27 Cal. App. 3d, 404, 411-14, 103 Cal. Rptr. 874-80 (1972). *See also* People v. Duncan, 40 Cal. App. 3d 940, 953-54, 115 Cal. Rptr. 699, 709 (1974); People v. Sloss, 34 Cal. App. 3d 74, 82-83, 109 Cal. Rptr. 583, 588 (1973).

69. The court in People v. Superior Court, 27 Cal. App. 3d 404, 411-12, 103 Cal. Rptr. 874, 878-79 (1972) stated:

> A reasonable and prudent magistrate could infer that the consignee of contraband mailed from outside the United States would know that he was party to an illegal transaction and that, branded with such knowledge, it is reasonable to infer that the consignee possesses other contraband of foreign and domestic origin. The argument that like junk mail, four-pound packages of marijuana are shipped from overseas at random to innocent consignees who have neither solicited nor been a knowledgeable party to the shipment or receipt of such goods should be rejected as unworthy of consideration.

70. People v. Duncan, 40 Cal. App. 3d 940, 115 Cal. Rptr. 699 (1974), recognized this problem, and suggested that a general search should not be permitted until the contraband actually has been delivered. *See id.* at 954, 115 Cal. Rptr. at 709.

People v. Singer, 44 A.D.2d 730, 354 N.Y.S.2d 178 (1974), *aff'd*, 36 N.Y.2d 1006, 337 N.E.2d 126, 374 N.Y.S.2d 612 (1976), permitted a search of the defendant's home, pursuant to an anticipatory warrant, after a package had been seized when the defendant attempted to pick it up at a Railway Express office. *Id.* at 730-31, 354 N.Y.S.2d at 179. In that case, however, the original warrant was based not only on the package, but also on an informant's statement that the defendant would be packaging the shipment for sale at his residence. *Id.* at 731, 354 N.Y.S.2d at 180.

71. *See, e.g.*, United States v. Allende, 486 F.2d 1351, 1352 (9th Cir. 1973) (the warrant itself directed that the search not take place until the package actually had been delivered and accepted), *cert. denied sub. nom.* Montoya v. United States, 416 U.S. 958 (1974); United States *ex rel.* Beal v. Skaff, 418 F.2d 430, 433-34 (7th Cir. 1969) (distance between place of issuance of warrant and place of execution made premature execution impossible); Johnson v. State, 617 P.2d 1117, 1124 n.11 (Alaska 1980) (court directed that prospective warrants be made contingent on delivery). Some jurisdictions, including Arizona, permit telephonic communication with the magistrate, which has the advantage of permitting an independent judicial determination that the requisite event has occurred. *See infra* notes 86-87 and accompanying text.

Alvidres v. Superior Court, 12 Cal.3d 575, 90 Cal. Rptr. 682 (1970) minimized the possibility

It is difficult, in some cases, to draw a precise distinction between "present" and "future" offenses. *People v. Glen*,[72] a leading case on prospective search warrants, permitted issuance of a warrant "where the crime and the person involved were committed by the train of circumstances already in process but short of consummation, so that in the natural course of events the crime would occur at the time and place with defendant's implication."[73] Thus, the New York court distinguished cases which reject as the basis for a warrant "speculation or inference" that a crime will be committed in the future.[74] The court stopped short of saying that mailed contraband creates probable cause that the addressee has committed a crime.[75] The contraband, however, was deemed sufficient to implicate the defendant and justify a search of his residence.[76]

Arizona Search and Seizure Law After Berge

At least on its face, *State v. Berge* has not settled the question whether evidence that a crime probably will be committed in the future can furnish authority for issuance of a search warrant. The language of the decision could be read broadly, in conjunction with *State v. Vitale*, to prohibit warrants which anticipate criminal conduct.[77] As previously suggested, however, a more plausible reading of *Berge* restricts its holding narrowly to its particular facts.[78] In *Berge*, the court demanded prior evidence linking the suspect to some criminal activity, apparently because the police helped contrive the events which led to the search and arrest. A warrant to search for seizable property, however, usually may issue regardless of whether any particular person can be identified with the property.[79] This suggests that the *Berge* court's analysis was directed toward the issue of reasonableness of law enforcement methods, rather than the probable cause issue,[80] and that the court did not intend to make probable cause contingent on whether a crime has been committed at the time the warrant issues. By that reasoning, *State v. Cox* could authorize a prospective warrant based on evidence of a crime that "it is reasonable to assume will be committed in the near future," in a factual setting other than controlled delivery of contraband.[81]

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that the warrant will be executed prematurely by pointing out that the police are unlikely to jeopardize the success of the search by executing the warrant when they are aware that the contraband is not yet on the premises. *Id.* at 582, 90 Cal. Rptr. at 686.

72. 30 N.Y.2d 252, 282 N.E.2d 614, 331 N.Y.S.2d 656, *cert. denied*, 409 U.S. 849 (1972), *noted in Criminal Procedure-Search and Seizure-Prospective Search Warrants*, 19 WAYNE L. REV. 1339 (1973).

73. *Id.* at 259, 282 N.E.2d at 617-18, 331 N.Y.S.2d at 663.

74. *Id.* (distinguishing, for example, State v. Guthrie, 90 Me. 448, 38 A. 368 (1897)).

75. The court stated, "The necessary pieces were in motion and all but inevitably the pieces would fall into a set, constituting a crime." *Id.* at 260, 282, N.E.2d at 618, 331 N.Y.S.2d at 662.

76. *See supra* note 74 and accompanying text.

77. *See supra* notes 46-49 and accompanying text.

78. *See supra* notes 49-56 and accompanying text.

79. *See* United States v. Feldman, 366 F. Supp. 356, 362-63 (D. Hawaii 1973).

80. The language of the opinion, though somewhat unclear, supports this interpretation. *See supra* note 23.

81. Since this reading of *Berge* in some cases permits warrants which anticipate criminal activity in some cases, it implicitly would limit the *Vitale* holding to the facts of that case, and

Even a narrow interpretation of *Berge* could have a significant impact on police practices.[82] The police will not be able to obtain a warrant to seize the evidence from a suspect until a controlled delivery or undercover sale has been carried out, *unless* sufficient evidence of the suspect's involvement in a completed or continuing crime already exists. The magistrate will require both probable cause to believe that seizable items will be found on the premises to be searched,[83] and probable cause to believe that the person who is the object of the search has committed a crime that is related to the seizable property.[84] The latter type of evidence is normally required only for a lawful arrest.[85] Essentially, the *Berge* court has introduced into Arizona search and seizure law a type of quasi-arrest warrant.

Yet it will be possible to minimize the impediment to effective law enforcement that could result when the police are required to delay obtaining a warrant until easily concealable or disposable goods have arrived at their destination. Pursuant to statute, Arizona permits the issuance of warrants by telephone.[86] Thus law enforcement officers, upon completion of a controlled delivery or undercover sale of contraband, can obtain a warrant quickly while maintaining surveillance on the suspect. It is unlikely that more than a few minutes will be lost because the warrant was not obtained in advance. Against that brief delay must be weighed the possibility that a mistaken search could be directed against one who has received contraband by accident or, worse, as the result of a malicious attempt to incriminate the recipient falsely or to harass him.[87] By postponing issuance of a search warrant until after the suspect clearly has been

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discard the language in *Vitale* which suggests that ARIZ. REV. STAT. ANN. § 13-3912 (1978) prohibits anticipatory warrants. A reasonable argument can be made that ARIZ. REV. STAT. ANN. § 13-3912(3) (1978) authorizes seizure of evidence of crimes which have not yet been committed. That provision states that "A search warrant may be issued . . . [w]hen the property or things to be seized are in the possession of a person having the intent to use them as a means of committing a public offense . . . ." *Id.* "Intent" indicates a crime planned for the future as opposed to a present or past crime, at least where intent to commit an act does not itself qualify as a crime. If such "intent" created a probability that a crime would be committed in the future, any property which could be used "as a means of committing" the crime arguably would be seizable regardless of the lack of a past or present offense. For example, a warrant to search the residence of a suspected drug dealer might authorize seizure of ledger books, scales, or packaging materials—all of which are used as "means" of selling and distributing drugs—upon a showing that a transaction probably will occur at some specified future time.

82. Contraband discovered in transit accounts for most situations in which anticipatory warrants are employed. *See generally* 1 W. LAFAVE, *supra* note 7.

83. This assumes that Arizona law permits warrants which anticipate the presence of seizable items on the premises to be searched. *See supra* note 58.

84. Some quantum of evidence less than probable cause conceivably could be held to establish a sufficient connection between the criminal offense and the object of the search to make an anticipatory warrant reasonable. People v. Glen, 30 N.Y.2d 252, 282 N.E.2d 614, 331 N.Y.S.2d 656, *cert. denied*, 409 U.S. 849 (1972) establishes such a link on the basis of the mailed contraband alone. *See supra* notes 73-77 and accompanying text. *Berge*, however, appears to require probable cause that the suspect has committed the offense in question. That conclusion follows from the court's statement that "[t]he question is . . . whether there was reasonable ground to believe a crime was being committed." *Berge*, 130 Ariz. at 138, 634 P.2d at 950.

85. *See supra* notes 1-5 and accompanying text. *See also* United States v. Feldman, 366 F. Supp. 356, 362-63 (D. Hawaii 1973).

86. ARIZ. REV. STAT. ANN. §§ 13-3914(c), 13-3915(c) (1978).

87. *But see* People v. Superior Court, 27 Cal. App. 3d 404, 411-12, 103 Cal. Rptr. 874, 878-79 (1972), *quoted supra* note 70, which summarily rejects this possibility.

implicated, *Berge* reduces the potential for an unjustified intrusion that might harm an innocent person.

Conclusion

In *State v. Berge*, the Arizona Supreme Court held that a prospective warrant to search for evidence that law enforcement officers plan to deliver to a suspect at some future time violates the reasonableness requirement of the fourth amendment. The court did not settle the broader question whether evidence of future events can make out probable cause to support a search warrant. Most jurisdictions which have considered the issue permit warrants to search for evidence of a crime that probably will be committed in the future. The Arizona courts now will require some showing that a suspect presently is committing or already has committed a crime before they issue a search warrant directed at him in situations involving controlled delivery of contraband.

John R. Hannah

V. FAMILY LAW

A. THE CONSTITUTIONALITY OF INTERVIEWING CHILDREN PRIVATELY IN CHAMBERS: MUST PARENTS BE AFFORDED AN OPPORTUNITY TO CROSS-EXAMINE?

In theory, child protective proceedings are informal proceedings where all concerned work together to determine the best interests of the child.[1] In reality, parent and state often disagree as to what constitutes the best interest of the child.[2] Although courts traditionally have had difficulty reconciling the competing interest of parent, child, and state,[3] the Arizona Supreme Court has reached a just and equitable balance in *In re Appeal in Maricopa County Juvenile Action No. JD-561*.[4] There the court recognized the due process right of a parent to cross-examine his child in a dependency proceeding.[5]

On December 18, 1979, the Arizona Department of Economic Security filed a petition in the Maricopa County Juvenile Court requesting that a ten and a half-year-old girl be declared a dependent child.[6] The petition alleged that the child's father had sexually molested her.[7]

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1. *See* S. KATZ, WHEN PARENTS FAIL 37-38 (1971). The "best interests of the child" test does not have much substance. "First, no state statute identifies specific factors a court should consider in determining the child's best interests. Obviously, this term can take on many different meanings. . . . In the absence of legislative definition, decisions merely reflect each judge's own 'folk psychology.'" Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 625, 649-50 (1976).

2. Despite agreement that the child's "best interest" should prevail, where that interest lies is a constant source of disagreement. The state argues that the child must be removed from parental custody, while the parent argues that the child should remain in the home. *See* Comment, *Dependent-Neglect Proceedings: A Case for Procedural Due Process*, 9 DUQ. L. REV. 651, 658 (1971).

3. Originally, it was believed that courts could not intervene in the parent-child relationship unless the situation was serious enough to warrant criminal charges. With the enactment of child abuse and neglect legislation, deference to the parent was replaced by deference to the state and its social agencies. *Child Abuse and Neglect*, 1 CHILDREN'S LEGAL R. J. 36 (July/Aug. 1979).

4. 131 Ariz. 25, 638 P.2d 692 (1981) [hereinafter *Juvenile Action No. JD-561*].

5. *Id.* at 28, 638 P.2d at 695.

6. *Id.* at 27, 638 P.2d at 694. In Arizona, a dependent child is one who is adjudicated to be:

(a) In need of proper and effective parental care and control and has no parent or guardian, or who has no parent or guardian willing to exercise or capable of exercising such care and control.

(b) Destitute or who is not provided with the necessities of life, or who is not provided with a home or suitable place of abode, or whose home is unfit for him by reason of abuse, neglect, cruelty or depravity by either of his parents, his guardian, or other person having his custody or care.

ARIZ. REV. STAT. ANN. § 8-201(11) (West Supp. 1982-83). A child who is adjudicated dependent will be "awarded" to one of the agencies or individuals listed. *See id.* § 8-241(A)(1). To "award" is defined as to "assign legal custody." *Id.* § 8-201(5).

7. 131 Ariz. at 27, 638 P.2d at 694.

At the dependency hearing the child's court-appointed lawyer[8] filed a motion requesting that the child not be required to testify as to the details of the sexual molestation.[9] If the testimony proved necessary, the attorney requested that the child be interviewed by the judge in chambers with only the child's therapist present.[10] The motion was granted over the objection of the father's attorney,[11] and the child was interviewed by the judge in chambers in the presence of the child's therapist and the official court reporter.[12] Although the conversation was transcribed verbatim, the father's counsel did not request to see the transcript.[13] The trial court found the allegations of sexual contact between father and daughter to be true and declared the child to be dependent.[14]

On appeal, the father argued that he had been denied due process when he was refused the opportunity to cross-examine his daughter during the private interview.[15] The court of appeals disagreed, holding that while the father would have been entitled to see the transcript of the judge's interview with the child, the father was not entitled to be present and cross-examine his daughter during the interview.[16] The Arizona Supreme Court reversed, holding that the father had been denied due process of law when refused the right to cross-examine his child, but the court added that the right to cross-examine would be subject to reasonable limitation by the trial judge.[17] Thus, it would be within the trial judge's discretion to permit only the father's counsel to be present during the interview to avoid the emotional trauma of a personal confrontation between father and daughter.[18]

This Casenote will first set forth the balancing test used by the court to determine the procedural safeguards due the parent in a dependency hearing. Next, the interests of parent, child, and state will be identified, and the importance that the nature of the proceeding itself plays in securing due process will be discussed. The role of cross-examination in reducing the risk of erroneously removing a child from parental custody will then be examined. Finally, the Arizona Supreme Court's success in protecting the rights and interests of all the participants in *Juvenile Action No. JD-561* will be assessed.

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8. A court may appoint an attorney to ensure that the child's interests are fully represented. *See* ARIZ. R. P. JUV. CT. 22.

9. 131 Ariz. at 27, 638 P.2d at 694. The child's attorney based the request on Rule 19 of the Rules of Procedure for the Juvenile Court, which states that "the court may exclude the child [from the hearing] at the request of the child's attorney."

10. 131 Ariz. at 27, 638 P.2d at 694.

11. *Id.*

12. *Id.*

13. *In re* Appeal in Maricopa County Juvenile Action No. JD-561, 131 Ariz. 50, 55, 638 P.2d 717, 723 (Ct. App. 1981), *vacated*, 131 Ariz. 25, 638 P.2d 692 (1981).

14. 131 Ariz. at 27, 638 P.2d at 694.

15. *See id.*

16. 131 Ariz. at 58-59, 638 P.2d at 725-26.

17. 131 Ariz. at 28, 638 P.2d at 695.

18. *Id.*

Procedural Due Process and the Balancing Test

The parent's interest in the care and custody of his or her child is one component of the liberty interest protected by the due process clause of the fourteenth amendment.[19] Due process requires that before a state may deny a liberty interest, certain procedural safeguards are necessary to ensure "fundamental fairness."[20] These procedural safeguards are to be identified by use of a test which balances "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions."[21] In a dependency proceeding, the court must consider the private interests of both the parent and the child together with the interest of the state.

The parent's interest in the custody and control of his or her child has received considerable judicial recognition.[22] This liberty interest has been deemed "essential,"[23] "far more precious . . . than property rights,"[24] "cognizable and substantial,"[25] and extremely important.[26] It is an interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection."[27]

The state also has interests in the parent-child relationship that must be identified before any procedural due process analysis of parental rights in child protective proceedings can be undertaken. The state's interest stems primarily from its role as protector of the child's interest under the *parens patriae* theory.[28] In Arizona, the child's interest has been identified as the right to effective parental care.[29] This right includes "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."[30] In the context of a dependency proceeding there is, in addition to these interests, the interest of the child to

19. Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Armstrong v. Manzo, 380 U.S. 545, 550 (1965); May v. Anderson, 345 U.S. 528, 533-34 (1953); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); *In re* Appeal in Maricopa County Juvenile Action No. JS-734, 25 Ariz. 333, 338, 543 P.2d 454, 459 (Ct. App. 1975); *In re* Appeal in Pima County Juvenile Action No. S-111, 25 Ariz. App. 380, 386, 543 P.2d 809, 815 (Ct. App. 1975).

20. Lassiter v. Department of Social Servs., 452 U.S. 18, 24 (1981).

21. *Id.* at 27; *see also* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

22. *See supra* note 19 and accompanying text.

23. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

24. May v. Anderson, 345 U.S. 528, 533 (1953).

25. Stanley v. Illinois, 405 U.S. 645, 652 (1972).

26. *Lassiter*, 452 U.S. at 27.

27. *Stanley*, 405 U.S. at 651.

28. "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).

29. *In re* Appeal in Maricopa County Juvenile Action No. J-75482, 111 Ariz. 588, 590-91, 536 P.2d 197, 199 (1975); Hernandez v. State *ex rel.* Arizona Dep't of Economic Sec., 23 Ariz. App. 32, 35, 530 P.2d 389, 392 (1975).

30. *Hernandez*, 23 Ariz. App. at 35, 530 P.2d at 392.

be free of unnecessary embarrassment or emotional trauma.[31]

The state also has interests of its own which may conflict with the child's interest and thus undermine the state's *parens patriae* role.[32] Among these other interests are the preservation of the family as a social institution,[33] administrative efficiency,[34] and fairness.[35]

These conflicting interests must be weighed in light of the nature of the proceeding in which parent, child, and state are involved.[36] This is because "due process is flexible and calls for such procedural protections as the particular situation demands."[37] In some proceedings the degree of potential deprivation of a protectible liberty interest may be greater than in others and thus call for additional procedural safeguards.[38] For example, the degree of deprivation of the parent's interest is potentially greater in a termination proceeding than in a dependency proceeding, since the deprivation that results from termination of parental rights is both total and permanent.[39] Not only is legal custody removed,[40] as in an adjudication of dependency, but in addition, the parent's guardianship rights are terminated.[41] Furthermore, a parent-child relationship, once severed, cannot be restored.[42] In an adjudication of dependency, however, the removal of legal custody constitutes neither a total deprivation nor a permanent one.[43]

The difference in the degree of potential deprivation between dependency and termination of parental rights, however, should not be overstated. Once legal custody is removed from the parent, the likelihood that custody will soon be restored is small.[44] Furthermore, the initial loss of custody imposes a substantially greater hardship on both parent and child than does final termination of the parent-child relationship. An erroneous

31. *See Juvenile Action No. JD-561*, 131 Ariz. at 28, 638 P.2d at 695.

32. Areen, *supra* note 28, at 893-94.

33. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976); *In re* Appeal in Pima County Juvenile Action No. S-111, 25 Ariz. App. 380, 387-88, 543 P.2d 809, 816-17 (Ct. App. 1975) (quoting Hyatt v. Hyatt, 24 Ariz. App. 170, 176-77, 536 P.2d 1062, 1068-69 (1975)); Arizona State Dep't of Economic Sec. v. Mahoney, 24 Ariz. App. 534, 537, 540 P.2d 153, 156 (1975).

34. Areen, *supra* note 28, at 894.

35. *Id.*

36. *See* Mathews v. Eldridge, 424 U.S. 319, 339-40 (1976).

37. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

38. *See Mathews*, 424 U.S. at 341. The degree of potential deprivation can be measured by the possible length of wrongful deprivation and by the hardship imposed by the deprivation. *Id.* at 341-42. *See also* Fusari v. Steinberg, 419 U.S. 379, 389 (1975).

39. *See* Wald, *supra* note 1, at 633. *See generally* ARIZ. REV. STAT. ANN. § 8-539 (1974).

40. ARIZ. REV. STAT. ANN. § 8-539 (1974). In Arizona, the right to legal custody of a child includes the right to have physical possession of the child; the right and the duty to protect, train and discipline the child; and the responsibility to provide the child with food, shelter, education and ordinary medical care. *Id.* § 8-531(8).

41. *Id.* § 8-539. In Arizona, guardianship rights include the authority to consent to marriage, to enlistment in the armed forces, and to major medical treatment; the authority to represent the child in legal action and to make other decisions of legal significance; the rights and responsibilities of legal custody; and the right to consent to the child's adoption. *Id.* § 8-531(6).

42. After termination of parental rights, the child is free to be adopted. *Id.* §§ 8-102, -106(A)(1)(b), -539 (1974 & Supp. 1974-82).

43. *See In re* Johnson, 86 Ariz. 297, 301-02, 345 P.2d 423, 425-26 (1959).

44. *See* Areen, *supra* note 28, at 887. "The available data indicate that between 40 percent and 80 percent of all children presently removed from home by court order are never returned to their parents." Wald, *supra* note 1, at 662.

decision to remove the child from the home may irreparably damage the parent-child relationship even if the error is subsequently rectified.[45] Furthermore, such state intrusion may adversely affect the child's normal development into adulthood.[46] Thus, although the end result of a termination proceeding is the total and permanent severance of the parent-child relationship, it can be argued that the harm that results from an initial decision to remove the child from the parent's care renders the dependency proceeding the more serious of the two.[47]

Calculating the Risk of Erroneous Deprivation

After weighing the interests of the parent, the state, and the child, the court must then consider the risk that the parent will be erroneously deprived of his or her child if denied the right to cross-examine the child during an *in camera* interview.[48] The practice of interviewing a child privately in chambers is used in a variety of situations for different purposes. For example, *in camera* testimony has been used to ascertain the child's true feelings and preferences,[49] as well as to elicit from the child factual statements concerning parental conduct.[50] It also has been used in termination proceedings,[51] dependency proceedings,[52] and divorce-custody disputes.[53] The private interview "lessens the ordeal for the child"[54] who is thereby spared the embarrassment and trauma of testifying before parents and strangers.[55] In addition, a private conference in the informal surroundings of the judge's chambers is thought to be more informative than questioning conducted in open court.[56]

How informal a hearing may be is limited, however, by the require-

45. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 13 (1979).

46. The child's development requires the privacy of family life under guardianship by parents who are autonomous. The younger the child, the greater is his need for them. When family integrity is broken or weakened by state intrusion, his needs are thwarted and his belief that his parents are omniscient and all-powerful is shaken prematurely. The effect on the child's developmental progress is invariably detrimental.

Id. at 9.

47. Furthermore, because the standard of proof in dependency proceedings is less stringent than in termination proceedings, *see infra* notes 66-67 and accompanying text, the initial decision to remove a child from parental custody may be more serious than would be an initial decision to terminate the parent-child relationship. "The child is removed and cannot be returned under the best interest test. Yet, termination cannot occur because the parental conduct leading to removal does not constitute grounds for termination." Wald, *supra* note 1, at 661 n.259. Thus, the child is removed from his parents, but is not available for adoption.

48. *See supra* note 21 and accompanying text.

49. *See* Burghdoff v. Burghdoff, 66 Mich. App. 608, 612, 239 N.W.2d 679, 682 (1976).

50. *See* Baker v. Vidal, 363 S.W.2d 158, 159 (Tex. Civ. App. 1962).

51. *See* State *ex rel.* Child v. Clouse, 93 Idaho 893, 899, 477 P.2d 834, 840 (1970).

52. *See Juvenile Action No. JD-561*, 131 Ariz. 25, 27, 638 P.2d 692, 694 (1981).

53. *See* Marshall v. Stefanides, 17 Md. App. 364, 366-67, 302 A.2d 682, 683 (Md. Ct. Spec. App. 1973).

54. Stickler v. Stickler, 57 Ill. App. 2d 286, 291, 206 N.E.2d 720, 723, (1965).

55. *See* Siegel & Hurley, *The Role of the Child's Preference in Custody Proceedings*, in THE YOUNGEST MINORITY II 262 (S. Katz ed. 1977).

56. *Id.* at 263. "In the informality of the judge's chambers the infant is not burdened by the presence of parents and witnesses, and not able to parrot a coached recitation on the prompting of counsel." *Id.*

ments of due process.[57] In *In re Gault*,[58] Justice Fortas cautioned that "[d]epartures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness."[59] Cross-examination is one procedure the absence of which may increase the risk of error in child protective proceedings, for the right to cross-examine has been heralded as an incomparable safeguard for testing the reliability of statements.[60]

The need for a right to cross-examine is dramatically illustrated where allegations of sexual misconduct are made against the parent, as they were in *Juvenile Action No. JD-561*.[61] Because the child is likely to be the only witness to the alleged sexual contact, there may be no independent evidence available to verify the truth of the child's statements concerning the allegations.[62] This problem is further exacerbated by the lack of a generally accepted definition of sexual abuse.[63] As a factual matter, distinguishing between appropriate displays of affection and sexual fondling may be difficult.[64] Others might mistakenly perceive a child's statements as indicating sexual contact and intent to make sexual contact where no such intent existed.[65] The probable value of cross-examination in clearing up any ambiguity or misunderstanding is high, for it is the parent who best knows the child and the events giving rise to the allegations and who, as a result, is in the best position to ask the questions necessary to bring the truth to light.

The need for cross-examination takes on added importance in dependency proceedings because of the low standard of proof required.[66] The state may prove dependency by a mere preponderance of the evidence,[67] whereas the parent-child relationship can be terminated only upon a showing of clear and convincing evidence.[68] As a result, cross-examination

57. *See* ARIZ. R. P. JUV. CT. 16(e) ("hearing shall be as informal as the requirements of due process and fairness permit").

58. 387 U.S. 1 (1967).

59. *Id.* at 18-19.

60. *See* 5 J. WIGMORE, EVIDENCE § 1367, at 32 (Chadbourn rev. 1974). Wigmore commented that in removing cross-examination as a procedural safeguard from juvenile courts "the promoters of that legislation in their enthusiasm for its benefits and their determination to eliminate the conditions of the usual criminal court, have gone to the borderline of prudence in their iconoclasm." *Id.* § 1400, at 200.

61. *See* 131 Ariz. 25, 27, 638 P.2d 692, 694. The petition filed by the Department of Economic Security alleged, among other things, that the child's father fondled her, and that the child complained that he "treats me like a wife." 131 Ariz. 50, 52, 638 P.2d 717, 719 (Ct. App. 1981).

62. This is true, for example, where the alleged sexual contact cannot easily be corroborated through medical testimony. *See* Comment, *Protecting Children from Parents Who Provide Insufficient Care—Temporary and Permanent Statutory Limits on Parental Custody*, 1980 ARIZ. ST. L.J. 953, 962.

63. *See* Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, in PURSUING JUSTICE FOR THE CHILD 265 (M. Rosenheim ed. 1976).

64. *Id.* at 266.

65. In *Juvenile Action No. JD-561*, the father maintained that everyone had blown a normal parent-child relationship out of proportion and that the reported sexual contact was exaggerated. 131 Ariz. 50, 52, 638 P.2d 717, 719 (Ct. App. 1981).

66. *See infra* notes 67-68 and accompanying text.

67. *In re* Appeal in Maricopa County Juvenile Action No. J-74449A, 20 Ariz. App. 249, 250, 511 P.2d 693, 694 (Ct. App. 1973); ARIZ. R. P. JUV. CT. 17(a)(2); *see also* Arizona State Dep't of Public Welfare v. Barlow, 80 Ariz. 249, 254, 296 P.2d 298, 301 (1956).

68. Santosky v. Kramer, 103 S. Ct. 1388, 1402-03 (1982).

may play a greater role in reducing the risk of erroneous deprivation of the parent's interest in dependency proceedings.

Due Process and the Role of Cross-Examination

A number of courts have concluded that the requirements of due process can be met by procedural safeguards other than the right to cross-examine.[69] For example, several courts state that a private interview held over the objection of the parent will be proper if the conversation is recorded and preserved for appeal.[70] Others add the requirement that the content of the interview be disclosed to the parent who must then be given an opportunity to offer rebuttal testimony.[71] These procedures spare the child the trauma of testifying before parents and strangers, while reducing the risk of erroneous deprivation by ensuring that the judge's decision is not based on "secret" evidence.[72] Neither the right to a transcript nor the right to rebut the child's testimony, however, is as effective as the right to cross-examine in testing the reliability of the child's statements.[73] Consequently, these procedures provide less protection against error.

In *Juvenile Action No. JD-561*, the Arizona Supreme Court held that due process requires that a parent be given an opportunity to cross-examine a child in a dependency hearing where the child's testimony is needed to establish the parental misconduct alleged.[74] The court reasoned that the adversary system would be rendered meaningless were parties denied the opportunity to test the assertions of their opponents.[75] But where the allegations were independently proved, the child's testimony is superfluous and the denial of the opportunity to cross-examine constitutes only harmless error.[76]

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69. *See infra* notes 70-71 and accompanying text.

70. *See, e.g.*, Strain v. Strain, 95 Idaho 904, 906, 523 P.2d 36, 38 (1974) (interview must be recorded if necessary to support decision in divorce-custody dispute); Schwartz v. Schwartz, 382 S.W.2d 851, 853 (Ky. 1964) (error not to record interview even when parents and attorneys were present); Walker v. Walker, 40 Ohio App. 2d 6, 8-9, 317 N.E.2d 415, 416-17 (1974) (interview in divorce-custody dispute must be recorded to protect parent's right to appeal).

71. *See* Marshall v. Stefanides, 17 Md. App. 364, 370, 302 A.2d 682, 685 (1973) (private questioning of child in divorce-custody dispute not error if the conversation is recorded and its content disclosed).

The Arizona Court of Appeals adopted this approach in *Juvenile Action No. JD-561*. The appellate court reasoned that it would not be unfair to deny the parent the opportunity to confront and cross-examine his daughter during the dependency hearing provided he had access to a verbatim transcript of the interview and was given the opportunity to offer rebuttal testimony. 131 Ariz. 50, 58, 638 P.2d 717, 725 (Ct. App. 1981).

72. *See* Siegel & Hurley, *supra* note 55, at 270-72.

73. *See supra* note 60 and accompanying text.

74. 131 Ariz. 25, 28, 638 P.2d 692, 695 (1981). *Cf.* Jenkins v. Jenkins, 125 Cal. App. 2d 109, 112, 269 P.2d 908, 910 (1954) (questioning of child over parental objection in divorce-custody proceeding did not deny due process where court made its findings on independent evidence offered in open court); Baker v. Vidal, 363 S.W.2d 158, 159 (Tex. Civ. App. 1962) (denial of opportunity to cross-examine child in divorce-custody case not reversible error where independent medical evidence established truth of allegation).

75. *Juvenile Action No. JD-561*, 131 Ariz. at 28, 638 P.2d at 695.

76. *See* Jenkins v. Jenkins, 125 Cal. App. 109, 112-13, 269 P.2d 908, 910 (1954); Baker v. Vidal, 363 S.W.2d 158, 161-62 (Tex. Civ. App. 1962). Because the instant appeal was brought without a trial transcript, the Arizona Supreme Court could not determine whether the denial of an opportunity to cross-examine the child could be considered harmless error. Therefore, the

Juvenile Action No. JD-561 reflects a thoughtful balancing of the need for informality and the dictates of due process. Affording the parent the opportunity to cross-examine is, ultimately, in the child's best interest, for although the child has an interest in being spared emotional trauma, the child's paramount interest lies in being a member of a functioning family.[77] The opportunity to cross-examine protects against an erroneous decision to remove the child from the family and thus serves the child's best interest as well as the interest of the parent.[78]

The court, however, did not forget the child's interest in being spared unnecessary trauma or embarrassment and accordingly recognized that the right to cross-examine does not include a right to confront.[79] Unlike the right to cross-examine where only the parent's attorney is present to assert the right, confrontation between the parent and the child needlessly exposes the child to psychological harm, for it is doubtful that the presence of the parent adds appreciably to the accuracy of the judge's decision. Thus, a parent is denied due process of law when refused the opportunity to cross-examine but not when denied the right of confrontation.[80] Accordingly, the trial court is given the discretion to allow only the parent's attorney to be present during the in-chambers interview where it appears that the parent's presence would be inhibiting.[81]

Conclusion

In *In re Appeal in Maricopa County Juvenile Action No. JD-561*, the Arizona Supreme Court held that a parent was denied due process when refused the opportunity to cross-examine his child during a dependency hearing. The court reached this result by first weighing the father's interest in retaining custody of his child, the state's interest as *parens patriae* in protecting the interests of the child, and the child's interest both in receiving effective parental care and in being spared the embarrassment and trauma of testifying before parents and strangers. These interests were then balanced against the likelihood that the trial court's decision to remove the child from her father's custody might have been erroneous where the father was denied the opportunity to test the reliability of his daughter's testimony.

Although the court concluded that the balance weighed in favor of a due process right to cross-examine, two limitations qualified this right. First, the court indicated that a trial court's refusal to afford a parent the opportunity to cross-examine his or her child constitutes reversible error only where the child's testimony is necessary to prove the allegation against the parent. Second, the court stipulated that the parent's right to cross-examine does not import a right of confrontation. Thus, a trial court

adjudication of dependency was reversed and the case was remanded to the superior court. 131 Ariz. at 28-29, 638 P.2d at 695-96.

77. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 45, at 5.

78. *See generally* Wald, *supra* note 1, at 639-40.

79. *See Juvenile Action No. JD-561*, 131 Ariz. at 28, 638 P.2d at 695.

80. *See id.*

81. *See id.*

may, in its discretion, allow only the parent's attorney to be present during the in-chambers interview. In placing these limits on a parent's right to cross-examine, the Supreme Court of Arizona has shown sensitivity to the child's interest in being spared unnecessary embarrassment or trauma, and has demonstrated understanding of the requirements of procedural due process.

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B. Standard of Proof in Cases of Dependency and Termination of Parental Rights in Arizona

In *Santosky v. Kramer*,[1] the United States Supreme Court declared that it was constitutionally impermissible for a state to allow termination of parental rights based on allegations supported by a mere preponderance of evidence.[2] The Court held that the due process requirement of the fourteenth amendment mandated, at a minimum, the use of the higher standard of "clear and convincing evidence."[3] Determination of the precise burden equal to or greater than that standard was left to state legislatures and state courts.[4]

The New York statute which failed constitutional review in *Santosky* is similar to the Arizona termination statute insofar as both statutes provide for termination of parental rights by a preponderance of evidence.[5] Before *Santosky*, the Arizona courts had always upheld the preponderance standard against constitutional attack.[6] The courts had weighed the risk of an erroneous severance of parental rights against an increased risk of forcing a child to return to a hostile and dangerous family situation.[7] Comparing the social disutility of these two outcomes, they had declared themselves unable to make a fundamental value determination that the erroneous severance of parental rights constitutionally required a higher burden of proof when considered against the erroneous failure to sever.[8]

Following *Santosky*, the Arizona Supreme Court declared, in *In re Appeal in Pima County Juvenile Action S-191*, that the preponderance of evidence standard used in Arizona severance proceedings was constitutionally infirm.[9] The trial court's severance order and the court of appeals' opinion were both vacated, and the case was remanded to the trial court for new severance proceedings based on the current constitutional considerations required by *Santosky*.[10]

Soon afterward, the Arizona Supreme Court had occasion to rule on a

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1. 455 U.S. 745 (1982).
2. *Id.* at 758.
3. *Id.* at 747-48.
4. *Id.* at 769-70.
5. *Compare* ARIZ. REV. STAT. ANN. § 8-537(B) (Supp. 1982-83) *with* N.Y. FAM. CT. ACT § 622 (McKinney 1975 & Supp. 1981-82). ARIZ. REV. STAT. ANN. § 8-537(B) states: "The court's findings with respect to grounds for termination shall be based upon a preponderance of the evidence under the rules applicable and adhering to the trial of civil causes." N.Y. FAM. CT. ACT § 622 states: "when used in this part, 'fact-finding' hearing means in the case of a petition permanently to terminate custody a hearing to determine whether the allegations . . . . are supported by a fair preponderance of the evidence."
6. *See In re* Appeal in Gila County Juvenile Action No. J-3824, 130 Ariz. 530, 637 P.2d 740 (1981); *In re* Juvenile No. J-2255, 126 Ariz. 144, 613 P.2d 304 (1980). *But see In re* Adoption of Baby Boy, 10 Ariz. App. 47, 51, 455 P.2d 997, 1000 (1969) (stronger showing should be required to terminate parental rights than is needed for deprivation of custody), *vacated*, 106 Ariz. 195 (1970).
7. *See* Hernandez v. State *ex rel.* Ariz. Dept. of Economic Sec., 23 Ariz. App. 32, 36, 530 P.2d 389, 392-93 (1975).
8. *See In re* Appeal in Gila County Juvenile Action No. J-3824, 130 Ariz. 530, 534, 637 P.2d 740, 744 (1981); *Hernandez*, 23 Ariz. App. at 36, 530 P.2d at 392-93.
9. 132 Ariz. 377, 377, 646 P.2d 262, 262 (1982).
10. *Id.* at 377, 646 P.2d at 262.

similar challenge to the preponderance of evidence standard of proof in dependency hearings.[11] In *In re Appeal of Cochise County Juvenile Action No. 5666-J*,[12] the supreme court refused to extend the *Santosky* mandate to adjudications of dependency,[13] thereby permitting them to continue to be based on a preponderance standard.

This Casenote will analyze the *Santosky* decision and its application to the Arizona termination procedure. It will trace prior Arizona case law in this area, and examine the practical impact of the change in standard of proof. Finally, this Casenote will comment upon the Arizona Supreme Court's decision to uphold the preponderance standard for dependency hearings and explore the ramifications of the use of two different standards in these interrelated procedures.

I. THE *SANTOSKY* DECISION

A. *Background*

The United States Supreme Court has recognized as fundamental the right of parental autonomy in the rearing and education of children.[14] The ultimate basis for the Court's protection of such rights is substantive due process[15]—traceable to *Meyer v. Nebraska*[16] and *Pierce v. Society of Sisters*.[17] Though these cases were decided in the *Lochner*[18] era, they have survived the post-*Lochner* retrenchment of substantive due process.[19] To-

11. A child can be adjudicated dependent if there is no parent willing to exercise or capable of exercising effective care and control. Once the court finds the child to be dependent, it may order a disposition in the best interest of the child. *See infra* notes 128-131 and accompanying text.

12. 133 Ariz. 157, 650 P.2d 459 (1982).

13. *Id.* at 159, 650 P.2d at 461.

14. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion) (invalidating municipal zoning ordinance restricting family living arrangements because institution of family deeply rooted in nation's history and tradition); Wisconsin v. Yoder, 406 U.S. 205, 232-34 (1972) (parents' interest in upbringing of children firmly established as enduring American tradition; this interest, coupled with the first amendment right to free exercise of religion, sufficient to overcome state's interest in compulsory high school education); Ginsberg v. New York, 390 U.S. 629, 639 (1968) (parents' claim to authority to direct rearing of their children basic to structure of society; state legislature entitled to aid parents in discharge of responsibility by prohibiting sale of sex-related material to children); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). *See also infra* notes 15-20 and accompanying text.

15. Substantive due process is a means of judicial reevaluation of state legislation. For a description of its rise, decline and revival, see generally G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 502-03 (10th ed. 1980) and L. TRIBE, AMERICAN CONSTITUTIONAL LAW 434-55 (1978).

16. 262 U.S. 390 (1923) (reversing the conviction of a teacher for teaching German and thus violating a state law prohibiting teaching of foreign languages to young children; upholding the right of parents to control the education of their children).

17. 268 U.S. 510 (1925) (sustaining a challenge by parochial and private schools to an Oregon law requiring children to attend public schools. The law interferes with the liberty of parents to direct the upbringing and education of their children).

18. 198 U.S. 45 (1905) (invalidated a New York state law regulating the working hours of bakers for unconstitutional interference with freedom of contract). Twenty-five years later, Nebbia v. New York, 291 U.S. 502 (1934) and West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), started a sharp retreat from the *Lochner* era's restrictive attitude toward permissible legislative ends.

19. At the height of the *Lochner* era, limitation on governmental power was found to derive from the "liberty" guaranteed by the due process clause of the fourteenth amendment. L. TRIBE, *supra* note 15, at 902. The Court undertook a stringent analysis of the relationship between a

day, family autonomy is deemed to be a fundamental liberty which should be given the highest judicial protection.[20]

Though parental authority over children is very great, it is by no means absolute. The state may use its police power[21] and its *parens patriae* power[22] to regulate the family. Thus, the state, exercising its police power, can require parents to comply with child-labor laws,[23] to vaccinate children,[24] or to send them to school.[25] In addition, when parents fail to act in their children's best interests, the state can use its *parens patriae* power to step into the family and protect the welfare of minor children.[26] *Parens patriae* power is to be used to further the best interest of the child;[27] hence, judicial determinations of child custody fall within the ambit of this power.[28]

The most drastic form of state intervention is encountered in the termination of parental rights—a judicial procedure in which the parent-child relationship is completely severed.[29] In effecting termination, the

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challenged law and its alleged objectives, and sustained most of the challenge to economic regulations. The post-New Deal era saw all these cases overturned. See supra note 15. Meyer v. Nebraska, 262 U.S. 390 (1923) and Pierce v. Society of Sisters, 268 U.S. 510 (1925), have, however, remained durable and fertile sources of constitutional doctrine concerning the nature of liberty. L. TRIBE, *supra* note 15, at 903.

20. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (state cannot prohibit abortions in the first trimester because it conflicts with the woman's privacy rights); Wisconsin v. Yoder, 406 U.S. 205 (1972) (parents have a right to guide religious belief and education of their high school age children); Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down a Connecticut law banning use of contraceptives by married couples as an unconstitutional intrusion into the privacy of the home).

Even nontraditional families have been included in the Court's protection. *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (privacy rights of extended families are as great as those of the usual nuclear families); Stanley v. Illinois, 405 U.S. 645 (1972) (unwed father has a privacy interest in the companionship, care and custody of his children).

21. The police power is the state's inherent plenary power to promote all aspects of the public welfare. This power has been broadly construed. *See* Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926).

22. The *parens patriae* power is the state's limited paternalistic power to protect and promote the welfare of certain individuals who lack the capacity to act in their own best interests, for example, children and mental incompetents. For a history of its origins, see Areen, *Intervention Between Parent and Child: A Reappraisal of the State Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 896 (1975).

23. Prince v. Massachusetts, 321 U.S. 158 (1944).

24. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

25. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) ("No question is raised concerning the power of the State reasonably to regulate all schools to require that all children of proper age attend some school. . . ."); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925). *But see* Wisconsin v. Yoder, 406 U.S. 205 (1972) (upholding the rights of Amish parents to keep their children from attending public school beyond the eighth grade).

26. *See In re* Appeal in Maricopa County Juvenile Action Nos. A-23498 & JS-2201, 120 Ariz. 82, 84, 584 P.2d 63, 65 (1978). *See also supra* note 22.

27. *See* O'Connor v. Donaldson, 422 U.S. 563, 583 (1975) (due process requires at a minimum that *parens patriae* legislation be compatible with the best interest of the affected class). *See also supra* note 22.

28. *See* Areen, *supra* note 22, at 896-900.

29. In the eyes of the law, a parent whose parental rights have been terminated becomes a stranger to the child. Dodson, *The Juvenile Court and Parental Rights*, 4 FAM. L.Q. 393, 405 (1970). In Arizona, the only remaining vestiges of the bond are the natural parents' legal obligation to support their children and the children's right of inheritance from their natural parents. ARIZ. REV. STAT. ANN. § 8-539 (1974). These rights are terminated only upon a final order of adoption. *Id.*

It is not clear whether termination occurs under the police power or the *parens patriae* power

state must, of course, comply with the Constitution as well as with its own termination statutes. All but five states have such statutes,[30] whereby termination can occur either when parents consent to give up their rights to the child[31] or when the state (or concerned private parties) petitions for involuntary termination.[32] Where no parental consent has been given, the petitioner must prove the unfitness of the parents in a formal proceeding.[33] At the time *Santosky* was decided, thirty states, the District of Columbia, and the Virgin Islands required that parental unfitness be proved by clear and convincing evidence, and two states required an even higher standard.[34]

B. *Facts of* Santosky

Two of John and Annie Santosky's children were removed from their custody in November 1973 and September 1974 on grounds of parental neglect.[35] Subsequently, a newborn infant was removed because the caseworkers feared for his safety.[36] For four years, the state offered the parents rehabilitative services such as counseling and psychotherapy.[37] One daughter was returned to them for a while, but the "situation blew up" and she was removed again.[38] Finally, convinced that the parents were unwilling to make plans for their children's future, the state peti-

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of the state. The Court has said that termination cannot be ordered merely because it is in the child's best interest. Quilloin v. Walcott, 434 U.S. 246, 255 (1978). It seems, then, that the police power is at least partially involved. In fact, the *Santosky* Court pointedly rejected the *parens patriae* power as the sole basis for termination, holding that any *parens patriae* interest occurs only at the dispositional phase, after the rights have been terminated, and the court is looking for the best alternative for the child. 455 U.S. at 766-67, 767 n.17.

Some states do, however, impose an additional requirement that termination be in the child's best interests. *See, e.g.*, Wasson v. Wasson, 92 N.M. 162, 584 P.2d 713 (Ct. App. 1978) (even though statutory requirement of abandonment was met, parental rights were not terminated because children's inheritance rights would be lost upon termination); TEX. FAM. CODE ANN. § 15.02(2) (Vernon Supp. 1980).

In Arizona, an added complication arises from the felony provision of the Arizona termination statute. ARIZ. REV. STAT. ANN. § 8-533(B)(4) (Supp. 1980-81) establishes, as grounds for termination, "that the parent is deprived of civil liberties due to the conviction of a felony if the felony . . . is of such nature as to prove the unfitness of such parent to have future custody and control of the child." This statute measures parental fitness against a custody standard, and interjects the state's *parens patriae* power into termination proceedings. *See* Casenote, *Arizona's Presumption Favoring Parental Rights—A Variable Standard?*, 23 ARIZ. L. REV. 470 (1981).

30. Bell, *Termination of Parental Rights: Recent Judicial and Legislative Trends*, 30 EMORY L.J. 1065, 1067 (1981); Katz, Howe & McGrath, *Child Neglect Laws in America*, 9 FAM. L.Q. 1, 55 (1975).

31. Ariz. Rev. Stat. Ann. § 8-533(B)(5) (Supp. 1982-83).

32. See, for example, *id.* § 8-533(A) which provides:

> Any person or agency that has a legitimate interest in the welfare of a child, including, but not limited to, a relative, foster parent, physician, the department of economic security, or a private licensed child welfare agency, may file a petition for the termination of the parent-child relationship alleging grounds contained in subsection B.

33. *See, e.g., id.* § 8-535(A).

34. *Santosky*, 455 U.S. at 749 n.3. New Hampshire and Louisiana have barred terminations unless the key allegations have been proved beyond a reasonable doubt. *Id.* Evidence beyond a reasonable doubt is also required for termination of Indian parental rights. *See* Indian Child Welfare Act of 1978, 25 U.S.C. § 1912(f) (Supp. V 1981).

35. 455 U.S. at 751.

36. *Id.*

37. *Id.* at 782-83.

38. *Id.* at 789 n.14.

tioned to terminate the Santoskys' parental rights.[39] In New York, at that time, such a petition was granted if the child was found to be "permanently neglected" by a preponderance of the evidence.[40]

The New York trial court granted the state's petition against the Santoskys,[41] and the court of appeals affirmed in a memorandum decision.[42] The United States Supreme Court reversed, holding that anything less than a clear and convincing standard was constitutionally impermissible.[43] The matter was remanded to the trial court for a new hearing.[44]

C. *The Meaning of "Clear and Convincing" Evidence*

In civil matters, the usual standard of proof is a preponderance of the evidence.[45] Though the meaning of this term is by no means universally agreed upon, a commonsense definition is that the evidence preponderates when it is more convincing to the trier than the opposing evidence.[46] This standard reflects society's minimal concern with private pecuniary matters; it is also based on a societal conclusion that the parties should share fairly equally the risk of loss.[47] The standard of proof is higher in cases where a more fundamental interest than loss of money is at stake.[48] Thus, in a criminal proceeding, where the defendant's life and liberty are jeopardized, the crime must be proven beyond a reasonable doubt.[49] There are some intermediate proceedings, which, though technically civil, entail fundamental liberty interests and require a greater amount of procedural due process, including a higher standard of proof.[50] For example, in the civil

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39. *Id.* at 782.

40. *See* N.Y. FAM. CT. ACT § 622 (McKinney 1975 & Supp. 1981-82). New York permits such a petition to be filed a year after the child is deemed neglected and put in the care of an authorized agency. N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney Supp. 1981-82). During this year, the state must provide rehabilitative services to the parents. N.Y. FAM. CT. ACT § 614-1(c) (McKinney Supp. 1981-82).

41. 455 U.S. at 751-52.

42. *In re* John AA, 75 A.D.2d 910, 427 N.Y.S.2d 319 (1980).

43. 455 U.S. at 747-48.

44. *Id.* at 770.

45. E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 793 (1972). Juvenile court procedures are civil matters, though in cases of juvenile delinquency, the Court has questioned the usefulness of the civil-criminal distinction. *See In re* Winship, 397 U.S. 358, 365-66 (1970); *In re* Gault, 387 U.S. 1, 50-51 (1967).

46. E. CLEARY, *supra* note 45, at 793. But see the definition given by the *Santosky* Court—preponderance of the evidence is a standard of proof that by its very terms demands consideration of the quantity, rather than the quality, of the evidence. 455 U.S. at 764.

47. 455 U.S. at 755.

48. *See id.*; Addington v. Texas, 441 U.S. 418, 424 (1979).

49. "Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." *In re* Winship, 397 U.S. 358, 362 (1970). *See also Santosky*, 455 U.S. at 755.

50. Note, *Appellate Review in Federal Courts of Findings Requiring More than a Preponderance of the Evidence*, 60 HARV. L. REV. 111, 112 (1946). "The requirement in civil actions of more than a preponderance of the evidence was first applied in equity to claims which experience had shown to be inherently subject to fabrication, lapse of memory, or the flexibility of conscience." *Id.* at 112.

The United States Supreme Court has mandated an intermediate standard of proof in those cases where, notwithstanding the "state's civil labels and good intentions," this level of certainty has been deemed necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with a "significant deprivation of liberty" or

commitment of the mentally ill,[51] or denaturalization and deportation of citizens,[52] where the infringements are of such grave concern to the individual that a preponderance of evidence standard seems unfair, the Court has required that the case against the defendant be established by clear and convincing evidence.[53]

In his concurring opinion in *In re Winship*,[54] Justice Harlan explained the significance of the standard of proof. The function of a standard of proof, according to Harlan, is "to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions."[55] Thus, where the individual interests at stake are "particularly important" and "more substantial than mere loss of money," but not as important as life or physical liberty, due process mandates proof by clear and convincing evidence.[56]

It is not clear whether the clear and convincing standard really provides any greater protection to the individual right involved than does the standard of preponderance. The United States Supreme Court has intimated that the difference between the two standards may be small, and, in fact, principally symbolic, although it held that the adoption of the higher standard was "more than an empty semantic exercise."[57] By reflecting the value society places on the individual right burdened, the higher standard might impress the fact finder with the importance of the decision, and thus be a moral force against taking the task lightly.[58] However, there is no sure way to determine whether the trial courts are correctly applying the clear and convincing standard, and the appellate process provides no safeguards either.[59] Under classical equity practice, appellate courts tried cases *de novo*, and were thus called upon to apply anew the standard of clear and convincing proof.[60] At present, however, the trial courts' findings are reversed only when clearly erroneous.[61] If the appellate court finds that there was substantial evidence supporting the verdict, it does not even consider whether the evidence met the clear and convincing stan-

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"stigma." Addington v. Texas, 441 U.S. 418, 424-26 (1979). *See infra* notes 54-56 and accompanying text.

51. *See* Addington v. Texas, 441 U.S. 418 (1979).

52. *See* Woodby v. Immigration & Naturalization Serv., 385 U.S. 276 (1966) (deportation); Chaunt v. United States, 364 U.S. 350 (1960) (denaturalization).

53. *See* Addington v. Texas, 441 U.S. 418, 427 (1979) (unanimous decision of participating justices that the fourteenth amendment requires at least clear and convincing evidence in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital); Woodby v. Immigration & Naturalization Serv., 385 U.S. 276, 277 (1966) ("it is incumbent upon the government . . . to establish the facts supporting deportability by clear, unequivocal and convincing evidence"); Chaunt v. United States, 364 U.S. 350, 353 (1960) (in view of the grave consequences to the citizen, naturalization decrees are not lightly to be set aside—the evidence must indeed be "clear, unequivocal and convincing").

54. 397 U.S. 358, 368 (1970).

55. *Id.* at 370.

56. Addington v. Texas, 441 U.S. 418, 424 (1979).

57. *Id.* at 424-25.

58. *Id.* at 427.

59. *See infra* notes 60-63 and accompanying text.

60. E. CLEARY, *supra* note 45, at 798.

61. *In re* Pima County Juvenile Action S-139, 27 Ariz. App. 424, 427, 555 P.2d 892, 895 (1976); Anonymous v. Anonymous, 25 Ariz. App. 10, 12, 540 P.2d 741, 743 (1975); FED. R. CIV. P. Rule 52(a).

dard.[62] Consequently the scope of review for the preponderance and the clear and convincing standards is essentially the same.[63]

D. *Procedural Due Process in Termination Decisions*

The *Santosky* Court used the three-factor test articulated in *Mathews v. Eldridge*[64] to decide whether the preponderance standard was consistent with the requirements of due process.[65] The three balancing factors given in *Mathews* are: 1) the private interest infringed, 2) the risk of erroneous results, and 3) the countervailing state interest in the challenged procedure.[66] Using this test, the *Santosky* Court concluded that the "fair preponderance of the evidence" standard was inconsistent with due process.[67] The Court also rejected a case-by-case approach to the standard of proof, noting that procedural due process rules are shaped by the risk of error inherent in the fact-finding process as applied to the generality of cases, not to the rare exceptions.[68]

Regarding the rejection of the case-by-case approach, it is difficult to explain the discrepancy between *Santosky* and *Lassiter v. Department of Social Services*,[69] decided just a year before. In *Lassiter*, the Court held that due process required only that appointment of counsel for indigent parents facing termination proceedings be left to the trial judge to decide on a case-by-case basis.[70] The Court's explanation of the discrepancy, citing the lack of precedent for a case-by-case approach to the standard of proof,[71] is not wholly satisfactory. If the aim is to be absolutely fair to the parents facing termination, it is hard to see why the Court did not take into account the practical realities of the situation, that is, that much greater prejudice to the parents might be caused by the lack of counsel than by a

62. See Beeler v. American Trust Co., 24 Cal. 2d 1, 7, 147 P.2d 583, 587 (1944) for the proposition that the purpose of the clear and convincing standard is to guide the trier of fact in consideration of the evidence, and that it is not a test to be applied by an appellate court in passing on the sufficiency of the evidence.

63. The *Beeler* dissent stated:

> [I]t is the duty of the appellate court in reviewing the evidence to determine, not whether the trier of facts could reasonably conclude that it is more probable that the fact to be proved exists than that it does not, . . . but whether the trier of fact could reasonably conclude that it is highly probable that the fact exists. When it holds that the trial court's finding must be governed by the same test with relation to substantial evidence as ordinarily applies in other civil cases, the rule that the evidence must be clear and convincing becomes meaningless.

Id. at 33, 147 P.2d at 600 (Traynor, J., dissenting). *See also* Note, *supra* note 50, at 113-18.

64. 424 U.S. 319 (1976).

65. 455 U.S. at 758. The *Santosky* Court cited Lassiter v. Department of Social Servs., 452 U.S. 18 (1981) for the proposition that the nature of the process due in parental rights termination proceedings turns on a balancing of the three distinct factors specified in *Mathews*, 455 U.S. at 754.

66. 424 U.S. at 335.

67. 455 U.S. at 758. The Court, in reviewing the factors, found the private interest "commanding," the risk of error from a preponderance standard substantial, and the governmental interest favoring that standard relatively slight. *Id.* at 758.

68. 455 U.S. at 757 (quoting Mathews v. Eldridge, 424 U.S. 319, 344 (1976)).

69. 452 U.S. 18 (1981).

70. *See id.* at 31. This conclusion was reached by applying the same three-factor *Mathews* test that the *Santosky* Court used. Justice Blackmun, who wrote the majority opinion in *Santosky*, had filed a dissenting opinion in *Lassiter*.

71. 455 U.S. at 757.

lower standard of proof.[72]

E. *Repercussions of* Santosky *on the Rights of Children*

The *Santosky* Court characterized the termination hearings as a conflict between the parents and the state.[73] It balanced the rights of these two parties and concluded that a fair allocation of the risk of loss required the higher standard of proof.[74] By refusing to include any parent-child conflict in the balancing process,[75] the Court demonstrated its unwillingness to confront the realities that face the children involved in termination proceedings.

The United States Supreme Court has declared children to be persons under the Constitution, possessed of due process rights,[76] even though the scope and extent of these rights have never been fully enumerated.[77] The dissent in *Wisconsin v. Yoder*[78] first brought out the possibility that the parent engaged in a conflict with the state may not be upholding the equivalent rights of the child. In cases involving abortion rights of minors, the Court has upheld an autonomous, rather than a familial right to privacy.[79] In recent years, however, the Court seems to be retreating from

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72. As Justice Blackmun pointed out in his dissent in *Lassiter*, "[f]aced with a formal accusatory adjudication, with an adversary—the state—that commands great investigative and prosecutorial resources, with standards that involve ill-defined notions of fault and adequate parenting, and with the inevitable tendency of a court to apply subjective values or to defer to the state's 'expertise,' the defendant parent plainly is outstripped if he or she is without the assistance of 'the guiding hand of counsel.'" 452 U.S. at 46. When the parent is indigent, lacking in education and easily intimidated by figures of authority, the imbalance may well become insuperable. *Id.* On the other hand, it is not clear whether a higher standard of proof significantly decreases the chance of error. *See supra* notes 57-63 and accompanying text.

73. "The factfinding does not purport—and is not intended—to balance the child's interest in a normal family home against the parents' interest in raising the child. . . . Rather, the factfinding hearing pits the State directly against the parents." 455 U.S. at 759.

74. *Id.* at 769.

75. "At the factfinding, the State cannot presume that a child and his parents are adversaries." *Id.* at 760. Such a presumption is, however, inherent in statutes providing separate counsel for children in termination cases. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-225(A) (Supp. 1982-83).

The Juvenile Justice Standards Project of the American Bar Association suggests that the child should be a party to all termination proceedings. IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT: STANDARDS RELATING TO ABUSE AND NEGLECT, Standard 8.3(B)(4)(a) (1981) [hereinafter cited as ABUSE AND NEGLECT].

76. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 512-13 (1969).

A full discussion of the constitutional rights of children is outside the scope of this Casenote. *See generally* Keiter, *Privacy, Children and Their Parents: Reflections On and Beyond the Supreme Court's Approach*, 66 MINN. L. REV. 459 (1982); *Developments—The Family*, 93 HARV. L. REV. 1156 (1980) [hereinafter cited as *Developments*].

77. *Compare In re* Gault, 387 U.S. 1, 30 (1967) (due process and fair treatment are mandated by the fourteenth amendment in juvenile court adjudications of delinquency) *with* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (jury trial not required by federal due process in juvenile delinquency adjudication). *See also* Parham v. J.R., 442 U.S. 584, 604 (1979) (upholding parental decision to voluntarily commit child to mental health facility without affording a hearing and counsel to the child).

78. 406 U.S. 205, 243-46 (1972) (Douglas, J., dissenting).

79. The voting patterns and the multiplicity of opinions generated in cases dealing with abortion rights of minors exemplify the difficulty faced by the Court in granting autonomy rights to children. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622 (1979); Carey v. Population Serv. Int'l, 431 U.S. 678 (1977); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

this position.[80] In *Parham v. J.R.*,[81] decided in 1979, the Court held that formal adversary hearings were not required when parents sought to commit their children to state mental institutions. The *Parham* majority emphasized the traditional concept of the family as a unit with broad parental authority over minor children, and stressed that children's rights were circumscribed by the rights and duties of their parents.[82] By eliminating from its consideration the right of the child to a normal family life in a permanent home, the *Santosky* Court amply demonstrated its continuance of the retreat from the protection of children's rights.

The New York Court of Appeals in *Santosky* had approved New York's preponderance standard on the ground that it "properly balanced rights possessed by the child . . . with those of natural parents. . . ."[83] The *Santosky* majority called this view "fundamentally mistaken,"[84] but went on to say that even if that assumption were accepted, the preponderance standard could not be said to fairly distribute the risk of error between parent and child.[85] In the opinion of the Court, the only consequence to the child of an erroneous failure to terminate is the preservation of an uneasy status quo.[86] The Court found that to be much less serious than the likely consequence to the parents of an erroneous termination, resulting, as it does, in loss of all contact with the child.[87] This allocation of gravity belies much of the available social science data suggesting that the so-called "uneasy status quo" may psychologically scar the child forever.[88] What is truly inexplicable is that the Court would allow this devastating damage simply to give abusive and neglectful parents another chance.[89]

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80. *See* Parham v. J.R., 442 U.S. 584 (1979) for the Court's presumption that parents represent the rights of children. *See also infra* notes 81-82 and accompanying text.

81. 442 U.S. 584, 613 (1979).

82. *Id.* at 603-04.

83. *In re* John AA, 75 A.D.2d 910, 427 N.Y.S.2d 320 (1980).

84. 455 U.S. at 765. The *Santosky* Court disagreed with the lower court's assumption that termination of the natural parents' rights will invariably benefit the child. To support its proposition, the Court cited Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975). If, however, foster care is as bad as Wald suggests, there is all the more reason to expedite the process of acquiring a permanent home for the child. Making termination more difficult does not necessarily get the child out of the limbo of foster care, because if the termination effort fails for lack of proof, the court can simply extend the period of the child's foster home placement.

85. 455 U.S. at 765.

86. *Id.* at 765-66.

87. *Id.*

88. *See* J. GOLDSTEIN, A FREUD & A. SOLNIT, BEYOND THE BEST INTEREST OF THE CHILD 31-34 (1973). The authors provide a thoughtful discussion of the child's need for continuity, and the dangers when the need is not met. They observe, "where children are made to wander from one environment to another, they may cease to identify with any set of substitute parents. . . . [M]ultiple placements at these ages puts many children beyond the reach of educational influence, and becomes the direct cause of behavior which the schools experience as disrupting and the courts label as dissocial, delinquent or even criminal." *Id.* at 33-34 *See also* UNITED STATES DEPARTMENT OF HEALTH, EDUCATION & WELFARE, PERMANENT PLANNING FOR CHILDREN IN FOSTER CARE (1977) (DHEW Pub. No. OHDS 77-30124) (on file with *Arizona Law Review*). "A foster child who moves many times, or who constantly fears that he may have to move, may become defensive, fearful, suspicious and, . . . may eventually protect himself from further disappointment and rejection by being less willing to invest in child-parent relationships. Eventually, he loses the capacity." *Id.* at 4.

89. "Parents may be free to become martyrs themselves. But it does not follow they are free,

The *Santosky* Court noted that only about twelve percent of the adoptable children in New York are ever adopted.[90] Presumably, it was downplaying the detrimental effect its decision would have on children living in foster care. It failed to observe, however, that the low adoption rate may be due, in part, to the difficulty of the legal process involved in terminating the rights of the natural parents. The state must offer rehabilitative services and wait to gather enough evidence while the children grow older and less attractive to adoptive parents.[91] Foster parents are reluctant to file adoption petitions because they are afraid that the child will be removed if the petition is not granted.[92] These circumstances may be impossible to prevent completely, but the extra difficulty introduced by stricter termination procedures will result in many more children being consigned to the limbo of foster care,[93] a result from which society could not conceivably stand to gain.

F. *Summary*

Many commentators have urged the stricter standard for termination decisions.[94] Some of them are proponents of minimal state intervention,

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in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." Prince v. Massachusetts, 321 U.S. 158, 170 (1943). Justice Rutledge's reference to parents in *Prince* is equally applicable to society in general. Society can choose to give certain rights to adults, but it should not be free to make martyrs of its children.

90. 455 U.S. at 765 n.15.

91. The state of New York cannot file a termination petition until a year after the child is found dependent. *See supra* note 40. Arizona does not impose a statutory waiting period, but courts have required that the state try to reestablish the family relationship. *See infra* note 112. Meanwhile the child is getting older, and less attractive to adoptive parents. As Goldstein, Freud & Solnit pointed out, "Adoption in the early weeks of an infant's life gives the adoptive parents the biological parents' chance to develop a psychological parent-child relationship. The chance is diminished if adoption occurs at a later stage, after the infant or young child has had earlier placements." J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 88, at 22. Thus, it is natural for prospective adoptive parents to want a very young child.

92. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-118 (1974) which states, in pertinent part: "In any case in which the petition is withdrawn or denied the court shall order the removal of the child from the proposed adoptive home if the court finds that such removal is in the child's best interest." It is possible that the adoptive parents do not want to risk the removal of the child by filing a termination petition which may not be granted. This fear will be aggravated by a higher standard of proof.

93. See Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975), for a detailed description of how foster children are adopted. Often no referrals are made because social workers distrust the legal system that would be involved when termination of parental rights are concerned. *Id.* at 275.

Recently, New Hampshire adopted the standard of proof beyond a reasonable doubt in termination proceedings. State v. Robert H, 118 N.H. 713, 393 A.2d 1387 (1978). As a result of this decision, the New Hampshire Division of Welfare filed fewer petitions to terminate parental rights, leaving the affected children in the limbo of foster care. Marshall, *State v. Robert H., A New Standard for Termination of Parental Rights*, 30 N.H.B.J. 205, 217 (1979). See also Grumet, *The Plaintive Plaintiffs*, 4 FAM. L.Q. 296, 315 (1970) for the proposition that welfare agencies usually contest only those cases where they are certain to win, and that as a result many children are sent back home to suffer further mistreatment.

94. *See, e.g.*, Katz, *Freeing Children for Permanent Placement Through a Model Act*, 12 FAM. L.Q. 203, 240 (1978); Note, *Involuntary Termination of Parental Rights: The Need for Clear and Convincing Evidence*, 2 AM. U.L. REV. 770 (1980); Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 68 GEO. L.J. 213, 234 (1979).

absent gross abuse or neglect.[95] Others have criticized state laws as being vague and overbroad, and have advocated a higher standard of proof as one way of countering these shortcomings.[96] However, it is doubtful whether use of a clear and convincing standard does indeed lead to a reduction in the chance of error.[97] All that one can say for sure is that the Court has once again thrown its weight on the side of parental power over children, giving little weight to the interest of the child in finding a permanent home with a "psychological parent."[98]

II. TERMINATION OF PARENTAL RIGHTS IN ARIZONA

A. *Background*

Prior to *Santosky v. Kramer*, Arizona courts had vacillated in deciding whether or not to allow termination without parental fault if found to be in the best interest of the child.[99] The legislature contributed to the uncertainty by enacting, repealing, and then reenacting adoption statutes authorizing the courts to dispense with parental consent to termination if the consent was withheld contrary to the child's best interests.[100] Until 1970, the juvenile court could not sever parental rights without there first being a pending adoption,[101] and the final severance did not take place until a final order of adoption was entered.[102] At present, in Arizona, a termination hearing[103] can be held separately from adoption proceedings.[104] The

95. *See* Wald, *supra* note 84 (Wald is the premier spokesperson for diminished state intervention in the family); *see also* J. GOLDSTEIN, A. FREUD & S. SOLNIT, *supra* note 88.

96. Alsager v. District Court, 406 F. Supp. 10, 18-20 (S.D. Iowa 1975), *aff'd in part*, 545 F.2d 1137 (8th Cir. 1976); Comment, *Application of the Vagueness Doctrine to Statutes Terminating Parental Rights*, 80 DUKE L.J. 336, 353-54 (1980). *See also infra* note 119.

97. A 1971 study showed that the jurors responding to a questionnaire asking them to express their beliefs in terms of numerical probabilities had a significantly different understanding of the phrase "preponderance of evidence" than did judges responding to the same questionnaire. The jurors thought the requirement called for a far greater showing of probability than did the judges. In fact, there was no significant difference in the jurors' perception between preponderance and clear and convincing standards. Simon, 5 LAW & SOC. REV. 319, 325 (1971). Even though termination proceedings are usually not jury trials, the ABA Justice Standards Project has advocated use of juries. *See* ABUSE AND NEGLECT, *supra* note 75, at Standard 5.3(A)(1); *see also supra* notes 57-63 and accompanying text.

98. See J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *supra* note 88, at 17-20, 98 for a definition of psychological parenthood.

99. *Compare* Caruso v. Superior Court, 100 Ariz. 167, 173 (1966) ("petitioner's right to his child recognized until his unfitness clearly appears or until it is shown by clear and convincing evidence that the child is dependent, neglected, incorrigible or delinquent") *with* Rizo v. Burruel, 23 Ariz. 137, 144, 202 P. 234, 241 (1921) ("under our law, the interests and welfare of the child are of the highest consideration, and in a proceeding of adoption the court may ignore the natural rights of a parent if in doing so the child's welfare is promoted") *and In re* Holman's Adoption, 80 Ariz. 201, 205, 295 P.2d 372, 376 (1956) (agreeing with *Rizo* about dispensing with parental rights if it would promote the welfare of the child).

100. See ARIZ. REV. STAT. ANN. § 8-106(c) (Supp. 1982-83), authorizing the court, in a pending adoption, to dispense with the parents' consent in the best interests of the child. This statute was enacted in 1905, repealed in 1933, and restored in 1952.

101. Anguis v. Superior Court, 6 Ariz. App. 68, 429 P.2d 702 (1967); ARIZ. REV. STAT. ANN. § 8-231 (1955) (repealed 1970).

102. *In re* Adoption of Luke, 3 Ariz. App. 327, 414 P.2d 176; ARIZ. REV. STAT. ANN. § 8-108 (1955) (repealed 1970).

103. As of 1975, 23 jurisdictions required termination proceedings to be separate from the dispositional phrase of a neglect hearing. Katz, Howe & McGrath, *supra* note 30, at 67. In Arizona, a termination hearing is separate from a neglect hearing, and has a dispositional phase of its own. *See* ARIZ. REV. STAT. ANN. §§ 8-522(A), -538(B) (1970 & Supp. 1982-83).

104. If parental rights are terminated, the court can appoint an individual as guardian, as well

statutory authority of the court to dispense with parental consent still remains, but there is case law gloss upon the statutory authority which requires the petitioner to show that the parent has failed in his responsibilities before parental consent can be found unnecessary.[105] Failure of parental responsibility must amount to willful desertion or neglect, bandonment, or other circumstances showing a clear lack of parental fitness.[106]

In Arizona, a termination hearing has not been seen as a battle between the parents and the state, but rather as a proceeding where the right of the child to live a normal life must be given adequate consideration.[107] Viewed in this context, the preponderance standard seems to protect adequately the rights of all concerned. The higher standard of proof may not actually change the result in too many cases, but its tendency will be to make it more difficult to achieve the desired end for the child.[108]

B. *Effects on Children of the Change in Standard of Proof*

The higher standard of proof required in termination proceedings after *Santosky* does not augur well for the children in foster care.[109] In addition, the statutory scheme in Arizona may make it especially difficult for foster children in this state. In Arizona, as in New York, a child can be found dependent if he or she is found by the preponderance of the evi-

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as vest legal custody in another individual or an authorized agency. ARIZ. REV. STAT. ANN. § 8-538(B) (1970). No requirement of a pending adoption is mentioned, though it is not precluded. See also ARIZ. R. JUV. P. 7 which states "The Court may handle all matters at one time, or in phases. . ."

105. *In re* Appeal in Pima County, Adoption of B-6355 and H-533, 118 Ariz. 111, 115, 575 P.2d 310, 314 (1978); *In re* Adoption of Hyatt, 24 Ariz. App. 170, 536 P.2d 1062 (1975). See also *In re* Adoption of Krueger, 104 Ariz. 26, 448 P.2d 82 (1968), where the court held that ARIZ. REV. STAT. ANN. § 8-106(c) (Supp. 1982-83) required that the parent receive actual notice that the court would consider dispensing with the parent's consent to the adoption.

106. *In re* Adoption of Hyatt, 24 Ariz. App. 170, 536 P.2d 1062.

107. *See* Hernandez v. State *ex rel.* Ariz. Dep't of Economic Sec., 23 Ariz. App. 32, 35, 530 P.2d 389, 392 (1975). The *Hernandez* court identified the competing interests as follows: "We are not only concerned with the rights of the natural parents but also the rights of the minor child, which 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. . . ."

Rejecting the contention that protection of the interests of the family relationship should demand a higher standard of proof, the Arizona Supreme Court, in *In re* Appeal in Gila County Juvenile Action No. J-3824, 130 Ariz. 530, 637 P.2d 740 (1981), observed:

> The asserted purpose of requiring a higher standard of proof is to assure that any error in the fact-finding process will be in favor of the family relationship. However, we believe that such an approach conveniently ignores or overlooks realities of our society in which child abuse and neglect are all too common . . . . The rights of parents in maintaining the family unit are secondary in importance when they are in direct conflict with the best interests of the children.

Id. at 535, 637 P.2d at 745.

In a similar vein, the Supreme Court of Massachusetts expressed its disagreement with use of the *Addington* rationale in termination cases: "In . . . Addington, a single individual's interests were pitted directly against those of the State. In custody proceedings, there exists a third interest—that of the child, whose welfare might significantly be jeopardized by requiring a more onerous burden of proof." Custody of a Minor, 378 Mass. 712, 721, 393 N.E.2d 379, 385 (1979).

108. For a discussion of how the increased standard of proof would affect the children in Arizona, see *infra* notes 110-115 and accompanying text.

109. *See supra* notes 88-93 and accompanying text.

dence to be destitute, homeless, abused or neglected.[110] But unlike the situation in New York, in Arizona there is no statutory minimum time between the finding of dependency and the subsequent filing of a termination petition.[111] Nor is there a statutory requirement that the state provide rehabilitative services to the parents.[112] While this may seem to facilitate adoption, in practice the converse is often true. The evidence used in the original dependency action cannot alone support a later termination petition,[113] but additional evidence is hard to acquire. Since the child is not in the home, there is no further opportunity for parental neglect. The petitioner cannot allege the parents' lack of response to rehabilitation attempts, because the statutes do not allow for such an allegation to be made. The only ground left is abandonment, which can be easily resisted by small efforts on the parents' part to continue to see the child.[114] Thus, unless the abuse was severe enough to support a termination petition without a prior finding of dependency, the petitioner encounters great difficulties of proof, with the inevitable result of leaving the child in an uncertain situation for a long time.[115] The greater proof required by *Santosky* will worsen an already bad situation and may well extinguish any chances of finding adoptive homes for the children involved.

C. *Procedural Effects of the Change in Standard of Proof*

From now on, parental termination cases will be decided by a clear and convincing standard. But what of the parent who claims that his parental rights were severed without enough evidence? As discussed above, the scope of review for both preponderance and clear and convincing standards is essentially similar.[116] The appellant can hope to prevail only in those cases where there was too little evidence to support termination under any standard.[117] Even then, the court will assume that the trial

110. ARIZ. REV. STAT. ANN. § 8-546(A)(4) (Supp. 1982-83).

111. *See id.* § 8-533(A). *See also supra* note 40 and accompanying text.

112. But Arizona courts have required the state to affirmatively help the parents restructure the family relationship. *See, e.g.*, Arizona Dep't of Economic Sec. v. Mahoney, 24 Ariz. App. 534, 537, 540 P.2d 153, 156 (1975).

113. When evidence of abuse is used to support a dependency petition, collateral estoppel may bar the use of the same evidence of abuse to support the new allegation that the abuse is serious enough to justify termination in a later proceeding against the parent. Comment, *Protecting Children From Parents Who Provide Insufficient Care—Temporary and Permanent Statutory Limits on Parental Custody*, 1980 ARIZ. STATE L.J. 953, 968. But see *In re* Appeal in Pima County Juvenile Action S-983, 133 Ariz. 182, 650 P.2d 484 (1982), where a severance petition was filed less than two months after a divorce, and the juvenile court was held not bound by principles of res judicata as to the dissolution court's determination regarding the appellant's fitness for purposes of visitation.

114. Comment, *supra* note 113, at 966-67.

115. *Id.* at 968.

116. *See supra* notes 60-63 and accompanying text.

117. *See In re* Appeal in Maricopa County Juvenile Action No. JS-4130, 132 Ariz. 486, 647 P.2d 184 (1982). In that case the court clarified the use of the word "state" in *Santosky*, stating that it is used both to refer to the party bringing the petition to terminate parental rights and to refer to the judicial system which enters an order of termination. Then it went to examine the evidence, finding it insufficient to support an order of termination under any standard. It, therefore, reversed rather than remanding for a new trial.

The Oregon Court of Appeals has determined that since it may factually review termination orders *de novo*, it constitutionally may apply the higher standard itself in reviewing an order that

court found every fact necessary to support its judgment and must affirm if any reasonable construction of the evidence justifies the decision.[118] Especially during a period of transition between two standards, it may be difficult to determine whether the trial judges, used to the old standards, are indeed weighing evidence according to the new one.[119]

The Arizona courts have decided to remand to trial courts the cases adjudicated under the pre-*Santosky* standard and in the appeals process when *Santosky* was decided.[120] Because appeals in termination cases have to be filed within fifteen days of the entry of judgment, and the hearing is expedited as much as possible, there will be few, if any, such cases still pending.[121] The question arises whether *Santosky* will be given complete retroactive effect, extending to judgments already finalized. The United States Supreme Court has held that where the purpose of a new rule is to overcome an aspect of a proceeding that substantially impairs its truth-finding function, the new rule is to be given complete retroactive effect.[122] This reasoning was used by the Court to give retroactive effect to the *In re Winship*[123] requirement of proof beyond a reasonable doubt in juvenile delinquency proceedings.[124] Adherence to this rationale should result in the retrospective application of the *Santosky* standard.[125] This will, of course, result in nullification of some long-standing termination orders, and some of the affected children may already have been adopted. Courts

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was based on a preponderance of the evidence and which was pending an appeal when *Santosky* was handed down. Juvenile Dep't of Multnomah County v. Farrell, 8 FAM. L. RPTR. 2614 (Or. Ct. App. July 21, 1982). In such a case, the higher standard of proof would probably result in greater actual protection.

118. *In re* Appeal of Juvenile Action JS-4130, 132 Ariz. 486, 487-88, 647 P.2d 184, 185-86 (1982) (quoting Neal v. Neal, 116 Ariz. 590, 570 P.2d 758 (1977)).

119. The trial court's work is made considerably harder by the vagueness of many child neglect laws. *See supra* note 96; *infra* note 138. For an interesting discussion of how the substantive law may interact with the standard of proof, resulting in no greater protection to the individual than would be afforded by a lower standard, see Wexler & Monahan, *A Definite Maybe: Proof and Probability in Civil Commitment*, 2 LAW & HUMAN BEHAV. 37 (1978).

120. *Id.* at 488, 647 P.2d at 186.

121. ARIZ. R. JUV. P. 25 & 26 (1971). For some time there was some dispute about the exact appeals procedure. ARIZ. REV. STAT. ANN. § 8-543 (1974) (repealed 1979) required that appeals from termination decisions be governed by rules for appeals from the superior court. This conflicted with the rules of procedure of the juvenile court. For example, in the juvenile court, appeals have to be initiated within 15 days of an order; also, the order need not be written. ARIZ. R. JUV. P. 25 (1971). Regular civil appeals, however, can be initiated only after a written order is entered, and the time limit is 60 days. This conflict has now been resolved by the repeal of § 8-543 and enactment of ARIZ. REV. STAT. ANN. § 8-236(A) (Supp. 1982-83) in 1979, which states: "Any aggrieved party in proceeding under this title may appeal from a final order of the juvenile court to the court of appeals in the manner provided in rules of procedure for the juvenile court as promulgated or approved by the Arizona supreme court. . . ."

122. See Williams v. United States, 401 U.S. 646, 653 (1971).

123. 397 U.S. 358 (1970).

124. Ivan V. v. City of New York, 407 U.S. 203, 204 (1972) (per curiam).

125. But see D. WEXLER, MENTAL HEALTH LAW: MAJOR ISSUES 68 n.29 (1981) where the author argues that the complete retroactive effect, without regard to adverse impact factors, is available only where the major purpose of the new rule is to substantially improve the fact-finding mission, and that, given the fact that a clear and convincing standard is not too different from preponderance, its major purpose may not be to improve the fact-finding process, thus rendering inapplicable the test enunciated in *Ivan*. The author concludes that Addington v. Texas, 441 U.S. 418 (1979) should nevertheless be held retroactive because of the small number of patients involved.

do nullify termination orders in cases of mistake or fraud,[126] regardless of the possible harm to the child, but the number of cases involved is much less than the number that would have to be reopened if *Santosky* were held to have completely retroactive effect.

Arizona courts could refuse to give retrospective effect to *Santosky* based on the United States Supreme Court's opinion that the review of a final judgment is subject to no fixed principle, but depends on consideration of particular relations and particular conduct, of rights claimed to have become vested, of status, and finally, of public policy.[127] The resolution of the issue could well involve a public policy debate on the importance of the natural parents's rights vis-a-vis the vested rights of the child and the adoptive parents in cases where the adoption had already taken place. In cases where the child is still in foster care, it may be easy to defend a reopening of the termination proceeding. But in cases where there is a long-standing adoption, the outcome of the public policy debate cannot be as easily predicted.

III. DEPENDENCY HEARINGS

In Arizona, a child can be adjudicated dependent when he or she has no parent willing to exercise or capable of exercising effective parental care and control, or when he or she is destitute, homeless, abused or neglected.[128] Anyone can initiate a complaint to the Arizona Department of Economic Security that can lead to a dependency action.[129] The allegations against the parent can be proved by a preponderance of the evidence.[130] If the court finds that the child is dependent within the meaning of the statute, it may order a disposition in accordance with the best inter-

126. The *Santosky* Court noted that though parents in New York may petition the family court to vacate or set aside an earlier order on narrow grounds, such as newly discovered evidence of fraud, this statutory provision has never been invoked to set aside a permanent neglect finding. 455 U.S. at 749 n.1.

In Arizona, courts have used Rule 60(c) of the Arizona Rules of Civil Procedure to set aside adoption orders. ARIZ. R. CIV. P. 60(c) states various reasons for relieving a party from a final judgment, including, for example, mistake, fraud, newly discovered evidence, judgments which are void or have been satisfied, and when a prior judgment on which the present one is based has been reversed. Rule 60(c)(6) is a catchall phrase relieving the party of a final judgment for "any other reason justifying relief."

Rule 60(c)(6) was used in Arizona State Dep't of Economic Sec. v. Mahoney, 24 Ariz. App. 534, 540 P.2d 153 (1975) to justify the setting aside of a prior severance order from which no appeal had been taken because the mother did not understand her rights.

127. Linkletter v. Walker, 381 U.S. 618, 627 (1964) (quoting Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940)).

128. ARIZ. REV. STAT. ANN. § 8-201(11) (Supp. 1982-83) provides:

(a) In need of proper and effective parental care and control and has no parent or guardian . . . willing to exercise or capable of exercising such care and control.

(b) Destitute or who is not provided with the necessities of life or who is not provided with a home; or whose home is unfit for him by reason of abuse, neglect, cruelty or depravity by either of his parents, his guardian, or other person having his custody or care.

(c) Under the age of eight years who is found to have committed an act that would result in adjudication as a delinquent . . . if committed by an older child.

129. ARIZ. REV. STAT. ANN. § 8-224(B) (1974); *id.* § 8-546.01(c)(a) (Supp. 1982-83).

130. *In re* Maricopa County Juvenile Action J-74449A, 20 Ariz. App. 249, 250, 571 P.2d 693, 694 (1973); ARIZ. R. JUV. P. 17(a)(2).

ests of the child.[131]

Recently the Arizona Supreme Court reviewed a challenge to the standard of proof in dependency proceedings. In *In re Appeal in Cochise County Juvenile Action No. 5666-J*,[132] the court upheld the preponderance of evidence standard, noting that a determination of dependency is unlike a termination, in that it is reversible.[133] The court weighed the risk of error and the public and private interests, concluding that the *Santosky* mandate of clear and convincing proof is not applicable to dependency proceedings.[134]

The harmful effect on children of the *Santosky* requirement of clear and convincing evidence in parental termination proceedings has already been discussed.[135] The harm will be increased by the disparity between the standards of proof for dependency and termination. A child might be found dependent and removed from the home on a mere preponderance of evidence, and never find another permanent home because the state cannot collect enough evidence to sever the rights of the natural parents.[136] From the point of view of the child, this is the worst of both worlds.[137] From the point of view of the parents as well, the smaller amount of proof needed to remove the child is unfair, because the parent's foremost interest is in keeping the family intact. The predicament of both parents and children is made worse by the vagueness and overbreadth of many dependency statutes, defects which are not always cured by judicial construction.[138] Moreover, a showing of iminent harm is not required,[139] and thus children who are not in any danger are often removed from the family, traumatizing them as well as their parents.

Given that terminations will occur only when the evidence is clear and convincing, the dependency statutes should be amended so that a preponderance of evidence suffices in cases of actual, or possible, physical

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131. ARIZ. REV. STAT. ANN. § 8-241(A)(1) (Supp. 1982-83).

132. 133 Ariz. 157, 650 P.2d 459 (1982).

133. *Id.* at 159, 650 P.2d at 461.

134. *Id.*

135. *See supra* notes 108-115 and accompanying text.

136. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 625, 626 (1976), states that 50% of dependency proceedings lead to removal of the child from the parental home. *Developments*, *supra* note 76, at 1317 n.52, gives statistics to the effect that 40%-80% of all removed children are never returned to their natural parents.

137. *See* Mnookin, *supra* note 93. The author makes a compelling argument that the disparity in standards of proof results in the worst of all worlds—children are removed too quickly, and once removed, little is done to help them get back home.

Some courts have sympathized with this point of view:

> By employing the same standard for a finding of dependency as for termination, courts can ensure that children do not remain in long-term foster care without a final termination decision because the state met the lower standard required for a finding of dependency but could not meet the stricter standard for termination.

Alsager v. District Court, 406 F. Supp. 10, 25 (S.D. Iowa 1975), *aff'd in part*, 545 F.2d 1137 (8th Cir. 1976).

138. *See generally* Note, *Dependency Adjudication in Arizona: Problems of Vagueness and Overbreadth*, 24 ARIZ. L. REV. 441 (1982).

139. *Id.* at 463-64.

harm to children, with a higher proof to be required in other cases.[140] In cases of physical abuse, the extra evidence required for termination may not be hard to come by. But in other instances, courts should require that the child not be removed from the home unless a clear case is made that such removal would be in the child's best interest, taking into account the alternative possibility that the child might have to spend the rest of his childhood bereft of home and family.[141]

CONCLUSION

In petitions for termination of parental rights, Arizona courts now require that the petitioner prove his case by clear and convincing evidence. This change was prompted by the United States Supreme Court's holding in *Santosky v. Kramer*, mandating an increased standard of proof. It is unclear what the practical effect of this change will be. Appellate courts cannot apply anew the standard of clear and convincing proof, but must affirm the trial court unless it is clearly in error. The trial court's judgment is upheld where there is substantial evidence to support its determination. There is no agreement on how much evidence would be considered substantial. Thus, termination cases may continue to be decided by a standard close to preponderance. Given the possible lack of any real practical effect of a change in the quantum of proof, the only reason for requiring such a change seems to be to demonstrate society's adherence to parental rights, even at the cost of ignoring the needs of children.

In Arizona, the ill-effects on children will be exacerbated by the continuance of the preponderance standard for dependency hearings. The variance in the standards could mean that children will be readily removed from the home but will not be available for adoption because the state will be reluctant to bring termination petitions without a large amount of evidence. In cases where the state has to prove abandonment in order to sever the parental rights, there is already a great burden on the state. The additional proof required by *Santosky* may well extinguish the hope of many foster children of ever having a permanent home.

Sharmila Mahajan

140. *See* ABUSE AND NEGLECT, *supra* note 75, at Standard 6.4(c).

141. *Cf.* Mnookin, *Foster Care, In Whose Best Interest?*, 43 HARV. EDUC. REV. 599 (1973). Mnookin suggests the following standard governing intervention by the state: A state may remove a child from parental custody without parental consent only if the state first proves: 1) there is an immediate and substantial danger to the child's health; and 2) there are no reasonable means by which the state can protect the child's health without removing the child from parental custody. *Id.* at 631.

VI. TORTS

A. THE APPORTIONMENT OF PUNITIVE DAMAGES AMONG JOINT TORTFEASORS

When assessing compensatory damages among multiple defendants, the common law rule of joint and several judgment liability, whereby the plaintiff may sue one or more of the parties separately or all of them together,[1] is almost universally accepted.[2] However, when assessing punitive damages[3] most courts have departed from the compensation-based emphasis of joint and several liability to the more punishment-oriented approach of apportionment.[4] Apportionment, which provides for the awarding of punitive damages in different amounts among codefendants or against one defendant but not others,[5] most effectively punishes and deters the wrongdoer by enabling the trier of fact to conform the penalty to the offense and the offender.[6]

In *Rubi v. Transamerica Title & Insurance Co.*,[7] an Arizona court for the first time was confronted with the issue of whether punitive damages may be apportioned.[8] The court of appeals concluded that the trier of fact is allowed to determine which defendants, if any, should be required to pay punitive damages.[9] Following the majority of states which have endorsed the apportionment of punitive damages,[10] the court affirmed the

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1. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 291 (1971).

2. Virtually every state follows the common law rule of joint and several liability when assessing compensatory damages. *Id.* at 291-92. However, when a jury violates the common law rule by returning a verdict for compensatory damages in separate amounts, most courts are reluctant to nullify the verdict. *See, e.g.*, Siebrand v. Gosnell, 234 F.2d 81, 93-94 (9th Cir. 1956) (Arizona law); Hooks v. Vet, 192 F. 314, 315 (5th Cir. 1911); Browder v. Cook, 59 F. Supp. 675, 678 (D.C. Idaho 1945). The defendant is usually not allowed to complain because he is often subjected to a smaller judgment than would have been imposed on him if a joint verdict had been returned. PROSSER, *supra* note 1, at 299.

3. The term punitive damages is synonymous with exemplary damages, vindictive damages, and smart money. Gila Water Co. v. Gila Land & Cattle Co., 30 Ariz. 569, 577, 249 P. 751, 753 (1926).

4. *See* cases cited *supra* note 10. Of the twenty-one states that have considered the apportionment of punitive damages, five have elected to continue with the joint and several approach. *See, e.g.*, Chupp v. Henderson, 134 Ga. App. 808, 216 S.E.2d 366 (1975) (the court gave no explanation for denying apportionment except to say that joint and several liability was the established principle); Pardridge v. Brady, 7 Ill. App. 639 (1881); Reby v. Whalen, 119 Pa. Super. 476, 179 A. 879 (1935); Young v. Aylesworth, 35 R.I. 259, 86 A. 555 (1913); Parker v. Roberts, 99 Vt. 219, 131 A. 21 (1925). With the exception of the recent Georgia case, Chupp v. Henderson, all of the above-mentioned cases are dated.

5. *See* Huckeby v. Spangler, 563 S.W.2d 555, 559-60 (Tenn. 1978).

6. Thomson v. Catalina, 205 Cal. 402, 406-08, 271 P. 198, 200 (1928).

7. 131 Ariz. 403, 641 P.2d 891 (Ct. App. 1981).

8. *Id.* at 405, 641 P.2d at 893.

9. *Id.*

10. Sixteen states have approved the apportionment of punitive damages. *See, e.g.*, Bindrim

lower court's decision to award punitive damages exclusively against one of two defendants.[11]

In light of the decision in *Rubi*, this Casenote will examine the rationale and impact of the court's departure from the traditional principles of joint and several liability. First, the nature and purposes of punitive damages as defined in Arizona's common law will be discussed. Second, the reasoning of the *Rubi* decision, which was based on the court's understanding of the purposes of punitive damages, will be analyzed. Lastly, the relative advantages and disadvantages of the opposing theories of joint and several liability and apportionment will be contrasted.

Nature of Punitive Damages

Punitive damages, according to Arizona's statutory and case law, are awarded to punish the offender and to deter others from similar misconduct.[12] Punitive damages are not awarded to compensate for a loss[13] but are designed to punish and deter "aggravated, wanton, reckless, or maliciously intentional wrongdoing."[14] Although an early Arizona case announced that punitive damages may also serve a compensatory function when actual damages seem inadequate to satisfy the wrong committed,[15] numerous subsequent Arizona cases have rejected this assertion.[16] While most states define punitive damages as Arizona does,[17] a small number of states refuse to recognize punitive damages in any situation[18] or recognize them only when expressly provided for by statute.[19]

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v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (1979); Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc., 88 N.M. 472, 542 P.2d 52 (Ct. App. 1975); Fredeen v. Stride, 269 Or. 369, 525 P.2d 166 (1974) (overruling prior Oregon cases).

11. 131 Ariz. at 404, 641 P.2d at 892.

12. *See* Hubbard v. Superior Court, 111 Ariz. 585, 586, 535 P.2d 1302, 1303 (1975); Fousel v. Ted Walker Mobile Homes, Inc., 124 Ariz. 126, 130, 602 P.2d 507, 511 (Ct. App. 1979). See also ARIZ. REV. STAT. ANN. § 12-653.01 (1982) (libel and slander correction law), which defines exemplary damages as "damages which may, in the discretion of the court or jury, be recovered in addition to general and special damages for the sake of example and by way of punishing a defendant who has made the publication or broadcast with actual malice."

13. *See, e.g.*, Nielson v. Flashberg, 101 Ariz. 335, 341, 419 P.2d 514, 520 (1966); Downs v. Sulphur Springs Valley Elec. Coop., Inc., 80 Ariz. 286, 293, 297 P.2d 339, 343 (1956); Ross v. Clark, 35 Ariz. 60, 68, 274 P. 639, 642 (1929). *See also* RESTATEMENT (SECOND) OF TORTS § 908 comment a (1977).

14. Acheson v. Shafter, 107 Ariz. 576, 578, 490 P.2d 832, 834 (1971). In view of the similarity of meaning among these terms, almost any term that describes misconduct coupled with a bad state of mind will describe the case for a punitive award. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 205 (1973).

15. Gila Water Co. v. Gila Land & Cattle Co., 30 Ariz. 569, 577, 249 P. 751, 753 (1926).

16. *See* cases cited *supra* note 13. It has also been suggested that punitive damages may serve a compensatory function in the limited sense that they may provide damages for the wounded feelings of the plaintiff or reward him as a kind of "private attorney general" for his public service in bringing a wrongdoer to account. D. DOBBS, *supra* note 14, at 205; *see also* Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 809-12, 174 Cal. Rptr. 348, 382-83 (1981).

17. *See, e.g.*, Wyatt v. Union Mortgage Co., 24 Cal. 3d 773, 790, 598 P.2d 45, 55, 157 Cal. Rptr. 392, 402 (1979). Northern Nev. Mobile Home Brokers v. Penrod, 96 Nev. 394, 398, 610 P.2d 724, 727 (1980); State *ex rel.* Young v. Crookham, 290 Or. 61, 63, 618 P.2d 1268, 1270 (1980).

18. *See* Abel v. Conover, 170 Neb. 926, 929, 104 N.W.2d 684, 688 (1960).

19. *See, e.g.*, Post v. Rodrigue, 205 So. 2d 67, 70 (La. Ct. App. 1967); City of Lowell v. Massachusetts Bonding & Ins. Co., 313 Mass. 257, 269, 47 N.E.2d 265, 272 (1943); Steele v. Johnson, 76 Wash. 2d 750, 751, 458 P.2d 889, 890 (1969).

Realizing that punitive damages are not to compensate for a loss but are essentially penal in nature, the state alone is considered the true party plaintiff.[20] This is so despite the fact that the named plaintiff rather than the state receives the actual payment of punitive damages.[21] A party does not have a legal right to punitive damages unless they are mandated by constitutional or statutory authority.[22] In most cases, punitive damages come to the plaintiff as an incidental windfall,[23] and he may not bring an independent action to collect them.[24]

The noncompensatory, penal nature of punitive damages also implies that such damages may be awarded as a matter of discretion by the trier of fact.[25] After considering the culpability and perhaps the wealth of the defendants, almost "unlimited individualization" may be exercised in assessing the amount of punitive damages.[26] Recognizing this discretionary power, appellate courts will rarely disturb an award of punitive damages unless the award is wholly unreasonable under the circumstances of the case.[27] In the event that punitive damages are awarded against one of two defendants when *both are equally culpable* for the same tort, appellate courts are divided as to whether this is an abuse of discretion.[28] It appears from the *Rubi v. Transamerica Title & Insurance Co.*[29] decision, that such an award is permissible in Arizona.

The Doctrine of Rubi v. Transamerica Title & Insurance Co.

Rubi v. Transamerica Title & Insurance Co. involved an action for

20. *See* Note, *Apportionment of Punitive Damages*, 38 VIR. L. REV. 71, 73 (1952). In this respect, a suit for punitive damages resembles a criminal charge, where though the prosecuting witness set the judicial machine in motion, the state is the true party plaintiff. *Id.*

21. *Id.*

22. *Rubi*, 131 Ariz. at 405, 641 F.2d at 893. *Accord* Downs v. Sulphur Springs, 80 Ariz. 286, 294, 297 P.2d 339, 343 (1956) (plaintiff not illegally prejudiced when a jury is instructed that no punitive damages can be recovered because the plaintiff is not entitled as a matter of right to the damages).

23. Davidson v. Dixon, 386 F. Supp. 482, 490 (1974).

24. Generally, actual damages must be established as a predicate for the recovery of punitive damages. Hubbard v. Superior Court, 111 Ariz. 585, 586, 535 P.2d 1302, 1303 (1975); Jacob v. Miner, 67 Ariz. 109, 121, 191 P.2d 734, 742 (1948). However, in Arizona, a court sitting in equity may award punitive damages without the requirement of actual monetary damages. Starkovich v. Noye, 111 Ariz. 347, 351, 529 P.2d 698, 702 (1974) (allowing punitive damages where reformation of contract, adding 40% interest, was ordered). *See generally* Casenote, *Punitive Damages Awarded in Equity Without Compensatory* Damages, 17 ARIZ. L. REV. 873 (1975). *Contra* Scalise v. National Util. Serv., Inc., 120 F.2d 938, 941 (5th Cir. 1941) (in Florida and in the federal courts, an independent action for punitive damages may be brought).

25. *See, e.g.*, Ahmed v. Collins, 23 Ariz. App. 55, 58, 530 P.2d 900, 904 (1975) (court has discretion to award $15,000 punitive damages to buyer of bed against seller in a fraud action where actual damages were $694).

26. Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1189 (1931); see Ahmed v. Collins, 23 Ariz. App. 55, 58, 530 P.2d 900, 904 (1975).

27. *See, e.g.*, Nielson v. Flashberg, 101 Ariz. 335, 341, 419 P.2d 514, 520 (1966) ($5,000 punitive damages awarded against public weighmaster for issuance of false certificates was not so unreasonable nor so disproportionate to compensatory damages award of $600 as to warrant a new trial).

28. *See, e.g.*, Bindrim v. Mitchell, 92 Cal. App. 3d 61, 82, 155 Cal. Rptr. 29, 40-41 (1979). *Cf.* Fordyce v. Montgomery, 424 S.W.2d 746, 751 (Mo. 1968) (it is reversible error to permit assessment of punitive damages against one of two joint defendants when one acted with malice, but the other "beyond difference of reasonable minds" did not).

29. *See infra* notes 47-50 and accompanying text.

fraud against two defendants for the intentional misrepresentation of the price of a parcel of property.[30] In *Rubi*, the appellants entered into a joint-venture agreement with appellee, Valencia, to purchase and resell selected parcels of real estate.[31] Valencia, a licensed real estate salesman, agreed to find the properties, while the appellants, who were attorneys, agreed to furnish any necessary legal work.[32] The property was to be acquired on an equal basis with each party paying one-third of the costs of the investment.[33]

Pursuant to this agreement, Valencia located certain properties which were then purchased.[34] However, on three occasions Valencia misrepresented to the appellants the actual purchase price from the owner.[35] For example, one parcel was actually purchased from its owner for $13,500, but appellants were told the sale price was $15,500.[36] By inflating the actual price, Valencia was able to reduce his share of the payment by $2,000.[37]

The second appellee, Transamerica Title, was the closing escrow agent for the three transactions at issue.[38] For each transaction, the same employee handled the closing, preparing all necessary documents.[39] The trial court found that the employee had prepared the documents with knowledge of the inflated figures.[40] Additionally, the employee had actual knowledge that Valencia was defrauding the appellants.[41] Nevertheless, her conduct was found not to be "intentionally wrongful."[42]

Compensatory damages were awarded against the defendants jointly and severally in the amount of Valencia's fraudulent gain.[43] Attorney's fees were also awarded jointly and severally against both defendants.[44] Punitive damages, however, were awarded exclusively against Valencia.[45] On appeal, the appellants raised but one issue: Did the trier of fact have discretion to award punitive damages against one but not the other defendant when both were found liable for fraud?[46]

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30. 131 Ariz. 403, 404, 641 P.2d 891, 892 (Ct. App. 1981).
31. *Id.*
32. *Id.*
33. *Id.* None of the parties was to receive any consideration or benefit beyond his one-third share of any profits. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* The closing documents furnished to the appellants used this greater price, showing each party paying one-third, or $5,166.67. *Id.*
37. *Id.*
38. *Id.* at 405, 641 P.2d at 893.
39. *Id.* At each closing, the employee prepared one set of papers, of no interest to the appellants, showing the actual purchase price and prepared a second set showing the inflated figures. *Id.*
40. *Id.* The court found that the employee was not only an escrow officer but she was also a managing agent; the company was therefore liable under the theory of respondeat superior. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 404, 641 P.2d at 892. No party on appeal questioned the compensatory liability or attorney's fees. *Id.* at 405, 641 P.2d at 893.
45. *Id.* at 404, 641 P.2d at 892.
46. *Id.* The appellee, Valencia, also filed a cross-appeal which presented two other issues: 1) "Did the trial court commit error in failing to dismiss the complaint because [the appellants and

The court of appeals affirmed the trial court's decision, holding that a trier of fact does have the right to select which defendants, if any, should be compelled to pay punitive damages.[47] The court concluded that assessing punitive damages exclusively against Valencia was logical in this case since he was the originator of the scheme and the only one to directly benefit from the deceit.[48] The conduct of the Transamerica employee, on the other hand, was found not to be "intentionally wrongful."[49] Nevertheless, even if the employee's conduct was intentionally wrongful, the court of appeals did not find it necessary to decide this question because no party has a "legal right" to punitive damages unless required by the Arizona constitution or by statute.[50]

In reaching this decision, the court relied heavily on *Ahmed v. Collins*.[51] In *Ahmed*, the Arizona Court of Appeals stated that punitive damages are not to compensate for a loss but are to punish misconduct, and must therefore be awarded as a matter of discretion by the trier of fact.[52] In view of the penal and discretionary nature of punitive damages, the court in *Rubi* would not substitute its judgment for that of the trial court.[53] Furthermore, the court could find no Arizona authority suggesting that it could reverse a case for failure to award punitive damages against all of the tortfeasors.[54]

Of course, the broad issue of *Rubi* was whether to apportion punitive damages or to follow the traditional approach of joint and several liability.[55] While the court of appeals recognized that this issue had never been considered by an Arizona court and that there is a division of authority among jurisdictions on the matter,[56] the court did not attempt to analyze or distinguish the separate methodologies. Neither did the court attempt to review similar cases in other jurisdictions or to assess the potential impacts of its decision. Therefore, this Casenote will continue where the court left off by examining and distinguishing the underlying policies and impacts of apportionment as compared to joint and several liability.

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appellee] were joint venturers and an accounting was necessary before the action could proceed"; and 2) "Was the amount of punitive damages award excessive." *Id.* The court held that an accounting is not first required where the action is for damages from fraud committed in connection with a joint venture, and that the punitive award was not clearly erroneous or the product of prejudice, bias, or improper influence. *Id.* at 406, 641 P.2d at 894.

47. *Id.* at 404-05, 641 P.2d at 892-93. Presumably, this decision would also extend to the awarding of punitive damages in unequal amounts among multiple tortfeasors. *See, e.g.*, Thomson v. Catalina, 205 Cal. 402, 406-08, 271 P. 198, 200 (1928).

48. 131 Ariz. at 405, 641 P.2d at 893.

49. *Id.*

50. *Id.*

51. *See id.*; Ahmed v. Collins, 23 Ariz. App. 54, 530 P.2d 900 (1975).

52. 23 Ariz. App. at 58, 530 P.2d at 904.

53. 131 Ariz. at 405, 641 P.2d at 893.

54. *Id.*

55. *See id.*

56. *Id.*

Joint and Several Liability

Since the early English case of *Merryweather v. Nixan*,[57] the plaintiff's right to damages, both punitive and compensatory, have been safeguarded under joint and several liability.[58] Under this approach, a judgment rendered jointly against two or more defendants may be satisfied in part from each of the defendants or wholly from one.[59] Thus, in the event that one or more of the codefendants are insolvent or uninsured[60] or that the results of the defendants' acts are indivisible,[61] the plaintiff may arbitrarily satisfy the entire judgment from any one or more tortfeasors. Unfortunately, however, the liability of a codefendant may be unjustly shifted to another who would not have been liable, or who would have been liable for a lesser amount, if sued separately.[62] Thus, the theory of joint and several liability preserves the plaintiff's right to collect the full amount of punitive damages, but it does so at the expense of the defendants' rights to fair punishment.

The basis for the preferential treatment of the plaintiff under joint and several liability stems from a traditional unwillingness of the courts to entertain and adjust the claims of convicted intentional tortfeasors.[63] This indifference to the plight of the wrongdoer is embraced in the classic maxim of common law that "no action arises out of a wrong"[64] and of equity that "he who comes into equity must come with clean hands."[65] The courts also presumed that the potential wrongdoer would be forewarned and deterred by the prospect that the entire consequences of his actions may fall on his shoulders.[66] Thus, rather than providing equitable

57. 101 Eng. Rep. 1337 (K.B. 1799). *See generally* Reath, *Contribution between Persons Jointly Charges for Negligence—Merryweather v. Nixan*, 12 HARV. L. REV. 176, 178 (1898).

58. *See supra* note 2 and accompanying text.

59. *See* W. PROSSER, *supra* note 1, at 296-97. If several defendants are sued jointly, exemplary damages are not recoverable against any of them unless all are liable therefore. Chupp v. Henderson, 134 Ga. App. 808, 812, 216 S.E.2d 366, 368-69 (1975). This role could lead to a multiplicity of suits, since a plaintiff might file several suits against different parties rather than risk loss of punitive damages entirely if he should not prevail against all defendants to a single action. Huckeby v. Spangler, 563 S.W.2d 555, 558 (Tenn. 1978).

60. *See* Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 S. CAL. L. REV. 728, 731-32 (1968). A plaintiff may also be motivated to sue a particular defendant to satisfy judgment because of a personal dislike or a feeling that the party was morally at fault. *Id.*; *see also* Dow v. Sunset Tel. & Tel. Co., 162 Cal. 136, 139, 106 P. 587, 588 (1910) (plaintiff chose to sue his employer rather than an equally negligent codefendant joined in the action.)

61. Dauenhauer v. Sullivan, 215 Cal. App. 2d 231, 236, 30 Cal. Rptr. 71, 74 (1963) (the law is loath to permit an innocent plaintiff to suffer as against a wrongdoing defendant because the result of the defendant's acts is indivisible).

62. *See infra* notes 82-83 and accompanying text.

63. *See generally* Morris, *supra* note 26, at 1192-93; Comment, *supra* note 60; at 730.

64. *See* MCCLINTOCK, HANDBOOK ON THE PRINCIPLES OF EQUITY 59 (2d ed. 1948); *see also* Sherman Concrete Pipe Mach., Inc. v. Gadsden Concrete & Metal Pipe Co., 335 So. 2d 125, 127 (Ala. 1976).

65. *See* 2 J. POMEROY, EQUITY JURISPRUDENCE 397-404 (5th ed. 1941); *see also* Lynn v. Duchell, 46 Cal. 2d 845, 850, 299 P.2d 236, 239 (1956) In an action to enjoin a city from closing an alley, the *Lynn* court stated "whenever a party who, as actor, seeks to set judicial machinery in motion and obtain some remedy, has violated conscience, good faith or other equitable principle in his prior conduct, then the doors of the court will be shut against him. . . ." *Id.* at 850, 299 P.2d at 237.

66. LeFlar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 133

assistance to the wrongdoer, the courts simply let the loss remain where the victim imposed it.

However, as courts have redefined the nature of punitive damages, the underlying maxims and theories supporting joint and several liability have been substantially eroded.[67] Most courts no longer give deference to a plaintiff's claim of a "right" to punitive damages.[68] Furthermore, allowing a defendant to be benefitted or enriched from a joint and several judgment, where payment of his share of damages is unjustly compelled from a codefendant, is contrary in theory to the equitable doctrine of unjust enrichment.[69]

To prevent a guilty party from escaping all, or at least his fair share of liability, many courts permit contribution and indemnity[70] among tortfeasors.[71] In most cases, however, contribution and indemnity provide little direct aid in resolving the deficiencies of a joint and several judgment. While it may seem that the ultimate result of judgment for contribution or indemnity would be the same as if damages had been apportioned or issued separately,[72] this reasoning fails in three crucial areas. First, and most importantly, contribution is not uniformly accepted. In Arizona,[73] along with ten other states,[74] the "no-contribution" rule is still followed. Second, contribution is not uniformly practiced. Of the thirty-nine states that have adopted contribution by statute[75] or judicial decision,[76] most

(1932). The rejoinder to this argument is that the tortfeasor may instead feel that he has a good chance of escaping all liability, especially if he is insolvent or uninsured. *Id.* at 133-34.

67. For example, courts today frequently assist various types of intentional tortfeasors. *See* Wantulok v. Wantulok, 223 P.2d 1030, 1032-34 (Wyo. 1950) (fraudulent grantor allowed to recover property conveyed to the grantee in fraud of creditors). *Contra* Sisson v. Janssen, 244 Iowa 123, 130, 56 N.W.2d 30, 34 (1952) (court ruled that a contract of sale would not be rescinded because the plaintiff did not come into court with clean hands).

68. *See supra* note 22 and accompanying text. While the plaintiff has a right to petition for punitive damages, he does not have a recognized right to collect such damages. *Rubi*, 131 Ariz. at 405, 641 P.2d at 893.

69. The defendant would be unjustly enriched were he not compelled to share in a burden which should have been borne by him as well as by a codefendant. W. KEENER, QUASI CONTRACTS 406 (1888); *see also* Note, *supra* note 20, at 74. *Cf.* Comment, *Denying Contribution Between Tortfeasors in Arizona: A Call for Change*, 1977 ARIZ. ST. L.J. 673, 676 (unjust enrichment applied to indemnity).

70. Contribution permits a tortfeasor to recover the damages he is forced to pay in excess of his pro rata or comparative share from the other legally responsible tortfeasors. Indemnity, on the other hand, may "shift the whole loss from one tortfeasor, who has been compelled to pay it, to the shoulders of another who should bear it instead." Pinal County v. Adams, 13 Ariz. App. 571, 572, 479 P.2d 718, 719 (1971). In Arizona, tortfeasors must be totally without fault to be indemnified. Transcon Lines v. Barnes, 17 Ariz. App. 428, 431, 498 P.2d 502, 505 (1972).

71. *See infra* notes 75, 76 and accompanying text.

72. *See* Comment, *supra* note 69, at 675, n.15.

73. *See* Blakely Oil v. Crowder, 80 Ariz. 72, 75, 292 P.2d 842, 843 (1956); *see also* Salt River Valley Water Users' Ass'n v. Giglio, 113 Ariz. 190, 205, 549 P.2d 162, 177 (1976) (defendant not allowed to sue a third party defendant who was previously liable to the plaintiff in the original cause of action).

74. *See, e.g.*, Howard v. Spafford, 132 Vt. 434, 321 A.2d 74 (1974); National Trailer Convoy, Inc. v. Oklahoma Turnpike Auth., 434 P.2d 238 (Okla. 1967); Panasuk v. Seaton, 277 F. Supp. 979 (D. Mont. 1968) (applying Montana law).

75. Twenty of the 39 states that permit contribution have adopted *The Uniform Contribution Among Tortfeasors Act*, providing contribution rights for a tortfeasor who has paid more than his pro rata share, so long as he has not intentionally caused or contributed to injury or death. *See generally* CONTRIBUTION AMONG TORTFEASORS ACT, §§ 1, 57, 59-60, 63-64, (1975).

76. *See, e.g.*, Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23 (1956); Hobbs v. Hurley, 117 Me.

have specifically excluded tortfeasors who intentionally cause or contribute to another's injury or death.[77] Third, contribution rights are enforceable only if the codefendants are solvent.[78] While apportionment would force a plaintiff to execute against each tortfeasor individually to receive full satisfaction,[79] contribution shifts the burden of adjusting inequitable claims to the defendant tortfeasor after he has paid more than his share.[80]

A Comparison of Apportionment and Joint and Several Liability

Contrary to the compensation-based emphasis of joint and several liability, apportionment is the product of modern theory recognizing punishment and deterrence as the primary function of punitive damages.[81] Apportionment splits up damages in proportion to the separate culpability and wealth of each codefendant, and, as a result, penalties conform more closely to the offense and the offender.[82] This concept is well-illustrated in a leading proapportionment case, *Thomson v. Catalina*,[83] where the jury recognized three levels of culpability and awarded punitive damages accordingly.

However, in states practicing joint and several liability, it is impossible to make the punishment fit the offense and the offender when culpability and wealth are disproportionate. In such states, the amount of the joint punitive damages award must be based on one of three alternatives:[84] (1) the sum of all of the punitive damages of each defendant,[85] (2) the largest punitive damages assessment against any one defendant,[86] or (3) the smallest of all assessments.[87]

If the plaintiff elects to enforce his judgment against the least culpable or most indigent defendant, the penalty will be excessive if the sum of all

449, 104 A. 815 (1918); Royal Indem. Co. v. Aetna Casualty & Sur. Co., 193 Neb. 752, 229 N.W.2d 183 (1975); Ellis v. Chicago & N.W. Ry., 167 Wis. 392, 167 N.W. 1048 (1918).

77. *E.g.*, NEV. REV. STAT. § 17.255 (1973): "There is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death." *See also* W. PROSSER, *supra* note 1, at 307; *supra* note 69.

78. It is doubtful that one would expend the effort to press a claim against an uninsured party who is too poor to satisfy the judgment. Comment, *supra* note 69, at 688.

79. *See* Cox v. Cooper, 510 S.W.2d 530, 536-37 (Ky. 1974) (liabilities become fixed and finally settled among joint tortfeasors after the apportionment).

80. Comment, *supra* note 64, at 675 n.15.

81. *See supra* notes 11-27 and accompanying text.

82. It has been held that if the evidence indicates that one joint defendant acted with malice, but that the other "beyond difference of reasonable minds" did not, it is reversible error to permit assessment of punitive damages against the latter defendant. Fordyce v. Montgomery, 424 S.W.2d 746, 751 (Mo. 1968).

83. 205 Cal. 402, 406, 271 P. 198, 200 (1928). In this suit for malicious prosecution, the jury awarded punitive damages of $1,000 against the judge who instigated the prosecution, $500 against the city marshall who actively promoted the prosecution and sought to have the plaintiff returned and tried before his co-conspirator, and $300 against a third defendant who was merely the tool of his codefendants. *Id.* at 403, 271 P. at 199.

84. Note, *supra* note 20, at 76.

85. No case has been found where the sum of all punitive damages has been used.

86. *See* Interstate Co. v. Garnett, 154 Miss. 325, 342, 122 So. 373, 382 (1929) (court assessed damages against a corporation according to the amount which the most culpable defendant, an employee, ought to pay).

87. *See, e.g.*, Moore v. Duke, 84 Vt. 401, 408, 80 A. 194, 197 (1911).

punitive damages or the largest of all assessments methods are chosen.[88] In such a case, the indigent or less guilty defendant would be required to pay the amount that the most culpable or wealthy should pay.[89] To avoid excessive penalties, some jurisdictions have limited punitive awards to the smallest amount assessed against any one defendant.[90] Of course, the problem then emerges in reverse; the judgment may be too small for the most culpable or wealthy defendant. Plagued with these irreconcilable problems, jurisdictions have turned to apportionment[91] or have refused to award punitive damages altogether when two or more parties are made defendants.[92]

Another difficult issue in joint liability states is whether inquiries may be conducted into the financial condition of codefendants. This issue has received considerable attention by the courts. A long line of older cases, starting with *Washington Gas Light Co. v. Lansden*,[93] hold that the admission of information respecting financial condition may be prejudicial, forcing indigent parties to respond in the same amount as the wealthiest of codefendants.[94] Therefore, in joint liability states, where one of a plurality of defendants may be compelled to pay the entire judgment, evidence of a defendant's financial condition is usually inadmissible.[95] However, in apportionment states, evidence of wealth is admissible because the danger of prejudice is eliminated by the issuance of separate verdicts.[96] In this regard, apportionment is demonstrably more accurate and equitable than joint and several liability.

Apportionment too, however, is subject to certain inequities. The dual function of compensatory damages[97] may distort the apportionment of punitive damages.[98] Compensatory damages, which are awarded jointly and severally,[99] may serve a dual purpose as both compensation and punishment.[100] If they are awarded as punishment, the trier of fact

88. *See* Note, *supra* note 20, at 76.

89. Even the most culpable defendant's punishment would be extreme if the sum of all damages theory were selected.

90. *See, e.g.*, Moore v. Duke, 84 Vt. 401, 408, 80 A. 194, 197 (1911).

91. *See supra* note 10.

92. *See, e.g.*, Dunaway v. Troutt, 232 Ark. 615, 339 S.W.2d 613 (1960). The court sought to avoid the inequities of a joint and several judgment by prohibiting punitive damages in cases involving several defendants. *Id.* at 625-26, 339 S.W.2d at 620. Dissatisfaction with this blanket prohibition resulted in a later holding in favor of the apportionment of punitive damages. *See* Life & Casualty Ins. Co. v. Padgett, 241 Ark. 353, 356-57, 407 S.W.2d 728, 730 (1966) (*overruling* Dunaway v. Troutt).

93. 172 U.S. 534 (1899).

94. *Id.* at 52. *Accord* Dawes v. Starrett, 336 Mo. 897, 930, 82 S.W.2d 43, 60 (1935); Walker v. Kellar, 218 S.W. 792, 797 (Tex. Civ. App. 1926); McAllister v. Kimberly-Clark Co., 169 Wis. 473, 475, 173 N.W. 216, 217 (1919).

95. *See* cases cited *supra* note 94.

96. *See, e.g.*, Lehman v. Spencer Ladd's, Inc., 182 So. 2d 402, 403 (Fla. 1965). *Cf.* Michael v. Cole, 122 Ariz. 450, 452, 595 P.2d 995, 997 (1979). *But see* McCauley v. Ray, 80 N.M. 171, 182, 453 P.2d 192, 203 (1968).

97. The dual function of compensatory damages is analogous to the minority view recognizing a compensatory function in punitive damages. *See supra* note 16 and accompanying text.

98. Morris, *supra* note 26, at 1193.

99. *See supra* note 2 and accompanying text.

100. Morris, *supra* note 26, at 1173-74, 1193-94. In such a case, punitive damages may only serve to increase the penalty. *Id.*

may elect to award a lesser amount of punitive damages or forego all punitive damages.[101] The problem arises when compensatory damages are collected exclusively from one codefendant. In this situation, the punitive damages award, which was based on an equal distribution of compensatory damages, is suddenly misapportioned by the unexpected shifting of compensatory liability among codefendants.[102] However, this problem, which could be substantially resolved by other precautions,[103] is not as serious as the unrestrained shifting of loss possible with joint and several liability.[104]

Conclusion

The decision in *Rubi v. Transamerica Title & Insurance Co.*, approving the allocation of punitive damages against one of two joint tortfeasors, properly restricts the application of joint and several liability to compensatory awards and apportionment to punitive awards. This decision is consistent with the divergent interests and policies served by compensatory and punitive damages.

Clearly, the rigid principles of joint and several liability were formulated with the interests of the uncompensated victim in mind. By permitting the victim to shift liability among multiple tortfeasors, the joint and several theory provides maximum leverage to the plaintiff in executing a judgment. Hence, it has been almost universally applied in the assessment of compensatory damages.

However, the joint and several methodology is in conflict with the purposes of punitive damages. Punitive damages are awarded to deter and punish the wrongdoer and are effective only so long as the penalty conforms to the offense and the offender. A blanket assessment of damages against parties who do not deserve the penalty or who deserve a lesser penalty, while the truly culpable go unpunished, is no longer justifiable on the basis of maxims and obsolete notions such as the "clean hands" doctrine and enforcement of the plaintiff's right to punitive damages. Arguably, contribution could help spread the loss, but contribution is unavailable in eleven states and limited by the nature of the tort and the solvency of the codefendants in most others.

On the other hand, but for the problem of the dual nature of compensatory damages, apportionment sidesteps the entanglements which plague the joint and several assessment of punitive damages. Apportionment, which provides for the formulation of awards consistent with the separate culpability and wealth of each defendant, follows most closely the recognized punishment-oriented objectives of punitive damages. Apportionment is also consistent with the widely accepted doctrine of unjust enrichment which provides for equitable loss distribution. Therefore, the

101. *Id.*
102. *Id.*
103. Note, *supra* note 20, at 78 (a plausible solution would be to make the collection of punitive damages by the plaintiff contingent on the defendant's paying no more than his pro rata share of compensatory damages).
104. *See supra* notes 59-62 and accompanying text.

decision in *Rubi*, permitting the exclusion of less culpable tortfeasors from punitive awards, appears to be eminently sound and in line with the policies served by punitive damages.

Tom Christensen

B. *FERNANDEZ V. ROMO*: HAS INTERSPOUSAL TORT IMMUNITY BEEN ABOLISHED IN ARIZONA?

Interspousal tort immunity is a doctrine which bars tort suits between spouses.[1] The doctrine has been the subject of sharp criticism[2] and is gradually falling into disfavor among American jurisdictions.[3] In *Fernandez v. Romo*,[4] the Arizona Supreme Court reexamined the doctrine of interspousal tort immunity and held that, at least in automobile negligence situations, interspousal tort immunity no longer exists in Arizona.

The objective of this Casenote is to explain *Fernandez v. Romo* and its significance to Arizona tort law. The Casenote will begin by briefly sketching the historical background of the interspousal immunity doctrine. Next, it will outline the basis of the decision in *Fernandez v. Romo*. Finally, the Casenote will discuss the probable impact of the case on other aspects of tort law.

Historical Background

The doctrine of interspousal immunity originated in English common law.[5] According to traditional common law, the legal identity of the wife was merged into the husband's upon marriage.[6] This merger created a marital unity which the common law regarded as a quasi-separate entity.[7] Thus, at common law, it was impossible to maintain an action against one's own spouse, since the complaining party would, conceptually speaking, be suing himself.[8]

American jurisdictions initially followed the common law rule of interspousal tort immunity.[9] In the mid-nineteenth century, however, indi-

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1. Fernandez v. Romo, 132 Ariz. 447, 448, 646 P.2d 878, 879 (1982); Bowslaugh v. Bowslaugh, 126 Ariz. 517, 518, 617 P.2d 25, 26 (1979); W. PROSSER, THE HANDBOOK OF THE LAW OF TORTS § 122, at 860 (4th ed. 1971).

2. Fernandez v. Romo, 132 Ariz. 447, 646 P.2d 878 (1982); Alley v. Dorame, 126 Ariz. 170, 171, 613 P.2d 834, 835 (1980); Maestas v. Overton, 87 N.M. 213, 214, 531 P.2d 947, 950 (1975); Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972); Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970); Klein v. Klein, 58 Cal. 2d 692, 26 Cal. Rptr. 102, 376 P.2d 70 (1962); W. PROSSER, *supra* note 1, § 122, at 862-64; McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303 (1959).

3. Fernandez v. Romo, 132 Ariz. 447, 452, 646 P.2d 878, 883 (1982) ("33 states [have] abrogated or limited the principle"); Note, *Interspousal Tort Immunity*, 14 ARIZ. L. REV. 608, 612 (1972).

4. 132 Ariz. 447, 451, 646 P.2d 878, 882 (1982). *See also infra* notes 66-74 and accompanying text.

5. Fernandez v. Romo, 132 Ariz. 447, 448, 646 P.2d 878, 879 (1982); Guffy *ex rel.* Reeves v. Guffy, 230 Kan. 89, 95, 631 P.2d 646, 652 (1981) (Prager, J., dissenting).

6. Fernandez v. Romo, 132 Ariz. 447, 449, 646 P.2d 878, 880 (1982); W. PROSSER, *supra* note 1, at 859-60.

7. W. PROSSER, *supra* note 1, at 859-60 ("at common law husband and wife were one person, and that person was the husband").

8. The common law unity concept did not extend to non-property related crimes. W. PROSSER, *supra* note 1, at 860.

9. Note, *supra* note 3, at 611. *See, e.g.*, Schwartz v. Schwartz, 7 Ariz. App. 445, 440 P.2d 326 (1968); Romero v. Romero, 58 N.M. 201, 269 P.2d 748 (1954); Schultz v. Christopher, 63 Wash. 496, 118 P. 629 (1911), *overruled*, Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972).

vidual states began passing married women's property acts[10] which substantially eliminated the common law marital unity[11] concept in property and contract law.[12] These acts were generally viewed as having been designed to give married women a separate legal identity[13] along with the rights necessary to the ownership and control of separate property.[14] Freedom to bring interspousal tort suits, however, was generally omitted from the grant of rights embodied in the acts.[15] Although the married women's property acts had the effect of weakening the unity concept in interspousal tort immunity,[16] a number of convincing public policy arguments[17] arose to support the tort immunity. Nevertheless, after a lengthy hiatus,[18] a trend developed toward limiting or totally abrogating the immunity.[19] Today, those jurisdictions which retain absolute interspousal immunity are in the minority.[20]

The Arizona Supreme Court first explicitly recognized interspousal tort immunity in *Schwartz v. Schwartz*.[21] In *Schwartz*, one spouse sought

10. W. PROSSER, *supra* note 1, at 861; Note, *Interspousal Tort Immunity*, 14 ARIZ. L. REV. 608, 611 (1972).

11. *See supra* note 6 and accompanying text.

12. W. PROSSER, *supra* note 1, at 861. Before Arizona became a state, it passed a married women's statute. 1901 ARIZ. REV. STAT., CIV. CODE ¶¶ 3105, 3106. For current version, see ARIZ. REV. STAT. ANN. § 25-214 (1976). Early construction of that statute granted married women full rights over their separate property. Eshom v. Eshom, 18 Ariz. 170, 157 P. 974 (1916) (explicitly granted wife a right of action against husband for conversion of her separate property); Hageman v. Vanderdoes, 15 Ariz. 312, 138 P. 1053 (1914) (allowed interspousal property actions).

13. W. PROSSER, *supra* note 1, at 861. *See* Fernandez v. Romo, 132 Ariz. 447, 449, 696 P.2d 878, 880 (1982).

14. W. PROSSER, *supra* note 1, at 861. In Arizona, see Hageman v. Vanderdoes, 15 Ariz. 312, 322, 138 P. 1053, 1057 (1914).

15. W. PROSSER, *supra* note 1, at 861-62. A few exceptions to this generality are: the Alaskan Married Woman's Act which was construed to allow interspousal tort suits, Cramer v. Cramer, 379 P.2d 95 (Alaska 1963), and the Connecticut Married Woman's Act which was interpreted to allow a wife to sue her husband for assault and battery, Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914).

16. W. PROSSER, *supra* note 1, at 861-62.

17. These arguments in brief form are: 1) Interspousal tort suits should not be allowed because they will have a detrimental effect on marital harmony, *see* Raisen v. Raisen, 379 S.2d 352, 354 (Fla. 1980); 2) Interspousal tort actions, by their nature, carry a much greater threat of fraud and collusion and therefore should be barred from the courts, *see* Burns v. Burns, 111 Ariz. 178, 181, 526 P.2d 717, 720 (1974); 3) Especially in community property jurisdictions, the tortfeasor spouse would be able to benefit from the injured spouse's damage award, most often obtained from an insurance carrier, *see* Windauer v. O'Connor, 107 Ariz. 267, 268, 485 P.2d 1157, 1158 (1971); 4) Review of the doctrine is best carried out by the legislature because of the complexity of the problem, *see* Huebner v. Deuchle, 109 Ariz. 549, 550, 514 P.2d 470, 471 (1973); and 5) It has also been said, though rarely in more recent times, that allowance of interspousal suits would bring a flood of petty marital suits to the courts, and that such suits are unnecessary since divorce and possible criminal prosecutions are adequate remedies. W. PROSSER, *supra* note 1, at 862. This argument is apparently less effective than the other arguments since it is seldom used. *See* Klein v. Klein, 58 Cal. 2d 692, 26 Cal. Rptr. 102, 376 P.2d 70 (1962).

18. Connecticut first limited the doctrine in 1914, *see* Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914), and Prosser noticed the trend away from the immunity many years later. W. PROSSER, *supra* note 1, at 864.

19. Fernandez v. Romo, 132 Ariz. 447, 450, 646 P.2d 878, 883 (1982). *See* Windauer v. O'Connor, 107 Ariz. 267, 485 P.2d 1157 (1971) (intentional tort exception); Rupert v. Stienne, 90 Nev. 397, 528 P.2d 1013 (1974) (automobile negligence exception). *But see* Guffy *ex rel.* Reeves v. Guffy, 230 Kan. 89, 631 P.2d 646 (1981); Raisen v. Raisen, 379 So.2d 352 (Fla. 1980) (upholding the immunity).

20. Fernandez v. Romo, 132 Ariz. 447, 452, 646 P.2d 878, 883 (1982).

21. 103 Ariz. 562, 563, 447 P.2d 254, 255 (1968). It seems that it was accepted as a matter of

to sue the other for negligently inflicted injuries arising from an Arizona auto accident.[22] Although the parties were New York domiciliaries and the Arizona Supreme Court applied the New York statute[23] which allowed interspousal suits, on conflict of law grounds,[24] the court remarked that Arizona had adhered to the common law interspousal tort immunity rule.[25] Later, in *Windauer v. O'Connor*,[26] the court allowed interspousal suits when intentional torts were alleged, but suit was permitted only after the parties had divorced. In *Windauer* the plaintiff had been intentionally shot by her husband.[27] In an effort to circumvent the probability of the tortfeasor spouse benefitting by his tortious act via community property laws,[28] the court conditioned recovery on divorce.[29] Thus, Arizona began its movement away from total interspousal tort immunity. Nevertheless, the Arizona Supreme Court maintained the doctrine in general[30] until *Fernandez v. Romo*.[31]

Analysis and Implication of Fernandez v. Romo

The controversy in *Fernandez v. Romo*[32] arose when the Ashford family encountered a rushing wash, filled by local thunderstorms, which was blocking their road homeward. Despite his wife's protests, Mr. Ashford attempted to cross the wash.[33] The car was swept downstream and overturned.[34] Mr. and Mrs. Ashford and one of their two children who were accompanying them were drowned.[35] The representative of Mrs. Ashford's estate later brought a wrongful death action[36] against Mr. Ashford's

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course that spouses could not sue each other before the Schwartz case. ARIZ. REV. STAT. ANN. § 1-201 (1974), enacting the common law so far as it is not repugnant to the United States Constitution and the constitution, laws and customs of the people of Arizona, was probably the authority which this view was based upon. *See* Huebner v. Deuchle, 109 Ariz. 549, 514 P.2d 470 (1973).

22. 103 Ariz. 562, 563, 447 P.2d 254, 255 (1968).

23. N.Y. GEN. OBLIG. LAW § 3-313 (Consol. 1978).

24. 103 Ariz. at 565, 447 P.2d at 257.

25. *Id.* at 563, 447 P.2d at 255.

26. 107 Ariz. 267, 268, 485 P.2d 1157, 1158 (1971).

27. *Id.* at 267, 485 P.2d at 1157.

28. *See* Burns v. Burns, 111 Ariz. 178, 181, 526 P.2d 717, 720 (1974).

29. 107 Ariz. at 268, 485 P.2d at 1158.

30. *See* Burns v. Burns, 111 Ariz. 178, 526 P.2d 717 (1974). In *Burns*, the court staunchly affirmed its adherence to the interspousal tort immunity doctrine in negligence cases. The main bases for the court's decision were: 1) that interspousal suit would disrupt marital harmony; 2) that an increased risk of fraud and collusion in such cases warranted the court's continuance of the doctrine; 3) that the tortfeasor would benefit from the spouse's damage award; and 4) that any change in the immunity is best left to the legislature. *Id.* at 180, 526 P.2d at 719. *Fernandez* appears to be a substantial turnabout from the logic of prior authority.

31. See *infra* notes 66-74 and accompanying text for an analysis of the extent to which the doctrine has been changed in Arizona.

32. 132 Ariz. 447, 448, 646 P.2d 878, 879 (1982).

33. *Id.*

34. *Id.*

35. *Id.* One of the Ashford's children escaped from the flooded car unharmed and another was not at the scene of the accident. *Id.* It was for the benefit of these two children that Mrs. Ashford's estate representative brought this wrongful death action. *Id.*

36. ARIZ. REV. STAT. ANN. § 12-611 (1982). This statute's language allows a wrongful death suit only if the decedent could himself have sued the tortfeasor to recover damages had death not ensued. *Id.* Thus, plaintiff in this case was barred from trial because the decedent would have been barred, by the interspousal tort immunity rule, had she survived. 130 Ariz. at 448, 646 P.2d at 879; *see* Huebner v. Deuchle, 109 Ariz. 549, 550, 514 P.2d 470, 471 (1973); Note, *Imputed Con-*

estate for the benefit of the surviving children.[37] The trial court granted the defendant's motion for summary judgment under the interspousal tort immunity rule.[38] The Arizona Supreme Court reversed the trial court and abrogated, at least in part, the interspousal immunity doctrine in Arizona.[39]

The Arizona Supreme Court reached its decision in *Fernandez* by rejecting four key factors generally relied on to support the doctrine of interspousal tort immunity.[40] First, the court dealt with the common law unity foundation of interspousal tort immunity.[41] The unity concept was based on the common law notion that the wife's legal identity, at least in civil matters, merged into the husband's legal identity upon coverture, thereby creating a single legal entity under the husband's name.[42] Under the traditional common law, the marital unity idea precluded interspousal suits because the single marital entity would, conceptually speaking, be suing herself.[43] The court strongly condemned the unity doctrine as "narrow"[44] and "antiquated"[45] and thus unable logically to support interspousal tort immunity in a modern context.[46]

After rejecting the marital unity principle, the court next considered the contention that interspousal tort suits should be barred because of their alleged detrimental effect on marital harmony.[47] The court tacitly admitted that the adversarial nature of an interspousal tort acton, including the possibility of each spouse testifying against the other, may to some extent be damaging to marital harmony.[48] Nevertheless, noting the prevalence of automobile insurance and its insulating effect on marital harmony in interspousal litigation,[49] the court concluded that family harmony will be dam-

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tributory Negligence as a Bar to Wrongful Death Recovery By All Beneficiaries, 17 ARIZ. L. REV. 908 (1975).

37. 132 Ariz. at 448, 646 P.2d at 879.

38. *Id.*; *see also supra* note 36.

39. 132 Ariz. at 452, 646 P.2d at 883; *see infra* notes 40-80 and accompanying text.

40. 132 Ariz. at 447-50, 646 P.2d at 880-83.

41. *Id.* at 447-48, 646 P.2d at 880-81; *see supra* notes 6-8 and accompanying text.

42. W. PROSSER, *supra* note 1, at 859-60.

43. 132 Ariz. at 449-50, 646 P.2d at 880-81; W. PROSSER, *supra* note 1, at 859-60; *see supra* notes 5-8 and accompanying text.

44. 132 Ariz. at 448, 646 P.2d at 881.

45. *Id.* For a succinct, but persuasive, argument supporting the general premise that the unity doctrine is "antiquated," see Freehe v. Freehe, 81 Wash. 2d 183, 185-87, 500 P.2d 771, 773-74 (1972).

46. 132 Ariz. at 451, 646 P.2d at 881. An inference can be raised from the *Fernandez* court's treatment of the common law marital unity concept that the court simply decided that societal values had progressed to a point where the common law unity notion and the affiliated interspousal tort immunity doctrine no longer reflected community attitudes. *See* Brooks v. Robinson, 284 N.E.2d 794, 797 (Ind. 1972); *supra* notes 40-45 and accompanying text; *see also* Freehe v. Freehe, 81 Wash. 2d 183, 186-87, 500 P.2d 771, 774 (1972).

47. 132 Ariz. at 448-49, 646 P.2d at 881-82. This argument, which was rejected in *Fernandez*, was employed in Burns v. Burns, 111 Ariz. 178, 180, 525 P.2d 717, 719 (1974) to uphold the immunity.

48. 132 Ariz. at 448, 646 P.2d at 881.

49. The presence of insurance with its insulating effect on spouses litigating against each other, has been one of the major justifications for creating the automobile negligence exception to the interspousal tort immunity doctrine. *See* Rupert v. Stienne, 90 Nev. 397, 403, 527 P.2d 1013, 1016-17 (1974). The really salient circumstance that makes automobile negligence cases different from other negligence cases is the greater prevalance of insurance in auto accident cases. Immer

aged less by allowing suit than by barring it.[50] Furthermore, the court noted the inconsistent rule that minors are allowed to sue their parents for negligently inflicted automobile injuries with no similar judicially recognized threat to family harmony.[51]

The court next considered the argument that interspousal tort suits are unusually susceptible to fraud and collusion by the spouses and, therefore, ought to be barred.[52] While the court admitted that it found this objection to interspousal suit to be the most persuasive,[53] it evinced faith in the judicial system's ability to ferret out fraudulent claims and thus effectively guard against the greater incidence of fraud expected in interspousal tort suits.[54] In addition, the court noted that the attorneys for the insurance company would detect and expose any evidence of collusive conduct.[55]

Finally, the court turned to the problem that community property laws present to abrogation of interspousal tort immunity.[56] Because Arizona is a community property state,[57] the courts have been concerned with

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v. Risco, 56 N.J. 482, 489-90, 267 A.2d 481, 487 (1970). Of course, the best situation for such an exception is in the case where the particular jurisdiction has a mandatory automobile insurance law. *See* Rupert v. Stienne, 90 Nev. 397, 528 P.2d 1013 (1974). At the time of the *Fernandez* decision, Arizona had no mandatory automobile insurance law actually in effect, though it had passed one which was to take effect in 1983. ARIZ. REV. STAT. ANN. § 28-1142 (Supp. 1982-83); *see also id.* § 28-1170. This prospectively effective statute may have been a factor in the *Fernandez* court's decision.

50. 132 Ariz. at 448, 646 P.2d at 881; *see* Immer v. Risko, 56 N.J. 482, 488, 267 A.2d 481, 484 (1970).

51. 132 Ariz. at 448-49, 646 P.2d at 881-82. In both interspousal suits and suits between minors and their parents, the courts have traditionally been concerned with the alleged detrimental effect litigation may have on the court protected spousal and parent-child relationship. Burns v. Burns, 111 Ariz. 178, 180, 526 P.2d 717, 719 (1974); Purcell v. Frazer, 7 Ariz. App. 5, 8, 435 P.2d 736, 739 (1967) (family harmony). *Cf.* Fernandez v. Romo, 132 Ariz. 447, 450-51, 646 P.2d 878, 881-82 (1982). Thus, it seems logically inconsistent to uphold interspousal tort immunity on marital harmony grounds and overrule parental immunity, because domestic tranquility concerns are "hollow" support for parent-child immunity. Fernandez v. Romo, 132 Ariz. 447, 450-51, 646 P.2d 878, 881-82 (1982); *see* Streenz v. Streenz, 106 Ariz. 86, 88-89, 471 P.2d 282, 284-85 (1970).

52. 132 Ariz. at 449, 646 P.2d at 882.

53. *Id.*

54. *Id.*; *see* Klein v. Klein, 58 Cal. 2d 692, 695, 26 Cal. Reptr. 102, 105, 376 P.2d 70, 73 (1962).

55. The court's reliance on the insurance carrier's lawyer as an added safeguard may be groundless. *See* 132 Ariz. at 449, 646 P.2d at 882. While the insurance company lawyer litigating for a fraudulent party will more likely "be quick to detect . . . evidence of collusive conduct," *id.*, because of the attorney-client privilege, he probably cannot bring such evidence to the court's attention. *See* Parsons v. Continental Nat'l Am. Group, 113 Ariz. 223, 550 P.2d 94 (1976); *see generally* Casenote, *Duties of the Insurance Company—Retained Counsel: To the Insurer and the Insured*, 18 ARIZ. L. REV. 757 (1976); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B) (1981). Although the attorney for the insurer cannot divulge evidence of fraud obtained through client confidences or secrets, he is ethically bound to refrain from assisting his client in illegal or fraudulent conduct. *Id.* DR 7-102(7). Thus, if the attorney cannot dissuade his client from fraud, *see id.* DR 7-102(B)(1), he has an ethical obligation to withdraw from the case without prejudicing his client's position, *id.* DR 2-110(A)(2) and thereafter refrain from divulging any client confidences. *Id.* DR 7-102(A)(4), (5) and (7). Of course as a practical matter such a mysterious withdrawal by counsel in admittedly fraud prone cases such as interspousal tort suits will almost certainly alert the court and the insurer to scrutinize the matter at hand very thoroughly for evidence of fraud.

56. 132 Ariz. at 451, 646 P.2d at 882.

57. ARIZ. REV. STAT. ANN. § 25-211 (1976). Until Jurek v. Jurek, 124 Ariz. 596, 606 P.2d 812 (1980), the entire damage award for personal injuries of either spouse was community property. Heimke v. Munoz, 106 Ariz. 26, 470 P.2d 107 (1970); Tinker v. Hobbs, 80 Ariz. 166, 294 P.2d 659 (1956); Kenyon v. Kenyon, 5 Ariz. App. 267, 425 P.2d 578 (1967).

the possibility of the tortfeasor/spouse benefitting from his negligence by sharing in the proceeds of the judgment against him.[58] This problem was alleviated, however, by the Arizona Supreme Court in the recent case of *Jurek v. Jurek*.[59]

Jurek changed the prior Arizona rule that a damage award for an injury to either spouse was community property.[60] Instead, *Jurek* held that damages for injury to the individual were recoverable as that person's separate property and the community was entitled to reimbursement for community expenses[61] and lost wages. In essence, "the compensation partakes of the same character as that which has been injured or suffered loss."[62] Accordingly, damage elements such as pain and suffering are rendered to the injured spouse as his personal property while lost wages and medical expenses, for example, are awarded to the community.[63] With the tortfeasor spouse relegated to a community property share in the community compensation alone, most of which is to be applied to financial obligations arising from the injury, the once persistent community property problem has been solved.[64]

Because there is conflicting language within the body of the *Fernandez* decision, there may be two plausible interpretations of the case's breadth.[65] One interpretation is that the case abrogates interspousal tort immunity only in automobile negligence situations.[66] The other interpre-

58. Burns v. Burns, 111 Ariz. 178, 180, 526 P.2d 717, 719 (1974); Windauer v. O'Connor, 107 Ariz. 267, 268, 485 P.2d 1157, 1158 (1971); Alley v. Dorame, 126 Ariz. 170, 171, 613 P.2d 834, 835 (Ct. App. 1980).

59. 124 Ariz. 596, 606 P.2d 812 (1980); *see* Fernandez v. Romo, 132 Ariz. 447, 451, 646 P.2d 878, 882 (1982); Alley v. Dorame, 126 Ariz. 170, 171, 613 P.2d 834, 835 (1980).

60. Heimke v. Munoz, 106 Ariz. 26, 470 P.2d 107 (1970) (upholding prior rule); Tinker v. Hobbs, 80 Ariz. 166, 294 P.2d 659 (1956); Pacific Constr. Co. v. Cochran, 29 Ariz. 554, 243 P. 405 (1926). *But see* Jurek v. Jurek, 124 Ariz. 596, 597-98, 606 P.2d 812, 813-14 (1980).

61. 124 Ariz. at 598-99, 606 P.2d at 814-15.

62. *Id.* at 598, 606 P.2d at 814.

63. *Id.* at 598, 606 P.2d at 814. The *Jurek* decision was based on the notion that community property comes from the joint labor and industry of the spouses. *Id.* at 597, 606 P.2d at 813. But the physical person of a spouse is personal property because it is brought into the marriage. *Id.* at 598, 606 P.2d at 814. Since it is apparent that maintenance of the spouses' bodies is essential to the survival of the community, expenses incurred due to the repair and maintenance of the spouses' bodies are a community debt. Thus, where a spouse is injured due to another's negligence, the community losses are such damage items as lost wages and medical expenses while the personal losses are items like pain and suffering and the value of a lost limb to the individual. *See id.* at 598, 606 P.2d at 814. The former damage items subtract from the fruits of the spouses' combined industry, while the latter damage items are losses to the individual alone.

Although the Arizona Supreme Court was not explicit on this point, one possible formula to apply to interspousal tort suits would be to reduce an injured spouse's damage award by the amount awarded for community losses. The entire sum actually recovered would be that spouse's separate property. On the other hand, the *Jurek* rule alone may be a sufficient safeguard against tortfeasor benefit. *See* Fernandez v. Romo, 132 Ariz. 447, 449-50, 646 P.2d 878, 882-83 (1982); Brumbaugh v. Pet, Inc., 129 Ariz. 12, 14, 628 P.2d 49, 51 (1981). For an alternative damage formula, see Freehe v. Freehe, 81 Wash. 2d 183, 192, 500 P.2d 771, 777 (1972).

64. Fernandez v. Romo, 132 Ariz. 447, 451, 646 P.2d 878, 882 (1982). Since the community property portion of the damage award would be expended on the financial obligations incurred due to the physical injury, there would be no windfall of unexpended cash which the tortfeasor could take advantage of. *See* Alley v. Dorame, 126 Ariz. 170, 171, 613 P.2d 834, 835 (1980); Note, *supra* note 3, at 612-18.

65. *See infra* notes 66-74 and accompanying text.

66. Any more narrow interpretation, such as creation of a wrongful death exception to interspousal tort immunity, however, is clearly not supported by the language of the case. In addition,

tation is that the case totally abrogates interspousal tort immunity.[67] In either case there is room for a difference of opinion.[68]

The second paragraph of the opinion sets out in clear language that the court "need answer but one question . . . whether the doctrine of interspousal tort immunity in automobile accident cases should be abolished."[69] Yet, throughout most of the opinion, the court uses broad unqualified language such as, "We believe the time has come to abrogate the doctrine of interspousal tort immunity in Arizona."[70] Unqualified assertions are properly taken to mean that no qualification was intended and thus the broad meaning of the language is its true meaning.[71] It could be argued with equal effect, however, that the court qualified its holding once and should not have to include the same condition in each passage.[72] The cutting edge of this second argument[73] is effectively blunted by the fact that the court focused its opinion on justifications for entirely abrogating the immunity.[74]

By contrast, the Nevada Supreme Court has clearly rejected interspousal tort immunity only in automobile negligence situations.[75] There, the court rested its automobile negligence exception, at least in substantial part, on Nevada's mandatory insurance law.[76] The *Fernandez* opinion, on the other hand, makes a weaker effort to justify an exception by special circumstances such as the prevalence of insurance in automobile negligence cases which are absent in other situations.[77] Instead, most of the

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a wrongful death exception to the Arizona interspousal tort immunity rule is probably precluded by clear language in the Wrongful Death Act itself. Huebner v. Deuchle, 109 Ariz. 549, 550, 514 P.2d 470, 471 (1973); *see supra* note 36. Similarly, an exception whereby the court suspends the interspousal immunity rule for parties with insurance is unsubstantiated by the language of the *Fernandez* decision. *See infra* notes 69-80 and accompanying text.

67. The majority of the court's reasoning as well as the holding, taken by itself, supports this view.

68. There is language supporting either view. In either case it seems likely that the Arizona Supreme Court may closely scrutinize any remainder of the interspousal tort immunity doctrine, if it has not entirely abrogated the immunity already.

69. 132 Ariz. at 448, 646 P.2d at 879.

70. *Id.* at 452, 646 P.2d at 883.

71. *See* Paxton v. McDonald, 72 Ariz. 378, 382-83, 236 P.2d 364, 367 (1951); *see also* Lopez v. Lopez, 125 Ariz. 309, 310, 609 P.2d 579, 580 (1980); Bowslaugh v. Bowslaugh, 126 Ariz. 517, 519, 617 P.2d 25, 27 (1979); *see also* Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (note particularly canons of construction labeled 18, 19, 20 and 21 and their contradictory opposites).

72. It would be unreasonable to expect the court to include the same conditioning phrase in each sentence or even in each paragraph. However, if the court wished to qualify the holding itself it should have explicitly done so.

73. The argument loses much of its effect when the court's own words, in essence, contradict its earlier qualification. Fernandez v. Romo, 132 Ariz. 447, 452, 646 P.2d 878, 883 (1982).

74. The court's reasoning that 1) the unity foundation of the immunity is outmoded; 2) barring an injured spouse from redress injures marital harmony more than interspousal suit; 3) fears of increased fraud and judicial inability to deal with a possibly greater incidence of fraud are unfounded; and 4) after *Jurek* the tortfeasor cannot benefit from a spouse's damage recovery, applied with such a telling effect on the entire immunity, seems to militate in favor of the total abrogation interpretation.

75. Rupert v. Steinne, 90 Nev. 397, 528 P.2d 1013 (1974).

76. *Id.* The prevalence of insurance in automobile negligence cases, and its insulating effect on marital harmony, is the major justification for the automobile negligence exception to the interspousal tort immunity doctrine. *See supra* notes 49-50 and accompanying text.

77. The court stated, "We do not believe, considering the existence of automobile accident

court's language cuts to the very root of the major justifications relied upon in the past to retain the immunity in general.[78] Thus, the total abrogation language[79] seem most consistent with the thread of reasoning which "leads [one] to believe that the rule need no longer be retained in this jurisdiction."[80] At the very least, the tenor of the decision sets the Arizona Supreme Court's stance as being inimical to the interspousal immunity doctrine.

The Probable Effect of Fernandez v. Romo *on the Intentional Tort Exception*

An interesting inconsistency with *Fernandez v. Romo* is found in *Windauer v. O'Connor*[81] where the Arizona Supreme Court created the intentional tort exception to the Arizona interspousal immunity rule. This exception required prospective litigants to get a divorce before an intentional tort action could be maintained.[82] The basis for the intentional tort exception, and the divorce requirement as well, was the court's professed belief in the common law marital unity principle[83] and its obvious absence in intentional tort situations.[84] However, the divorce requirement was not merely a recognition of the end of marital unity in intentional tort situations.[85] The requirement also served as an escape from the community property problem, not yet solved by *Jurek v. Jurek*.[86] To avoid this impediment, the Arizona Supreme Court allowed the right of action against the intentional tortfeasor to arise after the parties were divorced,[87] thereby circumventing the community property dilemma[88] with a separate property damage award going to the prevailing party. Now that the common law unity notion has been rejected,[89] and the community property problem

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insurance, that the family harmony or domestic tranquility will be harmed by allowing suit for injuries." 132 Ariz. at 449, 696 P.2d at 882.

78. *See* notes *supra* 66-74 and accompanying text.

79. *Id.*

80. 132 Ariz. at 447, 646 P.2d at 880.

81. 107 Ariz. 267, 268, 485 P.2d 1157, 1158 (1971). The *Windauer* case illustrates the court's concern over the possibility of the tortfeasor benefitting from his injurious act. There the court went so far as to allow a cause of action to arise only after divorce, *id.* at 268, 485 P.2d at 1158, in order to foreclose any possibility of tortfeasor benefit, despite the judicial policy of not encouraging divorce. Burns v. Burns, 111 Ariz. 178, 180, 526 P.2d 717, 719 (1974).

82. Arguably, it seems more likely that the true end to marital oneness in the intentional tort situation comes with the decision to divorce rather than with the occurrence of the intentional tort. This argument is bolstered by common experience which reveals many instances where a spouse has endured even repeated intentional infliction of harm from the other spouse, while still remaining faithful to the marriage. On the other hand, it is uncommon, to say the least, to hear of an instance where marital solidarity survives a divorce.

83. Windauer v. O'Connor, 107 Ariz. 267, 268, 485 P.2d 1157, 1158 (1971) (Arizona Supreme Court stated that "an intentional tort inflicted by one spouse on another so clearly destroys the concept of unity that the basis for the doctrine is lost").

84. *Id.* at 268, 485 P.2d at 1150.

85. *Id.*

86. 124 Ariz. 596, 598-99, 606 P.2d 812, 814-15 (1980); *see* Fernandez v. Romo, 132 Ariz. 447, 451, 646 P.2d 878, 882 (1982).

87. Windauer v. O'Connor, 107 Ariz. 267, 485 P.2d 1157 (1971).

88. *Id.* at 268, 485 P.2d at 1158.

89. *See supra* note 46.

solved,[90] the logical foundation of the *Windauer* decision has been substantially undermined. It seems likely, therefore, that the new rule of *Fernandez* with its broad language and more logical foundation,[91] will supplant the intentional tort exception and its divorce requirement.[92]

The Effect of Fernandez v. Romo *on Imputed Contributory Negligence*

The future of imputed contributory negligence in Arizona is also bound closely with the marital unity concept, for it was the unity concept which spawned imputed contributory negligence between husband and wife.[93] The imputed contributory negligence doctrine has survived only in community property jurisdictions because of the heightened concern over the possibility that the contributorily negligent party will benefit from his spouse's damage award.[94] The underlying rationale for imputed contributory negligence is that since the negligent spouse would receive the benefits of a favorable damage award, especially under community property laws,[95] the burden of the negligent spouse's conduct should be reciprocally imputed to bar recovery.[96] In this manner, the imputed contributory negligence rule seeks to preclude the tortfeasor spouse from benefitting from his negligent act.[97] Thus, like interspousal immunity, the doctrine of imputed contributory negligence between spouses is based on the common law unity doctrine and maintained, at least in part, on concern that the negligent party will benefit from his spouse's damage award.[98]

Now, with the Arizona Supreme Court's rejection of the marital unity doctrine, and the *Jurek* rule[99] denying the negligent spouse any profit from his negligent conduct,[100] there seems to be little basis for retaining the imputed contributory negligence rule.[101] Like interspousal tort immunity, imputed contributory negligence thwarts recovery by an injured party who, though otherwise blameless,[102] has the misfortune of being married

90. *See supra* notes 59, 63-64.

91. *See supra* notes 66-74 and accompanying text.

92. *See* Windauer v. O'Connor, 107 Ariz. 267, 485 P.2d 1157 (1971). The validity of this statement rests on the broad reading of the case. *See supra* notes 66-74 and accompanying text. "[W]hen the policy behind a rule no longer exists a rule should disappear." Imer v. Risko, 56 N.J. 482, 484, 267 A.2d 481, 483 (1970) (citing Long v. Landy, 35 N.J. 44, 50-51, 191 A.2d 1, 4 (1961)).

93. *See* W. PROSSSER, *supra* note 1, § 74, 489-90.

94. *Id.*

95. DeLozier v. Smith, 21 Ariz. App. 599, 601, 522 P.2d 555, 557 (1974); *see* ARIZ. REV. STAT. ANN. § 25-211 (1976).

96. W. PROSSER, *supra* note 1, § 74 at 490.

97. Tinker v. Hobbs, 80 Ariz. 166, 167, 294 P.2d 659, 660 (1956); DeLozier v. Smith, 21 Ariz. App. 599, 601, 522 P.2d 555, 557 (1974); Silvestri v. Hurlburt, 26 Ariz. App. 243, 244, 547 P.2d 514, 15 (1976); *see* Note, *supra* note 36.

98. DeLozier v. Smith, 21 Ariz. App. 599, 601, 522 P.2d 555, 557 (1974); Heimke v. Munoz, 106 Ariz. 26, 26, 470 P.2d 107, 109 (1970). The relationship may be even closer. Not only has parental immunity been abolished, Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970), but contributory negligence to minors is also disallowed. Zelman v. Strander, 11 Ariz. App. 547, 549, 466 P.2d 766, 768 (1970).

99. 124 Ariz. 596, 598-599, 606 P.2d 812, 814-15 (1980).

100. *See supra* notes 68-72 and accompanying text.

101. Of course the fraud and collusion argument and the disruption of marital harmony argument are inapplicable to imputed contributory negligence cases since the spouses would not be courtroom antagonists. *See* Alley v. Dorame, 126 Ariz. 70, 613 P.2d 834 (1980).

102. In both the interspousal tort immunity and imputed contributory negligence cases, the

to a negligent party[103] and, for that reason alone, is barred from recovery.[104] Thus, by analogy, it seems that imputed contributory negligence, stripped of its supporting rationales, will be discarded by the Arizona courts in the near future.[105]

Conclusion

In *Fernandez v. Romo*, the Arizona Supreme Court abrogated, at least in automobile negligence cases, the interspousal tort immunity rule. In doing so, the court categorically rejected the major justifications relied upon to uphold the immunity in the past. Despite the generally sweeping language of the opinion, however, the Arizona Supreme Court may have simply created an automobile negligence exception. Nevertheless, the language of *Fernandez v. Romo* was not entirely clear and the case itself raises a few questions in other areas of Arizona law as well.

It seems likely that *Fernandez v. Romo* will spark additional litigation on some of the questions which were left unanswered by the court's decision. These pressing questions need to be answered so that this significant area of Arizona law can become more clear and coherent. A few of the more readily discernable questions are: Did *Fernandez v. Romo* totally abrogate the interspousal tort immunity rule?; If interspousal tort immunity is now gone in Arizona, what specific damage formula will the court adopt to deal with the community property problem?; How will the inconsistency between the divorce requirement in the intentional tort exception and the allowance of interspousal negligence actions, not contingent on divorce, be reconciled?; and Will imputed contributory negligence between spouses be abrogated as well? These questions are sure to be fertile ground for litigation.

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injured spouse cannot himself be negligent, or the contributory negligence doctrine itself would bar recovery. ARIZ. CONST. art. 18, § 5; Heimke v. Munoz, 106 Ariz. 26, 27, 470 P.2d 107, 108 (1970).

103. The injured spouse is indeed unfortunate in the fact that because of his marital relationship with the tortfeasor, the courts withhold compensation for the tortiously inflicted injuries. *See supra* notes 1, 57-58 and accompanying text.

104. The Washington Supreme Court, in dealing with its interspousal tort immunity rule, found "more impelling the fundamental precept that, absent express statutory provision, or compelling public policy, the law should not immunize tortfeasors or deny remedy to their victims." Freehe v. Freehe, 81 Wash. 2d 183, 192, 500 P.2d 771, 777 (1972). It seems important to keep in mind the fact that a victim of another's negligence is barred from seeking recovery. As *Freehe* indicates, this is generally repugnant to most courts. If the Arizona court subscribes to the Washington court's viewpoint, interspousal tort immunity, as well as the imputed contributory negligence rule may soon be discarded. See *infra* notes 66-74 and accompanying text. Indeed, there is some evidence that such is the case, since in *Fernandez* the Arizona court dispensed with the previously compelling policy factors supporting the immunity (see supra notes 40-80 and accompanying text) and ignored the once common legislative deference argument. Burns v. Burns, 111 Ariz. 178, 181, 526 P.2d 717, 719 (1974). Furthermore, the Arizona Supreme Court may simply feel that the reasons for the interspousal tort immunity rule no longer apply to any persuasive extent. *See* Fernandez v. Romo, 132 Ariz. 447, 449, 646 P.2d 878, 880 (1982).

105. The analogy mentioned is, of course, with the interspousal immunity doctrine, which was subjected to a critical and damaging review in *Fernandez*.