APPELLATE DECISIONS 1980-81
Part I

CONTENTS

I. ADMINISTRATIVE LAW

JUDICIAL REVIEW OF RATE DECISIONS UNDER ARIZONA'S BIFURCATED STATUTE: RIDING THE HORNS OF A TWO-PRONGED DILEMMA

On February 2, 1979, Tucson Electric Power Company (TEP) applied to the Arizona Corporation Commission for a rate increase.[1] The commission conducted a hearing in August, 1979.[2] Although TEP had not requested a general rate increase since May, 1976,[3] the commission denied the proposed rate increase[4] and also denied TEP's subsequent petition for rehearing.[5] TEP then exercised its statutory right of appeal to the superior court.[6]

After reviewing the trial transcript and admitting additional evidence, including the testimony of expert witnesses, the superior court found the commission's decision unsupported by substantial evidence on six specific points.[7] The court therefore ordered the decision va-

---

1. Tucson Elec. Power Co. v. Arizona Corp. Comm'n, CA-CIV 5346, slip op. at 1 (Ct. App. April 2, 1981).

2. *Id.* at 2.

3. Answering Brief for Appellee at 2, Tucson Elec. Power Co. v. Arizona Corp. Comm'n, CA-CIV 5346 (Ct. App. April 2, 1981). The company explained that this rate increase was necessary

> to defray a $24 million increase in costs resulting from the addition in 1978 of government mandated pollution control facilities at one of the Company's generating stations (ACC tr., pp. 121-122). If it were not for the total investment in such non-revenue producing facilities of approximately $70 million, as required by Federal and State environmental regulations, the Company would not have required its first general rate increase since May, 1976.

Id.

4. Slip op. at 2.

5. *Id.*

6. *Id.* An appeal from a decision rendered by the Arizona Corporation Commission is governed by ARIZ. REV. STAT. ANN. § 40-254(A) (1974), which reads:

> Any party in interest, or the attorney general on behalf of the state, being dissatisfied with any order or decision of the commission, may within thirty days after a rehearing is denied or granted, and not afterwards, commence an action in the superior court of the county in which the commission has its office, against the commission as defendant, to vacate and set aside such order or decision on the ground that the valuation, rate, joint rate, toll, fare, charge or finding, rule or regulation, classification or schedule, practice, demand, requirement, act or service provided in the order or decision is unlawful, or that any regulation, practice, act or service provided in the order is unreasonable. The answer of the commission shall be served and filed within twenty days after service of the complaint, whereupon the action shall be at issue and ready for trial upon ten days notice to either party. The actions shall be tried and determined as other civil actions except as provided in this section.

7. Slip op. at 2. The six unsupported points were:

cated and set aside.[8] The commission appealed to the Arizona Court of Appeals, which affirmed in part, reversed in part, and remanded to the superior court.[9]

In *Tucson Electric Power Company v. Arizona Corporation Commission*,[10] the court of appeals presented two noteworthy propositions. First, the court held that the standard of review for a commission rate order is whether it is unlawful, and not whether the rate order is unreasonable.[11] Second, the court held that the superior court cannot admit new evidence unless the commission decision is unsupported by substantial legal evidence in the hearing record.[12]

The court of appeals ordered the superior court to instruct the commission to fix a just and reasonable rate consistent with the appellate court's opinion.[13] Both TEP and the Arizona Corporation Commission filed motions for rehearing, and both motions were denied by the court of appeals.[14] TEP's petition for review in the Arizona Supreme Court was granted on July 7, 1981. The court has yet to render a decision.

This casenote will first discuss the powers delegated to the Arizona

---

(1) The classification of the sales by the Company to South California Edison as "firm" rather than "nonfirm" or "interruptible";
(2) The allocation of the Company's transmission property and related expenses;
(3) The adoption of a twelve-month coincident peak method of allocation rather than a four-month coincident peak;
(4) The "normalization" of certain sales for resale by the Company;
(5) The assigning of the nonjurisdictional tax benefit, created by allocation methodology, to jurisdictional customers;
(6) The findings of return on common equity.

Id.

8. *Id.* The court also authorized the company to fix and implement interim rates. *Id.*

9. *Id.* at 17. The court of appeals reversed the superior court on all points except the asignment of the tax benefit, which the appellate court agreed was unsupported by substantial evidence. See note 7 *supra*.

10. CA-CIV 5346 (Ct. App. April 2, 1981).

11. Slip op. at 5 n.2.

12. *Id.* at 5-6. The court further states that "[a]n order may be unlawful even though supported by substantial evidence, if the evidence was improper or illegal." *Id.* at 5. This statement is erroneous. The court of appeals in Arizona Corp. Comm'n v. Citizens Utils. Co., 120 Ariz. 184, 584 P.2d 1175 (Ct. App. 1978), stated that certain evidence "would not legally support a . . . finding because it is itself not substantial lawful evidence but is speculative." *Id.* at 190, 584 P.2d at 1181. *See also* City of Tucson v. Citizens Utils. Water Co., 17 Ariz. App. 477, 481, 498 P. 2d 551, 555 (1972) (evidence offered by an expert was not substantial because the expert "failed to consider all the relevant factors as required by law.") Thus, a rate order based upon illegal evidence lacks substantial evidence, and an order lacking substantial evidence is unlawful.

It is important to note at this point that a rate may also be unlawful if it is found to be unreasonable. See text & note 40 *infra*. The opinion in *Tucson Elec. Power Co.* is also in error concerning this issue. *See* slip op. at 5 n.2.

13. Slip op. at 17. It appears that the court of appeals exceeded its authority at this point, since the commission possesses exclusive rate-fixing power. ARIZ. CONST. art. 15, § 3; Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 154, 294 P.2d 378, 384 (1956). A reviewing court may, at most, set aside a commission decision but may not order the commission to take any action. *See* ARIZ. REV. STAT. ANN. § 40-254(C) (1974) (judgment can only affirm, modify or set aside the commission's order).

14. Tucson Elec. Power Co. v. Arizona Corp. Comm'n, CA-CIV 5346 (Ct. App. June 2, 1981) (order denying motions for rehearing).

Corporation Commission and the presumed validity of agency decisions in general. An examination of the unlawfulness standard applied by the court of appeals when reviewing the commission's rate decisions will follow. Finally, the admissibility of new evidence in the review of an agency decision will be discussed.

The Power of the Arizona Corporation Commission: Exclusive, But Reviewable

The Arizona Constitution delegates to the Arizona Corporation Commission the duty to fix rates charged by public utilities.[15] The commission's power to fix rates is exclusive, and should not be disturbed unless the commission renders a decision which is arbitrary, not supported by substantial evidence or otherwise unlawful.[16] The other branches of government, including the judiciary, are precluded from invading the commission's sphere of power concerning ratemaking decisions.[17] Case law has recognized that Arizona is unique in granting its corporation commission such broad and plenary powers to fix the rates charged by public utilities.[18] Nevertheless, this broad grant of commission authority does not violate the separation of powers clause in the Arizona Constitution.[19]

Not only has the Arizona Constitution granted the commission broad and exclusive powers, including the power to fix public utility rates, but a general presumption of validity exists concerning adminis-

15. ARIZ. CONST. art 15, § 3, which provides in part: "The Corporation Commission shall have full power to, and shall, prescribe just and reasonable rates and chages to be made and collected by public service corporations within the State for service rendered therein . . . ."

16. *See, e.g.*, Arizona Corp. Comm'n v. Arizona Public Serv., 113 Ariz. 368, 371, 555 P.2d 326, 329 (1976); Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 154, 294 P.2d 378, 384 (1956); Arizona Corp. Comm'n v. Citizens Utils. Co., 120 Ariz. 184, 188, 584 P. 2d 1175, 1179 (Ct. App. 1978); see notes 40 & 44 *infra*.

17. ARIZ. CONST. art. 15, § 3; Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 154, 294 P. 2d 378, 384 (1956); Ethington v. Wright, 66 Ariz. 382, 392, 189 P.2d 209, 216 (1948) (holding that the commission's ratemaking powers are "supreme"). *Ethington* also recognized that the determination of fair value of utility properties is within the exclusive power of the commission. *Id. See* ARIZ. CONST. art 15, § 14; State v. Tucson Gas, Elec. Light & Power Co., 15 Ariz. 294, 306, 138 P. 781, 786 (1914).

18. Arizona Corp. Comm'n v. Superior Court, 107 Ariz. 24, 26, 480 P.2d 988, 990 (1971); State v. Tucson Gas, Elec. Light & Power Co., 15 Ariz. 294, 300, 138 P. 781, 783 (1914); City of Tucson v. Citizens Utils. Water Co., 17 Ariz. App. 477, 479, 498 P.2d 551, 553 (1972).

19. The separation of powers clause appears in ARIZ. CONST. art. 3, and reads:

> The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

The Arizona Supreme Court has stated that the commission may not be categorized within one of the three branches mentioned above. State v. Tucson Gas, Elec. Light & Power Co., 15 Ariz. 294, 305, 138 P. 781, 785 (1914). Instead, the commission's power includes duties derived from all three branches, and thus is an exception to the "separate and distinct" clause of the Arizona Constitution. *Id.*

trative decisions.[20] Courts are required to show deference to administrative decisions because the agency presumably possesses expertise within its field of decisionmaking.[21] This does not mean, however, that administrative decisions should remain totally unbridled, with judicial review constituting a mere cursory search for flagrant discretionary abuses.[22] Although the Arizona Corporation Commission exercises quasi-judicial powers,[23] commission decisions should be subject to meaningful judicial review.[24] Judicial review provides a check upon agency powers without superseding those powers.[25]

Although the commission may possess exclusive ratemaking authority,[26] the very fact that a statute has been enacted for the review of commission ratemaking[27] indicates that the legislature intended the ratemaking power to be checked by the courts. A conflict exists, however, because the legislature enacted a vague review statute and case law failed to define the precise standards and procedures to be utilized by the reviewing court. Nevertheless, there should be some restraint upon an agency's discretion, no matter how broad the delegation of power to the commission.[28]

The Proper Standard of Review for Rate Determinations

When reviewing a rate decision, the courts are bound by a statutory standard of review.[29] The review statute provides that "[a]ny party in interest [may] commence an action in the superior court. . . to vacate and set aside such order or decision on the ground that the [rate] provided in the order or decision is unlawful, or that any regulation, prac-

20. B. SCHWARTZ, ADMINISTRATIVE LAW § 204, at 579-80 (1976).

21. *See* Permian Basin Area Rate Cases, 390 U.S. 747, 767 (1968) (United States Supreme Court stated that regulatory decisions had been entrusted to the particular agency by Congress, and not to the judicial system); Wilderness Pub. Rights Fund v. Kleppe, 608 F.2d 1250, 1254 (9th Cir. 1979) (there is a presumption of administrative validity); Ethyl Corp. v. EPA, 541 F.2d 1, 36 (D.C. Cir. 1976) (courts are not equipped to dissect agency decisions involving technical assumptions); Arizona Dep't of Economic Security v. Magma Copper Co., 125 Ariz. 23, 26, 607 P.2d 6, 9 (1980) (agency expertise should be given due regard by the court).

22. At least one commentator has stated that courts tend to overemphasize agency expertise. K. DAVIS, ADMINISTRATIVE LAW TEXT, § 30.06, at 552 (1972). Professor Davis further stated that judges are the experts concerning, "judge-made law developed through statutory interpretation, most analysis of legislative history, fair procedure, and problems transcending the particular field of the agency." *Id. See also* Casenote, *Rate Decisions: Judicial Review of the Arizona Corporation Commission*, 19 ARIZ. L. REV. 488, 498 (1977), which analyzes Sun City Water Co. v. Arizona Corp. Comm'n, 113 Ariz. 464, 556 P.2d 1126 (1976) as holding that the decision of the superior court on review and that of the commission are presumed to hold equal weight.

23. See note 16 *supra*.

24. *See* Martin, *Legislative Delegations of Power and Judicial Review—Preventing Judicial Impotence*, 8 FLA. ST. U.L.REV. 43, 45 (1980).

25. *Id.*

26. Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 154, 294 P.2d 378, 384 (1956).

27. ARIZ. REV. STAT. ANN. § 40-254(A)-(F) (1974).

28. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 315, at 208 (1978). *See also* Martin, *supra* note 2, at 43.

29. ARIZ. REV. STAT. ANN. § 40-254(A)-(F) (1974).

tice, act or service provided in the order is unreasonable."[30] In *Tucson Electric Power Co.*, the majority read the statute in a strictly grammatical and very limited fashion.[31] The court noted the fact that the word "rate" did not appear in the same clause as the word "unreasonable".[32] The court therefore held that when reviewing a rate order promulgated by the commission, the superior court should use a standard of "unlawfulness" which does not include a consideration of "unreasonableness".[33]

The court's statutory interpretation is provocative for several reasons. First, the majority could not cite any case law supporting its position.[34] Indeed, the prior case law implied that reasonableness should be considered in rate review cases.[35] In fact, the Arizona Supreme Court has used the words "unreasonable" and "unlawful" interchangeably when applying the review statute.[36]

In addition, because the language of the review statute has not been changed in response to the supreme court's holdings, it should be presumed that the legislature approves of this interpretation.[37] Further evidence of legislative approval of a reasonableness standard of review for commission rate decisions may be found in various Arizona statutes.[38] The strongest language announcing legislative intent is found in section 40-361(A) of the Arizona Revised Statutes, which states that unreasonable charges received by a public service corporation[39] are,

30. *Id.* § 40-254(A). For the complete text of subsection (A), see note 6 *supra*.

31. See text & note 32 *infra*.

32. Slip op. at 5 n.2. Subsection (E) of the statute reads: "In all trials, actions and proceedings the burden of proof shall be upon the party adverse to the commission to show by clear and satisfactory evidence that is it unreasonable or unlawful." ARIZ. REV. STAT. ANN. § 40-254(E) (1974). The court stated, however, that the word "unreasonable" as it is used in section 40-254(E) relates back to its use in subsection (A). Slip. op. at 5 n.2. The court therefore determined that the term "unreasonable" in subsection (E) modified the same nouns as the term "unreasonable" in subsection (A), i.e. "regulations," "practices," "acts" or "services," and did not encompass the noun "rates" in either section. *Id.*

33. *See* slip op. at 5 n.2.

34. *Id.* at 22 (Wren, J., dissenting). The majority explained: "There are several Arizona decisions, not dealing with this precise issue, which use both the words 'unreasonable' and 'unlawful' in referring to the standard of review in a rate case. No case has been brought to our attention specifically dealing with this question." *Id.* at 5 n.2.

35. *Id.* at 18 (Wren, J., dissenting); see text & note 36 *infra*.

36. Arizona Corp. Comm'n v. Fred Harvey Transp. Co., 95 Ariz. 185, 189, 388 P.2d 236, 239 (1964); Arizona Corp. Comm'n v. Reliable Transp. Co., 86 Ariz. 363, 370, 346 P.2d 1091, 1096 (1960); Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 150, 294 P.2d 278, 281 (1956); *see* Arizona Corp. Comm'n v. Pacific Motor Trucking Co., 116 Ariz. 465, 467, 569 P.2d 1363, 1366 (Ct. App. 1977); Lofersky v. Needel, 26 Ariz. App. 231, 234, 547 P.2d 502, 505 (1976); Herzberg v. State *ex rel.* Humphrey, 20 Ariz. App. 428, 431, 513 P.2d 966, 969 (1973); Sulger v. Arizona Corp. Comm'n, 5 Ariz. App. 69, 72, 423 P.2d 145, 148 (1967).

37. *See, e.g.*, State v. Jones, 94 Ariz. 334, 336, 385 P.2d 213, 213 (1963); Altamirano v. Industrial Comm'n, 22 Ariz. App. 379, 382, 527 P.2d 1096, 1099 (1975); Coover v. Industrial Comm'n, 14 Ariz. App. 409, 411, 484 P.2d 21, 23 (1971).

38. For example, consider ARIZ. REV. STAT. ANN. § 40-250(C), (Supp. 1980-81) which states in part, "[o]n the hearing the commission shall by order establish the rates . . . which it finds just and reasonable . . . ." *See also id.* § 40-361(A) & (C).

39. The terms "public service corporation" and "public utility" have been used interchangea-

indeed, unlawful. The court in *Tucson Electric Power Co.* interpreted the review statute so that it conflicts with the language found in section 40-361(A).[40] The result is that two acts in pari materia[41] are now contradictory, an outcome frequently denounced in Arizona case law.[42]

Third, the Arizona Constitution explicitly states that the commission is to fix "just and reasonable rates."[43] The Arizona Supreme Court has repeatedly enforced this constitutional mandate.[44] If the word "just" is equated to the word "lawful",[45] then the constitution

---

bly in case law. *See* Van Dyke v. Geary, 244 U.S. 39, 43 (1917); Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 150, 152, 294 P.2d 278, 381-82 (1956); Scates v. Arizona Corp. Comm'n, 118 Ariz. 531, 534, 578 P.2d 612, 615 (Ct. App. 1978). *See also* City of Phoenix v. Kasun, 54 Ariz. 470, 97 P.2d 210 (1939), stating that "[p]ublic utilities . . . owe a legal duty to the public to furnish certain services . . . ." *Id.* at 475, 97 P.2d at 212. It logically follows from this statement that public utilities are public service corporations. The Arizona Constitution further supports this proposition by stating that "[a]ll corporations other than municipal engaged in . . . furnishing gas, oil, or electricity for light, fuel or power . . . shall be deemed public service corporations." ARIZ. CONST. art 15, § 2.

40. ARIZ. REV. STAT. ANN. § 40-361(A) (1974). "Charges demanded or received by a public service corporation for any commodity or service shall be just and reasonable. *Every unjust or unreasonable charge demanded or received is prohibited and unlawful.*" *Id.* (emphasis added). *See also* Mountain States Tel. & Tel. Co., 124 Ariz. 433, 436, 604 P.2d 1144, 1147-48 (Ct. App. 1979), stating that (1) failure to demonstrate the reasonableness of a rate results in an unlawful charge, and (2) a commission decision is reviewable if "arbitrary, unsupported by the evidence, or *otherwise* unlawful." See text & note 16 *supra*. Since the majority in *Tucson Elec. Power Co.* stated that rates are to be reviewed for lawfulness, and that lawfulness does not encompass reasonableness, ARIZ. REV. STAT. ANN. § 40-254(A) (1974), now directly conflicts with the above statutory and case law.

It is interesting to note an analogy to Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U.S. 370 (1932). In *Arizona Grocery Co.*, the United States Supreme Court interpreted section 1(5) of the Interstate Commerce Act (49 U.S.C. § 1(5), as amended 1906), which reads in pertinent part: "[A]ll charges made for any service rendered . . . in the transportation of . . . property . . . shall be just and reasonable . . . every unjust and unreasonable charge for such service . . . is prohibited and declared to be unlawful." The Court read this language to mean that an unreasonable rate is unlawful, and an unlawful rate is one that is unreasonable. 284 U.S. at 384, 387-89. The language of section 1(5) of the Interstate Commerce Act is similar to the language found in ARIZ. REV. STAT. ANN. § 40-361(A).

41. Two particular statutes are in pari materia if they "relate to the same subject or have the same general purpose." State *ex rel.* Larson v. Farley, 106 Ariz. 119, 122, 471 P.2d 731, 734 (1970).

42. Ordway v. Pickrell, 112 Ariz. 456, 459, 543 P.2d 444, 447 (1976); State Board of Dispensing Opticians v. Schwab, 93 Ariz. 328, 331, 380 P.2d 784, 787 (1963); City of Mesa v. Salt River Project Agricultural Improvement & Power Dist., 92 Ariz. 91, 98, 373 P.2d 722, 727 (1962); Schilling v. Embree, 118 Ariz. 236, 238, 575 P.2d 1262, 1264 (Ct. App. 1978); State v. McGriff, 7 Ariz. App. 498, 504, 441 P.2d 264, 270 (1968).

43. ARIZ. CONST. art. 15, § 3 uses the word "reasonable" when referring to ratemaking. Nowhere in the Arizona Constitution does the word "lawful" appear in relation to ratemaking. Thus, from a strict constitutional point of view a "reasonableness" requirement would seem more defensible than a "lawfulness" requirement. *But see* text & note 45 *infra*, relating the words "just" and "lawful".

44. *E.g.*, Southern Pac. Co.v. Arizona Corp. Comm'n, 98 Ariz. 339, 345, 404 P.2d 692, 696 (1965); Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 154-56, 294 P.2d 378, 384-85 (1956); State v. Tucson Gas, Elec. & Power Co., 15 Ariz. 294, 303, 138 P. 781, 785 (1914). The court has further stated that courts have a duty to protect constitutional rights. Bristor v. Cheatham, 75 Ariz. 227, 234, 255 P.2d 173, 177 (1953). Since the constitution mandates that the commission is to fix just and reasonable rates, ARIZ. CONST., art. 15, § 3, it logically follows that the people of Arizona have a constitutional right to pay only just and reasonable rates. Thus, a court must look for justness *and* reasonableness when reviewing a rate decision, to protect the constitutional rights of the citizens of Arizona.

45. The word "just" is synonymous with the words "reasonable" and "lawful". WEBSTER'S

requires rates to be both lawful *and* reasonable.

Finally, courts have repeatedly stated that the literal meaning of a statute is not controlling when determining legislative intent.[46] In construing a statute, the spirit and purpose behind the enactment must be promoted.[47] It is also imperative that the statute's spirit and purpose uphold the state constitution.[48] By construing the review statute literally, the court of appeals in *Tucson Electric Power Co.* ignored case law and violated the Arizona Constitution's separation of powers clause.[49] Thus, the court of appeals reached an absurd result that is in conflict with the statutory scheme and the Arizona Constitution. An absurd interpretation must be avoided whenever a reasonable interpretation is possible.[50] The more reasonable interpretation would be to require that the rate decision be both reasonable and lawful. This result would be consistent with prior case law,[51] the statutory scheme,[52] and the state constitution.[53] Furthermore, the court seems to contradict itself when it states that rates should be just and reasonable,[54] yet employs a lawfulness standard of review completely devoid of any reasonableness consideration. It is difficult to comprehend how the court's own reasonableness requirement will be enforced under this review standard. The court's strictly grammatical reading of the statute produces numerous problems and should be overturned on review.[55]

NEW COLLEGIATE DICTIONARY 628 (1976 ed.). Equating "just" with "lawful" would avoid redundancy, and is therefore the preferred reading. *See, e.g.*, State v. Superior Court for Maricopa County, 113 Ariz. 248, 249, 550 P.2d 626, 627 (1976); State v. Deddens, 112 Ariz. 425, 429, 542 P.2d 1124, 1128 (1975); State v. Arthur, 125 Ariz. 153, 155, 608 P.2d 90, 92 (Ct. App. 1980).

46. *See, e.g.*, International Longshoreman's & Warehouseman's Union v. Juneau Spruce Corp., 342 U.S. 237, 243 (1952); State Bd. of Directors for Jr. Colleges v. Nelson, 105 Ariz. 119, 120, 460 P.2d 13, 14 (1969); State *ex rel.* Church v. Arizona Corp. Comm'n, 94 Ariz. 107, 110, 382 P.2d 222, 224 (1963).

47. *See, e.g.*, Sellinger v. Freeway Mobile Home Sales, Inc., 110 Ariz. 573, 575, 521 P.2d 1119, 1121 (1974); State Bd. of Directors for Jr. Colleges v. Nelson, 105 Ariz. 119, 121, 460 P.2d 13, 14 (1969); State v. McGriff, 7 Ariz. App. 498, 504, 441 P.2d 264, 270 (1968).

48. Morris v. Arizona Corp. Comm'n, 24 Ariz. App. 454, 455, 539 P.2d 928, 929 (1975).

49. *See* ARIZ. CONST. art. 3.

50. *See, e.g.*, Ordway v. Pickrell, 112 Ariz. 456, 459, 543 P.2d 444, 447 (1976); State Board of Dispensing Opticians v. Schwab, 93 Ariz. 328, 331, 380 P.2d 784, 786 (1963);State v. Cutshaw, 7 Ariz. App. 210, 219, 437 P.2d 962, 971 (1968).

51. See text & notes 36 & 38 *supra*.

52. See text & note 40 *supra*.

53. See text & notes 43 & 44 *supra*.

54. Slip op. at 17.

55. The decisions of the United States Supreme Court would support overturning the construction adopted by the Arizona Court of Appeals: "[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." Lynch v. Alworth-Stephens Co., 267 U.S. 364, 370 (1925). In sum, the court of appeals holding that the standard of review for a rate decision is "lawfulness", exclusive of "reasonableness", is not a rational reading of the statute.

Admissiblity of Evidence and the Bifurcated Statute: A "Limited" Trial De Novo

A "pure" trial de novo has been described as "an independent finding of fact in which all evidence is received anew."[56] Both parties are given the chance to present new evidence concerning the dispute, while the prior agency decision is ignored.[57] Agency transcripts are inadmissible in a pure trial de novo; instead, a new factual determination is made exclusively upon new evidence.[58]

In Arizona, judicial review of rate cases involves a "limited" as opposed to a "pure" trial de novo.[59] As already noted, the legislature has limited judicial review by imposing a review statute that requires judicial deference to agency decisionmaking. Thus the reviewing court may not act as the court of original jurisdiction as it could in a "pure" de novo review.[60] The courts have defined the proper method for review of agency decisions as a search for "substantial evidence".[61] Substantial evidence has been defined as relevant evidence that may reasonably and adequately support a conclusion.[62]

In addition to applying the legislature's restricted method of review, the Arizona courts have limited the admission of evidence during

56. Casenote, *Public Utility Regulation—Judicial Review Under Public Utility Regulatory Act Will Be by Substantial Evidence*, 10 ST. MARY'S L.J. 612, 613 (1978). *See also* Lone Star Gas Co. v. State, 137 Tex. 279, 298, 153 S.W.2d 681, 692 (1941); Finrock, *Trial De Novo—Panacea?*, 24 BAYLOR L. REV. 135, 142 (1962). Judicial review of agency decisions is usually classified as being either by the substantial evidence test, or by trial de novo. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.07, at 152-53 (1958).

57. Sulger v. Arizona Corp. Comm'n, 5 Ariz. App. 69, 71, 423 P.2d 145, 147 (1967); Lone Star Gas Co. v. State, 137 Tex. 279, 298, 153 S.W.2d 681, 692 (1941).

58. Sulger v. Arizona Corp. Comm'n, 5 Ariz. App. 69, 72, 423 P.2d 145, 148 (1967).

59. Slip op. at 3-4. The actual words "trial de novo" do not appear anywhere in ARIZ. REV. STAT. ANN. § 40-254(A)-(F) (1974). Instead, the statute states that upon review in superior court, "[t]he trial shall conform, as nearly as possible . . . to other trials in civil actions." *Id.* § 40-254(C). The additional description of this procedure as a "limited trial de novo" has been derived through case law. Arizona Corp. Comm'n v. Reliable Transp. Co., 86 Ariz. 363, 371 n.4, 346 P.2d 1091, 1096 n.4 (1960); Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 154-55, 294 P.2d 378, 384 (1956).

60. Where a statute authorizes an appeal from an administrative decision, the superior court should act as if it were the court of original jurisdiction "in the absence of a specific statute to the contrary." Duncan v. Mack, 59 Ariz. 36, 40, 122 P.2d 215, 218 (1942). In a "pure" trial de novo the court should consider the agency's decision when weighing the credibility of the evidence, but is allowed to disregard the agency's opinion and form its own independent conclusion. *Id.* at 42, 122 P.2d at 218.

61. Slip op. at 5; Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 154, 294 P.2d 378, 384 (1956).

62. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). *See also* Woodby v. Immigration & Naturalization Serv., 385 U.S. 276, 282 (1976) ("judicial review (of an agency) is generally limited to ascertaining whether the evidence relied upon by the trier of fact was of sufficient quality and substantiality to support the rationality of the judgment."); City of Tucson v. Citizens Utils. Water Co., 17 Ariz. App. 477, 481, 498 P.2d 551, 555 (1972) (defining substantial evidence as "evidence of substance which establishes facts and from which reasonable inferences may be drawn."). It has also been stated that an agency finding may be upheld by substantial evidence even if the agency could have drawn two inconsistent conclusions from the evidence. Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966).

judicial review. In *Tucson Electric Power Co.*, the court of appeals decided that the only "logical" way to apply the review statute is through a two-stage procedure.[63] During the first stage, a review based solely upon the hearing transcript is made to determine if the rate order was supported by substantial legal evidence.[64] If the rate order meets this requirement, the trial de novo is ended and the rate order is affirmed.[65] If the rate order does not meet this requirement, the court then enters the second stage of review.[66] Only at this point is the court allowed to admit additional evidence "in support of, as well as in opposition to, the previously unsupported finding."[67] The court cannot, therefore, receive either new or additional evidence if the commission's rate order is found to be supported by substantial, lawful evidence within the hearing record.[68] Thus, the statutory trial de novo is, indeed, "limited".

The reviewing court is not always confined to the agency record alone. In rate cases similar to *Tucson Electric Power Co.* it is obvious that additional evidence was indeed admitted during limited trials de novo.[69] The conflict between the majority and dissenting opinions in

63. Slip op. at 5-6.

64. *Id.* at 5.

65. *Id.* at 5-6.

66. *Id.* at 6.

67. *Id.* Note that an appellate court shall uphold the superior court's decision if the decision is supported by reasonable evidence. *Id.* at 7-8. *See also* Sun City Water Co. v. Arizona Corp. Comm'n, 113 Ariz. 464, 465, 556 P.2d 1126, 1127 (1976); Arizona Corp. Comm'n v. Citizens Utils. Co., 120 Ariz. 184, 187, 584 P.2d 1175, 1178 (Ct. App. 1978).

68. Slip op. at 7. The United States Supreme Court in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), held that the "whole record" should be considered when reviewing an administrative decision. *Id.* at 488. The whole record includes evidence that conflicts with the board's particular decision. *Id.* An agency's findings should be respected, but must be set aside if they cannot be justified by the reviewing court. *Id.* at 490. The Court specifically stated that "[w]hether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts. . . ." *Id.* at 491. The *Universal Camera* court further stated that "[t]he trend in litigation is toward a rational inquiry into truth, in which the tribunal considers everything 'logically probative of some matter requiring to be proved.'" *Id.* at 497 (citations omitted). It is obvious from a reading of *Universal Camera* that evidence was introduced at trial outside the agency record. *Id.* at 493 (an examiner's report was introduced at trial which had not previously been read by the agency).

In another case, the District of Columbia Court of Appeals, although admitting that its scope of judicial review did not include making a "technical or policy redetermination", emphasized the fact that Congress had indeed provided for judicial review of agency decisions. International Harvester Co. v. Ruckelhaus, 478 F.2d 615, 641 (D.C. Cir. 1973). The court's objective should be to work constructively with the agency in furthering the public interest. *Id.* at 647. The court, therefore, should undertake a careful, reasoned study of the agency transcript. Greater Boston TV v. FCC, 444 F.2d 841, 850 (D.C. Cir. 1970). At times, admitting evidence outside the hearing record will be necessary to clarify certain decisions contained within the record. Citizen's to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

69. *See, e.g.*, Sun City Water Co. v. Arizona Corp. Comm'n, 113 Ariz. 464, 465, 556 P.2d 1126, 1127 (1976); Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 148, 294 P.2d 378, 380 (1956); City of Tucson v. Citizens Utils. Water Co., 17 Ariz. App. 477, 480, 498 P.2d 551, 554 (1972). *But see* Lofersky v. Needel, 26 Ariz. App. 231, 234, 547 P.2d 502, 505 (1976), holding that a trial de novo does not mean evidence never presented to the commission may be introduced upon review. This holding, however, applied specifically to the commission introducing available evidence not considered by the commission during a hearing, in an effort to uphold its decision upon review.

Tucson Electric Power Co. arises over precisely *when* this additional evidence is admissible. The majority opinion states that new evidence is admissible only after the agency record has been reviewed and found lacking in substantial legal evidence sufficient to support the agency decision.[70] Although the dissent argues that new evidence is admissible "before any determination is made by the court,"[71] only one Arizona rate case clearly admitted additional evidence at the inception[72] of a trial de novo review.[73] The other rate cases cited by the dissent[74] are harmonious with the bifurcated construction of the review statute proposed by the majority.[75]

The bifurcated construction does, however, present a problem. Under the bifurcated statutory procedure, the court initially reads the hearing record. If the court finds the agency decision clearly and substantially supported, review of the record is at an end.[76] When a reviewing court passsively accepts a commission decision, however, review of the commission decision is severely limited.[77] The reasoning behind such a "passive" stance is that agency decisions should be respected concerning technical matters within the agency's expertise.[78]

If, on the other hand, a court takes an aggressive stance, the bifurcated statute provides an opportunity for more extensive review. An "aggressive" court would argue that a confusing agency finding lacks substantial evidence supporting the decision.[79] The court would then

---

70. Slip op. at 5-6.

71. *Id.* at 18 (Wren, J., dissenting).

72. The words "before any determination is made by the court" (see text & note 71 *supra*) appear to mean "before reading the agency record" since the dissent (1) cited *Simms* for support (see text & note 73 *infra*), (2) read *Citizens Utils.* (see note 75 *infra*) as holding that "new evidence was introduced at the very *inception* of the trial on review in superior court, . . ." (Slip op. at 20 (Wren, J., dissenting)), and (3) used the words "*any* determination" instead of "*final* determination."

73. Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 148, 294 P.2d 378, 380 (1956) (engineer's testimony concerning appraisal of property was admitted at beginning of trial even though it could have been presented to the commission during hearings).

74. Slip op. at 20-21 (Wren, J., dissenting).

75. The dissent cites Arizona Corp. Comm'n v. Citizens' Utils. Co., 120 Ariz. 184, 188, 584 P.2d 1175, 1179 (Ct. App. 1978), and Sun City Water Co. v. Arizona Corp. Comm'n, 113 Ariz. 464, 465, 556 P.2d 1126, 1127 (1976) in support of its proposition that new evidence may be admitted at trial before a reading of the agency transcript. While additional evidence was admitted in both cases, it is not clear that the evidence was admitted at the beginning of the trial.

76. *See* slip op. at 7.

77. Consider the following example:

A rate decision is published by the Corporation Commission, and an appeal for review is filed in superior court. Under the now-bifurcated statute, the superior court examines the agency record since it is precluded under *Tucson Elec. Power Co.* from initially accepting any new or additional evidence. The court, while reviewing the agency record, finds the reasoning of several expert witnesses confusing. Further, the commission's published decision does not clarify why the testimony of one witness was accepted over the testimony of another. The superior court notes, however, that there is indeed *some* evidence in the hearing record to support the commission's position. A passive court will defer to agency expertise and uphold the decision, hoping that the agency made a fair finding.

78. See notes 20-21 *supra*.

79. See note 68 *supra*.

admit new evidence to clarify the record.[80]

Under the "aggressive" approach, the party challenging the commission decision is allowed to meet its burden of proof by introducing additional evidence.[81] The commission is also allowed to introduce evidence supporting its position. After admitting the evidence required to clarify the record, the superior court determines whether substantial lawful evidence exists supporting the commission decision. In this way, the bifurcated statute provides for a meaningful review and upholds the concept of a "limited" trial de novo.[82]

Finally, it is important to note that the court does not have the power to substitute its *judgment* for that of the commission.[83] The court may simply review the record and reach a *conclusion* independent of the commission's decision.[84] This is mandated by the language of the review statute which states that the court shall affirm, modify, or set aside the commission order.[85] Thus, the court may not actually remand a decision to the commission.[86]

In *Tucson Electric Power Co.*, the superior court did not remand to the commission, but instead vacated and set aside the decision,[87] which under the review statute it is empowered to do.[88] Thus, the court did not make an independent judgment. Rather, it reached an independent conclusion that the commission decision was not supported by substantial evidence.[89]

---

80. *Id.*

81. Slip op. at 7 ("[t]he party adverse to the Commission must, on appeal to the superior court, prevail upon stronger evidence than would have been necessary before the Commission"). The court of appeals in *Tucson Elec. Power Co.* stated that the burden of proof will be met by prevailing upon "clear and convincing evidence", *id.* at 7 n.4, although the review statute uses the words "clear and satisfactory evidence." ARIZ. REV. STAT. ANN. § 40-254(E) (1974).

82. Evidence will be admitted, as in a trial de novo, but only if the commission decision is first found lacking in substantial evidence. Slip op. at 7. This approach provides a meaningful review insofar as it precludes the court from utilizing a "rubber-stamp" procedure. It is the court's responsibility to either request new evidence when a commissin decision lacks clear and substantial support, or vacate the decision for lack of substantial support. The court upholds the commission decision as substantially supported in the transcript alone only when no further clarification is needed. This approach also promotes well-reasoned findings by the commission.

83. *Id.* at 5. *See also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1972); Sun City Water Co. v. Arizona Corp. Comm'n, 113 Ariz. 464, 465, 556 P.2d 1126, 1127 (1976); Arizona Corp. Comm'n v. Fred Harvey Transp. Co., 95 Ariz. 185, 191, 388 P.2d 236, 239 (1974); Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 154, 294 P.2d 378, 384 (1956); K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 29.00, at 653 (1976).

84. Arizona Corp. Comm'n v. Fred Harvey Transp. Co., 95 Ariz. 185, 190, 388 P.2d 236, 239 (1964); *see* Sun City Water Co. v. Arizona Corp. Comm'n, 113 Ariz. 464, 466, 566 P.2d 1126, 1128 (1976).

85. ARIZ. REV. STAT. ANN. § 40-254(C) (1974). *See also* note 84 *supra*.

86. The Arizona Supreme Court has described a remand as "send[ing] the pending matter back to the body from which it came where further action will be limited by the terms of the mandate." Sun City Water Co. v. Arizona Corp. Comm'n, 113 Ariz. 464, 466, 556 P.2d 1126, 1128 (1976).

87. Slip. op. at 2.

88. ARIZ. REV. STAT. ANN. § 40-254(C) (1974).

89. One hopes the court of appeals is not implying that an independent *conclusion* contrary to

Conclusion

The court of appeals opinion in *Tucson Electric Power Co. v. Arizona Corporation Commission* contains both strong and weak points. The holding that the trial court must only determine whether the commission's decision is unlawful, exclusive of being unreasonable, cannot be reconciled with other statutory provisions in pari materia, preexisting case law or the state constitution. This "lawfulness only" standard should be overturned by the Arizona Supreme Court on review.

The court of appeals opinion's deliniation of the bifurcated statutory procedure, however, is a helpful clarification. The reviewing court first reviews the hearing transcript to determine whether or not substantial legal evidence exists to support the commission's decision. If substantial legal evidence is found lacking, or further clarification is needed, then the court can accept new evidence from both parties. An "aggressive" reading of the birfurcated statute, therefore, provides a meaningful review of commission decisions. A dilemma arises when a reviewing court passively applies the statute and defers to agency expertise when further clarification is needed. In this situation, agency power remains essentially unbridled, and a meaningful review is precluded. The Arizona Supreme Court's opinion in *Tucson Electric Power Co.* will hopefully offer some guidance concerning the scope of review of Corporation Commission action.

Anna M. Unterberger

---

that of the agency is per se impermissible. This would be inconsistent with statutory and case law. See notes 84 & 85 *supra*.

Since the superior court found the agency record lacked substantial evidence, the issue of reasonableness was never addressed by the court. See text & note 16 *supra*.

II. CONSTITUTIONAL LAW

INHERENT JUDICIAL POWER AND REGULATION OF THE PRACTICE OF LAW

Most state courts in the United States claim inherent power to regulate the practice of law.[1] For the past eighty years this claim of inherent power has been the object of criticism and controversy.[2] In 1962, the controversy erupted in public fervor[3] when the Arizona Supreme Court declared it an unauthorized practice of law for title company employees to fill in the blanks on standard form contracts for the purchase of real estate.[4] In *State Bar of Arizona v. Arizona Land Title & Trust Co.*,[5] the court found that the relationship between title company employees and their customers lacked the professional posture necessary to protect the customers' legal rights.[6] Noting that in most cases title company employees are completely unqualified to practice law,[7]

1. *See, e.g.*, Hoffmeister v. Tod, 349 S.W.2d 5, 11 (Mo. 1961); *In re* Patton, 86 N.M. 52, 54, 519 P.2d 288, 290 (1974); West Virginia State Bar v. Earley, 144 W.Va. 504, 529, 109 S.E.2d 420, 436 (1959). Additional case authority is collected in Dowling, *The Inherent Power of the Judiciary*, 21 A.B.A.J. 635, 635-36 (1935).

2. This criticism is not found in judicial decisions, but in legal commentaries. *See* Beardsley, *The Judicial Claim to Inherent Power Over the Bar*, 19 A.B.A.J. 509, 509-11 (1933) (see discussion at note 33 *infra*); Weckstein, *Limitations on the Right to Counsel: The Unauthorized Practice of Law*, 1978 UTAH L. REV. 649, 649; Comment, *Control of the Unauthorized Practice of Law: Scope of Inherent Judicial Power*, 28 CHI. L. REV. 162, 163 (1960).

3. Marks, *The Lawyers and the Realtors: Arizona's Experience*, 49 A.B.A.J. 139, 139-40 (1963).

4. State Bar of Ariz. v. Arizona Land Title & Trust Co., 90 Ariz. 76, 95-96, 366 P.2d 1,14-15 (1961). Within months of this decision a constitutional amendment was adopted through referendum that permitted real estate brokers to draft or fill out all instruments incident to a sale, lease, or exchange of property. ARIZ. CONST. art. 26, § 1. This amendment was passed mainly as a result of the efforts of the Arizona Association of Realtors. *See* Adler, *Are Real Estate Agents Entitled to Practice a Little Law?*, 4 ARIZ. L. REV. 188, 188 (1963).

5. 90 Ariz. 76, 366 P.2d 1 (1961).

6. *Id.* at 88, 366 P.2d at 9. The court relied upon Canon 15 of the American Bar Association Canons of Professional Ethics, which proclaims that lawyers owe entire devotion to the interests of their clients. The court concluded that the relationship between title company employees and their customers bears none of the characteristics of the lawyer-client relationship envisioned in Canon 15. The primary interest of title company employees is in insuring titles. Therefore, these employees owe professional allegiance to the title company, not to their clients. *Id. See also* Hunt v. Maricopa County Employees Merit Sys. Comm'n, 127 Ariz. 259, 263, 619 P.2d 1036, 1040 (1980) (attorneys undergo legal training and examination and are subject to ethical standards, confidentiality requirements, and discipline, whereas laymen are not).

7. *Id.* at 89, 366 P.2d at 10. The court found that filling out a form amounts to drafting a legal instrument. The title company employee exercises discretion as to what form should be used and what language should be inserted in the blank spaces. Although the client should be advised as to the legal effect of the various forms of conveyance and their difference language, title company employees are unqualified to offer such advice. *Id.*

the court concluded that the practice of law in Arizona should be confined to lawyers.[8]

In 1980, the Arizona Supreme Court had a chance to consider the issue of unauthorized practice of law in a different setting. *Hunt v. Maricopa County Employees Merit System Commission*[9] raised the specific issue of whether a government employee could be represented by a union official at an administrative hearing involving an appeal from disciplinary action.[10] Ms. Hunt was employed in the Maricopa County Superior Court Clerk's office.[11] After disciplinary action was taken against her,[12] Ms. Hunt appealed her case to the Maricopa County Employees Merit System Commission.[13] Prior to her hearing Ms. Hunt advised the commission that she wanted to be represented by her union representative, a non-attorney.[14] The commission refused to allow this, concluding that representation by a non-lawyer would constitute the unauthorized practice of law.[15] Ms. Hunt then brought a special action before the Arizona Supreme Court.[16]

Ms. Hunt based her special action upon Arizona Revised Statutes section 32-261(D), which provides that:

> An employee may represent himself or designate a representative, not necessarily an attorney, before any board hearing or any quasi-judicial hearing dealing with personnel matters, providing that no fee may be charged for any services rendered in connection with such hearing by any such designated representative not an attorney admitted to practice.[17]

The *Hunt* court first declared that the practice of law is a matter exclusively within the authority of the judiciary.[18] The court found it in the public interest, however, to allow non-attorney representation in administrative hearings on personnel matters in certain situations.[19] The limitations set forth by the court are these: First, the lay representation must be provided without fee.[20] Second, the subject matter of the hearing must be of so little value that it does not warrant the hiring of an attorney; in any event the value must not exceed $1,000.[21] In addition,

8. *Id.* at 95, 366 P.2d at 14.
9. 127 Ariz. 259, 619 P.2d 1036 (1980).
10. *Id.* at 260-61, 619 P.2d at 1037-38.
11. *Id.* at 261, 619 P.2d at 1038.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. ARIZ. REV. STAT. ANN. § 32-261(D) (Supp. 1980).
18. *Id.* at 261-62, 619 P.2d at 1038-39.
19. *Id.* at 264, 619 P.2d at 1041.
20. *Id.*
21. *Id.*

the court cautioned that this grant of representative authority did not extend the attorney-client privilege to non-attorneys.[22] Furthermore, permission for limited lay representation would be withdrawn should the exception prove to be against the public interest.[23]

As a result of *Hunt*, the distinction between legislative and judicial power to regulate the practice of law is unclear.[24] Consequently, this casenote will first examine the basis for inherent judicial power to regulate the practice of law. Then the varying degrees of deference courts have given to legislative power in this area will be discussed. Next, the development of the doctrine of inherent judicial power in Arizona will be traced through Arizona case law. Finally, *Hunt* will be analyzed in light of precedential cases, and different interpretations of the *Hunt* decision will be explored.

The Basis of Inherent Judicial Power

All state constitutions contain provisions which separate the powers of government into legislative, executive, and judicial departments.[25] In most states, the power to regulate the practice of law is not specifically granted to either the legislature or the judiciary.[26] This omission, however, has not prevented the states' judicial branches from claiming the inherent power to regulate the practice of law.[27] The

22. *Id.*

23. *Id.*

24. Such confusion has also occurred in the aftermath of other similar state court decisions. *See* Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 MINN. L. REV. 783, 783-87 (1971). The author argues that the Minnesota Supreme Court has constantly expanded the doctrine of inherent judicial power since its decision in *In re* Greathouse, 189 Minn. 51, 248 N.W. 735 (1933). With each new decision, confusion over the boundary between judicial and legislative power to regulate the practice of law has increased. *Id.* at 787-95.

25. R. DISHMAN, STATE CONSTITUTIONS: THE SHAPE OF THE DOCUMENT 6 (rev. ed. 1968). The Arizona provision is typical:

> Distribution of Powers
>
> The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and Judicial; and except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

ARIZ. CONST. art. 3.

26. THE UNAUTHORIZED PRACTICE HANDBOOK 3 (J. Fischer & D. Lachman ed. 1972). In Arizona, the powers of the judicial branch are defined in art. 6, § 1-25 of the state constitution. Powers of the legislature are outlined at art. 4, § 1-24. Neither branch is expressly granted the power to regulate the practice of law.

27. *E.g.*, Hunt v. Maricopa County Employees Merit Sys. Comm'n, 127 Ariz. 259, 261-62, 619 P.2d 1036, 1038-39 (1980); Hoffmeister v. Tod, 349 S.W.2d 5, 11 (Mo. 1961) ("It has uniformly been held that our court has the inherent power to regulate and discipline the Bar, to define and declare what is the practice of law, and to prevent the practice of law by laymen or other unauthorized persons."); West Virginia State Bar v. Earley, 144 W.Va. 504, 531, 109 S.E.2d 420, 437 (1959) ("The judicial department of the government has the inherent power, independent of any statute, to inquire into the conduct . . . to determine whether he or it is usurping the function of an officer and illegally engaging in the practice of law and to put an end to such unauthorized practice wherever it is found to exist.").

courts have reasoned that in the absence of an express grant of power, each department of government has "the inherent right to accomplish all objects naturally within" its respective orbit.[28] Since the practice of law is so intimately connected with the judiciary, the power to regulate the practice of law naturally belongs to the judicial department.[29] In view of the separation of governmental powers into three distinct branches, and the mandate that no branch interfere with the powers and functions of the others, it is argued that any effort on the part of the legislature to regulate the practice of law would be unconstitutional.[30] In support of this position, the courts point out that attorneys are officers of the court, and that their conduct is bound up with the proper functioning of the judicial system.[31]

While today most state courts claim a broad power to regulate the practice of law,[32] at one time the courts' power in this area was quite limited.[33] Moreover, at least one commentator has argued that there is no constitutional basis for the courts' inherent power claim.[34] Doubts about the inherent power doctrine have been confined to legal commentaries,[35] however, and have not been expressed in judicial decisions.

---

28. Clark v. Austin, 340 Mo. 467, 476, 101 S.W.2d 977, 981 (1937); *see* Board of Overseers of Bar v. Lee, 422 A.2d 998, 1002 (Me. 1980).

29. Clark v. Austin, 340 Mo. 467, 476, 101 S.W.2d 977, 981 (1937).

30. *Id.*

31. *E.g.*, *In re* the Florida Bar, 316 So.2d 45, 48 (Fla. 1975) (lawyers, as officers of the court, have a professional responsibility to perform functions necessary for the operation of the judicial system); Board of Overseers of Bar v. Lee, 422 A.2d 998, 1002 (Me. 1980) (attorneys, as officers of the court, constitute an important part of the judicial system); West Virginia State Bar v. Earley, 144 W.Va. 504, 518-19, 109 S.E.2d 420, 436 (1959) (an attorney as an officer of the court, like the court itself, is an instrument to advance the ends of justice).

32. See authority cited in note 1 *supra*.

33. Kalish, *The Nebraska Supreme Court, The Practice of Law and the Regulation of Attorneys*, 59 NEB. L. REV. 555,558-59, 562 (1980); *see* Note, *supra* note 24, at 795-96. The author outlines the expansion of the doctrine of inherent judicial power in Minnesota:

> The development of the doctrine of inherent judicial power to regulate the practice of law in Minnesota illustrates a steady evolution away from the historical and logical origins of the concept. The Minnesota Supreme Court began by accepting and depending upon legislative enactments to regulate admission and disbarment; it then determined that statutory authorization was unnecessary because the power to regulate inhered in the court. This power in turn expanded to reach matters less directly related to the actual adjudicatory process, such as nonforensic lay practice and the administration of an organized bar. Finally the court determined that inherent judicial power over the practice of law necessarily implied exclusive judicial power and, conversely, legislative impotence.

Id.

34. Beardsley, *supra* note 2, at 509-10. Beardsley argues that all governmental power originally belongs to the people. When the people adopt a constitution, they vest certain parts of that power in each of the three parts of government. Through their constitution, the people grant certain power to the executive and judicial departments and they reserve certain power to themselves. If the power to regulate the bar is not granted to the executive or judicial departments or reserved to the people, it is vested in the legislative department. Beardsley concludes, "This is hornbook constitutional law. There is no place in our system of constitutional government for inherent power of judges, or for divine right of kings." *Id.* at 510.

35. *Id.* at 509-10; Comment, *supra* note 2, at 163.

Many state courts have taken the position that any legislation that limits or interferes with the inherent power of the courts is invalid.[36] Thus, the legislature, through its police power, may pass legislation in aid of the courts' inherent power, but may not in any way hinder or usurp this power.[37] Since it is the character of the act, and not where it occurs, that is crucial in determining whether an activity constitutes the practice of law,[38] courts have reasoned that their power to regulate the practice of law is not limited to courtroom practice.[39] Applying broad definitions to the meaning of the practice of law, state courts have invalidated many kinds of regulating legislation on the basis that such legislation violates the separation of powers provisions in state constitutions.[40]

The reason for so much judicial activism in this area is twofold. First, it serves to protect the integrity of the judicial process.[41] Second, it serves to protect the public from the consequences of relying on the

36. *See, e.g.*, Merco Constr. Eng'rs v. Municipal Court, 21 Cal.3d 724, 728, 581 P.2d 636, 638, 147 Cal. Rptr. 631, 633 (1978) (legislative enactments relating to admission to the practice of law are valid only to the extent they do not conflict with judicial rules for admission); *In re* Patton, 86 N.M. 52, 54, 519 P.2d 288, 290 (1974) (legislative attempts to control the practice of law are in violation of the exclusive constitutional prerogative of this court); West Virginia State Bar v. Earley, 144 W.Va. 505, 533, 109 S.E.2d 420, 438 (1959) (an enactment by the legislature authorizing the practice of law by laymen is void as an attempt by the legislature to exercise judicial powers).

37. State Bar of Ariz. v. Arizona Land Title & Trust Co., 90 Ariz. 76, 95, 366 P.2d 1, 14 (1961); Hoffmeister v. Tod, 349 S.W.2d 5, 11 (Mo. 1961). There is a fine distinction between aiding and usurping the courts' power. Courts have held that statutory penalties for unauthorized practice are an aid to the courts' power. *See In re* Thompson, 574 S.W.2d 365, 367 (Mo. 1978). *Compare* Bryant v. State, 457 S.W.2d 72, 77-78 (Tex. Civ. App. 1970) (amendment to State Bar Act providing that any attorney convicted of crime of moral turpitude shall be suspended was in aid of court's power) *with* Heiberger v. Clark, 148 Conn. 177, 191, 169 A.2d 652, 659 (1961) (statute fixing qualifications for admission to the bar is a usurpation) *and* Meunier v. Bernich, 170 So. 567, 577-78 (La. App. 1936) (clause in statute exempting certain activities from the definition of practice of law is a usurpation).

38. In State Bar of Ariz. v. Arizona Land Title & Trust Co., 90 Ariz. 76, 87, 366 P.2d 1, 9 (1961), the Arizona Supreme Court defined the practice of law as "those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries. . . ." *Id.*

39. People *ex rel.* Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 357, 8 N.E.2d 941, 947 (1937); *In re* Baker, 8 N.J. 321, 340, 85 A.2d 505, 514-15 (1951); West Virginia State Bar v. Earley, 144 W.Va. 504, 522, 109 S.E.2d 420, 432 (1959).

40. Board of Comm'rs, Ala. State Bar v. State *ex rel.* Baxley, 324 So.2d 256, 262 (Ala. 1976) (statute specifying number of times person may take the bar violates separation of powers provision in constitution); *In re* Park, 484 P.2d 690, 695 (Alaska 1971) (statutory requirements that only United States citizens may practice law in state is encroachment on supreme court's power and unconstitutional); Merco Constr. Eng'rs Inc. v. Municipal Court, 21 Cal. 3d 724, 733, 581 P.2d 636, 641, 147 Cal. Rptr. 631, 636 (1978) (legislation allowing corporations to act as attorneys struck down); Heiberger v. Clark, 148 Conn. 177, 191, 169 A.2d 652, 659 (1961) (statute fixing qualifications for admission to the bar is unconstitutional); *In re* Tenn. Bar Ass'n, 532 S.W.2d 224, 228 (Tenn. 1975) (statute providing no person should be denied license to practice law because he or she is not a member of an association invalidated); *see* Denver Bar Ass'n v. Public Utils. Comm'n, 154 Colo. 273, 279, 391 P.2d 467,471 (1964) (Public Utilities Commission rule allowing lay representation before commission struck down); People *ex rel.* Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 357, 8 N.E.2d 941, 947 (1937) (non-attorney representation before workman's compensation board disallowed).

41. Swenson v. Thibaut, 39 N.C. App. 77, 109, 250 S.E.2d 279, 299 (1978); West Virginia State Bar v. Earley, 144 W.Va. 504, 529, 109 S.E.2d 420, 435-36 (1959).

legal services of unqualified persons.[42] Despite public skepticism,[43] the courts have consistently asserted that regulating the practice of law protects the public, not the monopoly of the bar.[44] This concern with public welfare, however, has not always led to increased judicial activism. Some courts have translated their concern into judicial restraint, as the following section illustrates.

Limitations on Inherent Judicial Power

It has been suggested that courts overstep the boundaries of judicial power when they overturn legislation allowing limited lay practice outside the courtroom.[45] One commentator argues that while the primary purpose of legislative regulation in this area is to protect the public, the judiciary's primary purpose in regulating the practice of law should be to protect the integrity of the judicial system.[46] Therefore, legislation regulating the practice of law should be presumed valid unless it seriously interferes with the judicial process.[47]

Some state courts have at least in part recognized the validity of this deferential approach. In *Clark v. Austin*,[48] the Missouri Supreme Court acknowledged that, in regard to regulation of the practice of law, judicial power is essentially protective and self-serving, while legislative power serves to advance the public welfare.[49] Therefore, so far as is necessary for self-protection, the rights of the courts are paramount; beyond that, the legislature has constitutional rights in the exercise of its police power.[50] The *Austin* court went on to rule that the legislature has the inherent power to prescribe qualifications of those practicing before a public service commission which exercises delegated legislative power.[51]

---

42. Darby v. Mississippi State Bd. of Bar Admissions, 185 So.2d 684, 687 (Miss. 1966); State Bar v. Guardian Abstract & Title Co., 91 N.M. 434, 438, 575 P.2d 943, 947 (1978); *see* Hunt v. Maricopa County Merit Sys. Comm'n, 127 Ariz. 259, 263-64, 619 P.2d 1036, 1040-41 (1980); State Bar of Ariz. v. Arizona Land Title & Trust Co., 90 Ariz. 76, 86-89, 366 P.2d 1, 8-10 (1961).

43. Weckstein, *supra* note 2, at 649.

44. *E.g.*, People *ex rel.* Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 350, 8 N.E.2d 941, 944 (1937); Bump v. District Court of Polk County, 232 Iowa 623, 639, 5 N.W.2d 914, 922 (1942); Darby v. Mississippi State Bd. of Bar Admissions, 185 So.2d 684, 687 (Miss. 1966).

45. Kalish, *supra* note 33, at 557-58; *see* People *ex rel.* Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 365, 8 N.E.2d 941, 951 (1937) (Shaw, J., dissenting). "The selection and discipline of our own officers is a judicial function within our branch of government. The restraint and punishment of [those practicing before administrative agencies] in the interest of the public is a police power, within control of the legislature and beyond our jurisdiction." *Id.*

46. Kalish, *supra* note 33, at 557-58. Kalish points out that as between the judiciary and the legislature, the legislature is the more democratic institution, and is charged with the primary responsibility for promoting the public welfare. *Id.* at 557.

47. *Id.* at 558.

48. 340 Mo. 467, 101 S.W.2d 977 (1937).

49. *Id.* at 497, 101 S.W.2d at 994.

50. *Id.* at 496, 101 S.W.2d at 994.

51. *Id.* at 498, 101 S.W.2d at 995; *see* note 79 *infra*.

In 1933, the California Supreme Court similarly deferred to the legislative view of what is in the public interest and upheld a statutory provision allowing non-attorney representation before workmen's compensation boards.[52] More recently, the Florida Supreme Court ruled that in the absence of legislation, the court's responsibility to protect the public from the unauthorized practice of law predominates.[53] The legislature, however, has the authority to oust the court's role in supervising the practice of law before administrative proceedings.[54] In 1976 the Oregon Supreme Court was faced with a statutory regulation of the bar that conflicted with an Oregon Supreme Court rule.[55] The statute was upheld because it was not considered an unreasonable encroachment on the court's power.[56] The court pointed out that the separation of powers doctrine cannot work absolutely[57] and that there is necessary overlap between legislative and judicial functions.[58]

Other courts have implicitly deferred to legislative authority by interpreting statutes dealing with the practice of law[59] and by refusing to uphold challenges to such statutes.[60] Finally, the Wisconsin Supreme Court has held that an administrative agency's approval of a practice is not a usurpation of the court's power, if that practice is well-known to the court, and the court has not forbidden it.[61]

Further support for the contention that the practice of law is not a matter exclusively within the authority of the judiciary is found in the United States Supreme Court's deference to legislative and administrative rules regulating who may practice before federal agencies.[62] For example, in *Goldsmith v. United States Board of Tax Examiners*,[63] the Supreme Court held that even in the absence of statutory authoriza-

52. Eagle Indem. Co. v. Industrial Accident Comm'n, 217 Cal. 244, 249, 18 P.2d 341, 343 (1933).

53. The Florida Bar v. Moses, 380 So.2d 412, 417 (Fla. 1980).

54. *Id.*

55. Sadler v. Oregon State Bar, 275 Or. 279, 293, 550 P.2d 1218, 1226 (1976). The statute in question allowed public inspection of communications received by the Bar which concerned attorneys' professional conduct. This conflicted with Oregon Supreme Court Rule 32 which required investigations and hearings of disciplinary matters to be private. *Id.*

56. *Id.* at 295, 550 P.2d at 1227.

57. *Id.* at 285, 550 P.2d at 1222. The court rejected the Bar's argument that the statute must fail because of the conflict. *Id.* at 293, 550 P.2d at 1226. Since the statute did not affect rules for admission or disbarment, but only affected disciplinary procedure, the law did not unreasonably encroach upon the judicial function of disciplining lawyers. *Id.* at 295, 550 P.2d at 1227.

58. *Id.* at 285, 550 P.2d at 1222.

59. *See* Bland v. Reed, 261 Cal. 2d 445, 449, 67 Cal. Rptr. 859, 862 (1968) (statute authorizing non-attorney representation before workman's compensation boards); Oregon State Bar v. Wright, 280 Or. 693, 702-04, 573 P.2d 283, 288-89 (1977) (statute permitting any person to act as attorney for another in a justice court).

60. *In re* Bogart, 9 Cal. 3d 743, 750, 511 P.2d 1167, 1172, 108 Cal. Rptr. 815, 820 (1973).

61. State *ex rel.* Reynolds v. Dinger, 14 Wis. 2d 193, 203, 109 N.W.2d 685, 690 (1961) (administrative rule permitting real estate brokers to select and fill in standard forms does not conflict with court's authority to regulate practice of law).

62. Weckstein, *supra* note 2, at 658; see text & notes 63-67 *infra*.

63. 270 U.S. 117 (1926).

tion, an administrative tribunal may adopt rules as to who may practice before it.[64] Moreover, in *Sperry v. Florida*,[65] the United States Supreme Court held that a non-attorney registered with the United States Patent Office could practice patent law in Florida even though the Florida Supreme Court had determined that his actions constituted an unauthorized practice of law in that state.[66] The Court held that Florida's substantial interest in regulating the practice of law must yield to federal legislation permitting the Commissioner of Patents to allow non-attorney practice before the Patent Office.[67]

Thus, despite their broad claims of inherent judicial power, state courts have shown a surprising amount of judicial deference to legislation regulating the practice of law.[68] At the federal level, the Supreme Court has upheld congressional actions delegating the authority to regulate the practice of law before administrative agencies to those agencies.[69] In so doing, the Supreme Court has implicitly recognized congressional power to regulate the practice of law before administrative agencies.[70] Previous to *Hunt*, the Arizona judiciary likewise exercised similar restraint when faced with legislative enactments regulating the practice of law.[71]

Arizona and Inherent Judicial Power

In *Hunt*, the Arizona Supreme Court asserted that regulation of the practice of law is exclusively within the power of the judiciary.[72]

64. *Id.* at 121-22. The administrative tribunal was the Board of Tax Appeals, an independent agency in the executive branch of government. The duties of the board included hearing and determining appeals from the Commissioner of Internal Revenue on tax assessment and tax deficiency issues. Despite the lack of a statutory grant specifically authorizing the board's regulation of attorneys, the Court found for the board. *Id.* at 122. The Court reasoned that the general grant of power to the board to prescribe the procedures governing its conduct of business included the power to regulate attorneys practicing before it. *Id.* at 22.

65. 373 U.S. 379 (1963).

66. *Id.* at 385. The Florida Bar instituted proceedings in the Supreme Court of Florida to enjoin Sperry, a non-attorney, from practicing before a Florida branch of the United States Patent Office. *Id.* at 381. The Florida Supreme Court found that Sperry's actions constituted an unauthorized practice of law which it could properly prohibit, and that neither the United States Constitution nor federal statute empowered any federal body to authorize such conduct in Florida. *Id.* at 382.

67. *Id.* at 383-84. The Supreme Court held that since 35 U.S.C. § 31 expressly permits the commissioner to authorize non-attorneys to practice before the Patent Office, the Florida Supreme Court's injunction violated the supremacy clause. *Id.* at 385.

68. See text & notes 47-60 *supra*.

69. See text & notes 64-66 *supra*.

70. The entire discussion in *Sperry* is based upon this underlying assumption. *See* 373 U.S. at 396-97. The Court points out that as an exercise of this authority, Congress refused to limit the right to practice law before administrative agencies to lawyers when it passed the Administrative Procedure Act, despite protests of the bar. *Id.* at 388; *see* 5 U.S.C. §§ 1001-1011 (1976).

71. *See* text & notes 74-88 *infra*.

72. 127 Ariz. 259, 261, 619 P.2d 1036, 1038 (1980). In support of this claim, the Arizona Supreme Court pointed out that courts in other jurisdictions claim ultimate authority to regulate the practice of law. The court failed, however, to note the difference between "exclusive" and "ultimate" authority. *Id.* at 262, 619 P.2d at 1039.

The *Hunt* court maintained that this regulatory authority is granted under the state constitution.[73] As authority for these propositions, the court cited three Arizona Supreme Court cases.

The first case, *In re Miller*,[74] involved a challenge to a statute requiring individuals to pass an examination before being admitted to practice law in Arizona.[75] In *Miller*, the court made no sweeping declarations concerning inherent judicial power and the practice of law. Rather, the court expressed considerable deference for legislation regulating the practice of law.[76] While *Miller* did hold that the legislature may not enact laws which would make it impossible or unreasonably difficult for the judiciary to function as a separate and distinct unit of government,[77] the court pointed out that it is generally recognized that legislatures may prescribe necessary qualifications for admission to the bar.[78] Furthermore, the court declared that the wisdom of the policy embodied in the statute was not for the courts to determine, but rather was a matter of legislative concern.[79]

In *In re Bailey*,[80] a disbarment proceeding, the court's tone was again somewhat deferential. The court held that although the legislature may properly require that attorneys meet minimum qualifications, the courts, using their inherent power, may require more.[81] Furthermore, whenever an attorney's conduct is found to fall below standards set for professional conduct, his privilege to practice may be denied either under statutory authority or by the courts' inherent power to act.[82]

The *Hunt* court's assertion of the power to regulate the practice of law before administrative agencies[83] does not necessarily follow from the reasoning in *Miller* and *Bailey*. While the *Hunt* court claimed *exclusive* authority to regulate the practice of law, *Miller* and *Bailey*

73. *Id.* at 261-62, 619 P.2d at 1038-39; see ARIZ. CONST. art. 3.
74. 29 Ariz. 582, 244 P. 376 (1926).
75. *Id.* at 586, 244 P. at 377.
76. *See id.* at 597, 244 P. at 380.
77. *See id.* at 596, 244 P. at 380.
78. *Id.* at 596-97, 244 P. at 380.
79. *Id.* at 597, 244 P. at 380. The court stated,

> Whether it is a wise policy to require those who have practiced for years in other states to pass an examination before being admitted is not a matter for the courts to decide, but one which the legislature alone must determine. We are of the opinion that under its police power the legislature has the right to say what qualifications a citizen must possess in order to be permitted to practice law the same as it may determine the requirements for practicing medicine, dentistry, pharmacy, or any other profession, vocation or calling.

Id. Like the cases cited at notes 47-60 *supra*, the *Miller* court appeared to acknowledge that protection of the public is a legislative, rather than a judicial, function. *Id.* at 597, 244 P. at 380.
80. 30 Ariz. 407, 248 P. 29 (1926).
81. *Id.* at 412-13, 248 P. at 30; *accord, In re* Greer, 52 Ariz. 385, 390, 81 P.2d 96, 98 (1938).
82. 30 Ariz. at 413, 248 P. at 30.
83. *See* 127 Ariz. at 261, 619 P.2d at 1038.

plainly recognized the existence of legislative power in this area.[84] Since *Hunt* did not deal with courtroom practice,[85] the court could easily have concluded that the statutory exception embodied in section 32-261 (D)[86] would not have threatened the court's existence as a distinct unit of government.[87] Following *Miller*, the *Hunt* court could have deferred to the legislative view of the public good and upheld section 32-261 (D) as a proper exercise of legislative power. *Bailey*, however, may actually provide the more appropriate rationale for the *Hunt* result. This would be true if in fact the *Hunt* court resolved the constitutional issue in favor of the statute's validity and then added its own stricter conditions.[88] The constitutional issue is never really resolved, however, since *Hunt* neither recognizes any concurrent legislative power to regulate the practice of law nor expressly invalidates the statute. Thus, it is unclear whether the court invalidated section 32-261 (D) and promulgated its own rule, or whether it left the statute intact while adding certain conditions to it.

In the third case, *State Bar of Arizona v. Arizona Land Title & Trust Co.*,[89] the Arizona Supreme Court held that realtors, by filling in standard form purchase contracts, were engaged in the unauthorized practice of law.[90] The court approved the lower court's conclusion that it had the inherent power to supervise all lawyers and all phases of the practice of law.[91] After a careful analysis of the history of the legal profession[92] and the interests of title company customers,[93] the court concluded that it was not in the public interest to allow realtors to continue the practice.[94] It is important to note, however, that the holding in *Arizona Title*—together with the court's evaluation of the public interest—took place absent any statutory enactment in this area. Therefore, the court was not faced with the possibility of invalidating a legislative enactment.

Between the decisions in *Arizona Title* and *Hunt*, the Arizona Supreme Court considered the issue of unauthorized practice of law on

84. *Compare id. with In re* Miller, 29 Ariz. 582, 597, 244 P. 376, 380 (1926) *and In re* Bailey, 30 Ariz. 407, 412-13, 248 P. 29, 30 (1926).

85. *Hunt* dealt, however, with practice before a commission created by the judiciary. *Id.* at 261, 619 P.2d at 1038. Thus, unlike situations in which practice is before an administrative board delegated authority only by the legislature, see text & note 50 *supra*, it is at least arguable that judicial integrity is at stake. *Hunt*, however, mentions neither this distinction nor the issue of whether judicial integrity is at stake.

86. ARIZ. REV. STAT. ANN. § 32-261(D) (Supp. 1980); *see* text accompanying note 17.

87. See text & note 77 *supra*.

88. See text & note 81 *supra*.

89. 90 Ariz. 76, 366 P.2d 1 (1961).

90. *Id.* at 95-96, 366 P.2d at 14-15.

91. *Id.* at 81, 366 P.2d at 4.

92. *Id.* at 82-87, 366 P.2d at 5-8.

93. *Id.* at 88-94, 366 P.2d at 9-14.

94. *Id.* at 86, 366 P.2d at 8.

at least two occasions.[95] Although both cases are particularly relevant to the *Hunt* holding, neither case was discussed in the *Hunt* decision. In one case, *Hackin v. State*,[96] the Arizona Supreme Court interpreted a statutory exception to the unauthorized practice rule and implicitly recognized the authority of the legislature to make such exceptions.[97] The statute at issue in *Hackin* allowed laymen to file applications for writs of habeas corpus on behalf of a prisoner.[98] Noting the state's concession that the filing of such applications constituted the practice of law,[99] the court characterized the statute as an exception to the rule forbidding unauthorized practice.[100] The court found, however, that the public policy of the statute is served once the application is filed.[101] Therefore, the statute did not authorize court appearances by laymen.[102]

In *Hackin*, the court also looked to the public policy behind the statute in order to interpret the scope of the exception to the unauthorized practice rule.[103] In contrast, the *Hunt* court made its own public policy determination.[104] While the *Hackin* court never questioned the authority of the legislature to make such exceptions, the *Hunt* court seemed to deny any legislative authority in this area by its claim of exclusive power. Thus, the two cases cannot be easily reconciled.

In *Florez v. City of Glendale*,[105] the Arizona Supreme Court was presented with a factual situation similar to that found in *Hunt*. The issue in *Florez* was whether the Glendale Personnel Board could refuse to allow non-attorneys to practice before it.[106] Citing *Arizona Title* for the proposition that the practice of law in Arizona is confined to licensed attorneys,[107] the court held that representation of another by a non-attorney before a personnel board constitutes an unauthorized

95. Florez v. City of Glendale, 105 Ariz. 269, 463 P.2d 67 (1967); Hackin v. State, 102 Ariz. 218, 427 P.2d 910 (1967).

96. 102 Ariz. 218, 427 P.2d 910 (1967).

97. Id. at 219, 427 P.2d at 911.

98. ARIZ. REV. STAT. ANN. § 13-2002 (renumbered § 13-4122 (1978)).

99. 102 Ariz. at 219, 427 P.2d at 911.

100. *Id.*

101. *Id.* The court said,

> The provision embodied in A.R.S. 13-2002 permitting any person acting on behalf of the prisoner to file an application for a writ of habeas corpus further safeguards the protection that the writ was designed to provide. It is a practical realization that one confined to a cell, without ready access to a lawyer, often must depend on his family or friends to have "his body brought before the court" (i.e. "habeas corpus") to determine the legality of his incarceration.

Id.

102. *Id.* at 219-20, 427 P.2d at 911-12.

103. *Id.*

104. 127 Ariz. at 264; 619 P.2d at 1041.

105. 105 Ariz. 269, 463 P.2d 67 (1969).

106. *Id.* at 270, 463 P.2d at 68.

107. *Id.*

practice of law.[108] The decision in *Florez* was reached with very little analysis and in the absence of any authorizing legislation.

Perhaps *Florez* best supports the argument that the *Hunt* court actually deferred to legislative authority despite its claim of exclusive judicial power. The only major factual distinction between *Florez* and *Hunt* is the existence of the statute in *Hunt*. Since opposite conclusions were reached in *Hunt* and *Florez*, the existence of the statute in *Hunt* was apparently controlling.

The *Hunt* decision was achieved in an effort to balance the public's need for affordable representation with the court's perceived duty to protect the public from unqualified representatives.[109] This balancing is a necessary task in light of the court's claim of exclusive right to regulate the practice of law. Before the court asks whether or not limited lay practice serves the public good, however, it might ask whether or not the courts are in the best position to make such a determination. The *Hunt* court did not acknowledge the distinction made by some courts and commentators between legislative and judicial power to regulate the practice of law.[110] Further, the court did not consider the possibility of deferring to the legislative view of the public good, even though Arizona case law suggests that this is an acceptable course.[111]

Read literally, *Hunt* represents a significant expansion of the doctrine of inherent judicial power in Arizona. In *Miller* and *Bailey*, the courts asserted their power to regulate the practice of law while also recognizing concurrent legislative power in this area.[112] *Arizona Title* later expanded the scope of inherent power found in *Miller* and *Bailey* without mentioning either the presence or absence of legislative power in this area. In contrast, the *Hunt* court's claim of exclusive power implies that the legislature has no authority to regulate the practice of law.

Miller and *Bailey* implied that judicial power to regulate the practice of law overrides legislative power only when judicial integrity is

108. *Id.*

109. 127 Ariz. at 264, 619 P.2d at 104. In considering the public need for representation, the court recognized that petitioner's expense in employing an attorney to represent her would far exceed the $100 value of her claim. *Id.* at 263, 619 P.2d at 1040. Furthermore, the court conceded that petitioner's union representative was skilled in the area of employer-employee relations. *Id.* The court also agreed that it is illogical to support an individual's right to self-representation, no matter how incompetent, while simultaneously refusing that individual the right to receive help from a competent non-attorney. *Id.* On the side of public protection, the court pointed out that attorneys must pass an examination before they can represent the public, that attorneys are subject to ethical standards established for the clients' benefit, and that communication between attorneys and their clients is protected. *Id.* The court noted that in general, "[t]he ethical standards, discipline, training, and controls placed on lawyers is lacking in the case of representation by a layman." *Id.*

110. See text & notes 45-61 *supra*.

111. See text & note 79 *supra*.

112. See text & notes 74-88 *supra*.

threatened.[113] In *Arizona Title*, however, the court regulated unauthorized practice outside the courtroom in order to protect the public.[114] Following *Arizona Title*, the *Florez* court refused to allow non-attorneys to represent employees at personnel hearings.[115] Apparently the *Hunt* court also followed *Arizona Title* in undertaking its own analysis of the public good.[116] However, since *Hunt* allowed non-attorney representation, and *Arizona Title* and *Florez* did not, the existence of section 32-261 (D) must have affected the *Hunt* court's public welfare analysis. If this is so, the *Hunt* decision may not actually exceed the confines of *Miller* and *Bailey*. That is, the *Hunt* court may have upheld section 32-261 (D) and, under its inherent power, set out additional limitations on non-attorney representation before personnel boards. If this reading of *Hunt* is correct, however, the court should not have claimed exclusive authority to regulate the practice of law. On the other hand, if the court meant what it said when it asserted exclusive power, this claim is difficult to reconcile with prior Arizona case law.

Conclusion

In *Hunt v. Maricopa County Employees Merit System Commission*, the Arizona Supreme Court claimed an exclusive right to regulate the practice of law, including practice before administrative agencies. In this area, the court declared protection of the public to be its primary objective. In order to reach this objective, the court has tried to balance the public's need for some sort of representation with the court's duty to protect the public from incompetent representatives.

By making this claim of exclusive judicial power, the court has refused to recognize any distinction between legislative and judicial purposes for regulating the practice of law, even though Arizona case law suggests that the court has deferred to the legislative view of the public's welfare in the past. Reliance on the court's language thus indicates that *Hunt* greatly expanded the doctrine of inherent judicial power in Arizona. The *Hunt* result, however, argues for a narrower interpretation. Ultimately, the impact of *Hunt* on the division of legislative and judicial authority to regulate the practice of law awaits clarification through future case law.

Roberta H. Schulte

113. See text & notes 69-77 *supra*.
114. See text & notes 6, 89-94 *supra*.
115. 105 Ariz. at 270, 463 P.2d at 68.
116. 127 Ariz. at 263, 619 P.2d at 1040.

III. CONTRACTS

A RACE TO CONTRACT PROCEEDS: MILLER BOND SURETY ENTITLED TO ALL EARNED BUT UNPAID CONTRACT PROCEEDS OVER EQUITABLE PLEAS OF UNTIMELY SUPPLIER-CLAIMANT

Recognizing a serious need for uniform regulations regarding public construction contracts in Arizona,[1] the state legislature in 1969 passed the Little Miller Act.[2] Modelled after its federal counterpart,[3] the Act affords protection to the contracting public entity, unpaid subcontractors, laborers, and materialmen.[4] To effectuate this purpose, the Act requires a contractor undertaking a public construction project to secure a performance and payment bond.[5]

In *General Acrylics v. United States Fidelity & Guaranty Co.*,[6] the Arizona Court of Appeals was faced with a case of first impression involving a determination of remedies available to unpaid suppliers under the Little Miller Act.[7] The problem confronting the court was whether a surety or an unpaid subcontractor is entitled to remaining earned but unpaid contract proceeds upon completion of a construction project performed under the Act.[8] The court held that where the sub-

---

1. W. Haug, Need for Little Miller Act in Arizona (on file at the Arizona Law Review). Haug's article outlines the need for uniform statutory guidelines when filing suit on construction bonds. *Id. passim.* For instance, Haug cites former ARIZ. REV. STAT. ANN. § 18-113 (1960) (repealed 1974), which dealt with Arizona Highway Projects. Haug, *supra* at 2-4. These projects required a construction bond, and the initiation of suit on the bond was not limited by any notice or limitation provisions. *Id.* at 3; *see* Wells-Steward Constr. Co., Inc. v. Martin-Marrietta Corp., 103 Ariz. 375, 378, 442 P.2d 119, 122 (1968) (notice not required, but statute of limitations is six years. ARIZ. REV. STAT. ANN. § 12-548 (1956)).

2. 1969 Ariz. Sess. Laws ch. 52, § 11 (codified at ARIZ. REV. STAT. ANN. § 34-222 (1974)).

3. *Compare* 40 U.S.C. § 270a (1969) *with* ARIZ. REV. STAT. ANN. §§ 34-221 to 224 (1974 & Supp. 1980-81). *See also* Haug, *Arizona's Little Miller Act*, 5 ARIZ. B.J. 13 (1969).

> [T]he new law incorporates the provisions of the federal Act—40 U.S.C.A. § 270 (a) and (b) and makes the Arizona law the same as that governing federal contracts with two minor exceptions. These exceptions relate to the surety's liability for federal income tax withholdings and attorneys' fees in suits on the bonds.

Id.

Furthermore, Haug foresees that "[t]he Arizona courts will probably follow the federal decisions in interpretation of the new Act." *Id.* at 15.

4. American Sur. Co. v. Westinghouse Elec., 296 U.S. 133, 135 (1935); see text & notes 33-38 *infra*.

5. ARIZ. REV. STAT. ANN. § 34-222(A)(1), (2) (1974).

6. 128 Ariz. 50, 623 P.2d 839 (Ct. App. 1980).

7. *Id.*

8. *Id.*

contractor failed to make a timely claim against the bond, and where there were sufficient funds left on the bond to pay the subcontractor's claim in full had it been filed within the one-year statutory period, the subcontractor lost any equitable lien it might have had in the remaining funds held by the court.[9]

This casenote will initially discuss the facts leading to the dispute in *General Acrylics*. Next, the purpose of the Little Miller Act and the remedy it provides an unpaid supplier will be examined. To this end, the principles of subrogation and equitable lien rights will be analyzed and an attempt will be made to reconcile *General Acrylics*' implementation of the Little Miller Act with these equitable principles. Finally, the impact of this case on future Arizona decisions and, more specifically, on suppliers in public construction projects in Arizona will be considered.

General Acrylics v. USF&G—*A Factual Summary*

In June, 1976, Tuba City Unified School District entered into a contract with Slavens Construction Company (Slavens) for construction work.[10] Since the project involved a state public entity, Arizona law required Slavens to procure performance and payment bonds.[11] United States Fidelity & Guaranty Company (USF&G) executed and delivered the bonds, naming Tuba City as obligee.[12]

Slavens, as contractor, subsequently entered into subcontracts with several suppliers, two of whom were General Acrylics and All American School Supply (All American).[13] Although Slavens completed the structures contracted for, he failed to pay several suppliers, including General Acrylics and All American.[14] At the time of the completion of the contract, Tuba City, as owner, still held the sum of $106,228 in earned but unpaid proceeds due Slavens.[15] Slavens, All American, and General Acrylics each claimed the monies held by Tuba City.[16] Tuba

9. *Id.* at 55-56, 623 P.2d at 844-45.

10. *Id.* at 51, 623 P.2d at 840.

11. ARIZ. REV. STAT. ANN. § 34-222 (1974). *See generally* text & notes 34, 38 *infra*.

12. 128 Ariz. at 51, 623 P.2d at 840.

13. *Id.*

14. *Id.*

15. *Id.* The court determined in this case that it was unnecessary to distinguish between "funds which are statutorily authorized to be withheld by the government body and those that are simply not paid by the government body." *Id.* at 53 n. 3, 623 P.2d at 842 n. 3. ARIZ. REV. STAT. ANN. § 34-221(2) (1974 & Supp. 1980-81), provides in relevant part:

> [t]he owner by mutual agreement may make progress payments as provided for in this paragraph . . . but to insure the proper performance of such contract, the owner shall retain ten percent of the amount of each estimate until final completion and acceptance of all material, equipment and work covered by the contract.

16. 128 Ariz. at 51, 623 P.2d at 840.

City subsequently interpleaded the funds in its control.[17] The trial court determined that Slavens had no interest in the funds and thus dismissed his claim.[18] All American moved for summary judgment against Slavens personally and USF&G as surety on Slaven's payment bond.[19] These judgments were granted and USF&G paid All American the total amount of its outstanding debt.[20] All American then assigned all right, title, and interest in its judgment against Slavens to USF&G.[21]

After All American was paid, $200,000 remained on USF&G's payment bond which was available for any legitimate claims under the original contract.[22] General Acrylics, after filing a cross-claim and receiving judgment against Slavens in the All American action, failed to file a claim against USF&G within the one-year statutory period mandated by the Little Miller Act.[23] Thus, General Acrylics was left with one possible remedy—the monies remaining in the interpleaded action.[24] USF&G, as assignee and subrogee of All American, claimed it was entitled to all the contract proceeds, contending that General Acrylics' sole remedy was on the bond.[25] General Acrylics, on the other hand, claimed that it, as an unpaid subcontractor, was entitled to priority in the distribution of the interpleaded funds.[26]

The court, in its analysis, placed All American and General Acrylics in positions of preferred creditors as suppliers of the public contract.[27] Because USF&G was subrogated to All American's position, it

17. *Id.* The interpleader action, however, was not disposed of until All American's separate action was decided. *See id.*

18. *Id.*

19. *Id.*

20. *Id.* The total amount of All American's outstanding debt was $243,123.41. *Id.*

21. *Id.* The doctrine of subrogation is not self-executing. Thus, by payment, a surety does not become subrogated to the rights of the creditor. The surety acquires only a right to subrogation. This right must be actively asserted before subrogation can actually take place unless the right to subrogation is given by statute. Holland v. Kodimer, 11 Cal.2d 40, 42, 77 P.2d 843, 845 (1938); Fitts v. Terminal Warehousing Corp., 170 Tenn. 198, 203, 93 S.W.2d 1265, 1267 (1936); Downing v. Jeffrey, 173 S.W.2d 241, 246 (Tex. Civ. App. 1943).

22. 128 Ariz. at 51, 623 P.2d at 840.

23. *Id.*; ARIZ. REV. STAT. ANN. § 34-223(c) (1974). Section 34-223(c), providing in relevant part, "[N]o . . . suit shall be commenced after the expiration of one year from the date on which the last of labor was performed or materials were supplied. . . ."

24. Although General Acrylics obtained a judgment against Slavens in the All American action, Slavens was insolvent and unable to relieve General Acrylics. Similarly, because General Acrylics failed to file a timely claim on the bond, it was precluded from seeking relief from the surety. *See generally* text & note 75 *infra*.

25. 128 Ariz. at 52, 623 P.2d at 841.

26. *Id.*

27. *Id.* at 55, 623 P.2d at 844; *see In re* Dutcher Constr. Corp., 197 F. Supp. 441, 442-43 (W.D.N.Y. 1961), *aff'd*, 378 F.2d 866 (2d Cir. 1967). In *Dutcher*, the district court vacated the order of the referee which had held that since laborers and materialmen were only general creditors, they had no superior rights to the retained fund. The referee had further found that since the surety was subrogated to the rights of the materialmen, it too possessed only the rights of a general

held a position as a preferred creditor with General Acrylics.[28] The court, however, reduced General Acrylics to a general creditor because of its failure to file a timely claim against the bond.[29] The court held, therefore, that USF&G, as a preferred creditor, was entitled to the entire amount of the funds held by the court.[30] Because the *General Acrylics* court also implicitly held that failure to file on the statutorily mandated bond precluded other relief,[31] the Miller Act must be examined to test the correctness of this holding.

The Miller Acts—A Perusal

Congress passed the Miller Act in 1935.[32] The express purpose of the act was to afford greater protection to unpaid subcontractors, laborers, and materialmen working on public construction projects.[33] This protection is provided by requiring the contractor to procure a per-

creditor. Consequently, the referee had ruled that the fund belonged in the hands of the trustee in bankruptcy. 197 F. Supp. at 442-43.

The Second Circuit, affirming the reversal, stated:

> Various courts, especially the Court of Claims, have frequently said that the right of the laborers and materialmen to be paid is *prior to* the corresponding right of general creditors. Thus, laborers and materialmen have an equitable lien on all proceeds of the contract, and the government has an equitable obligation to see that they are paid. . . . The reason for this equitable obligation rests on the principle that it would be unfair for the government to permit money to go to general creditors, whose services did not contribute to performance of the contract, when laborers and materialmen responsible for performing the contract remain unpaid.

378 F.2d at 870 (emphasis added). *But see* American Sur. Co. v. Westinghouse Elec. Mfg. Co., 75 F.2d 377, 379 (5th Cir. 1935), where the court stated that furnishers of labor or material to the contractor have the legal status of general creditors. Similarly, a commentator has stated that "[i]n the absence of specific authority the supplier only stands as a general creditor against retained percentages." G. ASHE, LAW OF PUBLIC IMPROVEMENT CONTRACTORS' BONDS 57 (1966).

28. 128 Ariz. at 56, 623 P.2d at 845. *See generally* text & note 43 *infra*.

29. 128 Ariz. at 56, 623 P.2d at 845.

30. *Id.*

31. *See id.* at 55-56, 623 P.2d at 844-45. By citing authority such as United States v. Pennsylvania Dep't of Highways, 349 F. Supp. 1370, 1378 (E.D. Pa. 1972) (materialmen's sole right to reimbursement is on Miller Act bond) and United States v. McDonald Constr. Co., 295 F. Supp. 1363, 1366 (E.D. Mo. 1968) (materialmen may not pursue equitable lien theory to earned but unpaid contract proceeds where surety stands ready, willing, and able to pay), the court in *General Acrylics* implied that failure to file against the bond precluded other relief. *See* 128 Ariz. at 55, 623 P.2d at 844.

The court, however, could not have been limiting General Acrylics' sole remedy to the bond since it recognized a breach of contract claim in General Acrylics' favor by acknowledging its summary judgment against Slavens. *Id.* at 51, 623 P.2d at 840. Furthermore, the court's subsequent recognition of General Acrylics as a general creditor illustrates that it does not intend to say that an action on the bond is the exclusive remedy. Apparently, then, what the court meant was that a claim on the bond is the supplier's exclusive remedy, as a preferred or priority creditor, to the specific fund composed of contract proceeds; the supplier may, however, still have a cause of action as a general creditor.

32. Act of Aug. 24, 1935, ch. 642, § 1, 49 Stat. 793, *codified at* 40 U.S.C. § 270(a) (1969).

33. S. REP. NO. 1238, 74th Cong., 1st Sess. (1935). The Act as originally passed was entitled "An Act for the protection of persons furnishing material and labor for the construction of public works." Compiled Statutes at 2523 (1901); *In re* McGarry & Son, 240 F. 400, 401 (7th Cir. 1917). In the early years of the Act, case law established that one of its purposes was to give full protection to such laborers and materialmen in public construction work. *Id.* at 402; United States v. Rundle, 100 F. 400, 402 (9th Cir. 1900); United States v. National Sur. Co., 92 F. 549, 551 (8th Cir. 1899).

formance and payment bond through a surety who guarantees completion of the project and payment to all laborers and materialmen.[34]

Following its implementation and success, states began adopting similar acts, commonly referring to this legislation as "Little Miller Acts."[35] In 1969, Arizona adopted its own Little Miller Act, which appeared substantially similar to its federal counterpart.[36]

The statutory intent of surety bond legislation has been considered in case law. For example, in *American Surety Co. v. Westinghouse Electric Manufacturing Co.*,[37] the Fifth Circuit stated that surety bonds have a two-fold purpose. The surety bond provides a performance bond assuring the government of the contractor's full performance on his obligations. In addition, it provides a payment bond protecting third persons who furnish labor and material to the contractor.[38]

Mechanically, the act requires that suit not be brought by claimants (unpaid laborers or materialmen) until after ninety days from the date the claimant last supplied labor or materials.[39] Suit must be brought, however, within one year from the date the claimant last supplied materials or labor.[40] Although the Miller Act exists to provide greater protection in case of default, especially to laborers and materialmen, the Act does not purport to be the exclusive remedy available to an unpaid subcontractor.[41] The question of whether equitable relief may provide a remedy when one fails to adequately file on the bond will now be examined.[42]

---

34. 40 U.S.C. § 270(a) (1969).

35. *See* General Acrylics v. United States Fidelity & Guar. Co., 128 Ariz. 50, 50-52, 54; 623 P.2d 839, 839-40, 843 (1980) (referring to the "Little Miller Act"). *See also* ARK. STAT. ANN. § 36.25.010-.020 (1962); FLA. STAT. 255.05 (1977); N.M. STAT. ANN. § 6-6-11 (1975); OR. REV. STAT. 279.526 *et seq.* (1953).

36. *Compare* 40 U.S.C. § 270(a) (1969) *with* ARIZ. REV. STAT. ANN. §§ 34-222 to 224 (1974).

37. 75 F.2d 377 (5th Cir. 1935).

38. *Id.* at 379. "[T]he furnishers of labor or material for the work contracted are, like the government, beneficiaries of the bond." *Id.*; G. ASHE, *supra* note 27, at 42. Ashe states that "[t]he purposes underlying enactment of materialmen bond statutes [are], namely, to secure for such persons a prompt and adequate source of payment of bills for materials going into public improvements." *Id. But see In re* Flotations Syst., 65 F. Supp. 698, 702 (S.D. Cal. 1946); Casenote, *Miller Act Bond Surety is Subrogated to Equitable Right of Laborers and Materialmen to Percentage Fund Retained by the United States*, 24 MONT. L. REV. 161, 164 n.20 (1963). The author states: "[I]t has been argued that recognition of equitable rights in laborers and materialmen is unnecessary and inconsistent with the intended protection of the payment bond." *Id.*

39. 40 U.S.C. § 270(a) (1969); ARIZ. REV. STAT. ANN. § 34-223(c) (1974).

40. *See* note 39 *supra*.

41. 40 U.S.C. § 270(a) (1969); ARIZ. REV. STAT. ANN. § 34-223(c) (1974); Pearlman v. Reliance Ins. Co., 371 U.S. 132, 140 (1962). In addressing a suggestion that the congressional purpose of the Miller Act was to repudiate equitable doctrines and establish a uniform statutory rule, the *Pearlman* Court stated that "[C]ongress, in passing the Miller Act [did not] intend to repudiate equitable principles so deeply imbedded in our commercial practices, our economy and our law. . . ." *Id.*

42. Cases holding equitable relief proper in such a situation include American Sur. Co. v. Sampsell, 327 U.S. 269, 272-73 (1946); American Sur. Co. v. Westinghouse Elec. Mfg. Co., 296 U.S. 133, 137-39 (1935); and Western Asbestos Co. v. TGK Constr. Co., Inc., 121 Ariz. 388, 391, 590 P.2d 927, 930 (1979). In *Western Asbestos*, the Arizona Supreme Court held that failure to

II. *Beyond the Little Miller Act: A Plea for Equitable Relief*

A. *Stepping into Your Shoes, His Shoes, Their Shoes—The Equitable Principle of Subrogation*

In *General Acrylics*, the issue of USF&G's right to equitable subrogation to the rights and remedies of All American was conceded.[43] The question, therefore, should have become one of priority between two unpaid creditors in equal positions.[44] Because General Acrylics, as a preferred creditor, failed to file timely on the bond, however, its status as preferred creditor was reduced to that of general creditor.[45] Furthermore, because USF&G was subrogated to a position of a preferred creditor, the court concluded that the "race" to retained funds was between one general and one preferred creditor.[46] As between two in unequal positions, the preferred will always win out.[47] The *General Acrylics* court, however, should not necessarily have relegated General Acrylics to the position of a general creditor. An alternative subrogation analysis may have led to a more equitable result.

The principle premise in subrogation is that a subrogee stands in the shoes of the creditor.[48] Thus, a subrogee is entitled to all the bene-

---

comply with the statutorily prescribed format of notice did not preclude unpaid laborers from securing relief. *Id.* at 390-91, 590 P.2d at 929-30. *See also* State Highway Comm'n v. United Pac. Ins. Co., 52 Mich. App. 157, 159, 216 N.W.2d 469, 470 (1974), where the court held that four unpaid subcontractors had a priority right to the contract retainages held by the state despite the fact that the subcontractors had failed to file timely notices which would otherwise entitle them to recovery under the payment bond.

43. 128 Ariz. at 51, 623 P.2d at 840. Subrogation is the substitution of another person in the place of a creditor. Thus, the person in whose favor subrogation is exercised succeeds to the rights of the creditor in relation to the debt. Maryland Cas. Co. v. Lincoln Bank & Trust Co., 18 F. Supp. 375, 377 (W.D. Ky. 1937), *rev'd on other grounds*, 103 F.2d 1016 (6th Cir. 1939); Mosher v. Conway, 45 Ariz. 463, 468, 46 P.2d 110, 112 (1935); Harrison v. Citizens & Southern Nat'l Bank, 185 Ga. 556, 560, 195 S.E. 750, 752 (1937). Furthermore, a surety or guarantor, by payment of the debt of his principal at a time when he is obliged to make payment, acquires an immediate right to be subrogated. Sanders v. Magill, 9 Cal. 2d 145, 150, 70 P.2d 159, 162 (1937).

44. See text & notes 27-28 *supra*. Similar questions concern the priority between a lending institution and surety. The surety that has paid all the subcontractors has a priority right to funds retained by the owner. *See* Pearlman v. Reliance Ins. Co., 371 U.S. 132, 137, 141 (1962). Similarly, as between a trustee in bankruptcy and a surety, the court in United Pac. Ins. Co. v. United States, 319 F.2d 893 (1963), held that the surety was entitled to the unexpended contract balance even if an alleged subcontractor remained unpaid. *Id.* at 895.

But see American Sur. v. Sampsell, 327 U.S. 269, 271 (1946). There, the Supreme Court held that a bankruptcy court has the equitable power to subordinate the claim of the surety to the claims of unpaid laborers and materialmen who failed to file timely on the bond. *Id.* When dealing with the question of priority between a paid surety and an unpaid supplier, the Supreme Court has determined that a surety's rights are not equal to those of a member of the class its bond was given to protect. American Sur. Co. v. Westinghouse Elec. Mfg. Co., 296 U.S. 133, 138 (1935).

45. 128 Ariz. at 56, 623 P.2d at 845.

46. *Id.*

47. *See id.*; Lit Bros. v. Goodman, 144 Pa. Super. 43, 47, 18 A.2d 519, 522 (1941). The *Goodman* court reaffirmed the principle that the paying surety is favored in the law. *Id.* at 49, 18 A.2d at 522; *accord*, United States Fidelity & Guar. Co. v. John R. Alley & Co., 34 F. Supp. 604, 609 (D. Okla. 1940) (surety's subrogation right to unpaid funds is usually regarded as superior to the claims of general creditors).

48. Crutchfield v. Johnson & Latimer, 243 Ala. 73, 75, 8 So.2d 412, 414 (1942). *See also*

fits and remedies of the creditor and may use all the means which the creditor could employ to enforce payment.[49] A subrogee is not entitled, however, to any greater rights than those the creditor would have possessed.[50] Because USF&G, as surety, stepped into the shoes of a creditor satisfied by the bond, USF&G's only remaining recourse was to make a claim to the contract proceeds.[51] Similarly, because General Acrylics could no longer file on the bond,[52] its sole recourse was to the contract proceeds. If USF&G, as subrogee, is entitled to recourse against contract proceeds and its rights cannot exceed those whose shoes it stepped into, then All American, as creditor-obligee of the construction project, also must have that right of recourse.[53] In other words, if (1) All American is a preferred creditor not filing on the bond and (2) General Acrylics is a preferred creditor not filing on the bond and (3) All American can collect directly from contract proceeds (its subrogee's rights only being as great as its own), then (4) General Acrylics should similarly be allowed to collect directly from contract proceeds.

The court, however, did not analyze the case as just presented.[54] In fact, the court's reaffirmance of the principle that a subcontractor's only recourse is against the bond would be in direct conflict with the proposed analysis.[55] In its opinion, the *General Acrylics* court cites *United Pacific Insurance Co. v. United States*[56] for the proposition that an unpaid subcontractor's sole recourse is against the available surety

---

Freeman v. Equitable Life Assurance Soc'y, 304 Ill. App. 517, 531-32, 26 N.E.2d 714, 720 (1940); Smith v. Southwestern Engraving Co., 157 Okla. 211, 213, 11 P.2d 921, 922 (1932).

49. See authority cited in note 46 *supra*.

50. Beecher v. Leavenworth State Bank, 192 F.2d 10, 14 (1951), *cert. denied*, 343 U.S. 953 (1952); Fidelity & Cas. Co. v. Hoyle, 64 F.2d 413, 416 (1933); Crutchfield v. Johnson & Latimer, 243 Ala. 73, 75, 8 So.2d 412, 414 (1942); Mosher v. Conway, 45 Ariz. 463, 473, 46 P.2d 110, 114 (1935). In *Crutchfield*, the court held that where the record did not disclose a right to foreclose on a first mortgage, a subsequent mortgagee who paid off the loan on the first, and was thus subrogated to the position of the first mortgagee, did not acquire a right to foreclose on that mortgage. 243 Ala. at 75-76, 8 So.2d at 414.

51. 128 Ariz. at 51-52, 623 P.2d at 840-41. This assumption implies that had there been no bond, the creditors of the construction project would have had to proceed directly against the contract retainages. *See id.* Although technically both General Acrylics and All American, as subcontractors, successfully maintained an action against the general contractor, Slavens was insolvent and therefore judgment proof. *Id.* at 51, 623 P.2d at 840; *see* American Sur. v. Sampsell, 327 U.S. 269, 273 (1946) ("[B]ut for [the contractor's] insolvency . . . these [unpaid] laborers and materialmen would have been able to recover from him the money due them"). *See generally* note 43 *supra*, explaining the doctrine of equitable subrogation.

52. ARIZ. REV. STAT. ANN. § 34-223 (1974) requires that all suits involving public construction projects be commenced within one year from the date on which the last of labor was performed or materials were supplied by claimant. General Acrylics last performed work on the Tuba City contract in July, 1977, and did not file a claim against the USF&G bond until March, 1979, thus failing to comply with the statutory limitation. 128 Ariz. at 51, 623 P.2d at 840.

53. See note 43 *supra*.

54. *See generally* 128 Ariz. at 54, 623 P.2d at 843 for the court's analysis.

55. See text & notes 31, 52-54 *supra*.

56. 319 F.2d 893 (Ct. Cl. 1963).

bond.[57] The *United Pacific* case, however, inaccurately cites *United States v. Munsey Trust Co.*[58] in support of this principle. The *Munsey* decision does not discuss recourse measures available to unpaid suppliers.[59] The narrow holding of *Munsey* provides only that the government has a right to set off any independent claims it may have against monies retained as earned but unpaid contract proceeds.[60] That is, the government cannot be obligated to take a loss by paying suppliers and materialmen first.[61] Rather, the government's claim to that money must be satisfied before any other creditors' claims.[62] The *Munsey* Court did not, however, exclusively limit a subcontractor's recourse to relief solely on the bond as the *United Pacific* and *General Acrylics* courts maintain.[63] The *Munsey* court did reaffirm, however, that the statutory provisions requiring bonds were enacted for the purpose of protecting suppliers and laborers.[64]

In *American Surety Co. v. Sampsell*,[65] the United States Supreme Court implied that an unpaid supplier's recourse for relief was not limited to the bond and, therefore, equitable principles could be applied to afford protection beyond the scope of statutory provisions.[66] *Sampsell* involved a private construction project where a surety and several untimely lien claimants were seeking remuneration from contract proceeds which had passed to a trustee in bankruptcy proceedings.[67] Although *Sampsell* involved bankruptcy principles,[68] the Supreme Court, in affirming a decree by the referee that proceeds were to pass to the suppliers and not to the surety, stated that "[b]ut for [the contrac-

57. *See* 128 Ariz. at 55, 623 P.2d at 844, *quoting* United Pac. Ins. Co. v. United States, 319 F.2d 893, 896 (Ct. Cl. 1963). "If Briggs was in fact a laborer or materialman, he would have no right to assert a claim against the money in the hands of the government; his sole remedy is in the payment bond." *Id. But see In re* Dutcher Constr. Corp., 378 F.2d 866, 869 (2d Cir. 1967) *citing* Henningsen v. United States Fidelity & Guar. Co., 208 U.S. 404, 410 (1908), for the proposition that the United States is under an equitable obligation to see that laborers and materialmen are paid; National Sur. Corp. v. United States, 133 F. Supp. 381, 384 (Ct. Cl. 1955) ("[L]aborers and materialmen have the equitable right to assert a claim to moneys in the hands of the [government] which are due the contractor").

58. 332 U.S. 234 (1947).

59. *See id.*

60. *Id.* at 236-44.

61. *Id.* at 244.

62. The right of the government to retained percentages of progress payments on a construction contract does not devolve to a surety who has paid laborers and materialmen so as to prevent the government from applying the sums which it holds to the satisfaction of its own claim growing out of a separate and independent transaction. *Id.* at 242-43. "The provisions of 40 U.S.C. § 270a requiring a separate bond for payment of laborers and materialmen were enacted for their benefit and do not give sureties who have paid them rights to the detriment of the Government." *Id.* at 243-44.

63. United Pac. Ins. Co. v. United States, 319 F.2d 893, 896 (Ct. Cl. 1963); General Acrylics v. United States Fidelity & Guar. Co., 128 Ariz. 50, 55-56, 623 P.2d 839, 844-45 (Ct. App. 1980).

64. 332 U.S. at 243-44.

65. 327 U.S. 269 (1946).

66. *Id.* at 273.

67. *Id.* at 270-71.

68. *Id.* at 274.

tor's] insolvency and bankruptcy, these [unpaid] laborers and materialmen would have been able to recover from him the money due them, no matter what their rights against the surety might have been."[69] This last statement brings the *Sampsell* decision within the perimeter of the present case, even though *General Acrylics* did not involve bankruptcy proceedings.[70]

Applying the *Sampsell* rule to this case, General Acrylics, as an unpaid materialman, should have been able to recover from Slavens, the general contractor, its unpaid debt regardless of what the rights against the surety might have been.[71] Unfortunately, the trial court determined that Slavens had no interest in the contract proceeds as there were materialmen yet unpaid.[72] Therefore, because Slavens, though insolvent, had not filed bankruptcy[73], General Acrylics could not recover from Slavens its judgment against him and was thereby effectively prohibited from sharing in any contract proceeds.[74]

Thus, we have come around in a complete circle. General Acrylics cannot obtain satisfaction from Slavens because he is insolvent. Nor can it get its money from the surety because a claim under the bond no longer exists.[75] Finally, it cannot obtain money from the contract proceeds owed to the contractor because these proceeds are not vested in the contractor until he has paid all his materialmen and laborers.[76] Although *General Acrylics* propounds the policy that an unpaid supplier's only recourse for relief is an action on the bond,[77] the *Sampsell* case is good law and should be asserted as permitting an equitable remedy when the facts of this case arise again.

B. *Equitable Lien Theory: The Government's Moral Obligation*

General Acrylics proposed an equitable lien theory to support its

69. *Id.* at 273.

70. See 128 Ariz. at 54, 623 P.2d at 843, where the *General Acrylics* court distinguishes *Sampsell* on the bankruptcy issue. Note, however, that the court cites Pearlman v. Reliance Ins. Co., 371 U.S. 132 (1962), as authority in this case despite the fact that *Pearlman* was also a bankruptcy case.

71. *See* 327 U.S. at 273.

72. 128 Ariz. at 51, 623 P.2d at 840.

73. It is interesting to question here why General Acrylics did not file involuntary bankruptcy proceedings against Slavens, which would have forced the case into federal bankruptcy court and possibly caused a different result. *See* American Sur. v. Sampsell, 327 U.S. 269 (1946). *See also* 11 U.S.C. 95(b) (1976), which sets out the requirements for creditors in filing involuntary bankruptcy proceedings.

74. 128 Ariz. at 51, 623 P.2d at 840.

75. *Id.* at 52, 623 P.2d at 841; United States v. Pennsylvania Dep't of Highways, 349 F. Supp. 1370, 1378 (E.D. Pa. 1972). "Since any claims would now be barred by the one year limitation, there can be no unpaid claims as a matter of law." *Id.*

76. *See* United Pac. Ins. Co. v. United States, 319 F.2d 893, 895 (Ct. Cl. 1963); United States v. Pennsylvania Dep't of Highways, 349 F. Supp. 1370, 1381-82 (E.D. Pa. 1972); United States v. MacDonald Co., 295 F. Supp. 1363, 1366 (E.D. Mo. 1968).

77. *See* 128 Ariz. at 55-56, 623 P.2d at 844-45; note 31 *supra*.

right to the earned but unpaid proceeds held by the state governmental agency (Tuba City).[78] An equitable lien constitutes a right, charge, or encumbrance over property.[79] This type of lien generally arises either by express contract[80] or by implication from the conduct of the parties[81] out of considerations of right and justice.[82]

Persons involved in public construction projects do not have "lien" rights comparable to those involved in private construction projects.[83] The rationale behind this rule is that public property should not be subjected to encumbrances because of the failure of a contractor to pay his laborers and materialmen.[84] Therefore, the net result is that in seeking remuneration, the unpaid supplier cannot hold the government liable by demanding the sale of the finished product.[85] A line of cases exists, however, holding that although there is no legal duty on the part of the government (both federal and state) to make sure subcontractors are paid, there does exist a moral duty which courts of equity have upheld.[86]

In *In re Dutcher Construction Corp.*,[87] the Second Circuit held that the government has an equitable obligation to see that monies owing laborers and materialmen are paid.[88] In so holding, the court reasoned that it would be unfair for the government to permit any retained funds to go to general creditors whose services did not contribute to the completion of the project when laborers and materialmen, who fully performed under their contracts with the government, remained unpaid.[89] Because USF&G was subrogated to the position of All American as a

78. 128 Ariz. at 53-54, 623 P.2d at 842-43.

79. Jones v. Carpenter, 90 Fla. 407, 412, 106 So. 127, 129 (1925).

80. 4 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1235-37 (5th ed. 1941); *see* Exchange State Bank v. Federal Sur. Co., 28 F.2d 485, 487 (8th Cir. 1928).

81. Exchange State Bank v. Federal Sur. Co., 28 F.2d 485, 487 (8th Cir. 1928).

82. Greer v. Goesling, 54 Ariz. 488, 489, 97 P.2d 218, 219 (1939).

83. General Acrylics v. United States Fidelity & Guar. Co., 128 Ariz. 50, 52-53, 623 P.2d 839, 841-42 (Ct. App. 1980). In private construction projects, materialmen and laborers may secure a mechanic's lien which allows them to force the sale of the property to secure payment for work completed or materials supplied in the event that the contractor defaults. *Id. See also* Kerr-McGee Oil Indus., Inc. v. McGray, 89 Ariz. 307, 311, 361 P.2d 734, 736 (1961) (purpose of lien statutes is to protect laborers and materialmen who enhance, and thereby increase, the value of another's property).

84. Webb v. Crane Co., 52 Ariz. 299, 307-08, 80 P.2d 698, 703 (1938).

85. Kerrigan, *The Surety as Competing Claimant to Contract Funds*, 24 INS. COUNSEL J. 34, 35 (1957). "The government's immunity relieve[s] it of any risk of lien claims, per se." *Id.*

86. *See* Pearlman v. Reliance Ins. Co., 371 U.S. 132, 196 (1962); American Sur. v. Sampsell, 327 U.S. 269, 272 (1946); *In re* Dutcher Constr. Corp., 378 F.2d 866, 870 (2d Cir. 1967); National Sur. Corp. v. United States, 133 F. Supp. 381, 383 (1955); G. ASHE, *supra* note 27, at 51. Ashe states that "legislative acceptance of the social responsibility of the sovereign power to assure laborers and suppliers that payment would be made for their contributions to the public improvement" was a primary consideration behind the inception of statutory payment bonds. Ashe adds that this equitable obligation is recognized even today notwithstanding protection provided by the Miller Act bond. *Id.* at 96.

87. 378 F.2d 866 (2d Cir. 1967).

88. *Id.* at 870.

89. *Id.*

preferred creditor, however, the equitable rights of two creditors in equal positions were in conflict.[90] General Acrylics argued that a balancing of the equitable considerations favored it, as against USF&G, because of the strong social policy involved in the government's "moral" obligation to see that laborers and materialmen in public construction projects are paid.[91]

In rejecting General Acrylics' equitable lien theory, the court reasoned that although the theory may have some validity in analyzing the rights of laborers, suppliers, and general creditors of the contractor, it has little value in analyzing rights as between "parties who have actual connection with the construction."[92] This contention must fall, however, when cases such as *American Surety Co. v. Sampsell*[93] and *American Surety Co. v. Westinghouse Electric Manufacturing Co.*[94] are considered. *Sampsell* involved a surety and unpaid subcontractors who had not filed timely claims on the bond.[95] Similarly, the controversy in *Westinghouse* involved a surety and unpaid subcontractors who were not fully remunerated by the surety.[96] Both cases upheld the equitable lien theory in favor of the unpaid subcontractor.[97] Although these cases can be distinguished on minute factual grounds,[98] the underlying premise that these cases dealt with rights of parties directly involved with the construction project remains. In light of the fact that the United States Supreme Court has applied equitable lien principles when dealing with priorities between two parties directly involved in a construction project,[99] the failure of the *General Acrylics* court to analyze the cases on an equitable lien theory is without justification.

In further support of defeating the equitable lien claim, the *General*

---

90. 128 Ariz. at 53, 623 P.2d at 842.

91. *See id.*

92. *Id.* at 54, 623 P.2d at 843. "Thus, the cases that have dealt with the rights of parties involved in the construction have not applied the equitable lien theory." *Id.* at 55, 623 P.2d at 844. This statement, however, is not completely accurate. See text & notes 93-99 *infra*.

93. 327 U.S. 269 (1946). Although factually similar to *General Acrylics*, the *Sampsell* case involved a private construction setting. See text & notes 65-70 *supra*, for a discussion of the *Sampsell* case.

94. 296 U.S. 133 (1935). In American Sur. Co. v. Westinghouse Elec. Mfg. Co., the surety had paid the full amount of its bond and there were still unpaid claimants. *Id.* at 135.

95. 327 U.S. at 270-71.

96. 296 U.S. at 135. In *Westinghouse*, the bond amount was insufficient to cover all the claims of unpaid laborers and materialmen; therefore, some suppliers were left unpaid. *Id.* at 135-36. The Court disallowed the surety's claim for reimbursement from earned but unpaid proceeds where there were suppliers yet unpaid who similarly sought remuneration from this fund. *Id.* at 138-39. *See also* General Acrylics v. United States Fidelity & Guar. Co., 128 Ariz. 50, 54, 623 P.2d 839, 843 (Ct. App. 1980), where the *General Acrylics* court distinguishes the factual situation in *Westinghouse*.

97. 296 U.S. at 139, 327 U.S. at 272-74.

98. *See* General Acrylics v. United States Fidelity & Guar. Co., 128 Ariz. 50, 54, 623 P.2d 839, 843 (Ct. App. 1980); text & notes 65-70, 96 *supra* (distinguishing *Sampsell* and *Westinghouse* from the *General Acrylics* case).

99. *See* text & notes 93-97 *supra*.

Acrylics court analogized the legal posture of the parties to a situation involving a private construction project.[100] In so doing, the court stated that the payment bond required in public construction works "becomes the 'property' against which liens could be filed to secure payment for labor and materials."[101] The court added that in a private construction setting, untimely lien claimants, although having contributed to the value of the completed structures, do not have a right to share in the proceeds of the sale of the encumbered property with timely lien claimants.[102] Applying this principle to public construction projects, untimely bond claimants (General Acrylics) have no right to share with timely bond claimants (USF&G as subrogee of All American) in the proceeds of the bond itself.[103] If, as the court stated, the bond stands for the encumbered property, then the foregoing conclusion cannot be disputed.

The conflict presented to the *General Acrylics* court, however, was not the disposition of the bond proceeds.[104] The problem centered around the disposition of the contract proceeds and whether the proceeds should be given to either a surety who was paid to take the risk of the contractor's default or to an unpaid materialman who, had he been more diligent, could have received the full amount due him from the surety.[105]

In a recent line of cases, the federal courts have held that materialmen and laborers are not entitled to any funds remaining in the hands of the owner-obligee, the government, and that their only recourse to remuneration is through a claim on the Miller Act bonds.[106] In *Pearlman v. Reliance Insurance Co.*,[107] however, the United States Supreme Court disagreed. As between a surety and a contractor's trustee in bankruptcy, the *Pearlman* court held that the surety was entitled to retained earned but unpaid proceeds held by the court.[108] The Court stated that the government had a right to use the monies it held to pay

100. 128 Ariz. at 54, 623 P.2d at 843; *see* text & notes 101-03 *infra*, for the court's analysis.

101. 128 Ariz. at 54, 623 P.2d at 843. The court further notes that "this is the obvious legislative intent under Arizona's Little Miller Act." *Id.*

102. *Id.*

103. *See id.*

104. *Id.* at 50, 623 P.2d at 839.

105. *See id.* at 51, 623 P.2d at 840. The analogy advanced by the court thus fails to address the issue of the case.

106. United States v. Pennsylvania Dep't of Highways, 349 F. Supp. 1370, 1378 (E.D. Pa. 1972) (materialmen's sole right of relief is an action on the bond; failure of surety to pay a bond claimant does not defeat surety's right of subrogation to other claims which he had paid); United States v. MacDonald Constr. Co., 295 F. Supp. 1363, 1366 (E.D. Mo. 1968) (equitable lien remedies sought by laborers and materialmen to reach funds held by the government extend only in situations where such funds are determined to be due the contractor; Miller Act bonds are in lieu of liens given in private construction settings). *See also* note 31 *supra*.

107. 371 U.S. 132 (1962).

108. *Id.* at 141-42.

laborers and materialmen and that laborers and materialmen had a right to be reimbursed from this retained fund,[109] thus creating an equitable lien in favor of these unpaid subcontractors.[110] The court in *General Acrylics*, therefore, in dismissing the unpaid subcontractor's plea for equitable lien rights, similarly dismissed the rationale of several past Supreme Court decisions in this area of the law.[111]

Considering the fact that *General Acrylics* was a case of first impression in Arizona,[112] one is puzzled that the court of appeals, with no conclusive legislative history to rely upon, announced a limiting remedial rule that fails to recognize equitable principles and fails to protect suppliers of public construction contracts.[113] In light of this result, it is difficult to understand why the Arizona Supreme Court declined to grant review.[114] Leaving conditions as they are perpetuates confusion, for there are inconsistencies among the courts as to what theories and analyses should be applied.[115] Moreover, there are inconsistencies as to what conclusions should be reached.[116] In Arizona, however, *General Acrylics* must operate as a red flag to all subcontractors in public construction projects that equitable lien rights will not be applied in their favor as against a surety who stands ready and able to pay all legitimate bond claims.

Conclusion

General Acrylics conveys one message to suppliers of public construction projects in Arizona: Proceed in the statutorily prescribed manner. Although the Miller Acts (both federal and state) do not specifically limit a supplier or laborer's recourse to a claim on the bond, the *General Acrylics* court found this to be the legislative intent. Thus, in a priority contest between a surety and an unpaid materialman who fails to file a claim within the statutory period mandated by the Little Miller Act, the surety will prevail.

---

109. *Id.* at 141.

> [T]he government ha[s] a right to use the retained fund to pay laborers and materialmen; . . . the *laborers and materialmen ha[ve] a right to be paid out of the fund*; . . . the contractor, had he completed his job and paid his laborers and material men would have become entitled to the fund; and . . . the surety, having paid the laborers and materialmen, is entitled to the benefit of all these rights to the extent necessary to reimburse it.

Id. (emphasis added).

110. *See* text & notes 79-82 *supra*.

111. Pearlman v. Reliance Ins. Co., 371 U.S. 133, 141 (1962); American Sur. Co. v. Sampsell, 327 U.S. 271, 272-73 (1946); American Sur. Co. v. Westinghouse Elec. Mfg. Co., 296 U.S. 133, 137-38 (1935).

112. 128 Ariz. at 50, 623 P.2d at 839.

113. *See* text & notes 92-97 *supra*.

114. Petition for review to the Arizona Supreme Court was denied February 3, 1981. Arizona Supreme Court 15268-PR.

115. *See* text & notes 106-11 *supra*.

116. *Id.*

As this casenote has illustrated, the court's analysis contains certain flaws and inconsistencies. The result reached, however, may not be inappropriate, especially in light of public policy considerations. In cases dealing with equitable principles, public policy factors should always be considered. Although not mentioned by the *General Acrylics* court, a strong public policy rationale for its decision lies in the fact that a ruling in favor of laborers and materialmen will tend to discourage sureties from supplying the necessary bond coverage in public construction projects or, alternatively, may result in prohibitively high premium increases to cover the additional risk.

In further support of the court's holding, it may be argued that the requirement that an unpaid supplier file its claim within one year of the date materials were last supplied does not represent an unreasonable burden to the supplier. Such a public policy rationale provides a much more persuasive basis for the court's result in defeating the supplier's equitable argument. The court's reliance on conflicting law, on the other hand, only perpetuates the confusion that currently exists in this area of the law.

Mary C. Buthala

ASSIGNMENT OF CONTRACTS: DELEGATION OF RIGHTS, DUTIES OR BOTH?

An assignment of contract[1] is generally an expression of intention by the assignor that rights under the contract shall pass to the assignee.[2] This general definition of assignment, however, is not so easily applied in a situation involving a bilateral executory contract. A bilateral contract exists when the assignor has a duty to perform as well as a right to a performance by the other party to the contract.[3] An executory contract is one which is yet to be performed.[4] In this situation, the question arises whether the duties of performance are assigned along with the rights under the contract.

If duties were assigned in the same sense in which rights are, an assignment would relieve the assignor of his obligation to perform those duties.[5] Instead of an assignment of the performance of duties, an assignor may instead expressly or by implication delegate the duty to perform.[6] With or without a delegation of duties, however, the original promisor remains liable under the contract and may be answerable in damages if the delegatee does not strictly carry out performance.[7] Jurisdictions vary in their positions on whether the duties under a con-

---

1. It is erroneous to speak of an "assignment of a contract" because a "contract" cannot be assigned. One should speak in terms of the assignability of the legal relations created by the contract, since all that can be assigned is the right created by the promise. Corbin, *Assignment of Contract Rights*, 74 U. PA. L. REV. 207, 207 (1926). *See also* Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 924 (2d Cir. 1977); J. MURRAY, CONTRACTS § 289, at 591 (2d rev. ed. 1974); Note, *Obligations of the Assignee of a Bilateral Contract*, 42 HARV. L. REV. 941, 944 n.1 (1929).

Chapter 15 of the RESTATEMENT (SECOND) OF CONTRACTS speaks solely of the assignment of "rights" and not of the assignment of "contracts." RESTATEMENT (SECOND) OF CONTRACTS § 316 (1981).

2. Corbin, *supra* note 1, at 210; *see* Taylor v. Southern Bank & Trust Co., 227 Ala. 565, 567, 151 So. 357, 359 (1933); Lipe v. Bank, 236 N.C. 328, 331, 72 S.E.2d 759, 761 (1952); Minshall v. Sanders, 175 Okla. 1, 2, 51 P.2d 940, 942 (1936); RESTATEMENT (SECOND) OF CONTRACTS § 317 (1981).

3. 4 A. CORBIN, CONTRACTS § 906, at 628-29 (1952); *see* Crane Ice Cream Co. v. Terminal Freezing & Heating Co., 147 Md. 588, 593, 128 A. 280, 282 (1925); Rose v. Vulcan Materials Co., 282 N.C. 643, 659-60, 194 S.E.2d 521, 532-33 (1973).

4. BLACK'S LAW DICTIONARY 512 (5th ed. 1979).

5. *See* Edward Petry & Co v. Greater Huntington Radio Corp., 245 F. Supp. 963, 967-68 (S.D. W. Va. 1965); Crane Ice Cream Co. v. Terminal Freezing & Heating Co., 147 Md. 588, 598, 128 A. 280, 283 (1925); 3 S. WILLISTON, CONTRACTS § 411, at 19 (3d ed. 1960); Corbin, *supra* note 1, at 216.

6. Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 924 (2d Cir. 1977); Macke Co. v. Pizza of Gaithersburg, 259 Md. 479, 486, 270 A.2d 645, 649 (1970); Crane Ice Cream Co. v. Terminal Freezing Co., 174 Md. 588, 598, 128 A. 280, 283 (1925); *see* 4 A. CORBIN, *supra* note 3, § 866; S. WILLISTON, *supra* note 5, at 20.

One may delegate performance of his duties as long as the performance will be substantially the same as that by the delegator. Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 924 (2d Cir. 1977); Macke Co. v. Pizza of Gaithersburg, 259 Md. 479, 486, 270 A.2d 645, 649 (1970).

7. Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 924 (2d Cir. 1977); Crane Ice Cream Co. v. Terminal Freezing Co., 147 Md. 588, 598, 128 A. 280, 283 (1925); Bolin

tract are implicitly delegated when the benefits are assigned.[8]

Arizona recently interpreted the problem of delegation of duties under an assignment in *Norton v. First Federal Savings*.[9] In *Norton*, plaintiffs contracted with owner/developer Hutcheson to purchase land in June, 1974.[10] As required by city ordinance, Hutcheson posted a performance bond with First Federal Savings (First Federal) as surety,[11] guaranteeing the completion within eighteen months of certain off-site improvements.[12] The City of Flagstaff granted several extensions to the call date of the bond after Hutcheson failed to complete the improvements within the time allotted.[13]

In the fall of 1976, Hutcheson encountered financial difficulties and defaulted on several realty mortgages and deeds of trust held by First Federal.[14] Subsequently, Hutcheson entered into an agreement with First Federal[15] conveying his interest in properties, including plaintiffs' lots, to First Federal in lieu of its foreclosure on a number of mortgages and deeds of trust.[16] Plaintiffs filed suit against Hutcheson and First Federal for damages caused by the delay in completion of the off-site improvements.[17] The trial court entered partial summary judg-

---

Oil Co. v. Staples, 496 S.W.2d 167, 176 (Tex. Civ. App. 1973); *see* 4 A. CORBIN, *supra* note 3, § 866; 3 S. WILLISTON, *supra* note 5, at 20; Corbin, *supra* note 1, at 216.

In the case of a novation, however, the original promisor is relieved of liability under the contract because the parties to the contract agree that the delegatee will be substituted for the original promisor. *See* Catalina Groves v. Oliver, 73 Ariz. 38, 42, 236 P.2d 1022, 1025 (1951); Robinson v. Rispin, 33 Cal. App. 536, 541, 165 P. 979, 982 (1917); Atlantic & N.C.R. Co. v. Atlantic & N.C. Co., 147 N.C. 368, 380, 61 S.E. 185, 189 (1908).

8. See text & notes 29, 30 & 31 *infra*.

9. 128 Ariz. 176, 624 P.2d 854 (1981).

10. *Id.* at 177, 624 P.2d at 855.

11. *Id.* at 178, 179, 624 P.2d at 856, 857. The performance bond was posted in accordance with the requirements of FLAGSTAFF, ARIZ., CODE title IX, ch. 13 (1970) (and amendment thereto); *id.*, title XI, ch. 20 (1966) (and amendment thereto); and ARIZ. REV. STAT. ANN. § 9-463 (1974 & Supp. 1980-81). *Id.* The performance bond guaranteed that First Federal would pay $120,000 to the City of Flagstaff to make the improvements if Hutcheson failed to do so. *Id.*

12. 128 Ariz. at 178, 624 P.2d at 856. Hutcheson was to grade streets and install water and sewer lines. *Id.*

13. *Id.* at 177, 624 P.2d at 855. Despite repeated assurances and extensions, improvements were not completed for two and one-half years. *Id.* at 177-78, 624 P.2d at 855-56. In June, 1976, plaintiffs filed an action for damages and a motion for an order to show cause why the court should not issue a writ of mandamus compelling the city to cash the security posted by Hutcheson and complete the off-site improvements. *Id.* The Superior Court of Coconino County ordered the city to complete the off-site improvements by June 1, 1977. *Id.* at 178, 624 P.2d at 856. The city filed a third-party complaint against First Federal as surety on the performance bond. Appellant's Opening Brief at 6. This complaint was dismissed when First Federal agreed to complete the improvements for the city by June 15, 1977. *Id.* at 7. The off-site improvements were finally completed by First Federal in July, 1977—two and one-half years after their projected completion date. 128 Ariz. at 180, 624 P.2d at 858.

14. Appellant's Opening Brief at 7.

15. The agreement provided for delivery to First Federal of certain deeds and assignments in lieu of foreclosure. 128 Ariz. at 180, 624 P.2d at 858. It was "intended to cover all interests and potential interests that Hutcheson may hold in the properties which are the subject of this Agreement, ..." *Id.*

16. See note 15 *supra*.

17. 128 Ariz. at 177-78, 624 P.2d at 855-56.

ment in favor of First Federal and the Arizona Supreme Court affirmed.[18]

This casenote will first examine the common law underpinnings of assignment of contractual rights and the varying rules of interpretation that have emerged. Arizona's position on the subject will be reviewed and the *Norton* decision analyzed in that regard. Finally, the implications of the *Norton* case for future contract assignment issues in Arizona will be discussed.

Development of Case Law on Assignment of Contracts

At early common law, courts refused to recognize the assignment of contractual rights and duties because a contract was considered personal in nature and valid only between the original parties.[19] Thus, an assignee could not bring suit in his own name on an assigned contract.[20] In time, courts began to recognize the assignment of contractual rights by creating a legal fiction whereby the assignor was said to retain the contract right while giving the assignee a power of attorney to enforce that right on behalf of the assignor in the assignor's name.[21]

The courts have now come to recognize the assignability of contractual rights,[22] and generally allow the assignee to bring suit in his own name.[23] In addition, most jurisdictions permit one party to a contract to delegate duties to a non-party[24] so long as the duties are not of a personal nature[25] and the contract is not based on a relationship of

18. *Id.* at 178, 624 P.2d at 856. Only those counts in the complaint which sought damages from First Federal were dismissed on summary judgment. The plaintiffs still had recourse against Hutcheson because his liabilities under the contracts with the plaintiffs were not absolved by his assignment to First Federal. *Id.* at 182, 624 P.2d at 860.

19. Atlantic & N.C.R. Co. v. Atlantic & N.C. Co., 147 N.C. 368, 374, 61 S.E. 185, 187 (1908); Reef v. Mills Novelty Co., 126 Tex. 380, 382-83, 89 S.W.2d 210, 211 (1936); Lingle Water Users' Ass'n v. Occidental Bldg. & Loan Ass'n, 43 Wyo. 41, 44, 297 P. 385, 387 (1931).

20. *See* Langel v. Betz, 250 N.Y. 159, 163, 164 N.E. 890, 891 (1928); Little v. City of Portland, 26 Or. 235, 242, 37 P. 911, 912 (1894); Corbin, *supra* note 1, at 214.

21. *See* Welch v. Mandeville, 14 U.S. (1 Wheat.) 223, 235-36 (1816); Little v. City of Portland, 26 Or. 235, 242, 37 P. 911, 912 (1894); Mallory v. Lane, 79 Eng. Rep. 292 (Ex. 1615); J. CALAMARI & J. PERILLO, CONTRACTS § 18-2, at 632 (1970); Corbin, *supra* note 1, at 214.

22. *See* Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U.S. 379, 387 (1888); National Bond & Inv. Co. v. Midwest Fin. Co., 156 Kan. 531, 535, 134 P.2d 639, 642 (1943); Summers v. Freishtat, 274 Md. 404, 407, 335 A.2d 89, 90-91 (1975); Crane Ice Cream Co. v. Terminal Freezing & Heating Co., 147 Md. 588, 598, 128 A. 280, 283 (1925); Atlantic & N.C.R. Co. v. Atlantic & N.C. Co., 147 N.C. 368, 374, 61 S.E. 185, 187 (1908).

23. In 42 states, an action can be prosecuted by an assignee in his own name. *See* RESTATEMENT (SECOND) OF CONTRACTS (1981) at 144-46 for a list of states, including Arizona, allowing an assignee to sue in his own name.

24. Grismore, *Is the Assignee of a Contract Liable for Nonperformance of Delegated Duties?*, 18 MICH. L. REV. 284, 286 (1920); *see* Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 924 (2d Cir. 1977); Macke Co. v. Pizza of Gaithersburg, Inc., 259 Md. 479, 486, 270 A.2d 645, 646 (1970); Crane Ice Cream Co. v. Terminal Freezing & Heating Co., 147 Md. 588, 598, 128 A. 280, 283 (1925); J. CALAMARI & J. PERILLO, *supra* note 21, § 18-25, at 662.

25. *See* Standard Chautauqua Sys. v. Gift, 120 Kan. 101, 103, 242 P. 145, 146 (1926) (duty to furnish entertainment); Smith v. Board of Educ., 115 Kan. 155, 158, 222 P. 101, 102 (1924) (duties of architect); Campbell v. Sumner Co., 64 Kan. 376, 378-79, 67 P. 866, 867 (1902) (contract for

trust and confidence.[26]

A problem arises, however, when an assignment is made in general terms, such as an assignment of "the contract" or "all my right, title and interest in the contract", without differentiating between the rights and duties in the contract.[27] Whether such a general assignment constitutes a delegation of the duties under the contract is a matter of interpretation by the courts and depends upon the intention of the parties.[28] Some jurisdictions do not hold a delegatee liable for the performance of duties under the contract in the absence of an express promise by the delegatee to assume such duties.[29] Other jurisdictions imply a promise by the delegatee to assume the duties if the circumstances warrant such a finding.[30] One jurisdiction has expressly adopted the rule of the Restatement of Contracts, which presumes that the delegatee has assumed the duties under the contract in the absence of circumstances showing a contrary intention.[31]

Those jurisdictions espousing the rule that duties under a contract are not delegated unless there is an express promise by the delegatee to assume the duties[32] hold that the delegatee will not be held liable to either party to the original contract in the absence of an express as-

---

printing services); New England Cabinet Works v. Morris, 226 Mass. 246, 250-51, 115 N.E. 315, 316-17 (1917) (contract for cabinet design and manufacture).

26. *See* Carson v. Lewis, 77 Neb. 446, 449, 109 N.W. 735, 736 (1906) (attorney-client relationship); Deaton v. Lawson, 40 Wash. 486, 490, 82 P. 879, 880 (1905) (physician-patient relationship).

27. *See* Walker v. Phillips, 205 Cal. App. 2d 26, 29, 22 Cal. Rptr. 727, 729 (1962) (assignment of the "agreement"); Chatham Pharmaceuticals, Inc. v. Angier Chem. Co., 347 Mass. 208, 209-10, 196 N.E.2d 852, 854 (1964) (assigned "all its right, title and interest"); Keyes v. Scharer, 14 Mich. App. 68, 70, 165 N.W.2d 498, 500 (1968) (assignment of "all rights" of assignor); Senn v. Manchester Bank, 583 S.W.2d 119, 129 (Mo. 1979) (assignment of the "contract"); McGill v. Baker, 147 Wash. 394, 396, 266 P. 138, 139 (1928) (assignment of "all right, title and interest").

28. *See* Walker v. Phillips, 205 Cal. App. 2d 26, 32, 22 Cal. Rptr. 727, 731 (1962); Chatham Pharmaceuticals, Inc. v. Angier Chem. Co., 347 Mass. 208, 210, 196 N.E.2d 852, 854 (1964); Keyes v. Scharer, 14 Mich. App. 68, 72, 165 N.W.2d 498, 501 (1958); Massey-Ferguson Credit Corp. v. Brown, 173 Mont, 253, 258-59, 567 P.2d 440, 443 (1977); Radley v. Smith, 6 Utah 2d 314, 316, 313 P.2d 465, 466 (1957).

29. *See* Meyers v. Postal Fin. Co., — Minn. —, —, 287 N.W.2d 614, 617 (1979); Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 402, 144 N.E.2d 387, 391 (1957); Higgenbotham v. Topel, 9 Wash. App. 254, 259, 511 P.2d 1365, 1368 (1973).

30. *See* Walker v. Phillips, 205 Cal. App. 2d 26, 32, 22 Cal. Rptr. 727, 731 (1962); Central of Ga. Ry. Co. v. Woolfolk Chem. Works, Ltd., 122 Ga. App. 789, 792, 178 S.E.2d 710, 713 (1970); Keyes v. Scharer, 14 Mich. App. 68, 72, 165 N.W.2d 498, 501 (1968); Senn v. Manchester Bank, 583 S.W.2d 119, 128-29 (Mo. 1979); Massey-Ferguson Credit Corp. v. Brown, 173 Mont. 253, 260, 567 P.2d 440, 444 (1977); Langel v. Betz, 250 N.Y. 159, 162, 164 N.E. 890, 891 (1928); Shepard v. Commercial Credit Corp., 123 Vt. 106, 110, 183 A.2d 525, 527-28 (1962); McGill v. Baker, 147 Wash. 394, 401, 266 P. 138, 141 (1928); 4 A. CORBIN, *supra* note 3, at 62-63 (Supp. 1980); 3 S. WILLISTON, *supra* note 5, § 418A, at 104.

31. RESTATEMENT OF CONTRACTS § 164 (1932) provides in essence that where a party to an executory bilateral contract purports to assign the entire contract, his action is interpreted as an assignment of his rights and a delegaton of the performance of his duties, absent circumstances showing a contrary intention. Acceptance by the assignee is interpreted as consent to become an assignee of the rights, as well as a promise to assume the performance of the duties, absent circumstances showing a contrary intention. *Id.*

32. *See* note 29 *supra*.

sumption.[33] Where the delegatee expressly contracts with the delegator to assume the duties, the other party to the original contract becomes a creditor beneficiary[34] of the contract between the delegator and delegatee,[35] and has a right of action against both for nonperformance.[36]

Jurisdictions recognizing an implied assumption of duties by the delegatee look both to the language and surrounding circumstances of the delegation/assignment.[37] Thus, even without an express delegation of duties, the court may decide that the particular circumstances involved warrant a holding that the delegatee has impliedly bound himself to perform under the original contract.[38]

The American Law Institute has extended the above analysis by setting forth a rule of presumptive interpretation.[39] Section 164 of the Restatement of Contracts[40] states that absent circumstances showing a contrary intention, the assignment of an executory bilateral contract is a delegation of duties as well as an assignment of rights.[41] Although

33. *See, e.g.*, U.S. v. Thompson & Georgeson, Inc., 346 F.2d 865, 869 (9th Cir. 1965); Meyers v. Postal Fin. Co., — Minn. —, —, 287 N.W.2d 614, 617 (1979); Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 402, 144 N.E.2d 387, 391 (1957).

34. A creditor beneficiary is a person who benefits from the performance of a contract even though not a party to the contract. BLACK'S LAW DICTIONARY 333 (5th ed. 1979).

35. *See* Barnard v. Huff, 252 Mich. 258, 263, 233 N.W. 213, 214 (1930); Rose v. Vulcan, 282 N.C. 643, 660, 194 S.E.2d 521, 533 (1973); Hurst v. West, 272 S.E.2d 378, 384 (N.C. App. 1980); Prudential Fed. Sav. & Loan Ass'n v. King, 22 Utah 2d 379, 381, 453 P.2d 697, 699 (1969); McGill v. Baker, 147 Wash. 394, 401, 266 P. 138, 141 (1928).

36. *See* Barnard v. Huff, 252 Mich. 258, 263-64, 233 N.W. 213, 214-15 (1930); Rose v. Vulcan Materials Co., 282 N.C. 643, 663, 194 S.E.2d 521, 533 (1973); Younce v. Broad Rd. Lumber Co., 148 N.C. 34, 36, 61 S.E. 624, 625 (1908); Hurst v. West, 272 S.E.2d 378, 384 (N.C. App. 1980); Prudential Fed. Sav. & Loan Ass'n v. King, 22 Utah 2d 379, 381, 453 P.2d 697, 699 (1969).

37. Courts have found the following circumstances to be indicative of an implied assumption of duties by the assignee: (1) where the party accepts the benefits under the contract, Senn v. Manchester Bank, 583 S.W.2d 119, 128 (Mo. 1979); (2) where an assignee takes over an ongoing business, Walker v. Phillips, 205 Cal. App. 2d 26, 32-33, 22 Cal. Rptr. 727, 731 (1962); (3) where a covenant in the assignment is made for the benefit of the nonassigning party, McGill v. Baker, 147 Wash. 394, 401, 266 P. 138, 141 (1928); (4) where the assignment is from a dissolving company to its shareholders who formed a limited partnership, Central of Ga. Ry. Co. v. Woolfolk Chem. Works, Ltd., 122 Ga. App. 789, 792, 178 S.E.2d 710, 714 (1970); (5) where a close business relationship exists between the assignor and assignee and a representative of the assignee participated in the sale by the assignor to the nonassigning party, Massey-Ferguson Credit Corp. v. Brown, 173 Mont. 253, 260, 567 P.2d 440, 444 (1977); and (6) where the assignee attempts to enforce its rights against the nonassigning party by bringing suit, Langel v. Betz, 250 N.Y. 159, 162, 164 N.E. 890, 891 (1928).

38. See text & notes 30 & 37 *supra*. Professor Grismore believes that the rule of implied assumption of duties should be adopted by those jurisdictions recognizing only an express assumption of duties. *Grismore*, *supra* note 24, at 295. He contends that where courts recognize that an express promise creates a right of action against an assignee by a creditor beneficiary, there can be no objection to holding the assignee liable where the same has been implied. *Id.* at 294-95. The doctrine allowing a right of action for an express assumption of liability has demonstrated its usefulness and warrants its extension to situations involving an implied assumption of liability. *Id.* at 295.

39. See note 31 *supra*.

40. *Id.* The wording of § 164 in the original Restatement was changed somewhat in the RESTATEMENT (SECOND) OF CONTRACTS § 328 (1981) to coincide with U.C.C. § 2-210. See note 41 *infra*. The effect of the language in the RESTATEMENT (SECOND), however, is substantially the same as that of the original Restatement.

41. See notes 31 & 40 *supra*. This section of the Restatement has not been adopted in Ari-

many legal scholars consider the Restatement view as the most reasonable approach to the problem,[42] few jurisdictions have adopted it.[43] Decisions in the following cases highlight the difference in approaches taken by various jurisdictions.

In *Rose v. Vulcan Materials Co.*,[44] a contract to supply crushed stone to the plaintiff at a specified price was assigned to the defendant who subsequently raised the price of the stone.[45] The North Carolina Supreme Court held that the plaintiff acquired a right of action against the defendant assignee when the defendant failed to comply with the performance required by the assigned contract, thereby breaching its implied promise of performance.[46] The court expressly adopted the Restatement approach[47] in deciding that when the defendant assignee accepted the assignment of the contract, it became delegatee of the assignor's duties and impliedly promised to perform such duties.[48]

In contrast, the New York Court of Appeals in *Langel v. Betz*[49] expressly rejected the Restatement despite admitting that this approach is probably more in accord with modern ideas of contractual relations.[50] In *Langel*, a purchaser of land assigned a contract of sale without an express delegation of duties.[51] The plaintiff seller sued the assignee of the purchaser for specific performance.[52] The New York Court of Appeals held that mere acceptance of the assignment of a bilateral contract would not impose on the assignee a promise to assume

---

zona; however, a similar rule is set forth in U.C.C. § 2-210(4), *codified at* ARIZ. REV. STAT. ANN. § 44-2317(D) (1968). Section 44-2317(D) provides that an assignment in general terms operates as a delegation of performance of the duties of the assignor, and its acceptance by the assignee constitutes a promise to perform those duties, unless circumstances indicate a contrary intention (such as in an assignment for security). Since Article Two of the U.C.C. does not apply to transactions involving the sale of real property, *see* U.C.C. §§ 2-102 & 2-105(i); *cf. id.* § 9-104(j) (Article 9 does not apply to the transfer of an interest in real estate), this rule is not applicable to the *Norton* case.

42. *See, e.g.*, 4 A. CORBIN, *supra* note 3, at 629; 3 S. WILLISTON, *supra* note 5, at 105; Grismore, *supra* note 24, at 287; 15 TEX. L. REV. 258, 259 (1937).

43. Although several cases cite the Restatement, it is generally not expressly adopted as controlling. *See, e.g.*, International Paper Co. v. Whitson, 571 F.2d 1133, 1138 (10th Cir. 1977); Art Metal Constr. Co. v. Lehigh Structural Steel Co., 116 F.2d 57, 59 (3d Cir. 1940); Chatham Pharmaceuticals, Inc. v. Angier Chem. Co., Inc., 347 Mass. 208, 210, 196 N.E.2d 852, 854 (1964); Clark v. General Cleaning Co., 345 Mass. 62, 65, 185 N.E.2d 749, 751 (1962); Keyes v. Scharer, 14 Mich. App. 68, 72-73, 165 N.W.2d 498, 501-02 (1968); Hodges v. Campbell, 211 Or. 428, 437, 316 P.2d 312, 317 (1957); Radley v. Smith, 6 Utah 2d 314, 317, 313 P.2d 465, 467 (1957); Northern Pac. Ry. Co. v. Sunnyside Valley Irrigation Dist., 11 Wash. App. 948, 951, 527 P.2d 693, 695 (1974).

44. 282 N.C. 643, 194 S.E.2d 521 (1973).

45. *Id.* at 649-50, 194 S.E.2d at 526.

46. *Id.* at 663, 194 S.E.2d at 535.

47. *Id.* at 661, 194 S.E.2d at 534.

48. *Id.* at 663, 194 S.E.2d at 535.

49. 250 N.Y. 159, 164 N.E. 890 (1928).

50. *Id.* at 163, 164 N.E. at 892. The court noted that although § 164 of the Restatement comports with the more modern notion that a contract is not a strictly personal obligation, it adhered to the traditional rule that no promise is to be inferred from the assignment of a bilateral contract, absent circumstances indicating a contrary intent. *Id.* at 163-64, 164 N.E. at 892.

51. *Id.* at 161, 164 N.E. at 891.

52. *Id.*

the obligations of the assignor, absent circumstances indicating a contrary intention.[53] The court noted that requiring the assignee to perform in such circumstances would be "an act of oppression and injustice, unless the assignee had expressly, or by implication" entered into a contract with the assignor or with the seller to assume the duties under the contract.[54] The majority of states, including Arizona, follow the general rule set forth in *Langel*.[55]

Arizona Law on Delegation of Duties

The Arizona Supreme Court first dealt with the issue of delegation of duties in *Grant v. Harner*,[56] where it held that the assignment of a contract does not cast upon the assignee liabilities imposed by the contract in the absence of an express promise to assume the obligation.[57] The court reasoned that an assignment alone does not shift the assignor's liabilities to the assignee, nor does it create a new liability on the part of the assignee because the requisite "meeting of the minds" essential to the formation of a contract is absent.[58] Therefore, the court refused to imply that the parties to the assignment intended the assignee to perform the obligations owing under the contract.[59]

The Arizona Supreme Court reaffirmed the principles utilized in *Grant* in *Treadway v. Western Cotton Oil & Ginning Co*.[60] In *Treadway*, farming land was assigned to the defendant as security on a debt.[61] The defendant took possession of the property, farmed it, and made payments on it for a brief time.[62] When he stopped making payments, the plaintiff sued for the amount still due.[63] The court held that the plaintiff had no action against the defendant because the defendant had not contracted with the plaintiff to pay the obligations under the con-

53. *Id.* at 164, 164 N.E. at 892.

54. *Id.* at 162, 164 N.E. at 891. In response to the rule set forth in the *Langel* case, *id.* at 164, 164 N.E. at 892, the American Law Institute adopted a caveat to § 164 of the Restatement stating that no opinion is expressed by the Institute whether subsection (2) applies to the assignment of a land sale contract by a vendee. RESTATEMENT (SECOND) OF CONTRACTS § 328 Caveat (1981).

55. Rose v. Vulcan Materials Co., 282 N.C. 643, 662, 194 S.E.2d 521, 534; *see* Hencock v. Yeamans, 340 F.2d 503, 505 (5th Cir. 1965); Treadway v. Western Cotton & Ginning Co., 40 Ariz. 125, 136, 10 P.2d 371, 375 (1932).

56. 29 Ariz. 41, 239 P. 296 (1925).

57. *Id.* at 43-44, 239 P. at 296-97. Harner sold a mining lease to two parties who were to pay for the lease in installments. *Id.* at 42, 239 P. at 296. One of the purchasers assigned his interest in the lease to Erickson. *Id.* When the payments owing on the lease were not made, Harner sued both purchasers and Erickson. *Id.* The Arizona Supreme Court, finding no evidence that Erickson expressly promised to pay the amounts owed, held that Erickson did not become indebted to Harner by reason of the assignment. *Id.* at 44, 239 P. at 297.

58. *Id.* at 43-44, 239 P. at 296-97.

59. *Id.* at 44, 239 P. at 297.

60. 40 Ariz. 125, 10 P.2d 371 (1932).

61. *Id.* at 130, 10 P.2d at 372-73.

62. *Id.* at 132, 10 P.2d at 373.

63. *Id.*

tract.[64] The *Treadway* court noted that liability on the part of the assignee can result only from an express or implied contract of the assignee and cannot be implied from the mere acceptance of an assignment.[65] This is particularly true when the assignment is given solely as security for a debt.[66]

The court next considered the liability of an assignee in *Norton v. First Federal Savings*.[67] There, the Arizona Supreme Court held that First Federal, as assignee of an executory bilateral contract, did not assume the outstanding obligations under the contract when the benefits were assigned.[68] The *Norton* court indicated, however, that in a proper case it might recognize an implied assumption of obligations under a bilateral contract.[69] This left the question open for further clarification in future cases.

Assignability as Analyzed by the Norton Case

The plaintiffs in *Norton* contended that by accepting the benefits inherent in the assignment agreement between First Federal and Hutcheson,[70] First Federal also assumed Hutcheson's obligations to complete the off-site improvements on the subdivision.[71] Accordingly, they argued that First Federal was liable for the damages caused by the delay in completion of these improvements.[72] Although the *Norton*

64. *Id.* at 138, 10 P.2d at 375.
65. *Id.* at 136-37, 10 P.2d at 375.
66. *Id.* at 137, 10 P.2d at 375.
67. 128 Ariz. 176, 624 P.2d 854 (1981).
68. *Id.* at 182, 624 P.2d at 860.
69. *Id.* at 181, 624 P.2d at 859. By saying that it would "be logical for us to recognize an implied assumption of duties," the court seems to overlook the possibility that Arizona already recognizes an implied assumption of duties. In the *Treadway* case, the court quoted *Lisenby v. Newton* for the rule that "liability can only result from some express *or implied* contract of the assignee . . . ." Treadway v. Western Cotton Oil & Ginning Co., 40 Ariz. 125, 136, 10 P.2d 371, 375 (1932), *quoting* Lisenby v. Newton, 120 Cal. 571, 572, 52 P. 813, 814 (1898) (emphasis added). And, in *Grant v. Harner*, although the court found that the defendant did not expressly assume the duties imposed by the contract, it also discussed the circumstances surrounding the transaction before holding that the evidence did not support a finding that the assignee intended to assume the obligation. 29 Ariz. 41, 43, 239 P. 296, 296-97 (1925). These cases indicate that, under appropriate circumstances, the courts might have recognized an implied assumption of duties. Thus, the *Norton* court's statement that it might recognize an implied assumption of duties does not significantly advance Arizona law on this issue.
70. See note 15 *supra*, for relevant text of the agreement.
71. 128 Ariz. at 180, 624 P.2d at 858. The plaintiffs made this contention in a second amended complaint which sought damages from First Federal due to Hutcheson's failure to complete the off-site improvements. *Id.* at 178, 624 P.2d at 856. Liability for damages was based on two independent theories. One theory, which is discussed in this article, was that First Federal assumed the obligations and damages for which Hutcheson was liable by way of an assignment agreement between First Federal and Hutcheson. *Id.* The other theory was that plaintiffs were entitled to recover damages from First Federal because they were third party beneficiaries of the performance bond. *Id.* The supreme court held that there was no evidence to indicate that the parties to the performance bond intended to benefit the plaintiffs, and therefore, they could not be considered third party beneficiaries. *Id.* at 180, 624 P.2d at 858.
72. 128 Ariz. at 180, 624 P.2d at 858. This contention is based on the promise made by Hutcheson in the escrow instructions of plaintiffs' lot sale contracts to complete the off-site im-

court indicated that it might in the future recognize an implied assumption of duties by an assignee,[73] the circumstances of the present case did not warrant such a finding.[74] Several arguments against finding an assumption of the duties were addressed by the court.

First, the court justified its position by stating that since the assignment agreement was entered into two years after performance by the assignor was due,[75] the assignee did not intend to assume this past-due obligation when it accepted the assignment.[76] This position is fallacious because when First Federal accepted the assignment the call date on the bond had been extended, and thus, the obligations were not legally past due.[77]

Second, the court noted that the Restatement rule[78] referred to an assignment of a "contract" or of "all my rights under the contract,"[79] whereas the assignment involved in *Norton* was of "interests in certain properties" owned by Hutcheson.[80] The court believed that even if the Restatement rule were adopted in Arizona, it would not be applicable to the present case, where the assignment was of interests in properties rather than of interests under a contract.[81] In making this distinction, the court summarily rejected the applicability of the Restatement and thereby avoided the need to examine the probable intent of the parties.

When an agreement is made assigning a bilateral contract, it is probable the parties intend to transfer the contract as a whole.[82] Accordingly, since a contract consists of both rights and duties, one could assume that the parties intend to effect a complete substitution whereby

---

provements by November 1, 1974. *Id.* The contracts between Hutcheson and the Nortons were among the interests assigned by Hutcheson to First Federal in the November 4, 1976 agreement. *Id.*

73. Arizona recognized the validity of implied contracts in Arizona Bd. of Regents v. Arizona York Refrigeration, 115 Ariz. 338, 341, 565 P.2d 518, 521 (1977). The *Norton* court stated that since Arizona recognizes implied contracts, it would be logical to recognize an implied assumption of duties by an assignee. 128 Ariz. at 181, 624 P.2d at 859.

74. 128 Ariz. at 181, 624 P.2d at 859.

75. *Id.* at 182, 624 P.2d at 860.

76. *Id.*

77. *Id.* at 178, 624 P.2d at 856.

78. RESTATEMENT OF CONTRACTS § 164 (1932); see text & note 31 *supra*.

79. 128 Ariz. at 181, 624 P.2d at 859. See note 31 *supra*. Restatement § 164, Comment a recognizes that contracting parties are not always aware of the effects of substituting another entity in their place. The Restatement presumes that when an assignment is made, the parties' probable intent is to delegate the duties as well as assign the rights. Therefore, any general words of assignment would be interpreted to give effect to this probable intent, absent circumstances showing a contrary intention.

80. 128 Ariz. at 181, 624 P.2d at 859. There is a dispute as to exactly what was assigned. The majority stated that the interests in plaintiffs' lots were assigned, not Hutcheson's contracts of sale. *Id.* at 182, 624 P.2d at 860. The dissent quotes a letter written by First Federal's counsel which states that the assignment included the contracts of sale. *Id.* at 183, 624 P.2d at 861.

81. *Id.* at 181, 624 P.2d at 859.

82. Note, *The U.C.C. and Contract Law: Some Selected Problems*, 105 U. PA. L. REV. 836, 916 (1957).

the assignee assumes both the rights and the duties of the assignor.[83] In fact, the assignor often makes the assignment because he is no longer able to perform under the contract or because he intends to disqualify himself from further performance.[84] This seems to have been the situation in the *Norton* case.

In rejecting the Restatement, the *Norton* court distinguished an assignment of "interests in property" from an assignment of a "contract".[85] The distinction is difficult to perceive since in the usual case property interests arise pursuant to a contract. Thus, an assignment of interests in property would seem to require that a contract also be involved. In addition, by making this distinction, the court ignored the principle of the Restatement which discourages judicial reliance on technical definitions.[86]

"Assignment of contract" is a term of art that is often used incorrectly by lawyers attempting to include within the term both the transfer of rights and the delegation of duties.[87] The Restatement (Second) recognizes this problem in permitting the use of an assignment of "the contract" or any assignment "in similar general terms."[88] Furthermore, in light of the general contract principle that a court should give effect to the probable intent of the parties, the logical result in *Norton* would be to hold that the assignment of interests in properties was actually an assignment of the contracts relating to the properties involved.

Finally, the *Norton* court noted that the assignment by Hutcheson to First Federal was made in lieu of foreclosure of several mortgages and deeds of trust held by First Federal.[89] The court referred to a substantial amount of authority holding that an assignment made only as security indicates a positive intention by the assignee not to assume the obligations of the contract.[90] It then equated an assignment made as security with one made in lieu of foreclosure and held that no assumption of duties should be imposed.[91] Justice Hays pointed out in his concurring opinion that in this situation, the assignee receives a secur-

83. *Id.* at 917; Note, *Obligations of the Assignee of a Bilateral Contract*, 42 HARV. L. REV. 941, 941 (1929). *But see* Langel v. Betz, 250 N.Y. 159, 163-64, 164 N.E. 890, 891 (1928).

84. Grismore, *supra* note 24, at 288.

85. 128 Ariz. at 181, 624 P.2d at 859.

86. *See* RESTATEMENT (SECOND) OF CONTRACTS § 328, Comment b (1981).

87. Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 924 (2d Cir. 1977); J. CALAMARI & J. PERILLO, *supra* note 21, § 18-1 at 631-32; *see, e.g.*, Walker v. Phillips, 205 Cal. App. 2d 26, 29, 22 Cal. Rptr. 727, 729 (1962); Chatham Pharmaceuticals, Inc. v. Angier Chem. Co., 347 Mass. 208, 209-10, 196 N.E.2d 852, 854 (1964); Senn v. Manchester Bank, 583 S.W.2d 119, 129 (Mo. 1979); McGill v. Baker, 147 Wash. 394, 396, 266 P. 138, 139 (1928).

88. RESTATEMENT (SECOND) OF CONTRACTS § 328 (1981).

89. 128 Ariz. at 182, 624 P.2d at 860. See note 15 *supra* for the relevant text of the agreement.

90. 128 Ariz. at 182, 624 P.2d at 860.

91. *Id.*

ity interest in property which is already in default.[92] Thus, when the property is assigned, the assignee is actually getting little more than he would get under a foreclosure proceeding.[93] It would be inappropriate, therefore, to imply an assumption of duties where, as here, the purpose of the assignment is ultimately to protect the interests of the assignee.[94] Plaintiffs contended in their motion for rehearing, however, that Hutcheson's properties were transferred to allow First Federal to recoup funds it expended in completing the off-site improvements.[95] As such, the agreement was not simply a transfer of security interests in lieu of foreclosure, but rather was made by Hutcheson to First Federal as repayment for the money expended by First Federal on behalf of Hutcheson. Thus, this situation does not seem comparable to an assignment made only as security, and the court's reliance on the security argument is inappropriate.

The arguments against assignment posited in *Norton* indicate that the court focused mainly on the language of the agreement rather than the probable intent of the parties and the context in which the transaction took place. By taking such a position, the court continues to adhere to an overly strict rule of construction that may subvert the actual intent of the parties.

An "Appropriate" Case for the Norton Court

The Arizona Supreme Court in *Norton* indicated that in an appropriate case, it would recognize an implied assumption of duties by an assignee.[96] The court did not disclose, however, what it considered to be an appropriate case. The following hypothetical case will posit a set of facts which might constitute an appropriate case for the court to recognize an implied assumption of duties.

The ideal situation for recognition of an implied assumption of duties would encompass several factors indicating the clear intent of the parties. Consider a situation in which a developer is indebted to another party such as a contractor rather than a lending institution. The developer encounters financial difficulties and is unable to complete the off-site improvements required in certain lot sales contracts. He offers to assign to the contractor all his right, title and interest in the

92. *Id.* at 183, 624 P.2d at 861 (Hays, J., concurring).

93. *Id.*

94. *Id.*

95. Motion for Rehearing at 4-7.

96. 128 Ariz. at 181, 624 P.2d at 859. The court stated that it would be logical to recognize an implied assumption of duties by an assignee, but that the circumstances of the present case did not require it. *Id.*

contracts in payment of the debt. The contractor accepts the assignment but does not complete the improvements.

These facts circumvent the limitations imposed on recognizing an implied assumption of duties. First, the duties imposed under the lot sales contracts are not of a personal nature and are therefore assignable.[97] Second, the assignment was of "interests in contracts" rather than of interests in properties.[98] Third, the assignment was not made as security.[99] These factors indicate that the parties probably intended the assignee to perform the outstanding duties under the contracts. Under these circumstances, then, the court would have the opportunity to adopt a rule of interpretation to guide Arizona courts in deciding future cases involving the issue of assignments.

Any rule adopted by the supreme court should allow the lower courts flexibility in construing the probable intent of the parties. As Professor Corbin points out, "[t]he factual basis for the inference of a promise varies with each case; generalizations are perilous, and are to be used merely as guides to assist in the making of a reasonable inference."[100] Justice Hays, concurring in *Norton*, also recognized this need for flexibility of interpretation when he stated that the court should review individually each case involving an assignment of contract to determine whether the circumstances reveal an intent to assume the obligations imposed under the contract.[101]

Thus, to properly determine intent, the court should carefully examine the language of the assignment, the factual circumstances surrounding the assignment, and the subsequent conduct of the parties.[102] Further, even if the court were to adopt the Restatement rule of presumptive interpretation, it would still need to examine the individual circumstances to determine whether the parties intended a contrary result.[103] The *Norton* court, however, has not provided any distinct guidelines, and the exact course Arizona courts will take on the issue of assignment is not clear.

Conclusion

At early common law, courts refused to recognize assignments of contracts. This rule was slowly modified so that current case law recog-

97. *See* text & note 25 *supra*.
98. *See* text & notes 31 & 79 *supra*.
99. See text & notes 89-94 *supra*.
100. 4 A. CORBIN, *supra* note 3, at 631.
101. 128 Ariz. at 182-83, 624 P.2d at 860-61 (Hays, J., concurring).
102. *See* text & note 37 *supra*.
103. *See* text & note 31 *supra*. Adoption of the Restatement would also place Arizona in conformity with the relevant U.C.C. provision concerning assignment of contracts. *See* note 41 *supra*.

nizes the assignability of contractual rights, and in some cases, a delegation of duties as well.

Some jurisdictions require that for the delegatee to be liable for nonperformance, he must have expressly promised to perform the delegator's duties. Other jurisdictions will imply a promise by the delegatee if the circumstances warrant such a finding. Only one jurisdiction has expressly adopted the Restatement rule, which presumes that the parties intended the delegatee to perform the duties in the absence of circumstances showing a contrary intention.

Arizona cases have in the past held that a delegatee is not liable for nonperformance under an assignment unless he expressly promises to assume contractual duties. The Arizona Supreme Court in *Norton* inferred that it would recognize an implied assumption of duties in an appropriate case, but held that the circumstances of that case did not warrant such a finding. Although *Norton* may have carried Arizona law somewhat further in the direction of recognizing an implied assumption of duties, it raised more questions than it answered. The court intimated that it would imply an assumption of duties under appropriate circumstances, but did not explain what circumstances it might consider to be appropriate. Whether the court will adopt the Restatement rule in a case involving the assignment of contracts can only be a matter of speculation.

Should the issue arise again, adoption of the Restatement rule would be the best course. This rule presumes that the parties intended to delegate duties absent indications of contrary intent. In addition, the court should delineate some guidelines for determining what constitutes contrary intent. The adoption of the Restatement rule would abrogate the court's seemingly rigid adherence to a strict rule of construction, and instead focus on the actual intent of the parties.

Gail L. Daniel

JUDICIAL MODIFICATION OF UNREASONABLY RESTRICTIVE COVENANTS NOT TO COMPETE

A covenant not to compete may be described generally as a promise by the covenantor not to compete with the covenantee in a trade or business. Most commonly, covenants not to compete are ancillary to the sale of a business or an employment contract.[1] Because a covenant not to compete restricts the character or the location of the covenantor's work, it is a type of restraint of trade.[2] The United States Supreme Court has noted that a narrow reading of the Sherman Antitrust Act[3] would render any commercial contract restraining trade illegal.[4] The legislative history of the act, however, indicates that Congress did not intend to prohibit enforcement of all such contracts.[5]

Courts have thus held covenants not to compete valid as long as the restraint is reasonable under the facts and circumstances of the particular case.[6] While the Supreme Court has used a reasonableness test in determining the enforceability of most restraints alleged to be in violation of the Sherman Act, it has also held that certain categories of business agreements are *per se* unreasonable and therefore violative of the act.[7] Once a court determines that a conveant not to compete is

---

1. BLACK'S LAW DICTIONARY 329 (5th ed. 1979). This casenote analyzes a case involving a covenant which is ancillary to a contract for the sale of a business. In deciding disputes involving this type of covenant, courts consistently draw reasoning from cases dealing with post-employment covenants. *See* Central Specialties Co. v. Schaefer, 318 F. Supp. 855, 858 (N.D. Ill. 1970); Bess v. Bothman, 257 N.W.2d 791, 794-95 (Minn. 1977). Therefore, cases involving both covenants ancillary to a contract for the sale of a business and an employment contract will be cited and discussed.

2. Note, *Validity of Covenants Not to Compete: Common Law Rules and Illinois Law*, 1978 U. ILL. L.F. 249, 249; *see* Three Phoenix Co. v. Pace Indus., Inc., No. C-374993, slip op. at 7-8 (Ariz. Ct. App. March 10, 1981).

3. 15 U.S.C. § 1 *et seq.* (1890 & Supp. 1981). The Sherman Act provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several [s]tates, or with foreign nations, is declared to be illegal." *Id.* at § 1.

Arizona has a similar antitrust statute which is interpreted in accordance with the Sherman Act. ARIZ. REV. STAT. ANN. § 44-1402 (Supp. 1980-81); *see* Dattilo v. Tucson Gen. Hosp., 23 Ariz. App. 392, 395-96, 533 P.2d 700, 703-04 (1975).

4. United States v. Topco Assocs., Inc., 405 U.S. 596, 606 (1972); *see* Three Phoenix Co. v. Pace Indus., Inc., slip op. at 7.

5. United States v. Topco Assocs., Inc., 405 U.S. 596, 606 (1972).

6. Standard Oil Co. v. United States, 221 U.S. 1, 60-62 (1910). This is referred to as a "rule of reason" analysis. United States v. Topco, 405 U.S. 596, 606-07 (1972). This analysis includes "consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption." *Id.; see* Three Phoenix Co. v. Pace Indus., Inc., slip op. at 7-11; Dattilo v. Tucson Gen. Hosp., 23 Ariz. App. 392, 395, 533 P.2d 700, 703 (1975).

7. United States v. Topco Assocs., Inc., 405 U.S. 596, 607 (1972). In Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958), Mr. Justice Black explained the need for, and the appropriateness of, a per se rule:

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not

invalid under the applicable rule, an issue arises as to whether the court must refuse to enforce the promise entirely, or whether the court may modify the agreement and enforce the promise within reasonable limits. Authorities are sharply divided regarding the propriety of such judicial modification.[8]

In the recent case of *Three Phoenix Company v. Pace Industries, Inc.*,[9] the Arizona Court of Appeals considered this very issue. In that case, plaintiff Three Phoenix Company (Three Phoenix) and defendant Pace Industries, Inc. (Pace) each purchased part of a computer testing equipment business from Wabash Computer Corporation (Wabash).[10] Three Phoenix purchased the portion of the business that sold and leased equipment to test single magnetic computer memory discs.[11] Pace acquired the part of the business that promoted "Pack Scan III", a system used in testing multiple discs.[12] Although on their face the Wabash-Three Phoenix and Wabash-Pace agreements appeared to have been executed several months apart,[13] they were actually part of a single overall plan.[14]

All of the parties to the agreement intended that Pace be restricted from competing with single-disc testing products then contemplated by Three Phoenix and Wabash for as long as Pace utilized the technology purchased from Wabash.[15] Consequently, a covenant not to compete was included in the Wabash-Pace agreement.[16]

---

only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

Id. The per se rule more often applies when the covenant is not ancillary to a legally enforceable contract. Sound Ship Bldg. Corp. v. Bethlehem Steel Corp., 387 F. Supp. 252, 255 (D.N.J. 1975); Three Phoenix Co. v. Pace Indus., Inc., slip op. at 8-10. Covenant topics traditionally considered to be per se violations include group boycotts, horizontal and vertical price-fixing, and agreements by competitors to divide markets. 387 F. Supp. at 257.

8. See text & notes 26-34 *infra*.

9. Slip op. at 11-12.

10. *Id.* Wabash sold its equipment division to the two parties because it wanted to terminate its computer testing equipment operations. *Id.* Three Phoenix had originally wished to acquire the entire equipment division of Wabash, but because Wabash was not confident that Three Phoenix could fulfill Wabash's existing contractual obligations, Wabash would not agree. *Id.* Eventually, it was agreed that Pace would acquire the Pack Scan III line, and that Three Phoenix would acquire the single disc testing line. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 4. The Wabash-Three Phoenix agreement was consumated on June 6, 1973, while the Wabash-Pace agreement was executed on October 11, 1973. *Id.* at 4-5.

14. *Id.* at 4. Pace understood that except for the portion transferred to Pace, Wabash planned to transfer its entire equipment division to Three Phoenix. *Id.* In fact, Pace knew that Three Phoenix's interests were given such great weight in the formulation of the Wabash-Pace agreement that Three Phoenix could virtually veto the Wabash-Pace agreement. *Id.* at 3.

15. *Id.* at 4.

16. *Id.* The following paragraphs were included in the Wabash-Pace agreement:

Three Phoenix brought an action against Pace, claiming that Pace was competing with it in the market for single disc testing equipment.[17] The superior court held that the Wabash-Three Phoenix agreement did not convey to Three Phoenix the right to enforce paragraph nine of the Wabash-Pace agreement.[18] In paragraph nine, Pace agreed not to compete with Wabash's product lines.[19] The court also held that paragraph ten of the Wabash-Pace agreement, which prohibited Pace from competing with specific product lines of Three Phoenix, constituted an illegal restraint of trade and was therefore unenforceable.[20]

On appeal, the Arizona Court of Appeals rejected Pace's argument that the covenant not to compete was a *per se* illegal restraint of trade[21] and applied instead the "rule of reason."[22] Reversing the trial court's decision, the court held first that Three Phoenix was entitled to seek enforcement of paragraphs nine and ten of the Wabash-Pace agreement.[23] The court then held that although the covenants did constitute an unreasonable restraint of trade,[24] they could be modified by the

---

9. *Non-Competition*. BUYER shall not during the term of this agreement within the world manufacture, use, lease, sell or otherwise dispose of any equipment or inventions which would directly or indirectly perform the same operations as said INVENTIONS or be in the competition therewith nor shall BUYER for a period of two (2) years or for so long as they manufacture or sell said INVENTIONS, whichever period is longer, design, manufacture or sell any other equipment or products which were heretofore designed, manufactured or sold by the SELLER INCLUDING THE #SSA AND #SDT FOR THE WINCHESTER DISC which SELLER intended to design, manufacture or sell.

10. *Non-Competition with Three Phoenix Company*. SELLER has sold the following product lines to Three Phoenix Company, an Arizona corporation: the certification equipment, disc memo and ICT-300. BUYER shall not in any way compete with Three Phoenix in said product lines and shall not engage in any business activity with respect to them, including without limitation consulting services, maintenance or the supplying of spare parts.

Id. at 5.

17. *Id.* Three Phoenix sought to enjoin the competition on the basis of paragraphs nine and ten of the Wabash-Pace agreement and its own acquisition agreement with Wabash. *Id.* at 4. In the Wabash-Three Phoenix agreement, Wabash assigned to Three Phoenix "rights under certain covenants not to compete." *Id.*

18. *Id.* at 5; see note 16 *supra*, for the text of paragraph nine.

19. *Id.*

20. Slip op. at 5; see note 16 *supra*, for the text of paragraph ten.

21. Slip op. at 7-9; see note 22 *infra*, for the court's rationale regarding this issue.

22. Slip. op. at 9; see text & note 6 *supra*. The *Three Phoenix* court recognized that competition is encouraged when one party sells a business to two or more parties, and that covenants not to compete often facilitate such business transfers. Slip op. at 9. Therefore, the court reasoned, such covenants should not be classified as *per se* violations of the antitrust laws, but should be governed by the rule of reason. *Id.* This use of the rule of reason is consistent with past Arizona decisions. *See, e.g.*, Truly Nolan Exterminating, Inc. v. Blackwell, 125 Ariz. 481, 481, 610 P.2d 483, 483 (1980); Snelling & Snelling v. Dupay Enterprises, 125 Ariz. 362, 364, 609 P.2d 1062, 1064 (1980); Gann v. Morris, 122 Ariz. 517, 518, 596 P.2d 43, 44 (1979); Dattilo v. Tucson Gen. Hosp., 23 Ariz. App. 392, 395, 533 P.2d 700, 703 (1975).

23. Slip op. at 6. The court held that Three Phoenix was a third party beneficiary with respect to paragraph ten of the Wabash-Pace agreement. In addition, the court held that Three Phoenix is vested with the power to seek enforcement of paragraph nine of the agreement under assignment of future rights principles. *Id.* at 6-7 *citing* RESTATEMENT (SECOND) OF CONTRACTS § 153 (Tent. Draft No. 3, 1967) and 4 A. CORBIN, CONTRACTS § 874 (1951).

24. Slip. op. at 10; see text & notes 63-64 *infra*.

court and enforced within reasonable limits.[25]

This casenote will first discuss the different approaches courts have taken in determining the enforceability of covenants not to compete which have been deemed illegal restraints of trade. The arguments for and against each approach will be considered. Prior Arizona case law on this subject will then be examined. Finally, the *Three Phoenix* case will be analyzed, with emphasis on the court's application of past Arizona case law and the decision's possible future implications.

The Approaches

Although progress in the various states has been inconsistent, the law involving enforcement of unreasonably restrictive covenants has gradually evolved from an "all or nothing" approach to the "blue pencil" rule to the "reasonableness" doctrine.[26] Under the "all or nothing" approach, invalid covenants not to complete, usually involving unreasonable restrictions in territorial scope or duration, will not be enforced.[27] Courts following this approach will not "make a new contract" for the parties by limiting the restrictions to a more reasonable duration or area.[28]

According to the "blue pencil" rule, an unreasonably restrictive covenant will fall unless the offensive term is severable from the rest of the covenant.[29] Under this rule, the severability of a covenant which excessively restrains trade is determined by purely mechanical means. If the promise is written in such a way that the unreasonable restraint can be eliminated by crossing out a few of the words with a "blue pen-

25. Slip. op. at 12; see text & notes 65-71 *infra*.

26. *See* Note, *Partial Enforcement of Post-Employment Restrictive Covenants*, 15 COLUM. J.L. & SOC. PROB. 181, 197 (1979).

27. *E.g.*, Welcome Wagon, Inc. v. Morris, 224 F.2d 693, 701 (4th Cir. 1955) (restrictive covenant ancillary to an employment contract held to be entirely unenforceable because territory was too vast); Rector-Phillips-Morse, Inc. v. Vroman, 253 Ark. 750, 756, 489 S.W.2d 1, 5 (1973) (court will not rewrite contract by reducing restriction to a shorter time or to a smaller area); Federated Mut. Ins. Co. v. Whitaker, 232 Ga. 811, 815, 209 S.E.2d 161, 164 (1974) (restrictive covenant containing illegal and unenforceable clauses must fail); Frederick v. Professional Bldg. Maintenance Indus., Inc., — Ind. App. —, —, 344 N.E.2d 299, 302 (1976) (if restrictive covenant is unreasonable, court may not enforce reasonable restriction under guise of interpretation); Welcome Wagon Int'l, Inc. v. Hostesses, Inc., 199 Neb. 27, 28, 255 N.W.2d 865, 866 (1977) (covenant restricting person from competing with former employer was unreasonable and thus unenforceable).

28. *See* cases cited in note 27 *supra*.

29. *E.g.*, Timenterial, Inc. v. Dagata, 29 Conn. Supp. 180, 184, 277 A.2d 512, 514 (1971) (if terms of unreasonably restrictive covenant are severable, court may invalidate unreasonable terms and enforce those terms which are reasonable); Welcome Wagon Int'l, Inc. v. Perder, 255 N.C. 244, 248, 120 S.E.2d 739, 742 (1961) (if terms of covenant not to compete are divisible as to territory, court will enforce reasonable restrictions in territorial division, and refuse to enforce unreasonable restrictions in territorial divisions); Eastern Business Forms, Inc. v. Kistler, 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972) (restrictive covenant which contains divisible terms may be good as to part and bad as to part); Comment, *Contracts—Partial Enforcement of Restrictive Covenants*, 50 N.C. L. REV. 689, 692 (1972).

cil," the contract will be enforced as long as the remaining words constitute a complete and valid contract.[30]

Under the "reasonableness" doctrine, unreasonable covenants not to compete may be modified by the courts and enforced within their proper sphere.[31] While courts that follow the other theories refuse to look beyond the terms written by the parties themselves,[32] courts applying the "reasonableness" doctrine feel free to modify the agreement and enforce instead a more reasonable restriction.[33] A growing minority of courts now apply the "reasonableness" doctrine when confronted with unreasonably restrictive covenants not to compete.[34]

Courts adhering to the "all or nothing" view hold that use of either the "reasonableness" test or the "blue pencil" rule amounts to a judicial rewriting of the parties' contract[35] and subjects the parties to an agreement they have not made.[36] In the opinion of these courts, modifying a covenant's express terms impinges more seriously upon the parties' agreement than complete non-enforcement.[37] Corbin disagrees; he argues that applying a "reasonableness" standard involves much less of a variance from the intent of the parties than does total non-enforcement.[38] The court is not making a new contract for the parties, but rather is merely creating the most desirable effect for both the parties and the public at large.[39] In addition, a party who has bound himself to a broad, unreasonable covenant may be presumed to have assented to the lesser degree of restraint found reasonable by the court.[40]

Proponents of the "blue pencil" rule reason that the parties' intent is effectuated when part of a divisible covenant is enforced because

30. *See* cases cited in note 29 *supra*; 6A A. CORBIN, CONTRACTS § 1390, at 67-68 (1962 & Supp. 1964).

31. *E.g.*, Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, 370 (Iowa 1971) (unreasonably restrictive covenants will be enforced to extent they are reasonable); Wells v. Wells, — Mass. App. Ct. —, —, 400 N.E.2d 1317, 1319 (1980) (covenant not to compete will be enforced only to the extent it is reasonable); Bess v. Bothman, 257 N.W.2d 791, 795 (Minn. 1977) (court has power to modify and enforce restrictive covenant which, as it stands, is an illegal restraint of trade); Solari Indus., Inc. v. Malady, 55 N.J. 571, 585, 264 A.2d 53, 61 (1970) (covenant not to compete is subject to partial enforcement to extent reasonable); Raimonde v. Von Vlerah, 42 Ohio St. 2d 21, 25-26, 325 N.E.2d 544, 547 (1975) (covenant containing unreasonable restrictions will be enforced to extent necessary to protect employer's legitimate interests).

32. *See* cases cited in notes 27 & 29 *supra*. *See also* Comment, *supra* note 29, at 693.

33. A reasonable restriction is one which protects the covenantee's legitimate interests without causing undue hardship on the covenantor or impairing the public interest. Solari Indus., Inc. v. Malady, 55 N.J. 571, 585, 264 A.2d 53, 61 (1970).

34. RESTATEMENT (SECOND) OF CONTRACTS § 326 (1979). *See generally* cases cited in note 31 *supra*.

35. *See* cases cited in note 27 *supra*.

36. *See* cases cited in note 27 *supra*. *See also* Frederick v. Professional Bldg. Maintenance Indus., Inc., — Ind. App. —, —, 344 N.E.2d 299, 301 (1976).

37. *See* cases cited in note 27 *supra*.

38. Corbin, *A Comment on Beit v. Beit*, 23 CONN. B.J. 43, 50 (1949).

39. *Id.*

40. Solari Indus., Inc. v. Malady, 55 N.J. 571, 582, 264 A.2d 53, 59 (1970).

such a covenant is actually a combination of several distinct covenants agreed to by the parties.[41] Partial enforcement of indivisible covenants, however, is viewed as improper because indivisible covenants would have to be artificially split up in order to eliminate unreasonable terms.[42] On the other hand, the "blue pencil" rule has often been attacked as mechanical, legalistic, and as leading to contradictory results.[43] Opponents of the theory argue that where the purpose of two covenants is essentially the same, it is inequitable when only one is enforceable simply because its terms are divisible.[44]

One court has pointed out that acceptance of a "reasonableness" standard might encourage employers and purchasers in a superior bargaining position to insist upon oppressive restrictions.[45] Another court has stated that the "reasonableness" standard provokes unnecessary litigation.[46] This is because if a covenant is unreasonably restrictive, the covenantee has nothing to lose by seeking partial injunctive relief.[47] Both of these problems may be partially avoided by refusing to enforce covenants that are intentionally unreasonable and oppressive.[48] This solution may be ineffective, however, because the covenantee still would only have to make a "restrictive covenant ostensibly within the outer boundaries of reasonableness" to assure complete enforcement.[49]

It has also been argued that, under the "reasonableness" doctrine, legal draftsmen will have less cause to worry about drafting a reasonable covenant in the first place.[50] If judicial modification is available, sloppy legal work may be encouraged and the drafting of proper covenants will ultimately be left to the already-burdened courts.[51] Despite this possible infirmity, the "reasonableness" doctrine enables courts to reach decisions that are both equitable and consistent with the purposes

41. Beit v. Beit, 135 Conn. 195, 205, 63 A.2d 161, 166 (1948) (covenant intended by parties to be an entirety may not be divided in order to uphold part of it); Eastern Business Forms, Inc. v. Kistler, 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972) (restrictive covenant which contains divisible terms may be good as to part and bad as to part).

42. *See* cases cited in note 41 *supra*.

43. Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, 371 (Iowa 1971); *see* A. CORBIN, *supra* note 30, § 1390, at 67-69.

44. 14 S. WILLISTON, CONTRACTS § 1674C, at 293 (3d ed. 1972 & Supp. 1979).

45. Fullerton Lumber Co. v. Torborg, 270 Wis. 133, 147, 70 N.W.2d 585, 592 (1955). Employers and purchasers may hope that a covenantor, quite possibly with insufficient funds, will not challenge the oppressive restriction in court. Even if a covenantor successfully challenges the covenant, however, the court will merely modify the agreement and enforce instead a more reasonable restriction. The "all or nothing" approach eliminates this problem because the employer or purchaser is faced with the possibility of having the covenant entirely invalidated by the court.

46. Rector-Phillips-Morse, Inc. v. Vroman, 253 Ark. 750, 756, 489 S.W.2d 1, 5 (1973).

47. *Id.*, see discussion at note 45 *supra*.

48. 14 S. WILLISTON, CONTRACTS, *supra* note 44, at 293.

49. Rector-Phillips-Morse, Inc. v. Vroman, 253 Ark. 750, 755, 489 S.W.2d 1, 5 (1973). The court apparently felt that a covenant within the outer boundaries of reasonableness is undesirable for public policy reasons. *Compare* note 67 *infra*.

50. *See* Note, *supra* note 26, at 191-92.

51. *Id.*

of the antitrust laws.[52] Courts adhering to this doctrine recognize its public benefits and find no difficulty in distinguishing between the reasonable and the unreasonable.[53] The effect of the "all or nothing" view, on the other hand, is to improperly reward the party who breaches the agreement.[54] The "reasonableness" standard thus provides flexibility in determining remedies available to the parties and the public.[55]

Arizona's Approach

Arizona courts, indicating adherence to the "all or nothing" approach, long refused to enforce unreasonably restrictive covenants not to compete.[56] Then, in 1978, the Arizona Court of Appeals held in *Esmark, Inc. v. McKee*[57] that under Illinois law, courts may modify an unreasonable covenant not to compete and enforce instead a more reasonable restriction so long as the unreasonable term is severable from the rest of the covenant.[58] At the time, the precedential value of the case seemed minimal since the court decided the case under Illinois law.[59]

Just two years later, however, the court in *Snelling & Snelling, Inc. v. Dupay Enterprises, Inc.*[60] cited the *Esmark* decision as precedent in holding that unreasonably restrictive covenants not to compete may be modified and enforced to give adequate protection to the covenantee without undue hardship to the covenantor.[61] In the recent *Three Phoenix* decision, the Arizona Court of Appeals again had the opportunity to determine the propriety of judicial modification.[62]

---

52. *Id.* at 213.

53. *See* Corbin, *supra* note 38, at 50.

54. *Id.*

55. *See* Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, 371 (Iowa 1971).

56. Lessner Dental Laboratories, Inc. v. Kidney, 16 Ariz. App. 159, 162, 492 P.2d 39, 42 (1971); Wright v. Palmer, 11 Ariz. App. 292, 294, 464 P.2d 363, 365 (1970).

57. 118 Ariz. 511, 578 P.2d 190 (Ct. App. 1978).

58. *Id.* at 514, 578 P.2d at 193. The severability requirement indicates that Illinois courts use the "blue pencil" rule when dealing with the enforceability of unreasonably restrictive covenants not to compete.

59. *See id.* at 512, 578 P.2d at 191. The case was decided under Illinois law because the contract included a provision requiring that the contract be construed and enforced pursuant to Illinois law. *Id.*

60. 125 Ariz. 362, 609 P.2d 1062 (Ct. App. 1980).

61. *Id.* at 364, 609 P.2d at 1064. At first glance, the wording of the court's holding appears to signal an acceptance of the "reasonableness" doctrine in Arizona. *Id.* The severability requirement of *Esmark* is not mentioned. *Id. Snelling*, however, involved a covenant with two divisible terms, one of which the court held to be unreasonable. *Id.* The court refused to enforce the unreasonable term, but did enforce the remaining restriction. *Id.* at 364-65, 609 P.2d at 1064-65. The court's approach thus appears to be an application of the "blue pencil" rule.

62. Three Phoenix Co. v. Pace Indus., Inc., slip op. at 11-12.

The Three Phoenix Decision

In *Three Phoenix*, the Arizona Court of Appeals initially determined that the restrictive covenant in question was an unreasonable restraint of trade.[63] The court stated that a restriction from a worldwide market might be considered reasonable, but that a time restriction measured by Pace's use of its acquired technology could not be.[64] The court held, however, that an unreasonable covenant not to compete is not *ipso facto* completely unenforceable.[65] The court believed that the parties' intentions are more closely served by judicial modification than by complete invalidation.[66] Although the court agreed that courts should not rewrite contracts, it felt that parties who agree to unreasonably restrictive covenants should not be lightly released from all contractual duties.[67]

In reaching its decision, the *Three Phoenix* court stated that Arizona law was not conclusive as to whether unreasonable covenants not to compete must be invalidated as written or whether they may be judicially modified and enforced as limited.[68] The court ruled that *Wright v. Palmer*,[69] an Arizona case involving an alleged oral covenant with indefinite terms, was not controlling.[70] The court added that the recent

63. *Id.* at 10. *Citing* Sound Ship Bldg. Corp. v. Bethelehem Steel Corp., 387 F. Supp. 252, 255 (D.N.J. 1975), the *Three Phoenix* court stated that the rule of reason involves four elements:

(1) the restraint is ancillary to the main purpose of a lawful contract.
(2) the restraint is neither imposed by a party with monopolistic power nor fosters a monopoly.
(3) the restraint is partial in nature and reasonably limited in time and scope.
(4) the restraint is no greater than necessary to afford fair protection to the parties and not so extensive as to interfere with the interests of the public.

Id. at 10. In determining the reasonableness of the covenant, however, the court discussed only the element regarding time and scope. *Id.*

64. *Id.* Because the prevention of competition is violative of the Sherman Antitrust Act, the court concluded that a time limit measured by Pace's use of the invention was unreasonable. *Id.*

65. *Id.* at 12.

66. *Id.*

67. *Id.* The court stated that its duty is to uphold and enforce contracts unless considerations of public policy dictate otherwise. *Id.* In *Three Phoenix*, the court apparently felt that public policy considerations fell on the side of modification and enforcement.

68. *Id.* at 11.

69. 11 Ariz. App. 292, 464 P.2d 363 (1970).

70. Slip. op. at 11. The court's distinction of *Wright* is invalid, however, since the *Wright* court, in reaching its decision, assumed that the oral communication between the parties constituted a covenant not to compete. Wright v. Palmer, 11 Ariz. App. 292, 294, 464 P.2d 363, 365 (1970). Although it is not entirely clear whether the *Wright* court held the covenant *per se* invalid or whether it found the covenant unreasonable and invalidated it under the "all or nothing" view, the covenant was stricken solely because it contained no time or space limitations. *Id.* Note that paragraph ten of the Wabash-Pace agreement also contained no time or space limitations. See note 16 *supra*, for the text of this covenant. The *Three Phoenix* court may have distinguished *Wright* in order to allow the transition to the "reasonableness" doctrine in Arizona without specifically overruling the *Wright* decision. See note 71 *infra*.

The *Three Phoenix* court also held that the only Arizona Supreme Court decision arguably addressing this issue, Lassen v. Benton, 86 Ariz. 323, 346 P.2d 137 (1959), *opinion modified*, 87 Ariz. 72, 347 P.2d 1012 (1959), did not apply because the covenant involved was found wholly enforceable. Slip op. at 11.

Esmark and *Snelling* decisions suggested that modification might be appropriate.[71]

With the *Three Phoenix* decision, Arizona law has completed the progression from the "all or nothing" approach to the "blue pencil" rule to, finally, the "reasonableness" doctrine.[72] Adoption of the "reasonableness" doctrine by the Arizona Court of Appeals will avoid the inequities caused by utilization of the "all or nothing" or "blue pencil" rules.[73] No longer will an overly broad covenant be upheld if, upon its facts, it should reasonably be modified.[74] Further, covenants will no longer be stricken entirely as too broad though justice and equity seem to require enforcement of a more reasonable restriction.[75] It may be argued that legal draftsmen may worry less about drafting a reasonable covenant in the first place,[76] or that adherence to a "reasonableness" standard provokes unnecessary litigation[77] or encourages employers and purchasers in a superior bargaining position to insist upon oppressive restrictions.[78] From the viewpoint of traditional notions of equity and freedom of contract, however, the "reasonableness" doctrine is a logically appealing rule by which to grant partial relief on an overly broad covenant not to compete.[79]

Conclusion

In the *Three Phoenix* decision, the Arizona Court of Appeals recognized a court's power to modify an unreasonable covenant not to compete. This decision is consistent with recent cases in other jurisdictions addressing the issue. Adherence to this "reasonableness" doctrine will clearly assure more equitable results by allowing courts to weigh all the factors of a case to insure that the covenantee's interests are protected without extreme hardship to the covenantor.

Jeffrey S. Katz

71. Slip. op. at 11-12. Although the *Esmark* and *Snelling* opinions contain language that approaches the "reasonableness" doctrine, it appears that these courts actually applied the "blue pencil" rule. See text & notes 58-61 *supra*. Thus, the *Three Phoenix* court is cleverly using the modification language of *Esmark* and *Snelling* to smooth the transition to the "reasonableness" doctrine in Arizona.

72. Arizona courts initially adhered to the "all or nothing" approach. *See* Lassen v. Benton, 86 Ariz. 323, 327, 346 P.2d 137, 139 (1959); *opinion modified*, 87 Ariz. 72, 347 P.2d 1012 (1959); Wright v. Palmer, 11 Ariz. App. 292, 294, 464 P.2d 363, 365 (1970).

73. See text & notes 43-44, 54-55 *supra*.

74. Solari Indus., Inc. v. Malady, 55 N.J. 571, 584, 264 A.2d 53, 60 (1970).

75. *Id.*

76. See text & note 50 *supra*.

77. See text & note 46 *supra*.

78. See text & note 45 *supra*.

79. *See* Note, *supra* note 26, at 231.

CRIMINAL LAW

ARIZONA'S ELIMINATION OF SPECIFIC INTENT FROM THE CRIME OF RECEIVING STOLEN PROPERTY

The 1978 Revised Arizona Criminal Code significantly changed the law governing the offense of receiving stolen property.[1] An essential element of this crime under the old criminal code was specific intent to permanently deprive the owner of possession of his property or to utilize the property for personal gain.[2] In *State v. Morse*,[3] the Arizona Supreme Court held that under the new criminal code, specific intent is no longer an element of the crime of receiving stolen property.[4]

In *Morse*, the defendant was charged with possession of a stolen motorcycle.[5] He claimed that he found the motorcycle in the desert near his home and that he believed he had the legal right to retain it while applying for title.[6] Morse was convicted after the Superior Court judge instructed the jury that he must have "intended to permanently deprive the owner of the property," but that "it is no defense that a person did not know that his act was unlawful or that he believed it to be lawful."[7]

On appeal, the defendant argued that while receiving stolen prop-

---

1. *Compare* ARIZ. REV. STAT. ANN. § 13-1802 (1978), providing, "(A) A person commits theft if, without lawful authority, such person knowingly . . . (5) Controls property of another knowing or having reason to know that the property was stolen"; *with id.* § 13-621 (Supp. 1957-58) (repealed 1978), which provided "(A) A person who, for his own gain, or to prevent the owner from again possessing the property, buys, sells, possesses, conceals or receives personal property, knowing or having reason to believe that the property is stolen, is guilty. . . ."

2. *See* State v. Fleming, 117 Ariz. 122, 128, 571 P.2d 268, 274 (1977); State v. Tellez, 6 Ariz. App. 251, 258, 431 P.2d 691, 698 (1967). In *Tellez*, the court of appeals held that the crime of receiving stolen property under § 13-621 consisted of receiving stolen property with guilty knowledge and an intent of depriving the owner of possession or obtaining it for one's own gain. 6 Ariz. App. at 258, 431 P.2d at 698.

In *Fleming*, the supreme court affirmed a jury instruction stating that to be convicted of possessing stolen property under § 13-621, the defendant must have possessed stolen property, known the property was stolen, and must have possessed the property for his own gain or with the intent to prevent the rightful owner from again possessing it. 117 Ariz. at 128, 571 P.2d at 274. The court held that this instruction "clearly advised the jury that they had to find that both knowledge and specific intent were present before they could convict." *Id.*

3. 127 Ariz. 25, 617 P.2d 1141 (1980).

4. *Id.* at 31, 617 P.2d at 1147.

5. *Id.* at 27, 617 P.2d at 1143.

6. *Id.* at 27, 30, 617 P.2d at 1143, 1146.

7. Brief for Appellee at 8-9, State v. Morse, 127 Ariz. 38, 617 P.2d 1154 (Ct. App. 1980).

erty requires a finding of specific intent, ignorance or mistake of law can in some instances operate to negate this element.[8] The Arizona Court of Appeals, however, affirmed the conviction and dismissed these claims, ruling that counsel's poorly made objection to this instruction at trial was insufficient "to preserve as error the giving of the instruction."[9]

The Arizona Supreme Court also affirmed Morse's conviction. Although finding the form of objection sufficient, the court rejected the defendant's claim on the merits.[10] The court held that specific intent is not an element of the crime of receiving stolen property under title 13, section 1802(A)(5) of the Arizona Criminal Code.[11] Instead, the court ruled that the mental state required of the defendant is that he "knowingly" receive the stolen property in question.[12] Thus, although the defendant mistakenly believed he had the right to take the motorcycle, mistake was no defense because it did not negate the requisite mental state.[13]

This casenote will examine the history of specific intent as the required mens rea in theft offenses and its abandonment as a necessary element of the crime of receiving stolen property under the Revised Arizona Criminal Code. Next, it will review the defense of ignorance or mistake of law or fact in crimes requiring a specific mental state. Finally, it will propose recognition of the continued viability of ignorance or mistake as a defense to the crime of receiving stolen property under title 13, section 1802(A)(5) of the Arizona Criminal Code.

The History of Specific Intent in Theft Offenses

The various offenses constituting theft or larceny,[14] including receiving stolen property, have traditionally been classified as intentional crimes.[15] Larceny historically has never been a malum prohibitum offense, under which liability is imposed for a wrongful act regardless of the actor's intent, knowledge, or negligence.[16] Rather, the act of taking

8. State v. Morse, 127 Ariz. at 29, 617 P.2d at 1145.
9. *Id.* at 39, 617 P.2d at 1155.
10. *Id.* at 29-31, 617 P.2d at 1145-47.
11. *Id.* at 31, 617 P.2d at 1147.
12. *Id.*
13. *Id.*
14. The term "larceny" may be applied to encompass all of the various theft offenses, *see* People v. Williams, 73 Cal. App. 2d 154, 157, 166 P.2d 63, 64 (1946), and is hereinafter used in this general sense.
15. *See* Morissette v. United States, 342 U.S. 246, 260-61 (1952).
16. R. PERKINS, CRIMINAL LAW 784-86 (2d ed. 1969). Larceny was one of the few felonies under the common law of England. At common law, it consisted of the trespassory taking and carrying away of the personal property of another with the intent to steal. An early statute, the Statute of Westminster, classified larceny as punishable by imprisonment or whipping when the value of the stolen property was less than twelve pence, but as punishable by death when the value of the property taken exceeded twelve pence. *Id.* at 232-33.

another's property or receiving property stolen from another has traditionally not constituted a crime unless it is accompanied by animus furandi, the specific intent to steal and permanently deprive the owner of possession of his property.[17]

At English common law, the requirement of specific intent as an essential element of larceny resulted primarily from its status as a capital offense.[18] Although theft offenses are no longer capital offenses, American courts have consistently held that specific intent is a necessary element of such crimes.[19] The United States Supreme Court explained the importance of this requirement in *Morissette v. United States*.[20] In *Morissette*, the defendant was convicted of stealing government property in violation of title 18, section 641 of the United States Code, after taking some shell casings from a gunnery range in the mistaken belief that they were abandoned.[21] The Court reversed the conviction, ruling that despite Congress's failure to expressly require specific intent in the statute, specific intent is nevertheless an element of theft under title 18, section 641.[22] In addition, the Court held that Morissette's belief that the shell casings were abandoned could, if believed by the jury, negate the required felonious intent.[23]

In finding that the offense required the mental element of intent, the *Morissette* Court held that an evil state of mind, described in such terms as "intentional, wilful, knowing, fraudulent, or malicious," often functions to criminalize an otherwise indifferent act.[24] Thus, in order to avoid punishing morally blameless persons,[25] such an injury became

17. *Id.* at 265-66. The requirement of a mens rea, or intent in crime, began to surface in the twelfth century as the common law began to stress "the psychical element in crime." 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 477 (2d ed. 1923). The notion that an injury becomes a crime only when inflicted intentionally is closely related to the belief in the freedom of one's human will and the "consequent ability and duty of the normal individual to choose between good and evil." Morissette v. United States, 342 U.S. 246, 250-51 (1951), *quoting* Pound, *Introduction*, in F. SAYRE, CASES ON CRIMINAL LAW (1927). Thus, no injury could constitute a crime unless accompanied by a "vicious will." *Id.*

18. *See* Gerber & Foreman, *Arizona's Criminal Law: The Critical Need for Comprehensive Revision*, 18 ARIZ. L. REV. 63, 96 (1976). The status of larceny as a capital offense at common law was probably due to the frequency with which the crime was committed without leaving any clue by which the victim might hope to obtain redress. R. PERKINS, *supra* note 16, at 234.

19. *See* Morissette v. United States, 342 U.S. 246, 252 (1951) (specific intent has consistently been held to be a necessary element of theft in the United States); People v. Kunkin, 9 Cal. 3d 245, 251, 507 P.2d 1392, 1396, 107 Cal. Rptr. 184, 188 (1973) ("theft by larceny requires a specific intent permanently to deprive the rightful owner of his property"); State v. Leicht, 124 N.J. Super. 126, 133, 305 A.2d 78, 82 (N.J. Super. 1973) (animus furandi, the intent to deprive the owner permanently of the property taken, is fundamentally necessary for an act of taking to constitute larceny); Worthington v. State, 469 S.W.2d 182, 183 (Tex. Crim. 1971) (an intent to deprive the owner of property of possession is an "essential element" of theft).

20. 342 U.S. 246 (1952).

21. *Id.* at 248-49; *see* 18 U.S.C. § 641 (1948).

22. 342 U.S. at 263.

23. *Id.* at 273-76.

24. *Id.* at 264.

25. *Id.* at 250-52.

a crime only when inflicted with one of the enumerated culpable mental states.[26]

Specific Intent in the Arizona Law of Theft

In the past, Arizona has followed the majority of American courts[27] in holding that theft does not constitute a crime in the absence of specific criminal intent.[28] Decisions under the former Arizona Criminal Code established that a person was guilty of theft only when there was a "felonious taking of property with the intent to permanently deprive the owner of its possession and use."[29] Arizona courts extended the specific intent requirement of theft to the crime of receiving stolen property under title 13, section 621(A) of the old Arizona Criminal Code.[30] The Arizona courts thus recognized a prima facie case for a conviction for receiving stolen property under title 13, section 621(A) when the defendant: (1) had possession of stolen property; (2) knew, or had reason to know, that the property was stolen; and (3) possessed the property for his own gain or with the intent to prevent the rightful owner from regaining possession.[31] Consequently, it was well established that the "intent to receive the stolen goods for personal gain or to deprive the owner of possession is an element of the crime of receiving stolen property under A.R.S. § 13-621(A)."[32]

Despite the long history of specific intent as an essential element of theft in Arizona and in other American jurisdictions, the enactment of title 13, section 1802(A)(5) of the Arizona Criminal Code and the *State v. Morse* decision significantly alter the elements of the crime of receiving stolen property by eliminating the requirement of specific intent.[33] Under title 13, section 1802(A)(5) and *Morse*, a person is guilty of receiving stolen property if he knowingly and without lawful authority

26. *Id.* at 250. The Court also explained that the intent requirement was necessary to make the punishment fit the offender and not merely the crime. *Id.* at 251 n.5.

27. *Id.* at 260-61; see text & note 19 *supra*.

28. *See* State v. Jackson, 101 Ariz. 399, 400, 420 P.2d 270, 271 (1966) (theft requires a specific felonious intent to permanently deprive the owner of his property); State v. Marsin, 82 Ariz. 1, 3, 307 P.2d 607, 608 (1957) ("intent to permanently deprive the owner of his possession is an essential ingredient" of the offense of grand theft).

29. Whitson v. State, 65 Ariz. 395, 397, 181 P.2d 822, 823 (1947) ("to constitute the crime of larceny there must be present the element of felonious taking of the property with the intent permanently to deprive the owner of its possession and use"); *see* State v. Jackson, 101 Ariz. 399, 400, 420 P.2d 270, 271 (1966); State v. Marsin, 82 Ariz. 1, 3, 307 P.2d 607, 608 (1957).

30. *See* State v. Kuhnley, 74 Ariz. 10, 15, 242 P.2d 843, 846 (1952) (the offense of receiving stolen property requires the receipt of the goods with the intent of depriving the owner of possession or obtaining it for one's own gain (discussing identical language in ARIZ. REV. STAT. § 43-5506 (1939)); Franklin v. Eyman, 3 Ariz. App. 501, 503, 415 P.2d 899, 901 (1966) (specific intent is an element of receiving stolen property).

31. *See* State v. Fleming, 117 Ariz. 122, 128, 571 P.2d 268, 274 (1977); State v. Tellez, 6 Ariz. App. 251, 258, 431 P.2d 691, 698 (1967).

32. Franklin v. Eyman, 3 Ariz. App. 501, 503, 415 P.2d 899, 901 (1966).

33. *See* State v. Morse, 127 Ariz. 25, 31, 617 P.2d 1141, 1147 (1980).

controls the property of another while knowing or having reason to know that the property was stolen.[34] To justify its interpretation of section 1802(A)(5), the *Morse* court reasoned that the legislature's elimination of language concerning intent from this section of the new code indicated an intent to remove that element from the offense of receiving stolen property.[35] This result is further necessitated, the court reasoned, by the continued presence of an intent element in two of the other five subsections of the statute prohibiting other types of theft.[36]

The mental state required by title 13, section 1802(A)(5) as interpreted by the *Morse* court is that the defendant "knowingly" control the property of another.[37] The "knowingly" standard of culpability is separately defined in the Arizona Criminal Code as an awareness or belief that, with respect to conduct or to a circumstance described by a statute defining an offense, the conduct is of that nature or the circumstance exists.[38] The "knowingly" standard is one of four states of mental culpability defined by title 13, section 105(5). These mental states are termed "intentionally," "knowingly," "recklessly," and "criminal negligence" by the statute.[39] "Intentionally" is the highest degree of culpability, while "criminal negligence" is the lowest.[40] The "knowingly" standard falls directly below the "intentionally" standard.[41]

A comparison of the "knowingly" standard with the "intentional" standard reveals the significant import of the change in the offense of receiving stolen property as interpreted by the *Morse* decision. To be convicted of receiving stolen property under the "knowingly" standard, the defendant need not have acted with the objective of controlling the property of another as under the former code.[42] Rather, the "knowingly" standard is met if the defendant was actually aware or believed that he was unlawfully in possession of the property of another, and was aware or believed that the property in question was stolen.[43] An awareness and conscious disregard of, or a failure to perceive, the risk

34. ARIZ. REV. STAT. ANN. § 13-1802(A)(5) (1978); State v. Morse, 127 Ariz. 25, 31, 617 P.2d 1141, 1147 (1980).
35. 127 Ariz. at 30, 617 P.2d at 1146.
36. *Id.*
37. *Id.* at 31, 617 P.2d at 1147.
38. ARIZ. REV. STAT. ANN. § 13-105(5)(b) (1978).
39. *Id.* "Intentionally" means that a person's objective is to cause a result or to engage in conduct described by a statute defining an offense. *Id.* "Recklessly" means that a person is aware of and consciously disregards a substantial risk that a result described in a statute will be caused by his conduct. *Id.* "Criminal negligence" occurs when a person fails to perceive the substantial risk that the result described in the statute will occur. *Id.*
40. *See id.*
41. *See id.*
42. *See id.* § 13-105(5); State v. Fleming, 117 Ariz. 122, 128, 571 P.2d 268, 274 (1977); State v. Tellez, 6 Ariz. App. 251, 258, 431 P.2d 691, 698 (1967).
43. *See* ARIZ. REV. STAT. ANN. §§ 13-105(5), 13-1802(A)(5) (1978).

that he was in control of stolen property is still, however, insufficient to support a conviction for this crime.[44]

The reduction of the required mental element from "intentionally" to "knowingly" will make it far easier for the prosecution to obtain convictions for the crime of receiving stolen property. Under *Morse* and the new criminal code, the crime of receiving stolen property in Arizona now consists of two elements, both requiring knowledge. First, the defendant must knowingly and without lawful authority control the property of another.[45] Second, he must know or have reason to know that the property is stolen.[46]

The second element of the offense, often referred to as "guilty knowledge,"[47] is the more readily established of the two elements as a result of a statutory inference contained in the new Arizona Criminal Code.[48] Although the former criminal code required proof of actual knowledge that the property was stolen,[49] a jury may now infer, pursuant to title 13, section 2305(1), that a person in possession of stolen property knew that the property was stolen.[50]

The Arizona case of *State v. Jones*[51] illustrates the operation of this inference. There, several items stolen in a burglary were seized at the defendant's home after being identified by their owner.[52] The trial court rejected the defendant's contention that the evidence did not show that he knew the items were stolen, and convicted Jones of receiving stolen property under title 13, section 1802(A)(5).[53]

The Arizona Supreme Court affirmed the conviction, holding that although a defendant must have actual or constructive knowledge that

---

44. *See id.* § 13-1802(A)(5).

45. *Id.*; State v. Morse, 127 Ariz. 25, 30, 617 P.2d 1141, 1146 (1980).

46. ARIZ. REV. STAT. ANN. § 13-1802(A)(5) (1978); State v. Morse, 127 Ariz. 25, 30, 617 P.2d 1141, 1146 (1980).

47. State v. Butler, 9 Ariz. App. 162, 166, 450 P.2d 128, 134 (1969). "Guilty knowledge" refers to the second element of the offense of receiving stolen property, that the receiver actually knew that the property in his possession was stolen. *Id.* This knowledge must have existed at the time the property was received. *Id.* The *Butler* court held that guilty knowledge may be proven by either direct or circumstantial evidence, but that the mere possession of stolen goods by a defendant does not establish this element. *Id.*

48. ARIZ. REV. STAT. ANN. § 13-2305(1) (1978) provides, "Proof of possession of property recently stolen, unless satisfactorily explained, gives rise to an inference that the person in possession of the property was aware of the risk that it had been stolen or in some way participated in its theft."

49. *See* State v. Tellez, 6 Ariz. App. 251, 254, 431 P.2d 691, 694 (1967). In *Tellez*, the defendant was convicted of receiving stolen property after several stolen items were found in the trunk of his car. *Id.* The Arizona Court of Appeals reversed, ruling that although there was sufficient proof that the goods were stolen and in the car the defendant was driving, there was no proof that the defendant knew that he had possession of stolen goods. *Id.* at 258, 431 P.2d at 698.

50. *See* ARIZ. REV. STAT. ANN. § 13-2305(1) (1978).

51. 125 Ariz. 417, 610 P.2d 51 (1980).

52. *Id.* at 419, 610 P.2d at 53.

53. *Id.* Jones gave no explanation for his possession of the stolen goods. *Id.* at 420, 610 P.2d at 54.

the property in his possession was stolen, section 2305(1) provides that proof of possession of recently stolen property, unless satisfactorily explained, permits the inference that the person in possession of the goods knew they were stolen.[54] This inference is permissive, and may be either accepted or rejected by the jury when the evidence shows that there was an unsatisfactory explanation of the possession of recently stolen property.[55] Thus, when there is a lack of evidence as to the defendant's knowledge that the property was stolen, but it is shown that the defendant did in fact possess recently stolen property without a satisfactory explanation for the possession, the trier of fact is free to infer that the defendant knew the property was stolen to fulfill this element of the offense.[56]

Given the inference establishing knowledge that the property was stolen, the prosecution must prove only the first element of the offense, whether the defendant knowingly and without lawful authority controlled the property of another.[57] The state need now show only that the defendant controlled the stolen property with an actual awareness or belief that the property rightfully belonged to another.[58] The burden of the prosecution thus has been significantly reduced from the prior standard requiring both specific intent and proof of actual knowledge that the property was stolen.

It is unclear, however, whether the legislature and the Arizona Criminal Code Commission, which drafted the code, actually meant to eliminate the element of specific intent from the offense of receiving stolen property.[59] This is particularly so in light of the long history of specific intent as an essential element of the offense.[60]

The primary basis for the *Morse* court's elimination of specific intent was its conclusion that retention of language concerning specific intent by the legislature in two subsections on theft, coupled with its exclusion from the subsection dealing with receiving stolen property,

54. *Id.*

55. *See* Sandstrom v. Montana, 442 U.S. 510, 523 (1979) (when an inference is permitted, the trier of fact must remain free to consider additional evidence and to accept or reject the inference); State v. Dixon, 127 Ariz. 554, 560, 622 P.2d 501, 507 (Ct. App. 1980) (court may submit permissible inferences to the jury as long as the jury is informed that the inference is not conclusive); State v. Van Winkle, 126 Ariz. 476, 477, 616 P.2d 936, 937 (Ct. App. 1980) (the statutory inference is permissive and thus does not violate constitutional standards).

56. *See* ARIZ. REV. STAT. ANN. § 13-2305(1) (1978); State v. Jones, 125 Ariz. 417, 420, 610 P.2d 51, 54 (1980).

57. *See* STATE BAR OF ARIZ., THE NEW ARIZONA CRIMINAL CODE 119-20 (1977).

58. *Id.* at 120.

59. *See* ARIZ. CRIM. CODE COMM'N, ARIZONA REVISED CRIMINAL CODE 179 (1975). The commission probably did not intend this result because of the well established Arizona law that specific intent is a necessary element of theft offenses. *See id. See also* text & notes 28-31 *supra*.

60. *See, e.g.*, Morissette v. United States, 342 U.S. 246, 252 (1952); Whitson v. State, 65 Ariz. 395, 397, 181 P.2d 822, 823 (1947); Worthington v. State, 469 S.W.2d 182, 183 (Tex. Crim. 1971); text & notes 15-27 *supra*.

indicated an intent to remove the intentional element of the crime.[61] The commentary to the proposed code drafted by the Arizona Criminal Code Commission, however, indicates a different conception of the elements of this offense than that held by the *Morse* court. The commentary states that the essence of theft under the new code is the unlawful control of another's property with the intent to deprive the owner of its possession.[62] The commission indicates that the "control or taking" of the property or services must be knowing and intentional in all theft offenses proscribed in title 13, section 1802.[63] The major change from the old code proposed by the commission was that the requisite element of intent would be met if the defendant did not intend to keep the property permanently, but only until the major part of its value was lost.[64] This modification clearly falls far short of the *Morse* court's complete elimination of the intent requirement.

Continued Viability of Ignorance or Mistake as a Defense

Regardless of the apparent intent of the Arizona Criminal Code's drafters and the long history of specific intent as an essential element of theft offenses, present Arizona law governing the crime of receiving stolen property clearly requires only the lesser mental state of a defendant's knowingly controlling the property of another.[65] A remaining question, however, is whether the defense of ignorance or mistake remains viable under the new "knowingly" standard.[66] Despite the *Morse* court's affirmation of the instruction stating that "it is no defense that a person did not know that his act was unlawful or that he believed it to be lawful,"[67] ignorance or mistake of fact may still be a defense to the crime of receiving stolen property when it operates to negate the required mental state.[68] In the *Morse* case, ignorance or mistake of fact should have negated the first element of the crime, that of knowingly controlling the property of another without lawful authority.[69]

61. *See* State v. Morse, 127 Ariz. 25, 30, 617 P.2d 1141, 1146 (1980). This position is in sharp contrast to that taken by the United States Supreme Court in Morissette v. United States, 342 U.S. 246 (1952). There, the Court held that present legislative silence concerning intent formerly required by the common law and other statutory interpretations warranted the inference that specific intent was inherent in theft offenses, even when not specifically expressed in the statute. *Id.* at 262.

62. ARIZ. CRIM. CODE COMM'N, *supra* note 59, at 179.

63. *Id.*

64. *Id.* The ALI Model Penal Code proposed an identical change in the specific intent requirement. ALI MODEL PENAL CODE § 223.01(1) (Proposed Official Draft, 1962).

65. *See* text & notes 32-42 *supra*.

66. *See* State v. Morse, 127 Ariz. 25, 30, 617 P.2d 1141, 1146 (1980); text & notes 8-11 *supra*.

67. State v. Morse, 127 Ariz. at 29, 617 P.2d at 1145.

68. *See* Perkins, *Ignorance or Mistake of Law Revisited*, 1980 UTAH L. REV. 473, 476; text & notes 73-76 *infra*.

69. See text & notes 34-46 *supra*.

In affirming the trial court's instruction, the *Morse* court held that the defendant's belief that he had the legal right to possess the motorcycle while applying for title was actually ignorance of the fact that what he did violated the law.[70] The court decided that this form of ignorance did not constitute a defense to the crime, since it was not a lack of the types of knowledge constituting elements of receiving stolen property under title 13, section 1802(5).[71] Rather, the court found this form of ignorance to be merely a lack of knowledge about the law forbidding the illegal conduct with which the defendant was charged.[72] This form of ignorance was held to be no defense because title 13, section 204(B) of the Arizona Criminal Code states that "ignorance or mistake as to a matter of law does not relieve a person of criminal responsibility."[73]

Another type of ignorance, however, might have constituted a valid defense. As the *Morse* court acknowledged,[74] ignorance or mistake of law, such as occurs when a person does not know that his actions are criminal, is generally no defense to the commission of a crime.[75] If an offense requires a specific mental state, such as one of the four culpable mental states specified in title 13, section 105(5),[76] however, ignorance or mistake of fact can in certain circumstances negate the requisite mens rea.[77] In such situations, no offense has been committed because the defendant's ignorance or mistake eliminates a necessary element of the crime.[78] This defense should be viable not only in crimes requiring specific intent, but also in any offense requiring a culpable mental state.[79]

---

70. 127 Ariz. at 31, 617 P.2d at 1147.

71. *Id.*

72. *Id.*

73. *Id.; see* ARIZ. REV. STAT. ANN. § 13-204(B) (1978 & Supp. 1980-81).

74. *See* 127 Ariz. at 31, 617 P.2d at 1147.

75. *Id.*; *see, e.g.*, United States v. Toomey, 404 F. Supp. 1377, 1380 (S.D.N.Y. 1975) ("ignorance of the law is no defense"); Hale v. Morgan, 22 Cal. 3d 388, 396, 584 P.2d 512, 149 Cal. Rptr. 375, 380 (1978) (ignorance of the law does not excuse a violation of the law because if such a defense were permitted the ignorance plea would be universally made); State v. Savoie, 67 N.J. 439, 458-59, 341 A.2d 598, 609 (1975) ("ignorance as to whether the conduct constitutes an offense . . . is no excuse unless the . . . offense so prescribes"). *See also*, W. LAFAVE & A. SCOTT, CRIMINAL LAW 356 (1972).

76. *See* ARIZ. REV. STAT. ANN. § 13-105(5) (1978); text & note 42 *supra*.

77. *See* United States v. Squires, 440 F.2d 859, 864 (2d Cir. 1971) (ignorance of fact is a defense when it negates the knowledge required to establish a material element of the offense).

78. *See* Sisson v. State, 16 Ariz. 170, 172, 141 P. 713, 713 (1914) (honest mistake as to ownership of property negates the felonious intent required for larceny); Territory v. Dowdy, 14 Ariz. 145, 147, 124 P. 894, 898 (1912) (mistake such as taking of the property of another under an honest although groundless claim of right is not larceny since it negates the required criminal intent); State v. Abbey, 13 Ariz. App. 55, 57, 474 P.2d 62, 64 (1970) ("a taking of property under a contractual claim of right in good faith, however ill-advised, is not larceny").

79. *See* United States v. Squires, 440 F.2d 859, 864 (2d Cir. 1971) (reversing a conviction for knowingly making a material false statement in acquiring a firearm from a licensed dealer on the ground that the defendant's ignorance of the contents of a form negated the "knowingly" element of the offense); Hargrove v. United States, 67 F.2d 820, 821-23 (5th Cir. 1933) (ignorance of the duty to file an income tax return is a defense to a charge of "wilfully and knowingly attempting to defeat and evade the payment of income taxes"); Perkins, *supra* note 68, at 476.

The American Law Institute's Model Penal Code indicates that ignorance or mistake may be a defense to theft offenses.[80] It states that mistake as to a collateral matter of nonpenal law, such as when the actor believed that he had the legal right to act as he did with respect to the property involved, is a defense to theft when the actor mistakenly believed that he had the right to acquire or dispose of the property involved.[81] In addition, a mistake of fact is a defense to theft when the actor was unaware that the property or service involved actually belonged to another.[82] This defense, as presented in the Model Penal Code, operates to negate the required mental element of these crimes.[83] Thus, if the actor mistakenly believed that the property belonged to no one or that he had the legal right to take the property, then he possessed neither the intent to permanently deprive the owner of his property nor the knowledge that the property was that of another, as required for a conviction for theft.[84]

Arizona courts under the old criminal code adopted this rationale in holding that ignorance or mistake as to either the actual ownership of the property or the legal right to take the property is a defense to theft offenses.[85] In *Sisson v. State*,[86] the defendant took a horse from a corral in order to return it to its supposed rightful owner. The court determined that if the defendant took the property with an honest belief in his right to take it, there was no theft, since the mistake negated the "essential ingredient of felonious intent."[87] Likewise, *State v. Abbey*[88] more recently affirmed the validity of the ignorance or mistake defense in theft cases. In *Abbey*, the Arizona Court of Appeals reversed a defendant's conviction for theft after he took a tractor that he apparently owned jointly with a corporation under a dubious financial arrangement.[89] The *Abbey* court held that taking property under a

80. ALI MODEL PENAL CODE § 223.1(3) (Proposed Official Draft, 1962), providing, "[I]t is an affirmative defense to larceny when the actor was unaware that the property or service was that of another or acted under an honest claim of right to the property or service involved or that he had a right to acquire or dispose of it as he did. . . ."

81. *Id.*

82. *Id.*

83. See text & notes 73-76 *supra*. The commentary to the Model Penal Code states that "[T]he actor does not commit theft if he believes, however, unreasonably, that no one owns the property or that he is the owner or entitled to possession of the specific property taken." ALI MODEL PENAL CODE § 206.10, Comment, at 98 (Tentative Draft No. 2, 1954).

84. *See* Morissette v. United States, 342 U.S. 246, 270-71 (1951) (mistake of fact regarding property believed to be abandoned negates both the mental states of specific intent and knowledge).

85. *See* Sisson v. State, 16 Ariz. 170, 172, 141 P. 713, 713 (1914); Territory v. Dowdy, 14 Ariz. 145, 147, 124 P. 894, 895 (1912); State v. Abbey, 13 Ariz. App. 55, 57, 474 P.2d 62, 64 (1970); text & notes 84 *supra* and 86-88 *infra*.

86. 16 Ariz. 170, 141 P. 713 (1914).

87. *Id.* at 172, 141 P. at 713.

88. 13 Ariz. App. 55, 474 P.2d 62 (1970).

89. *Id.* at 57, 474 P.2d at 64.

contractual claim of right in good faith, however ill-advised, is not larceny.[90]

Although the *Abbey* and *Sisson* decisions were based upon the premise that the mistake negated the requisite element of "intent," their rationale should be equally applicable to vitiate the mental state of "knowingly" required by the *Morse* court. The drafters of the new criminal code, citing *Abbey* and *Sisson*, clearly indicated that an honest mistake as to ownership of or contractual right to the property should continue to preclude conviction for theft.[91] Moreover, title 13, section 204(A)(1) of the Arizona Criminal Code provides that ignorance or mistake of fact is a defense when it negates the culpable mental state required for the offense.[92] The statute does not limit the defense of ignorance or mistake of fact to intentional crimes, but is instead applicable in all crimes requiring a specific mental state when the mistake of fact operates to negate that element of the offense.[93] In addition, the *Morse* court itself seemed to implicitly recognize this when it noted that the type of knowledge which the defendant claimed to lack was not one of the elements constituting the crime of receiving stolen property, but was instead simply ignorance of the status of his action as a violation of the law.[94]

The possibility that the defense of an honest mistake of fact is available to negate the mental state of "knowingly" was raised by the United States Supreme Court in *Morissette v. United States*.[95] In *Morissette*, the defendant was convicted of "knowingly converting government property" under title 13, section 641, of the United States Code.[96] Although the Court held that specific intent was a necessary element of the crime despite Congress's failure to expressly require this element in the statutory definition, it nevertheless recognized that even if the required mental state was "knowingly," ignorance or mistake of fact could operate as a defense.[97] The decision was reversed as the result of

90. *Id.*

91. ARIZ. CRIM. CODE COMM'N, *supra* note 59, at 170. "[T]he control or 'taking' exercised over the property must be knowing or intentional. Thus either an honest mistake as to ownership of an item or a contractual right to the property should preclude conviction. . . ." *Id.*

92. ARIZ. REV. STAT. ANN. § 13-204(A)(1) (1978).

93. *Id.*; see text & note 77 *supra*.

94. 127 Ariz. at 31, 617 P.2d at 1147. Ignorance of the law, as when a person does not know his conduct is illegal, is no defense. State v. Savoie, 67 N.J. 439, 458-59, 341 A.2d 598, 609 (1975); *see* text & note 75 *supra*. When mistake of fact, however, negates a material element of the crime, such as a required mental state, it is a defense. *See* ARIZ. REV. STAT. ANN. § 13-204(A) (1978 & Supp. 1980-81); United States v. Squires, 440 F.2d 859, 864 (2d Cir. 1971). Thus, the *Morse* Court ruled that "[t]he knowledge which defendant claims that he lacked is not among the types of knowledge which constitute elements of § 13-1802(A)(5). Rather, defendant claims that he lacked the knowledge that what he did violated the law." 127 Ariz. at 31, 617 P.2d at 1141.

95. 342 U.S. 246 (1952).

96. *Id.* at 248.

97. *See id.* at 270-71.

an erroneous jury instruction stating that a belief that the property was abandoned would not be a defense to the crime.[98] The *Morissette* Court indicated that "[k]nowing conversion requires more than knowledge that the defendant was taking the property into his possession. He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion."[99] The requirement that the defendant must have known of the facts making the act of taking a conversion is essentially identical to the first element of the crime of receiving stolen property under *Morse* and title 13, section 1802(A)(5), which requires that the defendant knowingly control the property of another without lawful authority.[100] The *Morissette* Court further stated that "it is not apparent how Morissette could have knowingly . . . converted property that he did not know could be converted as would be the case . . . if he truly believed it to be abandoned and unwanted property."[101] Thus, the *Morissette* decision suggests that ignorance or mistake will continue to be a defense when it negates the required mental state of knowingly controlling the property of another.[102]

The California case of *People v. Goodin*[103] provides by analogy further support for the use of the defense of mistake of fact in a situation such as *Morse*. In that case, the defendant was convicted of "wilfully and maliciously" tearing up a public highway.[104] The California Supreme Court reversed the conviction, holding that if the defendant truly believed that the road was abandoned and that he had a right to use it for his own benefit, he did not act wilfully and maliciously.[105]

The *Goodin* court held that ignorance of the law is a defense when it negates the mental elements required for the crime.[106] In analogizing the crime of maliciously damaging a public highway to the offense of larceny, the court stated that larceny exists only when the taker knows that the property does not belong to him.[107] Thus, the court decided that it was an adequate defense to show that the taker honestly believed he had a right to take the property.[108]

98. *Id.* at 249, 263.
99. *Id.* at 270-71.
100. ARIZ. REV. STAT. ANN. § 13-1802(A)(5) (1978); State v. Morse, 127 Ariz. at 31, 617 P.2d at 1147.
101. 342 U.S. at 271.
102. *See id.* at 270-71; text & notes 77-79 *supra*.
103. 136 Cal. 455, 69 P. 85 (1902).
104. *Id.* at 456, 69 P. at 85.
105. *Id.* at 458, 69 P. at 86.
106. *Id.* at 458-59, 69 P. at 86.
107. *Id.*
108. *Id.* at 459, 69 P. at 86.

The defense of ignorance or mistake of fact explicated by *Morissette* and *Goodin* and recognized in Arizona by *Abbey, Sisson*, and the Arizona Criminal Code should remain available to negate the mental state of "knowingly" required by *Morse* and title 13, section 1802(A)(5). Any form of ignorance or mistake of fact, such as when the defendant believed that he had the right to take the property or did not know that the property actually belonged to another, should be a defense when it negates the required mental state of "knowingly."[109] The lessening of the mental state required for the offense of receiving stolen property from "intentionally" to "knowingly" in no way transformed this crime into a malum prohibitum offense.[110] Despite the presumption regarding the second element of the crime, that the defendant in possession of stolen property knew that the property was stolen,[111] the state still must prove the first element of the crime, that the defendant was actually aware or believed that the property rightfully belonged to another,[112] before the defendant may be convicted of receiving stolen property under the Arizona Criminal Code.[113] If the defendant mistakenly believed that the property was abandoned and belonged to no one, he did not act with the knowledge that the property belonged to another which is required by *Morse* and title 13, section 1802(A)(5), and he, therefore, should not be convicted of this offense.

Conclusion

The Arizona Supreme Court's decision in *State v. Morse* significantly changes the interpretation of Arizona law on the crime of receiving stolen property. It is no longer necessary that the state prove that the defendant intended to permanently deprive the owner of possession of his property. Instead, it is necessary only that the state prove that the defendant actually knew that he was in unlawful possession of the stolen property of another.

While the court's conclusion that the legislature meant to eliminate the requirement of specific intent is questionable, the major question created by the *Morse* decision is the continued viability of the defense of ignorance or mistake of fact. Although *Morse* is not clear on this issue, substantial authority supports the continued availability of the defense when it operates to negate the mental state of "knowingly."

109. See text & notes 77-79 *supra*.

110. *See* People v. Washburn, 593 P.2d 962, 965 (Colo. 1979) (change of the word "intentionally" to "knowingly" does not remove the element of a culpable mental state from a statute); text & notes 37-41 *supra*.

111. *See* text & note 48 *supra*; ARIZ. REV. STAT. ANN. § 13-1802(A)(5) (1978).

112. *See* text & note 42 *supra*.

113. *See* ARIZ. REV. STAT. ANN. § 13-1802(A)(5) (1978); People v. Washburn, 593 P.2d 962, 965 (Colo. 1979).

Thus, both the intent exhibited by the drafters of the Arizona Criminal Code and the case law suggest that the *Morse* court should not have affirmed the trial court's instruction on ignorance of the law. If Morse honestly believed that the motorcycle was abandoned and that he had the right to take it while applying for title the required mental state of knowingly controlling the property of another without lawful authority would not have existed and no crime would have been committed.

Keith W. Kroese

DUE PROCESS AND USE OF PRIOR GUILTY PLEAS AS AN AGGRAVATING CIRCUMSTANCE IN SENTENCING FOR A SUBSEQUENT CRIME

Plea bargains resulting in guilty pleas are widely used to secure convictions in the criminal justice system.[1] Once a defendant has been convicted of a crime, multiple offender or recidivist statutes are commonly used to enhance a defendant's sentence for subsequent convictions.[2] In Arizona, this policy is reflected in the death penalty provision of the Arizona Criminal Code, which recognizes prior convictions for certain offenses[3] as an aggravating circumstance.[4] In *State v. Superior Court*,[5] the Arizona Supreme Court considered whether prior guilty pleas to nine murder charges in California could be used as an aggravating circumstance in an Arizona murder trial.[6]

David Gretzler and Willie Luther Steelman were responsible for a series of kidnappings and murders in the fall of 1973.[7] On November 3, 1973, they murdered Patricia and Michael Sandberg in Tucson, Arizona.[8] The pair then stole the Sandbergs' car and drove to California

---

1. From July 1, 1978 to June 30, 1979, some 83% of all convictions in federal courts were the result of guilty pleas. ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF U.S. COURTS A-69 (1979); *see* Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 313-15 (1975).

2. Presently, 43 jurisdictions have habitual offender laws and ten of those laws provide for life imprisonment for certain repeat offenses. L. SLEFFEL, THE LAW AND THE DANGEROUS CRIMINAL: STATUTORY ATTEMPT AT DEFINITION AND CONTROL 1 (1977); Hart v. Coiner, 483 F.2d 136, 143-44 (4th Cir. 1973).

3. ARIZ. REV. STAT. ANN. § 13-703(F)(1), (2) (Supp. 1980-81) provides:

> Aggravating circumstances to be considered shall be the following:
>
> (1) The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposeable.
>
> (2) The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

4. *Id.* § 13-703(F); *see id.* § 13-703(A) which provides:

> A person guilty of first degree murder as defined in § 13-1105, shall suffer death or imprisonment in the custody of the department of corrections for life, without possibility of parole until the completion of the service of twenty-five calender years, as determined and in accordance with the procedures provided in subsection B through G of this section.

Section 13-703(E) provides:

> In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calender years, the court shall take into account the aggravating and mitigating circumstances included in subsection F of this section and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

5. 128 Ariz. 583, 627 P.2d 1081 (1981).

6. *Id.* at 584, 627 P.2d at 1082.

7. State v. Gretzler, 126 Ariz. 60, 65, 612 P.2d 1023, 1028 (1980) (detailing the events which led to Gretzler's conviction).

8. 128 Ariz. at 584, 627 P.2d at 1082.

where, on November 6, they murdered nine more persons.[9] Gretzler and Steelman were arrested in California on November 8, 1975.[10] Gretzler was eventually charged with nine counts of murder in California and two counts of murder in Arizona.[11]

The California proceedings were instituted first and Gretzler pleaded not guilty.[12] On June 6, 1974, Gretzler, pursuant to a plea agreement, changed his plea in the California proceeding from not guilty to guilty of nine counts of first degree murder.[13] During the change of plea hearing, the California trial judge informed Gretzler that his plea would not affect any other proceeding in any other jurisdiction.[14]

After sentencing in the California proceedings, Gretzler was extradited to Arizona where he was found guilty of two counts of first degree murder.[15] The California convictions were then introduced as aggravating circumstances under the Arizona death penalty statute[16] and Gretzler was sentenced to death.[17]

The death sentence was vacated[18] after the Arizona death penalty statute was held partially unconstitutional in *State v. Watson*.[19] Resentencing was ordered,[20] and Gretzler filed a motion in limine[21] to preclude the use of the California convictions as aggravating circumstances under the amended death penalty statute.[22] Gretzler argued that the California judge misled him to believe that the guilty pleas would have no effect on any other proceedings when, in fact, they

9. *Id.*
10. *Id.*
11. State v. Gretzler, 126 Ariz. 60, 67, 612 P.2d 1023, 1030 (1980).
12. 128 Ariz. at 584, 627 P.2d at 1082.
13. *Id.*
14. *Id.*
15. *Id.*
16. See text & notes 3-4 *supra*.
17. 128 Ariz. at 584, 627 P.2d at 1082.
18. *Id.*; *see* State v. Gretzler, 126 Ariz. 60, 92, 612 P.2d 1023, 1055 (1980).
19. 120 Ariz. 441, 586 P.2d 1253 (1978).
20. State v. Gretzler, 126 Ariz. 60, 92, 612 P.2d 1023, 1055 (1980). Gretzler's challenge to the constitutionality of Arizona's death penalty statute resulted in resentencing pursuant to State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, 440 U.S. 924 (1978). State v. Superior Court, 128 Ariz. 583, 584, 627 P.2d 1081, 1082 (1981); *see* Note, *Reconstruction of Arizona's Death Penalty Statute Under Watson*, 22 ARIZ. L. REV. 1037, 1037-38 (1980).
21. 128 Ariz. at 584, 627 P.2d at 1082; *see* State v. Rodriguez, 126 Ariz. 28, 30, 612 P.2d 484, 486 (1980). A motion in limine is not provided for by name in either our criminal or civil rules of procedure. *Id.* The Arizona Supreme Court has held that a motion in limine is nothing more than a motion to suppress and should be treated as such. *Id.* Further, the Arizona Supreme Court stated in *State v. Superior Court* that a motion in limine would be an appropriate device to challenge the use of prior convictions as aggravating circumstances under ARIZ. REV. STAT. ANN. § 13-703(F) (Supp. 1980-81), and that the standard of review shall be the same as a motion to suppress; the trial court will be upheld absent a clear abuse of discretion. 128 Ariz. at 585, 627 P.2d at 1083. *See also* State v. Dupuy, 116 Ariz. 152, 154, 568 P.2d 1049, 1052 (1977); State v. Wright, 125 Ariz. 36, 38, 607 P.2d 19, 21 (Ct. App. 1979).
22. 128 Ariz. at 584-85, 627 P.2d at 1082-83.

had an effect on sentencing in Arizona.[23] The motion was granted and the state filed a petition for review by special action.[24]

In *State v. Superior Court*, the Arizona Supreme Court held that the California convictions could be used for enhancement of sentencing purposes even though the defendant had been misinformed by the California trial judge regarding the consequences of his plea on the criminal charges pending in Arizona.[25] The Arizona Supreme Court also held that the California convictions were not subject to collateral attack in Arizona.[26] The supreme court therefore ordered the trial court to deny Gretzler's motion in limine and to resentence within sixty days.[27]

This casenote begins with an examination of the due process requirement that a defendant be advised of certain consequences of a guilty plea before the plea can be accepted as voluntary and intelligent. Particular attention will then be given to the Arizona Supreme Court's determination that the California trial court was not required to advise Gretzler of the effect of his guilty pleas on sentencing should he subsequently be convicted in Arizona.[28] Whether Gretzler's guilty pleas in California should be subject to collateral attack in Arizona will also be considered. Finally, the policy considerations that determine which consequences of a defendant's guilty plea must be disclosed to the defendant in order to satisfy due process are discussed.

Requirements For Acceptance of Guilty Pleas

The acceptance of a defendant's guilty plea must satisfy constitutional due process requirements.[29] Three constitutional rights are waived upon entry of a guilty plea: the privilege against self-incrimination, the right to a trial by jury, and the right to face one's accusers.[30] Accordingly, the defendant's guilty plea must be intelligent,[31] voluntary,[32] and accurate.[33] The distinction between these requirements,

23. *Id.* at 584, 627 P.2d at 1082.
24. *Id.* at 585, 627 P.2d at 1083.
25. *Id.* at 586, 627 P.2d at 1084.
26. *Id.*
27. *Id.*
28. This casenote is primarily concerned with the due process requirement that a defendant must be apprised of the consequences of his guilty plea before the plea can be accepted by a trial court. Whether a conviction is void for enhancement of sentence purposes when a defendant is misinformed as to the consequences of his plea in a subsequent criminal proceeding pending in another jurisdiction will also be considered. See text & notes 80-82 *infra*.
29. Boykin v. Alabama, 395 U.S. 238, 243 n.5 (1969); McCarthy v. United States, 394 U.S. 459, 466 (1969); *see* U.S. CONST. amends. V, XIV.
30. Boykin v. Alabama, 395 U.S. 238, 243 (1969).
31. Brady v. United States, 397 U.S. 742, 748 (1970); Boykin v. Alabama, 395 U.S. 238, 242 (1969); Von Moltke v. Gillies, 332 U.S. 708, 720 (1948); Smith v. O'Grady, 312 U.S. 329, 334 (1941); Kercheval v. United States, 274 U.S. 220, 223 (1927); FED. R. CRIM. P. 11(c).
32. Brady v. United States, 397 U.S. 742, 748 (1970) (a guilty plea must be the voluntary expression of the defendant's own choice); Machibroda v. United States, 368 U.S. 487, 493 (1962)

however, is by no means clear.

In *Boykin v. Alabama*,[34] the United States Supreme Court held that it was error for a trial judge to accept a guilty plea unless there was an affirmative showing that the plea was both intelligent and voluntary.[35] *Boykin* requires that the judge determine whether the defendant understands the consequences of his plea and the rights he is waiving by entering such a plea.[36] Since *Boykin*, however, the Supreme Court has treated the intelligence requirement as part of the voluntariness requirement.[37] Therefore, a defendant's guilty plea will not be deemed voluntary unless it was intelligently made.[38] In light of this blurring of the "voluntary" and "intelligent" criteria, this casenote will refer to these requirements collectively as the intelligence/voluntariness requirement.

There are three major components of the intelligence/voluntariness requirement.[39] The defendant must assent to the plea,[40] know the elements of the charges against him,[41] and understand

("a guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void"); FED. R. CRIM. P. 11(d).

33. North Carolina v. Alford, 400 U.S. 24, 38 (1970) (because there was a strong factual basis for the guilty plea, and equivocal guilty plea could be accepted by a trial judge); McCarthy v. United States, 394 U.S. 459, 467 (1969) (Rule 11's requirement that there be a factual basis for the plea was to keep a defendant from voluntarily pleading guilty when his conduct did not fall into the charge to which he plead guilty); State v. Watson, 120 Ariz. 441, 448, 586 P.2d 1253, 1260 (1978) (*North Carolina v. Alford* required a trial court to establish a factual basis for a plea of guilty before such a plea is constitutionally acceptable), *cert. denied*, 440 U.S. 924 (1979); FED. R. CRIM. P. 11(f); ARIZ. R. CRIM. P. 17.3. *But see* J. BOND, PLEA BARGAINING AND GUILTY PLEAS 159 (1978); Note, *Equivocal Guilty Pleas—Should They Be Accepted?*, 75 DICK. L. REV. 366, 366-67 (1970).

34. 395 U.S. 238 (1969).

35. *Id.* at 242.

36. *See id.* at 242-43.

37. Henderson v. Morgan, 426 U.S. 637, 645 (1976) (the nature of constitutional protections waived and the elements of the charges against the defendant must be fully disclosed so that the defendant's guilty plea is intelligent and therefore voluntary); Sober v. Crist, 644 F.2d 807, 809 (9th Cir. 1981); *see* McCarthy v. United States, 394 U.S. 459, 466 (1969) (a guilty plea could not "be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts").

38. *See* Henderson v. Morgan, 426 U.S. 637, 647 (1976). In Pilkington v. United States, 315 F.2d 204, 206-07 (4th Cir. 1963), the court discussed the district court's erroneous statements regarding the maximum penalty faced by the defendant in terms of involuntariness and held that the defendant was entitled to a hearing on the voluntariness issue. In Kotz v. United States, 353 F.2d 312, 314 (8th Cir. 1965), the court treated the defendant's lack of knowledge of the possible sentence in terms of intelligence. *See* J. BOND, *supra* note 33, at 74-75.

39. Note, *The Trial Judge's Satisfaction As To Voluntariness and Understanding of Guilty Pleas*, 1970 WASH. U.L.Q. 289, 305.

40. Brady v. United States, 397 U.S. 742, 748 (1970) (at a minimum, a defendant's decision to plead guilty must be "the voluntary expression of his own choice"); Machibroda v. United States, 368 U.S. 487, 493 (1962) ("a guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void"); Waley v. Johnston, 316 U.S. 101, 104 (1942) (coerced guilty pleas are no more consistent with due process than coerced confessions).

41. Morgan v. Henderson, 426 U.S. 637, 645 (1976) (a "plea cannot be voluntary in the sense it constituted an intelligent admission" to the charged offense unless the defendant has notice of the "true nature of the charge against him"); Smith v. O'Grady, 312 U.S. 329, 334 (1941) (real notice of the true nature of the charges was considered to be the "most universally recognized" requirement of due process).

the consequences of his guilty plea.[42] The difficulty arises in determining which consequences of the plea must be disclosed. On this point, the United States Supreme Court has remained silent. The lower federal courts and the state courts have thus been left to develop their own standards as to which consequences must be disclosed to satisfy due process requirements.[43]

Typically, direct consequences of the plea must be revealed while collateral consequences need not be disclosed.[44] Each jurisdiction has developed its own list of direct and collateral consequences.[45] A myr-

42. Brady v. United States, 397 U.S. 742, 748 (1970) (waivers of constitutional rights that occur upon the entry of a plea of guilty must be knowing and intelligent acts "done with sufficient awareness of the relevant circumstances and likely consequences" of such a waiver); Boykin v. Alabama, 395 U.S. 238, 243-44 (1969) (the defendant must have a "full understanding of what the plea connotes and of its consequences"); Kercheval v. United States, 274 U.S. 220, 223 (1927) (defendants must have a "full understanding of the consequences" of their pleas before a court can accept them).

43. Casenote, *Guilty Plea Protection and Administration*, 63 CAL. L. REV. 197, 220 (1974); Casenote, *The Rational Basis for Guilty Plea and the Restrictive Scope of Direct Consequences*, 31 WASH. & LEE L. REV. 236, 238 (1974). *But see* Brady v. United States, 397 U.S. 742, 755 (1970). The *Brady* Court adopted a voluntariness standard that a guilty plea entered by a defendant who was "fully aware of the direct consequences" of the plea "must stand unless induced by threats." *Id.* At the federal level, Rule 11 of the Federal Rules of Criminal Procedure provides some help as to which consequences must be disclosed. *See* McCarthy v. United States, 394 U.S. 459, 465 (1969) (Rule 11 was "designed to assist the trial judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary"); United States v. Myers, 451 F.2d 402, 404 (9th Cir. 1972) (Rule 11 does not require that every conceiveable consequence of the plea be disclosed and that "[a]lthough a comprehensive category of those consequences has not been developed, there is agreement that any factor that necessarily affects the maximum term of imprisonment is a consequence of the plea within the meaning of Rule 11"); FED. R. CRIM. P. 11(c); see note 45 *infra*, for the text of this rule and its 1966 predecessor.

44. Strader v. Garrison, 611 F.2d 61, 63 (4th Cir. 1979) (a guilty plea "is not rendered involuntary in a constitutional sense if the defendant is not informed of all the possible indirect and collateral consequences" of such a plea); United States v. Sambros, 454 F.2d 918, 922 (D.C. Cir. 1971) ("the Supreme Court meant what it had said [in *Brady*] when it used 'direct'; by doing so it excluded collateral consequences"); Durant v. United States, 410 F.2d 689, 692 (1st Cir. 1969) (consequences that are civil in nature are not within the scope of Rule 11 because they are collateral consequences); *see* Casenotes, note 43 *supra*.

45. See text & notes 48-57 *infra*. At the federal level, Rule 11 of the Federal Rules of Criminal Procedure is a guide to the advice which must be given to a defendant before a plea is accepted. See text & note 43 *supra*. Further, Rule 11(c) is generally considered to be a codification of Boykin v. Alabama. FED. R. CRIM. P. 11 (commentary); *see* State v. Cuthbertson, 117 Ariz. 62, 64, 570 P.2d 1189, 1191 (1977). The historical development of Rule 11 indicates a trend toward greater specification of the consequences which must be disclosed to the defendant upon the acceptance of his plea. *See* United States v. Carter, 619 F.2d 293, 297-98 (3d Cir. 1980). *Compare* Fed. R. Crim. P. 11 (1966) (address "the defendant personally and determin(e) that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea") *with* Fed. R. Crim. P. 11 (1944) (determine "that the plea is made voluntarily with understanding of the nature of the charge"). The present version of Rule 11 requires that a defendant be informed of the maximum possible sentence and any mandatory minimum sentence.

> (c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of and determine that he understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law.

FED. R. CRIM. P. 11(c)(1). *See also* Note, *Rule 11 and Collateral Attack on Guilty Pleas*, 86 YALE L.J. 1395, 1405 (1977).

"A major purpose of the 1975 amendments in expanding Rule 11 was to facilitate prompt disposition of post conviction attacks on guilty pleas." *Id.* The commentary following the 1975

iad of different disclosure requirements have resulted.[46] Further, the method used to determine whether a consequence is direct or collateral ultimately determines the outcome.[47]

One common test for the existence of a direct consequence focuses on whether the length of detention is affected.[48] A similar test concerns whether the consequence "represents a definite, immediate and largely automatic effect on the range of the defendant's punishment."[49] Under these tests, direct consequences generally include ineligibility for parole,[50] enhancement of punishment under a habitual offender statute in the instant proceeding,[51] and consecutive, as opposed to concurrent, sentences.[52] Collateral consequences which need not be disclosed include deportation,[53] loss of voting and other civil privileges,[54] civil institutionalization,[55] enhancement of sentence in subsequent criminal proceedings,[56] and undesirable discharge from the military.[57]

---

version of Rule 11 indicates that individual judges have discretion to disclose any consequences of a guilty plea beyond those enumerated in Rule 11(c). FED. R. CRIM. P. 11 (commentary).

46. See text & notes 50-57 *infra*.

47. Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973); J. BOND, *supra* note 33, at 148.

48. *See* Durant v. United States, 410 F.2d 689, 692 (1st Cir. 1969) (the test is whether the consequences affect the length of detention; this test is widely accepted as the demarcation between direct and collateral consequences).

49. Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973) (determination of direct or collateral consequence was made on the basis of "whether the result represent(ed) a definite, immediate and largely automatic effect on the range of defendant's punishment"); *see* Fruchtman v. Kenton, 531 F.2d 946, 949 (9th Cir.) (Rule 11 imposes no duty to reveal a consequence if that consequence is not the sentence of the court which accepted the plea), *cert. denied*, 429 U.S. 895 (1976). *See also* United States v. Briscoe, 432 F.2d 1351, 1353-54 (D.C. Cir. 1970) (the court discussed the severity of deportation and said that "the likelihood of deportation may thus rightly be included in the judgment as to whether an accused should plead guilty" so that any government action that creates uncertainty surrounding that likelihood "may undercut the voluntariness of the plea"); Spradley v. United States, 421 F.2d 1043, 1046 (5th Cir. 1970) ("personal explanation of *anything which affects the length of detention*") (emphasis in original).

50. United States *ex rel.* Williams v. Morris, 633 F.2d 71, 75 (7th Cir. 1980); Durant v. United States, 410 F.2d 689, 693 (1st Cir. 1969); ALI-MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.4(e)(ii), at 248 (1975). *Contra*, Trujillo v. United States, 377 F.2d 266, 269 (5th Cir.), *cert. denied*, 389 U.S. 899 (1967).

51. Berry v. United States, 412 F.2d 189, 192-93 (3d Cir. 1969); UNIFORM LAWS ANN. CRIM. P. § 444(b)(ii), at 197 (1974); ABA STANDARDS FOR CRIMINAL JUSTICE §§ 14-1.4(a)(iii), at 14, 19 (1980); ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.4(e)(iii), at 248 (1975).

52. United States v. Myers, 451 F.2d 402, 404 (9th Cir. 1972); People v. Cairns, 4 Mich. App. 633, 640, 145 N.W.2d 345, 348 (1966); UNIFORM LAWS ANN. R. CRIM. P. § 444(b)(ii), at 197 (1974). *Contra*, Kincade v. United States, 559 F.2d 906, 909 (3d Cir.), *cert. denied*, 434 U.S. 970 (1977); Faulisi v. Daggett, 527 F.2d 305, 309 (7th Cir. 1975); ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.4(e) (commentary), at 619 (1975).

53. Fruchtman v. Kenton, 531 F.2d 946, 949 (9th Cir.), *cert. denied*, 429 U.S. 895 (1976); United States v. Santelises, 509 F.2d 703, 703-04 (2d Cir. 1975); United States v. Sambro, 454 F.2d 918, 923 (D.C. Cir. 1971).

54. Waddy v. Davis, 445 F.2d 1, 3 (5th Cir. 1971); Meaton v. United States, 328 F.2d 379, 380-81 (5th Cir. 1964) (includes other rights, such as the right to travel abroad, as collateral consequences as well); United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963).

55. Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973). *See also* Gardner v. Griggs, 541 F.2d 851, 852-53 (9th Cir. 1976) (admission to a state facility for diagnostic evaluation was deemed to be a collateral consequence that need not have been disclosed before the guilty plea was accepted).

56. Hightower v. United States, 455 F.2d 481, 482 (6th Cir. 1972); State v. Superior Court,

The Arizona Supreme Court has not expressly adopted the direct/collateral dichotomy test for required disclosure. The court has said, however, that Rule 17.2 of the Arizona Rules of Criminal Procedure[58] codifies *Boykin*'s requirement that a defendant's plea must be voluntary and intelligent.[59] Rule 17.2(b) requires that the court inform and determine that the defendant understands the consequences of a guilty plea that affects the range of possible sentences that may be received "including any special conditions regarding sentence, parole, or commutation imposed by statute."[60] The Arizona courts have applied a test of whether the consequence is "an operational element" of the sentence in order to determine whether disclosure is required under Rule 17.2(b).[61] The result has been disclosure requirements that bear a close resemblance to the results that are reached under a direct/collateral dichotomy.[62]

Rule 17.2, however, requires more than the constitutional minima of due process.[63] According to the Arizona Supreme Court, even if the *Boykin* constitutional requirements have been satisfied, a violation of

---

128 Ariz. 583, 585, 627 P.2d 1081, 1083 (1981); People v. District Court, 191 Colo. 298, 301, 552 P.2d 297, 299 (1976); ABA STANDARDS FOR CRIMINAL JUSTICE § 14-1.4(a)(iii) (commentary), at 14.25 (1980).

57. Redwine v. Zuckert, 317 F.2d 336, 338 (D.C. Cir. 1963).

58. ARIZ. R. CRIM. P. 17.2 provides:

> Before accepting a plea of guilty or no contest, the court shall address the defendant personally in open court, informing him of and determining that he understands the following:
>
> a. The nature of the charge to which the plea is offered;
>
> b. The nature and range of possible sentence for the offense to which the plea is offered, including any special conditions regarding sentencing, parole, or commutation imposed by statute;
>
> c. The constitutional rights which he foregoes by pleading guilty or no contest, including his right to counsel if he is not represented by counsel;
>
> d. His right to plead not guilty.

59. State v. Rogel, 116 Ariz. 114, 116, 568 P.2d 421, 423 (1977). The Arizona Supreme Court has also said that *Boykin* makes Rule 11 of the Federal Rules of Criminal Procedure applicable to the states. State v. Cuthbertson, 117 Ariz. 62, 64, 570 P.2d 1075, 1077 (1977). *But see* text & note 93 *infra*.

60. ARIZ. R. CRIM. P. 17.2(b).

61. *See* State v. Rogel, 116 Ariz. 114, 116, 568 P.2d 421, 423 (1977). The Arizona Supreme Court said that a fine was not an "operative element" of the sentence, "thus it did not affect the computation or effect of appellant's sentence or parole therefrom. . . ." *Id.*

62. Under Rule 17.2(b), the following consequences must be disclosed to the defendant before his plea can be accepted: 1) mandatory parole terms, State v. Cuthbertson, 117 Ariz. 62, 64, 570 P.2d 1175, 1177 (1977); 2) more jail time as the result of violation of probation than defendant could have received as a sentence, State v. Cutler, 121 Ariz. 328, 330, 590 P.2d 444, 446 (1978); 3) minimum sentence, State v. Rios, 113 Ariz. 30, 32, 545 P.2d 954, 956 (1976). *See also* Casenote, *Intelligent and Voluntary Plea of Guilty: Informing A Defendant of Possible Punishment*, 20 ARIZ. L. REV. 1028, 1033 (1978). Under Rule 17.2(b), the following consequences do not have to be disclosed: 1) fines, State v. Rogel, 116 Ariz. 114, 116, 568 P.2d 421, 423 (1977); 2) the possibility of consecutive as opposed to concurrent sentences, State v. Gordon, 125 Ariz. 425, 427, 610 P.2d 59, 61 (1980).

63. State v. Dishong, 122 Ariz. 218, 219, 594 P.2d 84, 85 (1979); State v. Cuthbertson, 117 Ariz. 62, 64, 570 P.2d 1175, 1177 (1977); Casenote, *supra* note 62, at 1033.

Rule 17.2(b) may still require the guilty plea to be vacated.[64] An appellate court must, however, first determine whether the defendant has been prejudiced by the violation of Rule 17.2(b).[65] If prejudice is found, the matter is either remanded for an evidentiary hearing to determine whether the defendant had actual knowledge of the sentencing provisions[66] or the plea is vacated.[67] If the defendant was not aware of the sentencing provisions and they were not disclosed to him on the record, then his plea must be vacated.[68]

Analysis of State v. Superior Court

State v. Superior Court resolved two issues related to the acceptance of guilty pleas. The primary issue was whether Gretzler's California convictions were inadmissible for enhancement of sentence purposes because Gretzler had been inaccurately informed of the consequences of his pleas in matters then pending in Arizona.[69] Second, the court addressed the issue of whether a collateral attack on the California guilty pleas in Arizona was permissible.[70]

The Arizona Supreme Court recognized that a void conviction could not be used for enhancement of sentence purposes.[71] This principle originated in cases involving the denial of the right to counsel and involuntary confessions.[72] Although these cases involve either the fifth or sixth amendments, they suggest that any error of constitutional magnitude would render a conviction void for enhancement of sentence

64. *See* State v. Ellis, 117 Ariz. 329, 333, 572 P.2d 791, 795 (1977); State v. Cuthbertson, 117 Ariz. 62, 64, 570 P.2d 1175, 1177 (1977).

65. State v. Dishong, 122 Ariz. 218, 219, 594 P.2d 84, 85 (1979); State v. Ellis, 117 Ariz. 329, 333, 572 P.2d 791, 795 (1977); State v. Cuthbertson, 117 Ariz. 62, 64, 570 P.2d 1175, 1177 (1977). These cases involved prejudice to the defendant when special sentencing provisions that were not disclosed to the defendant came into play as a result of the actual sentence imposed. In State v. Wilson, 126 Ariz. 348, 350, 615 P.2d 645, 647 (Ct. App. 1980), there was no prejudice to the defendant even though he had not been informed of the possibility of consecutive sentences because the actual sentence imposed ran concurrently.

66. State v. Dishong, 122 Ariz. 218, 220, 594 P.2d 84, 87 (1979); State v. Ellis, 117 Ariz. 329, 333, 572 P.2d 791, 795 (1977); State v. Soloman, 117 Ariz. 228, 231, 571 P.2d 1024, 1027 (1977); State v. Rodriguez, 126 Ariz. 104, 106, 612 P.2d 1067, 1069 (Ct. App. 1980).

67. State v. Dishong, 122 Ariz. 218, 219, 594 P.2d 84, 85 (1979); State v. Ellis, 117 Ariz. 329, 333, 572 P.2d 791, 795 (1977); State v. Soloman, 117 Ariz. 228, 231, 571 P.2d 1024, 1027 (1977); State v. Hill, 118 Ariz. 157, 160, 575 P.2d 356, 359 (Ct. App. 1978).

68. See authority cited in notes 66-67 *supra*.

69. State v. Superior Court, 128 Ariz. 583, 584, 627 P.2d 1081, 1082 (1981).

70. *Id.* at 585-86, 627 P.2d at 1083-84.

71. *Id.* at 585, 627 P.2d at 1083.

72. *Id.*; *see* Burgett v. Texas, 389 U.S. 109, 115 (1967); Martinez v. Estelle, 612 F.2d 173, 174 (5th Cir. 1980). *Burgett* held that a prior conviction that was constitutionally infirm under Gideon v. Wainwright, 372 U.S. 335 (1963), could not be used for enhancement purposes because this use would erode the principle of *Gideon* and the defendant would suffer the denial of the right to counsel anew. 389 U.S. at 115. *Martinez* held that a prior conviction entered without a reliable determination as to the voluntariness of the confession as requied by Jackson v. Denno, 378 U.S. 368 (1964), could not be used for enhancement of sentence purposes when the defendant's allegations, if true, supported the conclusion that the confession was involuntary. 612 F.2d at 174.

purposes. The Arizona Supreme Court thus implied that a substantial violation of the due process requirements of *Boykin v. Alabama* would render the convictions constitutionally infirm and thus preclude their use for enhancement of sentence purposes.[73]

The Arizona Supreme Court, however, seems to hold that the acceptance of Gretzler's pleas in California did not violate the due process requirements of *Boykin*.[74] The court found that there was a factual basis for the plea[75] and that Gretzler's pleas were voluntarily made.[76] Furthermore, the court flatly held that failure of the California trial judge to accurately advise Gretzler that his guilty pleas might have an effect on sentencing in Arizona does not render the convictions void.[77]

Although the court did not use the direct/collateral analysis, it reached the same result that most jurisdictions would have reached under this form of analysis.[78] There is, however, a unique aspect to the acceptance of Gretzler's guilty pleas. Rather than saying nothing about a collateral consequence, the California judge informed Gretzler that his pleas could not be used in any other proceeding in any other jurisdiction.[79] Furthermore, the California judge gave Gretzler incorrect information because Gretzler's pleas were in fact used as aggravating circumstances in Arizona to enhance his sentence for first degree murder.[80] The Arizona Supreme Court held, however, that a trial judge does not have to accurately inform a defendant of the consequences of

73. 128 Ariz. at 585, 627 P.2d at 1083. The Arizona Supreme Court stated that it found "no violation of [*Boykin v. Alabama*] in the acceptance of the defendant's pleas of guilty in the California court which would render the judgments void." *Id.* This suggests that there are some *Boykin* violations that would render a judgment void for enhancement purposes. Other jurisdictions have dealt with *Boykin* violations and habitual offender statutes (enhanced punishment) in different ways. *See* State v. Holsworth, 93 Wash. 2d 148, 159, 607 P.2d 845, 850 (1980). In *Holsworth*, the Washington Supreme Court stated that constitutionally infirm convictions based on pre-*Boykin* pleas that failed to meet the *Boykin* requirements could not be used for enhancement purposes. *Id. But see* State v. Holden, 375 So. 2d 1372, 1374 (La. 1979). In *Holden*, the Louisiana Supreme Court held that under Timmreck v. United States, 441 U.S. 780 (1979), due process does not render a conviction void for enhancement of sentence purposes "simply because the record does not affirmatively show waiver of *Boykin*-listed rights." *Id.* at 1374. This is the same result the Arizona Supreme Court reaches concerning technical violations of *Boykin* on collateral review. State v. Superior Court, 128 Ariz. at 586, 627 P.2d at 1084; *see* text & notes 89-102 *infra*.

74. 128 Ariz. at 585, 627 P.2d at 1083; *see* text & note 85 *infra; accord*, Wright v. United States, 624 F.2d 557, 561 (5th Cir. 1980); Weinstein v. United States, 325 F. Supp. 597, 600 (D.C. Cal. 1971) (a defendant does not have to be advised that his guilty plea can be used for enhancement of sentence purposes in another matter); State v. Christensen, 201 N.W.2d 457, 459 (Iowa 1972); People v. Wilson, 365 N.Y.S.2d 961, 963, 81 Misc. 2d 739, 741 (1975); State v. Porter, 49 Ohio App. 2d 227, 229, 360 N.E.2d 759, 760-61 (1976); People v. McGrath, 43 N.Y.2d 803, 804, 373 N.E.2d 284, 284-85 (1977). *But see* Rohren v. Montana, 237 F. Supp. 747, 753 (D.C. Mont. 1965).

75. 128 Ariz. at 585, 627 P.2d at 1083. This satisfies the accuracy requirement. *See* text & note 33 *supra*.

76. 128 Ariz. at 585, 627 P.2d at 1083; *see* text & notes 31-36 *supra*.

77. 128 Ariz. at 585, 627 P.2d at 1083.

78. See text & note 74 *supra*. Enhancement of sentence for a subsequent crime is generally treated as a collateral consequence. See text & note 56 *supra*.

79. 128 Ariz. at 584, 627 P.2d at 1082.

80. *Id.* The opinion sets out the dialogue between the California trial judge and Gretzler

his guilty plea on the enhancement of a subsequent sentence in another jurisdiction.[81]

The judge's inaccuracy concerning a collateral consequence arguably raises doubt as to whether the guilty plea is voluntary.[82] The Arizona court, however, did not discuss the prejudicial effect of the misinformation. Instead, the court focused on the good faith and the purpose behind the remarks of the California judge.[83] The court ac-

---

which indicates that the judge had erroneously informed Gretzler that his guilty pleas would have no effect in any other jurisdiction. *See id.*

81. *Id.* at 585, 627 P.2d at 1083. The Arizona Supreme Court held that "the law does not require a judge in one state to accurately explain the law of a sister state before a plea of guilty to a crime in the pleading state may be accepted as voluntary"; however, the court did not cite any authority for that proposition. *Id. See* text & note 74 *supra*.

82. The record is not clear whether Gretzler actually knew that he could receive the death penalty in Arizona if he was convicted in California of first degree murder. 128 Ariz. at 585, 627 P.2d at 1083. Gretzler's California counsel refused to advise Gretzler on the matters pending in Arizona. Response To Petition For Special Action, at page 4. However, the record indicates that Gretzler and his California counsel knew that Arizona had the death penalty. State v. Gretzler, No. A24565, A24567 (evidentiary hearing on Gretzler's motion in limine, Pima County Super. Ct., Oct. 24, 1980). During the change of plea hearing and after the California judge had accepted Gretzler's change of plea, the trial judge re-emphasized that the California convictions would not affect any other proceedings. 128 Ariz. at 584, 627 P.2d at 1082. Gretzler indicated that the re-sentencing hearing in Arizona that he would not have pled guilty to the 9 counts of first degree murder in California if he had known that he could receive the death penalty in Arizona as a result. *Id.* at 585, 627 P.2d at 1083.

In Hunter v. Fogg, 616 F.2d 55, 58 (2d Cir. 1980), the second circuit dealt with a state trial court's potential failure to advise misinform defendant as to sentencing possibilities. The court said that "[w]hen a state court guilty plea is alleged to be constitutionally invalid because the defendant was not told or was misinformed about sentencing information requisite to an informed plea, the issue is 'whether the defendant was aware of actual sentencing possibilities, and, if not, whether accurate information would have made any difference in his decision to enter a plea.'" *Id.* The *Fogg* court avoided applying this test by finding that there was no judicial misinformation. *Id.* at 63. The *Fogg* test applies when the misinformation concerns "information requisite to an informed plea"; in other words, direct consequences. *Id.* at 58. Thus, in situations where there has been judicial misinformation concerning direct consequences, the question becomes whether the defendant was prejudiced by such an error. Jones v. United States, 419 F.2d 515, 518-19 (8th Cir. 1969) (the trial court advised the defendant that the maximum sentence possible was 30 years when it was in fact 20 years, but because defendant's counsel had informed defendant of correct term, the defendant was not prejudiced by the misinformation). Although Gretzler was apparently prejudiced by the misinformation, the enhancement effect of conviction on sentencing for subsequent crimes is not treated as a direct consequence. *See* text & note 74 *supra*.

In Strader v. Garrison, 611 F.2d 61 (4th Cir. 1979), the Fourth Circuit dealt with misinformation regarding a collateral consequence. *Id.* at 62-63. The *Strader* court said:

> One would not suppose that the collateral consequence rule, which exempts some consequences from the positive disclosure requirement, would apply in a situation in which the defendant's guilty plea was induced by actual misadvice respecting some collateral consequence when that consequence was of substantial importance to the defendant.

Id. at 63. The *Strader* case dealt with parole ineligibility, a collateral consequence in the Fourth Circuit in which disclosure would not ordinarily be required. *Id.* The court held that grossly inaccurate advice from the defendant's attorney regarding parole eligibility activated the disclosure requirement. *Id.* at 65. In Gretzler's case, the misinformation originated with the judge, not defense counsel. Although *Strader* is analagous, no authority appears to deal specifically with judicial misinformation as to collateral consequences. *See also* Hammond v. United States, 528 F.2d 15, 18 (4th Cir. 1975). *Contra*, United States v. Sambro, 454 F.2d 918, 923 (D.C. Cir. 1971); United States v. Sapp, 439 F.2d 817, 820 (5th Cir. 1971); United States v. Parrino, 212 F.2d 919, 921-22 (2d Cir. 1954).

83. 128 Ariz. at 586, 627 P.2d at 1084.

cordingly held that the judgments had been entered in good faith and that Gretzler had not been purposefully misled.[84] Any violation of *Boykin*, therefore, was regarded as only technical in nature[85] and not subject to collateral attack in Arizona even though the death penalty was involved.[86] The court relied upon the United States Supreme Court decision in *Timmreck v. United States*[87] for the proposition that a technical violation of *Boykin* does not render a conviction subject to collateral attack.[88]

The *Timmreck* case, however, did not deal with *Boykin* violations.[89] *Timmreck* held that a technical violation of Rule 11 of the Federal Rules of Criminal Procedure[90] in the acceptance of a guilty plea does not render a conviction subject to collateral attack.[91] Although some portions of Rule 11 parallel the due process requirements enunciated in *Boykin*,[92] the Federal Rules of Criminal Procedure are not applicable to the states.[93] The authority relied upon by the Arizona Supreme Court for holding that the California convictions were not subject to collateral attack in Arizona thus concerned technical violations of Rule 11, and not *Boykin*.[94]

The United States Supreme Court has never held that a technical violation of the *Boykin* requirements is not subject to collateral at-

84. *Id.*

85. There is language in State v. Superior Court that can be interpreted as saying either that there was no *Boykin* violation or that if there were, it was only a technical violation. The court said, "The law does not require a judge in one state to accurately explain the law of a sister state before a plea of guilty to a crime in the pleading state may be accepted as voluntary." *Id.* at 585, 627 P.2d at 1083. This implies that *Boykin* does not require disclosure; hence, there was no violation of *Boykin*. There is language, however, that indicates that there may have been a mere technical violation of *Boykin* or at least a violation that would not render the California judgments void. Id. at 585, 586, 627 P.2d at 1083, 1084.

86. *Id.* at 586, 627 P.2d at 1084.

87. 441 U.S. 780 (1979).

88. 128 Ariz. at 586, 627 P.2d at 1084.

89. 441 U.S. at 781.

90. See note 45 *supra*.

91. 441 U.S. at 785; *see* Davis v. United States, 417 U.S. 333, 346 (1974).

92. *See* FED. R. CRIM. P. 11(c) (historical note on the 1974 amendment). The amendment identifies more specifically what must be explained to the defendant and also codifies the requirements of Boykin v. Alabama, 395 U.S. 238 (1969), which held that a defendant must be apprised of the fact that he relinquishes certain constitutional rights by pleading guilty. *Id.*

93. Casenote, *Tennessee Procedure For Acceptance of Guilty Pleas—Jury Setting Punishment May Receive Evidence of Defendant's Prior Criminal Record After Guilty Plea*, 8 MEM. U.L.J. 173, 175 (1977). *But cf.* Boykin v. Alabama, 395 U.S. 238, 244-45 (1969) (Harlan, J., dissenting) (Justice Harlan felt that to reverse convictions because there was not a record to show that they were intelligent and voluntary was to require the states, as a matter of constitutional law, to adhere to the rigid prophylatic requirements of Rule 11); McCarthy v. United States, 394 U.S. 459, 464 (1969) (the *McCarthy* Court based its holding upon the construction of Rule 11 and not on any constitutional grounds); Erickson, *Finality of a Guilty Plea*, 48 NOTRE DAME LAW. 835, 836 (1973) ("[t]he essence of *Boykin* was to make the requirements of Rule 11 applicable to the states").

94. Timmreck v. United States, 441 U.S. 780, 781 (1979). *Timmreck* concerned a violation of Rule 11(c) of the Federal Rules of Criminal Procedure because the defendant was not informed of a special mandatory parole term. *Id.* at 782. *See also* United States v. Lopez-Beltran, 619 F.2d 19, 20 (9th Cir. 1979) (violation of Rule 11(f), requiring a judge to determine that there was a factual basis for the plea before accepting it).

tack.[95] Also, since due process provides an irreducible level of constitutional protection,[96] any violation of the *Boykin* requirements should constitute a violation of due process.[97] Further, any constitutional due process violation is subject to collateral review.[98] Therefore, any *Boykin* violation should also be subject to collateral review.

Even if it is assumed that collateral relief is generally not available when there is only a technical *Boykin* violation, the *Timmreck* opinion indicates that collateral relief may be available in order to avoid a "complete miscarriage of justice"[99] or a proceeding "inconsistent with rudimentary demands of fair procedure."[100] At the very least, the notions of justice and fair procedure should protect a defendant who relies on a judge's erroneous statement regarding the consequences of the plea when the pleas are then used to impose the death penalty.[101] Therefore, regardless of whether *Timmreck* includes *Boykin* violations within the scope of its holding, collateral review should be allowed under the circumstances presented in *State v. Superior Court*.[102]

Policy Considerations in Disclosing the Consequences of Guilty Pleas

Several policy considerations support limiting disclosure of the consequences of a guilty plea. First, the administration of justice requires finality of pleas.[103] In addition, a requirement of extensive disclosure would place an onerous burden on the trial judge.[104] Disclosure requirements might also result in prejudice to the state if the

95. *But see* Roberts v. United States, 445 U.S. 552, 556 (1980). The Court stated, "[W]e have, however, sustained due process objections to sentences on the basis of 'misinformation of constitutional magnitude' ". *Id.*

96. The use of "irreducible level of constitutional protections" is meant to convey the concept that whatever due process of law requires, it is a constitutional minimum. Therefore, if the *Boykin* Court holds that due process requires a guilty plea to be voluntary and intelligent, that is a minimum of constitutional protection. A violation of *Boykin* is a violation of due process and cannot be considered merely technical, for *Boykin* is already the minimum protection provided by law.

97. See text & note 29 *supra*.

98. Machibroda v. United States, 368 U.S. 487, 493 (1962) (plea that was not voluntary is open to collateral attack); State v. Holsworth, 83 Wash. 2d 148, 151, 607 P.2d 845, 848 (1980) (attack on the use of pre-*Boykin* pleas under a habitual offender statute was not a collateral attack, rather a challenge to the *present* use of an invalid plea in a *present* criminal sentencing process); Comment, *Due Process At Sentencing: Implementing The Rule of United States v. Tucker*, 125 U. PA. L. REV. 1111, 1117-18 (1977) (most federal circuit courts require that the court applying a multiple offender statute pass on the validity of the prior convictions because the prosecution in the present case has the burden of proving that those prior convictions existed).

99. 441 U.S. at 784 (citing Hill v. United States, 368 U.S. 424, 428 (1962)).

100. *Id.*

101. See text & note 95 *supra*.

102. See text & note 80 *supra*.

103. Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975); *see* Erickson, *supra* note 93, at 835-37; Note, *supra* note 45, at 1399.

104. *See* Michael v. United States, 507 F.2d 461, 466 (2d Cir. 1974) (a trial judge does not have to anticipate all the "multifarious peripheral contingencies" surrounding a guilty plea); Mathis v. Hocker, 459 F.2d 988, 989 (9th Cir. 1972); United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963); United States v. Sherman, 474 F.2d 303, 305 (9th Cir. 1973).

state relies on the pleas and drops other charges against the defendant.[105] Finally, judicial economy might be adversely affected because of increased collateral attacks on the validity of guilty pleas.[106] Direct and collateral attacks on the validity of guilty pleas frequently occur.[107] Requiring a trial judge to speculate on the diverse consequences of a plea in any given situation would only invite more challenges should the judge incorrectly list the consequences or fail to disclose them completely.

The policy consideration behind requiring more extensive disclosure of the consequences of a guilty plea is also important. The most prominent consideration is that the defendant have a full understanding of the consequences of his guilty plea.[108] In view of this, administrative convenience is a weak reason for overriding the defendant's right to an intelligent[109] and voluntary[110] waiver of the constitutional rights involved in pleading guilty.[111]

The government's interest in limiting collateral attacks and the defendant's interest in insuring voluntary and intelligent waivers are both enhanced when the plea process is spelled out exactly.[112] Full disclosures might in fact decrease challenges to the validity of guilty pleas.[113] If the consequences to be disclosed were clearly delineated and applied in every case, future challenges to guilty pleas would be limited to those where a record of the advisement was not made[114] or where coercion outside the plea hearing was alleged.[115] Disclosure of all of the severe consequences of a guilty plea, whether or not those consequences affect the length of detention or are the automatic results of the plea, would thus decrease instances of both direct and collateral attack.[116]

105. United States v. Lambros, 544 F.2d 962, 966-67 (8th Cir. 1976), *cert. denied*, 430 U.S. 930 (1977); J. BOND, *supra* note 33, at 314.

106. United States v. Carter, 619 F.2d 293, 297 (3d Cir. 1980) (decrease in challenges to guilty pleas' validity and reduction of the burden on the criminal justice system are recognized state interests in an effective plea process); United States v. Sherman, 474 F.2d 303, 305 (9th Cir. 1973); J. BOND, *supra* note 33, at 314; ABA STANDARDS FOR CRIMINAL JUSTICE § 14-1.4 (commentary), at 14.21 (1980).

107. McCarthy v. United States, 394 U.S. 459, 465 (1969); United States v. Carter, 619 F.2d 293, 293-94 (3d Cir. 1980); Note, *supra* note 45, at 1395-96.

108. Boykin v. Alabama, 395 U.S. 238-243-44 (1969).

109. See note 31 *supra*.

110. See note 32 *supra*.

111. Casenote, *The Rationale Basis For Guilty Pleas, supra* note 43, at 248. Although expanding the scope of direct consequences to include severe collateral consequences would increase the burden on the trial judge, knowledge of such consequences may be vital to a rational waiver of a defendant's rights. *Id.* Courts are properly concerned with administrative economy, but this concern should not be paramount. *Id.* It is far more important that courts justly apply the strictures of criminal procedure. *Id.*

112. United States v. Carter, 619 F.2d 293, 297 (3d Cir. 1980).

113. *Id. See also* Casenote, *Rational Basis For Guilty Pleas, supra* note 43, at 249.

114. *See* Note, *supra* note 45, at 1405.

115. *Id.*

116. *See* Casenote, *Rational Basis for Guilty Pleas, supra* note 43, at 249. *See also* McCarthy v. United States, 394 U.S. 459, 465 (1969). The Court said the following about compliance with Rule

There are, however, some consequences that are either too remote or too insignificant to weigh in the defendant's decision whether to plead guilty.[117] Loss of civil privileges such as the right to vote or the right to obtain a drivers license have little import for defendants facing such harsh consequences as life imprisonment or the death penalty. It could hardly be said that the defendant would be prejudiced if not told of these possibilities in this situation.[118] These civil consequences are so numerous and speculative that to require disclosure would present a great burden on the courts in most situations.[119]

Although guilty pleas can be beneficial to both the state and the defendant,[120] this benefit should not be bought at the expense of the defendant's rights. Most courts take the position that a trial judge is entitled to believe that a defendant will not commit any additional crimes in the future.[121] Therefore, the possible enhancement-of-sentence effect of a conviction in a subsequent criminal proceeding may not be considered to have a large impact on a defendant's decision to plead guilty.[122] However, when subsequent charges are contemporaneously pending in another jurisdiction, as in Gretzler's case,[123] the possible enhancement of sentence effect of a conviction takes on far greater significance.[124] Because most states have some type of habitual of-

11: "Thus, the more meticulously the Rule is adhered to, the more it tends to discourage, or at least enable more expeditious disposition of, the numerous and often frivilous post conviction attacks on the constitutional validity of guilty pleas." *Id.* There is also a possibility that failure to advise defendants of consequences having a severe impact on the defendant may have a chilling effect on defendants pleading guilty. An additional chilling effect may result from the defendant's inability to rely on the judge's statements as to the consequences of the plea under the rule adopted in *State v. Superior Court*. The defendant who already faces severe consequences may take the position, "what do I have to lose by going to trial?" Gretzler would not have had much to lose.

117. Whether or not a consequence is too remote or speculative could be determined using several factors. The severity and the inevitability of the consequence would be highly relevant. Casenote, *Guilty Plea Protection and Administration*, 63 CAL. L. REV. 197, 223 (1975) (factors considered were severity and inevitability); Casenote, *Rational Basis For Guilty Plea, supra* note 43, at 243 (factors considered were gravity of the penalties and likelihood of their being applied). *But see* J. BOND, *supra* note 33, at 148-49 (although collateral consequences might have a "detrimental impact" on the defendant and be quite severe, "they do not, after all, affect the time defendant must spend in jail").

118. See United States v. Cariola, 323 F.2d 180, 186-87 (3d Cir. 1963) (although the court held that defendant's plea was voluntary, defendant had argued that he had pled guilty only to terminate the proceedings and he had not known of the civil consequences of his action).

119. See note 117 *supra*.

120. Brady v. United States, 397 U.S. 742, 752 (1970); Santobello v. New York, 404 U.S. 257, 260 (1971).

121. Weinstein v. United States, 325 F. Supp. 597, 600 (C.D. Cal. 1971). Trial judges "have a right to assume that the defendant will not be guilty of a subsequent offense." *Id., quoting* Fee v. United States, 207 F. Supp. 674, 676 (W.D. Va. 1962).

122. See text & note 56 *supra*.

123. Gretzler knew that criminal charges were pending against him in Arizona. Further, Gretzler was questioned by the Tucson police while in custody in California. State v. Gretzler, 126 Ariz. 60, 69, 612 P.2d 1023, 1032 (1980).

124. Casenote, *Guilty Plea Protection, supra* note 43, at 225. Finally, a judge must consider any special facts of which he has actual knowledge. *See* United States v. Myers, 451 F.2d 402, 404 (9th Cir. 1972). When a judge is aware that an individual defendant's special interest is at stake,

fender statute,[125] a general warning of possible enhancement of sentence effects for future convictions would not be an onerous burden to place upon the trial judge.

Conclusion

The criminal justice system depends heavily on the use of guilty pleas for convictions. A defendant who pleads guilty, however, must be advised of certain consequences of his plea in order for that plea to constitute an intelligent and voluntary waiver of constitutional rights. The Arizona Supreme Court in *State v. Superior Court* held that a defendant need not be informed of the possible enhancement of sentence effect of his conviction on actions pending in another state. The court failed to discuss what prejudicial effect, if any, the California trial judge's misinformation had on the defendant.

The Arizona Supreme Court also expanded the *Timmreck v. United States* holding to cover so-called technical *Boykin* violations in denying the defendant the right to collaterally challenge the California plea. This clearly is not justified by the language in *Timmreck* which dealt with technical violations of Rule 11 of the Federal Rules of Criminal Procedure. Any violation of *Boykin*, whether or not characterized as technical is a violation of due process and therefore is subject to collateral attack.

Collateral attacks such as the one in *State v. Superior Court* are likely to continue until the United States Supreme Court firmly enumerates those consequences of a guilty plea that must be disclosed to satisfy due process. If there were clear standards as to what due process required for an intelligent and voluntary waiver of a defendant's *Boykin* rights, this uniformity would reduce uncertainty and minimize attacks on the validity of guilty pleas. The delineation of clear guidelines would inure to the benefit of both the government and the individual defendant.

John Christopher Rambow

---

he must inform the accused of consequences which jeopardize that interest even if ordinarily these consequences would not fall within the duty to inform. *Id.*

125. See note 2 *supra*.

CRIMINAL PROCEDURE

A BAN ON POLICE-INITIATED INTERROGATION FOLLOWING AN ACCUSED'S INVOCATION OF HIS RIGHT TO COUNSEL

In *Miranda v. Arizona*[1] the United States Supreme Court held that the privilege against self-incrimination[2] is fully applicable during any period of custodial interrogation.[3] To safeguard this privilege, a defendant prior to interrogation must be informed of his right to remain silent and his right to the presence of an attorney.[4] A troublesome issue left open by the *Miranda* opinion concerns the standard to be applied in determining whether a person in custody has waived these rights.[5]

The *Miranda* Court noted that the manner in which the accused invokes his privilege against self-incrimination affects his ability to later waive that right.[6] Dicta in the *Miranda* opinion also indicates that a waiver of the right to remain silent could occur in the absence of counsel.[7] Certain language in *Miranda* strongly suggests that the right to counsel's presence, once invoked, cannot be waived in the absence of an attorney.[8] Such a construction, however, has been criticized because it would "transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects

---

1. 384 U.S. 436 (1966).

2. The fifth amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S.CONST. amend. V.

3. 384 U.S. 436, 469 (1966). It has been noted that the language used in the fifth amendment is reasonably susceptible to the interpretation "that nobody shall be compelled to give oral testimony against himself in a criminal proceeding underway in which he is a defendant." Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH.L.REV. 1,2 (1930). In practice, however, it has been given a much more liberal construction by the Court. *See* Massiah v. United States, 377 U.S. 201, 206 (1964); Douglas v. California, 372 U.S. 353, 355 (1963); Powell v. Alabama, 287 U.S. 45, 57 (1932).

4. 384 U.S. at 475. Specifically, the accused must be warned:

> [T]hat he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479. Other guidelines relating to the procedure to be followed after the warnings have been issued are discussed in text & notes 8 & 33-35 *infra*.

The right to counsel guaranteed by *Miranda* stems not from the sixth amendment, but rather from the fact that "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege." 384 U.S. at 469.

5. See text & notes 30-32 *infra*.

6. 384 U.S. at 474.

7. *Id.* at 474-75.

8. *Id.* at 474. "If the individual states that he wants an attorney, the interrogation must cease *until an attorney is present*." *Id.* (emphasis added). See text & notes 24-30 *infra*.

of an opportunity to make informed and intelligent assessments of their interests."[9] In *Edwards v. Arizona*,[10] the United States Supreme Court reached a compromise decision.

The *Edwards* case arose as follows:[11] Edwards was arrested, pursuant to a warrant, for his alleged involvement in the robbery of a Tucson bar during which the proprietor suffered a fatal heart attack.[12] Edwards was taken to the police station, informed of his *Miranda* rights, and subjected to an interrogation session that terminated when he expressed a desire to consult with an attorney.[13] The following morning Edwards was approached by two different officers, and once again apprised of his *Miranda* rights.[14] After listening, at his own request, to a tape recorded statement of a co-conspirator, Edwards confessed his involvement in the incident.[15]

The confession was admitted in evidence at Edwards' trial and he was found guilty of robbery, burglary and first degree murder.[16] In reversing Edwards' conviction, the United States Supreme Court ruled that where an accused has requested counsel, police may not establish a valid waiver by showing merely that, upon being re-advised of his rights, the accused responded to further questioning.[17] Furthermore, police may not subject the accused to further interrogation unless the *accused himself* initiates subsequent contact with police.[18] Thus, this ruling maintains the *Miranda* distinction between the procedural safeguards triggered by a request for counsel and those required following a request to remain silent.[19]

This casenote will first examine the *Miranda* decision in an effort to determine whether it provides a sufficient basis for treating an invocation of the right to counsel differently from an invocation of the right to remain silent. The manner in which the Supreme Court, lower federal courts and state courts have applied the *Miranda* doctrine will then

9. Michigan v. Mosley, 423 U.S. 96, 102 (1975). While the Court was speaking about the problems associated with a blanket prohibition against the taking of a voluntary statement after the person in custody has expressed a desire to remain silent, it could be argued that the same reasoning is applicable to the situation where a request is made for the presence of counsel. *But cf.* note 49 *infra*. (a request for counsel could be viewed as an expression of the accused's feeling of incompetence to deal with authorities without legal advice, and as such would warrant a blanket prohibition against the taking of a statement in the absence of counsel, no matter how voluntarily it is given).

10. 49 U.S.L.W. 4496 (1981).

11. For a more detailed account of the facts in the case, see text & notes 59-63 *infra*.

12. State v. Edwards, 122 Ariz. 206, 209, 594 P.2d 72, 75, *rev'd sub nom.* Edwards v. Arizona, 49 U.S.L.W. 4496 (1981).

13. 122 Ariz. at 209, 594 P.2d at 75.

14. *Id.*

15. *Id.*

16. *Id.*

17. Edwards v. Arizona, 49 U.S.L.W. 4496, 4498 (1981).

18. *Id.* See text & notes 72-75 *infra*.

19. Edwards v. Arizona, 49 U.S.L.W. at 4497. See text & notes 33-35 *infra*.

be considered. Finally, the reasoning which led the *Edwards* Court to reach the decision it did, as well as the possible ramifications of that holding, will be examined.

Historical Perspective of the Privilege Against Self-Incrimination

The privilege against self-incrimination, while having its foundation in the Constitution,[20] was actually not applied to situations involving coerced confessions until 1897.[21] Further, it was not until 1964 that the Court incorporated the fifth amendment privilege into the due process clause of the fourteenth amendment, making it applicable to the states.[22] Prior to this time, coerced confessions could be excluded from evidence, but on fourteenth amendment due process rather than fifth amendment self-incrimination grounds.[23]

In *Miranda v. Arizona*,[24] the Supreme Court recognized that during any period of custodial interrogation, a great potential for a violation of the accused's privilege against self-incrimination exists.[25] The Court consequently enunciated the contemporary scope of the privilege against self-incrimination. Expressing its dissatisfaction with the "totality of circumstances" test previously employed to determine whether a confession in a given context was voluntarily made,[26] the Court announced in its stead a stringent set of guidelines to be followed by police when conducting custodial interrogations.[27] Specifically, the Court

20. See note 2 *supra*.

21. Braum v. United States, 168 U.S. 532, 542 (1897). The Court held: "In criminal trials, in courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' " *Id.*

22. Malloy v. Hogan, 378 U.S. 1, 8 (1964).

23. Brown v. Mississippi, 297 U.S. 278, 286 (1936). The Court in *Brown* reasoned that interrogation is part of the process by which the state obtains convictions and therefore comes within the purview of the fourteenth amendment due process clause. *Id.* at 286.

24. 384 U.S. 436 (1966).

25. *Id.* at 467.

26. *Id.* at 457. Prior to *Miranda*, courts were required to determine, from the totality of the circumstances, whether the confession in a given context was voluntarily made. *See, e.g.*, Haynes v. Washington, 373 U.S. 503, 513 (1963) (written confession excluded where obtained after 16 hours of incommunicado incarceration and suspect was allowed to call his wife only after signing the confession); Culombe v. Connecticut, 367 U.S. 568, 602 (1961) (confession of mentally defective suspect who was held without the benefit of counsel for an unreasonable length of time and without being apprised of his constitutional rights, excluded); Leyra v. Denno, 347 U.S. 556, 558 (1954) (confession excluded where it was obtained after many hours of interrogation and given to state-employed psychiatrist whom ailing suspect had been misled into believing was a medical doctor). The "totality of circumstances" test was criticized prior to *Miranda* for its "elusive, measureless . . . ad hoc, case-by-case" nature. Reck v. Pate, 367 U.S. 433, 455 (1961) (Clark, J., dissenting).

27. Miranda v. Arizona, 384 U.S. at 467-74. The Court felt these procedural safeguards necessary to combat the inherently coercive atmosphere present during custodial interrogation. *Id.* at 467. Custodial interrogation was defined by the Court as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way." *Id.* at 444 (footnote omitted). The meaning of "interrogation" under *Mi-*

held that the prosecution may not use statements obtained during custodial interrogation unless the accused is first apprised of, and subsequently waives, his right to remain silent and his right to the presence of an attorney.[28]

Although the *Miranda* Court purported to clearly spell out the procedure to be followed once the *Miranda* warnings have been given,[29] it soon became apparent that a wide variety of questions concerning waiver remained unanswered.[30] For example, while the Court did enumerate certain instances where a finding of waiver would be unlikely,[31] the Court failed to define the circumstances under which the government would be able to shoulder the "heavy burden" of demonstrating that the rights of an accused were knowingly and intelligently waived.[32] In addition, in describing the procedure to be followed after warnings had been issued, the Court stated that the interrogation must cease where an accused invokes the right to remain silent.[33] But where the accused requests an attorney, the Court instructed that the interro-

---

randa was subsequently expanded in Rhode Island v. Innis, 446 U.S. 291, 301 (1979). See note 62 *infra*.

28. 384 U.S. at 476.

29. *Id.* at 473-74. The Court stated:

> [o]nce warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. . . . If authorities conclude that they will not provide counsel during a reasonable period of time . . . they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time.

Id.

These procedures have been referred to as "second-level" *Miranda* safeguards, or those to be followed *after* a defendant has asserted his *Miranda* rights. *See* People v. Grant, 45 N.Y.2d 366, 371, 380 N.E.2d 257, 260 (1978).

30. *See* C. WHITEBREAD, CRIMINAL PROCEDURE 300-06 (1980). The major questions relating to waiver include: 1) Whether a valid waiver can be found in the absence of an express oral or written waiver (answered affirmatively in North Carolina v. Butler, 441 U.S. 369, 373 (1979)), *see id.* at 301; 2) Whether the right to remain silent or to the presence of an attorney, once asserted, can subsequently be waived in the absence of counsel (answered affirmatively with respect to the right to remain silent in Michigan v. Mosley, 423 U.S. 96, 104 (1975)), *see id.* at 305-06.

31. 384 U.S. at 476. Evidence of "lengthy interrogation or incommunicado incarceration before a statement is made . . . [or] that the accused was threatened, tricked, or cajoled into a waiver, . . ." would indicate that the accused did not voluntarily waive his privilege. *Id.*

32. *Id.* at 475. The Court stated: "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.* This passage directly follows the Court's discussion of the procedures to be complied with when the accused invokes his right to remain silent or his right to counsel. *Id.* at 474. Therefore, it appears that the *Miranda* Court contemplated the resumption of interrogation by police in the absence of an attorney, *even where the accused has requested counsel. See id.* Such an interpretation, however, seems to be in direct conflict with explicit language found elsewhere in the opinion. See text & note 34 *infra*.

33. 384 U.S. at 474.

gation must cease *until an attorney is present*.[34] Because the Court distinguished between these two situations, it was logical to assume that they were not to be treated identically.[35] The Court's underlying reasons for making such a distinction, however, were not expressed in the opinion.[36] Thus, it is necessary to look beyond *Miranda*, and to its progeny, to discern a framework on which to base the disparate treatment of a suspect's request for counsel as opposed to his election to remain silent.

Application of the Miranda Doctrine in Subsequent Cases

Michigan v. Mosley[37] is the only case prior to *Edwards* in which the United States Supreme Court dealt directly with the question whether *Miranda* rights, after being asserted, may subsequently be waived by an accused.[38] Mosley was arrested in connection with two robberies[39] and was apprised of his *Miranda* rights. Mosley subsequently informed police that he did not wish to answer any questions concerning the robberies, and the interrogating officer promptly ceased questioning.[40] After an interval of approximately two hours, Mosley was taken by police to a different interrogation room and read a fresh set of *Miranda* warnings.[41] Police questioned Mosley concerning another event totally unrelated to the crime for which he was arrested, and after approximately 15 minutes of interrogation Mosley implicated himself in that incident.[42]

Mosley argued that his incriminating statements could not be used against him at trial because, under *Miranda*, it was constitutionally impermissible for police to initiate further questioning following his invocation of the right to remain silent.[43] The Court held, however, that the admissibility of statements obtained following an individual's invocation of his right to remain silent depends on whether his right to cut off questioning has been "scrupulously honored."[44] A finding of waiver is

34. *Id.* The significance of this syntactical variation was not clear, however, until later cases. See text & notes 47-48 *infra*.

35. *But see* note 32 *supra*.

36. See note 49 *infra*.

37. 423 U.S. 96 (1975).

38. *Id.* at 100-02. While other United States Supreme Court cases have dealt either directly or indirectly with waiver of the right to counsel, *see* Rhode Island v. Innis, 446 U.S. 291, 298 n. 2 (1979); Brewer v. Williams, 430 U.S. 387, 404 (1977), these cases have been decided on sixth rather than fifth amendment grounds.

39. 423 U.S. at 97.

40. *Id.*

41. *Id.* at 97-98.

42. *Id.* at 98.

43. *Id.* at 98-99.

44. *Id.* at 104. *Miranda* had held that certain "[p]rocedural safeguards must be employed . . . to assure that the exercise of the [privilege against self-incrimination] will be scrupulously honored. . . ." 384 U.S. at 478-79. According to the *Mosley* Court, whether the right is "scrupu-

possible, therefore, provided that police respect an accused's election to remain silent, thereby alleviating the coercive atmosphere otherwise present during custodial interrogation.[45]

In reaching its conclusion, the Court emphasized the *Miranda* distinction between the invocation of the rights to silence and counsel and the procedural safeguards each invocation triggers.[46] Thus, "the interrogation must cease until an attorney is present" only if the accused invokes his right to counsel.[47] Justice White in concurrence commented on the above language quoted from *Miranda*, observing that "[t]he Court showed . . . that when it wanted to create a *per se* rule against further interrogation after assertion of a right, it knew how to do so."[48] Although the Court recognized and perpetuated the distinction betwen the invocation of *Miranda* rights, the majority offered no reason for treating each invocation differently.[49] Furthermore, the *Mosley* decision did not finally resolve the issue whether police could resume questioning of an accused following his invocation of the *right*

---

lously honored" is a function of whether subsequent police activity undercuts the accused's previous decision to remain silent, or otherwise works to undermine his will. 423 U.S. at 105.

45. 423 U.S. at 104.

46. *Id.* at 104 n. 10.

47. *Id., quoting* Miranda v. Arizona, 384 U.S. 436, 474 (1966).

48. *Id.* at 109 (White, J., concurring). Justice White went on to note that "[t]he Court [in Miranda] said '[i]f the individual states that he wants an attorney, the interrogation must cease *until an attorney is present*.' However, when the individual indicates that *he* will decide unaided by counsel whether or not to assert his 'right to silence' the situation is different." *Id.* at 109-11 (emphasis in original) (citation and footnote omitted).

49. The reasoning used by Justice White is a plausible justification for treating an invocation of the right to remain silent differently from a request for counsel. *See* Casenote, *Custodial Suspect's Admissions After Assertion and Subsequent Waiver of Right to Counsel Are Not Per se Excluded in Absence of Coercion*, 31 VAND.L.REV. 1069, 1075 (1978). Briefly stated, the argument is as follows: An accused who invokes his right to counsel is expressing his own view that he is not competent to deal with the authorities without legal advice, while one who invokes only the right to remain silent has, in effect, chosen to make his own decisions. Therefore, it follows that a suspect who elects to remain silent is better qualified (at least in his own mind) to waive his rights without the assistance of counsel than is an individual who requests the assistance of counsel. *Id.*

Whether such significance should be attached to the exact manner in which the accused asserts his privilege against self-incrimination is debatable. *See* Casenote, *Fifth Amendment, Confessions, Self-Incrimination—Does a Request for Counsel Prohibit a Subsequent Waiver of* Miranda *Prior to the Presence of Counsel?* 23 WAYNE L.REV. 1321, 1337 (1977). Given the fact that *Miranda* warnings are generally issued immediately upon arrest (to insure that any statements subsequently made by the suspect may be used against him at trial) and that a suspect understandably experiences considerable trauma at the shock of being arrested, the writer concludes:

> To hold that an individual who asserts his rights by silence can be subjected to renewed questioning initiated by police and can waive his rights under *Mosley*, while an individual who fortuitously mentions counsel may not, would be to draw a distinction of law upon the most advantageous selection of words spoken by an individual during a brief and confusing period of time.

Id.

The A.L.I. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Official draft, 1975) [hereinafter MODEL CODE] seems to acknowledge the invalidity of the distinction between the two situations, providing: "No waiver shall be sought from an arrested person at any time after he has indicated in any manner *that he does not wish to be questioned or that he wishes to consult counsel before submitting to questioning*." § 140.8(2)(d) (emphasis added).

to counsel.[50]

Application of the *Miranda* doctrine by the lower federal courts and the state courts has produced varied results.[51] Several courts have determined that police may legitimately ask a person in custody (who has previously requested counsel) whether he has changed his mind about speaking to authorities.[52] Other courts have held that a finding of waiver is possible where the suspect's initial request for counsel is equivocal.[53] Many courts, giving the language in *Miranda* and *Mosley* a more literal interpretation, have placed a flat prohibition on further police-initiated interrogation once the accused has invoked his right to counsel.[54] Still others have rejected a *per se* rule banning additional questioning, holding that a valid waiver of the once invoked right to counsel may be found if the particular facts of the case indicate a knowing and intelligent waiver.[55]

Those courts which have refused to treat an invocation of the right to counsel differently from the right to silence have, for the most part,

---

50. 423 U.S. at 100 n. 7. The court noted that since Mosley had invoked only his right to remain silent, the procedures to be followed upon a request for counsel were not at issue. *Id.* Therefore, that portion of the Court's opinion dealing with the right to counsel should be regarded as dicta. See text & notes 47-48 *supra*.

51. See text & notes 52-55 *infra*.

52. *See* United States v. Rodriguez-Gastelum, 569 F.2d 482, 483 (9th Cir.), *cert. denied*, 436 U.S. 919 (1978), where defendant, after being advised of his rights and requesting an attorney, was asked by a police officer if he would like to talk without counsel, to which defendant replied, "that's fine." 569 F.2d at 483. The court held that the defendant's reply operated to allow further interrogation by police. *Id.* For other cases which follow this position *see* United States v. Collins, 462 F.2d 792, 797 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972) (confession made by accused in response to a noncoercive suggestion by police to reconsider his request for counsel is admissible); State v. Crisler, 285 N.W.2d 679, 682 (Minn. 1979) (police might have been entitled to resume interrogation if defendant had subsequently disavowed his request to speak to an attorney). *See also* Michigan v. Mosley, 423 U.S. 96 (1975) (White, J., concurring),

> [a]lthough a recently arrested individual may have indicated an initial desire not to answer questions, he would nonetheless want to know immediately—if it were true—that his ability to explain a particular incriminating fact or to supply an alibi for a particular time period would result in his immediate release. Similarly, he might want to know—if it were true—that (1) the case against him was unusually strong and that (2) his immediate cooperation with the authorities in the apprehension and conviction of others or in recovery of property would redound to his benefit in the form of a reduced charge.

Id. at 109 n. 1.

53. *See* Nash v. Estelle, 560 F.2d 652, 658 (5th Cir.), *cert. denied*, 444 U.S. 981 (1979). In *Nash* the accused, after initially requesting counsel, indicated that he would like to talk to police in an effort to get things "straightened out." *Id.* The court held that following such an indecisive invocation of *Miranda* rights, police may make an inquiry into whether the accused has elected to waive counsel. *Id. accord*, State v. Travis, 26 Ariz. App. 24, 29, 545 P.2d 986, 991 (1976) ("We do not, however, view appellant's statement that he *might want* an attorney . . . sufficient to have required cessation of further questioning.") (emphasis added).

54. *E.g.*, United States v. Massey, 550 F.2d 300, 307 (5th Cir. 1977); United States v. Clark, 499 F.2d 802, 807 (4th Cir. 1972); United States v. Priest, 409 F.2d 491, 493 (5th Cir. 1969).

55. *See, e.g.*, White v. Finkbeiner, 611 F.2d 186, 190 (7th Cir. 1979) (suspect's statement, "I don't need a lawyer" constituted waiver of his previously invoked right to counsel); United States v. Grant, 549 F.2d 942, 946, (4th Cir.), *cert. denied*, 432 U.S. 908 (1977) (spontaneous admission made by suspect who had invoked his right to counsel not excludable); Cobbs v. Robinson, 528 F.2d 1331, 1342 (2d Cir. 1975), *cert. denied*, 424 U.S. 947 (1976) (incriminating statements made by suspect after his grandmother had suggested that he tell the truth, were admissible).

done so on the ground that the *Mosley* "scrupulously honoring" test is applicable in both cases.[56] This judicial standpoint is fostered by two main considerations: 1) that courts should avoid formulating rules which have the effect of imprisoning a man in his rights (the effect which a *per se* rule against the taking of confessions following an invocation of the right to counsel would have); and 2) that courts should not unduly hamper police in their exercise of legitimate investigative activity.[57] Cases upholding the *Miranda* distinction have generally relied on the special significance which both *Miranda* and *Mosley* attributed to a request for counsel.[58]

The lack of harmony in the results reached by lower courts in applying the *Miranda* doctrine may have prompted the Court to seek an opportunity to clarify any uncertainties concerning waiver of the right to counsel.

The Edwards Case

The fact situation in *Edwards v. Arizona* presented a less than perfect opportunity for the Court to formulate a new rule with respect to the waiver of *Miranda* rights.[59] First, Edwards' invocation of his right to counsel was somewhat equivocal.[60] Second, at the second meeting between the police and Edwards,[61] a tape recorded statement played at Edwards' request apparently prompted his confession.[62] Finally, the

56. *See* United States v. Rodriguez-Gastelum, 569 F.2d 482, 487 (9th Cir.), *cert. denied*, 436 U.S. 919 (1978); United States v. Collins, 462 F.2d 792, 797 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972).

57. See note 56 *supra*.

58. *See, e.g.*, United States v. Massey, 550 F.2d 300, 307 (5th Cir. 1977); United States v. Clark, 499 F.2d 802, 807 (4th Cir. 1972); United States v. Priest, 409 F.2d 491, 493 (5th Cir. 1969).

59. See text & notes 60-63 *infra*.

60. *See* 122 Ariz. 206, 210, 594 P.2d 72, 76. According to the facts as stated in the Arizona Supreme Court opinion, Edwards, after attempting unsuccessfully to strike a plea agreement with the county attorney, stated that he "want[ed] an attorney before making a deal." 122 Ariz. at 209, 594 P.2d at 75. The court realized that Edwards' statement, at first blush, seemed to be a request for an attorney *only if a deal was discussed further*. *Id.* at 210, 594 P.2d at 76. Looking at the statement in the context made, however, the Arizona court found that such an interpretation was erroneous. *Id.* Since Edwards wanted an attorney in order to make a deal, and his part of the deal would have been a confession, the court reasoned that "to allow him to make a confession without counsel would be to deny him his right to counsel for the very purpose, albeit limited, for which it was invoked." *Id.* at 211, 594 P.2d at 77. The court then went on to determine that although Edwards' statement was equivocal, it was sufficiently clear in the context in which it was made and was therefore sufficient to invoke the full complement of *Miranda* rights. *Id.* The court found significant the fact that the interrogating detective apparently interpreted Edwards' statement as a request to remain silent and to consult with an attorney, since immediately following the statement, he ceased questioning. *Id.* at 209, 594 P.2d at 75.

61. *Id.* The second meeting between police and Edwards occurred the morning after the initial interrogation session. *Id.* While the record indicated that Edwards told the detention officer that he didn't wish to speak to anyone but was informed "that he had to," *id.*, only Edwards testified to that effect. Respondent's Brief at 8 n. 14.

62. 122 Ariz. at 209, 594 P.2d at 75. The tape recorded statement, that of a co-conspirator, implicated Edwards in the incident. *Id.* The state argued that what transpired on the morning of January 20 could hardly be characterized as "interrogation." Respondent's Brief at 22. The

Court could conceivably have decided the case on sixth and fourteenth amendment grounds, thereby avoiding the question whether it was possible for a suspect, in the absence of his attorney, to waive his once asserted right to counsel.[63]

The Court, however, took this opportunity to clarify the exact procedure that police must follow upon a suspect's request for the presence of counsel.[64] Justice White, whose concurring opinion in *Mosley* had noted the significance of a suspect's request for counsel,[65] delivered the opinion. The Court found that the trial court had erred in considering whether Edwards' confession had been "voluntarily" given, "without separately focusing on whether Edwards had knowingly and intelligently relinquished his right to counsel."[66] The Court noted that the Arizona Supreme Court focused on the "totality of circumstances" test,[67] rather than inquiring whether Edwards "knowingly and intelligently" relinquished his right.[68] Thus, because the lower court applied the wrong test in determining the question of waiver, the Court reversed the conviction.[69] Although the Court could have remanded solely on the basis of this misapplication of the law without any further

---

United States Supreme Court, in Rhode Island v. Innis, 446 U.S. 291 (1979), defined "interrogation" as follows: "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301. The state admitted that had Edwards been *told* that the detective was going to play the tape, it could be argued that this constituted interrogation (because the officer would have believed that this act was "reasonably likely to elicit an incriminating response from the suspect"). Respondent's Brief at 22. But it was Edwards who requested that the tape be played. 122 Ariz. at 209, 594 P.2d at 75. The United States Supreme Court, however, had no difficulty in concluding that Edwards had been subjected to custodial interrogation on January 20. Edwards v. Arizona, 49 U.S.L.W. at 4498. The ease with which the Court found interrogation is somewhat perplexing, however, since the only *police-initiated* interrogation consisted of the detectives informing Edwards that they wanted to talk to him. *Id.*

63. *See* Petitioner's Brief at 29-37. Edwards was arrested pursuant to a warrant issued on the authority of a criminal complaint. *Id.* at 29. He argued that since the filing of a complaint before a magistrate is one of two methods by which felony actions may be commenced under Arizona law, his sixth amendment right to counsel had accrued prior to the interrogation which resulted in his confession. *Id.* at 29-37. Therefore, on the authority of Massiah v. United States, 377 U.S. 201, 206 (1964), Edwards argued that his confession should have been excluded without regard to whether his *Miranda* rights were violated, as he was deprived of counsel at a critical stage of the prosecution. Petitioner's Brief at 29-37. The Court declined to decide the case on these grounds, stating "[t]he Arizona Supreme Court did not address the Sixth Amendment question, nor do we." Edwards v. Arizona, 49 U.S.L.W. 4496, 4497 n. 7.

64. 49 U.S.L.W. at 4498.

65. See text & note 48 *supra*.

66. 49 U.S.L.W. at 4497.

67. See note 26 *infra*.

68. 49 U.S.L.W. at 4497. The Court said that such an inquiry must be made in order to determine whether there has been a valid waiver. *Id.* The "intentional relinquishment or abandonment of a known right or privilege" standard for waiver of the right to counsel was established in Johnson v. Zerbst, 304 U.S. 458, 464 (1938), and has been reiterated by the Court with reference to the right to counsel under *Miranda* on several occasions. *See* Fare v. Michael C., 442 U.S. 707, 724-25 (1979), North Carolina v. Butler, 441 U.S. 369, 374-75 (1979).

69. 49 U.S.L.W. at 4497.

consideration of the matter,[70] the Court instead seized upon the opportunity to announce a broad prophylactic rule in direct opposition to the previous trend toward limiting the scope of *Miranda*.[71]

The *Edwards* Court, relying on specific language in the *Miranda* opinion[72] as well as dicta from later decisions construing *Miranda*,[73] concluded "that it is inconsistent with *Miranda* and its progeny" to allow further police-initiated interrogation of an accused who has invoked his right to counsel.[74] The Court additionally held that a finding of waiver is possible following an assertion of the right to counsel, but only if "the accused himself initiates further communications, exchanges or conversations with police."[75]

Both concurring opinions in *Edwards* criticized the majority for placing too much emphasis on who initiated further conversation in determining whether Edwards had waived his right to counsel.[76] The majority made it clear, however, that the mere fact that police initiated the second meeting with Edwards was not in and of itself sufficient

---

70. The Court, after examining the facts in the case, also found that Edwards had not waived his rights. *Id.* at 4498.

71. *See generally* Fare v. Michael C., 442 U.S. 707, 724 (1979) (Court refused to consider a juvenile's request for his probation officer tantamount to an assertion of the right to counsel); Michigan v. Mosley, 423 U.S. 96, 104-05 (1975) (Court permitted reinterrogation of a suspect who had previously invoked his right to remain silent); Harris v. New York, 401 U.S. 222, 226 (1971) (Court held that statements obtained in violation of *Miranda* may still be used for impeachment purposes if the defendant chooses to take the witness stand); Casenote, *Fare v. Michael C. (99 Sup. Ct. 2560): Juveniles and In Custodial Interrogations*, 7 PEPPERDINE L.REV. 953, 962 (1980); Casenote, *Criminal Law—Right to Counsel—Incriminating Statements Obtained During Incustody Interrogation Not Admissible Without Proof of Waiver of Defendant's Right to Counsel*, 54 N.D.L.REV. 307, 310 (1977); Casenote, *supra* note 49, 31 VAND.L.REV. at 1072 n. 33.

72. See note 8 *supra*.

73. See text & notes 38-44 *supra*. *See also* Rhode Island v. Innis, 446 U.S. 291, 298 (1980) (referring to the "undisputed right" of one who has asserted his right to counsel to be free of interrogation "until he [has] consulted with a lawyer"); Fare v. Michael C., 442 U.S. 707, 719 (1979) (referring to *Miranda's* "rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease").

74. 49 U.S.L.W. at 4498.

75. *Id.* Thus, the Court avoided the potential criticism that it was formulating a rule which would "imprison a man in his privileges." *See* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 280 (1942). The *Edwards* Court noted that even where the suspect is the one who initiates the further communication, it is still possible that the police will say or do something that clearly constitutes interrogation. 49 U.S.L.W. at 4498 n. 9. In such a case it would be necessary to determine from the "totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with authorities" whether the purported waiver was knowing and intelligent. *Id.*

76. 49 U.S.L.W. at 4498 (Burger, C.J., concurring). The Chief Justice stated that "[t]he notion that any prompting of a person in custody is somehow evil *per se* has been rejected." *Id. citing* Rhode Island v. Innis, 446 U.S. 291, 303 (1980). Justice Burger was willing to find that Edwards' confession should have been excluded on purely "voluntariness" grounds. 49 U.S.L.W. at 4498. In another concurring opinion, in which Justice Rehnquist joined, Justice Powell noted that:

> [w]ho 'initiated' a conversation may be relevant to the question of waiver, but it is not the *sine qua non* to the inquiry. The ultimate question is whether there was a free and knowing waiver of counsel before interrogation commenced. . . . I hesitate to join the opinion only because of what appears to be an undue, and undefined emphasis on a single element: 'initiation.'

Id. at 4500 (Powell, J., concurring).

grounds on which to exclude his confession.[77] Absent police behavior at the subsequent meeting constituting "interrogation" within the meaning of *Rhode Island v. Innis*,[78] Edwards' right to counsel would not have been violated.[79]

The *Edwards* Court's reluctance to announce a rule establishing a *per se* exclusion of waivers following a request for counsel was very likely motivated by its recognition of the drastically adverse effects such a rule would have on legitimate police activity, as well as on the accused's ability to exercise his free will.[80] Yet it is conceivable that the Court could have transplanted the *Mosley* "scrupulously honoring" test[81] into the context where the accused makes a request for counsel without impeding either police investigative activity or the accused's ability to make informed and intelligent assessments of his interests.[82] The Court's election in *Edwards* to prescribe additional procedural safeguards where the accused has requested counsel (rather than merely refusing to talk), however, was based on the special significance attributable to such a request.[83]

Clearly, an accused who feels incompetent to deal with police on his own behalf, and consequently asks for an attorney, is particularly susceptible to the coercive atmosphere present during custodial interrogation.[84] Therefore, he is deserving of the added protection which the *Edwards* decision prescribes. The disparate treatment of an accused who requests counsel vis-a-vis one who elects to remain silent (which is occasioned by the varying results reached in *Mosley* and *Edwards*), however, could lead to the anomolous result of favoring the sophisticated over the naive suspect. For instance, an accused who is cognizant of the *Edwards* safeguards triggered by a request for counsel will invariably invoke his right to counsel even though he is perfectly capable of dealing with police on his own.[85] An accused who is unversed in this area of criminal law, on the other hand, will not realize the significance of the manner in which he invokes his *Miranda* rights. Thus, although

77. 49 U.S.L.W. at 4498.

78. 446 U.S. 291 (1979). For a discussion of *Innis*, see note 62 *supra*.

79. 49 U.S.L.W. at 4498.

80. *See* Casenote, *Fifth Amendment, supra* note 49, at 1336. Not only would spontaneous remarks or admissions made by the accused be excludable under a flat *per se* rule, but also physical evidence discovered as a result of such statements by reason of the fruit-of-the-poisonous-tree doctrine. *Id. See also* text & note 9 *supra*.

81. See text & note 44 *supra*.

82. *See* Casenote, *Fifth Amendment, supra* note 49, at 1337. At the same time, application of the "scrupulously honoring" test would promote uniform treatment of those who invoke their privilege against self-incrimination, irrespective of the manner in which it is done. *Id.*.

83. Edwards v. Arizona, 49 U.S.L.W. at 4498.

84. *See* Michigan v. Mosley, 423 U.S. 96, 109 (White, J., concurring). See text & notes 46-49 *supra*. In particular, see discussion in note 49 *supra*.

85. The accused could thereby prevent police from making further attempts to elicit a confession. Casenote, *Custodial Suspect's Admissions, supra* note 49, at 1075.

he may be unable to fend for himself, such a person could be denied the protection which he needs due to his unfortuitous selection of words in invoking his *Miranda* rights.[86] The simplest method of avoiding this undesired result is to eliminate the distinction between the two situations and treat all suspects equally, irrespective of the manner in which they invoke their privilege against self-incrimination. Such a solution should be legislatively implemented.[87] In any event, the result reached by the *Edwards* Court was clearly prophesied in dicta found in both *Miranda* and its progeny.[88]

Ramifications of the Edwards Opinion

The possible ramifications of the *Edwards* decision are numerous. *Edwards* will undoubtedly have an adverse effect on the ability of police to obtain a confession from one who has requested the assistance of counsel.[89] In this sense, however, it is in consonance with the nature of our system of criminal justice which "demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by . . . compelling it from his own mouth."[90]

The rule promulgated in *Edwards* will have the further effect of somewhat simplifying the inquiry which future courts will have to make in deciding whether an accused has waived his once asserted right to counsel.[91] As with most rules in the law, however, the *Edwards* rule is stated in general terms, and therefore the effect its application will have on future cases remains to be seen. For example, it is not clear from the decision: 1) Whether police may initiate interrogation of an accused *anytime* after he initiates further conversation or whether the two events must be proximate in time; 2) whether the exchange in which an accused initiates conversation must be related to the subject matter of the crime for which he has been arrested in order for police to be free to question him; 3) whether police, in a *Mosley*-type situation,

86. See note 49 *supra*.

87. See MODEL CODE, *supra* note 49, at §140.8(2)(d).

88. Edwards v. Arizona, 49 U.S.L.W. at 4498. *See e.g.*, Rhode Island v. Innis, 446 U.S. 291, 298 (1980); Michigan v. Mosley, 423 U.S. 96, 101 n. 7 (1975); Miranda v. Arizona, 384 U.S. 436, 474 (1966).

89. Police conduct which heretofore has been considered permissible (e.g., asking the accused whether he has changed his mind about speaking to police without an attorney; confronting the suspect with physical evidence or an accomplice who implicates him in the crime, etc.) will no longer be acceptable since it clearly falls within the meaning of the word "interrogation" as defined by the Court in Rhode Island v. Innis, 446 U.S. 291, 301 (1980). See note 62 *supra*.

90. Miranda v. Arizona, 384 U.S. 436, 460, *citing* Chambers v. Florida, 309 U.S. 227, 235-38 (1940).

91. It is clear from *Edwards* that statements obtained through police-initiated interrogation of an accused who has invoked his right to counsel are per se excludable. 49 U.S.L.W. at 4498. Where the accused has initiated further conversation the inquiry that must be made is more complex. See note 75 *supra*.

may question an accused, who has requested counsel, about a crime that is totally unrelated to the original offense for which he has been arrested. The impact of the *Edwards* decision will become clearer as more and more courts are faced with the task of applying the new rule in varying contexts.

Finally, the *Edwards* opinion makes it clear that police may not resume interrogation of an accused who has invoked the right to counsel unless the accused initiates further conversation.[92] Consequently, the decision will in the future perhaps reduce the number of cases in which the courts must deal with purported *Miranda* violations in situations similar to that presented in *Edwards*.

Conclusion

While the *Edwards* decision does not totally resolve all of the issues concerning the waiver of *Miranda* rights, it does provide helpful guidelines to both the courts and police for dealing with situations involving custodial interrogation. Further, the ban which the Court placed on police-initiated interrogation following an accused's request for counsel is consistent with the goal of the *Miranda* doctrine: to dissipate the inherently coercive atmosphere present during custodial interrogation.

While the *Edwards* rule is somewhat more restrictive on police investigative activity than is the *Mosley* "scrupulously honoring" approach, it still avoids the shortcoming of "imprisoning a man in his rights," a result which the "scrupulously honoring" test was designed to avoid. It would be more consistent with the objectives of *Miranda*, however, to eliminate the procedural distinction which currently exists, thereby promoting uniform treatment of all those who invoke their *Miranda* rights. Consequently, a legislative solution, applying the *Edwards* rule where a defendant invokes his right to silence, in addition to where he invokes his right to counsel, is recommended.

Dennis Weyrauch

92. Edwards v. Arizona, 49 U.S.L.W. at 4498.

HAS ARIZONA *SHIRLEY* THROWN IN THE *TOWLE*? THE DEMISE OF THE EXCLUSIONARY RULE IN ARIZONA PROBATION REVOCATION PROCEEDINGS

The fourth amendment to the United States Constitution guarantees the right of the people to be free from unreasonable searches and seizures.[1] It does not, however, prescribe a remedy for its violation.[2] To safeguard fourth amendment rights, the United States Supreme Court has created the exclusionary rule.[3] Under this rule, evidence obtained in violation of the fourth amendment is barred from use in a federal or state criminal trial against the victim of the illegal search or seizure.[4] The past decade has been characterized by a judicial trend toward restricting the exclusionary rule from application in proceedings collateral to the actual criminal trial.[5] One such collateral proceeding is the probation revocation hearing.

The Arizona Supreme Court in *State v. Alfaro*[6] recently held that the exclusionary rule may not be invoked in a probation revocation hearing.[7] In 1976, defendant Alfaro pled guilty to a charge of second-degree rape, and was placed on probation for five years.[8] In July 1979, Alfaro became the subject of a burglary investigation by Tucson po-

---

1. U.S. CONST. amend. IV mandates:
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.

2. *Id.*; *see* Mapp v. Ohio, 367 U.S. 643, 661-62 (1961) (Black, J., concurring).

3. Mapp v. Ohio, 367 U.S. 643, 651-53 (1961); Weeks v. United States, 232 U.S. 383, 391-93 (1914) (the exclusionary rule prohibits, within certain limitations, the use in court of evidence or testimony obtained by government officials through means violative of substantial constitutional rights such as those embodied in the fourth amendment); see text & notes 22-25 *infra*.

4. United States v. Calandra, 414 U.S. 338, 347 (1974); Mapp v. Ohio, 367 U.S. 643, 655 (1961). The exclusionary rule also prohibits the use of evidence or testimony obtained in violation of the fifth and sixth amendments. *See, e.g.*, Gilbert v. California, 388 U.S. 263, 271-72 (1967); United States v. Wade, 388 U.S. 218, 239-41 (1967); Miranda v. Arizona, 384 U.S. 436, 478-79 (1966). This casenote, however, will be limited to exclusionary rule considerations within the context of the fourth amendment only.

5. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 494-95 (1976) (exclusionary rule does not apply in a federal habeas corpus proceeding); United States v. Janis, 428 U.S. 433, 460 (1976) (exclusionary rule should not be extended to forbid use of evidence seized by a criminal law enforcement agent of one sovereign in the civil proceeding of another sovereign); United States v. Calandra, 414 U.S. 338, 348, 354 (1974) (exclusionary rule does not apply to grand jury proceedings); *cf.* United States v. Salvucci, 448 U.S. 83, 86-90, 92-95 (1980) (exclusionary rule benefits may be claimed by defendants charged with crimes of possession only if their own fourth amendment rights have been violated; "automatic" standing rule eliminated). *See also* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411-27 (1971) (Burger, C.J., dissenting), which presaged these restrictions. "I believe the time has come to re-examine the scope of the exclusionary rule and consider at least some narrowing of its thrust so as to eliminate the anomalies it has produced." *Id.* at 424.

6. 127 Ariz. 578, 623 P.2d 8 (1980).

7. *Id.* at 579, 623 P.2d at 9.

8. *Id.*

lice.[9] Prior to obtaining a search warrant, police learned that Alfaro was a probationer.[10] Subsequently, in a search incident to the warrant, police discovered stolen property in Alfaro's residence and car.[11]

At a hearing to revoke his probation prior to trial on a burglary charge, Alfaro attempted to challenge the search warrant and its evidentiary fruits.[12] The superior court determined that although police knew before obtaining the warrant that Alfaro was on probation, their motive in conducting the search was legitimate.[13] The court ruled that no suppression hearing was required because the exclusionary rule did not apply under the circumstances of the case.[14] Alfaro's probation was then revoked, and he was sentenced to a term of two to three years imprisonment.[15]

The Arizona Court of Appeals disagreed with the superior court and ruled in a memorandum decision that the exclusionary rule did apply to the revocation proceeding.[16] The appellate court determined that Alfaro therefore was entitled to a hearing on his motion to suppress.[17] The Arizona Supreme Court, however, affirmed the trial court order revoking Alfaro's probation.[18] In a divided opinion, the supreme court held that the exclusionary rule does not apply to probation revocation proceedings.[19]

This casenote first will discuss generally the development and purpose of the exclusionary rule. The examination then will focus on application of the exclusionary rule in probation revocation hearings in federal and state courts, and on prior Arizona precedent, particularly as delineated in *State v. Shirley*[20] and *State v. Towle*.[21] Finally, this casenote will analyze the Arizona Supreme Court's holding in *State v. Alfaro* and its probable effect on Arizona criminal procedure.

---

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* Alfaro's counsel filed a motion to suppress evidence obtained by police from their search; in this motion, the trial court was urged to hold a suppression hearing to determine whether the fourth amendment had been violated. The court proceeded instead with an ad hoc hearing to determine whether Alfaro was entitled to a hearing on his motion to suppress. Appellant's Opening Brief at 1-2, State v. Alfaro, 127 Ariz. 578, 623 P.2d 8 (1980); Appellee's Answering Brief at 1-2.

13. 127 Ariz. at 579, 623 P.2d at 9.

14. *Id.*

15. Appellant's Opening Brief at 5; Appellee's Answering Brief at 5.

16. State v. Alfaro, CA-CR 1988-2, slip op. at 1, (Ariz. Ct. App. July 31, 1980).

17. *Id.*

18. State v. Alfaro, 127 Ariz. 578, 581, 623 P.2d 8, 11 (1980).

19. *Id.* at 579, 623 P.2d at 9.

20. 117 Ariz. 105, 570 P.2d 1278 (1977).

21. 125 Ariz. 397, 609 P.2d 1097 (1980).

Development and Purpose of the Exclusionary Rule

In the landmark 1914 case of *Weeks v. United States*,[22] the United States Supreme Court unanimously held that the fourth amendment barred the use, in a federal prosecution, of evidence secured through an illegal search and seizure.[23] In 1961, in *Mapp v. Ohio*,[24] the Supreme Court extended the *Weeks* exclusionary rule to the states, and held broadly and unequivocally that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[25]

In recent years, however, the Court has begun to narrow the thrust of the exclusionary rule. In 1974, the Supreme Court in *United States v. Calandra*[26] refused to apply the exclusionary rule to grand jury proceedings.[27] The Court reasoned that application of the exclusionary rule should be restricted to areas where remedial objectives are thought best served.[28] In language far removed in tone from that in its broad *Mapp* holding, the Court noted that "[d]espite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally-seized evidence in all proceedings or against all persons."[29]

The *Calandra* Court employed a "balancing" test to determine whether the exclusionary rule should apply in grand jury proceedings.[30] This balancing test weighed the potential injury to the historical role and functions of the grand jury against the potential benefits resulting from application of the rule.[31] The Court concluded that extension of the exclusionary rule to grand jury proceedings would seriously

22. 232 U.S. 383 (1914); see text & note 3 *supra*.

23. *Id.* The Court emphasized that the aspect of the case with which it was dealing involved the right of the Court in a criminal prosecution to retain evidence seized by a United States Marshal without a warrant. *Id.* at 393. Justice Day reasoned that "[t]o sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Id.* at 394.

24. 367 U.S. 643 (1961).

25. *Id.* at 655.

26. 414 U.S. 338 (1974). In *Calandra*, federal agents searched Calandra's place of business, pursuant to a warrant, for evidence of illegal gambling operations. They seized evidence including a card believed to be a loansharking record. *Id.* at 340-41. A special grand jury investigating possible loansharking activities subpoenaed Calandra to question him about the seized evidence. *Id.* at 341. Calandra moved to suppress the evidence on fourth amendment grounds. *Id.*

27. *Id.* at 354-55.

28. *Id.* at 348.

29. *Id.*

30. *Id.* at 348-51.

31. *Id.* at 349. *Compare* the *Calandra* balancing test, see text & notes 31-32 *infra*, *with* the balancing approach set forth by Justice (then Chief Judge) Cardozo in People v. DeFore, 242 N.Y. 13, 150 N.E. 585 (1926). Judge Cardozo noted on the one hand the social need that law shall not be flouted by enforcement officials and on the other the social need that crime be suppressed. He balanced the gain in protection for the individual against the loss of protection for society, and found the latter consideration to weigh more heavily. *Id.* at 24, 150 N.E. at 589.

impede the grand jury in its investigatory function,[32] with only at best an uncertain deterrent effect to discourage unlawful police conduct.[33]

In 1976, in two companion cases, the Supreme Court further constricted the scope of applicability of the exclusionary rule. In the first case, *United States v. Janis*,[34] the Court held that the exclusionary rule should not be extended to forbid the use of evidence seized by one sovereign in the civil proceeding of another sovereign.[35] The Court utilized an approach similar to the *Calandra* balancing test, noting that any marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding is outweighed by the cost to society of extending the rule to such a situation.[36]

The second 1976 case, *Stone v. Powell*,[37] held that where a state has provided an opportunity for full and fair litigation of a fourth amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial.[38] The *Calandra* balancing test was reviewed at length,[39] and a similar analysis employed by weighing the utility of the exclusionary rule against the costs of extending it to collateral review of fourth amendment claims.[40] The Court concluded that any additional benefit from application of the exclusionary rule to such situations would be outweighed by the costs of deflecting the truth-finding process and of freeing the guilty.[41]

The Supreme Court has often emphasized that the primary purpose of the exclusionary rule is deterrence of future unlawful police conduct.[42] The rule is designed not to redress injury to the privacy of

32. United States v. Calandra, 414 U.S. 338, 349 (1974). The Court noted that the grand jury's functions are both investigative and accusatorial. *Id.* Since it does not adjudicate guilt or innocence, the grand jury traditionally has been unimpeded by criminal procedural or evidentiary restrictions. *Id.* The Court feared that application of the exclusionary rule would impede the function of the grand jury by overwhelming it with suppression motions only marginally related to its major objective. *Id.* at 349-50.

33. *Id.* at 351.

34. 428 U.S. 433 (1976). In *Janis*, Los Angeles police seized under warrant certain wagering records and $4,940 in cash. *Id.* at 435-36. Shortly afterward, the records were turned over to an agent of the U.S. Internal Revenue Service, who used them to prepare a tax assessment. *Id.* at 436-37. The IRS then levied upon the $4,940 in partial satisfaction of the assessment. *Id.* at 437. At a suppression hearing in Los Angeles Municipal Court, the warrant was determined to have been defective. *Id.* at 437-38. Subsequently, petitioner filed suit in United States District Court for a refund of the $4,940. *Id.* at 438. During pretrial proceedings, petitioner moved to suppress the wagering records as illegally seized evidence. *Id.*

35. *Id.* at 459-60.

36. *Id.* at 453-54.

37. 428 U.S. 465 (1976).

38. *Id.* at 494.

39. *Id.* at 487-88.

40. *Id.* at 489.

41. *Id.* at 490-93.

42. Elkins v. United States, 364 U.S. 206, 217 (1960). The purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.*, *cited in* Mapp v. Ohio, 367 U.S. 643, 656

the search victim,[43] but to remove the incentive for law enforcement officers to disregard the constitutional guarantee.[44] The exclusionary rule for decades has been the subject of ardent controversy.[45] Since *Weeks*, the debate within the Court itself regarding the rule has been heated.[46] During the past few years, however, the Supreme Court has tended to apply the balancing approach first set forth in *Calandra* to limit application of the exclusionary rule to suppression of inanimate objects in initial criminal trials.[47] Justice Rehnquist has aptly summarized what seems currently to be the primary concern of the Court: "Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth . . . is deflected."[48]

Application of the Exclusionary Rule in Probation Revocation Proceedings in Federal and State Courts

The United States Supreme Court has not specifically ruled whether the exclusionary rule applies in probation revocation hearings.[49] Other federal courts, however, have used the balancing approach set forth in *Calandra*[50] to determine whether the exclusionary

(1961); United States v. Calandra, 414 U.S. 338, 347 (1974). In *Mapp*, the Court stressed the need for the exclusionary rule's deterrent effect because other remedies against unreasonable searches and seizures, such as tort action against police, had proven ineffective. 367 U.S. at 652-53.

A secondary purpose of the exclusionary rule is the preservation of judicial integrity. Courts should not consider illegally obtained evidence, in order to avoid lending judicial sanction to official misconduct. *See* Elkins v. United States, 364 U.S. 206, 222-23 (1960). As Justice Brandeis pointed out in his dissenting opinion in Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting): "Our Government is the potent; the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *But see* Justice (then Chief Judge) Cardozo's succinct criticism of the exclusionary rule: "The criminal is to go free because the constable has blundered." People v. DeFore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926). Although the Supreme Court has referred to the secondary purpose of preservation of judicial integrity, it has relied principally upon the deterrence rationale in deciding whether or not to apply the exclusionary rule to improperly seized evidence. United States v. Peltier, 422 U.S. 531, 536 (1975).

43. United States v. Calandra, 414 U.S. 338, 347 (1974).

44. Elkins v. United States, 364 U.S. 206, 217 (1960).

45. *See* Elkins v. United States, 364 U.S. 206, 216 (1960).

46. *See* United States v. Janis, 428 U.S. 433, 446 (1976). Acknowledging the continuing debate, the Court noted that seven Supreme Court cases on the subject had produced a combined total of 27 separate signed opinions or statements. *Id.* at 446 n.15.

47. *See, e.g.*, United States v. Ceccolini, 435 U.S. 268, 275-79 (1978) (balancing test used to determine that exclusionary rule should be invoked with much greater reluctance when applied to "live" testimony rather than to suppress an inanimate object); Stone v. Powell, 428 U.S. 465, 487-93 (1976) (balancing approach used to determine that exclusionary rule may not be applied as the basis for federal habeas corpus relief after a state prisoner has been provided a full and fair hearing in state courts on his fourth amendment claim); United States v. Janis, 428 U.S. 433, 446-54 (1976) (balancing approach used to determine that exclusionary rule should not be extended to prohibit use in a federal civil tax proceeding of evidence improperly seized by state officials).

48. Rakas v. Illinois, 439 U.S. 128, 137 (1978).

49. Harris v. State, 270 Ark. 634, 637-38, 606 S.W.2d 93, 95 (1980).

50. See text & notes 30-33 *supra*.

rule should be extended to such proceedings.[51] The Fourth Circuit has held that unconstitutionally seized evidence is not admissible in probation revocation hearings.[52] Most circuits, however, have held that the exclusionary rule does not apply to such proceedings.[53]

The Ninth Circuit is among the courts declining to extend the exclusionary rule to revocation proceedings. In *United States v. Winsett*,[54] the court held that evidence obtained in violation of the fourth amendment is admissible in probation revocation proceedings if, at the time of search, law enforcement officers did not know or have reason to believe that the suspect was on probation.[55] When police are aware of the probationer's status, however, they may have significant motive to conduct an illegal search, even though they know that the evidence would be inadmissible in a subsequent criminal proceeding.[56] In such circumstances, the court noted, extension of the exclusionary rule to a probation revocation hearing might be necessary to effectuate fourth amendment safeguards.[57]

The *Winsett* court utilized the *Calandra* approach in its analysis by balancing the potential benefit and harm of applying the exclusionary rule under the facts presented.[58] It determined that application of the exclusionary rule to the probation revocation proceeding in this case

51. *See, e.g.*, United States v. Workman, 585 F.2d 1205, 1209-11 (4th Cir. 1978) (exclusionary rule applies, since probationer has no prior opportunity to exclude newly found evidence, and revocation proceedings frequently serve as alternative to trial on new charges); United States v. Vandemark, 522 F.2d 1019, 1020-22 (9th Cir. 1975) (illegally seized evidence held admissible in revoking probation and in subsequent sentencing where law enforcement officials were unaware of defendant's status as probationer); United States v. Winsett, 518 F.2d 51, 54-55 (9th Cir. 1975) (double application of exclusionary rule to trial and to subsequent probation revocation hearing not required where, at time of arrest and search, police have neither knowledge nor reason to believe that suspect is a probationer).

52. United States v. Workman, 585 F.2d 1205, 1211 (4th Cir. 1978). The *Workman* court utilized the *Calandra* balancing approach to weigh the potential harm to the revocation proceeding against the potential benefits of applying the rule. *Id.* at 1209. The court reasoned that probation revocation is an adjudicative criminal proceeding which can easily result in the probationer's loss of freedom. *Id.* The court then concluded that the rationale underlying the application of the exclusionary rule in other adjudicative criminal proceedings also justifies its application in probation revocation hearings. *Id.* at 1209-10.

53. *See* United States v. Frederickson, 581 F.2d 711, 713 (8th Cir. 1978); United States v. Winsett, 518 F.2d 51, 55 (9th Cir. 1975); United States v. Farmer, 512 F.2d 160, 162-63 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975); United States v. Brown, 488 F.2d 94, 95 (5th Cir. 1973); United States v. Hill, 447 F.2d 817, 819 (7th Cir. 1971) (by implication); United States *ex rel.* Sperling v. Fitzpatrick, 426 F.2d 1161, 1164 (2d Cir. 1970); United States *ex rel.* Lombardino v. Heyd, 318 F. Supp. 648, 651 (E.D. La. 1970), *aff'd*, 438 F.2d 1027 (5th Cir.), *cert. denied*, 404 U.S. 880 (1971).

54. 518 F.2d 51 (9th Cir. 1975). Border Patrol agents stopped appellant at a checkpoint in California, and discovered over 100 pounds of marijuana in his car. The agents were unaware of Winsett's status as a probationer at the time they conducted the search and seizure. *Id.* at 52.

55. *Id.* at 55.

56. *Id.* at 54 n.5. Refusal to apply the rule in these circumstances leaves police with nothing to lose by pursuing illegal searches. If the motion to suppress in the criminal trial were denied, defendant would stand convicted of a new crime. If the motion were granted, the evidence would still be used to revoke defendant's probation. In either event, defendant would be put behind bars. *Id.*

57. *Id.*

58. *Id.* at 54.

would have at best only a marginal benefit of deterrent effect on future police misconduct.[59] On the other hand, the potential damage to the probation system resulting from exclusion of reliable evidence (which may indicate that the probationer is not ready for rehabilitation) far outweighs the potential benefit.[60] The court noted that "the exclusionary rule is a 'needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease.' "[61]

In *United States v. Vandemark*,[62] the Ninth Circuit affirmed the *Winsett* holding.[63] The *Vandemark* court also utilized the *Calandra* balancing approach to reach its holding that extension of the exclusionary rule to sentencing subsequent to probation revocation would have a disruptive effect far greater than any benefit of incremental deterrence of police misconduct.[64] The *Vandemark* court thus concluded that the exclusionary rule does not apply to either probation revocation or subsequent sentencing where, at the time of search, law enforcement officials were unaware of the probationer's status.[65]

Like federal courts, state courts have diverged on the issue of applicability of the exclusionary rule to probation revocation proceedings. A few state courts have held that the exclusionary rule applies.[66] These courts have generally stressed the benefit of deterrence of police misconduct in such situations.[67]

The great majority of states which have considered the issue, however, hold that the exclusionary rule is not applicable in probation revocation hearings.[68] The *Calandra* balancing approach has frequently been used to justify the conclusion that the rule should not be extended to revocation proceedings.[69] In such cases, courts have concluded that

---

59. *Id.*

60. *Id.* at 54-55.

61. *Id.* at 54 n.4 (quoting Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 389 (1964)).

62. 522 F.2d 1019 (9th Cir. 1975). Border Patrol agents, unaware of appellant Vandemark's status as a probationer, stopped his car and found 284 pounds of marijuana. *Id.* at 1020.

63. *Id.* at 1025.

64. *Id.* at 1021. The court thus discarded appellant's argument that even if the judge may revoke probation on the basis of illegally seized evidence, he may not consider that evidence in subsequently imposing a sentence. *Id.*

65. *Id.* at 1025.

66. *See, e.g.*, Grubbs v. State, 373 So. 2d 905, 908-09 (Fla. 1979); State v. Wilcox, 44 Or. App. 173, ——, 605 P.2d 721, 722-23 (1980); Moore v. State, 562 S.W.2d 484, 486-87 (Tex. Crim. App. 1978).

67. *See, e.g.*, Amiss v. State, 135 Ga. App. 784, 785, 219 S.E.2d 28, 30 (1975); Michaud v. State, 505 P.2d 1399, 1402-03 (Okla. Crim. App. 1973); State v. Wilcox, 44 Or. App. 173, —, 605 P.2d 721, 723 (1980).

68. People v. Atencio, 186 Colo. 76, 79-80, 525 P.2d 461, 463 (1974); *see, e.g.*, Harris v. State, 270 Ark. 634, 638, 606 S.W.2d 93, 95 (1980); People v. Dowery, 20 Ill. App. 3d 738, 742-45, 312 N.E.2d 682, 685-87 (1974), *aff'd*, 62 Ill. 2d 200, 204-08, 340 N.E.2d 529, 531-33 (1975); State v. Caron, 334 A.2d 495, 499 (Me. 1975).

69. *See, e.g.*, State v. Sears, 553 P.2d 907, 912 (Alaska 1976); State v. Davis, 375 So. 2d 69, 73 (La. 1979); State v. Spratt, 386 A.2d 1094, 1095-96 (R.I. 1978).

invocation of the exclusionary rule in revocation proceedings would yield only a minimal additional deterrent effect, which would be outweighed by the adverse effect on the rehabilitative objectives of the probation system.[70]

To apply the exclusionary rule to revocation hearings would inevitably frustrate the remedial purpose of the system by impeding the court's ability to assess a probationer's conduct.[71] Violation of probation conditions may indicate that the probationer is not ready or is incapable of rehabilitation.[72] It is thus vital that all reliable evidence relevant to the probationer's conduct be available during probation revocation proceedings.[73]

A number of state courts, while holding the exclusionary rule inapplicable in probation revocation hearings, have nevertheless indicated that evidence may be excluded when: police misconduct in effecting the search "shocks the conscience"[74] or offends the public tradition and collective conscience;[75] police act in bad faith;[76] or the unlawful search and seizure are carried out by law enforcement officials with knowledge or reason to believe that the suspect is a probationer.[77] Despite such indications, these courts still adhere to the general principle that the exclusionary rule does not apply in probation revocation proceedings.[78]

Application of the Exclusionary Rule in Probation Revocation Hearings in Arizona

In *State v. Alfaro*,[79] the Arizona Supreme Court was asked to decide whether the exclusionary rule extends to probation revocation proceedings.[80] The issue had previously been considered in lower Arizona

70. *See* note 69 *supra*.
71. State v. Davis, 375 So. 2d 69, 74 (La. 1979).
72. *Id.*
73. *Id.* at 73-74.
74. *See, e.g.*, State v. Sears, 553 P.2d 907, 914 (Alaska 1976) (*Sears* cites, by way of example, Rochin v. California, 342 U.S. 165 (1952)—suspect's stomach was pumped against his will to force regurgitation of morphine capsules. This is conduct that "shocks the conscience.") People v. Atencio, 186 Colo. 76, 80, 525 P.2d 461, 463 (1974); State v. Spratt, 386 A.2d 1094, 1095 n.2 (R.I. 1978).
75. *See, e.g.*, State v. Sears, 553 P.2d 907, 914 (Alaska 1976); *In re* Martinez, 1 Cal. 3d 641, 650-51, 463 P.2d 734, 740-41, 83 Cal. Rptr. 382, 388-89, *cert. denied*, 400 U.S. 851 (1970); People v. Atencio, 186 Colo. 76, 80, 525 P.2d 461, 463 (1974).
76. *See, e.g.*, Harris v. State, 270 Ark. 634, 638, 606 S.W.2d 93, 95 (1980); State v. Davis, 375 So. 2d 69, 74 (La. 1979); State v. Proctor, 16 Wash. App. 865, 867, 559 P.2d 1363, 1364 (1977).
77. State v. Sears, 553 P.2d 907, 914 (Alaska 1976).
78. *See* State v. Sears, 553 P.2d 907, 913 (Alaska 1976); Harris v. State, 270 Ark. 634, 638, 606 S.W.2d 93, 95 (1980); *In re* Martinez, 1 Cal.3d 641, 650, 463 P.2d 734, 740, 83 Cal. Rptr. 383, 388, *cert. denied*, 400 U.S. 851 (1970); People v. Atencio, 186 Colo. 76, 80, 525 P.2d 461, 463 (1973); State v. Davis, 375 So.2d 69, 74 (La. 1979); State v. Spratt, 386 A.2d 1094, 1095-96 (R.I. 1978); State v. Proctor, 16 Wash. App. 865, 867, 559 P.2d 1363, 1364 (1977).
79. 127 Ariz. 578, 623 P.2d 8 (1980).
80. See discussion of facts at text & notes 7-18 *supra*.

courts, but with disparate results.[81]

In 1977, the Arizona Court of Appeals held in *State v. Shirley*[82] that the exclusionary rule was properly applied in a probation revocation proceeding when police officers who conducted the search were aware of the defendant's status as a probationer.[83] In *Shirley*, law enforcement officials seized a quantity of marijuana, prescription-only drugs, and a revolver under a warrant which was later determined to have been defective.[84] The officers were aware when they obtained the search warrant that Shirley was on probation.[85]

The court of appeals distinguished the Ninth Circuit opinions in *Winsett* and *Vandemark*,[86] which had rejected application of the exclusionary rule to revocation proceedings. The *Shirley* court reasoned that in those cases, officers conducting the searches had no knowledge of the suspects' status as probationers.[87] In *Winsett*, the Ninth Circuit had expressly recognized that extension of the exclusionary rule to probation revocation proceedings might be necessary to effectuate fourth amendment safeguards where police at the moment of search know that a suspect is a probationer.[88] The state conceded in *Shirley* that when the probationer's status is known, an exception is carved out from the general refusal to extend the exclusionary rule because of the added incentive of police to conduct an illegal search.[89] The court concluded that the facts in *Shirley* provided potential incentive for misconduct, and that the exclusionary rule was properly applied to the probation revocation proceeding.[90]

In *State v. Towle*,[91] the Arizona Court of Appeals affirmed its holding in *Shirley* that the exclusionary rule applies to probation revocation proceedings where police officers who conducted a search under a defective warrant were aware of the suspect's status as a probationer.[92] In *Towle*, however, police did not know before their search

81. *See, e.g.*, State v. Towle, 125 Ariz. 397, 398, 609 P.2d 1097, 1098 (1980); State v. Shirley, 117 Ariz. 105, 105, 570 P.2d 1278, 1278 (1977); State v. Robledo, 116 Ariz. 346, 348, 569 P.2d 288, 290 (1977); text & notes 82-90, 91-96, 97-104 *infra*.

82. 117 Ariz. 105, 570 P.2d 1278 (1977).

83. *Id.* at 105, 570 P.2d at 1278.

84. *Id.*

85. *Id.* One of the officers who conducted the illegal search was an arresting officer on the burglary charge for which Shirley had been placed on probation. *Id.* at 107, 570 P.2d at 1280. This officer testified at the probation revocation hearing that he "had hoped for something a little bit more" following the burglary conviction. *Id.*

86. See text & notes 54-65 *supra*.

87. State v. Shirley, 117 Ariz. 105, 106, 570 P.2d 1278, 1279 (1977); see text & notes 55-57 *supra*.

88. United States v. Winsett, 518 F.2d 51, 54 n.5 (9th Cir. 1975).

89. State v. Shirley, 117 Ariz. 105, 106-07, 570 P.2d 1278, 1279-80 (1977).

90. *Id.* at 107, 570 P.2d at 1279. The Arizona Court of Appeals affirmed that the trial court properly suppressed the evidence and denied the petition to revoke probation. *Id.*

91. 125 Ariz. 397, 609 P.2d 1097 (1980).

92. *Id.* at 398, 609 P.2d at 1098.

that defendant was a probationer.[93] Thus, since the facts of the case did not fall within the ambit of the *Shirley* rationale, and the police had no incentive to carry out an illegal search,[94] the exclusionary rule did not apply.[95] *Towle* is significant because, despite the specific ruling on the facts of the case, the court of appeals affirmed the *Shirley* rationale creating a narrow extension of the exclusionary rule to probation revocation proceedings in Arizona.[96]

The court of appeals had earlier indicated a different position in *State v. Robledo*.[97] In this case, Robledo's probation officer unexpectedly visited his residence, where Robledo freely gave the officer a spontaneous urine sample.[98] Analysis of the sample revealed that Robledo had been using morphine, and his probation was revoked.[99]

The *Robledo* court first determined that no fourth amendment violation had occurred.[100] The court indicated in dicta, however, that even assuming an illegal search and seizure, there would still be no basis for excluding the urine sample from evidence in a probation revocation proceeding.[101] The court noted that the basic purpose of the exclusionary rule is to bar illegally seized evidence from trial, where it might otherwise be used to convict a defendant of a crime in the first instance.[102] In the context of a probation revocation hearing, however, the need for deterrence was found to be outweighed by the importance of determining compliance with the terms of probation established by the court.[103] Thus, although *Robledo* may be distinguished from *Shirley* and *Towle* on the basis that the search was consensual, and was conducted by a probation officer[104] rather than by police, *Robledo* nevertheless may be viewed as a more accurate portent of the subsequent direction of this issue in Arizona.

---

93. *Id.*

94. *Id.* Presumably, the fact that police did not know of appellant's status and had no incentive to carry out an illegal search formed the basis of the implied conclusion that there would be no point or benefit to deterrence of similar police conduct in the future.

95. *Id.*

96. *Id.*

97. 116 Ariz. 346, 569 P.2d 288 (1977).

98. *Id.* at 347, 569 P.2d at 289.

99. *Id.*

100. *Id.* The actions of the probation officer were not unreasonable, since he had clear authority to visit appellant's home, and the urine sample was given freely upon request. *Id.* Although detailed exposition is beyond the scope of this casenote, it should be noted that probation officers historically have enjoyed a special status with respect to warrantless searches of probationers. *See generally* 47 GEO. WASH. L. REV. 863 (1979).

101. 116 Ariz. at 348, 569 P.2d at 290.

102. *Id.*

103. *Id.*

104. *Id.* at 347, 569 P.2d at 289. The purposes of the probation system give probation authorities a special and unique interest in invading the privacy of probationers under their supervision. United States v. Consuelo-Gonzalez, 521 F.2d 259, 266 (9th Cir. 1975). See note 100 *supra*. This special interest does not extend, however, to law enforcement officers in general. *Id.*

An even earlier foreshadowing of the *Alfaro* decision may be found in a 1975 special concurrence by Justice Hays in *State v. Smith*.[105] In *Smith*, the Arizona Supreme Court held that where *Miranda* warnings[106] had not been given to a probationer prior to police interrogation, incriminating statements were inadmissible in a subsequent probation revocation proceeding.[107] Justice Hays decried the majority's application of *Miranda* to such situations.[108] He stressed the difference between probation revocation hearings and criminal proceedings, and emphasized the rehabilitative purpose of probation.[109] Justice Hays further remonstrated that it was detrimental to the concept of probation to turn a revocation hearing into a criminal proceeding.[110] Five years later, Justice Hays was to reiterate this philosophy in his majority opinion in *State v. Alfaro*.[111]

In *Alfaro*, the Arizona Supreme Court employed the *Calandra* balancing approach[112] to determine that the exclusionary rule should not be extended to a probation revocation hearing.[113] The potential benefit of deterrent effect on future police misconduct was balanced against the potential injury resulting from suppression of probative evidence.[114] In setting up the framework of its balancing test, the court noted that probation revocation hearings are non-adjudicative in nature, and that due process requirements of such proceedings do not include the full range of evidentiary and procedural safeguards found in criminal prosecutions.[115] The court further observed that the purpose of probation revocation proceedings is to ascertain whether continued probation is still

105. State v. Smith, 112 Ariz. 416, 421, 542 P.2d 1115, 1120 (1975) (Hays, J., specially concurring).

106. Miranda v. Arizona, 384 U.S. 436, 444 (1966) (Court held that an individual to be subjected to custodial police interrogation must be advised "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, . . ." in order to safeguard the constitutional protection against self-incrimination).

107. State v. Smith, 112 Ariz. 416, 420-21, 542 P.2d 1115, 1119-20 (1975). The erroneous admission of police testimony did not require reversal of the probation revocation, however, since police established by independent evidence that the probationer was not complying with terms of his probation. *Id.* at 421, 542 P.2d at 1120.

108. *Id.* at 421, 542 P.2d at 1120 (Hays, J., specially concurring).

109. *Id.*

110. *Id.* Justice Hays warned that the majority opinion would construct a procedural barrier to individual therapy and defeat the rehabilitative goal of probation. *Id.* He noted that "it is detrimental to the concept of probation to turn a revocation hearing into a criminal proceeding when by intent the revocation hearing should serve a purpose similar to that of a presentence report." *Id.*

111. State v. Alfaro, 127 Ariz. 578, 579, 623 P.2d 8, 9 (1980). "Essentially, the function of a probation violation hearing is not to decide guilt or innocence but to determine, by a preponderance of all reliable evidence, whether a probationer has violated the terms and conditions of his probation." *Id.* at 579, 623 P.2d at 9.

112. See text & notes 26-33 *supra*.

113. 127 Ariz. at 579, 623 P.2d at 9.

114. *Id.* at 579-80, 623 P.2d at 9-10.

115. *Id.* at 579, 623 P.2d at 9.

an effective means of rehabilitation and in the best interest of society.[116] The supreme court concluded that any benefit accrued by application of the exclusionary rule would be outweighed by the harm done to the rehabilitative goal of probation.[117] Expressly disapproving anything to the contrary in *Shirley*, the court therefore held that the exclusionary rule does not apply to revocation hearings in Arizona.[118] This holding has unified Arizona case law, and placed it in accord with that of numerous other jurisdictions.[119]

In analyzing *Alfaro*, the policy underlying the exclusionary rule must be examined. The primary purpose of the rule is to deter future unlawful government conduct, thereby preserving the fourth amendment guarantee of freedom from unreasonable searches and seizures.[120] From the facts set forth in *Alfaro*, it appears that the police acted in a good-faith effort to comply with the requirements for a proper search and seizure.[121] Although the police knew of Alfaro's status as a probationer, they did obtain a warrant prior to search,[122] and the trial judge ruled that their motive for search was legitimate.[123] The quantum of police misconduct in *Alfaro* thus appears to have been either negligible or non-existent. Accordingly, there could be no basis for deterrence of similar conduct in the future. The rationale for application of the rule is effectively undermined by the facts of the case, and the *Alfaro* holding therefore appears to have been justified.

The court, however, did not limit its holding to factual situations such as those found in *Alfaro*. Rather, it held unequivocally that the exclusionary rule does not apply in probation revocation proceedings.[124] Assuming, nevertheless, that there has been an unreasonable search and seizure,[125] justification may still be found for refusal to extend the exclusionary rule to a probation revocation hearing. The main purpose of probation is to promote the rehabilitation of the criminal by allowing him to integrate into society as a constructive individual, with-

116. *Id.*
117. *Id.* at 580, 623 P.2d at 10.
118. *Id.* at 579, 623 P.2d at 9.
119. *Id.* at 580 n.1, 623 P.2d at 10 n.1; see text & notes 68-73 *supra*.
120. Elkins v. United States, 364 U.S. 206, 217 (1960).
121. 127 Ariz. at 579, 623 P.2d at 9.
122. *Id.*
123. *Id.*
124. *Id.*
125. It is not clear in Arizona what would constitute an unreasonable search of a probationer. The Arizona Supreme Court has declared that it is not an unconstitutional limitation upon a probationer's fourth amendment rights to require him, as a specified condition of probation, to submit to search and seizure at any time by any police officer, even without a search warrant. State v. Montgomery, 115 Ariz. 583, 583-84, 566 P.2d 1329, 1329-30 (1977). Under such a holding, it would appear that the fourth amendment guarantee for probationers in Arizona may be minimal.

out being confined in a penal system.[126] Violation of probation conditions may show that the probationer is not ready or is incapable of rehabilitation and integration into society.[127] Therefore, it is extremely important that all reliable evidence which may shed light on the probationer's conduct be available during probation revocation hearings.[128] Application of the exclusionary rule to such hearings would thus result in frustration of the remedial purpose of the probation system by obstructing the court's assessment of the probationer's conduct.[129] The exclusionary rule is a judicially created remedy calculated to safeguard fourth amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.[130] There is neither constitutional nor sound policy reason to require automatic transposition of this rule to the probation revocation proceeding.[131]

Conclusion

Although the exclusionary rule has been the subject of ardent debate, there has been a trend—since the Supreme Court decided *Calandra* in 1974—toward restricting the application of this rule. Most jurisdictions today hold that the exclusionary rule does not apply either in part or at all in probation revocation hearings. Until *Alfaro*, the rule seemed to have had narrow application in Arizona under the *Shirley* rationale, as affirmed in *Towle*.

Alfaro undoubtedly marks the demise of the *Shirley-Towle* application of the exclusionary rule in probation revocation hearings. The court, however, did not address the question whether the exclusionary rule may be applied where police misconduct in effecting their search adduces lack of good faith or shocks the conscience. It must therefore remain to be seen whether in such circumstances the court will adhere to what now appears to be an unequivocal holding that the exclusionary rule does not apply at all in probation revocation proceedings in Arizona.

Wilbur M. Roadhouse

126. United States v. Winsett, 518 F.2d 51, 54 (9th Cir. 1975).
127. *Id.* at 55.
128. *Id.*
129. State v. Davis, 375 So. 2d 69, 74 (La. 1979).
130. United States v. Calandra, 414 U.S. 338, 348 (1974).
131. State v. Caron, 334 A.2d 495, 498 (Me. 1975).

EXTENDING THE DOCTRINE OF COLLATERAL ESTOPPEL TO INCLUDE DETERMINATIONS MADE AT PROBATION REVOCATION PROCEEDINGS

Due to the demise of the mutuality doctrine,[1] improvements in the criminal justice system and an increasing workload for the judiciary,[2] the doctrine of collateral estoppel[3] has been extended to criminal cases.[4] The application of collateral estoppel to criminal proceedings, however, has raised many new issues not encountered in civil litigation.[5] One of these issues is whether a determination made at a probation revocation proceeding, not itself a criminal trial, should be given preclusive effect at a subsequent criminal trial.

In *State v. Williams*,[6] the Arizona Court of Appeals addressed this issue. The trial court convicted defendant Williams of robbery and placed him on probation for a period of 10 years.[7] Less than a year

---

1. The mutuality doctrine prevented a party from being bound by a prior adjudication unless the party seeking preclusion would also be bound by an adverse determination. *E.g.*, Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1921); *In re* Bloom's Estate, 213 Cal. 575, 581, 2 P.2d 753, 755 (1931); Miller v. Stieglitz, 172 A. 57, 59 (N.J. Misc. 1934). This doctrine was based on the rationale that it was only fair that a party not be bound by a determination unless it could also bind the opposing party. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE 578 (2d ed. 1977). Beginning with the California Supreme Court's decision in Bernhard v. Bank of America, 19 Cal. 2d 807, 812-13, 122 P.2d 892, 894-95 (1942), this reasoning was attacked. The California court stated that only three questions are relevant in determining whether collateral estoppel is applicable. *Id.* at 813, 122 P.2d at 895. First, was the issue decided in the prior adjudication identical to the issue in the present action? *Id.* Second, "[w]as there a final judgment on the merits?" *Id.* Third, was the party that is to be precluded a party to the prior action, or in privity with a party to the prior action? *Id.* Once these factors are met, mutuality of parties is not needed. *Id.*

This approach subsequently was adopted by the Supreme Court in Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 327-30 (1971). Arizona has also abandoned the mutuality requirement. *See, e.g.*, Krumtum v. Burton, 111 Ariz. 448, 451, 532 P.2d 510, 513 (1975); Mecham v. City of Glendale, 15 Ariz. App. 402, 404, 489 P.2d 65, 67 (1971); DiOrio v. City of Scottsdale, 2 Ariz. App. 329, 331, 408 P.2d 849, 851 (1965).

Mutuality did not present a problem in the *Williams* case as the parties were the same in both the probation revocation hearing and the criminal trial.

2. *See* Vestal, *Criminal Prosecutions: Issue Preclusion and Full Faith and Credit*, 28 U. KAN. L. REV. 1, 1 (1979-80).

3. "Collateral estoppel" and "issue preclusion" refer to the same doctrine. A. VESTAL, RES JUDICATA/PRECLUSION v-6 (1969).

4. Vestal, *supra* note 2, at 1, 6. *See, e.g.*, Hoag v. New Jersey, 356 U.S. 464, 470 (1958); Laughlin v. United States, 344 F.2d 187, 190 (D.C. Cir. 1965); Teitelbaum Furs, Inc. v. Old Dominion Co., 58 Cal. 2d 601, 606, 375 P.2d 439, 441, 25 Cal. Rptr. 559, 561 (1962).

Arizona courts recognize the use of collateral estoppel in criminal cases. State v. Little, 87 Ariz. 295, 304, 350 P.2d 756, 762 (1960); State v. Forteson, 8 Ariz. App. 468, 472, 447 P.2d 560, 564 (1968).

5. *See, e.g.*, State v. Feela, 101 Wis. 2d 249, 263, 304 N.W.2d 152, 159 (1981) (collateral estoppel applies to ultimate facts but not evidentiary facts); Vestal, *supra* note 2, at 5-6 (full faith and credit issue of effect of sister state's criminal determinations); Vestal, *Issue Preclusion and Criminal Prosecutions*, 65 IOWA L. REV. 281, 291-92 (1980) (problem in determining whether an issue is actually decided when jury returns a general verdict).

6. 1 CA-CR 4373 (Ariz. Ct. App. Jan. 29, 1981), *supplemental opinion*, 1 CA-CR 4373 (Ariz. Ct. App. May 14, 1981).

7. Slip op. at 2.

after he was put on probation, Williams was arrested and charged with the crime of sexual assault.[8] Soon thereafter, the state filed a petition to revoke the defendant's probation[9] and proceeded to prosecute the alleged probation violation first.[10] Based on a preponderance of the evidence,[11] the judge found that the state had failed to prove that the defendant had committed the crime of sexual assault.[12] Thus, the petition to revoke probation was dismissed, and the defendant's probation was reinstated.[13]

Before a different judge, the defendant subsequently moved to dismiss the pending criminal charges pursuant to the doctrines of double jeopardy, res judicata and collateral estoppel.[14] The second judge denied this motion.[15] At the ensuing criminal trial, the jury found the defendant guilty of the crime of sexual assault and a sentence of 14 years imprisonment was imposed.[16] Based on this conviction, the state filed another petition to revoke probation.[17] At the dispositional hearing,[18] probation was revoked and the defendant was sentenced to 10-14 years imprisonment for the original robbery conviction.[19]

The Arizona Court of Appeals reversed the lower court's decision in the subsequent consolidated appeal.[20] The court overturned the sexual assault conviction, holding that factual findings made at a probation violation hearing are dispositive at a subsequent criminal trial.[21] Having overturned the criminal conviction for sexual assault, the court reinstated the defendant's probation.[22]

This casenote reviews the policy behind collateral estoppel and the requirements that must be met before an issue may be precluded from relitigation. The court's opinion in *Williams* is reviewed in light of these considerations. Specifically, the problems of applying collateral

---

8. *Id.*

9. *Id.* Revocation of probation is governed by ARIZ. R. CRIM. P. 27.7. The probation revocation proceeding involves two hearings. First, a violation hearing is held to determine whether there has been a violation of the written terms of probation. *Id.* Second, should a violation be found, a dispositional hearing is held to determine whether continuing probation is still in the best interests of the state and the defendant. *Id.*

10. Slip op. at 2.

11. ARIZ. R. CRIM. P. 27.7(b)(3) provides that "[a] violation must be established by a preponderance of the evidence" at the violation hearing.

12. Slip op. at 2.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 3.

18. The violation hearing is dispensed with following a criminal conviction since the issue of guilt has already been determined. See text & note 31 *infra*.

19. Slip op. at 3.

20. *Id.* The defendant appealed both the criminal conviction and the probation revocation. The court of appeals consolidated the appeals upon the request of the defendant. *Id.*

21. *Id.* at 10.

22. *Id.*

estoppel to criminal cases and the differences between a probation revocation proceeding and a criminal trial are discussed. Finally, the reasoning of other jurisdictions that have decided the same issue is examined.

Overview on the Conclusiveness of Judgments

When arrested, a probationer faces two possible judicial actions. First, probation may be revoked for a violation of the written terms of probation.[23] This is done through a probation revocation proceeding tried before the sentencing court.[24] Should the sentencing court find that the probationer violated the terms of probation,[25] and then decide to revoke probation,[26] sentencing on the original crime is imposed.[27] Second, the probationer faces possible criminal prosecution for charges stemming from the arrest while on probation.[28] In cases where the probationer faces both actions, a question arises as to whether determinations made at the first proceeding are conclusive upon those to be made at the second. The resolution of this question depends upon the order of the proceedings and the result of the determination at the first proceeding.[29] Four possible situations exist.

When the state proceeds with the criminal trial first, there are two possible outcomes. First, the defendant-probationer may be convicted and sentenced on the merits.[30] At the subsequent probation revocation proceeding, the state is not required to relitigate the issue of guilt, as it has already met the higher standard of proof at the criminal trial.[31] Second, the defendant-probationer may be acquitted at the criminal trial. The state may then relitigate the issue of guilt at the succeeding probation revocation hearing.[32]

23. ARIZ. R. CRIM. P. 27.5(a). If the probation officer has reasonable cause to believe the probationer has violated the written terms of probation, the probation officer may petition the sentencing court to revoke probation. *Id.*

24. *Id.* at 27.7(b)(1): "A hearing to determine whether a probationer has violated a written condition or regulation of probation shall be held before the sentencing court. . . ."

25. *Id.* at 27.7(b)(4): "If the court finds that a violation of a condition or regulation of probation occurred, it shall make specific findings of the facts which establish the violation. . . ."

26. *Id.* at 27.7(c)(2): "Upon a determination that a violation of a condition or regulation of probation occurred, the court may revoke, modify or continue probation."

27. Since probation involves the suspension of the imposition of the sentence, probation revocation involves sentencing on this original crime even though revocation may have been based on a subsequent crime. State v. Pietsch, 109 Ariz. 261, 263, 508 P.2d 337, 339 (1973); State v. Crowder, 103 Ariz. 264, 265, 440 P.2d 29, 30 (1968); Standlee v. Smith, 83 Wash. 2d 405, 405, 518 P.2d 721, 722 (1974).

28. People v. Kondo, 51 Ill. App. 3d 874, 876, 366 N.E.2d 990, 991 (1978).

29. See text & notes 31-35 *infra*.

30. See text & note 28 *supra*.

31. ARIZ. R. CRIM. P. 27.7(e) provides that if there is a criminal conviction against the probationer, then no violation hearing is required. Instead, only a dispositional hearing is required to determine whether the sentencing court should revoke, modify or continue probation.

32. Since a criminal conviction requires proof beyond a reasonable doubt, ARIZ. REV. STAT. ANN. § 13-115 (1978); *see* State v. McGuire, 124 Ariz. 64, 65, 601 P.2d 1348, 1349 (1978), and

When the state commences the probation revocation proceeding before the criminal prosecution, two other possibilities exist. First, the probationer may be found guilty of a probation violation. Sentencing is then imposed on the crime for which the probationer was placed on probation.[33] Should the state elect to proceed with a subsequent criminal prosecution, they must relitigate the issue of guilt.[34] Second, the defendant may be acquitted of the charges at the pre-trial violation hearing. The *Williams* opinion addressed the question of whether an acquittal at a revocation hearing precludes relitigation of the same issue at a subsequent criminal trial.[35]

Policies Underlying Collateral Estoppel

Collateral estoppel, or issue preclusion, means that an issue of ultimate fact that has been determined by a valid and final judgment cannot be relitigated between the same parties.[36] The doctrine of collateral estoppel serves three policy functions. First, it prevents the harassment of the prevailing litigant.[37] The party that prevails in the first trial should not be subjected to multiple proceedings solely for the benefit of the adverse party. Second, collateral estoppel saves the time and money of the judiciary by preventing relitigation.[38] Third, collateral estoppel maintains the prestige of the courts by refusing to allow liti-

---

revocation of probation is based on proof of a preponderance of the evidence, ARIZ. R. CRIM. P. 27.7(b)(3), the state still might be able to achieve a favorable determination based on the lower standard of proof required at a violation hearing. Consequently, the state is not precluded from relitigating the issue. State v. Jameson, 112 Ariz. 315, 318, 541 P.2d 912, 915 (1975); *cf.* Standlee v. Rhay, 557 F.2d 1303, 1307 (9th Cir. 1977) (acquittal of a criminal charge does not preclude the state from initiating parole revocation proceedings). Illinois courts, however, preclude probation revocation proceedings after a probationer has been acquitted of a criminal charge that is the basis for revoking probation. People v. Grayson, 58 Ill. 2d 260, 265, 319 N.E.2d 43, 46, *cert. denied*, 421 U.S. 994 (1975). No other jurisdictions follow this view. Note, *Probation and Parole: Effect of Felony Acquittal on Probation Revocation*, 31 OKLA. L. REV. 474, 485 (1978).

33. See note 27 *supra*.

34. In proving the issue of guilt at the violation hearing, the state need only meet the burden of a preponderance of the evidence. *See* ARIZ. R. CRIM. P. 27.7(b)(3). To obtain a criminal conviction, the state must offer proof beyond a reasonable doubt. ARIZ. REV. STAT. ANN. § 13-115 (1978); *see* State v. McGuire, 124 Ariz. 64, 65, 601 P.2d 138, 139 (1978). Therefore, the state must relitigate the issue of guilt in order to meet the higher standard of proof required. People v. Kondo, 51 Ill. App. 3d 874, 878, 366 N.E.2d 990, 993 (1977); *see* People v. Vahle, 60 Ill. App. 3d 391, 395, 376 N.E.2d 766, 768-69 (1978).

35. While *Williams* represents a case of first impression in Arizona, other jurisdictions have addressed this problem. *See* People v. Kondo, 51 Ill. App. 3d 874, 878, 366 N.E.2d 990, 993 (1978) (acquittal at probation revocation hearing precludes state from relitigating issue of guilt at subsequent criminal trial); State v. Bradley, 51 Or. App. 569, —, 626 P.2d 403, 406 (1981) (collateral estoppel applied). *But see* State v. Dupard, 93 Wash. 2d 268, 277, 609 P.2d 961, 965 (1980) (acquittal at parole revocation hearing did not preclude issue from being relitigated at subsequent criminal trial). See text & notes 94-98, 111-29 *infra* for a discussion of these cases.

36. Ashe v. Swenson, 397 U.S. 436, 443 (1970). However, mutuality of parties is not required. See note 1 *supra*.

37. *See* Lee v. Johnson, 70 Ariz. 122, 127, 216 P.2d 722, 725 (1950) (discussing res judicata).

38. *See id.*; People v. Taylor, 12 Cal. 3d 686, 695-97, 527 P.2d 622, 628, 117 Cal. Rptr. 70, 76-77 (1974).

gants to overturn, by indirection, a decision of the court.[39]

These policies are applicable regardless of the adjudicating bodies involved.[40] In the most familiar situation, the finding of one court of law is sought to be preclusive upon another court of law faced with the exact same issue.[41] The only concerns are whether the issue is the same, whether it was actually decided, and whether it was necessary to the outcome of the decision.[42] Collateral estoppel is not limited to situations involving only courts of law and equity. It has been expanded to include also the decisions of administrative bodies,[43] foreign judgments,[44] and, with the *Williams* opinion, the determinations of a probation violation hearing as well.[45]

Requirements for Collateral Estoppel

In order for a party to be precluded from relitigating an issue the party must have been a party to the prior suit, or in privity with a party to the prior suit.[46] This requirement ensures that the party had a full and fair opportunity to litigate the issue sought to be precluded from relitigation.[47] Once allowed this opportunity, the party should not be able to relitigate the issue simply because there was an adverse determination.[48]

For an issue to be precluded, three requirements must first be met.[49] Initially, there must be an identity of issues.[50] This ensures that

39. Lee v. Johnson, 70 Ariz. 122, 127, 216 P.2d 722, 725 (1950); People v. Taylor, 12 Cal. 3d 686, 695-97, 527 P.2d 622, 628-29, 117 Cal. Rptr. 70, 76-77 (1974); Note, *People v. Taylor: Collateral Estoppel in Criminal Cases—Key Principles and Policies*, 4 HASTINGS CONST. L.Q. 747, 751-52 (1977).

40. *See* generally Vestal, *supra* note 5, at 857-62.

41. *See, e.g.*, Ashe v. Swenson, 397 U.S. 436, 445 (1970); State v. Little, 87 Ariz. 295, 304-05, 350 P.2d 756, 761-62 (1960); State v. Forteson, 8 Ariz. App. 468, 472, 447 P.2d 560, 564 (1968).

42. See text accompanying notes 50-55 *infra*.

43. *See* United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966) (when an administrative agency acts in a judicial capacity and resolves issues of fact, then the findings will be precluded from relitigation in a court of law).

44. Vestal, *Preclusion/Res Judicata Variables: Adjudicating Bodies*, 54 GEO. L.J. 857, 872 (1966) (American courts will give preclusive effect to foreign judgments under certain conditions).

45. *See* ARIZ. R. CRIM. P. 27.7(b)(3). To the extent that the violation hearing does not have the same formalities as a criminal trial, the *Williams* decision represents an extension of the collateral estoppel doctrine. For a discussion of whether this extension is legitimate, see text & notes 110-48 *infra*.

46. *See* Montana v. United States, 440 U.S. 147, 154 (1979); RESTATEMENT (SECOND) OF JUDGMENTS § 85 (1942).

47. RESTATEMENT (SECOND) OF JUDGMENTS § 68.1 comment j (Tent. Draft No. 1, 1973).

48. See text accompanying notes 37-39 *supra*.

49. See text & notes 50-55 *infra*. In stating the law of collateral estoppel, the court of appeals in *Williams* seemed to mistate the necessary prerequisites. The court said that "the prerequisites necessary to establish collateral estoppel are that there must exist a valid final judgment, on the merits, rendered in a judicial trial between the same parties, and the issue sought to be relitigated must have been actually litigated in the first proceedings." Slip op. at 8. This statement may be somewhat antiquated. While collateral estoppel does require a final judgment on the merits, see note 64 *supra*, and the issue must actually be litigated in the first proceeding, see notes 52-53 *supra*, collateral estoppel is no longer restricted to litigation between the same parties, see note 1 *supra*,

a party is not precluded from litigating a point that was never decided.[51] Second, the issue must have been actually litigated.[52] The concern here is whether the issue was decided on its merits, and whether the precluded party had an incentive and opportunity to fully and fairly litigate the issue.[53] Third, the issue determined must have been necessary to the outcome of the prior decision, and not merely incidental to the holding.[54] This assures that the court had an incentive to consider the issue with great care.[55]

Analysis of the Decision

The *Williams* opinion surprisingly devoted little attention to both the policy reasons and requirements of collateral estoppel.[56] Instead, the court emphasized the distinctions between double jeopardy and collateral estoppel.

The double jeopardy clause of the fifth amendment[57] has two components. First, once a defendant has been convicted, the state may not retry the case in order to impose a stiffer sentence.[58] Second, should the defendant be acquitted, she or he may not be retried for the same offense.[59] The bar of double jeopardy requires an identity of offenses.[60]

---

and it is not limited to the determinations of judicial bodies. See notes 43-44 *supra*. In the *Williams* case there was an identity of parties and the issue of guilt was decided by the sentencing court. See note 24 *supra*. Thus, neither of these concerns pose a problem in *Williams*.

50. United States v. Hernandez, 572 F.2d 218, 220 (9th Cir. 1978); Krumtum v. Burton, 111 Ariz. 448, 451, 532 P.2d 510, 513 (1975); State v. Peele, 75 Wash. 2d 28, 30, 448 P.2d 923, 925 (1968); *see* State v. Forteson, 8 Ariz. App. 468, 472, 447 P.2d 560, 564 (1968).

51. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 68, comment c (Tent. Draft No. 1, 1973).

52. *E.g.*, United States v. Hernandez, 572 F.2d 218, 220 (9th Cir. 1978); United States v. Marakar, 300 F.2d 513, 515 (3d Cir.), *vacated on other grounds*, 370 U.S. 723 (1962); Krumtum v. Burton, 111 Ariz. 448, 451, 532 P.2d 510, 513 (1975); *see* State v. Forteson, 8 Ariz. App. 468, 472, 447 P.2d 560, 564 (1968).

53. *See* note 47 *infra*.

54. *E.g.*, United States v. Hernandez, 572 F.2d 218, 220 (9th Cir. 1978); Mecham v. City of Glendale, 15 Ariz. App. 402, 404, 489 P. 65, 67 (1971); Moore Drug Co. v. Schaneman, 10 Ariz. App. 587, 589, 461 P.2d 95, 97 (1969).

55. A. VESTAL, *supra* note 3, at v. 204.

56. In a supplemental opinion, Supp. Slip op. at 4, the court discussed the application of ARIZ. R. CRIM. P. 27.8(e), which provides:

> Before accepting an admission by a probationer that he has violated a condition or regulation of his probation, the court shall address him personally and shall determine that he understands the following:
>
> (e) If the alleged violation involves a criminal offense for which he has not yet been tried, the probationer shall be advised, at the beginning of the revocation hearing, that regardless of the outcome of the present hearing, he may still be tried for that offense, and any statement made by him at the hearing may be used to impeach his testimony at the trial.

The court ruled that this provision, and specifically the language that states that the probationer may be tried for a criminal offense regardless of the outcome of the hearing, applied only to situations involving admissions by the probationer and was not relevant to the *Williams* case. Supp. Slip op. at 4.

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

58. *See* Green v. United States, 355 U.S. 184, 187 (1957).

59. *See* State v. Burrvell, 98 Ariz. 37, 44, 401 P.2d 733, 739 (1965).

The criminal trial in *Williams* and the probation revocation proceeding did not, however, involve the same offense.[61] Thus, neither the trial nor the second probation revocation proceeding were barred by principles of double jeopardy.

Collateral estoppel, though embodied in the fifth amendment double jeopardy clause,[62] is distinguished from double jeopardy. The double jeopardy bar takes effect once jeopardy attaches,[63] while issue and claim preclusion require a final judgment on the merits.[64] Double jeopardy requires an identity of offenses,[65] while collateral estoppel requires only an identity of issues.[66] Thus, the defense of collateral estoppel may be available where the defense of double jeopardy is not.[67]

Although the *Williams* court recognized that collateral estoppel, rather than double jeopardy, was implicated, the court failed to discuss the three requirements necessary for an issue to be precluded: the issue sought to be precluded must be identical to the issue decided in the prior proceeding; the issue precluded must have been actually decided in the prior proceeding; and the issue precluded must have been necessary to the outcome of the prior decision.[68] First, although the majority did not discuss the identity of issues, the dissent argued that the issues in the two proceedings were substantially different.[69] The dissenting judge felt that the issue in the probation revocation hearing was

60. *E.g.*, State v. Wilson, 85 Ariz. 213, 215-16, 335 P.2d 613, 614 (1959); State v. Hill, 26 Ariz. App. 37, 38, 545 P.2d 999, 1000 (1976); State v. Stout, 5 Ariz. App. 271, 276, 425 P.2d 582, 587 (1967).

61. A similar situation was presented in State v. Simmerman, 118 Ariz. 298, 576 P.2d 157 (Ct. App. 1978). In *Simmerman*, the defendant faced two probation revocation proceedings. He was acquitted of possessing stolen property at the first hearing. *Id.* at 298, 576 P.2d at 157. However, he was subsequently convicted for the same charge at the criminal trial. *Id.* Upon this conviction, the state filed another petition to revoke probation. *Id.* The defendant contended on appeal that the second petition was barred by principles of double jeopardy. *Id.* at 299, 576 P.2d at 158. The court of appeals rejected this argument, ruling that the charges in each probation revocation hearing were different. *Id.* At the first hearing the defendant was charged with possessing a stolen car, but at the second hearing he was charged with having been convicted of a felony. *Id.* At the initial probation revocation hearing defendant Williams was charged with committing a crime of sexual assault. Slip op. at 2. Following the criminal conviction, at the second probation revocation hearing, Williams was charged with having been convicted of a felony. *See* ARIZ. R. CRIM. P. 27.7(e). Thus, the second probation revocation hearing was not barred by double jeopardy.

62. Ashe v. Swenson, 397 U.S. 436, 445 (1970).

63. Jeopardy attaches when a jury is impaneled, sworn, and proceedings commenced. *E.g.*, State v. Riggins, 111 Ariz. 281, 283, 528 P.2d 625, 627 (1974); Klinefelter v. Superior Court, 108 Ariz. 494, 495, 502 P.2d 531, 532 (1972); City of Tucson v. Valencia, 21 Ariz. App. 148, 149, 517 P.2d 106, 107 (1974).

64. *E.g.*, Day v. Wiswall's Estate, 93 Ariz. 400, 402, 381 P.2d 217, 219 (1963); Hoff v. City of Mesa, 86 Ariz. 259, 261, 344 P.2d 1013, 1014 (1959); Moore Drug Co. v. Schaneman, 10 Ariz. App. 587, 589, 461 P.2d 95, 97 (1969).

65. See note 60 *supra*.

66. See note 50 *supra*.

67. Note, *Collateral Estoppel is Constitutionally Required in Criminal Cases Because It is Embodied In the Fifth Amendment Double Jeopardy Clause—Ashe v. Swenson*, 69 MICH. L. REV. 762, 769 (1971).

68. See text & notes 50-55 *supra*.

69. Slip op. at 16 (Eubank, J., dissenting).

whether the defendant violated the written terms of his probation, and if so, whether probation should be revoked.[70] At the criminal trial, the issue was whether the defendant committed the crime of sexual assault.[71]

This view tends to look at the problem too generally. The issue in every violation hearing is whether the defendant violated the terms of probation.[72] To determine whether the defendant Williams violated the written terms of his probation, the court necessarily had to determine whether he committed a sexual assault.[73] Thus, in both the probation violation hearing and the criminal trial, the crucial issue involved a determination of whether the assault occurred.[74]

The second requirement for collateral estoppel is that the issue be actually litigated at the prior proceeding.[75] In civil litigation this is usually not a problem.[76] On the other hand, criminal trials are marked by a general verdict.[77] A verdict of not guilty can indicate, among other things, a determination that the defendant did not commit the crime.[78] To apply issue preclusion, the court needs to examine the record of the prior decision as well as other circumstances relevant to the appeal to determine whether there was a meaningful adjudication of any ultimate issues of fact.[79] When the defendant's acquittal can be explained only by a factual determination of the issue sought to be precluded, then collateral estoppel should be applied.[80] If there is any basis for the decision other than the adjudication of the factual issue, then the doctrine of collateral estoppel should be rejected.[81]

In an ordinary civil case, the burden is on the asserting party to show that the issue to be precluded was actually litigated and de-

---

70. *Id.*

71. *Id.*

72. Under ARIZ. R. CRIM. P. 27.7(b)(1), the issue in every violation hearing is "whether a probationer has violated a written condition or regulation of probation. . . ."

73. The petition to revoke probation was based upon the indictment for sexual assault. Slip op. at 2.

74. While for collateral estoppel purposes, the *issues* were the same, for double jeopardy purposes, the *charges* in the two proceedings were different. See text & notes 58-61 *supra*.

75. See text & notes 52-53 *supra*.

76. Vestal, *supra* note 5, at 291; *see* State v. Forteson, 8 Ariz. App. 468, 472, 447 P.2d 560, 564 (1968).

77. State v. Forteson, 8 Ariz. App. 468, 472, 447 P.2d 560, 564 (1968); *see* Vestal, *supra* note 5, at 291.

Under ARIZ. R. CRIM. P. 23.2 the jury can return only four types of verdicts: a general verdict, an insanity verdict, a verdict for a different offense (provided the defendant was so charged) and a verdict for a different degree of the offense charged.

78. State v. Forteson, 8 Ariz. App. 468, 472, 447 P.2d 560, 564 (1968); State v. Peele, 75 Wash. 2d 28, 31, 448 P.2d 923, 925 (1968); *see* DeSacia v. State, 469 P.2d 369, 380 (Alaska 1970).

79. Ashe v. Swenson, 397 U.S. 436, 444 (1970); DeSacia v. State, 469 P.2d 369, 380 (Alaska 1970).

80. Ashe v. Swenson, 397 U.S. 436, 444 (1970); State v. Forteson, 8 Ariz. App. 468, 473, 447 P.2d 560, 565 (1968).

81. State v. Forteson, 8 Ariz. App. 468, 473, 447 P.2d 560, 565 (1968).

cided.[82] For the defendant in the criminal trial this could be an insurmountable burden.[83] This burden is relieved in the criminal trial by a presumption that a verdict of acquittal did turn on the resolution of the factual issue.[84] The burden is then shifted to the state to show whether a rational jury could have reached its verdict upon an issue other than that which the defendant seeks to preclude from relitigation.[85]

In *Williams*, the state had the burden of establishing that the sentencing court's decision to continue the defendant's probation was not based on a finding that the defendant had not committed a sexual assault.[86] The state did not meet this burden. Rather, the court of appeals ruled that based upon a preponderance of the evidence, the defendant did not commit a sexual assault.[87]

A related problem in deciding whether an issue was actually litigated is whether the precluded party had an incentive and opportunity to fully and fairly litigate the issue.[88] Where the party sought to be precluded has not had a full and fair opportunity to litigate the issue in the prior proceeding, the issue should not be precluded as a matter of fairness.[89] This presents a substantial problem in a *Williams*-type case as the prosecutor is under harsh time constraints. Once the petition to revoke probation is filed with the sentencing court, the court will issue either a summons or a warrant for the arrest of the probationer.[90] The probationer must be arraigned within seven days of the summons or the initial appearance following the arrest.[91] The violation hearing must then follow within seven to 20 days of the arraignment.[92] Given these time constraints, the state may not be able to fully prepare for the

82. Pierpont v. Hydro Mfg. Co., Inc., 22 Ariz. App. 252, 254, 526 P.2d 776, 778 (1974) (party who asserts res judicata has burden of showing that determinative issues were litigated in former lawsuit); Ulan v. Kay, 7 Ariz. App. 325, 326, 439 P.2d 297, 298 (1968) (party asserting res judicata must show the same issue was decided in former case as in latter case); Koos v. Roth, 43 Or. App. 383, —, 602 P.2d 1128, 1130 (1979) (burden is on asserting party to prove elements of collateral estoppel).

83. A. VESTAL, *supra* note 5, at 292.

84. State v. Little, 87 Ariz. 295, 305, 350 P.2d 756, 762 (1960); *see* Vestal, *supra* note 5, at 321.

85. Ashe v. Swenson, 397 U.S. 436, 444 (1970).

86. See text & note 85 *supra*.

87. Slip op. at 2.

88. See text & note 47 *supra*.

89. RESTATEMENT (SECOND) JUDGMENTS § 68.1 comment j (Tent. Draft No. 1, 1973). *See generally* Vestal, *supra* note 5, at 294-95.

90. ARIZ. R. CRIM. P. 27.5(b) provides: "After a petition to revoke [probation] has been filed, the sentencing court may issue a summons directing the probationer to appear on a specified date for a revocation hearing or may issue a warrant for the probationer's arrest."

91. *Id.* at 27.7(a)(1) states: "The revocation arraignment shall be held no more than 7 days after service of the summons or the probationer's initial appearance under Rule 27.6 before the issuing or assigned judge."

92. *Id.* at 27.7(b)(1) provides that: "[A violation hearing] shall be held before the sentencing court no less than 7 days and no more than 20 days after the revocation arraignment, unless the court, upon the request of the probationer made in writing or in open court on the record, sets the hearing for another date."

hearing.[93]

The Oregon Court of Appeals addressed this issue in *State v. Bradley*.[94] In *Bradley*, the defendant obtained a favorable determination of a probation revocation hearing and consequently sought to dismiss a criminal trial based on the same alleged conduct.[95] The court expressed concern over the state being "ambushed" by the defendant at the probation revocation proceeding.[96] Thus, the court declined to adopt a general rule precluding the state from litigating the issue at the subsequent trial.[97] Instead, the court limited the application of collateral estoppel to situations involving an express factual finding. In addition, the court required that the state have notice that the issue would be fully litigated and that the state have a complete opportunity to litigate the issue.[98]

Unfortunately, this overbearing concern for the state being ambushed is not necessary. First, the defendant can hardly ambush the state when the state is responsible for initiating the proceedings. By filing the petition to revoke probation, the state indicates that it has an incentive to litigate the issue, and will be prepared to do so.[99] In addition, probation revocation represents a serious deprivation of liberty to the defendant.[100] Consequently, the prosecution should not bring charges against the defendant unless there is sufficient evidence to support them.[101] Further, there must be a sanctity in the pleadings upon

93. The dissent argued that the state made no effort to meet the higher burden of proof required in a criminal proceeding, and therefore should not be barred from doing so in the future. Slip op. at 16 (Eubank, J., dissenting). Implicit in this statement is the assumption that the state did not put forth its best effort to convict at the violation hearing, but given the chance, it will meet the higher standard of proof required at the criminal trial. This could be due to the fact that if the state can achieve probation revocation, which can be achieved at less expense to the state, then it is relieved of prosecuting the criminal charge since the defendant will be incarcerated for the original crime for which probation had been imposed. *See* Morrissey v. Brewer, 408 U.S. 471, 479 (1972). For rebuttal of this argument, see text & notes 99-103 *infra*.

94. 51 Or. App. 569, 626 P.2d 403 (1981).

95. *Id.* at —, 626 P.2d at 406.

96. *Id.*

97. *Id.*

98. *Id.*

99. The Oregon probation revocation statute, Or. Rev. Stat. § 137.550 (1979-80), does not specify time limits for the state to bring a violation hearing. Scott McAllister, counsel in the Oregon Attorney General's Office, stated that the state had 15 days after the arrest to bring such a hearing, but could, and usually does get a continuance of up to 60 days. Telephone Conversation with Scott McAllister, Oregon Attorney General's Office, Nov. 16, 1981.

100. The practice of allowing the state two opportunities to have the defendant incarcerated is unfair to the defendant involved. While on probation, the probationer enjoys what is referred to as "conditional liberty." *See* Morrissey v. Brewer, 408 U.S. 471, 480 (1972). Conditional liberty, although not subject to the same protection as absolute liberty, is protected by the due process clause of the fourteenth amendment. *Id.* at 482. Revocation of probation thus has serious consequences for the probationer. Therefore, if the state intends to file a petition to revoke probation, it should be prepared to fully prosecute the charge or be bound by the result. If the state cannot succeed based upon a lower standard of proof, then theoretically it could not succeed at the higher standard.

101. People v. Bone, 70 Ill. App. 3d 972, 976-77, 389 N.E.2d 575, 578 (1979) (Mills, J., concur-

which the defendant can rely.[102] Lastly, the defendant is forced to prepare for the proceeding. In such a case, it is only fair that the state prosecute those charges fully, or withdraw.[103]

Some of these problems could be avoided by staying the petition to revoke probation until after the criminal trial.[104] The state would then not be bound by the 20 day time constraint. Regardless of the outcome of the trial, however, probation could still be revoked.[105] Thus, the state could preserve its options. The state would also avoid any issue preclusion that could arise from the probation revocation hearing. This sequence would also be more economical because the state could dispense with the violation hearing at a subsequent probation revocation should it obtain a criminal conviction.[106]

Finally, the third requirement for the application of collateral estoppel is that the issue precluded be necessary to the outcome of the prior decision. This presented no problem in *Williams*. The issue sought to be precluded concerned whether Williams had committed a sexual assault. The petition to revoke probation was also based on the charge of sexual assault. In addition, the court reinstated the defendant's probation upon a finding that the state did not meet its burden of proof.[107]

Competency of a Probation Violation Hearing

When a party seeks to bind an adversary in a judicial proceeding, a reviewing court must make two inquiries. First, the court must determine whether the precluding body was competent to bind the precluded court.[108] Second, the court must determine whether the precluded court possesses any expertise that must be protected.[109] In *Williams*, the probation violation hearing was tried before a judicial

ring); ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY D.R. 7-103(a) (Aug. 1980) (a prosecutor shall not bring charges when not supported by probable cause).

102. *See* People v. Bone, 70 Ill. App. 3d 972, 977, 389 N.E.2d 575, 578 (1979) (Mills, J., concurring).

103. *Id.*

104. *But see* State v. Jameson, 112 Ariz. 315, 541 P.2d 912 (1975). In *Jameson*, the Arizona Supreme Court expressly disapproved of the practice of deferring the violation hearing until after criminal trial:

> Finally, we express disapproval of the practice of deferring the hearing on probation revocation until after the adjudication of guilt or innocence on the criminal charge when both proceedings are based upon the same facts. The question of whether the accused has violated the terms of his probation should be promptly resolved.

Id. at 318, 541 P.2d at 915. In so doing, the court cast no opinion over delaying the petition to revoke probation. The court only stated that once the petition to revoke probation is filed, the ensuing violation hearing should not be delayed. Thus, the court has not expressed any opinion on the practice of staying the petition to revoke probation until after the criminal proceeding.

105. See text & notes 30-32 *supra*.

106. Under ARIZ. R. CRIM. P. 27.7(e), the violation hearing is dispensed with upon a criminal conviction.

107. Slip op. at 10.

108. Vestal, *supra* note 44, at 862.

109. *Id.* at 862.

body, the sentencing court.[110] To the extent, however, that the probation violation hearing is a more informal proceeding than a criminal trial, *Williams* represents an extension of the application of collateral estoppel. Thus, the only area of concern is the competency of the sentencing court in the probation violation hearing.

Although *Williams* presents a case of first impression for Arizona,[111] several other states have decided this same issue.[112] In *State v. Dupard*,[113] the Washington Supreme Court held that the state was not precluded in a criminal prosecution from relitigating an issue previously decided in favor of the defendant at a parole revocation hearing.[114] A parole violation determination is made by an administrative review board, not a court.[115] The *Dupard* court recognized, however, that collateral estoppel was not limited to findings made by other courts.[116] Indeed, the court found that a parole revocation board was competent to adjudicate the issue of the defendant's guilt.[117] Yet the court rejected application of collateral estoppel because it felt that many criminal offenses would be resolved at the probation revocation stage, and not in a criminal trial.[118] The court believed that the legislature intended for new crimes to be processed in the criminal justice system rather than a parole revocation hearing.[119]

State v. Dupard can be distinguished from *Williams* because *Dupard* involved the determinations of a parole revocation board. A parole revocation board is an administrative body rather than a judicial

110. *See* ARIZ. R. CRIM. P. 27.7(b)(1), note 24 *supra*.

111. Slip op. at 3.

112. *E.g.*, People v. Kondo, 51 Ill. App. 3d 874, 879, 366 N.E.2d 990, 993 (1977); State v. Bradley, 51 Or. App. 569, —, 626 P.2d 403, 406 (1981); State v. Dupard, 93 Wash. 2d 268, 277, 609 P.2d 961, 965 (1980).

113. 93 Wash. 2d 268, 609 P.2d 961 (1980). In *State v. Dupard*, the defendant had been convicted and incarcerated for a narcotics violation, and subsequently paroled. *Id.* at 270, 609 P.2d at 962. While on parole he was arrested for narcotics on two separate occasions. A parole revocation hearing based on both incidents was held one day prior to the defendant's arraignment on criminal charges. *Id.* The defendant was acquitted at the parole revocation hearing for charges based on the first arrest, but found guilty of a parole violation based on the second arrest. *Id.* Nevertheless, the parole board reinstated parole. *Id.* The state then charged the defendant with three counts of narcotics possession. *Id.* The first two counts were based on the first arrest, and the third count was based on the second arrest. *Id.* The defendant, in a motion to dismiss, sought to preclude the state from relitigating the issue previously decided in his favor. *Id.* at 270-71, 609 P.2d at 962. The trial court denied the motion, and the defendant appealed. *Id.* at 271, 609 P.2d at 962.

The court of appeals affirmed the trial court in an unpublished opinion. *Id.* In denying collateral estoppel, the court of appeals held that since the parole board was not a court of law, its decision could not be treated as a valid final judgment for the purposes of collateral estoppel. *Id.* at 275, 609 P.2d at 964. The Washington Supreme Court affirmed this opinion, but for different reasons. *Id.* at 276-77, 609 P.2d at 965. See text & notes 114-19 *infra*.

114. 93 Wash. 2d at 277, 609 P.2d at 965.

115. *Id.* at 274-75, 609 P.2d at 964.

116. *Id.* at 275, 609 P.2d at 964.

117. *Id.*

118. *Id.* at 276, 609 P.2d at 964.

119. *Id.*

body.[120] *Williams* involved probation revocation. Probation revocation is in the discretion of the sentencing court.[121] Thus, crimes committed during probation are processed in the criminal justice system, albeit at a violation hearing.

In *People v. Kondo*,[122] the Illinois Court of Appeals reached a conclusion identical to that of the Arizona Court of Appeals. The defendant in *Kondo*, while on probation for an assault and battery conviction, was arrested for possession of a weapon.[123] At the probation revocation hearing the defense argued that the weapon was in a nonfunctioning state and the defendant therefore did not violate the terms of probation.[124] The court agreed and denied the petition to revoke probation.[125] At the subsequent criminal trial, the defendant moved to dismiss on the grounds that the factual issue had been resolved in his favor.[126] The trial court granted the motion,[127] and the court of appeals affirmed.[128] The court of appeals reasoned that even though this was a probation revocation hearing, the court would look to the substance of the prior adjudication.[129]

As *Kondo* indicates, the correct inquiry should focus on the procedural differences between the two proceedings.[130] More specifically, the courts should inquire whether a probation revocation hearing is sufficient to determine the issue of guilt.[131] While a probation revocation hearing is not subject to the same limitations as that of a criminal trial,[132] the defendant is accorded some procedural safeguards since she or he may be deprived of "conditional liberty."[133]

The defendant, however, is not afforded the full panoply of rights

120. In Arizona, the governor appoints five members to the Board of Pardons and Paroles. ARIZ. REV. STAT. ANN. § 31-401(A) (Supp. 1980-81). These members serve on a full time basis. *Id.* at § 31-401(B).

121. *See* ARIZ. R. CRIM. P. 27.7(b)(1), as reproduced in note 24 *supra*.

122. 51 Ill. App. 3d 874, 366 N.E.2d 990 (1977).

123. *Id.* at 875, 386 N.E.2d at 991.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 876, 366 N.E.2d at 991.

128. *Id.* at 879, 366 N.E.2d at 993.

129. *Id.* at 877, 366 N.E.2d at 992.

130. People v. Grayson, 58 Ill. 2d 260, 264-65, 319 N.E.2d 43, 45-46 (1974); People v. Kondo, 51 Ill. App. 3d 874, 878, 366 N.E.2d 990, 992 (1977).

131. See text & note 108 *supra*.

132. State v. Smith, 112 Ariz. 416, 419, 543 P.2d 1115, 1118 (1975); State v. Walter, 12 Ariz. App. 282, 284, 469 P.2d 848, 850 (1970). ARIZ. R. CRIM. P. 27.7(b)(3) provides: "Each party may present evidence and shall have the right to cross examine witnesses who testify. The court may receive any reliable evidence not legally privileged, including hearsay."

133. Since the probationer has not been incarcerated, he or she has not suffered a complete loss of liberty. Nevertheless, there are certain restrictions on the probationer's liberty. Thus, the probationer enjoys "conditional liberty." Morrissey v. Brewer, 408 U.S. 471, 480 (1972); Fisher, *Parole and Probation Revocation Procedures After Morrissey and Gagnon*, 65 J. CRIM. L. & CRIMINOLOGY 46, 48 (1974).

due a defendant in a criminal prosecution.[134] Counsel at a probation revocation hearing is awarded on a case by case basis,[135] while counsel is guaranteed at a criminal trial.[136] Hearsay evidence is admissible at revocation hearings,[137] but limited in criminal trials.[138] Further, the exclusionary rule does not apply at a probation revocation proceeding.[139] Due to the court's and the defendant's interest in having all reliable evidence reviewed, the rules of evidence are relaxed in a probation revocation proceeding.[140] Coupled with the lower standard of proof in probation revocation proceedings,[141] the state is more likely to prevail at the probation revocation proceeding than at the criminal trial.[142]

While the preceeding discussion may appear to support precluding the extension of collateral estoppel to the situation presented in *Williams*, a closer examination reveals the converse. The relaxation of evidentiary rules in probation revocation proceedings only operates to the detriment of the defendant. The state is permitted to bring forth all

134. Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973); Morrissey v. Brewer, 408 U.S. 471, 480 (1972); Standlee v. Rhay, 557 F.2d 1303, 1307 (9th Cir. 1977).

The defendant does have a right to counsel on a case by case basis. Gagnon v. Scarpelli, 411 U.S. at 790.

135. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

136. Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963).

137. ARIZ. R. CRIM. P. 27.7(b)(3), as reproduced in note 132 *supra*.

138. ARIZ. R. CRIM. P. 19.3 provides:

a. General Rule. The law of evidence relating to civil actions shall apply to criminal proceedings, except as otherwise provided.

. . .

c. Prior Recorded Testimony.

(1) *Admissibility*. Statements made under oath by a party or witness during a previous judicial proceeding or a deposition under Rule 15.3 shall be admissible in evidence if:

(i) The party against whom the former testimony is offered was a party to the action or proceeding during which a statement was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he now has (no person who was unrepresented by counsel at the proceeding during which a statement was made shall be deemed to have had the right and opportunity to cross-examine the declarant, unless such representation was waived) and

(ii) The declarant is unavailable as a witness, or is present and subject to cross-examination.

(2) *Limitations and Objections*. The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that the former testimony offered under this section is not subject to:

(i) Objections to the form of the question which were not made at the time the prior testimony was given.

(ii) Objections based on competency or privilege which did not exist at the time the former testimony was given.

139. United States v. Winsett, 518 F.2d 51, 54-55 (9th Cir. 1975); United States v. Farmer, 512 F.2d 160, 162 (6th Cir. 1975); *see* United States v. Hill, 447 F.2d 817, 819 (7th Cir. 1971).

140. United States v. Winsett, 518 F.2d 51, 55 (9th Cir. 1975).

141. See note 34 *supra*.

142. *See generally* E. CLEARY, MCCORMICK ON EVIDENCE § 341 (1972); WIGMORE, 9 J. WIGMORE, ON EVIDENCE, § 2498 (1940).

evidence supporting the revocation of the defendant's probation.[143] In addition, the burden of proof in probation revocation proceedings is more favorable to the state than the burden that must be met in criminal trials.[144] Thus, the state is more likely to prevail in the revocation proceeding than in a subsequent trial. Consequently, since a determination of an issue in one trial has a preclusive effect on a determination of the same issue in a subsequent trial utilizing the same truth-finding procedures as the first,[145] a determination in favor of the defendant in a probation revocation proceeding should thus be given preclusive effect in a subsequent criminal trial.

The *Kondo* decision was not a major step for the Illinois Appellate Court since the Illinois Supreme Court had previously held that an acquittal at a criminal trial precluded the state from retrying the issue at a subsequent probation revocation hearing.[146] Further, under Illinois law, the prosecution has 120 days to prepare for a violation hearing,[147] while in Arizona the prosecution has only seven to 20 days to prepare.[148] Though the shorter preparation period places a burden on the Arizona prosecutor, it should not affect the application of legal principles. If the time constraint works an undue hardship on the prosecutor, then perhaps a change in the Arizona law is warranted.

Conclusion

Collateral estoppel is a judicial tool used to economize the court's time, prevent harassment of the prevailing litigant, and add a measure of confidence to the court's decision. For these policy reasons, an issue that was actually decided by a prior proceeding and was necessary to the outcome of the decision should not be relitigated. It should make no difference that the prior proceeding was not a civil or criminal prosecution. The concern should only be with the validity of the determination. As long as the body rendering the decision was acting within its jurisdiction, the proceeding was sufficiently adversarial, and the finding was necessary to the outcome of the decision, the finding should be

143. See text & note 140 *supra*.
144. See note 34 *supra*.
145. See text & notes 49-55 *supra*.
146. People v. Grayson, 58 Ill. 2d 260, 265, 319 N.E.2d 43, 46, *cert. denied*, 421 U.S. 994 (1975). The *Grayson* court allowed the use of collateral estoppel in this instance although theoretically the state could have met the lower standard of proof required at a revocation hearing. *Id.* However, since the Supreme Court held that the state must relitigate an issue in order to meet a lower standard of proof, the appellate court was bound to rule that the state was also estopped from relitigating the issue in order to meet the higher standard of proof.
147. ILL. ANN. STATS. ch. 38 ¶ 1005-6-4(3)(b) (Supp. 1980-81) provides that § 103-5 governs time constraints. 38 ILL. ANN. STATS. ¶ 103-5(a) (1980) provides: "Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he was taken into custody, . . ." with some specific exceptions.
148. ARIZ. R. CRIM. P. 27.7(b)(1), note 92 *supra*.

respected. In the case of a probation revocation hearing, the proceeding is sufficiently parallel to that of a criminal trial in order to lend credibility to its adjudication. Issues resolved favorable to the defendant should not be relitigated at a subsequent criminal prosecution.

Stephen M. Bressler

PROBATION REVOCATION IN ARIZONA: NO LONGER " TAILS WE WIN, HEADS YOU LOSE"[1]

Arizona courts often exercise statutory authority to suspend the imposition or execution of a criminal sentence and place a convicted defendant on probation.[2] Probation is usually subject to certain conditions,[3] one of which may be that the probationer must not violate any criminal law during his term of probation.[4] If a probationer is accused of violating a criminal law while on probation, the state must afford a hearing prior to revoking probation.[5]

Due process requires that the probationer must be permitted to testify on his own behalf at the revocation hearing.[6] When the state schedules a probation revocation hearing prior to a criminal trial on the crime allegedly committed during probation, however, a probationer is faced with a testimonial dilemma. If the probationer testifies on his own behalf at the revocation hearing he may waive his fifth amendment privilege and his statements may be used against him at the subsequent criminal trial.[7] On the other hand, if the probationer invokes his fifth amendment privilege and remains silent at the revocation hearing, he forgoes his due process right to testify.[8] It was a challenge to this "tails we win, heads you lose"[9] situation that brought the case of *State v. Boyd*[10] before the Arizona Court of Appeals.

In *Boyd*, the defendant was convicted of aggravated assault and robbery and sentenced to five years probation.[11] The following year, the state charged the defendant with burglary and conspiracy to com-

---

1. People v. Coleman, 13 Cal. 3d 867, 876, 533 P.2d 1024, 1033, 120 Cal. Rptr. 384, 393 (1975); *See* State v. Maxwell, 97 Ariz. 162, 163-64, 398 P.2d 548, 548-49 (1965). *See generally* State v. Fimbres, 108 Ariz. 430, 431-32, 501 P.2d 14, 15-16 (1972).

2. *See* ARIZ. REV. STAT. ANN. § 13-901(A) (Supp. 1980-81). This provision grants a trial court statutory authority to impose probation "upon such terms and conditions as the court deems appropriate." *Id*; *see* State v. Carter, 116 Ariz. 595, 597, 570 P.2d 763, 765 (1977). A trial court may require that a defendant comply with conditions imposed pursuant to probation which are intended to aid in the rehabilitation of the offender or to serve as an alternative to incarceration as punishment. State v. Montgomery, 115 Ariz. 583, 584, 566 P.2d 1329, 1330 (1977).

3. *See* ARIZ. REV. STAT. ANN. § 13-901(A) (Supp. 1980-81).

4. State v. Camargo, 112 Ariz. 50, 52, 537 P.2d 920, 922 (1975); *See* State v. Montgomery, 115 Ariz. 583, 584, 566 P.2d 1329, 1330 (1977).

5. Gagnon v. Scarpelli, 411 U.S. 778, 781-82 (1973); State v. Moreno, 21 Ariz. App. 462, 463-64, 520 P.2d 1139, 1140-41 (1974). ARIZ. R. CRIM. P. 27.3-27.9 establish the procedure for probation revocation in Arizona.

6. *See* Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973); State v. Moreno, 21 Ariz. App. 462, 463, 520 P.2d 1139, 1140 (1974); text & notes 22-26 *infra*.

7. Brief for Appellant at 3-7, State v. Boyd, 128 Ariz. 381, 625 P.2d 970 (Ct. App. 1981); *see* People v. Coleman, 13 Cal. 3d 867, 874, 533 P.2d 1024, 1031, 120 Cal. Rptr. 384, 391 (1975).

8. People v. Coleman, 13 Cal. 3d 867, 874-75, 533 P.2d 1024, 1031-32, 120 Cal. Rptr. 384, 391-92 (1975).

9. *Id.* at 876, 533 P.2d at 1033, 120 Cal. Rptr. at 393.

10. 128 Ariz. 381, 625 P.2d 970 (Ct. App. 1981).

11. *Id.* at 382, 625 P.2d at 971.

mit burglary.[12] Based on this alleged criminal conduct, the state petitioned to revoke the defendant's probation.[13] The defendant moved to postpone the revocation hearing until after the completion of the related criminal trial, claiming that a failure to postpone the hearing would result in a denial of due process guaranteed by the fifth and fourteenth amendments to the United States Constitution.[14] The superior court denied the defendant's motion and held a revocation hearing at which the defendant, who did not testify, was sentenced to a term in prison.[15]

On appeal, the defendant insisted that by holding the revocation hearing first, the state forced him to surrender his right to testify on his own behalf in order to preserve his privilege against self-incrimination on the pending criminal charges.[16] The Arizona Court of Appeals held, however, that the United States Constitution does not require that a criminal trial be held prior to a probation revocation hearing on related charges.[17] The court then added that if a probation revocation hearing is held before a criminal trial on the related charges, Arizona Rule of Criminal Procedure 27.8 prescribes that testimony given by a probationer at the hearing may be used against him at trial only for the purpose of impeachment.[18]

This casenote will analyze the *Boyd* court's decision. First, a probationer's due process rights, especially his fifth amendment privilege, will be examined to determine if ordering the revocation hearing prior to the criminal trial on the related charges violates due process. Whether this procedure compels the defendant to incriminate himself will be discussed in light of Supreme Court cases which preclude imposing a penalty upon, or requiring a waiver of a constitutional right before, the exercise of the privilege against self-incrimination. The *Boyd* court's interpretation of the language of Rule 27.8 will also be discussed. Finally, this casenote will discuss the policy implications of the *Boyd* decision.

Due Process in the Context of Probation Revocation

Traditionally, the courts have viewed probation as "an act of

12. *Id.*
13. *Id.*
14. Brief for Appellant at 3-4. The fifth amendment to the United States Constitution protects a criminal defendant from being compelled to be a witness against himself. U.S. CONST. Amend. V. The fifth amendment was made binding upon the states by virtue of the due process clause of the fourteenth amendment in Malloy v. Hogan, 378 U.S. 1, 8 (1964); *see* text & note 28 *infra*.
15. State v. Boyd, 128 Ariz. 381, 382, 625 P.2d 970, 971 (Ct. App. 1981).
16. *Id.*
17. *Id.* at 383, 625 P.2d at 972.
18. *Id.*

grace."[19] Probation proceedings have consequently received a very low degree of procedural protection. For decades, courts denied due process protection in probation proceedings on various theories.[20] Finally, in *Gagnon v. Scarpelli*,[21] the United States Supreme Court recognized that the conditional liberty of probation was a valuable interest[22] which must be given minimum due process protections.[23] These minimum requirements of due process protect the integrity of the fact finding process and insure the imposition of the appropriate sanction.[24]

A fundamental requirement of due process is a meaningful opportunity to be heard and to speak on one's own behalf.[25] In the probation revocation context this means that the probationer has a right to a hearing as well as the right to appear in person and present evidence on his own behalf.[26] In *Boyd*, the probationer was forced to forgo his right to

19. Escoe v. Zerbst, 295 U.S. 490, 492 (1935). Justice Cardozo (in dictum) declared, "[w]e do not accept the petitioner's contention that the privilege [of probation] has a basis in the Constitution . . . . Probation . . . comes as an act of grace to one convicted of a crime . . . ." *Id.* at 492-93; Varela v. Merrill, 51 Ariz. 64, 76, 74 P.2d 569, 574 (1937).

20. *See* United States v. Wilson, 32 U.S. (7 Pet.) 150, 161 (1833). In *Wilson* the Court considered probation a contract which could be revoked for breach of conditions. *Id.* This view was repudiated by the Seventh Circuit in Hahn v. Burke, 430 F.2d 100, 104-05 (7th Cir. 1970) (Court repudiated the view that probation was a contractual relationship by explaining that a probationer does not enjoy equal bargaining power with the state).

In Escoe v. Zerbst, 295 U.S. 490, 492 (1935), probation was treated as a privilege and not a right. This distinction was repudiated, however, in Goldberg v. Kelly, 397 U.S. 254, 262 (1970) and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961). *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1451-54 (1968).

In Williams v. New York, 337 U.S. 241 (1949), Justice Black wrote that requiring due process in areas like probation would destroy the benevolent purpose of corrections. A parens patriae view was advanced on the notion that probation revocation was non-adversarial. *Id.* at *248-49*; *see* Note, *The Impossible Dream?: Due Process Guarantees for California Parolees and Probationers*, 25 HASTINGS L.J. 602, 606-07 (1974) (goals of the state and the state and the individual are the same). This theory was rejected in *In Re* Gault, 387 U.S. 1, 30 (1967) (citing Kent v. United States, 383 U.S. 541, 555 (1966)). *Compare* Anderson v. Corall, 263 U.S. 193, 196 (1923), where the Court held that a parolee was considered to be in constructive custody, with the invisible walls of the prison about him at all times. This theory was abrogated, however, by Specht v. Patterson, 386 U.S. 605, 610 (1967).

21. 411 U.S. 778 (1973).

22. *Id.* at 782. In *Gagnon*, the Supreme Court held that probation was constitutionally indistinguishable from parole. *Id.* In Morrisey v. Brewer, 408 U.S. 471 (1972), the Supreme Court held that the conditional liberty of parole was a constitutionally protected interest. *Id.* at 482.

23. Gagnon v. Scarpelli, 411 U.S. at 781-82; *see* Morrisey v. Brewer, 408 U.S. at 482. In *Gagnon*, the court enumerated the following minimum requirements of due process:

> (a) written notice of the claimed violation of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation or] parole.

411 U.S. at 786.

24. Ryan v. Montana, 580 F.2d 988, 993 (9th Cir. 1978); McCracken v. Corey, 612 P.2d 990, 993 (Alaska 1980) (parole revocation).

25. *E.g.*, Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970); Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Grannis v. Ordean, 234 U.S. 385, 394 (1914).

26. Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973); *see* note 23 *supra*.

testify in order to exercise the privilege against self-incrimination.[27]

Impermissible Burdens on the Fifth Amendment Privilege As a Violation of Due Process in the Probation Revocation Context

The self-incrimination clause of the fifth amendment to the United States Constitution applies to the states through the due process clause of the fourteenth amendment.[28] The precise scope of the privilege against compelled self-incrimination, however, has not been finally determined.[29]

In general, it is permissible for the state to secure a conviction through the use of a statement made by the accused if the statement was not compelled.[30] When an individual is subjected to a probation revocation hearing to be followed by a criminal trial, testimony might be compelled in either of two ways.[31] First, an individual asserting his fifth amendment privilege and remaining silent may be made to suffer a penalty.[32] Alternatively, an individual may be required to waive his fifth amendment privilege in order to assert some other right.[33]

The first type of compulsion is exemplified in a series of employment cases in which an individual invoked his fifth amendment privilege in response to an investigatory inquiry.[34] In each case, the

27. 128 Ariz. at 382, 625 P.2d at 971.

28. Malloy v. Hogan, 378 U.S. 1, 8 (1964).

29. *See* Note, *Constitutional Law—Due Process—Probationer Not Entitled to Use Immunity at Deferred Sentence Violation Hearing Held Prior to Trial for Same Incident*, 21 WAYNE L. REV. 1127, 1129 (1975); *see, e.g.*, Hoffa v. United States, 385 U.S. 293, 303 (1966); Miranda v. Arizona, 384 U.S. 436, 499, 504, 526 (1966); United States v. Segal, 549 F.2d 1293, 1299 (9th Cir.), *cert. denied*, 431 U.S. 919 (1977).

30. *See* Garner v. United States, 424 U.S. 648, 653-54 (1976); Hoffa v. United States, 385 U.S. 293, 303-04 (1966); Miranda v. Arizona, 384 U.S. 436, 467 (1966).

31. Note, *Revocation of Conditional Liberty for the Commission of a Crime: Double Jeopardy and Self-Incrimination Limitations*, 74 MICH. L. REV. 515, 540 (1976). While the exent to which the fifth amendment applies to probation revocation proceedings has yet to be decided by the United States Supreme Court, it has been held that the fifth amendment might not apply to a probation revocation hearing "in its full rigor." United States v. Segal, 549 F.2d 1293, 1299 (9th Cir.), *cert. denied*, 431 U.S. 919 (1977). This language suggests that a probationer facing revocation proceedings may be subjected to a greater degree of compulsion than may a criminal defendant without violating the fifth amendment. *See id.*

32. Note, *supra* note 31, at 540; *see* text & notes 34-39, 56-57 *infra*.

33. *Id.*; *see* text & notes 40-56, 60-67 *infra*; Garrity v. New Jersey, 385 U.S. 493 (1967). In *Garrity*, police officers, who were under investigation for corruption, were told that if they failed to testify by asserting their privilege against self-incrimination, they would be terminated. *Id.* at 494. The officers testified and were convicted in a subsequent trial based on their prior testimony. *Id.* at 495. On appeal, the testimony was held inadmissible on the grounds that it was not voluntary. *Id.* at 497-98. The Court reasoned that making a defendant choose between the lesser of two evils does not make his testimony voluntary. *Id.* at 498.

34. *See* Lefkowitz v. Cunningham, 431 U.S. 801, 803-04 (1977) (state political office holder was subpoenaed before a grand jury and requested to waive his constitutional immunity; if he refused, he faced removal from party office and disqualification from holding any public or party office for five years); Lefkowitz v. Turley, 414 U.S. 70, 75-76 (1973) (architects summoned to testify before a grand jury which was investigating charges of conspiracy, bribery and larceny were requested to sign waivers of immunity or face cancellation of their existing state contracts and disqualification from further transactions with the state for five years); Uniformed Sanitation

individual's assertion of the privilege was used against him in a subsequent proceeding.[35] The United States Supreme Court held that these individuals had been penalized for asserting their fifth amendment privilege and that the penalties constitute an unconstitutional impairment of the privilege.[36] The Supreme Court has emphasized that the penalty need not involve imprisonment.[37] Instead, the term penalty encompasses any sanction which makes an "assertion of the fifth amendment privilege costly."[38] The Court's willingness to find an impermissible burden, however, has been narrowly restricted to situations in which the refusal to waive the privilege against self-incrimination "leads automatically and without more to imposition of sanctions."[39] Therefore, for a probationer to successfully claim that by

---

Men v. Commissioner of Sanitation, 392 U.S. 280, 281-82 (1968) (fifteen department of sanitation employees, subjects of an investigation into alleged misconduct in their official duties, were advised that if they refused to testify based on self-incrimination grounds, their employment would be terminated); Gardner v. Broderick, 392 U.S. 273, 274 (1968) (police officer subpoenaed to appear before a grand jury investigating alleged bribery and corruption, was asked to sign a waiver of immunity and told that he would be terminated if he refused to sign); Spevack v. Klein, 385 U.S. 511, 512-13 (1967) (in disbarment proceedings, attorney refused to honor a subpoena and refused to testify at the proceedings, asserting his fifth amendment privilege against compelled self-incrimination).

35. In *Lefkowitz v. Cunningham*, the state party office holder was automatically divested of his party office and was banned from holding any public or party office for five years for refusing to waive his constitutional immunity. 431 U.S. at 804. In *Lefkowitz v. Turley*, because the architects refused to waive their immunity, the district attorney, as required by law, notified various contracting authorities of the architects' conduct and called attention to the disqualification statutes. 414 U.S. at 76. In *Uniformed Sanitation Men*, petitioners were discharged solely for asserting their privilege against self-incrimination and refusing to testify during a grand jury investigation of their conduct during employment. 392 U.S. at 76. In *Gardner*, the appellant was discharged following an administrative hearing solely for his refusal to sign a waiver of immunity during the grand jury investigation. 392 U.S. at 275. The New York Supreme Court dismissed Gardner's petition for reinstatement, and the New York Court of Appeals affirmed, holding that both Garrity v. New Jersey, 385 U.S. 493 (1967) and *Spevack*, 385 U.S. 511 (1967) did not apply. *Id.* at 277. In *Spevack*, the appellate division of the New York Supreme Court ordered Spevack disbarred, holding that the privilege against self-incrimination was not available to him. 385 U.S. at 512.

36. In *Lefkowitz v. Cunningham*, the Court held that a party office holder could not be constitutionally removed from office for a refusal to waive immunity. 431 U.S. at 807. In *Lefkowitz v. Turley*, the Court ruled that a public contractor who refused to waive his immunity could not be constitutionally disqualified from public contracting. 414 U.S. at 83. In *Uniformed Sanitation Men*, dismissal of public employees who refused to testify under a waiver of immunity was held to result in an unconstitutional penalty. 392 U.S. at 284-85. In *Gardner*, dismissal of a police officer who refused to sign a waiver of immunity at a grand jury proceeding was held to violate the constitutional privilege against self-incrimination. 392 U.S. at 279. In *Spevak*, the Court held that disbarment of an attorney who refused to testify or produce records on self-incrimination grounds constituted an unconstitutional penalty in violation of the privilege against self-incrimination. 325 U.S. at 516.

37. Spevack v. Klein, 385 U.S. 511, 515 (1967).

38. *Id.*

39. Lefkowitz v. Cunningham, 431 U.S. 801, 808 n.5 (1977); *see* Baxter v. Palmigiano, 425 U.S. 308, 316-20 (1975) (holding that a defendant in a criminal prosecution cannot be required to choose between testifying before introducing any other evidence on his behalf or not testifying at all). The court in *Cunningham* distinguished *Baxter* by explaining that the *Baxter* defendant's silence was only one of many factors considered in assessing a penalty, and the silence was only given the probative value warranted by the specific facts involved. 431 U.S. at 808 n.5. In *Cunningham*, however, the defendant's refusal to waive the fifth amendment privilege resulted in the automatic sanction of his being divested of his party office. 431 U.S. at 804-05.

remaining silent at the revocation hearing he suffers an impermissible penalty, he must demonstrate that he suffers an automatic sanction by remaining silent.

The second type of unconstitutional compulsion of testimony is illustrated by *Simmons v. United States*.[40] In *Simmons*, the defendant gave testimony in support of a motion to suppress evidence which was allegedly seized in violation of the fourth amendment.[41] The government subsequently used this testimony to establish the defendant's guilt.[42] The Supreme Court found the government's use of the suppression hearing testiomy impermissible because the defendant was forced to waive his privilege against self-incrimination in order to assert his fourth amendment claim.[43] The Court reasoned that requiring the election of one constitutional right at the expense of another was intolerable.[44]

The more recent case of *McGautha v. California*[45] has left the choice of rights reasoning in *Simmons* "open to question."[46] In *McGautha*, the defendant challenged the procedure for determining the issues of guilt and punishment in a unitary trial.[47] In a unitary trial the defendant must choose between speaking out to mitigate his responsibility and punishment, or remaining silent and risking a stricter sentence.[48] The Supreme Court, in rejecting the challenge, held that a unitary trial on the issues of guilt and punishment does not unconstitutionally impair the defendant's fifth amendment right.[49] The Court recognized that the legal system abounds with situations which require a defendant to make difficult choices such as whether to testify on one's own behalf.[50] The Constitution, the Court explained, does not necessarily forbid requiring difficult choices even if the choice is between

---

40. 390 U.S. 377 (1968).
41. *Id.* at 381.
42. *Id.*
43. *Id.* at 394. The Court feared that if such testimony was permitted valid fourth amendment claims would not be made. *Id.* at 392-93.
44. *Id.* at 394. *But see* text & notes 46-54 *infra*.
45. 402 U.S. 183 (1971).
46. *Id.* at 212-13. The Court declared:

> While we have no occasion to question the soundness of the result in *Simmons* . . . the validity of that reasoning must now be regarded as open to question, ... Although a defendant may have a right, even of constitutional dimension, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.

Id.; *see* People v. Coleman, 13 Cal. 3d 867, 878-82, 885-86, 533 P.2d 1024, 1035-37, 1039-40, 120 Cal. Rptr. 384, 394-97, 399-400 (1975); People v. Rocha, 86 Mich App. 497, 507, 272 N.W.2d 699, 704 (1978); Commonwealth v. Kates, 452 Pa. 102, 113-14, 305 A.2d 701, 707 (1973).
47. 402 U.S. at 213.
48. *See id.*
49. *Id.* at 217.
50. *Id.* at 213

exercising different constitutional rights.[51]

McGautha distinguished *Simmons* on the grounds that use of the suppression hearing testimony in *Simmons* would weaken the exclusionary rule's protection of fourth amendment rights.[52] Waiver of the privilege against self-incrimination is compelled when the choice appreciably impairs the policies behind another constitutional right.[53]

Therefore, for a probationer to successfully assert that his privilege against self-incrimination is offended by ordering the revocation proceeding prior to the criminal trial, he must demonstrate that the policies behind some other right are impaired by assertion of the privilege.

Due Process as Applied in Boyd

The court in *Boyd* was asked to decide if requiring a probationer to choose whether or not to testify at a revocation proceeding held prior to a criminal trial amounted to an unconstitutional infringement on the defendant's fifth amendment privilege.[54] The court held, as many other courts have, that scheduling a revocation hearing prior to a criminal trial on related charges does not violate the Constitution.[55] Although the portion of the court's opinion dealing with this holding is

51. *Id.* Since the *McGautha* decision, thee has been some confusion as to when a choice of rights situation as it existed in *Simmons* and *McGautha* impermissibly impairs a defendant's privilege against self-incrimination. The Supreme Court has held since *Simmons* that a defendant in a criminal prosecution cannot be required to choose between testifying before introducting any other evidence on his behalf and not testifying at all. Brooks v. Tennessee, 406 U.S. 605, 612 (1972). Requiring testimony by a criminal defendant as a condition to the introduction of other evidence constitutes an infringement on the defendant's right to remain silent by making assertion of the right costly. *Id.* at 611. It has been suggested that *Brooks* limits the precedential value of *McGautha*. Note, *supra* note 31, at 545. It has also been argued that the Court viewed the consequence of not testifying first, that is, not being able to testify later, as a penalty. *Id.* Yet, the choice faced in *Brooks* was similar to the one faced in *McGautha*. *Id.*

52. McGautha v. United States, 402 U.S. 183, 211; see note 43 *infra*.

53. 402 U.S. at 213

54. State v. Boyd, 128 Ariz. 381, 382, 625 P.2d 970, 971 (Ct. App. 1981). Because of the confusion created by the *McGautha* decision's criticism of the choice of rights analysis of *Simmons*, some state courts have refused to rule on the prorpriety of the timing of a revocation hearing in relation to the criminal trial on constitutional grounds. Rather, these courts have based their decisions on the supervisory powers they possess over their lower state courts. *E.g.*, McCracken v. Corey, 612 P.2d 990, 998 (Alaska 1980); People v. Coleman, 13 Cal. 3d 867, 872, 533 P.2d 1024, 1030, 120 Cal. Rptr. 384, 390 (1975); State v. Hass, 268 N.W.2d 456, 460 (N.D. 1978).

55. State v. Boyd, 128 Ariz. 381, 382, 625 P.2d 970, 971 (Ct. App. 1981). Cases in accord with *Boyd* include Ryan v. Montana, 580 F.2d 988, 994 (9th Cir. 1978), *cert. denied*, 440 U.S. 977 (1979); Flint v. Mullen, 499 F.2d 100, 105 (1st Cir.), *cert. denied*, 419 U.S. 1026 (1974); People v. Carr, 185 Colo. 293, 297, 524 P.2d 301, 303 (1974); Borges v. State, 249 So.2d 513, 514 (Fla. Dist. Ct. App. 1971); Jackson v. State, 140 Ga. App. 659, 660, 231 S.E.2d 554, 555 (1976); People v. Price, 24 Ill. App. 2d 364, 378, 164 N.E.2d 528, 534 (1960); People v. Baines, 83 Mich. App. 570, 573-74, 269 N.W.2d 228, 230 (1978); State v. Ryan, 166 Mont. 419, 423, 533 P.2d 1076, 1078-79 (1975); State v. Kartman, 192 Neb. 803, 807, 224 N.W.2d 753, 755 (1975); Dail v. State, — Nev. —, —, 610 P.2d 1193, 1194 (1980); State v. Randall, 27 Or. App. 869, 875, 557 P.2d 1386, 1390 (1976); Commonwealth v. Kates, 452 Pa. 102, 114, 305 A.2d 701, 707 (1973); State v. Cyganowski, 21 Wash. App. 119, 122, 584 P.2d 426, 427 (1978); Sigman v. Whyte, — W. Va. —, —, 268 S.E.2d 603, 606-07 (1980). *See generally* United States v. Markovitch, 348 F.2d 238, 241 (2d Cir. 1965).

rather conclusory, the cases cited by the court more fully detail the reasons behind the court's decision.

First, a probationer is not made to suffer a penalty for remaining silent.[56] The risk of an adverse judgment in the revocation hearing, although undesirable, is simply not a penalty upon the probationer.[57] Once an individual exercises his fifth amendment privilege, not every undesirable consequence which results will be considered a penalty.[58] Since there is no automatic penalty to the probationer for remaining silent at the revocation hearing, such as termination of probation, a defendant has an uncoerced choice in deciding whether or not to testify.[59]

Nor is *Simmons* directly applicable to a probation revocation hearing situation.[60] Many courts have recognized the testimonial dilemma faced by a probationer as a difficult one, but characterize it as nothing more than a strategic choice which is not of constitutional dimension.[61] Unlike *Simmons*, the defendant in *Boyd* was not forced to exercise one constitutional right at the expense of another.[62] In *Boyd*, the defendant's choice was whether or not to exercise his fifth amendment right to be silent,[63] which is the same decision that any defendant must make

56. Flint v. Mullen, 499 F.2d 100, 104, (1st Cir.), *cert. denied*, 419 U.S. 1026 (1974)

57. *Id.* The court explained that if the risk of an adverse judgment was considered an impermissible penalty within the meaning of the United States Supreme Court's definition, then the same conclusion would have to be reached in any proceeding which is based upon the same circumstances as a subsequent criminal trial. *Id.* This result, the court warned, would place an undue burden upon the state. *Id.*

58. *Id.*

59. State v. Randall, 27 Or. App. 869, 873-74, 557 P.2d 1386, 1388-89 (1976); *see* Flint v. Mullen, 499 F.2d 100, 103 (1st Cir.), *cert. denied*, 419 U.S. 1026 (1974). In addition, in the employment cases, *see* text & notes 34-36 *supra*, the intention of the government was to collect information for the express use in subsequent criminal trials. *See* note 34 *supra*. The use of the probation process as "a subterfuge for criminal investigations" has been expressly forbidden. United States v. Consuelo-Gonzalez, 521 F.2d 259, 267 (9th Cir. 1975). There is no indication, however, that in subjecting Boyd to a revocation hearing the state was attempting to gather evidence for use in a later criminal prosecution. *See* State v. Boyd, 128 Ariz. 381, 382-83, 625 P.2d 970, 971-72 (Ct. App. 1981).

60. Flint v. Mullen, 499 F.2d 100, 103 (1st Cir.), *cert. denied*, 419 U.S. 1026 (1974).

61. Ryan v. Montana, 580 F.2d 988, 992 (9th Cir. 1978), *cert. denied*, 440 U.S. 977 (1979); Flint v. Mullen, 499 F.2d 100, 103 (1st Cir.), *cert. denied*, 419 U.S. 1026 (1974); State v. Ryan, 166 Mont. 419, 423, 533 P.2d 1076, 1078 (1975); Dail v. State, — Nev. —, —, 610 P.2d 1193, 1195 (1980); State v. Randall, 27 Or. App. 869, 875, 557 P.2d 1386, 1390 (1976). It has been noted that a probationer's choice to testify at a revocation hearing might be viewed as less strategic if an adverse finding could be based on the defendant's silence. Flint v. Mullen, 499 F.2d 100, 103 (1st Cir.), *cert. denied*, 419 U.S. 1026 (1974). In *Boyd*, however, no such inference was permitted. *See* State v. Boyd, 128 Ariz. 381, 382-83, 625 P.2d 970, 971-72 (Ct. App. 1981).

62. *See* State v. Boyd, 128 Ariz. 381, 382-83, 625 P.2d 970, 971-72 (Ct App. 1981); Flint v. Mullen, 499 F.2d 100, 103 (1st Cir.), *cert. denied*, 419 U.S. 1026 (1974). Furthermore, if the defendant in *Simmons* had remained silent, the penalty would have been waiver of a fourth amendment claim. Simmons v. United States, 390 U.S. 377, 392-93 (1968). In *Boyd*, however, the defendant was not made to suffer any penalty for remaining silent other than the loss of an opportunity to persuade the court in his favor. *See* 128 Ariz. at 382, 625 P.2d at 971.

63. State v. Boyd, 128 Ariz. 381, 382, 625 P.2d 970, 971 (Ct. App. 1981); *see* Flint v. Mullen, 499 F.2d 100, 103 (1st Cir.), *cert. denied*, 419 U.S. 1026 (1974).

when brought to trial.[64]

Conversely, the situation in *McGautha* seems analogous to that of *Boyd*. In *McGautha*, the defendant faced the difficult but constitutional choice of speaking out for a more lenient sentence or risking a stricter sentence by remaining silent.[65] The testimonial dilemma faced by a probationer when a revocation hearing occurs prior to the criminal trial is essentially the same type of difficult, but constitutional, choice faced by the defendant in *McGautha*.[66]

Forcing a probationer to assume the risk that any statement he makes at the revocation hearing may be used against him in a subsequent criminal trial is no more harsh than the circumstances in *McGautha*,[67] and therefore cannot be considered compulsion in violation of the fifth amendment.[68] The probationer's choice of whether or not to testify on his own behalf, even though it may implicate in some way the policies of the privilege against self-incrimination, is not constitutionally impermissible.[69] Therefore, in holding that the Constitution does not require that a criminal trial be held prior to a probation revocation hearing on related charges,[70] the *Boyd* court's decision reflects a majority view[71] and appears constitutionally sound.

Limited Use of a Probationer's Revocation Hearing Testimony

It has been suggested that when a probationer refuses to testify at a probation revocation hearing for fear of self-incrimination, his right to be heard has been impaired.[72] Though the impairment may not violate the Constitution, it can render a court unable to assure "[a]n informed, intelligent, and just revocation decision."[73] Some courts have also recognized that forcing a probationer to exercise his right to testify at the hearing to affect his release, at the risk of making incriminating statements in violation of his fifth amendment privilege, creates an unfair tension between competing constitutional values.[74]

64. Flint v. Mullen, 499 F.2d 100, 103 (1st Cir.), *cert. denied*, 419 U.S. 1026 (1974).
65. McGautha v. California, 402 U.S. 183, 211-13 (1971).
66. Flint v. Mullen, 499 F.2d 100, 103 (1st Cir.), *cert. denied*, 419 U.S. 1026 (1974).
67. Ryan v. Montana, 580 F.2d 988, 993 (9th Cir. 1978), *cert. denied*, 440 U.S. 977 (1979); *see* Flint v. Mullen, 499 F.2d 100, 103 (1st Cir.), *cert. denied*, 419 U.S. 1026 (1974).
68. Ryan v. Montana, 580 F.2d 988, 993 (9th Cir. 1978), *cert. denied*, 440 U.S. 977 (1979); *see* Flint v. Mullen, 499 F.2d 100, 103 (1st Cir.), *cert. denied*, 419 U.S. 1026 (1974).
69. McGautha v. California, 402 US. 183, 217 (1971).
70. State v. Boyd, 128 Ariz. 381, 383, 625 P.2d 970, 972 (Ct. App. 1981).
71. *See* cases cited at note 55 *supra*.
72. People v. Coleman, 13 Cal. 3d 867, 874-75, 533 P.2d 1024, 1031-32, 120 Cal. Rptr. 384, 391-92 (1975); *see* McCracken v. Corey, 612 P.2d 990, 993 (Alaska 1980).
73. People v. Coleman, 13 Cal. 3d 867, 873, 533 P.2d 1024, 1031, 120 Cal. Rptr. 384, 391 (1975).
74. McCracken v. Corey, 612 P.2d 990, 997-98 (Alaska 1980); People v. Coleman, 13 Cal. 3d 867, 873-74, 533 P.2d 1024, 1031-32, 120 Cal. Rptr. 384, 391-92 (1975); People v. Rocha, 86 Mich. App. 497, 512, 272 N.W.2d 699, 703 (1978).

Many courts have eased this testimonial dilemma by granting a probationer use immunity for testimony given at a revocation hearing when the hearing precedes the criminal trial.[75] In *State v. Boyd*, the Arizona Court of Appeals interpreted Rule 27.8 of the Arizona Rules of Criminal Procedure to limit admission of a probationer's revocation hearing testimony in a subsequent criminal trial to impeachment use.[76] A probationer's revocation hearing testimony is thus not admissible in the prosecution's case in chief.[77]

Rule 27.8 of the Arizona Rules of Criminal Procedure requires the court to explain to the probationer that an admission that he has violated a condition of probation which involves a criminal offense may be used to impeach the probationer's testimony at a subsequent trial for that criminal offense.[78] By interpreting Rule 27.8 as conferring use immunity for the probationer's testimony at the revocation hearing, the court recognized that when a defendant testifies at the revocation hearing, his testimony may still be used to impeach him.[79] The court concluded, however, that use of the revocation hearing testimony to impeach does not pressure the defendant into either remaining silent or testifying at the hearing.[80] Limiting the use of revocation hearing testimony to impeachment merely creates an incentive for the probationer to speak truthfully at the revocation hearing if he testifies at all.[81] The *Boyd* court also recognized that "the protective shield of *Simmons* is not to be converted into a license for false representation."[82] Indeed, the Court in *Simmons* did not specifically preclude the use of suppression hearing testimony for impeachment purposes.[83] The solution to the tension in *Simmons* was the exclusion of any testimony given in the

75. Melson v. Sard, 402 F.2d 653, 655 (D.C. Cir. 1968); McCracken v. Corey, 612 P.2d 990, 998 (Alaska 1980); People v. Coleman, 13 Cal 3d 867, 889, 533 P.2d 1024, 1042, 120 Cal. Rptr. 384, 402 (1975); People v. Rocha, 86 Mich. App. 497, 512-13, 272 N.W.2d 699, 706-07 (1978); State v. Hass, 268 N.W.2d 456, 460 (N.D. 1978); State v. DeLomba, 117 R.I. 673, 679-80, 370 A.2d 1273, 1276 (1977); State v. Evans, 77 Wis. 2d 225, 235-36, 252 N.W.2d 664, 668-69 (1977).

76. State v. Boyd, 128 Ariz. 381, 383, 625 P.2d 970, 972 (Ct. App. 1981).

77. *Id.*

78. ARIZ. R. CRIM. P. 27.8(e). Rule 27.8 provides in perintent part:

> Before accepting an admission by a probationer that he has violated a condition or regulation of his probation, the court shall . . . determine that he understands the following:
>
> * * *
>
> (e) [i]f the alleged violation involves a criminal offense for which he has not yet been tried . . . that . . . any statement made by him at the hearing may be used to impeach his testimony at the trial.

79. State v. Boyd, 128 Ariz. 381, 383, 625 P.2d 970, 972 (Ct. App. 1981).

80. *Id.*

81. *Id.*

82. *Id.*, *quoting* United States v. Kahan, 415 U.S. 239, 243 (1974).

83. Simmons v. United States, 390 U.S. 377, 394 (1968). In the later case of Brown v. United States, 411 U.S. 223 (1973), the Court interpreted *Simmons* to prohibit only the direct admission of an accused's testimony at a subsequent trial. *Id.* at 228.

suppression hearing from use at trial "on the issue of guilt."[84] For these reasons the *Boyd* court concluded that Rule 27.8 afforded a probationer ample protection of his constitutional right to testify or to remain silent at the revocation proceeding.[85]

Rule 27.8, by its strict wording, governs the admissibility in a later trial of an *admission* by a probationer that he has violated the terms of his probation.[86] The *Boyd* court, however, appears to have applied the rule more broadly. The court interpreted Rule 27.8 as requiring limited admissibility of a probationer's testimony from the revocation hearing even when the probationer denies that he has violated any condition of probation.[87]

There is no Arizona case law or comment to the rules to support this broad reading of Rule 27.8. A prior version of the rules of criminal procedure, however, lends greater support to the conclusion reached by the court in *Boyd* than do the present Rules of Criminal Procedure. Rule 27.7(c)(i) of the 1973 Arizona Rules of Criminal Procedure, prior to its amendment in 1975, provided that a probationer subjected to a revocation hearing which involved a criminal offense for which he may be subsequently tried must be advised that *any statement* he makes at the hearing may be used to impeach his testimony at trial.[88] The 1973 version of Rule 27.7, therefore, seems to support the *Boyd* court's holding that any testimony given by a probationer at a revocation hearing may only be used for impeachment purposes at a later trial.

In 1975, however, Rule 27.7 was amended and this provision was eliminated.[89] It could thus be argued that the drafters of the amended rules intended to permit the use of a probationer's revocation hearing testimony in the prosecution's case in chief in the subsequent criminal trial. In spite of the 1975 amendment, however, the *Boyd* court held that a probationer's testimony at a revocation proceeding may only be

84. Simmons v. United States, 390 U.S. at 394. Although prior inconsistent statements made by the probationer during the revocation hearing may be introduced into trial against the probationer, a court must instruct the jury that such prior inconsistent statements may only be considered for the purpose of impeaching the credibility of the probationer, and not for determining the issue of guilt. *See* Ladd, *Some Observations on Credibility: Impeachment of Witnesses*, 52 CORNELL L. Q. 239, 249 (1966). Despite precise and easily understood instruction, if a jury believes that the probationer's prior inconsistent statements are true and incriminating, it seems unrealistic to expect that the jury will not consider those inconsistent statements with respect to the issue of guilt. *Id.*

85. State v. Boyd, 128 Ariz. 381, 383, 625 P.2d 970, 972 (Ct. App. 1981). The court in *Boyd* seems to suggest that even if a probationer's fifth amendment privilege is unconstitutionally burdened by scheduling the revocation proceeding prior to the criminal trial, that impermissible burden is eliminated by prohibiting the use of the probationer's revocation hearing testimony in the prosecution's case in chief. *Id.*

86. *See* note 78 *supra*.

87. State v. Boyd, 128 Ariz. 381, 383, 625 P.2d 970, 972 (Ct. App. 1981).

88. ARIZ. R. CRIM.P. 27.7(c)(1).

89. *Id.*

used for impeachment purposes at the subsequent criminal trial.[90] Because *Boyd* was not heard by the Arizona Supreme Court, the court of appeals' interpretation of Rule 27.8, correct or not, is controlling until another case challenges this broad interpretation.[91]

Policy Implications

While some courts have suggested that delaying the revocation hearing may be preferable,[92] the Constitution does not always require a state to adopt the preferable procedure.[93] Moreover, many jurisdictions have recognized that there are numerous policy advantages in conducting less formal revocation proceedings prior to a criminal trial on related charges.[94] The United States Supreme Court has noted that a less formal revocation is less expensive for the state.[95] Further, the Supreme Court has suggested than an informal revocation hearing may be the most effective means of removing a repetitive offender from society.[96]

A probationer may also benefit by having the revocation proceeding occur first. If probation is revoked for subsequent criminal conduct and the probationer is sentenced for the first offense, a court may subsequently impose a concurrent or reduced sentence if he is found guilty on the second offense.[97] Allowing the state to withdraw probation more easily may also encourage the state to extend probation more often.[98] In addition, a less formal proceedings may return the probationer who has not committed the alleged violation to conditional liberty more quickly.[99] Further, delay of a revocation proceeding may disadvantage the probationer because evidence grows old and wit-

90. State v. Boyd, 128 Ariz. 381, 383, 625 P.2d 970, 972 (Ct. App. 1981).

91. *See* State v. Brown, 23 Ariz. App. 225, 228, 532 P.2d 167, 170 (1975); State v. Meek, 9 Ariz. App. 149, 151, 450 P.2d 115, 117, *cert. denied*, 396 U.S. 847 (1969).

92. Flint v. Mullen, 499 F.2d 100, 104-05 (1st Cir.), *cert. denied*, 419 U.S. 1026 (1974); People v. Coleman, 13 Cal. 3d 867, 896, 120 Cal. Rptr. 384, 406, 533 P.2d 1024, 1046 (1975); *see* McCracken v. Corey, 612 P.2d 990, 996 (Alaska 1980).

93. Flint v. Mullen, 499 F.2d 100, 105 (1st Cir.), *cert. denied*, 419, U.S. 1026 (1974).

94. *See* Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973); Morrissey v. Brewer, 408 U.S. 471, 479, 483-84 (1972); Ryan v. Montana, 580 F.2d 988, 994 (9th Cir. 1978), *cert. denied*, 440 U.S. 977 (1979); Dail v. State, — Nev. —, —, 610 P.2d 1193, 1195-96 (1980); Commonwealth v. Kates, 452 Pa. 102, 109, 305 A.2d 701, 707-08 (1973); State v. Cyganowski, 21 Wash. App. 119, 122, 584 P.2d 426, 428 (1978).

95. Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973).

96. Morrissey v. Brewer, 408 U.S. 471, 479, (1972); *see* Dail v. State, — Nev. —, —, 610 P.2d 1193, 1195 (1980); Commonwealth v. Kates, 452 Pa. 102, 109, 305 A.2d 701, 707-08 (1973); State v. Cyganowski, 21 Wash. App. 119, 122, 584 P.2d 426, 428 (1978). *See generally* People v. Ressin, — Colo. —, — 620 P.2d 717, 720 (1981). "The probationer's commission of a serious offense serves as a strong indication that he is . . . incapable of reintegration into society at that point, and remedial action by the court might well be necessary in the interests of the probationer and society." *Id.*

97. Dail v. State, — Nev. —, —, 610 P.2d 1193, 1195-96 (1980).

98. *See* Morrissey v. Brewer, 408 U.S. 471, 483-84 (1972).

99. *See id.* at 484.

nesses become unavailable.[100]

Those states which have lessened the testimonial dilemma faced by a probationer by granting use immunity for testimony at the revocation hearing have also recognized many policy advantages. Conferring use immunity does not impose any substantial cost on the state,[101] does not significantly inconvenience the state,[102] and does permit the state to schedule the revocation hearing prior to the criminal trial if it so desires.[103] Therefore, the benefits to the state of this more informal revocation process are preserved.[104]

By granting use immunity, a court can still protect a defendant's due process right to be heard.[105] The court can thereby maintain a fundamentally fair and just revocation procedure which benefits both the probationer and the state.[106] By granting a defendant the protection of use immunity, the court no longer forces the defendant to face the "cruel trilemma of self-accusation, perjury, or contempt."[107]

It has also been suggested that granting use immunity to a probationer's revocation testimony maintains the "state-individual balance" at the later criminal trial by forcing the government to build its case against the individual without the help of the individual.[108] Use immunity also removes any incentive for the state to schedule the revocation hearing prior to trial for the illegitimate purpose of acquiring evidence for the subsequent trial.[109] Finally, use immunity creates an incentive for the probationer to tell the truth. While such testimony may not be used by the prosecution in its case in chief, it may be used to impeach

100. Ryan v. Montana, 580 F.2d 988, 994 (9th Cir. 1978), *cert. denied*, 440 U.S. 977 (1979). Dail v. State, — Nev. —, —, 610 P.2d 1193, 1195 (1980).

101. Note, *supra* note 31, at 553.

102. *See id.* at 554; Flint v. Mullen, 499 F.2d 100, 106 (1st Cir.) (Coffin, C. J., dissenting), *cert. denied*, 419 U.S. 1026 (1974).

103. People v. Coleman, 13 Cal. 3d 867, 889, 533 P.2d 1024, 1042, 120 Cal. Rptr. 384, 402 (1975); *see* Morrissey v. Brewer, 408 U.S. 471, 483 (1972).

104. People v. Coleman, 13 Cal. 3d at 879, 533 P.2d at 1042, 120 Cal. Rptr. at 402 (1975).

105. *See id.* at 867, 874-75, 533 P.2d 1024, 1031-32, 120 Cal. Rptr. 384, 391-92 (1975).

106. *See id.*; People v. Rocha, 86 Mich. App. 497, 513, 272 N.W.2d 699, 707 (1978); State v. DeLomba, 117 R.I. 673, 680, 370 A.2d 1273, 1277 (1977).

107. People v. Coleman, 13 Cal. 3d 867, 878, 533 P.2d 1024, 1034, 120 Cal. Rptr. 384, 394 (1975), *quoting* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964). While a probationer is not subject to contempt if he refuses to testify, he might incriminate himself if he chooses to testify, or he might lose a valuable opportunity to present a defense against revocation if he declines to testify. People v. Coleman, 13 Cal. 3d 867, 878, 533 P.2d 1024, 1034, 120 Cal. Rptr. 384, 394 (1975). To avoid these alternatives, a probationer may perjure himself so as not to damage his position at the subsequent trial. *Id.*

108. Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964). This balance is undermined when the state is allowed to take advantage of the defendant's testimony at the prior revocation hearing. People v. Coleman, 13 Cal. 3d 867, 875-76, 533 P.2d 1024, 1032-33, 120 Cal. Rptr. 384, 392-93 (1975).

109. People v. Coleman, 13 Cal. 3d 867, 889, 533 P.2d 1024, 1042, 120 Cal. Rptr. 384, 402 (1975).

inconsistent testimony the probationer may give at the criminal trial.[110] Therefore, for a probationer to benefit from the use immunity, he must testify truthfully.[111]

Conclusion

In *State v. Boyd*, the Arizona Court of Appeals held that the Constitution does not require that a criminal trial be held prior to a probation revocation hearing based on the alleged criminal conduct. If the revocation hearing is scheduled before the trial, however, Rule 27.8 of the Arizona Rules of Criminal Procedure mandates that testimony given by the probationer at the hearing may be used at trial only for the purpose of impeachment. The court's decision allowing a probation revocation proceeding to be held prior to a criminal trial on related charges is both constitutionally correct and in accord with the majority of courts which have decided the issue.

One might argue that use immunity is not the best solution to the testimonial dilemma faced by a probationer subjected to a revocation proceeding. The application of use immunity in *Boyd*, however, certainly accords an Arizona probationer more procedural protection than is required by the United States Constitution or the state constitutions as interpreted in many other jurisdictions. Certainly, the court's interpretation of Rule 27.8 will be the subject of criticism not only by those who think that use immunity is not an adequate solution to the dilemma faced by the probationer, but by those who believe the court's interpretation is too broad and unsupported by the rule. Nevertheless, the court's interpretation of Rule 27.8 is both a reasonable and a practical resolution to the situation faced by a probationer who is subjected to both a revocation proceeding and a criminal trial on related charges.

The court's holding also relieves the tension surrounding the probationer's choice to testify without placing an undue burden upon the state. The decision preserves for the state the benefits of conducting a less formal revocation proceeding prior to a criminal trial on related charges. The decision in *Boyd* thus serves to simultaneously protect the interests of two very divergent adversaries: the state and the individual the state seeks to incarcerate.

Scott M. Finical

110. State v. Boyd, 128 Ariz. 381, 383, 625 P.2d 970, 972 (Ct. App. 1981); People v. Coleman, 13 Cal. 3d 867, 892, 533 P.2d 1024, 1044, 120 Cal. Rptr. 384, 404 (1975). See text & note 81 *supra*.

111. State v. Boyd, 128 Ariz. 381, 383, 625 P.2d 970, 972 (Ct. App. 1981); People v. Coleman, 13 Cal. 3d 867, 892, 533 P.2d 1024, 1044, 120 Calif. Rptr. 384, 404 (1975).

THE NEW TREND IN EFFECTIVE ASSISTANCE OF COUNSEL CASES: ARIZONA LAGS BEHIND

Both the United States Constitution[1] and the Arizona Constitution[2] clearly provide a criminal defendant with the right to assistance of counsel.[3] The necessary quality of that assistance, however, is not so clear.[4] Until the last decade, the most prevalent test of counsel's adequacy was whether the representation was so poor that it reduced the proceedings to a "farce and mockery" of justice.[5] In adopting this standard, most courts considered the right to effective assistance to be a guarantee of due process.[6]

Many courts, however, found the "farce and mockery" analysis too superficial to adequately review ineffectiveness claims.[7] A new trend thus emerged in the early 1970s which recognized that the guarantee of effective counsel should more properly be considered a direct right contained in the sixth amendment's right to counsel than a derivative right contained in the due process clause.[8] To meet the sixth amendment's demands, courts following this trend have determined that the proper test should be whether the representation was "reasonably effective" or "within the range of competence of attorneys in criminal cases."[9]

---

1. U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

2. ARIZ. CONST. art. II, § 24 provides: "In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel. . . ."

3. *See* Johnson v. Zerbst, 304 U.S. 458 (1938). The Supreme Court construed the right to counsel to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived. *Id.* at 468. *See also* Gideon v. Wainwright, 372 U.S. 335 (1963) (the sixth amendment's guarantee of counsel for indigent criminal defendants held applicable to the states through the fourteenth amendment). The Court further interpreted the right to counsel as a fundamental right guaranteed to state defendants through the due process clause of the fourteenth amendment. *Id.* at 341.

4. *See generally* Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973); Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233 (1979); Finer, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443 (1977); Note, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review*, 13 COLUM. J.L. & SOC. PROB. 1 (1977).

5. *E.g.*, Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965) (farce or mockery of justice); O'Malley v. United States, 285 F.2d 733, 734 (6th Cir. 1961) (farce and mockery of justice; shocking to the conscience of the court); States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949) (farce and mockery of justice), *cert. denied*, 338 U.S. 950 (1950).

6. *E.g.*, Snead v. Smyth, 273 F.2d 838, 842 (4th Cir. 1959); United States *ex rel.* Feeley v. Ragen, 166 F.2d 976, 980 (7th Cir. 1948); Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

7. *E.g.*, Cooper v. Fitzharris, 586 F.2d 1325, 1328-30 (9th Cir. 1978) *cert. denied*, 440 U.S. 974 (1979); United States v. Bosch, 584 F.2d 1113, 1120-21 (1st Cir. 1978); Beasley v. United States, 491 F.2d 687, 692-96 (6th Cir. 1974).

8. *E.g.*, Cooper v. Fitzharris, 586 F.2d 1325, 1328-30 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979); United States v. Bosch, 584 F.2d 1113, 1120-21 (1st Cir. 1978); Beasley v. United States, 491 F.2d 687, 692-96 (6th Cir. 1974).

9. Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.) (the sixth amendment demands the skill,

Despite the overwhelming trend, Arizona still formally adheres to the "farce and mockery" test.[10] In *State v. Moreno*,[11] the appellant requested that the Arizona Supreme Court reject the "farce and mockery" test in favor of one requiring counsel to be "reasonably effective."[12] The court skirted the issue, however, stating that regardless of the standard applied, appellant's trial counsel was adequate.[13] The court indicated, though, the possibility that given a more meritorious case, Arizona might modify its standard and fall in line with the majority.[14]

In *Moreno*, the defendant was charged with first degree murder and given a jury trial.[15] Despite Moreno's repeated denial of guilt, he was convicted.[16] Moreno then entered a motion for new trial, arguing ineffective assistance of counsel.[17]

At an evidentiary hearing held in connection with his motion for a new trial, Moreno offered testimony attempting to demonstrate that a diminished capacity "defense"[18] would have been available at the original trial had his attorney pursued the evidence.[19] Trial counsel testified, however, that he had conducted an investigation concerning the

---

judgment and diligence of a reasonably competent defense attorney), *cert. denied*, 445 U.S. 945 (1980); Cooper v. Fitzharris, 586 F.2d 1325, 1329 (9th Cir. 1978) (reasonably effective and competent defense representation), *cert. denied*, 440 U.S. 974 (1979); United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978) (reasonably competent assistance, which is shorthand for the range of competence expected of attorneys in criminal cases).

10. The standard was adopted in State v. Kruchten, 101 Ariz. 186, 197, 417 P.2d 510, 521 (1966), *cert. denied*, 385 U.S. 1043 (1967). The standard was most recently reaffirmed in State v. Salinas, — Ariz. —, —, 631 P.2d 519, 521 (1981).

11. 128 Ariz. 257, 625 P.2d 320 (1981).

12. *Id.* at 260, 625 P.2d at 323.

13. *Id.* The court relied upon State v. Williams, 122 Ariz. 146, 152, 593 P.2d 896, 902 (1979), in which the court had addressed a similar request to change the Arizona standard and had concluded that counsel's performance met both standards.

14. After briefly acknowledging appellant's request to change Arizona's standard, the court stated: "We have no occasion to address the issue here . . . ." 128 Ariz. at 260, 625 P.2d at 323. It is this author's opinion that such language implies that another case might present the proper occasion to address the issue. In addition, if the court were completely close-minded to a change, it would seem unnecessary for it to justify its position by stating that counsel was adequate even under the suggested stricter standard. *Id.* The court more recently indicated the possibility that the standard might be re-evaluated at a future date in State v. Salinas, — Ariz. —, —, 631 P.2d 519, 521 (1981). In *Salinas*, the court stated, "Although we do not purport to abandon the prevailing rule *at this time*, we conclude that even under the suggested standards, defendant was not denied effective assistance of counsel." *Id.* (emphasis added).

15. 128 Ariz. at 258, 625 P.2d at 321.

16. *Id.*

17. *Id.* at 259 n.1, 625 P.2d at 322 n.1. Defendant also moved for new trial for failure to give a lesser included offense instruction and for violation of the attorney-client privilege. *Id.*

18. The *Moreno* court noted that ARIZ. REV. STAT. ANN. § 13-503 (1980) allows the jury to consider voluntary intoxication as it relates to a particular defendant's culpable mental state, but not as a "defense." 128 Ariz. at 259 n.2, 625 P.2d at 322 n.2; *see* State v. Lafoon, 125 Ariz. 484, 486, 610 P.2d 1045, 1047 (1980) (voluntary intoxication may be considered only as it relates to ability to form specific intent, not as an excuse for criminal conduct); State v. Cooper, 111 Ariz. 332, 334, 529 P.2d 231, 233 (1974) (voluntary intoxication cannot be a defense to crime).

19. 128 Ariz. at 259, 625 P.2d at 322. The testimony included information indicating that at the time of the murder, Moreno was under the influence of beer, heroin, and a prescription drug, Serax. Such information had not been revealed at trial. *Id.*

diminished capacity defense but that none of Moreno's witnesses had disclosed any helpful information concerning his condition at the time of the murder.[20] Counsel further testified that it was not until Moreno had been convicted that the witnesses "refreshed" their memories to reveal Moreno's extensive heroin use and a significant increase in the amount of beer he had consumed at the time of the murder.[21]

At the evidentiary hearing, trial counsel also stated that, based upon information provided him by Moreno, his strategy at trial had been to discredit the eyewitness's testimony.[22] He added that he had mentioned to Moreno the possibility of alternative strategies, including the possibility of diminished capacity.[23] Moreno, however, had remained adamant about his innocence, insisting "I remember what happened that night, and I did not shoot that man."[24] Trial counsel then decided that arguing his client's absolute innocence, while at the same time presenting evidence of intoxication, would probably be more harmful than helpful to the case.[25] He stated that it was a conscious tactical decision not to present inconsistent defenses.[26]

Moreno's motion for a new trial was denied and Moreno was subsequently sentenced to life imprisonment without possibility of parole for twenty-five years.[27] On appeal, Moreno again contended that he was denied the effective assistance of counsel.[28] He additionally requested that his appeal be reviewed using a more scrutinizing standard than Arizona's "sham or mockery" test.[29]

The Arizona Supreme Court affirmed Moreno's conviction, stressing that Moreno had insisted that he remembered clearly what happened the night of the shooting and had adamantly denied guilt.[30] The court held that given Moreno's unequivocal denial of guilt,[31] along with trial counsel's interviews with witnesses who corroborated Moreno's original story, trial counsel was not obligated to pursue "inconsistent alternative theories not based upon the facts presented to him."[32] The court went on to summarily dispose of Moreno's request

20. *Id.*
21. *Id.*
22. Direct examination of Attorney Ronan, at 156–57 (reporter's transcript of Nov. 14, 1979), 128 Ariz. 257, 625 P.2d 320 (1981).
23. 128 Ariz. at 259, 625 P.2d at 322.
24. *Id.*
25. Direct examination of Attorney Ronan, at 156–57 (reporter's transcript of Nov. 14, 1979).
26. *Id.*
27. 128 Ariz. at 258, 625 P.2d at 321.
28. *Id.* at 259, 625 P.2d at 322.
29. *Id.* at 260, 625 P.2d at 323.
30. *Id.* at 259, 625 P.2d at 322.
31. The court noted that there was no indication that Moreno's recollection was faulty, unclear, or incomplete. *Id.*
32. *Id.* At this point, the court indicated its displeasure with Moreno's appellate counsel for

that Arizona's "sham or mockery" standard for judging such claims be rejected.[33] In its holding, however, the court failed to indicate which standard of effectiveness it employed in the case.[34] Although the court indicated a willingness to change Arizona's standard should a proper occasion arise, it did not explain the extent of that willingness.[35] Rather, the *Moreno* court merely stated that regardless of the standard used, trial counsel's efforts were satisfactory.[36]

---

suggesting that trial counsel should have presented a defense inconsistent with the facts. The court stated:

> Nor do we think, as appellant's new counsel appeared to argue at the evidentiary hearing, that trial counsel should exceed the bounds of ethical, if not legal, propriety and present a defense inconsistent with the facts. In argument, second defense counsel stated: "[T]he concept of how to prepare a case is not necessarily consistent with the facts. . . . All you need is somebody who is prepared to consistently perjure, and they're easy to find. You can find almost anyone in any community, who is otherwise respected and otherwise respectable, willing to perjure himself or herself for proper bond. . . ." We sincerely hope we have misunderstood the argument with respect to the subornation of perjury as an alternative theory of the case.

128 Ariz. at 259–60, 625 P.2d at 322–23.

Given the court's apparent outrage at appellate counsel's statements, it seems highly unlikely that the court would even consider changing Arizona's standard on the basis of this case.

33. *Id.* at 260, 625 P.2d at 323.

34. *See id.*

35. See note 14 *supra*.

36. 128 Ariz. at 260, 65 P.2d at 323. While the court did not articulate its reasoning in claiming that trial counsel's efforts passed even the reasonably effective assistance standard, several factors which were presented to the court shed light on a possible rationale. First, most courts that have replaced the "farce and mockery" standard are clear in stressing that an attorney's informed tactical choices on how to present a case for trial should not be scrutinized by hindsight. *See, e.g.*, Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974); People v. Pope, 23 Cal. 3d 412, 424, 590 P.2d 859, 865–66, 152 Cal. Rptr. 732, 738 (1979). In *Cooper*, for example, the court stated that to successfully challenge trial counsel's actions, it must be shown that his "errors or omissions reflect a failure to exercise the skill, judgment, or diligence of a reasonably competent defense attorney. . . . 586 F.2d at 1330. Similarly, in Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978), the court said that to prevail, the defendant must demonstrate that his attorney's error "resulted from neglect or ignorance rather than from informed, professional deliberation." 561 F.2d at 544. The fact that Moreno's trial counsel made an informed tactical decision, then, weighs in his favor.

Second, under the new "reasonably effective assistance" standard, the appellant is required to show that he was prejudiced by his counsel's actions. *See, e.g.*, Cooper v. Fitzharris, 586 F.2d at 1331–33 (for an appeal to be successful, the defense must have been prejudiced by counsel's performance); United States *ex rel.* Johnson v. Johnson, 531 F.2d 169, 177 (3d Cir.) (petitioner has burden of proving his case was prejudiced by counsel's action), *cert. denied*, 425 U.S. 997 (1976); State v. Carriger, 123 Ariz. 335, 338 599 P.2d 788, 791 (1979) (appellant must show that counsel's error materially affected the jury deliberations). For a discussion on Arizona's prejudice requirement, see text & notes 110 & 112 *infra*. *But see* McQueen v. Swenson, 498 F.2d 207, 216 (8th Cir. 1974) (after a showing by petitioner that admissible evidence exists which would have been discovered by reasonable investigation and which would have been helpful to his case, a new trial is warranted unless the court considers the omission harmless beyond reasonable doubt); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.) (after appellant makes a showing of counsel's ineffectiveness, the burden is on the government to show a lack of prejudice), *cert. denied*, 393 U.S. 849 (1968).

The "reasonably effective assistance" standard does not mean that the defendant must prove that he would have been acquitted "but for" trial counsel's mistakes. *See* Cooper v. Fitzharris, 586 F.2d at 1333. Instead, appellant must show only that it was likely that counsel's inadequacy affected the trial's outcome. *See* United States v. Decoster, 624 F.2d 196, 208 (D.C. Cir. 1979). If appellant can make such a showing, the burden switches to the government to demonstrate that in fact no prejudice resulted. *Id.*

In *Moreno*, it is likely that evidence of intoxication would not have influenced the trial's outcome. As noted by the *Moreno* court, evidence of voluntary intoxication is not a defense to

This casenote will first examine the history of the "farce, sham or mockery" test. The trend in federal courts toward a more scrutinizing test will then be discussed, with special emphasis on the Ninth Circuit. Finally, this casenote analyzes the possible trend in Arizona away from a strict "farce and mockery" test.

History of the "Farce and Mockery of Justice" Standard

In *Powell v. Alabama*[37] the United States Supreme Court first suggested that a criminal defendant's right to counsel included a guarantee of effective assistance.[38] In reaching its decision, the Court apparently relied upon the due process clause of the fourteenth amendment as the origin of the right to "effective" representation.[39] After *Powell*, the Court similarly relied upon the due process clause in addressing numerous claims of ineffective assistance but failed to articulate a standard by which to judge such claims.[40] Lower courts were consequently left to develop their own tests.[41]

In *Diggs v. Welch*,[42] the District of Columbia Circuit Court of Appeals was the first to formulate the "farce and mockery" test.[43] In

---

crime, but is admissible only to determine the culpable mental state with which the defendant committed the act. 128 Ariz. at 259, 625 P.2d at 322; *see* ARIZ. REV. STAT. ANN. § 13-503 (1980). *See also* State v. Gretzler, 126 Ariz. 60, 85, 612 P.2d 1023, 1048 (1980); State v. Steelman, 120 Ariz. 301, 314, 585 P.2d 1213, 1226 (1978). Several Arizona cases hold that where the defendant clearly recalled the events at the time of the crime, evidence that the defendant had been drinking did not raise an issue to be submitted to the jury. *See, e.g.*, State v. Kruchten, 101 Ariz. 186, 196, 417 P.2d 510, 520 (1966), *cert. denied*, 385 U.S. 1043 (1967); State v. Roqueni, 94 Ariz. 72, 74-75, 381 P.2d 757, 759, *cert. denied*, 375 U.S. 948 (1963); Rascon v. State, 47 Ariz. 501, 513-16, 57 P.2d 304, 309-10 (1936). Since Moreno was adamant about his innocence, and since he maintained a clear recollection of the evening of the murder, it is doubtful that either the judge or the jury would have been influenced by evidence of his intoxication. As the *Moreno* court additionally noted, there was ample evidence that the murder was committed with premeditation. 128 Ariz. at 261, 625 P.2d at 324. Such evidence might negate the possibility of Moreno's diminished capacity to comprehend his actions.

37. 287 U.S. 45 (1932).

38. *Id.* at 71. The Court stated:

> [I]n a capital case, where the defendant is unable to employ a counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of *due process* of law; and that duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of *effective* aid in the preparation and trial of the case.

Id. (emphasis added).

39. *See id.*

40. *See, e.g.*, Reece v. Georgia, 350 U.S. 85 (1955) (appointment of counsel in a state prosecution at such time as to preclude effective aid in the preparation and trial of a capital case held to be a denial of due process); Glasser v. United States, 315 U.S. 60 (1942) (conviction set aside where counsel was appointed to simultaneously represent codefendant with conflicting interests); Avery v. Alabama, 308 U.S. 444 (1940) (trial court's denial of defense counsel's motion for continuance held not to constitute denial of the right to counsel under the facts of the case).

41. *E.g.*, Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965) (farce or mockery of justice); O'Malley v. United States, 285 F.2d 733, 734 (6th Cir. 1961) (farce and mockery of justice); shocking to the conscience of the court); Snead v. Smyth, 273 F.2d 838, 842 (4th Cir. 1959) (farce of the trial).

42. 148 F.2d 667 (D.C. Cir. 1945).

43. Dyer v. Crisp, 613 F.2d 275, 276 (10th Cir.), *cert. denied*, 445 U.S. 945 (1980); Ricken-

Diggs, a federal prisoner who had pled guilty to grand larceny charges petitioned for habeas corpus on the basis of ineffective assistance of counsel.[44] In denying the petition, the court stated that the sixth amendment requires no more than the formal appointment of counsel.[45] The court emphasized that the proper basis for the petitioner's claim was the due process clause guarantee of a fair trial.[46]

The *Diggs* court held that for an ineffective assistance argument to succeed, the petitioner would be required to show that his was an extreme case and that the proceedings amounted to no more than a "farce and mockery" of justice.[47] The court stressed that in the absence of other evidentiary facts indicating that the petitioner was denied a fair trial, counsel's careless or negligent actions alone will not be deemed so ineffective that they violate the petitioner's rights under the due process clause.[48] The *Diggs* court also expressed a fear that an ineffective assistance claim could be too easily made if the word "effective" was liberally construed.[49] The court was apparently concerned that during his "enforced leisure," a prisoner might use his imagination and ingenuity to dream up all the mistakes and failures that his attorney could possibly have made.[50]

After *Diggs* a majority of jurisdictions,[51] including Arizona,[52] adopted some form of the "farce and mockery" standard. One reason for adopting such a lax standard was to prevent the appeals courts from becoming burdened with large numbers of frivolous appeals.[53] It was also feared that if a stricter standard was used, unprincipled lawyers would intentionally render their clients' convictions vulnerable to col-

---

backer v. Warden, Auburn Correctional Facility, 550 F.2d 62, 65 (2d Cir. 1976), *cert. denied*, 434 U.S. 826 (1977); Beasley v. United States, 491 F.2d 687, 693 (6th Cir. 1974).

44. 148 F.2d at 668.

45. *Id.*

46. *Id.* at 669. The due process clause in federal proceedings such as this one is contained in the fifth amendment to the United States Constitution. The due process clause referred to in state proceedings is found in the federal constitution's fourteenth amendment.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* The court felt that this problem would be especially acute in the many cases where no written transcript of the trial was made. *Id.* at 670.

51. *See, e.g.*, Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965) (farce or mockery of justice); O'Malley v. United States, 285 F.2d 733, 734 (6th Cir. 1961) (farce and mockery of justice, shocking to the conscience of the court); Snead v. Smyth, 273 F.2d 838, 842 (4th Cir. 1959) (farce of the trial); United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949) (farce and mockery of justice), *cert. denied*, 338 U.S. 950 (1950); United States *ex rel.* Feeley v. Ragen, 166 F.2d 976, 980 (7th Cir. 1948) (travesty of justice).

52. *See* State v. Krutchen, 101 Ariz. 186, 197, 417 P.2d 510, 521; note 10 *supra*; text & notes 85–89 *infra*.

53. *See generally* Cooper v. Fitzharris, 586 F.2d 1325, 1329 (9th Cir. 1978) (criticizing "farce and mockery" test), *cert. denied*, 440 U.S. 974 (1979); Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir.) (adopting "farce and mockery" test), *cert. denied*, 325 U.S. 889 (1945); Erickson, *supra* note 4, at 238 (criticizing "farce and mockery" test).

lateral attack.[54] Finally, courts were reluctant to put defense counsel on trial before a reviewing court.[55]

The Trend in Federal Courts

The "farce and mockery" test has been continually criticized by legal commentators.[56] For example, one author has contended that the test, which indicates no more than what a trial should not be, offers no guidelines to appellate courts in deciding whether an attorney was effective.[57] Another commentator has noted that the "farce and mockery" standard has resulted in some absurd decisions.[58] For instance, in *United States v. Katz*,[59] the Second Circuit held that the defendant did not demonstrate that the proceedings were reduced to a "farce and mockery of justice," even though his attorney had slept through parts of the trial.[60] The court stressed that the attorney slept only through testimony that was relatively unimportant.[61] The court further noted that the trial judge stated that she would have alerted the sleeping attorney had he slept through any important testimony.[62] While not all cases decided under the "farce and mockery" standard have been so extreme, many courts and commentators now agree that the standard is outmoded.[63]

In the midst of widespread criticism of the "farce and mockery" test, the United States Supreme Court in 1970 decided *McMann v. Richardson*.[64] In *McMann*, the Court stated that the adequacy of an attorney's advice to his client on a guilty plea should be "within the

54. *See* Cooper v. Fitzharris, 586 F.2d 1325, 1329 (9th Cir. 1978) (criticizing "farce and mockery" test), *cert. denied*, 440 U.S. 974 (1979); People v. Ortiz, 22 Ill. App. 3d 788, 795, 317 N.E.2d 763, 768 (1974) (justifying "farce and mockery" test); Note, *supra* note 4, at 31–32 (criticizing "farce and mockery" test).

55. *See, e.g.*, Mitchell v. United States, 259 F.2d 787, 793 (D.C. Cir.) (adopting "farce and mockery" standard), *cert. denied*, 358 U.S. 850 (1958); Andrews v. Robertson, 145 F.2d 101, 102 (5th Cir. 1944) (adopting "farce and mockery" test), *cert. denied*, 324 U.S. 874 (1945); Erickson, *supra* note 4, at 238 (criticizing "farce and mockery" test). The *Mitchell* court was concerned with the possibility that a stricter review would deter potential defense counsel from accepting criminal cases. 259 F.2d at 793.

56. *See generally* Bazelon, *supra* note 4, at 28; Bines, *Remedying Ineffective Representation in Criminal Cases: Departure from Habeas Corpus*, 59 VA. L. REV. 927 (1973); Craig, *The Right to Adequate Representation in the Criminal Process: Some Observations*, 225 SW. L.J. 260 (1968); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289 (1964); Note, *supra* note 4, at 32–37; Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434 (1965).

57. Note, *supra* note 4, at 37.

58. Erickson, *supra* note 4, at 238.

59. 425 F.2d 928 (2d Cir. 1970).

60. *Id.* at 931. The Second Circuit is the only circuit that still adheres to the "farce and mockery" standard. *See* Rickenbacker v. Warden, Auburn Correctional Facility, 550 F.2d 62, 66 (2d Cir. 1976), *cert. denied*, 434 U.S. 826 (1977).

61. 425 F.2d at 931.

62. *Id.*

63. See notes 56–58 *supra*.

64. 397 U.S. 759 (1970).

range of competence demanded of attorneys in criminal cases."[65] The Court further suggested that the right to effective assistance of counsel is guaranteed by the sixth amendment.[66] This was the first time the Supreme Court stressed that the focus of such an appeal should be on counsel's performance rather than on the fairness of the trial as a whole.[67] Since *McMann*, almost all the federal courts of appeals have agreed that the standard should properly be based on the sixth amendment and have rejected the "farce and mockery" standard in favor of stricter standards of review.[68]

---

65. *Id.* at 771; *see* Tollett v. Henderson, 411 U.S. 258, 264 (1973), (same test used in a similar situation). Although *McMann* and *Tollett* focused solely on situations involving guilty pleas, many lower courts subsequently adopted similar tests which have been applied to all types of ineffective assistance claims. See cases cited in note 68 *infra*.

66. 397 U.S. at 771.

67. *See id.*

68. *See, e.g.*, Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.) (the sixth amendment demands the skill, judgment and diligence of a reasonably competent defense attorney), *cert. denied*, 445 U.S. 945 (1980); Cooper v. Fitzharris, 586 F.2d 1325, 1329 (9th Cir. 1978) (reasonably effective and competent defense representation), *cert. denied*, 440 U.S. 974 (1979); United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978) (reasonably competent assistance, which is shorthand for the range of competence expected of attorneys in criminal cases); Marzullo v. Maryland, 561 F.2d 540, 544 (4th Cir. 1977) (within the range of competence demanded of attorneys in criminal cases), *cert. denied*, 435 U.S. 1011 (1978); United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976) (the customary skills and diligence that a reasonably competent attorney would use under similar circumstances), *cert. denied*, 434 U.S. 884 (1977); United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 641 (7th Cir. 1975) (an advocate whose performance meets a minimum professional standard); Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974) (reasonably effective assistance); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974) (reasonably likely to render and rendering reasonably effective assistance); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) (exercise of the customary skill and knowledge which normally prevails at the time and place).

The D.C. Circuit has traditionally paid close attention to the proper standard for reviewing ineffectiveness claims. Since the D.C. Circuit was the first to enunciate the "farce and mockery" standard in Diggs v. Welch, 148 F.2d 667 (D.C. Cir. 1945), it is noteworthy that it was also one of the first jurisdictions to completely reject the "farce and mockery" standard. In United States v. DeCoster (I), 487 F.2d 1197 (D.C. Cir. 1973), the court adopted a standard requiring all attorneys to give "reasonably competent assistance" and to act as a diligent and conscientious advocate. *Id.* at 1202. To clarify its expectations, the court advised that counsel should be guided by the American Bar Association Standards for the Defense Function. *Id.* at 1203. The court also held that once the appellant establishes that a substantial violation of any of the defense functions has occurred, the burden switches to the government to show that the defendant was not prejudiced by the violation. *Id.* at 1204.

The *DeCoster* case was remanded to the district court to determine whether counsel's mistakes necessitated a new trial under the newly adopted standards. *Id.* at 1201. On remand, the motion for new trial was denied, and the case was again appealed to the same court. 624 F.2d 300, 301 (D.C. Cir. 1976). The appellant's conviction was reversed, based upon the record and the standards developed on the first appeal. *Id.*

Upon rehearing, however, the standard was significantly modified. United States v. DeCoster (III), 624 F.2d 196 (D.C. Cir. 1979) (en banc). The plurality stated that the test should be whether counsel's behavior was measurably below that which could be expected from an "ordinarily fallible lawyer." *Id.* at 206. The plurality also rejected the uniform use of the A.B.A. Defense Standards, stressing that each case must be judged according to its peculiar facts. *Id.* at 214. Finally, the plurality stated that the appellant must carry the burden of proving that his attorney's conduct deprived him of an otherwise available, substantial defense. *Id.* at 206.

The *DeCoster* opinions provide a lengthy discussion of the competing issues and concerns relating to ineffective assistance of counsel. In dissent in the final appeal, Judge Bazelon presented a lengthy reaffirmance of the original holding in the first *DeCoster* opinion. 624 F.2d at 264 (Bazelon, J., dissenting). Each opinion is worthy of the attention of any party concerned with the issues presented in this casenote.

The new trend is toward a determination of whether counsel's actions were reasonable, both before and during trial.[69] While a due process analysis limited the review of counsel's conduct solely to judgment of blatant errors made during the formal proceedings, the sixth amendment analysis allows the review to go beyond the courtroom doors.[70] For example, in its recent opinion rejecting the "farce and mockery" standard, the California Supreme Court stated that the right to adequate assistance of counsel requires a focus on the quality of representation rather than a superficial glance at the fairness of the trial as a whole.[71] In *Herring v. Estelle*,[72] the Fifth Circuit utilized a similar rationale in adopting its "reasonably effective" standard, stressing that the due process requirements are merely a subset of the sixth amendment requirements.[73] The court stated that although a criminal proceeding might not have been a "farce or mockery," the defendant may still have received inadequate representation.[74]

In *Cooper v. Fitzharris*,[75] the Ninth Circuit recently joined other courts in holding that "reasonably competent and effective representation is the quality of legal assistance required under the sixth amendment."[76] The *Cooper* court noted that in the Ninth Circuit, the shift to a reasonably effective representation standard had been a gradual one.[77] The court recognized that rephrasing the Ninth Circuit's standard was a positive step toward requiring appellate courts to focus their inquiry in ineffective assistance claims on counsel's performance, which is the proper subject matter of the constitutional guarantee.[78] The court also noted that, in contrast to the "farce and mockery" test, the new standard recognizes that counsel's assistance, if effective, necessar-

69. *See* cases cited in note 70 *infra*.

70. United States *ex rel.* Williams v.Twomey, 510 F.2d 634, 639–41 (7th Cir. 1975) (whether counsel was appointed too late and whether counsel had inadequately prepared and investigated the case); Herring v. Estelle, 491 F.2d 125, 128–29 (5th Cir. 1974) (whether counsel had given inadequate advice on a guilty plea and whether counsel was inadequately prepared); United States v. DeCoster, 487 F.2d 1197, 1201 (D.C. Cir. 1973) (whether poor trial tactics were a result of lack of investigation or of tactical decision).

71. People v. Pope, 23 Cal. 3d 412, 423, 590 P.2d 859, 865, 152 Cal. Rptr. 732, 738 (1979).

72. 491 F.2d 125 (5th Cir. 1974).

73. *Id.* at 128.

74. *Id.*

75. 586 F.2d 1325 (9th Cir. 1978).

76. *Id.* at 1328.

77. *Id.* at 1329.

78. *Id.* While it may be argued that changing the name of a jurisdiction's standard is purely a semantic exercise lacking any substantive change, the *Cooper* court recognized that its newly adopted test (reasonably effective and competent defense representation) is substantially different than its previous "farce and mockery" test. The court stated that the "farce and mockery" test "depends upon the subjective reaction of a particular judge." *Id.* at 1329–30. The court acknowledged that the new standard likewise involves personal subjectivity, but pointed out that the judgment will now be made with reference to an identifiable standard of competency. *Id.*; *accord*, Beasley v. United States, 491 F.2d 687 (6th Cir. 1974). Regarding the need for a more meaningful standard than "farce and mockery," the *Beasley* court stated that "the law demands objective explanation, so as to ensure the even dispensation of justice." *Id.* at 692.

ily involves more than what appears on the trial record.[79]

The *Cooper* court additionally addressed two of the concerns expressed by earlier courts which followed a "farce or mockery" standard. In response to the claim that attorneys might intentionally render their client's convictions vulnerable to collateral attack,[80] the court summarily noted that experience had proven such a fear baseless.[81] Further, in response to the claim that the appellate courts would become overburdened with frivolous claims of ineffective counsel,[82] the court stressed that a valid ineffective assistance claim would require both specific pleading on the inadequacies of the representation and a showing of how those inadequacies prejudiced the accused.[83]

In general, *Cooper* provides a well-reasoned analysis of the need to change the prevailing standard in the Ninth Circuit. The court's reasoning is similar, if not identical, to that of courts in other jurisdictions.[84] Consequently, *Cooper* is representative of the obvious trend in the federal courts to clarify and objectify the standards for judging ineffective assistance of counsel claims.

The Possible Trend in Arizona

In 1966, Arizona officially adopted its "farce and mockery" test in *State v. Kruchten*.[85] In *Kruchten*, the defendant was convicted of first degree murder after a guilty plea.[86] The defendant appealed on the ground that his attorney had failed to properly counsel him on the consequences of his guilty plea.[87] The Arizona Supreme Court affirmed the defendant's conviction, stating that the attorney's advice to plead guilty was a strategic decision intended to avoid a sentence of capital punishment.[88] The court did not consider counsel's advice to be a "farce or a sham or shocking to the conscience."[89]

Since *Kruchten*, Arizona has officially used the "farce and mock-

79. 586 F.2d at 1329; *accord*, United States v. DeCoster (I), 487 F.2d 1197, 1204 (D.C. Cir. 1973) (an attorney's duty also extends to investigation of the case and interviewing the defendant and witnesses before trial). *See also* ABA STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION, *Introduction*, at 147–48 (1971); *id.* at § 4.1 and Commentary.

80. 586 F.2d at 1329; see text & note 54 *supra*.

81. 586 F.2d at 1329.

82. *Id.*, see text & note 53 *supra*.

83. 586 F.2d at 1329. For a more detailed explanation of the requirement that counsel's mistakes must have prejudiced the defendant, *see id.* at 1331.

84. *See, e.g.*, Dyer v. Crisp, 613 F.2d 275 (10th Cir.), *cert. denied*, 445 U.S. 945 (1980); United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978).

85. 101 Ariz. 186, 417 P.2d 510 (1966), *cert. denied*, 385 U.S. 1043 (1967). "Farce or sham" is the wording adopted by the court. 101 Ariz. at 197, 417 P.2d at 521.

86. 101 Ariz. at 189, 417 P.2d at 513.

87. *Id.* at 191–94, 417 P.2d at 515–18.

88. *Id.* at 197, 417 P.2d at 521.

89. *Id.*

ery" standard in evaluating all claims of ineffective assistance of counsel.[90] Most ineffective assistance claims consequently were rejected by the Arizona courts,[91] and Arizona showed no sign of modifying its standard[92] though the reasonably effective assistance trend was well underway in many other jurisdictions. Even as recently as 1976, in *State v. Watson*,[93] the Arizona Supreme Court apparently endorsed the analysis which had been used by both the Ninth Circuit[94] and the California Supreme Court[95] before those jurisdictions rejected the "farce and mockery" test. In defending the "farce and mockery" standard,[96] those jurisdictions indicated that courts should be reluctant to critically analyze defense counsel's performance.[97] Although the *Watson* court reaffirmed Arizona's "farce and mockery" test, it also attempted to substantiate that standard somewhat by stating that defense counsel must be a qualified member of the bar and must act diligently on the defendant's behalf.[98]

The next major case to analyze Arizona's standard was *State v. Williams*[99] in 1979. In *Williams*, the Arizona Supreme Court acknowledged the recent developments in other jurisdictions.[100] Further, although the court noted that Arizona officially employs the "farce and mockery" standard,[101] it concluded that the trial attorney's performance did not fail to meet any of the suggested standards.[102] Despite the *Williams* court's refusal to officially abandon the "farce and mockery" standard, its conclusion that counsel's performance passed all standards indicates that the court may currently be involved in a gradual transition to the modern standard.[103] In addition, in a strongly stated special concurrence, Justice Gordon maintained that the "sham and

90. *See, e.g.*, State v. Austin, 124 Ariz. 231, 233, 603 P.2d 502, 504 (1979), *cert. denied*, 446 U.S. 911 (1980); State v. Brookshire, 107 Ariz. 21, 24, 480 P.2d 985, 988 (1971); State v. Bustamonte, 103 Ariz. 551, 555, 447 P.2d 243, 247 (1968).

91. *See, e.g.*, cases cited in note 90 *supra*. *But see* State v. Lopez, 3 Ariz. App. 200, 204, 412 P.2d 882, 886 (1966) (counsel's inadequacies extreme and held to have deprived the defendant of his constitutional right to a fair trial).

92. *But see* State v. Meredith, 106 Ariz. 1, 2, 469 P.2d 820, 821 (1970), where the court stated that trial counsel did do a conscientious, capable job of defending his client. This statement appears to go somewhat beyond the traditional "farce and mockery" analysis.

93. 114 Ariz. 1, 559 P.2d 121 (1976).

94. *See* Brubaker v. Dickson, 310 F.2d 30, 37 (9th Cir. 1962).

95. *See In re* Williams, 1 Cal. 3d 168, 460 P.2d 984, 81 Cal. Rptr. 784 (1969).

96. Both jurisdictions subsequently rejected that standard. *See* Cooper v. Fitzharris, 586 F.2d 1325, 1329 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979); People v. Pope, 23 Cal. 3d 412, 422, 590 P.2d 859, 865, 152 Cal. Rptr. 732, 737 (1979).

97. 114 Ariz. at 13–14, 559 P.2d at 133–34 (discussing Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962) and *In re* Williams, 1 Cal. 3rd 168, 460 P.2d 984, 81 Cal. Rptr. 784 (1969)).

98. *Id.*; *accord*, State v. Meredith, 106 Ariz. 1, 2, 469 P.2d 820, 821 (1970).

99. 122 Ariz. 146, 593 P.2d 896 (1979).

100. *Id.* at 150–53, 593 P.2d at 900–03.

101. *Id.* at 151, 593 P.2d at 901.

102. *Id.* at 152, 593 P.2d at 902.

103. *See id.* 150–53, 593 P.2d at 900–03.

mockery" standard no longer meets the sixth amendment requirements.[104] He analyzed *Williams* to determine whether the defendant was afforded 'reasonably effective representation, within the range of professional conduct customarily expected of an attorney in a criminal case."[105] Justice Gordon concluded that the defendant had not been prejudiced, and therefore concurred with the majority.[106]

Interestingly, Justice Gordon wrote the opinion in *State v. Dippre*,[107] the next assistance of counsel case before the Arizona Supreme Court. He explicitly stated that the court had recently declined to abandon the "farce and mockery" standard and that it remained the court's guideline.[108] Although this initially appeared to be a clearer statement of the law in Arizona than was made in *Williams*, Justice Gordon went on to point out that two of the defendant's allegations seriously challenged the adequacy of his attorney's efforts.[109] Nevertheless, Gordon noted that counsel's omissions had not prejudiced the defendant's case.[110] Thus, once again it is unclear whether the "farce and mockery" test actually formed the basis for the court's holding that counsel's representation was adequate.[111] In any event, whether counsel's mistakes prejudiced the defendant's case appears to be a factor receiving considerable attention from the court.[112]

By evading the issue concerning modification of Arizona's standard, the court has repeatedly reached holdings such as *Moreno*.[113] The *Moreno* court offered little explanation for its finding that by either standard counsel was satisfactory.[114] As a consequence, it is not possible to determine with any certainty just what standard Arizona actually uses in assistance of counsel cases. On the one hand, it is possible that

104. *Id.* at 154, 593 P.2d at 904 (Gordon, J., concurring).
105. *Id.* at 155, 593 P.2d at 905.
106. *Id.*
107. 121 Ariz. 596, 592 P.2d 1252 (1979). This case was decided the day after *Williams*.
108. *Id.* at 598, 592 P.2d at 1254.
109. *Id.* at 599, 592 P.2d at 1255 (counsel's failure to obtain a copy of the grand jury transcript and to interview the victim prior to trial).
110. *Id.*
111. *Id.*; *see* State v. Austin, 124 Ariz. 231, 233, 603 P.2d 502, 504 (1979) (performance of defense counsel "far exceeded" the requirements of Arizona's "sham and farce" test), *cert. denied*, 446 U.S. 911 (1980); State v. Kelly, 123 Ariz. 24, 27, 597 P.2d 177, 180 (1979) ("applying any of the several tests discussed recently . . . we do not believe Kelly was denied effective assistance of counsel").
112. *See* State v. Kelly, 123 Ariz. 24, 27, 597 P.2d 177, 180 (1979) (appellant's allegation of prejudice held "wholly hypothetical"). In State v. Carriger, 123 Ariz. 335, 337–38, 599 P.2d 788, 790-91 (1979), the court again focused on prejudice to the defendant rather than upon which standards to apply. The court stated that "[e]ven applying the 'reasonably competent attorney' standard . . . the ultimate question remains whether any error by counsel 'materially affected the deliberations of the jury.'" 123 Ariz. at 338, 599 P.2d at 791.
113. *See, e.g.*, State v. Austin, 124 Ariz. 231, 233, 603 P.2d 502, 504 (1979), *cert. denied*, 446 U.S. 911 (1980); State v. Kelly, 123 Ariz. 24, 27, 597 P.2d 177, 180 (1979); State v. Williams, 122 Ariz. 150–53, 593 P.2d 896, 900–03 (1979); State v. Dippre, 121 Ariz. 596, 599, 592 P.2d 1252, 1255 (1979). *See also* text & notes 11–36 *supra*.
114. *See* 128 Ariz. at 257, 625 P.2d at 323; text & note 36 *supra*.

the Arizona Supreme Court will change its effectiveness standard to one requiring reasonably effective assistance when it is faced with a case involving prejudice to the defendant. It is also possible, however, that the court will continue to steadfastly follow the "farce and mockery" test even though its recent decisions indicate a reserved willingness to change Arizona's standard.

Conclusion

The right to effective assistance of counsel gradually evolved from the due process clauses of the fifth and fourteenth amendments. At one time, counsel was held to be ineffective only if it could be shown that the attorney's actions reduced the proceedings to a "farce and mockery" of justice. Over the past decade, however, the trend in most jurisdictions has been for the courts to develop a more objective standard for judging ineffective assistance claims. The new standards are basically intended to determine whether counsel was "reasonably effective."

In the face of these recent changes, the Arizona Supreme Court has refused to reject Arizona's "farce and mockery" standard. Furthermore, the court has been extremely unclear as to what standard it is actually applying. The court's decision in *Moreno*, exemplified this lack of clarity and failed to address either the form or the substance of the Arizona standard. In rejecting appellant's claim of ineffective assistance of counsel, the court not only failed to explain its decision, but also perpetuated its line of cases offering little guidance to Arizona courts faced with assistance of counsel issues.

Marjorie R. Perry

THE STATE'S ABILITY TO APPEAL FROM A DIRECTED VERDICT OF ACQUITTAL

Prior to 1970, the government's ability to appeal from any kind of mid-trial determination in a criminal case was very limited.[1] In 1971, Congress passed the Criminal Appeals Act,[2] giving federal prosecutors the ability to appeal mid-trial determinations so long as the appeal does not violate the double jeopardy clause of the fifth amendment.[3] The Arizona legislature, following the lead provided by the Criminal Appeals Act, granted statutory authority for the state to appeal criminal dispositions subject also to the double jeopardy bar.[4] Generally, the United States Supreme Court has recognized that the government's right to appeal is limited only by the constitutional provision barring double jeopardy.[5]

Prior to these statutory enactments, the United States Supreme Court had held that the government could not appeal an adverse crimi-

---

1. *See* United States v. Jenkins, 490 F.2d 868, 874 (2d Cir. 1973), *aff'd*, 420 U.S. 358 (1975). Judge Friendly, writing for the court, traces the history of the double jeopardy clause. 490 F.2d at 870-75. With regard to government appeals in the criminal context, he notes that the problem of double jeopardy was not addressed by the Supreme Court until the case of United States v. Sanges, 144 U.S. 310 (1892). *Id.* at 874. The *Sanges* Court held that the government could not appeal unless expressly authorized by statute. 144 U.S. at 323.

In 1907, Congress passed the first Criminal Appeals Act, 34 Stat. 1246 (1907) (current version at 18 U.S.C. § 3731 (1976)). This statute provided the federal government limited power to appeal in a criminal case "from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more courts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." 18 U.S.C. § 3731. This new statute was intended by Congress to remove all barriers to government appeals, except the double jeopardy clause. United States v. Wilson, 420 U.S. 332, 337 (1975).

2. 18 U.S.C. § 3731 (Supp. 1971).

3. United States v. Wilson, 420 U.S. 332, 337 (1975); see note 1 *supra*.

4. ARIZ. REV. STAT. ANN. § 13-4032 (1978 & Supp. 1980-81), which provides:

An appeal may be taken by the state from:

1. An order quashing or dismissing an indictment, information or complaint or count of an indictment, information or complaint.
2. An order granting a new trial.
3. An order arresting judgment.
4. A ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment.
5. An order made after judgment affecting the substantial rights of the state.
6. The sentence on the grounds that it is illegal, or if the sentence imposed is other than the presumptive sentence authorized by § 13-604 or § 13-701 (repeat and felony offenders sentencing).
7. An order granting a motion to suppress the use of evidence.
8. A judgment of acquittal of one or more offenses charged in an indictment, information or complaint or count of an indictment, information or complaint entered after a verdict of guilty on the offense or offenses.

Id.

5. United States v. Scott, 437 U.S. 82, 85 (1978); United States v. Jenkins, 420 U.S. 358, 364 (1975); United States v. Wilson, 420 U.S. 332, 337 (1975). The Court in *Jenkins* specifically recognized "that the intention of Congress in amending 18 U.S.C. § 3731 in 1971 was to extend the Government's right to appeal to the fullest extent consonant with the Fifth Amendment." 420 U.S. at 363-64 (footnote omitted).

nal decision without express statutory authority.[6] In light of these new statutory provisions permitting criminal appeals by the government, a new question in constitutional law has arisen concerning the scope of the double jeopardy clause in relation to appeals by the prosecution from mid-trial determinations in favor of the defendant.[7] Specifically, since the early seventies the Court has been asked several times to review the limitations imposed by the double jeopardy clause on the government's ability to appeal criminal dispositions.[8]

In *United States v. Scott*,[9] the Supreme Court recently attempted to determine the type of mid-trial determination that is appealable by the government. *Scott* held that a dismissal granted by the trial judge on grounds of pre-indictment delay would not invoke the double jeopardy clause and thus bar an appeal.[10] In an effort to define a nonappealable determination, the Court stated that when "the ruling of the judge, whatever its label, actually represents a resolution (in defendant's favor) correct or not, of some or all of the factual elements of the offense charged,"[11] then further proceedings are barred by double jeopardy. This new notion of what constitutes a non-appealable determination for double jeopardy purposes overruled the test propounded by the

6. United States v. Sanges, 144 U.S. 310, 312 (1892). The Court reviewed English common law and the present state of the law in America and concluded,

> whatever may have been, or may be, the law of England upon the question, it is settled by an overwhelming weight of American authority, that the state has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether that judgment was rendered upon a verdict of acquittal, or upon the determination by the court of a question of law.

Id.

7. *See* United States v. Wilson, 420 U.S. 332, 336-51 (1975). Wilson was found guilty of converting union funds under § 601(c) of the Labor-Management Reporting and Disclosure Act of 1959. (29 U.S.C. § 501 (c) (1959)). *Id.* at 333. After the verdict, the district court dismissed the indictment on grounds of pre-indictment delay. *Id.* The Third Circuit held that double jeopardy barred an appeal. *Id.* The Supreme Court held that when a trial judge grants a dismissal after the jury has returned a guilty verdict, the government may appeal because reversal would require no new proceedings but only a reinstatement of the jury's verdict. *Id.* at 352-53.

Justice Marshall, in the majority opinion, traces the history of government appeals in criminal cases and notes that

> [t]he statutory restrictions on Government appeals long made it unnecessary for this Court to consider the constitutional limitations on the appeal rights of the prosecution except in unusual circumstances. . . . Now that Congress has removed the statutory limitations and the Double Jeopardy Clause has been held to apply to the states, see *Benton v. Maryland*, 395 U.S. 784 (1969), it is necessary to take a closer look at the policies underlying the Clause in order to determine more precisely the boundaries of the Government's appeal rights in criminal cases.

Id. at 339.

8. United States v. Scott, 437 U.S. 82, 84 (1978) (double jeopardy bars appeal from dismissal granted because of preindictment delay); United States v. Martin Linen Supply Co., 430 U.S. 564, 567 (1977) (no appeal allowed from a judgment of acquittal); United States v. Jenkins, 420 U.S. 358, 360 (1975) (double jeopardy bars appeal when reversal would require further proceedings at the trial court level); United States v. Wilson, 420 U.S. 332, 333 (1975) (appeal allowed from post-verdict grant of dismissal).

9. 437 U.S. 82 (1978).

10. *Id.* at 84.

11. *Id.* at 97, *quoting* United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1971).

Court three years earlier in *United States v. Jenkins*.[12]

The Arizona Supreme Court's first opportunity to apply this new standard came in *Rolph v. City Court of Mesa*.[13] Rolph was arrested and charged with public sexual indecency.[14] At trial, after the state had presented its evidence, the defendant moved for a directed verdict of acquittal.[15] The trial court, the City Court of Mesa, granted the motion, ruling that the state had not satisfied the statutory elements needed to establish guilt.[16] The state appealed, claiming that the city court judge had misconstrued the statute.[17] The superior court[18] agreed and ordered the city court to reconsider its directed verdict in light of the correct statutory construction embodied in the superior court's order.[19]

The defendant petitioned the Arizona Supreme Court for review by special action.[20] The defendant claimed that if the city court were allowed to reconsider its prior order, his constitutional protection against double jeopardy would be violated.[21] The state, however, contended that the city court's order was based on its interpretation of the statute.[22] Thus, the defendant's guilt or innocence was not addressed, and hence the *Scott* definition of a non-appealable determination was not satisfied.[23]

---

12. 420 U.S. 358 (1978). Jenkins was charged with "knowingly refusing and failing to submit to induction into the armed forces of the United States." *Id.* at 359. The trial court dismissed the charge, after a bench trial, on the grounds that the draft board had not considered Jenkin's application for conscientious objector status. 349 F. Supp. 1068, 1073 (E.D.N.Y. 1972). The Second Circuit dismissed the appeal as barred by double jeopardy. 420 U.S. at 360. The Supreme Court held that any determination, which, if reversed, would call for a further factual inquiry by the trial court, was barred by the double jeopardy clause. *Id.* at 370.

13. 127 Ariz. 155, 618 P.2d 1081 (1980).

14. *Id.* at 157, 618 P.2d at 1083. Defendant was charged with the violation of ARIZ. REV. STAT. ANN. § 13-1403(A)(1) (1978). This statute states in relevant part: "A. A person commits public sexual indecency by intentionally or knowingly engaging in any of the following acts, if another person is present, and the defendant is reckless about whether such other person, as a reasonable person, would be offended or alarmed by the act: 1. An act of sexual contact."

15. 127 Ariz. at 157, 618 P.2d at 1083.

16. *Id.* The city court found that a violation of § 13-1403(A)(1), *see* note 14 *supra*, requires contact "which occurred between two separate individuals." 127 Ariz. at 157, 618 P.2d at 1083.

17. 127 Ariz. at 157, 618 P.2d at 1083. The court recessed and allowed the state to file a special action in superior court. *Id.*

18. *Id.* The superior court accepted jurisdiction over the special action pursuant to ARIZ. REV. STAT. ANN. vol. 17A, R. P. FOR SPECIAL ACTIONS 3, which provides:

QUESTIONS RAISED

The only questions that may be raised in a special action are:

(a) Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion; or

(b) Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or

(c) Whether a determination was arbitrary and capricious or an abuse of discretion.

19. 127 Ariz. at 157, 618 P.2d at 1084.

20. *Id. See* ARIZ. REV. STAT. ANN. vol. 17A, R. P. FOR SPECIAL ACTIONS 8, which governs appeals from special action determinations by a superior court.

21. 127 Ariz. at 157, 618 P.2d at 1083.

22. *Id.*

23. *Id.* at 158, 618 P.2d at 1084.

Review was granted and the Arizona Supreme Court held that the appeal by the state was barred by the double jeopardy clause.[24] The court found that the city court had made a factual finding as to the guilt or innocence of the defendant, and therefore this particular mid-trial determination satisfied the *Scott* definition of a non-appealable determination.[25]

In an attempt to clarify this complex and fairly philosophical area, this casenote briefly examines the double jeopardy problems that arise with mid-trial dismissals of criminal cases. *Scott* and its progeny are discussed in an effort to determine the present content of the double jeopardy clause as it relates to appeals of mid-trial determinations. Next, the Arizona Supreme Court's interpretation of the federal doctrine as applied in *Rolph* is analyzed. Lastly, the discussion focuses on whether the rationale developed by *Scott* should extend to the directed verdict of acquittal in *Rolph*.

The Federal Standard

The issue of the government's ability to appeal from mid-trial determinations in favor of a defendant came before the Supreme Court in *United States v. Jenkins*,[26] only four years after the Criminal Appeals Act was passed.[27] In *Jenkins*, the Court propounded a firm and clear rule: the double jeopardy clause bars any appeal by the government which, if reversed on appeal, would necessitate further proceedings at the trial court level.[28] The Court emphasized that subjecting the defendant to further proceedings violates the double jeopardy clause because of the continuing nature of the action.[29]

In *United States v. Scott*, the Court took the opportunity to reconsider its finding in *Jenkins*.[30] In *Scott*, the defendant was granted a motion to dismiss on the grounds of preindictment delay.[31] The trial

24. *Id.*
25. *Id.*
26. 420 U.S. 358 (1975).
27. See note 1 *supra*.
28. United States v. Jenkins, 420 U.S. 358, 370 (1975).
29. *Id.* at 369. Specifically, the Court stated: "We are unable to accept the Government's contentions. Both rest upon an aspect of the 'continuing jeopardy' concept that was articulated by Mr. Justice Holmes in his dissenting opinion in Kepner v. United States, 195 U.S. at 134-37, but has never been adopted by a majority of this Court." *Id.*

The Court's discussion of the purposes of the double jeopardy clause suggests that the harassment rationale is the major support for the holding. *Id.* at 370. For a discussion of the harassment rationale, see text & notes 45-46 *infra*.

30. United States v. Scott, 437 U.S. 82, 86-87.
31. 437 U.S. 82, 84 (1978). Scott was charged with three counts of distributing various narcotics. *Id.* Even though his case did not come to trial until March, 1975, two of the transactions leading to his arrest had taken place the previous September. *Id.* Before trial, and twice during trial, Scott moved to dismiss these two counts "on the ground that his defense had been prejudiced by preindictment delay. At the close of all the evidence, the court granted respondent's motion." *Id.*

judge, however, did not grant the motion until just before the case was to be submitted to the jury.[32] The Supreme Court, in an opinion by Justice Rehnquist, emphasized that the dismissal was granted on a legal technicality and was not based on a factual determination of guilt or innocence.[33]

Moreover, the Supreme Court distinguished *Scott* from any case involving an "acquittal," to which the law is said to grant "special significance."[34] This "special significance" stems from a long standing rule that judgments of "acquittal" are final and, thus, cannot be appealed.[35] This special significance, however, does not attach merely because of the label the trial judge chooses to apply to the determination.[36] An "acquittal," according to the *Scott* court, represents a resolution of some of the elements of the crime in favor of the defendant.[37] This becomes the test to apply to determine the ap-

32. United States v. Scott, 544 F.2d 903, 903 (6th Cir. 1976) (per curiam), *rev'd* 437 U.S. 82 (1978). The Sixth Circuit per curiam opinion in *Scott* noted that "after the defense had presented its case and has rested, the motion to dismiss was renewed and it was then granted by the district court on the basis of preindictment delay and the prejudice it caused to the defendant's case." 544 F.2d at 903.

33. 437 U.S. at 96.

34. *Id.* at 91. In support of the proposition that the law attaches particular significance to acquittals, the Court cites Fong Foo v. United States, 369 U.S. 141 (1962) and Kepner v. United States, 195 U.S. 100 (1904). *Id.* at 89-90.

In *Fong Foo*, acquittal was directed by the district court judge on the grounds of "improper conduct by the Assistant United States Attorney who was processing the case, and a supposed lack of credibility in the testimony of the witnesses for the prosecution who had testified up to that point." 369 U.S. at 142. The Court in a per curiam opinion, affirmed the acquittal noting that the verdict was final. *Id.* at 143.

The *Kepner* case involved the application of the double jeopardy protection to a proceeding which took place in the Philippine Islands. 195 U.S. at 110-11. The Court found that the defendant could not be retried after he was acquitted in a bench trial. *Id.* at 110. The Court emphasized the finality of an acquittal, stating:

> No case has been called to our attention, and after a most diligent examination of authorities, we have not been able to find a single American case where a retrial has been ordered or sanctioned by an appellate court at the instance of the prosecution, after the defendant had once been put upon his trial for an alleged felony, upon a valid indictment before a competent court and jury and acquitted by the verdict of such jury.

Id. at 132.

35. United States v. Ball, 163 U.S. 662, 669-70 (1896).

36. United States v. Scott, 437 U.S. at 96, *citing* United States v. Jorn, 400 U.S. 470, 478 (1971); United States v. Sisson, 399 U.S. 267, 290 (1970).

37. 437 U.S. at 97. Justice Rehnquist used language from United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) to define the type of action taken by the trial judge that will erect the double jeopardy wall and block the state's appeal. *Id.* at 97.

Martin Linen involved a motion for acquittal under FED. R. CRIM. P. 29 (c), granted after a deadlocked jury was excused. 430 U.S. at 565. The Court affirmed the circuit court's opinion holding that the appeal was barred by the double jeopardy clause. *Id.* at 575. The key fact in reaching this conclusion was that the district court had weighed the government's evidence and found it to be legally insufficient to support a conviction. *Id.* at 572. In rendering its opinion the Court used language to define an acquittal which was later cited in *Scott*. *Id.* at 571; see text & note 11 *supra*. Justice Brennan, who authored the opinion in *Martin Linen*, dissented in *Scott* because he felt that the Court had misread the meaning *Martin Linen* had assigned to the double jeopardy protection. 437 U.S. at 102. Indeed, Justice Brennan implied that the majority in *Scott* neglected half of the rationale behind the double jeopardy clause. *Id.* at 104-05.

pealibility of mid-trial determinations.[38]

The new test emerging from *Scott* focuses on the character of the trial court's determination.[39] If the court must have decided factual elements in the case in order to dismiss, then appeal by the state from an adverse ruling is barred.[40] To understand the significance of this new approach, the policy considerations which are thought to be served by the double jeopardy clause must be examined.

In *United States v. Green*,[41] the Supreme Court briefly examined the history and purpose behind the double jeopardy clause. Justice Black, writing for the Court in *Green*, explained that from the time of Blackstone the double jeopardy provision had been understood to be a protection for the individual defendant against repeated state attempts to convict him for an alleged offense.[42] This implicitly suggests that there are two somewhat distinct policy considerations which justify the continued vitality of the double jeopardy clause.[43] First, the clause protects society's interest in the finality of criminal judgments.[44] By protecting the finality of criminal judgments, the double jeopardy clause prevents the state from reprosecuting defendants and thereby increasing the likelihood that an innocent defendant could be found guilty.[45] Second, the clause aids in preventing government harassment

38. 437 U.S. at 97.

39. *Id.*

40. See note 37 *supra*.

41. 355 U.S. 184 (1957). In *Green*, the defendant had been convicted of second degree murder. *Id.* at 186. The jury had also considered a charge of first degree murder but had refused to find the defendant guilty. *Id.* After the trial, the defendant won a reversal of the second degree murder charge on appeal. *Id.* He was then retried on a first degree murder charge. *Id.* The Court held that this violated the double jeopardy clause because the jury in the first trial had already considered the charge and refused to convict the defendant. *Id.* at 190-91.

42. *Id.* at 187. The Court stated:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system or jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. This passage was quoted with approval in both United States v. Jenkins, 420 U.S. at 370, and in *Scott*, 437 U.S. at 95. Therefore the meaning of this passage must be sufficiently vague that, in the opinion of Justice Rehnquist, it can be used as philosophical support for either the holding in *Jenkins* or in *Scott*. *See id.*

43. *See* Note, *Double Jeopardy Consequences of Dismissals*, 58 WASH. U.L.Q. 117, 122 (1980).

44. *See* Fong Foo v. United States, 369 U.S. 141, 143 (1962); United States v. Ball, 163 U.S. 662, 671 (1896).

45. Justice Brennan's dissent in *Scott* provides a good discussion in support of this rationale:

> There are a number of reasons a retrial enhances the risk that 'even though innocent, [the criminal defendant] may be found guilty.' Green v. United States, 355 U.S. 184, 188 (1957). A retrial affords the Government the opportunity to reexamine the weaknesses of its first presentation in order to strengthen the second. And, as would any litigant, the Government has been known to take advantage of this opportunity. It is not uncommon to find that prosecution witnesses change their testimony, not always subtly, at second trials.

432 U.S. at 105 n.4.

of criminal defendants.[46] This is a necessary consideration because, apart from the greater likelihood that the defendant will be convicted upon retrial, a second prosecution means further legal expense and continued damage to the defendant's reputation.[47]

The *Scott* Court narrowed the definition of acquittal to exclude technical dismissals which do not require a factual determination as to the guilt or innocence of the accused.[48] The Court was able to do so by focusing on the "finality" prong of the rationale while ignoring, or at least subordinating, the "harassment" rationale.[49] This is particularly the case where the mid-trial dismissal is granted pursuant to defendant's own motion, as in *Scott*.[50] A necessary inference from the language in *Scott* is that a multiple trial situation will not be considered harassment so long as the defendant in some sense brought the problems attendant with further proceedings upon himself.[51] This is a significant change and would indicate that the majority of the Court has changed the philosophical underpinning of the double jeopardy clause itself.[52]

What emerges from this realignment of policy considerations supporting the double jeopardy clause is a test that focuses on the character of the determination made by the trial judge and the factors the judge considered in reaching this determination.[53] To gain further insight into the content of this new test, it is necessary to examine its application among various jurisdictions.[54]

---

46. *See* Arizona v. Washington, 434 U.S. 497, 503-04 (1978). While the Court recognized the "public interest in the finality of criminal judgments," *id.* at 503, it also seems that a fairness element was involved:

> Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that a defendant may be convicted.

Id. at 503-04 (footnotes omitted). Thus, protection against harassment by the prosecution is at the heart of the double jeopardy clause. *See* Note, *supra* note 43, at 122.

47. 434 U.S. at 503-04.

48. 437 U.S. at 96.

49. *Id.* at 108-09 (Brennan, J., dissenting).

50. *Id.* at 96.

51. *Id.*

52. *Id.* at 104-05 (Brennan, J., dissenting). Justice Brennan wrote:

> The purpose of the Clause, which the Court today fails sufficiently to appreciate, is to protect the accused against the agony and risks attendant upon undergoing more than one criminal trial for any single offense. . . . A retrial increases the financial and emotional burden that any criminal trial represents for the accused, prolongs the period of the unresolved accusation of wrongdoing, and enhances the risk that an innocent defendant may be convicted.

Id.

53. *Id.* at 97.

54. *Id.* at 110-15 (Brennan, J., dissenting).

Application of the Scott *Standard*

The Ninth Circuit Court of Appeals dealt with a mid-trial determination situation in *United States v. Gonzales*.[55] In Gonzales, the defendants were charged with violating federal immigration laws.[56] Before trial, the judge had designated certain illegal aliens as material witnesses.[57] During the fourth day of the trial the government informed the court that two of the illegal aliens, who were arrested at the same time as the defendants, had been released and were unavailable to testify.[58] The defendants moved for dismissal and acquittal, arguing that to allow potential witnesses to escape the subpoena power is a violation of fifth amendment due process guarantees and sixth amendment guarantees regarding examination of favorable witnesses.[59] The judge dismissed the case and entered an order of acquittal based upon the unavailability of the witnesses.[60]

On appeal, the government argued that the district court had not made a determination as to the guilt or innocence of the accused and, therefore, the appeal was not violative of the double jeopardy clause.[61] The Ninth Circuit accepted this argument, concluding that before the double jeopardy clause precludes an appeal, there must be a clear demonstration "that the [trial] court . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction."[62]

The *Gonzales* court's analysis is mistaken, however, if it assumes that the *Scott* definition of a non-appealable determination cannot be satisfied unless the trial court hears all of the prosecution's evidence before making its ruling.[63] The key to the *Scott* decision is the technical nature of the dismissal, not the point in the proceedings at which it is granted.[64] A determination is non-appealable under *Scott* if it re-

55. 617 F.2d 1358 (9th Cir. 1980).
56. *Id.* at 1360.
57. *Id.*
58. *Id.*
59. *Id.* The defendants based their motion on United States v. Mendez-Rodriquez, 450 F.2d 1, 4-5 (9th Cir. 1971) (denial of due process when witnesses made unavailable by government) and United States v. Tsutagawa, 500 F.2d 420, 423 (9th Cir. 1974) (government may not place witnesses outside the power of courts to require attendance).
60. 617 F.2d at 1361.
61. *Id.* at 1362. The government argued that the trial court could not have considered the sufficiency of the evidence because the judge granted the motion in the middle of the prosecutor's case. *Id.*
62. *Id.*
63. *See* United States v. Scott, 437 U.S. at 97. The Court provided several examples that imply that failure of proof will not be the only determination which invokes the *Scott* definition. *Id.* These examples include the defenses of insanity and entrapment. *Id.*
64. *Id.* at 96. The Court stated:

> This is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact. It is instead a picture of a defendant who chooses to

solves, in the defendant's favor, at least one of the factual issues in the case.[65] Even though the trial court in *Gonzales* did not make a decision on an issue of fact, its determination bore directly on its ability to decide a factual question.[66] The constitutional violation found in *Gonzales* was directly related to the defendant's ability to refute the government's case against him at trial.[67] The testimony which was lost, due to the failure of the witnesses to appear, impaired the ability of the court to make a determination concerning the constitutional violation which would satisfy the *Scott* test.[68] Consequently, it is at least arguable that *Scott* was misapplied in *Gonzales*.[69]

In *State v. Allen*,[70] the Iowa Supreme Court reached a novel result in its interpretation of the *Scott* rule.[71] The defendant in *Allen* was charged with sexual abuse.[72] He argued that the Iowa sexual abuse statute was unconstitutionally vague.[73] The trial court accepted this argument and acquitted the defendant of the charge.[74]

Rather than applying the *Scott* formula to determine whether an issue of fact had been decided in favor of the defendant, the Iowa Supreme Court interpreted the Iowa state double jeopardy clause to allow an appeal from a determination grounded on unconstitutional statutory vagueness.[75] The Iowa court then proceeded to consider

---

avoid conviction and imprisonment, not because of his assertion that the Government has failed to make out a case against him, but because of a legal claim that the Government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt.

Id.

65. See text & notes 30-38 *supra*.

66. 617 F.2d at 1360. Several witnesses had been interviewed by defense council who had requested that they be held for trial. *Id.* The government did not inform the court or opposing council that several of the Mexican nationals, who had not been interviewed, were not available to testify until the fourth day of trial. *Id.*

67. *See* note 66 *supra*.

68. *See id.*

69. If the dismissal granted because of the unavailability of two key witnesses is characterized as a failure of proof rather than a technical constitutional violation, then according to *Scott* appeal would be barred. *See* 437 U.S. at 96-99. Moreover, if all that is needed to satisfy *Scott* is a trial court finding bearing on the guilt or innocence of the accused, the fact that witnesses who participated in the crime are not available to testify may be interpreted as a failure on the part of the prosecution to produce evidence legally sufficient to sustain a conviction. *See id.* at 97.

70. 304 N.W.2d 203 (Iowa 1981).

71. See text & notes 72-88 *infra*.

72. 304 N.W.2d at 205.

73. *See id.*

74. *Id.* at 205.

75. *Id.* at 206. Prior to its discussion of *Scott*, the Iowa court dealt with its ability to hear the appeal:

> Consequently we treat the motion for acquittal as a motion to dismiss insofar as it assailed the facial validity of the statute. We hold that the resulting judgment on that ground was an order dismissing the information within the meaning of section 814.5(1)(a) as well as a final judgment of acquittal of the sexual abuse charge. Accordingly the State had a right to appeal and we have jurisdiction.

Id.

whether the statute was vague.[76] It found that the trial court had been mistaken in its interpretation of the statute.[77] Only then, after considering the merits of the appeal and reversing the trial court, did the Iowa court invoke the double jeopardy bar.[78] The court held that even though it had reached the merits of the appeal, a remand would be improper because it would violate the defendant's double jeopardy rights.[79]

This conclusion, however, makes little sense under the clear, if difficult, procedure which *Scott* outlines for an appellate court to follow. First, the appellate court must ascertain whether the determination by the trial court was a resolution of a factual issue in favor of the defendant.[80] If so, the court need go no further and the appeal is dismissed as violative of defendant's double jeopardy protection.[81] Only if a factual issue was not resolved in favor of the defendant would the appellate court reach the merits of the appeal, reversing and remanding the case if necessary.[82]

The Iowa court's approach stands this procedure on its head. In order to correct errors made by the trial court, the appellate court determined that the Iowa appeals statute was satisfied, and then reached the merits of the appeal.[83] Only after deciding the merits of the appeal did the Iowa court note that reprosecution of the defendant was barred by the Iowa constitution.[84] *Scott* was then mentioned as an afterthought that provided further support for the holding that the defendant could not be reprosecuted.[85]

This novel Iowa approach would allow appellate review of trial court determinations without subjecting the defendant to any further trial proceedings.[86] It also subjects the defendant to further appellate proceedings which can be both costly and injurious to his character.[87]

---

76. *Id.* at 206-07.
77. *Id.* at 207. "[W]hen, construed, section 709.4(4) is sufficiently definite both on its face and as applied in this case." *Id.*
78. *Id.* at 208.
79. *Id.*
80. See text & notes 30-38 *supra*.
81. *Id.*
82. *Id.*
83. 304 N.W.2d at 205-06.
84. *Id.* at 208.
85. *Id.* The Iowa Court's discussion of *Scott* included this passage:
> We need not decide in this case whether *Scott* will affect our interpretation of the double jeopardy provision in the Iowa constitution. This is because the issue of defendant's guilt or innocence was submitted to the court in this case. It was not only submitted, but the defendant was actually convicted of what the court found to be a lesser included offense. Thus, even if we were to follow *Scott* under our constitution, the result would be the same in the present case.

Id.
86. *See id.*
87. *Id.*

As a result, this approach severely undercuts the "harassment" rationale behind double jeopardy.[88]

The *Gonzales* and *Allen* cases indicate that courts are struggling with the new definition as set out in *Scott*.[89] This may stem from an unwillingness to cast off part of the rationale behind the double jeopardy clause.[90] More likely it is simply evidence that the new standard, by focusing on the character of the trial court's dismissal, is more difficult to apply.[91] The *Scott* standard requires appellate courts to consider all the attendant circumstances in order to decide whether a factual determination as to the guilt of the accused was made by the trial judge.[92] To some extent this is discretionary, and therefore appellate courts across the country face the difficult task of deciding how far the "finality" rationale which underlies *Scott* should extend.[93]

Recently, the United States Supreme Court decided *Hudson v. Louisiana*,[94] a case which may help clarify at least one area of confusion resulting from the *Scott* rule regarding mid-trial determinations. The defendant in *Hudson*, after being found guilty by a jury, moved for a new trial, which under Louisiana law was his only means of challenging the sufficiency of the evidence against him.[95] The trial judge granted the motion and the state appealed.[96] The Louisiana Supreme Court reversed and the defendant was found guilty at a second trial in which a new eyewitness testified for the state.[97] The United States Supreme Court held that the second trial was barred by double jeopardy because the defendant was granted a post-verdict motion for a

88. *See* United States v. Scott, 437 U.S. 82, 106 (1978) (Brennan, J., dissenting).

89. For further evidence of the lower court's struggles, *see* United States v. Black, 644 F.2d 445, 447 (5th Cir. 1981) (trial judge able to circumvent *Scott* definition of acquittal by reserving his ruling on a pre-verdict motion for acquittal); People v. Conte, 104 Mich. App. 73, 75, 304 N.W.2d 485, 487 (1981) (appeal characterized as "interlocutory" in nature so as not to violate *Scott*). *But see* United States v. Steed, 646 F.2d 136, 138 (4th Cir. 1981) (Fourth Circuit recognizes the various considerations involved and correctly holds that a post-verdict judgement of acquittal grounded on insufficient evidence is appealable); Klobucher v. Commonwealth of Pa., 639 F.2d 966, 969 (3d Cir. 1981) (retrial allowed under *Scott* after dismissal due to failure to inform defendant of the presumption of innocence).

90. See text & notes 43-52 *supra*.

91. *See* United States v. Steed, 646 F.2d 136, 142 (4th Cir. 1981). In discussing an acquittal granted on the grounds of insufficient evidence after the jury returned a guilty verdict, the court stated:

> As Justice Brennan has pointed out, application of the test of appealability of pre-verdict dismissals adopted in *United States v. Scott*, 437 U.S. 82, 98, turning as it does upon the question of whether the dismissal was based upon purely factual assessments of insufficiency of the evidence to convict or upon grounds 'unrelated to factual guilt or innocence,' will frequently be a difficult one.

Id. at 142, *citing* United States v. Scott, 437 U.S. 82 (1978).

92. *See id.* at 140-42.

93. *Id.*

94. 450 U.S. 40 (1981).

95. *Id.* at 41.

96. *Id.*

97. *Id.* at 41-42.

new trial on the grounds that the evidence presented in the first trial was legally insufficient.[98]

Even though *Hudson* did not involve a mid-trial dismissal, the language of the case, if read broadly, indicates that any dismissal granted "on the ground that the evidence was legally insufficient to support the verdict"[99] will invoke the double jeopardy bar.[100] The government may still appeal a motion granted after a verdict is rendered, but if reversal would require further proceedings, such as if the motion was granted any time prior to the jury's verdict, appeal would be barred.[101]

The impact of *Hudson* on the mid-trial determination situation is difficult to gauge because the Court in *Hudson* did not cite or discuss *Scott*.[102] Moreover, the decision's lack of analysis[103] makes it difficult to discern which half of the double jeopardy rationale the Court was emphasizing.[104] Thus, although *Hudson* purports to clarify the double jeopardy area, it leaves lower courts with little additional guidance for dealing with mid-trial determinations.[105] Given the present state of the case law it is likely there will be continued litigation in this area.[106]

The Arizona Application

Rolph v. City Court of Mesa[107] gave the Arizona Supreme Court an

98. *Id.* at 43.

99. *Id.*

100. *See id.* The Court did not tie its holding to the specific motion under consideration by the trial court in the case. *Id.* at 43. Indeed, Justice Powell took great pains to point out that the motion for a new trial was the defendant's only means, under the Louisiana Code of Criminal Procedure, to challenge the sufficiency of the evidence. *Id.* at 41 n.1. The necessary implication of Powell's discussion is that any successful motion based on the legal insufficiency of the evidence will erect the double jeopardy bar. *See id.*

101. *See id.* at 42-43.

102. *See id.* The Court considers the case to be within the holding of Burks v. United States, 437 U.S. 1 (1978), which is the only double jeopardy case discussed in the short opinion. *Id.* at 43. The *Burks* case involved a reversal by the Sixth Circuit, based on the government's insufficient evidence to overcome the defendant's insanity defense. 437 U.S. at 4. The Court held that a defendant may not be retried when his conviction is reversed due to evidentiary insufficiency. *Id.* at 18. This is to be distinguished from a reversal based on "trial error" which will allow for a new trial. *Id.* at 15.

103. 450 U.S. at 41-45. Only one Supreme Court opinion is discussed in *Hudson*. *Id.*; *see* notes 102 *supra*, 104 *infra*.

104. The *Hudson* opinion does not contain a discussion of the principles which underlie the double jeopardy clause. 450 U.S. 40, 42-43. Therefore, the question of mid-trial determinations may be handled in a different manner.

105. *Id.*

106. *See* Whalen v. United States, 445 U.S. 684, 699 (1980) (Rehnquist, J., dissenting). Justice Rehnquist, who authored the *Scott* and *Jenkins* opinions, pointed out:

> Despite its roots in antiquity, however, this guarantee [the double jeopardy clause] seems both one of the least understood and, in recent years, one of the most frequently litigated provisions of the Bill of Rights. This Court has done little to alleviate the confusion, and our opinion, including ones authored by me, are replete with *mea culpa's* occasioned by shifts in assumptions and emphasis.

Id. (footnotes omitted).

107. 127 Ariz. 155, 618 P.2d 1081 (1980).

opportunity to interpret the *Scott* rule.[108] The court, noting that jeopardy attached when the jury was impaneled,[109] recognized that there was a double jeopardy problem before them.[110] The court then proceeded to acknowledge the federal standard as enunciated in *Scott*.[111] The court, however, distinguished *Rolph* from *Scott* because the acquittal in *Rolph* was granted after the trial court considered the city's evidence.[112]

Next, without explicitly recognizing the new definition of a non-appealable mid-trial determination,[113] the Arizona court considered the nature of the proceeding in question.[114] The court emphasized that the determination made by the trial court was termed an acquittal.[115] Recognizing that the state may not appeal from an acquittal, the court held that an appeal was barred.[116]

The approach that the Arizona court adopts in *Rolph* assigns importance to two factors: the point in the proceedings at which the de-

---

108. *Id.* at 157, 618 P.2d at 1083.

109. *Id.*; *see* State v. Riggins, 111 Ariz. 281, 283, 528 P.2d 625, 627 (1974); Klinefelter v. Superior Court Maricopa County, 108 Ariz. 494, 495, 502 P.2d 531, 532 (1972); City of Tucson v. Valencia, 21 Ariz. App. 148, 149, 517 P.2d 106, 107 (1973).

110. 127 Ariz. at 157, 618 P.2d at 1083.

111. *Id.* at 157-58, 618 P.2d at 1083-84; *see* United States v. Scott, 437 U.S. 82, 97 (1978); United States v. Jenkins, 420 U.S. 358, 370 (1975); text & notes 30-38 *supra*. In particular, the court recognized that *Scott* overruled *Jenkins*. 127 Ariz. at 157, 618 P.2d at 1083. According to the Arizona Supreme Court, *Jenkins* had barred all appeals from mid-trial dismissals, but *Scott* "held that where the defendant himself seeks to have his trial terminated without any submission to either judge or jury as to his guilt or innocence, an appeal by the Government from his successful effort to do so does not offend the Double Jeopardy Clause." *Id.*

112. 127 Ariz. at 158, 618 P.2d at 1084. If the cases are to be distinguished it is on the grounds upon which the respective terminations were granted. In *Scott*, the dismissal was granted for preindictment delay. 437 U.S. at 84. On the other hand, in *Rolph* the directed verdict of acquittal was granted because of legal insufficiency of the evidence. 127 Ariz. at 157, 618 P.2d at 1083.

113. See text & note 11 *supra*.

114. 127 Ariz. at 158, 618 P.2d at 1084.

115. *Id.* Specifically, the court states without analysis that "the state is not authorized to appeal from a judgment of acquittal." *Id.*, *citing* State v. Miller, 14 Ariz. 440, 444, 130 P. 891, 893 (1913); State v. Hunt, 8 Ariz. App. 514, 522, 447 P.2d 896, 904 (1968). In *Miller*, the state attempted to appeal an evidentiary ruling after the jury had returned a verdict of not guilty in a murder case. 14 Ariz. at 440, 130 P. at 892. The Arizona Supreme Court found that it had no jurisdiction to hear the appeal because the jury's verdict of acquittal was final. *Id.* at 444, 130 P. at 893. In *State v. Hunt*, the Arizona Court of Appeals baldly reminded the prosecutor that the state could not appeal from a judgment of acquittal. 8 Ariz. App. at 522, 447 P.2d at 904. Both cases were decided prior to the *Scott* decision.

By accepting the trial court's label of "acquittal" without substantial inquiry, the *Rolph* opinion falls within what the Supreme Court views as the "core of the area protected by the Double Jeopardy Clause. As we have recognized in cases from United States v. Ball, 163 U.S. 662 (1896), to Sanabria v. United States, [437 U.S. 54 (1978)], . . . a defendant once acquitted may not be again subjected to trial without violating the Double Jeopardy Clause." United States v. Scott, 437 U.S. 82, 96 (1978).

In United States v. Ball, 163 U.S. 662 (1896) the Court stated:

> The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him [the defendant] twice in jeopardy and thereby violating the Constitution. However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense.

Id. at 671.

116. 127 Ariz. at 158, 618 P.2d at 1084.

fendant's motion is granted and the label the trial court assigns to the determination.[117] The problem with this approach is that it fails to undertake the inquiry required by *Scott*.[118] The outcome under the *Scott* analysis depends upon the nature of the determination made by the trial judge, not the point in the proceedings at which he made it.[119] Furthermore, the *Scott* opinion expressly emphasized that the label given to a determination is not dispositive.[120] The inquiry should concern whether the trial judge made a finding of fact directly relating to the guilt, or lack thereof, of the accused.[121]

This is not to say that the Arizona court erred in its result. First, an application of the *Scott* standard reveals that the *Rolph* result is correct.[122] The trial judge could not have found the statute inapplicable without making a finding of fact relating to the guilt, or lack thereof, of the defendant.[123] Therefore, even though the *Scott* definition of acquittal may have been misinterpreted, a correct application of *Scott* would have produced the same result reached by the *Rolph* court.[124]

In addition, despite the incorrect analysis, the decision of *Rolph* serves both purposes underlying the double jeopardy clause.[125] First, its strong language on the finality of a termination which is labeled an "acquittal" serves to protect the integrity of criminal judgments.[126] Second, the fact that the state now may not contest statutory interpretations which are called acquittals serves to prevent unnecessary harassment of criminal defendants.[127] These two points make *Rolph* an important Arizona interpretation of the new double jeopardy standard.

Finally, the result in *Rolph* is reaffirmed by the *Hudson* case.[128] *Hudson* held that an appeal from a determination grounded on insuffi-

---

117. *See id.*

118. See text & notes 30-38 *supra*.

119. *See* United States v. Scott, 437 U.S. at 97.

120. *Id.* at 96.

121. See text & notes 11-12 *supra*.

122. *See* United States v. Scott, 437 U.S. at 97. Under the *Scott* definition, it would be clear that in *Rolph* there was a factual determination bearing on the guilt or innocence of the defendant; *accord*, Hudson v. Louisiana, 450 U.S. 40, 43 (1981).

123. *See* 127 Ariz. at 158, 618 P.2d at 1084.

124. *See id.*

125. See text & notes 43-47 *supra*.

126. *See* 127 Ariz. at 158, 618 P.2d at 1083. The *Rolph* court said: "Likewise, this court attaches particular importance to acquittals. We have consistently ruled that a defendant once acquitted of a particular crime, is protected from further prosecution by the prohibition of double jeopardy." *Id.*, *citing* State v. Arnold, 115 Ariz. 421, 422, 565 P.2d 1283, 1284 (1977), and State v. Bollander, 112 Ariz. 35, 37, 537 P.2d 22, 24 (1975).

127. The court recognizes the difference between a dismissal and an acquittal. 127 Ariz. at 158, 618 P.2d at 1083. This recognition by the court stems from policy considerations weighing in favor of an end to the proceedings which, in turn, ends the harassment of the defendant. *See id.*

128. 450 U.S. 40 (1981). For a brief analysis of *Hudson* see text & notes 94-106 *supra*.

cient evidence is barred.[129] In *Rolph*, the trial court dismissed the charge for failure to show evidence fulfilling one of the statutory elements of the offense charged.[130] Therefore, under *Hudson*, an appeal by the prosecution in *Rolph* would be barred.[131]

Conclusion

In *United States v. Scott* the United States Supreme Court altered the rule concerning the types of mid-trial determinations that are appealable by the state. By rejecting the clear rule in *United States v. Jenkins* and propounding a new definition of acquittal, the Court has forced lower courts to deal with cases that had previously been unquestionably barred by the double jeopardy clause.

As the first of these cases to come before the Arizona Supreme Court, *Rolph v. City Court of Mesa* adherred to traditional notions of the significance attached to the label of acquittal. Furthermore, *Rolph* signifies that when Arizona courts, faced with criminal violations which require statutory elements to be proven, grant a directed verdict after the prosecution's case, they are making a decision as to the guilt or innocence of the accused based on the facts of the case. This decision is termed an acquittal. Thus, mid-trial determinations in criminal cases, which are based upon statutory interpretation, comply with the Supreme Court's definition of acquittal, and therefore any subsequent appeal by the state should be barred by the double jeopardy provision.

Jay Simpson

129. 450 U.S. at 43. *Hudson* dealt with a post-verdict motion challenging the sufficiency of the state's evidence. *Id.* at 41. For a discussion of the broad language and lack of analysis in *Hudson* see text & notes 102-06 *supra*.

130. *See* 127 Ariz. at 158, 618 P.2d at 1083. The trial court made a finding that there had been no contact between defendant and another person. *See id.* at 157, 618 P.2d at 1083.

131. *See* Hudson v. Louisiana, 450 U.S. at 43.

VI. EVIDENCE

HYPNOSIS, THE STATE OF THE ART IN ARIZONA

The issue of forensic hypnosis has been examined by courts since the 1897 California case of *People v. Ebanks*.[1] In *Ebanks*, the California court refused to recognize hypnotism as a viable scientific technique.[2] Since then, the judiciary has gradually modified its attitude toward hypnosis to permit its limited use by both the defendant[3] and the prosecutor.[4]

Judicial acceptance of hypnosis, however, has generally been limited. In criminal prosecutions, courts have required that a proper foundation be laid[5] and that testimony be independently corroborated.[6] Recently, however, the Arizona Supreme Court refused even limited judicial recognition of hypnosis.

In *State v. La Mountain*[7] the Arizona Supreme Court denied ad-

---

1. 117 Cal. 652, 49 P. 1049 (1897). The defense attempted to introduce testimony by a hypnotist who heard the defendant deny his guilt while under hypnosis. *Id.* at 665, 49 P. at 1053.

2. *Id.* at 665, 49 P. at 1053. The court found hypnotism to be unrecognized in the United States and to be an "illegal defense." *Id.*

3. *See* People v. Modesto, 59 Cal. 2d 722, 732, 382 P.2d 33, 39, 31 Cal. Rptr. 225, 231 (1963) (psychiatrist's explanation of hypnotic techniques was deemed admissible as part of a psychiatric examination to determine the defendant's motive for murdering two young girls); Cornell v. Superior Court, 52 Cal.2d 99, 103, 338 P.2d 447, 448-49 (1959) (defendant was granted examination by an experienced hypnotist in order to recall his whereabouts at the time of a murder; the court recognized hypnosis as useful to the attorney in preparing his client's defense and found it to be protected ultimately by the defendant's right to counsel); *cf.* People v. Busch, 56 Cal. 2d 868, 878, 366 P.2d 314, 320, 16 Cal. Rptr. 898, 904 (1961) (court refused to admit testimony by doctor who hypnotized defendant absent sufficient foundation establishing reliability); State *ex rel.* Sheppard v. Koblentz, 174 Ohio St. 120, 122, 187 N.E.2d 40, 41 (1962), *cert. denied*, 373 U.S. 911 (1963) (constitutional right to counsel does not include assistance by a hypnosis expert).

4. *See* Harding v. State, 5 Md. App. 230, 236, 246 A.2d 302, 306 (1968), *cert. denied*, 395 U.S. 949 (1969) (hypnotism of prosecution witness concerned the credibility but not the admissibility of her testimony); State v. McQueen, 295 N.C. 96, 119-20, 244 S.E.2d 414, 427-28 (1978) (hypnosis, like other psychiatric treatment, may affect the credibility of the refreshed testimony but would not render the testimony incompetent); text & notes 21-32 *infra*.

5. *See* Harding v. State, 5 Md. App. 230, 237-44, 246 A.2d 302, 306-10 (1968) (foundational testimony laid by expert witness-hypnotist); text & notes 21-32, 36 *infra*; *cf.* United States v. Awkard, 597 F.2d 667, 669-70 (9th Cir.) *cert. denied*, 444 U.S. 885 (1979) (error in admission of foundational expert testimony which unduly bolstered the witness' testimony); Emmett v. Ricketts, 397 F. Supp. 1025, 1038, 1041 (N.D. Ga. 1975) (implying foundation was inadequate where tapes of hypnosis sessions were erased).

6. *See* People v. Smrekar, 68 Ill. App. 3d 379, 388, 385 N.E.2d 848, 854-55 (1979) (corroboration of direct and circumstantial evidence indicated that prosecution witness was not fantasizing in identification of defendant following hypnosis session); State v. Temoney, 45 Md. App. 569, 576, 414 A.2d 240, 244 (1980) (witness recalled a "distinguishing trait" to identify the defendant after undergoing hypnosis and also identified the defendant in a photographic array).

7. 125 Ariz. 547, 611 P.2d 551 (1980).

missibility of identification testimony by a witness who had undergone hypnosis.[8] Although recognizing the usefulness of hypnosis as an investigative tool, the court nevertheless found insufficient proof that the state of the art[9] would permit admission of testimony produced by hypnosis.[10] The *La Mountain* court's skepticism concerning hypnosis was recently transformed into a *per se* rule of exclusion in *State v. Mena*.[11] There, the Arizona Supreme Court held inadmissible all testimony by a witness who had been hypnotized prior to trial.[12] Although hypnosis may still be used as an investigatory tool,[13] after *Mena* it is unclear whether pre-hypnosis testimony may in the future be preserved by deposition and admitted.[14]

This casenote will outline the development of hypnosis as a forensic technique, focusing on the controversy regarding the relative weight to be afforded hypnosis-developed testimony and the validity of the technique under the *Frye* rule of general scientific acceptability. The facts of *State v. La Mountain* and *State v. Mena* will then be reviewed, with emphasis on the potential for admissibility of hypnosis-developed testimony. Finally, recommendations for preserving pre-hypnosis testimony will be made, urging that the *Mena* decision be modified to permit admissibility on a case-by-case basis.

Development and Judicial Use of Hypnosis

Hypnosis[15] is a medical technique which, while not easily subject

8. *Id.* at 551, 611 P.2d at 555.

9. The Arizona court is unclear whether hypnosis should be defined as a "science" or an "art". *See id. See generally* Smith, note 15 *infra* for an analysis of the nature of hypnosis as a science or an art.

10. 125 Ariz. at 551, 611 P.2d at 555.

11. 128 Ariz. 226, 624 P.2d 1274 (1981); The most recent affirmance of *La Mountain* and *Mena* is State *ex rel.* Collins v. Superior Court, Nos. CR-113617 & CR-115022 (Ariz. Jan. 7, 1982). The decision was rendered in response to a Special Action taken to the Arizona Supreme Court after defendant's motion in limine was granted by the Superior Court, thereby precluding seven previously hypnotized rape victims from testifying at trial. The Arizona Supreme Court upheld the ruling.

12. 128 Ariz. at 232, n.1, 624 P.2d at 1280. Testimony from previously hypnotized witnesses was considered to be inadmissible from the point of hypnosis forward. *Accord*, State *ex rel.* Collins v. Superior Court. Testimony of persons who have undergone hypnosis is inadmissible in a criminal trial because it is unreliable and it violates a defendant's sixth amendment right to cross-examination. Slip op. at 21.

13. 128 Ariz. at 232, n.1, 624 P.2d at 1280, n.1. *Accord*, State *ex rel.* Collins v. Superior Court, slip op. at 15-17.

14. 128 Ariz. at 232, n.1, 624 P.2d at 1280, n.1. The issue of admissibility of pre-hypnosis depositions without the witness' oral testimony was not reached in State *ex rel.* Collins v. Superior Court. The Arizona Supreme Court did, however, state that video taping of pre-hypnosis discussions would not render subsequent testimony admissible. Slip op. at 15.

15. The term hypnosis, meaning "sleep" as derived from the Greek language, was popularized by James Braid, who is considered to be the "father" of modern hypnosis. Smith, *The Science of Medicine and the Art of Hypnosis*, 43 PHAROS 6,7 (1980). Hypnosis has variously been defined as hypnotic sleep, E. BLOCK, HYPNOSIS: A NEW TOOL IN CRIME DETECTION 11 (1976); as a method for producing a controlled state of consciousness, F. MONAGHAN, HYPNOSIS IN CRIMINAL INVESTIGATION 90 (1980); and as a means of relaxing and focusing a person's normal conscious-

to scientific study, has become a part of everyday medical practice.[16] Although use of this technique dates back 3,000 years,[17] its origin is as obscure as the beginnings of medicine.[18] Despite disagreements regarding the operation of hypnosis,[19] it has been useful in eliciting additional information from witnesses in criminal investigations.[20]

Testimony obtained from a witness who had submitted to hypnosis to restore memory was first held admissible in 1968 in *Harding v. State*.[21] *Harding* was the "perfect example" for the admission of testimony by a victim-witness in a criminal prosecution.[22] During hypnosis by a clinical psychologist, the victim was able to recall theretofore "blanked out" events that occurred after she was shot in the chest by the defendant and placed on an abandoned road.[23] The victim was able to relate the events after awakening, even though she was not told what was said during hypnosis.[24] At trial, the prosecution sought to admit testimony of the victim derived from the hypnotic refreshment.[25]

The defense in *Harding* objected not to the hypnosis technique per se, but rather to the fact that the psychologist had not graduated from a school of hypnotism.[26] Nevertheless, the court found that because the psychologist had conducted therapeutic hypnosis for four years, he was qualified to administer hypnosis and to provide expert testimony.[27] The testimony was admitted and the jury was left to judge its

---

ness, somewhat like daydreaming, Medlyn, *Hypnosis and the Witness*, The Arizona Daily Star, Apr. 19, 1981 § B, at 1, col. 5 (referring to an interview with Dr. Harold Russell, the hypnotist in *Mena*).

16. Hypnosis was recognized by the American Medical Association in 1959 as a therapeutically valuable technique. *Counsel on Mental Health, Medical Use of Hypnosis*, 168 J.A.M.A 186, 187 (1958); State v. Mena, 128 Ariz. at 231, 624 P.2d at 1279. *See generally* Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 OHIO ST. L.J. 567, 569, 613 (1977).

17. *See* Smith, *supra* note 15, at 6-7.

18. Smith, *supra* note 15, at 6. Hypnosis has been associated with the healing effects of magnets, astral bodies, magnetic cures, the concept of a "universal fluid," "animal magnetism," and use as a hypnoanesthetic to conduct painless operations. *Id.* at 6-7.

19. See Ault, *Hypnosis: the FBI's Team Approach*, FBI Law Enforcement Bulletin 5, Jan. 1980, 5-6 (Investigative Techniques), for a discussion of the recent controversy between the scientific and law enforcement communities regarding the proper uses of hypnosis.

20. Ault, *supra* note 19, at 8. Of 50 cases in which hypnosis was utilized, 60% yielded additional information. Hypnosis also resulted in a savings of manpower. *Id.* The Los Angeles Police Department compiled a similar survey indicating that of 571 cases in which hypnosis was used with a witness, additional information was attained in 80.6% of the cases. Los Angeles Police Department Hypnosis Survey 1975 through 1980, compiled March 5, 1981. See also Holden, *Forensic Use of Hypnosis on the Increase*, SCIENCE, June 1980, 1443-44; Reiser, *Hypnosis as a Tool in Criminal Investigation*, POLICE CHIEF, Nov. 1980, 36, 37, 40.

21. 5 Md. App. 230, 246 A.2d 302 (1968); see text & notes 22-32 *infra*.

22. E. BLOCK, *supra* note 15, at 71-77. *Harding* was a "perfect example" because the conviction was upheld on appeal, the hypnotist was a psychologist and not a medical doctor, and the hypnotist was stringently cross-examined by the defense.

23. 5 Md. App. at 232, 247, 246 A.2d at 304,312.

24. *Id.* at 235, 246 A.2d at 305.

25. *Id.* at 234, 246 A.2d at 305.

26. *Id.* at 236, 246 A.2d at 306.

27. *Id.*

credibility.[28]

Crucial to the *Harding* court's determination of admissibility was the fact that the witness testified from her own memory, which was merely refreshed by hypnosis.[29] Moreover, the prosecution revealed at trial that there had been a pre-trial hypnosis session.[30] There was also independent corroboration of the witness' testimony, and a precautionary statement was given to the jury.[31]

Similar to the *Harding* decision,[32] the Ninth Circuit in *Wyller v. Fairchild Hiller Corp.*[33] analogized hypnosis to refreshment of a witness' memory.[34] Rather than exclude the testimony altogether, the court permitted the jury to consider the fact that hypnosis was conducted as but one factor in weighing the credibility of the witness.[35] The rationale in *Wyller* was more fully developed in the Ninth Circuit criminal case of *United States v. Adams*.[36] In *Adams*, the defendants were convicted of assault, robbery, murder, and conspiracy.[37] The defense called a prosecution witness who had been hypnotized by postal inspectors.[38]

The *Adams* court rejected the premise that a witness who had been hypnotized was rendered *per se* incompetent to testify.[39] It reasoned

---

28. *Id.* at 244, 246 A.2d at 310.

29. *Id.* at 246, 246 A.2d at 306; *accord*, State v. McQueen, 295 N.C. 96, 244 S.E.2d 414 (1978). In *McQueen*, although the witness' memory was refreshed with hypnosis prior to trial, she still testified from her own recollection. The court likened this use of hypnosis to reading a document or having a conversation with another person prior to trial. *Id.* at 119-20, 244 S.E.2d at 427-28. *See also* FED. R. EVID. 612, which deals with writing used to refresh memory.

30. Harding v. State, 5 Md. App. at 247, 246 A.2d at 312.

31. *Id.* The convictions were affirmed. *Id.*

32. *Id.* at 236, 246 A.2d at 306.

33. 503 F.2d 506 (9th Cir. 1974).

34. *Id.* at 509. The court also found that there had been adequate opportunity for cross-examination of the witness and of the hypnotist. *Id.* at 509-10. *See also* Kline v. Ford Motor Co., Inc., 523 F.2d 1067, 1069 (9th Cir. 1975) (eyewitness of auto accident in civil suit held competent to testify even though recollection had been refreshed through hypnosis); State v. McQueen, 295 N.C. 96, 119, 244 S.E.2d 414, 427-28 (1978) (refreshment of a witness' memory through hypnosis likened to the reading of a document or a conversation with another person and was admissible).

35. Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 509 (9th Cir. 1974); *accord*, Kline v. Ford Motor Co., Inc., 523 F.2d 1067, 1069 (9th Cir. 1975); *cf.* State *ex rel.* Collins v. Superior Court, slip op. at 13 (it is "our opinion that a typical juror will place greater emphasis on posthypnotic testimony than it warrants").

36. 581 F.2d 193 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978). The Ninth Circuit case of United States v. Awkard, 597 F.2d 667 (9th Cir. 1979) also explains the *Wyller* rationale. In *Awkard*, while sustaining the admissibility of the testimony by the witness who had been hypnotized, the court denied admissibility of the expert testimony. *Id.* at 669. Reiterating that the Ninth Circuit, since *Wyller*, had no quarrel with the admissibility of hypnotically refreshed evidence, the court held that expert testimony was therefore unnecessary as a foundational prerequsite. *Id.* Fearing prejudice to the function of the jury in weighing the credibility of the witness, the court ruled that the trial judge erred by admitting expert testimony that could serve as an "oath-helper" for the witness. *Id.* at 670. The court affirmed the convictions, ruling that the error was not reversible error. *Id.*

37. 581 F.2d 193-94 (9th Cir. 1978).

38. *Id.* at 198. The defense called the witness after unsuccessfully moving to limit testimony to the witness' pre-hypnosis statements. *Id.*

39. *Id.* at 199.

that hypnosis did not as a matter of law make a witness unreliable,[40] nor did it violate a defendant's sixth amendment right to confrontation.[41] However, noting certain irregularities in the hypnosis methods used, the court set forth standards which should be followed for use when the memory of a witness is refreshed through hypnosis.[42] They include: maintaining complete stenographic records of interviews with hypnotized witnesses; recording who was present and what was asked; and preferably audio or video recording of the interview.[43]

While the controversy over hypnosis has generally focused on its evidentiary weight, a test formulated more than fifty years ago in *Frye v. United States*[44] has recently been applied by courts to determine whether hypnosis-developed testimony may be admissible at all into evidence.[45] The *Frye* test holds that expert testimony is not admissible unless a scientific technique has gained general acceptance in the scientific field.[46] The main difficulty presented by the *Frye* test has been to determine whether or not hypnosis has crossed the fine line between the experimental and the demonstrable stages of science.[47] Where it is found to be merely experimental, expert testimony is excluded.[48] In determining general scientific acceptance, hypnosis has often been compared with polygraphs and truth serums.[49] While courts differ on the manner in which the *Frye* test should be applied to hypnosis,[50] the

40. *Id.*

41. *Id. See also* People v. Smrekar, 68 Ill. App. 3d 379, 388, 385 N.E.2d 848, 855 (1979) (the ability to cross-examine the witness distinguished hypnosis-developed testimony from testimony of the hypnotist as to statements made to him by a patient, and all witnesses are subject to subconscious stimuli which may affect cross-examination). *See* text & notes 77, 87-89 *infra*.

42. 581 F.2d at 198-99.

43. *Id.* at 199.

44. 293 F. 1013 (D.C. Cir. 1923).

45. *See, e.g.*, Polk v. State, 48 Md. App. 382, —, 427 A.2d 1041, 1046-49 (1981); State v. Mack, 292 N.W.2d 764, 767-68 (Minn. 1980); State v. Hurd, 86 N.J. 525, 535-37, 432 A.2d 86, 91-92 (1981). *See generally* Casenote, *Admissibility of Present Recollection Restored by Hypnosis, State v. McQueen*, 15 WAKE FOREST L. REV. 357 (1979).

46. 293 F. at 1014. The appellate court ruled that the systolic blood pressure deception test in issue had not gained the necessary scientific recognition and excluded the results of the test. *Id. See also* People v. Kelly, 17 Cal. 3d 24, 39-41, 549 P.2d 1240, 1250-51, 130 Cal. Rptr. 144, 154-55 (1976) (holding voice-writer identification to be potentially admissible if general scientific reliability is established by expert testimony and the witness is properly qualified as an expert).

47. 293 F. at 1014. "Just when a scientific principle crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone, the evidential force of the principle must be recognized. . . ." *Id.* See text & notes 49-51 *infra*.

48. 293 F. at 1014.

49. Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS, 311, 313 (1979); *see* People v. Tait, 99 Mich. App. 19, 28, 297 N.W.2d 853, 857 (1980). *But cf.* State v. McQueen, 295 N.C. 96, 121-22, 244 S.E.2d 414, 429 (1978) (hypnosis held to be unlike admitting into evidence the results of a lie detector test).

50. *See* State *ex rel.* Collins v. Superior Court, slip op. at 14 (until hypnosis is generally accepted as a reliable tool to enhance memory accurately it is inadmissible); State v. Mena, 128 Ariz. 226, 231, 624 P.2d 1274, 1279 (1981) (scientific principle must have gained general acceptance in the particular field from which it derives in order to be accepted by a court as fact); People v. Diggs, 112 Cal. App. 3d 522, 530-31, 169 Cal. Rptr. 386, 391 (1980) (issue of inadmissibility because of pre-trial hypnosis interview has not been decided; admissibility of evidence based on a

recent trend is to interpret *Frye* to mean that scientifically accurate recall is required for admissibility.[51]

Hypnosis-Refreshed Testimony in Arizona

In *State v. La Mountain*,[52] the Arizona Supreme Court considered the admissibility of testimony by a witness who underwent pre-trial hypnosis. In *La Mountain*, the witness, who was the victim of a rape, was hypnotized by a deputy sheriff experienced in the investigative use of hypnosis.[53] During hypnosis, the witness was shown a photographic lineup from which she made an incorrect identification.[54] She was then hypnotized a second time, during which she indicated that her first identification was incorrect and then identified defendant La Mountain.[55] After being brought out of hypnosis, she reidentified the defendant.[56]

Apparently concerned that the witness relied unduly upon her hypnotic identification when she later implicated the defendant, the *La Mountain* court noted that no expert testimony was introduced to explain what effect hypnosis has on an individual's memory.[57] Recognizing that hypnosis can be useful as an investigative tool, the court nevertheless held that the state of the art of hypnosis did not permit admission of hypnotically developed testimony.[58]

In *State v. Mena*,[59] the Arizona Supreme Court transformed its skepticism concerning hypnosis displayed in *La Mountain* into a *per se*

---

new scientific technique requires that the proponent establish the reliability of the testimony, usually by expert testimony from a qualified expert and by showing that correct scientific procedures were used in the particular case); State v. Temoney, 45 Md. App. 569, 576, 580, 414 A.2d 240, 244, (1980) (court interpreted the *Frye* rule to mean that, while expert opinion deduced from hypnosis may be inadmissible due to the controversy surrounding hypnosis, it does not necessarily preclude a description of the hypnosis technique nor does it preclude admission of the hypnotically induced testimony itself); People v. Tait, 99 Mich. App. 19, 28-29, 297 N.W. 2d 853, 857 (1980) (the same requirements must be met as are required for the introduction of voicewriter or lie detector evidence); State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980) (results of hypnosis not scientifically accurate under *Frye*).

51. *Cf.* State v. Mena, 128 Ariz. 226, 232, 624 P.2d 1274, 1279 (1981) (use of hypnosis to produce accurate memory recall not generally accepted) *with* State v. Hurd, 86 N.J. 525, 537, 432 A.2d 86, 92 (1981) (hypnosis met *Frye* test as a procedure for revealing new information, not for determining truth).

52. 125 Ariz. 547, 611 P.2d 551 (1980).

53. *Id.* at 550, 611 P.2d at 554.

54. *Id.* at 551, 611 P.2d at 555.

55. *Id.*

56. *Id. See also* F. MONAGHAN, *supra* note 15, at 61, emphasizing that witnesses should be protected from exposure to mug shots or lineups until the hypnotic phase of the investigation has been exhausted.

57. 125 Ariz. at 551, 611 P.2d at 555. Two other witnesses, one of whom had been hypnotized, identified the defendant in the photographic lineup. *Id.* at 549, 611 P.2d at 553. The victim and two witnesses identified the defendant in court. *Id.*

58. *Id.* at 551, 611 P.2d at 555.

59. 128 Ariz. 226, 624 P.2d 1274 (1981); *accord*, State *ex rel.* Collins v. Superior Court, slip op. at 6, 21.

rule holding all hypnosis-developed testimony to be inadmissible.[60] The defendant Mena was arrested following an altercation with three other men in which one man was stabbed[61] and hit in the head with a beer bottle.[62] Mena was later convicted of aggravated assault and escape.[63] The defendant appealed on the basis that testimony of the victim after his pre-trial hypnosis was introduced without proper foundation.[64]

The Arizona Supreme Court reversed Mena's conviction, holding that pre-trial hypnosis rendered the victim's in-court testimony unreliable.[65] The court ruled that all testimony by witnesses hypnotized prior to trial is inadmissible in Arizona courts.[66] In creating this *per se* rule of exclusion, the *Mena* court found that the *Frye* test of general scientific acceptance had not been met.[67] In addition, it feared that introduction of hypnotically refreshed testimony could violate the defendant's constitutionally guaranteed rights to a fair trial and to confront and cross-examine witnesses.[68]

In determining whether hypnosis was scientifically accepted, the Arizona Supreme Court focused on the general reliability of hypnosis as a technique for inducing accurate recall.[69] It noted that hypnosis creates an altered state of consciousness in which the subject is likely to experience false, distorted, or confabulated memories.[70] Further, the court concluded that a hypnotized subject is especially prone to memory distortions in his desire to please the hypnotist.[71] The court also

60. 128 Ariz. at 232, 624 P.2d at 1280; see text & note 84 *infra*.

61. 128 Ariz. at 227, 624 P.2d at 1275.

62. Transcript of Proceedings, vol. 1, at 103, State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981).

63. 128 Ariz. at 227, 624 P.2d at 1275.

64. *Id.* The victim was hypnotized in order to refresh his memory of the incident, and the hypnotists were not called as witnesses at the trial. *See id.* at 228, 624 P.2d at 1276.

65. *Id.* at 231, 624 P.2d at 1279.

66. *Id.* at 232, 624 P.2d at 1280. In State *ex rel.* Collins v. Superior Court, slip op. at 21, the court specified that the testimony is inadmissible in criminal trials.

67. 128 Ariz. at 231-32, 624 P.2d at 1279-80.

68. *Id.* at 232, 624 P.2d at 1280; *accord*, State *ex rel.* Collins v. Superior Court, slip op. at 17-21.

69. 128 Ariz. at 228-29, 624 P.2d at 1276-77. The court first dismissed a contention that the motion by the defense challenging the admission of expert testimony was untimely. *Id.* at 228, 624 P.2d at 1276. Defendant was not required to anticipate the state's last minute failure to introduce expert foundational testimony. *Id.*; *see* ARIZ. R. CRIM. P. 16.1 (requiring that all pre-trial motions be filed 20 days prior to trial, or be thereafter precluded). *See also* State v. Grier, 129 Ariz. 279, 282, 630 P.2d 575, 578 (Ct. App. 1981) (witness gave accurate description of automobile in pre-hypnosis statements, other evidence corroborated testimony, and pre-trial motion to exclude testimony was withdrawn; any error was not fundamental error).

70. 128 Ariz. at 230-31, 624 P.2d at 1278-79; State *ex rel.* Collins v. Superior Court, slip op. at 7-12; *see* Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CAL. L. REV. 313, 314-15 (1980); Dilloff, *The Admissibility of Hypnotically Influenced Testimony*, 4 OHIO N. U. L. REV. 1, 22 (1977); Kroger & Douce, *Hypnosis in Criminal Investigation*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 358,366 (1979); Putnam, *Hypnosis and Distortions in Eyewitness Testimony*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 437, 439, 444 (1979).

71. 128 Ariz. at 228-29, 624 P.2d at 1276-77, *citing* Diamond, note 70 *supra*; Dilloff, note 70

noted that the subject might later remember implanted memories as his own.[72] Special emphasis was placed on an article by Bernard Diamond,[73] an expert in the field, which stated that a previously hypnotized witness cannot distinguish between a "true recollection and a fantasy or suggested detail."[74] Diamond also emphasized that use of hypnosis by police is "tantamount to the destruction or fabrication of evidence."[75] Conceding that the majority of courts freely admit hypnosis-developed testimony, the court nonetheless aligned itself with the one case it could find holding that hypnosis was not scientifically acceptable, and which, like Diamond, likened hypnosis to "tampering with evidence."[76]

The court bolstered its decision to exclude hypnotically refreshed testimony by concluding that hypnosis may render subsequent cross-examination of a witness ineffective.[77] There is much disagreement regarding whether or not pre-trial hypnosis per se inhibits effective cross-examination of a witness.[78] Cross-examination may indeed be rendered inadequate if it is assumed than an implanted memory becomes more resistant to courtroom examination.[79] Given, however, the genuine disagreement over the effect of cross-examination on a previously hypnotized witness,[80] a *per se* rule of exclusion is much too expansive.

---

supra; Spector & Foster, note 16 *supra*; 9 ENCYCLOPEDIA BRITANNICA 133 (1979), authored by Dr. Martin T. Orne, psychiatrist and psychologist at the University of Pennsylvania, and editor in chief of the INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS. *See* State v. Mack, 292 N.W.2d 764, 766 (Minn. 1980) (also referring to Dr. Orne's work).

72. 128 Ariz. at 229, 624 P.2d at 1277; State *ex rel.* Collins v. Superior Court, slip op. at 9.

73. 128 Ariz. at 229, 624 P.2d at 1277, *citing* Diamond, note 70 *supra*. Diamond, a Professor of Law at U. Cal., Berkeley, and Clinical Professor of Psychiatry at U. Cal., San Francisco, hypnotized Sirhan Sirhan, the assassin of Robert Kennedy. Diamond, *supra* note 70, at 313. Diamond acknowledges that an adequate record of the hypnosis session could be preserved by videotape. *Id.* at 339; *see* text & note 107 *infra*.

74. 128 Ariz. at 229, 624 P.2d at 1277, *citing* Diamond, *supra* note 70, at 314.

75. *Id.*

76. 128 Ariz. at 231, 624 P.2d at 1279, *citing* People v. Tait, 99 Mich. App. 19, 297 N.W.2d 853 (1980).

77. State *ex rel.* Collins v. Superior Court, slip op. at 18-20; State v. Mena, 128 Ariz. at 232, 624 P. 2d at 1280. U.S. CONST. amend. VI guarantees in relevant part that in all criminal prosecutions, the accused shall enjoy the right to be confronted by the witnesses against him. This includes the right to cross-examine such witnesses. Pointer v. Texas, 380 U.S. 400, 404 (1965).

78. *See* State v. Jorgensen, 8 Or. App. 1,9, 492 P.2d 312, 315 (1971) (hypnosis testimony allowed where prolonged and vigorous cross-examination by defendant's counsel took place); Dilloff, *supra* note 70, at 22 (cross-examination of witness and of hypnotist helpful in determining the reliability of hypnosis-developed testimony); Spector & Foster, *supra* note 16, at 583-84, 592-94, 603-04 (cross-examination of the witness and of the hypnotist is helpful in determining the reliability of a witness' testimony although a witness may become more adamant about his testimony than he should under the cross-examination process); Levitt, *The Use of Hypnosis to "Freshen" the Memory of Witnesses or Victims*, TRIAL, Apr. 1981, 56, 57 (a previously hypnotized witness becomes "immune" to cross-examination); Worthington, *The Use in Court of Hypnotically Enhanced Testimony*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 402, 414 (1979) (because hypnosis alters the witness' memory, the defendant is totally deprived of his right to cross-examine his accuser).

79. See text & notes 72-74 *supra*.

80. See State *ex rel.* Collins v. Superior Court, slip op. at 27 (Holohan, J., dissenting); text & note 78 *supra*.

The better rule would be to permit testimony and cross-examination when undue influence by the hypnotist is avoided by proper procedures and documentation.[81]

In creating its *per se* bar of inadmissibility, the *Mena* court fielded a statutory argument with a constitutional justification.[82] The prosecution cited an Arizona statute[83] granting admissibility of testimony by an eyewitness in any criminal prosecution.[84] The court determined, however, that hypnosis of a witness forced an exception to this statutory right to testify.[85] Again stressing the defendant's paramount right to cross-examine adversarial witnesses,[86] the court held that the statute is subject to exception when the identification is tainted by an illegal pre-trial procedure.[87] Implying that hypnosis was such a procedure, the court found that exclusion of hypnotically adduced evidence would further the goal of preserving a defendant's right to fair trial and cross-examination.[88] The express statutory right of an eye-witness to testify at trial, however, should not be per se overridden without evidence of impropriety or taint in the pertinent hypnosis session. The state's interest in presenting relevant eyewitness testimony would arguably preclude a per se rule forbidding an eyewitness to testify.[89]

While Arizona is not unique in considering scientific acceptability of hypnosis-developed testimony, its exclusive reliance on this criterion results in alignment with a minority of courts who hold such testimony to be inadmissible *per se*.[90] This outcome is troubling in light of the fact that the *Mena* court received virtually no expert testimony on the

---

81. *See* Dilloff, *supra* note 70, at 21-22. Three methods have been suggested for dealing with hypnotically influenced testimony: 1) forbidding the witness to testify at all; 2) allowing the witness to testify only as to those matters which he remembered prior to the hypnosis; or 3) allowing the witness to testify and permitting the cross-examiner to probe the hypnotic session. *Id.* at 21.

Dilloff suggests the following safeguards for the use of hypnosis: cautionary instructions to the jury; expert testimony on the general reliability of hypnosis and on the hypnosis technique employed; and cross-examination of both the witness and the hypnotist. *Id.* at 22.

82. 128 Ariz. at 232, 624 P. 2d at 1280.

83. ARIZ. REV. STAT. ANN. § 13-3989 (1978). This statute provides: "The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court of this state."

84. 128 Ariz. at 232, 624 P.2d at 1280.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id. See also* State *ex rel.* Collins v. Superior Court, slip op. at 17-21.

89. *See* J. MARSHALL, LAW & PSYCHOLOGY IN CONFLICT 48-49 (2d ed. 1966), for a discussion of the stress and influence that all witnesses are subjected to. *See also* State *ex rel.* Collins v. Superior Court, slip op. at 27, 31 (Holohan, J., dissenting).

90. State v Mena, 128 Ariz. 226, 231, 624 P.2d 1274, 1279 (1981); People v. Bicknell, 114 Cal. App. 3d 388, 405, — Cal. Rptr. —, — (1980); People v. Tait, 99 Mich. App. 19, 28, 297 N.W.2d 853, 857 (1980); State v. Mack, 292 N.W.2d 764, 771 (Minn. 1980); *cf.* Polk v. State, 48 Md. App. 382, —, 427 A.2d 1041, 1048-49 (1981), *citing Mena id.* at —, 427 A.2d at 1048. In *Polk*, a conviction was reversed because the eight-year-old victim had been hypnotized prior to testifying at trial. The appellate court remanded for a new trial to determine the status of hypnosis. *Id.* at —, 427 A.2d at 1049.

process of hypnosis.[91] One extreme implication of Arizona's conclusion that hypnosis is scientifically unaccepted would be that, under *Frye*, expert scientific testimony on the issue of general acceptance of hypnosis itself is inadmissible.[92]

Recommendations in Light of La Mountain *and* Mena

A result better than the *Mena per se* exclusionary rule would have been one similar to that derived by the New Jersey Supreme Court in *State v. Hurd*.[93] There, the court acknowledged that hypnosis must be shown to be scientifically acceptable before witnesses who have been hypnotized may testify at trial.[94] Expressly rejecting the *per se* rule of inadmissibility advanced by the *Mena* court,[95] the New Jersey court established a two-tiered determination by which the trial court may establish that recollection of a witness who has been hypnotized is as reliable as that of an ordinary witness.[96] First, a special hearing should be made prior to trial.[97] In order for testimony to be admissible, the trial court must conclude that the hypnosis procedure followed in the particular case was reasonably likely to result in recall comparable to normal human recall.[98] Second, if found to be reliable at the pre-trial hearing, the procedure's reliability may be further challenged by introducing expert testimony at trial.[99] While the opponent may challenge the specific hypnosis procedures employed, he is expressly prohibited

91. The *Mena* court merely relied on a Michigan case, a law review article, and the ENCYCLOPEDIA BRITANNICA. 128 Ariz. at 226, 624 P.2d at 1275; *cf.* State v. Mack, 292 N.W.2d 764, 765-66 (Minn. 1980) (five experts testified about the reliability of hypnosis); State v. Hurd, 86 N.J. 525, 532, 432 A.2d 86,89 (1981) (extensive expert testimony considered). See text & note 76 *supra*.

92. See text & note 46 *supra*. In State *ex rel.* Collins v. Superior Court, Justice Holohan, in dissent, specifically limits the issue to whether or not the previously hypnotized witness may testify. Slip op. at 28.

93. 86 N.J. 525, 432 A.2d 86 (1981). In *Hurd*, a detective present during a hypnosis session asked: "Is it someone you know?" "Is it David?" "Is it Paul?" He thereby may have implanted a suggestion in the victim's mind as to who the attacker was. *Id.* at 531, 432 A.2d at 89. In State *ex rel.* Collins v. Superior Court, the court expressly rejected the *Hurd* holding. Slip op. at 14; see text & note 95 *infra*.

94. *Id.* at 535-36, 432 A.2d at 91.

95. *Id.* at 541, 432 A.2d at 94.

96. *Id.* at 546-47, 432 A.2d at 97.

97. *Id.* at 543, 432 A.2d at 95. The hearing should be made prior to trial or out of the jury's presence. *Id.*

98. *Id.* at 546-48, 432 A.2d at 97-98.

99. *Id.* at 543, 432 A.2d at 95. The court also accepted the following standards, proposed by Dr. Orne, see notes 49 & 71 *supra*, for admissibility of hypnosis-developed testimony:

1) A psychiatrist or psychologist experienced in the use of hypnosis must conduct the session.
2) The hypnotist should be an independent professional.
3) Any communications between the hypnotist and law enforcement personnel must be in writing, or otherwise recorded.
4) A pre-hypnosis narrative interview should be conducted.
5) All contacts between the hypnotist and the subject must be recorded, preferably using videotape.
6) Only the hypnotist and the subject should be present during any phase of the interview or the hypnosis session.

from arguing the general unreliability of hypnosis.[100]

The Arizona Supreme Court is waiting for the scientific community to provide support for the reliability of hypnosis-developed testimony before it will admit testimony by witnesses who have been hypnotized.[101] Yet major hypnosis societies have failed to publish a clear statement outlining the advantages and disadvantages of pre-trial hypnosis.[102] Nor have they regularly published analyses of participation by experts in significant unreported court proceedings.[103] The *per se* rule of inadmissibility, however, itself forestalls study and documentation of the effects of pre-trial hypnosis because without potential for admissibility, there is little incentive for furthering expert substantiation of the uses and abuses of forensic hypnosis.[104]

Although the *Mena* decision appears to have established a rigid *per se* rule of inadmissibility, it did leave open the possibility for modification. In a significant footnote, the court recognized the difficulty created by the *Mena* rule, which forces the state to use investigative hypnosis only with those witnesses who it determines will not be testifying at trial.[105] The court then reserved decision on whether pre-hypnosis testimony by a witness may be preserved by deposition and later introduced into evidence, perhaps on videotape.[106] The court could admit the deposition as testimony itself, or restrict its use to comparison with videotape of the hypnosis session. The latter alternative would permit analysis of the relative consistency of the witness' testimony, the possibility of memory distortion, and the degree of assimilation and subjective conviction relating to pre- and post-hypnosis testimony.[107]

---

86 N.J. at 545-46, 432 A.2d at 96-97.

The Arizona Prosecuting Attorney's Advisory Counsel (APAAC) has recently proposed guidelines similar to those of Dr. Orne without specifying who might be a "qualified expert" and allowing for certain support personnel to be present during the sessions. APAAC Seminar, Aug. 14, 1981, Phoenix, Arizona. *See also* Ault, *FBI Guidelines for the Use of Hypnosis*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 449-50 (1979). The most recent Arizona Supreme Court decision suggests similar guidelines without formally adopting them for use in an investigative context. State *ex rel.* Collins v. Superior Court, slip op. at 14, 16-17.

100. 86 N.J. at 543, 432 A.2d at 95.

101. State v. Mena, 128 Ariz. at 231, 624 P.2d at 1279.

102. *See generally* Warner, *The Use of Hypnosis in the Defense of Criminal Cases*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 417 (1979).

103. *Id.* Warner states that courts are often unreceptive forums for the presentation of scientific materials, thus perpetuating the prejudices of laymen. *Id.* at 434. "It is, however, a natural characteristic of the law, resting as it does upon established precedents and attitudes that have received general acceptance, to follow rather than lead in the initial introduction of probationary advances of science." *Id. See also* Orne, *supra* note 49, at 337. Orne posits that as serious research considers the effects of hypnosis on memory, it will be more possible to determine what role hypnosis should play in the court system. *Id.*

104. See note 103 *supra*.

105. State v. Mena, 128 Ariz. at 232, n.1, 624 P.2d at 1280, n.1. The Arizona court reemphasized its concern in State *ex rel.* Collins v. Superior Court, slip op. at 15.

106. 128 Ariz. at 232, n.1, 624 P.2d at 1280, n.1.

107. *See* State *ex rel.* Collins v. Superior Court, slip op. at 15 (videotaping can lessen the effects of suggestion, but cannot document subtle effects for a jury to view); People v. Lopez, 110

Conclusion

For almost a century, United States courts have considered the propriety of various uses of hypnosis by both the defense and the prosecution. Most courts have permitted introduction of testimony by a witness who has previously undergone hypnosis when a proper foundation has been laid, when the testimony is adequately corroborated, and when it is clear that testimony is based on the witness' own recollection rather than on hypnotic suggestion. Admission of such evidence has been approved despite the scientific community's failure to reach a consensus on the uses and misuses of hypnosis in altering recall.

Finding insufficient evidence of scientific acceptance, the Arizona Supreme Court has declared inadmissible all testimony by witnesses who have undergone hypnosis, from the point of hypnosis on. Since scientific acceptance of hypnosis is probably not forthcoming, hypnosis sessions should meanwhile be videotaped and pre-trial depositions carefully preserved. If *Mena* is modified,[108] such records may be admissible by themselves or may serve as the tools to determine whether or not the witness has indeed testified from his own recollection, untainted by any aspect of the hypnosis session.

Christine L. Brooks

Cal. App. 3d 1010, 1016-18, 168 Cal. Rptr. 378, 382-83 (1980) (tape recording of hypnosis session played in open court demonstrated that no facts relating to the crime were suggested by the hypnotist; it was also shown that the victim had clearly lied while under hypnosis). *See also* Gravitz, *Discussion*, 23 AM. J. CLINICAL HYPNOSIS 102, 108 (1980) (urging videotape coverage of interviews and urging professional surroundings); Kroger & Douce, *supra* note 70, at 367 (videotape recording evidences what procedures were followed during investigative hypnosis sessions); Orne, *supra* note 49, at 314 (illustrating videotape analysis to determine reliability of testimony).

108. State *ex rel.* Collins v. Superior Court was a 3 to 2 decision. One of the majority has since retired from the Arizona Supreme Court.

II. PROPERTY

ESTABLISHMENT OF PRESCRIPTIVE EASEMENTS IN ARIZONA

In Arizona, a private prescriptive easement[1] is granted when a claimant proves that he adversely used[2] another's land long enough to have established adverse possession.[3] A claimant's use is adverse when it is actual, open, notorious, continuous, uninterrupted, and under a claim of right.[4] Upon showing adverse use, the claimant becomes entitled to an easement in the adversely used property.[5]

Prescriptive easements are not favored by the law in Arizona because they inflict a loss of rights upon title owners.[6] The scope of such easements is therefore limited to the actual use that gave rise to the prescription.[7] As a further result of this disfavor, the use of another's

---

1. The public cannot acquire rights of way by prescription. *See* Territory v. Richardson, 8 Ariz. 336, 339-40, 76 P. 456, 457-78, (1901); *cf.* La Rue v. Kosich, 66 Ariz. 299, 304-07, 187 P.2d 642, 645-47, (1947) (where land owner allows public use, prescription does not arise). *But cf.* Suiter v. Kurtz, 1 Ariz. App. 350, 353, 403 P.2d 3, 6 (1965) (testimony that user considered the land public does not necessarily defeat prescription).

2. Tenny v. Lupow, 103 Ariz. 363, 368, 442 P.2d 107, 112 (1968) (a claim of right by a donee based upon a parol gift of land, renders donee's possession adverse as against the donor, even though parol gift has no legal effect); Gusheroski v. Lewis, 64 Ariz. 192, 198-99, 167 P.2d 390, 393-94 (1946) (many inimical acts to owner's claim of exclusive possession and domination over many years in excess of the statutory period gives rise to presumption that the use is under a claim of right and not by license to the owner). *But see* La Rue v. Kosich, 66 Ariz. 299, 303, 187 P.2d 642, 645 (1947) (fact that owner knew of the occasional use of property does not by itself even raise a presumption that such use was under a claim of right); Lewis v. Farrah, 65 Ariz. 320, 323-24, 180 P.2d 578, 580 (1947) (clear and positive evidence of adversity not shown by three or four isolated instances of use over a nineteen year period).

Adverse use "is not construed as implying actual enmity or ill will," but is use under a claim of right inconsistent to the claims of the owner. Gusheroski v. Lewis, 64 Ariz. at 197-98, 167 P.2d at 392-93; *see* Jacobs v. Brewster, 354 Mo. 729, 736, 190 S.W.2d 894, 899 (1945) (the essence of an easement is use).

Prescriptive easements also affect only the right to use the land, not to possess it. Etz v. Mamerow, 72 Ariz. 228, 231, 233 P.2d 442, 444 (1951).

3. See text & note 34 *infra*; ARIZ. REV. STAT. ANN. § 12-526 (A)(1) (1956) (10 years).

4. England v. Ally Ong Hing, 105 Ariz. 65, 72, 459 P.2d 498, 505 (1969) (claim of right for one purpose is not notice of use under claim of right for another purpose); La Rue v. Kosich, 66 Ariz. 299, 303, 187 P.2d 642, 645 (1947) (claim of right must be distinct and positive subsequent to permissive use by claimant and general public); Lewis v. Farrah, 65 Ariz. 320, 323-24, 180 P.2d 578, 580 (1947) (three or four isolated instances of use over a period of years does not show claim of right); Gusheroski v. Lewis, 64 Ariz. 192, 198, 167 P.2d 390, 393 (1946) (continuous, regular use for period of years well in excess of requirement of 10 years adverse use); Glantz v. Gabel, 66 Mont. 134, 141-42, 212 P. 858, 860 (1923) (use of drainage ditch gives notice of claim of right).

5. England v. Ally Ong Hing, 105 Ariz. 65, 72, 459 P.2d 498, 505 (1969); La Rue v. Kosich, 66 Ariz. 299, 303, 187 P.2d 642, 645 (1947).

6. Krencicki v. Petersen, 22 Ariz. App. 1, 3, 522 P.2d 762, 764 (1974).

7. England v. Ally Ong Hing, 105 Ariz. 65, 72-73, 459 P.2d 498, 505-06 (1969) (notice of adversity with respect to path leading to one destination is not notice with respect to path leading

property is presumed permissive rather than adverse,[8] especially where the servient estate[9] is open and unenclosed or unimproved.[10] Nevertheless, if the user establishes the requisite elements of prescription, a presumption of adversity arises in his favor.[11] The owner of the servient estate must then prove that the claimant's use was permissive.[12] If the servient estate's owner fails to rebut this inference, the easement is established.[13] Only if the easement holder intentionally abandons the easement,[14] or merely fails to use it for the same period as was necessary to establish the easement, will it lapse.[15]

The action needed to establish the requisite elements of a prescriptive easement was recently addressed by the Arizona Court of Appeals in *Brown v. Ware*.[16] In 1947, plaintiff Brown's parents purchased a five acre parcel bordered on the north by Bilby Road, then on Tucson's

---

to another destination); Wise v. Knapp, 3 Ariz. App. 99, 105, 412 P.2d 96, 102 (1966) (easement limited to type of use which established it—passenger vehicles to and from residential garages); Sunnybrook Groves, Inc. v. Hicks, 113 So. 2d 239, 242 (Fla. Dist. Ct. App. 1939) (because of loss of rights involved, prescriptive easements are limited to the actual original use).

8. *E.g.*, England v. Ally Ong Hing, 105 Ariz. 65, 72, 459 P.2d 498, 505 (1969); Clarke v. Clarke, 133 Cal. 667, 669-70, 66 P. 10, 11 (1901); Hester v. Sawyer, 41 N.M. 497, 504-05, 71 P.2d 646, 651 (1937).

9. "A servient estate is an estate burdened with a servitude. . . . Most commonly it is a parcel of land burdened by an easement for the benefit of [the dominant estate]." BLACK'S LAW DICTIONARY 1228 (5th ed. 1979). *See* Etz v. Mamerow, 72 Ariz. 228, 231, 233 P.2d 442, 444 (1951); Korricks Dry Goods Co. v. Kendall, 33 Ariz. 325, 329, 264 P. 692, 694 (1928).

10. *See* Etz v. Mamerow, 72 Ariz. 228, 232, 233 P.2d 442, 445 (1951) (mere use of unenclosed land must be accompanied by other indications of claim of right in order to raise a presumption of adversity by that use); La Rue v. Kosich, 66 Ariz. 299, 301, 187 P.2d 642, 643 (1947) (unfenced land with well-defined roadway used indiscriminately by the public could not become plaintiff's private prescriptive easement).

One cannot acquire prescriptive easements over open and unenclosed lands unless the intention to do so is plainly apparent. Aguirre v. Hamlin, 80 Idaho 176, 185, 327 P.2d 349, 354 (1958), *citing* Hester v. Sawyer, 41 N.M. 497, 71 P.2d 646 (1937). This requirement is necessary to insure that the owner has notice of the adverse claim. Frequently, the owner is not in a position to detect or prevent others from crossing his land. Thus, he would not be able to assert his rights until the statute of limitations had run. Aguirre v. Hamlin, 80 Idaho at 185, 327 P.2d at 354. *See also* Sanchez v. Dale Bellamah Homes of N.M., Inc., 76 N.M. 526, 529, 417 P.2d 25, 28 (1966) (rule for open and unenclosed lands applies only where owners could not reasonably know of the use).

11. *See* Tenny v. Luplow, 103 Ariz. 363, 367-68, 442 P.2d 107, 111-12 (1968); Sanchez v. Dale Bellamah Homes of N.M., Inc., 76 N.M. 526, 529, 417 P.2d 25, 27 (1966).

12. La Rue v. Kosich, 66 Ariz. 299, 306, 187 P.2d 642, 647 (1947); Gusheroski v. Lewis, 64 Ariz. 192, 198-99, 167 P.2d 390, 393-94 (1946); Sanchez v. Dale Bellamah Homes of N.M., Inc., 76 N.M. 526, 529, 417 P.2d 25, 27 (1966). An owner's acknowledgement of the validity of the user's claim of right is not equivalent to permission, however, and does not preclude prescription. *See* Furrh v. Rothschild, 118 Ariz. 251, 256, 575 P.2d 1277, 1282 (1978).

13. *See* Gusheroski v. Lewis, 64 Ariz. 192, 196-98, 167 P.2d 390, 392-94 (1946) (mutual easements); Wise v. Knapp, 3 Ariz. App. 98, 104-05, 412 P.2d 96, 101-02 (1966) (suit for adverse possession, cross-complaint for easement); Rorebeck v. Criste, 1 Ariz. App. 1, 4, 398 P.2d 678, 681 (1965) (adverse possession).

14. Furrh v. Rothschild, 118 Ariz. 251, 256, 575 P.2d 1277, 1282 (1978) (habitual use of another, equally convenient way does not extinguish prescriptive right unless there is an intentional abandonment); Nichols v. Peck, 70 Conn. 439, 441-42, 39 A. 803, 803-04 (1898) (an established prescriptive right is not extinguished when the user voluntarily uses another way under a mere implied license).

15. *Id.* Zimmer v. Dykstra, 39 Cal. App. 3d 422, 434-35, 114 Cal. Rptr. 380, 388 (1974).

16. No. 2 CA-CIV 3795 (Ariz. Ct. App. April 7, 1981).

outskirts.[17] They built a home near the center of the tract and constructed an access road to Bilby Road.[18] In 1954, Brown's parents sold a parcel containing the access road to Battershell.[19] Sometime later, Battershell sold the northern portion of his parcel to Mason.[20] Mason in turn sold his parcel to Ware in 1974.[21] No deed explicitly reserved an easement for the benefit of Browns' land even though it was undisputed that the road had served as the only means of access to the Brown parcel since 1947.[22]

In 1964, Mason tried closing the road by stretching a strand of barbed wire across it.[23] The very next morning, however, the "egg lady" broke the wire as she drove through, and Mason never pursued the matter.[24] On June 13, 1978 defendant-appellee Donald Ameigh, a co-owner with Ware, closed the access road by piling debris upon it.[25] Brown removed the obstruction after 25 hours and instituted suit in Superior Court on June 22, 1978 to establish an easement over the access road.[26] The superior court held that the use by the plaintiffs and the general public was permissive and denied the easement.[27]

The Arizona Court of Appeals found, however, "no evidence . . . implied, express, or otherwise. . . ."[28] that the defendants, or either of their two precedessors in interest, had permitted the plaintiffs to use a dirt road over the defendants' property. In light of the defendants' failure to show permission, the court of appeals reversed the superior court

---

17. Slip op. at 2.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* The Brown family, its visitors, neighbors, and delivery people all used the road. It accommodated automobiles, horses, bicycles, and foot traffic. *Id.*
23. *Id.* at 3.
24. *Id.*
25. *Id.*
26. *Id.* It might be thought that this action should have been brought as an action to establish an implied easement. An implied easement requires:

> (1) The existence of a single tract of land so arranged that one portion of it derives a benefit from the other, the division thereof by a single owner into two or more parcels, and the separation of title; (2) before separation occurs, the use must have been long, continued, obvious or manifest, to a degree which shows permanency; and (3) the use of the claimed easement must be essential to the beneficial enjoyment of the parcel to be benefited.

Porter v. Griffith, 25 Ariz. App. 300, 302, 543 P.2d 138, 140 (1975).

An implied easement approach to *Brown*, however, appears to have at least four difficulties. First, the proof required for an implied easement is inconsistent with that required for a prescriptive easement. An implied easement requires an implicit *agreement* between the buyer and seller. *Id. See also* Peet v. Schurter, 142 Cal. App. 2d 237, 242-43, 298 P.2d 142, 145 (1956). Second, Arizona has never allowed an implied easement. Porter v. Griffith, 25 Ariz. App. at 302, 543 P.2d at 140. Third, *Porter* appears to say that implied easements by reservation will not be found in Arizona. *Id.* Fourth, the easement in *Brown v. Ware* may not have been essential to the beneficial enjoyment of the Brown parcel. Appellee's Brief at 1.

27. Slip op. at 3.
28. *Id.* at 4.

and granted an easement because the plaintiff had for 24 years made continuous, open, hostile, and visible use of the road.[29]

This casenote will outline briefly the history of prescriptive easements. It will then analyze the interplay of two crucial requirements for establishing prescriptive easements. First, the claimant must communicate to the title owner that his use is under a claim of right. Second, possessing this knowledge, the owner must not subsequently interrupt the claimant's adverse use. Finally, the conclusions derived will be applied to the Arizona Court of Appeals decision in *Brown v. Ware*.

HISTORY

Early English common law recognized that possession or use of land lends credence to the inference that the possession or use began rightfully.[30] The result of this doctrine was that the longer the use, the greater the inference that the use remained rightful.[31] Acceptance of this inference eventually led to the development of the fiction of the "lost grant". Under this doctrine, it was inferred from use of the land for a sufficient period of time that the owner had granted an easement by deed, but that the grant instrument had been lost.[32] Later, proof of sufficiently lengthy use entitled the claimant to a mandatory jury instruction.[33] Ultimately, however, the English adopted prescription statutes under which use for a prescribed time established a prescriptive easement.[34]

Courts in the United States have drawn an analogy with statutes of limitations for adverse possession as a way to fix the time for prescription.[35] Under this doctrine, use that is permissive will vitiate a claim-

29. *Id.* at 4-5. The defendant Ware's (Mason's) parcel had remained unimproved during the 24 years preceding the suit. The use of the road, however, increased to include "U.S. Mail delivery, city garbage collection, sales[persons], and employees of plaintiff Brown's business numbering in the hundreds." *Id.* at 2-3. In addition, plaintiff-appellants Van Valkenburgs (purchasers of another parcel of the original five acres) now use the road for access to their home which lies just east of the original Brown homesite. *Id.* at 2. Brown's business, Tucson Custom Sheet Metal, Inc., was moved to the original homesite in 1965 and Brown's mother still resides there. *Id.*

30. *See* Jackson (*ex rem.* Bonnell) v. Sharp, 9 Johns. 163 (N.Y. 1812); 2 AMERICAN LAW OF PROPERTY § 8.44 (A.J. Casner ed. 1952).

31. 2 AMERICAN LAW OF PROPERTY, note 30 *supra*.

32. *Id.* at § 8.50. If there had been no grant, surely the true owner would have objected to the unlawful trespass. Hester v. Sawyer, 41 N.M. 497, 502, 71 P.2d 646, 649 (1937).

33. 2 AMERICAN LAW OF PROPERTY, *supra* note 30, at § 8.50.

34. *Id.* at § 8.51.

35. Lewis v. Farrah, 65 Ariz. 320, 322, 180 P.2d 578, 579 (1947); Gusheroski v. Lewis, 64 Ariz. 192, 197, 167 P.2d 390, 392 (1946); Curtis v. Southern Pac. Co., 39 Ariz. 570, 574, 8 P.2d 1078, 1079 (1932); Boyd v. Atchison, 39 Ariz. 154, 160, 4 P.2d 670, 671-72 (1931); 2 AMERICAN LAW OF PROPERTY, *supra* note 30, at § 8.52; *cf.* Sanchez v. Dale Bellamah Homes of N.M., Inc., 76 N.M. 526, 528-29, 417 P.2d 25, 27, (1966) (prescription is based upon 10 years use alone and does not depend upon a statute).

ant's prescriptive right.[36] This ingenuity, however is not without its problems. First, some western states, including Arizona, have short statutes of limitations.[37] Thus, one might suffer a loss of property rights upon relatively short notice. This result is inconsistent with the reluctance of American courts to divest property rights.[38] Second, states like Arizona and New Mexico have a great deal of open and unenclosed or unimproved land.[39] In addition, there may be a custom of permitting others to cross one's land for their convenience.[40] As a result, one might lose property rights without sufficient notice of the claim of right. Therefore, these factors might combine to turn a simple neighborly courtesy into an unwitting "grant" of an irrevocable prescriptive easement.[41]

Despite these difficulties, Arizona courts have adopted the rule that sufficient evidence of actual, open, notorious, continuous, and uninterrupted use of another's land, under a claim of right for the required time, raises a rebuttable presumption that the use was adverse.[42] The opposing view, however, considers proof of long continued, open, and notorious use as mere evidence of adversity.[43] Consequently, despite proof of these elements, a claimant must still prove adversity.[44]

Although these two views give differing evidentiary weight to relevant facts, each requires that the evidence of prescription establish that the owner received either implied[45] or actual knowledge[46] of the ad-

36. 2 AMERICAN LAW OF PROPERTY, *supra* note 30, at § 8.56; *see* cases cited in note 12 *supra*.

37. ARIZ. REV. STAT. ANN. § 12-526 (1956) (10 years).

38. See text & note 6 *supra*.

39. *See* England v. Ally Ong Hing, 105 Ariz. 65, 72, 459 P.2d 498, 505 (1968).

40. *Id.*

41. Boyden v. Achanbach, 86 N.C. 397, 398-99 (1882) ("It would be unreasonable to deduce from the owner's quiet acquiescence, a simple act of neighborly courtesy, . . . consequences so seriously detracting from the value of the land. . . ."). *See also* La Rue v. Kosich, 66 Ariz. 299, 303-04, 187 P.2d 642, 645 (1947). Another difficulty with using statutes of limitations for establishing adverse possession to define the limitation period for prescriptive easements is that the transposition may create confusion between the requirements for adverse possession and those for prescription. *Compare* Etz v. Mamerow, 72 Ariz. 228, 231, 233 P.2d 442, 444 (1951) ("[A]n action to establish an easement does not involve possession or occupation . . . . It does not disturb the legal title . . . . It does not involve dominion over the premises except that which is necessary for the enjoyment of the use") *with* Lewis v. Farrah, 65 Ariz. 320, 323, 180 P.2d 578, 579 (1947) ("The elements necessary to establish each [adverse possession and easement by prescription] . . . are substantially the same, and the rules of law relating to title by adverse possession are, in general, applicable to easements by prescription").

42. *See, e.g.*, Tenny v. Luplow, 103 Ariz. 363, 367-68, 442 P.2d 107, 111-12 (1968); Gusheroski v. Lewis, 64 Ariz. 192, 198, 167 P.2d 390, 393 (1946); Trueblood v. Pierce, 116 Colo. 221, 233, 179 P.2d 671, 677 (1947).

43. *E.g.*, Gowen v. Swain, 90 N.H. 383, 385-86, 10 A.2d 249, 251 (1939); Weber v. Gerber Holding Co., 138 N.J. Eq. 544, 547-48, 49 A.2d 300, 302 (1946), *rev'd on other grounds*, Weber v. L.G. Trucking Corp., 140 N.J. Eq. 96, 52 A.2d 839 (1947); State *ex rel.* Shorett v. Blue Ridge Club, 22 Wash. 2d 487, 495, 156 P.2d 667, 671 (1945).

44. See authorities cited in note 43 *supra*.

45. *See* Tenny v. Luplow, 103 Ariz. 363, 367-68, 442 P.2d 107, 111-12 (1968) (implied notice); Aguirre v. Hamlin, 80 Idaho 176, 184, 327 P.2d 349, 353-54 (1958) ("constructive knowledge"); Sanchez v. Dale Bellamah Homes of N.M., Inc., 76 N.M. 526, 528-29, 417 P.2d 25, 27 (1966) ("imputed knowledge").

verse nature of the use. In those circumstances, for example, where the servient estate is unenclosed or unimproved,[47] courts may require that the evidence establish actual knowledge by the owner.[48] In addition, a distinct and positive assertion of the claim of right[49] may be needed for the claimant to carry the burden of proof where there is a history of permission.[50]

KNOWLEDGE AS THE TEST OF ADVERSITY AND INTERRUPTION

Arizona courts do not favor prescriptive easements.[51] Rather, use of another's land is presumed permissive.[52] Thus, a claimant's *prima facie* case consists of establishing the absence of permission, that is, in showing actual, open, notorious, continuous, and uninterrupted use of the owner's land under a claim of right.[53] Once the claimant carries this initial burden of production, the owner must address the issue of permission. The owner must show that either the use was permissive,[54] or that the use was interrupted before the time to establish an easement had run.[55] This section will analyze the two major aspects of the parties' burden of proof: first, the requirements for adequate communication and knowledge of a claim of right will be examined; second, interruption of the claim of right will be considered.

A. *Communication and Knowledge*

It is well settled that permissive use of another's land cannot ripen merely through a lapse of time[56] into a prescriptive easement regardless

46. *See* Tarpey v. Veith, 22 Cal. App. 289, 292-93, 134 P. 367, 369 (1913); Aguirre v. Hamlin, 80 Idaho 176, 184, 327 P.2d 349, 353-54 (1958); Sanchez v. Dale Bellamah Homes of N.M., Inc., 76 N.M. 526, 528-29, 417 P.2d 25, 27 (1966); Hester v. Sawyer, 41 N.M. 497, 505-06, 71 P.2d 646, 652 (1937).

47. See cases cited in note 10 *supra*.

48. See cases cited in note 45 *supra*.

49. La Rue v. Kosich, 66 Ariz. 299, 305, 187 P.2d 642, 646 (1947). *La Rue* involved unimproved land. *Id.* at 305, 187 P.2d at 646. In discussing the manner in which a claimant under such circumstances must communicate the claim of right to a landowner, the court stated that "[only if] the user of the dominant estate expressly abandons and denies his right under license or permission, and openly declares his right to be adverse to the owner of the servient estate. . ." will the use ripen into a prescriptive right. *Id.*

50. *Id.* at 303-04, 187 P.2d at 645; Spillsbury v. School District No. 19, 37 Ariz. 43, 47, 288 P. 1027, 1029 (1930).

51. See text & notes 1-15 *supra*.

52. See text & note 8 *supra*.

53. See text & notes 2-4 *supra*.

54. See text & note 12 *supra*.

55. See text & notes 83-88 *infra*.

56. See text & note 49 *supra*. A distinct and positive assertion is required subsequent to a period of permissive use. Doing that which one has permission to do cannot, of itself, serve to alert the owner of one's change of heart. *See* Gospel Echos Chapel, Inc. v. Wadsworth, 19 Ariz. App. 382, 384, 507 P.2d 994, 996 (1973); La Rue v. Kosich, 66 Ariz. 299, 305-06, 187 P.2d 642, 646-47 (1947).

of the duration of the use.[57] Permissive use may subsequently become adverse, however, upon a clear,[58] distinct and positive assertion of one's claim of right, or a disavowal of the owner's title.[59] Asserting one's claim of right suffices to place the owner on notice of the intention of the user to claim rights of usage inconsistent with those held by the owner.[60]

In *La Rue v. Kosich*,[61] the Arizona Supreme Court presented an extensive discussion of what constitutes notice of the claim of right to a servient owner. The defendant's land was unenclosed and unimproved and the road involved was known by the claimant to be used regularly and freely by many other persons.[62] The claimant contended that he had used the road always believing it to be public, citing the use which others had made of the road as supporting this belief.[63]

The supreme court, however, denied the claim for an easement for three reasons. First, agreeing with the claimant that he had shown that he *claimed* a right to use the road, the court found no evidence that he had made that claim *to* the owner.[64] The claimant must show that the claim exists other than in the mind of the claimant[65] before an easement will be granted. Second, the court found that the evidence established that the claimant along with the general public had enjoyed permissive use of the disputed roadway via the neighborly indulgence of its past and present owners.[66] In situations involving prior permissive use, the claimant must openly declare his adversity to the owner himself.[67] Finally, since the land was open and unenclosed, it was particularly important that the claim of right be communicated in order to

57. *E.g.*, Etz v. Mamerow, 72 Ariz. 228, 232, 233 P.2d 442, 445 (1951); La Rue v. Kosich, 66 Ariz. 299, 305, 187 P.2d 642, 646 (1947); Thomas v. England, 71 Cal. 456, 460, 12 P. 491, 493 (1886).

58. Gospel Echos Chapel, Inc. v. Wadsworth, 19 Ariz. App. 382, 384, 507 P.2d 994, 996 (1973).

59. See text & note 49 *supra*.

60. *Cf.* Higginbotham v. Kuehn, 102 Ariz. 37, 39, 424 P.2d 165, 167 (1967) (A claimant who has an intention to claim a right to use servient estate because he mistakenly believes he is entitled to use the land does not, because of this mistake, subvert the adverse nature of his use of the land. It is the parties' actual intentions that matter and not what they would have intended were they not mistaken in their beliefs).

61. 66 Ariz. 299, 187 P.2d 642 (1947).

62. *Id.* at 304, 187 P.2d at 645.

63. *Id.*

64. *Id.*

65. *Id.* at 303, 187 P.2d at 645; *accord*, Furrh v. Rothschild, 118 Ariz. 251, 256, 575 P.2d 1277, 1282 (1978).

The claim of right "is nothing more" than the intention to claim a right. Higginbotham v. Kuehn, 102 Ariz. 37, 38, 424 P.2d 165, 166 (1967). Thus, the claim of right must be communicated or else the use is not adverse. *Accord*, Tarpey v. Veith, 22 Cal. App. 289, 292-93, 134 P. 367, 369 (1913) ("[the claim of right] must in someway be asserted in such a manner that the owner may know of the claim").

66. La Rue v. Kosich, 66 Ariz. 299, 306, 187 P.2d 645, 646 (1947).

67. *Id.*

insure that the owner had adequate notice of the claim.[68]

In *Sparks v. Scottsdale Mortgage Corporation*,[69] the Arizona Court of Appeals further elucidated the concept of notice. The claimed easement was used solely as a means of ingress and egress to the claimant's garage.[70] It had been in use for at least 19 years prior to the defendant-servient owner's purchase of the land.[71] The land remained unimproved until shortly after the defendant's purchase.[72]

In granting the easement, the court of appeals first distinguished *La Rue v. Kosich* on the grounds that while *La Rue* involved the public use of a roadway, *Sparks* involved private use of the claimed easement.[73] Second, the easement was granted even though, as in *La Rue*, the only overt notification of the claim of right was the use of the easement.[74] Thus in Arizona, overt, non-verbal acts may constitute notice of the user's intention to claim rights inconsistent with the owner's rights.[75]

Finally, the concept of notice was further refined by the Arizona Supreme Court in the case of *England v. Ally Ong Hing*.[76] In this case, the plaintiff claimed two easements which were used for quite distinct purposes.[77] The easements followed virtually the same course upon the defendant's land. The defendant's predecessor in interest, however, had actual knowledge only of the claim of right associated with the first easement.[78] These facts led the supreme court to grant the plaintiff the first, but not the second easement.[79] The court reasoned that notice of a claim of right relates to a particular purpose associated with the use.[80] Thus, notice of a claim of right for one purpose could not be notice of a claim of right for a different purpose.[81]

---

68. *Id.* at 303-04, 187 P.2d at 645.
69. 1 Ariz. App. 8, 398 P.2d 916 (1965).
70. *Id.* at 10, 398 P.2d at 918.
71. *Id.* at 9, 398 P.2d at 917.
72. *Id.* at 10, 398 P.2d at 918.
73. *Id.*
74. *Id.*
75. *Id.*; *accord*, Gusheroski v. Lewis, 64 Ariz. 192, 198-99, 167 P.2d 390, 393-94 (1946). Where no verbal communication regarding the easement passes between the parties or their predecessors in interest, the conduct of the claimant must itself notify the owner of the claim of right. *Id.* The court viewed private as opposed to general public use as an especially effective notification of the user's claim of right. *Id.* at 198, 167 P.2d at 393.
76. 105 Ariz. 65, 459 P.2d 498 (1968).
77. *Id.* at 72, 459 P.2d at 505. One was for driving cattle to a watering hole. The second was for driving them to a grazing pasture. *Id.*
78. *Id.* The claimants had applied for water rights at a spot located on defendant's land. Defendant's predecessor in interest attended the hearing and thus had actual knowledge of their intention to use his land. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*; *cf.* Hester v. Sawyers, 41 N.M. 497, 506-07, 71 P.2d 646, 652-53 (1937) (change in location of right of way sufficient to begin non-permissive use); Sanchez v. Dale Bellamah Homes of N.M., Inc., 76 N.M. 526, 529, 417 P.2d 25, 28, (1966) (presumption of permissiveness extends

La Rue, *Sparks*, and *England* focus upon communication and knowledge. They indicate that whether notice of a claim of right is sufficient depends upon the circumstances of each case. In particular, a court must consider whether there has been prior permissive use, whether the use occured on unimproved land, the medium of notice (verbal or non-verbal), and the purpose to which the use relates.[82]

B. *Interruption of Adverse Use*

The second major aspect of proof of prescriptive use involves interruption of a claimant's adverse use of the servient estate.[83] If an owner undertakes an unequivocal act of ownership before the prescriptive period has run, the adverse use is interrupted.[84] An unequivocal act of ownership may be determined by two apparently distinct approaches. First, if the jurisdiction bases prescription upon a doctrine advocating easy settlements of title disputes, then protests and mere denials of a claim of right will not constitute unequivocal acts of ownership.[85] This view requires either physical, intentional, and protracted interference or legal action to interrupt the prescriptive period.[86] Second, other jurisdictions recognize that prescription is based upon the owner's acquiescence to a claim of right.[87] According to this view, verbal complaints and denials constitute unequivocal assertions of ownership.[88] The former view, then, requires actual interference for interruption, while the latter recognizes a mere complaint as sufficient.

---

only to open and unenclosed lands situated such that the owner would not reasonably know of their use).

82. *Compare* England v. Ally Ong Hing, 105 Ariz. 65, 72, 459 P.2d 498, 505 (1969) (unimproved mining claims; one easement granted, the other denied) *and* Sanchez v. Dale Bellamah Homes of N.M., Inc., 76 N.M. 526, 529-30, 417 P.2d 25, 28 (1966) (approximately one-half mile square parcel surrounded by residences and shown on U.S. Geological survey map, easement granted) *with* Wise v. Knapp, 3 Ariz. App. 99, 105, 412 P.2d 96, 102 (1966) (mutual use of driveway to gain access to residences, easement granted), Suiter v. Kurtz, 1 Ariz. App. 350, 353-54, 403 P.2d 3, 6-7 (1965) (mutual use of disputed road to move farming equipment, easement granted), *and* Gusheroski v. Lewis, 64 Ariz. 192, 198-99, 167 P.2d 390, 393-94 (1946) (mutual use of disputed boundary strip to operate farm machinery, easement granted).

83. *See* Gusheroski v. Lewis, 64 Ariz. 192, 197, 167 P.2d 390, 393 (1946).

84. *Cf.* Higginbotham v. Kuehn, 102 Ariz. 37, 39, 424 P.2d 165, 167 (1967) (interruption of adverse possession is defined as "an entry by an owner . . . [which will] clearly indicate to the occupant that his . . . right is challenged").

85. Leigh Valley R.R. v. McFarlan, 43 N.J.L. 605, 629 (1881); *see* 2 AMERICAN LAW OF PROPERTY, *supra* note 30, at § 8.58, n.1.

86. *See* Conness v. Pacific Coast Joint Stock Land Bank, 46 Ariz. 338, 339-43, 50 P.2d 888, 889-90 (1935) (physical or legal interference); Leigh Valley R.R. v. McFarlan, 43 N.J.L. 605, 629 (1881) (physical or legal interference). *See also*, 2 AMERICAN LAW OF PROPERTY, *supra* note 30, at § 8.58 n.1.

87. Essentially, one acquiesces when, knowing of the adverse character of the use, one does nothing to stop it or fails to complain. *See* Dartnell v. Bidwell, 115 Me. 227, 231-32, 98 A. 743, 745 (1916). If acquiescence continues long enough a prescriptive right is obtained. Hester v. Sawyer, 41 N.M. 497, 503-04, 71 P.2d 646, 650 (1937).

88. *See* Chicago & Northwestern Ry. Co. v. Hoag, 90 Ill. 339, 348-49 (1878); Powell v. Bagg, 74 Mass. (8 Gray) 441, 443 (1857); Ingraham v. Hough, 46 N.C. 39, 42-43 (1853); Dartnell v. Bidwell, 115 Me. 227, 232, 98 A. 743, 745 (1916).

Arizona courts have not explicitly addressed the question of what constitutes interference with the prescriptive use of an easement. In *Higginbotham v. Kuehn*,[89] however, the Arizona Supreme Court applied the actual interference doctrine in the analogous context of adverse possession. *Higginbotham* concerned an action by a claimant seeking to establish title through adverse possession to a boundary strip separating the claimant's and defendant's land.[90] The defendant's predecessors in interest had mistakenly erected a fence one and one-half feet inside their property line.[91] The defendant tore it down only to replace it with a different style fence in the same location as the original fence.[92] The defendant contended that this action interrupted the claimant's use of the one and one-half foot strip, thus defeating the claimant's claim.[93] The court, however, stated that interruption occurs only when an owner enters the land used by the occupant and intends to take possession.[94] Since the evidence in *Higginbotham* did not support such an entry, the court held that the claimant's use had not been interrupted.[95]

As *Higginbotham* indicates, Arizona has adopted the actual interference doctrine. The rationale for this adoption is based upon the policy of the law that disfavors allowing title in property to remain long in dispute.[96] If mere protests and denials could interrupt prescriptive use, an owner would be required to do no more than complain to the usurper.[97] Thus, the passage of time might erode the quality of the relevant evidence, denying the claimant the advantage normally derived from long enjoyment in quieting titles.[98] As a consequence, prescriptive easements would rest upon the "most unstable" of footings.[99]

89. 102 Ariz. 37, 424 P.2d 165 (1967).
90. *Id.* at 38, 424 P.2d at 166.
91. *Id.* at 38, 424 P.2d at 167.
92. *Id.*
93. *Id.* at 39, 424 P.2d at 167.
94. *Id.*, *citing* Kirby Lumber Corp. v. Smith, 305 S.W.2d 829, 830 (Tex. Civ. App. 1957).
95. *Id.*
96. Conness v. Pacific Coast Joint Stock Land Bank, 46 Ariz. 338, 341-42, 50 P.2d 888, 890 (1935), *quoting* LeHigh Valley R.R. Co. v. McFarlan, 43 N.J.L. 605, 629 (1881). *See also* Higginbotham v. Kuehn, 102 Ariz. 37, 39, 424 P.2d 165, 167 (1967); Gusheroski v. Lewis, 64 Ariz. 192, 197, 167 P.2d 390, 393 (1946).

Conness is not a clear case on its facts. Between 1917 and 1924 one Clymer owned the disputed tract and the plaintiffs had used the land with his knowledge and without objection from him. 46 Ariz. at 339, 50 P.2d at 889. The facts do not show, and the court does not explain, why this period of use is adverse. The court must, however, consider it to be so, since Clymer's successors in interest, the defendants, owned the tract for only nine years before the suit arose. *Id.* at 339-40, 50 P.2d at 889. During these nine years they threatened to disrupt the easement only once, shortly after they acquired the tract. They did nothing, however, for the next nine years. Thus, since verbal complaints will not interrupt the prescriptive period, the plaintiffs had established an easement on the strength of 16 years adverse use. *Id.* at 342-43, 50 P.2d at 890.
97. *Id.* at 341-42, 50 P.2d at 890.
98. *Id.*
99. *Id.* at 341, 50 P.2d at 890.

In light of previously expounded policy positions, however, Arizona's actual interference doctrine is fundamentally unsound for two reasons. First, prescriptive easements are disfavored because they inflict a loss of rights.[100] Therefore, the law presumes the permissive use of another's land,[101] thus placing the burden of persuasion to show adversity upon the claimant.[102] By requiring the owner to demonstrate actual interference, rather than requiring that the claimant demonstrate the absence of such interference, this policy is frustrated. Second, property titles are publicly recorded.[103] Any person may therefore search out the limits of another's title and, consequently, need not remain "uncertain" about his own right to cross land which he knows is not his own.

In addition, *Higginbotham* indicates that the Arizona courts are committed to the conceptually questionable—if not inconsistent—position that the intention to interrupt is of consequence when expressed physically and not of consequence when expressed otherwise. Physical interference interrupts adversity because it "bear[s] on its face an unequivocal intention" to deny the user's claim of right.[104] An oral or written complaint, however, might very well suffice to notify the user of this intention. If notification is properly proven in court, it should be no less convincing than showing one has placed debris in the road.

Finally, one can effectively communicate a claim of right by acts, words, or mutual recognition of the fact that the claimant's use was "necessary".[105] It is wholly unclear, then, why one cannot effectively deny a claim, and thus interrupt the prescriptive use, by any of these methods.[106] The result of *Higginbotham* is that by holding mere complaints to be irrelevant to the proof of interruption as a matter of law, the courts have committed themselves to a specious distinction. If so, prescriptive easements indeed rest upon the "most unstable" of footings after all.

BROWN V. WARE

This casenote has identified two important requisites of prescriptive use. First, the prescriptive user must demonstrate that he commu-

100. See text & notes 6-7 *supra*.
101. See text & notes 8-10 *supra*.
102. See text & notes 2-5 *supra*.
103. ARIZ. REV. STAT. ANN. §§ 33-411 to-419 (1974).
104. 102 Ariz. at 39, 424 P.2d at 167, *quoting* Kirby Lumber Co. v. Smith, 305 S.W.2d 829, 830 (Tex. Civ. App. 1957).
105. Wise v. Knapp, 3 Ariz. App. 99, 105, 412 P.2d 96, 102 (1966) (the claimed easement was the claimant's only means of access to his garage).
106. *But cf.* Conness v. Pacific Coast Joint Stock Land Bank, 46 Ariz. 338, 342-43, 50 P.2d 888, 890 (1935) (physical or legal interference alone will interrupt the claim of right).

nicated his claim of right to the owner.[107] Second, an owner may rebut this showing by demonstrating that he has interrupted the prescriptive use.[108] The Arizona Court of Appeals' reasoning in *Brown v. Ware* is deficient on both of these points.

The first deficiency is apparent from the court's discussion of communication of the claimed right. The court begins this discussion with the statement that from the very moment Battershell acquired his parcel in 1954, the Browns claimed a right to treat his parcel as servient to their own.[109] The court, however, offers no evidence for this assertion. Instead, it merely emphasizes that the Browns and their successors in interest continued to use the road.[110]

The court's premature discovery of adversity is explained by this emphasis on continuous use. In focusing solely upon the long continued use the court forgets that, as *England v. Ally Ong Hing*[111] illustrates, the owner's knowledge of the adverse use must be accompanied by the knowledge that the user is claiming a right to so use the owner's land.[112] As in *La Rue v. Kosich*,[113] *Brown* involves open and unenclosed or unimproved land.[114] Indeed, the defendants-owners' land has remained vacant since 1947.[115] Notice of adverse use thus is especially important.[116] However, neither the court's opinion, nor the briefs of the parties mention that the Browns ever asserted their claims to the respective owners of the claimed servient estate. It would thus appear, following *La Rue*, that the Browns' and their friends' use would be insufficient notice of their supposed claim of right.[117]

Finally, it could be argued that absent any explicit challenge to his rights, Battershell should be entitled to assume, because the Browns' parents sold the parcel to him, that the Browns' continued use of the road was not adverse.[118] Indeed, *La Rue* states that a conveyance or a claimant's contemplation of a conveyance, made while the use continues, implies permission.[119] While in the present case the conveyance involved the claimant as seller and the servient owner as buyer, the *La*

107. See text & notes 51-82 *supra*.
108. See text & notes 83-106 *supra*.
109. Slip op. at 4.
110. *Id.*
111. 105 Ariz. 65, 459 P.2d 498 (1969).
112. *Id.* at 72-73, 459 P.2d at 505-06; see discussion at text & notes 77-81 *supra*.
113. 66 Ariz. 299, 301-02, 187 P.2d 642, 643-44; *see* discussion at text & notes 61-68 *supra*.
114. Slip op. at 2.
115. *Id.*
116. See text & notes 59 & 68 *supra*.
117. The standard for notice of a claim of right in unimproved land appears to be higher than for improved land. See text & notes 10, 47-48 *supra*.
118. While this proposition is inconsistent with an easement by prescription, it forms the basis for an easement by implication. *See* note 26 *supra*.
119. 66 Ariz. at 304-05, 187 P.2d at 645-46.

Rue rationale should apply. At the time of sale, the road which is now the easement at issue was apparently plainly visible.[120] In addition, the road was the only route of ingress and egress used by the Browns.[121] Consequently, it seems that the parties contemplated continued and permissive use. Thus, subsequent use could not have, from the beginning, been adverse to Battershell's title.[122]

The other deficiency in the *Brown* decision appears in the court's discussion of interruption. In 1964, Mason tried to close off the putative easement by stringing a piece of barbed wire across the road, but was foiled when the "egg lady" drove through his barrier.[123] It is thus clear that Mason did not acquiesce in the use of the road.[124] It is not obvious, however, that this action even raises the issue of interruption. First, it is not clear whether an interruption by the "egg lady's" use of the road could be attributed to the claimant.[125] Second, even if this is an interruption, it occurred fourteen years before defendant Ameigh blocked the road with debris. The plaintiffs, then, could subsequently have acquired an easement through 10 years adverse use prior to the present action.[126]

It is important, however, to take up the issue of interruption for three reasons. First, both the parties' briefs and the court's opinion treat interruption as an issue.[127] Second, the doctrine of interruption in Arizona is confused and for this reason alone merits discussion.[128] Third, this is the only Arizona case dealing with prescriptive easements which has addressed the issue of interruption.[129]

The *Brown* court ruled that Mason's action was not an interruption because it was not "substantial," it did not result in "actual interference," and was not followed by a legal "attempt to test the right."[130]

---

120. Slip op. at 4.
121. *Id.*
122. See discussion in note 26 *supra*.
123. Slip op. at 3.
124. *Id.*
125. It is the *claimant's* use that must be interfered with in order to interrupt the prescriptive use. *See* Higginbotham v. Kuehn, 102 Ariz. 38, 39, 424 P.2d 166, 167 (1967); Gusheroski v. Lewis, 64 Ariz. 192, 197, 167 P.2d 390, 393 (1946).
126. ARIZ. REV. STAT. ANN. § 12-526 (1956).
127. Slip op. at 4-5.
128. See text & notes 96-106 *supra*.
129. *Cf.* Higginbotham v. Kuehn, 102 Ariz. 37, 39, 424 P.2d 165, 167 (1967) (involves adverse possession of a strip of land, not a prescriptive easement). See text & notes 89-95 *supra*.
130. Slip op. at 4 n.2. The court qualified this proposition by stating that "[a]n isolated instance of attempted interruption of the use resulting in no actual interruption and followed by no attempt to test the right will not *as a matter of law necessarily* destroy the presumption of a grant founded on a user in other respects sufficient." *Id.* (emphasis added) (citation omitted). It is puzzling how the emphasized phrase is to be understood. It appears that the court is saying that a non-substantial interference may, but as a matter of law need not, constitute an interruption. However, the court cites 28 C.J.S. *Easements* § 16(c) (apparently § 18(c)) (1941). This source requires at least temporary actual interference. *Id.* at § 18(c). In citing this source, the court is consequently endorsing that requirement.

It is clear, however, that stringing the barbed wire showed Mason's disapproval of the use. In addition, if Mason just happened to have placed the wire low enough so that it flattened the egg lady's tire, rather than perhaps scratching her headlights, he would have actually interfered with the road's use. Yet Mason's act would have been the same regardless of the small difference in the height of the wire. Thus, the distinction between actual interference and mere complaints is a specious one. Consequently, the courts should concentrate upon notice to the claimant of the owner's objection to the use of the land,[131] and not upon actual interference. The court, however, focuses not upon the clarity with which the owner asserts his title, but rather upon his actual interference with the use.[132] It thus follows prior Arizona case law which equates actual interference with what it is supposed to signify: an unequivocal assertion of ownership.

CONCLUSION

The facts of *Brown v. Ware* do not show that the claimants ever made a distinct and positive assertion of their claim of right sufficient to put the owners upon notice of this claim. In addition, if the claim of right was communicated to the owner, it is also unclear whether the servient owner's assertion of ownership was sufficiently unequivocal to constitute an interruption. Nonetheless, the Arizona Court of Appeals contributes to the confusion inherent in Arizona prescriptive easements law by its uncritical acceptance of the actual interference doctrine of interruption. Until this position is modified to allow for proof of interruption which is neither of physical nor of legal interference, prescriptive easements will indeed rest upon the "most unstable" of footings.

Scott Weible

131. An interruption clearly indicates to the user that his right to use the land is challenged. See text & notes 95-96, 98-99 *supra*.

132. *See* Slip op. at 4.

VIII. TORTS

CONSTRUING UNINSURED MOTORIST AUTOMOBILE INSURANCE COVERAGE: THE MEANING OF "UPON"

Traditionally, responsibility for loss arising out of an automobile accident is allocated to the party at fault.[1] Automobile liability insurance, however, allows the majority of American motorists to shift the loss to the company insuring the party at fault.[2] The failure or inability of some drivers to purchase automobile liability insurance, however, would preclude any insurance recovery for injuries sustained by the innocent victims of the uninsured motorist's negligence.[3] Consequently, uninsured motorist coverage has become a standard coverage provision in automobile insurance policies.[4] Uninsured motorist coverage permits the innocent injured party to recover from his own insurance company if the party at fault was uninsured.[5]

A present standard uninsured motorist clause provides, in part, coverage for "any other person while occupying an insured vehicle."[6] The language of this clause raises a fundamental question as to what circumstances constitute "occupying" for these purposes. An analysis of the judicial decisions in various jurisdictions reveals the divergent construction this standard policy provision has received.[7]

In *Manning v. Summit Home Insurance Company*,[8] a case of first impression in Arizona, the issue was whether Deeanna Manning was covered by an automobile insurance policy's uninsured motorist coverage as a person "occupying" the insured vehicle.[9] Prior to the accident, Manning had been taking a photograph of Joey Santa Maria, the named insured, while he positioned snow chains under the tires of the

---

1. A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE § 1.1, at 3 (1969).
2. *Id*; *see* W. PROSSER, LAW OF TORTS § 82, at 541-42 (1971).
3. A. WIDISS, *supra* note 1, at 3-4.
4. *Id.* § 1.11, at 15. Uninsured motorist coverage is mandated by statute in forty-seven states, including Arizona. *See* notes 61-62 *infra*.
5. A. WIDISS, *supra* note 1, § 1.1, at 4.; *see* Chambers v. Owens, 22 Ariz. App. 175, 177, 525 P.2d 306, 308 (1974); Transnational Ins. Co. v. Simmons, 19 Ariz. App. 354, 356, 507 P.2d 693, 695 (1973).
6. A. WIDISS, *supra* note 1, § 2.4, at 24.
7. 1 R. LONG, THE LAW OF LIABILITY INSURANCE § 8.02, at 8-11 (1975). *Compare* cases cited at note 19 *infra* (requiring physical contact) *with* cases cited at note 21 *infra* (permitting broader coverage under the "use" rule).
8. 128 Ariz. 79, 623 P.2d 1235 (Ct. App. 1980).
9. *Id.*

insured automobile.[10] She then placed the camera on the front seat of the car and returned to the rear of the vehicle to wait for Santa Maria to finish straightening the chains.[11] While standing two to three feet from the rear of the vehicle waiting to assist Santa Maria with the chore of putting the chains on the rear tires of the car, Manning was struck and injured by a vehicle driven by an uninsured motorist.[12]

The term "occupying" was defined in the Santa Maria policy as "in or upon or entering into or alighting from" the insured vehicle.[13] Manning contended that a reasonable construction of the policy provision would be that she was "upon" the insured vehicle at the time of the accident.[14] Summit Home Insurance Company, the defendant, responded that Manning could not have been "upon" the vehicle because she was neither in physical contact with the car, nor actively involved in putting the snow chains on the tires.[15]

The superior court granted Summit Home Insurance Company's request for summary judgment.[16] The Arizona Court of Appeals reversed the superior court and entered judgment for Manning as a matter of law.[17] The court posited three possible constructions of the term "upon" under the policy provision.[18] One possible construction would require physical contact with the insured automobile before the claimant is "upon" the vehicle.[19] A second possible construction would per-

---

10. *Id.* at 80, 623 P.2d at 1236.

11. *Id.*

12. *Id.* at 83, 623 P.2d at 1239.

13. *Id.* at 79, 623 P.2d at 1235. The Summit Home Insurance Company Policy, Coverage K, Uninsured Motorists provides:

> I. Damages for Bodily Injury Caused by Uninsured Automobiles: The company will pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, . . . sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile . . . .
>
> II. Definitions: (a) "insured" means: (1) the named insured as stated in the policy . . . and any person designated as named insured in the schedule and, while residents of the same household, the spouse of any such named insured and relatives of either; (2) any other person while occupying an insured automobile; and . . . . (e) Occupying. The word "occupying" means in or upon or entering into or alighting from.

Id. at 79 n.1, 623 P.2d at 1235 n.1.

14. Brief for Appellant at 10-11, Manning v. Summit Home Ins. Co., 128 Ariz. 79, 623 P.2d 1235 (Ct. App. 1980). The claimant's construction was based upon an application of the use rule. *Id.*; see text & notes 49-70 *infra*.

15. Brief for Appellee at 2, 8.

16. 128 Ariz. at 79, 623 P.2d at 1235.

17. *Id.* at 83, 623 P.2d at 1239.

18. *Id.* at 82-83, 623 P.2d at 1238-39.

19. *Id.* at 82, 623 P.2d at 1238. Cases involving the physical contact construction of the term "upon" generally consist of two types. First, some cases deny coverage where no touching occured. *See, e.g.*, Testone v. Allstate Ins. Co., 165 Conn. 126, 134, 328 A.2d 686, 691 (1973) (plaintiff was not "upon" the car because plaintiff was not in physical contact with the vehicle and the fact plaintiff was near the car when injured is of no significance); Whitmire v. Nationwide Mut. Ins. Co., 254 S.C. 184, 191, 174 S.E.2d 391, 394 (1970) ("in" and "upon" encompass situations where physical contact with the vehicle is necessary to allow recovery); Green v. Farm Bureau Mut. Auto. Ins. Co., 139 W.Va. 475, 479, 80 S.E.2d 424, 426 (1954) (plaintiff was not "upon" the

mit a claimant's intention to occupy the vehicle to be sufficient by itself to allow recovery.[20] Finally, the third possible construction would allow recovery on the theory that the claimant may be said to be "upon" the vehicle if the claimant's activities are in close proximity to the vehicle and related to the operation and use of the vehicle.[21] This third construction is also referred to as the "use" rule[22] and is formulated in several different ways by the various courts that have relied upon it.[23] The Arizona Court of Appeals in *Manning* adopted a form of the "use" rule by holding that Manning's activities were integrally related to the use and occupancy of the vehicle.[24]

This casenote will initially discuss the three possible constructions of the term "upon" suggested in the *Manning* opinion. A critical analysis of the application of the Arizona Court of Appeals' formulation of the use rule to the instant facts will follow. Finally, some implications and consequences of the court's holding will be discussed.

---

vehicle since there was no physical contact with the vehicle immediately prior to the injury). The second type of case allows coverage where a touching occured. These latter cases recognize the proposition that actual physical contact with the insured's automobile is sufficient to sustain a recovery under the uninsured motorist policy provision. *See, e.g.*, Henderson v. Hawkeye-Security Ins. Co., 252 Iowa 97, 103, 106 N.W.2d 86, 89-90 (1960) (plaintiff injured while leaning against her stalled vehicle was held to be "occupying" the vehicle); Sherman v. New York Cas. Co., 78 R.I. 393, 397, 82 A.2d 839, 841 (1951) (plaintiff with his hands and knees in contact with the vehicle while trying to stop it from rolling was held to be "upon" the vehicle); McAbee v. Nationwide Mut. Ins. Co., 249 S.C. 96, 100, 152 S.E.2d 731, 732-33 (1967) (plaintiff standing with his back against the truck to stop it from rolling was held to be "upon" the vehicle).

20. 128 Ariz. at 83, 623 P.2d at 1239; *see* Fidelity Cas. Co. of N.Y. v. Garcia, 368 So.2d 1313 (Fla. Dist. Ct. App. 1979). Construction of the term "alighting from" may be based upon "the time and place at which the insured shows an intention, evidenced by an overt act based on that intention, to undertake a new direction or activity." *Id.* at 1315. *See also* Carta v. Providence Wash. Indem. Co., 143 Conn. 372, 122 A.2d 734 (1956). *But see* cases cited at note 47 *infra*.

21. 128 Ariz. at 82, 623 P.2d at 1238; *see* Cocking v. State Farm Mut. Auto. Ins. Co., 6 Cal. App. 3d 965, 970, 86 Cal. Rptr. 193, 196-97 (1970) (recovery extended to one in a position in relation to the vehicle as to be injured in its use); Stoddard v. "Aid" Ins. Co. (Mut.), 97 Idaho 508, 511, 547 P.2d 1113, 1116 (1976) (paraplegic had remained in substantial contact with the vehicle and was engaged in acts which resulted from an involvement with the vehicle as a means of transportation); Wolf v. American Cas. Co., 2 Ill. App. 2d 124, 130, 118 N.E.2d 777, 780 (1954) (the word "upon" connotes some physical relationship between the injured and the car that enlarges the area defined by the words "in", "entering" or "alighting from"); Nickerson v. Citizens Mut. Ins. Co., 393 Mich. 324, 331, 224 N.W.2d 896, 899 (1975) (recovery grounded upon immediate prior occupancy and subsequent injury arising out of the use or repair of the insured vehicle); Nelson v. Iowa Mut. Ins. Co., 163 Mont. 82, 86, 515 P.2d 362, 364 (1973) (although deceased's death from frostbite and exposure occured 143 feet away from the insured vehicle, recovery was allowed because her activities up to the time of death were directed toward extricating herself from the car, and therefore were reasonably connected with the operation of the vehicle); Robson v. Lightning Rod Mut. Ins. Co., 59 Ohio App. 2d 261, 264, 393 N.E.2d 1053, 1055 (1978) (definition of "occupying" should be based on analysis of the relationship between the vehicle and the injured person within a reasonable geographic perimeter); Madden v. Farm Bureau Mut. Auto. Ins. Co., 82 Ohio App. 111, 114-15, 79 N.E.2d 586, 588 (1948) coverage provided in case where owner was using the vehicle and was in a position to be injured in its use); Moherek v. Tucker, 69 Wis.2d 41, 48, 230 N.W.2d 148, 152 (1975) (plaintiff, holding a tire that was in turn pressed up against the bumper of the insured automobile, had not severed his connection with the vehicle because up to the time of injury he was continuously attempting to start the car).

22. See text & notes 49-70 *infra*.

23. See text & notes 67-70 *infra*.

24. 128 Ariz. at 83, 623 P.2d at 1239; see text at note 80 *infra*.

Three Alternative Constructions of the Term "Upon"

Court opinions from various state jurisdictions define the coverage of the standard uninsured motorist clause[25] either in terms of reasonable proximity to the insured vehicle[26] or in terms of some relationship between the insured vehicle and the claimant.[27] In construing the terms "in," "upon," "entering into" and "alighting from," as they are used in uninsured motorist coverage, courts adhere to well-established principles of construction applied generally to insurance policies.[28] Thus, when the applicable term in the insurance contract is clear and unambiguous, the term is understood in its plain, ordinary and popular sense.[29] Conversely, when the term in the insurance contract is ambiguous so that the intention of the parties cannot be ascertained, the term is liberally construed in favor of the insured.[30]

Many courts find physical contact with the insured vehicle necessary in order for a person to be "upon" the vehicle.[31] In justifying this "physical contact" construction, these courts have found the term "upon" to be clear and unambiguous and hence give it the meaning ordinarily accepted in everyday speech.[32] For example, in *Green v. Farm Bureau Mutual Automobile Insurance Company*,[33] the plaintiff was changing a flat tire on the insured vehicle when the automobile

25. See note 13 *supra*.

26. Some courts have gone so far as to require actual physical contact between the insured vehicle and the injured person. See text & note 19 *supra*; text & notes 31-36 *infra*.

27. A. WIDISS, *supra* note 1, § 2.11, at 47 (Supp. 1981); *see* Robson v. Lightning Rod Mut. Ins. Co., 59 Ohio App. 2d 261, 264, 393 N.E.2d 1053, 1055 (1978) (the question of whether the vehicle was "occupied" by the plaintiff is governed by the relationship between the insured vehicle and the plaintiff who is within reasonable proximity to the vehicle); Madden v. Farm Bureau Mut. Auto. Ins. Co., 82 Ohio App. 111, 114-15, 79 N.E.2d 586, 588 (1948) (the language of the policy intends to provide coverage in situations where the owner not only was using the insured vehicle, but was also in a position in relation to the vehicle as to be injured in its use).

28. *See generally* cases cited at notes 29-30 *infra*.

29. Christoffer v. Hartford Accident & Indem. Co., 123 Cal. App. 2d Supp. 979, 981, 267 P.2d 887, 890 (1954) ("upon" is given the meaning ordinarily accepted in everyday speech); New Amsterdam Cas. Co. v. Fromer, 75 A.2d 645, 647-48 (D.C. 1950) ("entering into" given ordinary meaning that common speech imports); Katz v. Ocean Accident & Guar. Corp., 202 Misc. 745, 747, 112 N.Y.S.2d 737, 739 (1952) ("alighting from" given ordinary meaning of common speech).

30. Wolf v. American Cas. Co., 2 Ill. App. 2d 124, 126, 118 N.E.2d 777, 780 (1954) (ambiguous insurance provisions under which an insurer seeks to limit its liability must be construed strongly in favor of the insured); Nelson v. Iowa Mut. Ins. Co., 163 Mont. 82, 86, 515 P.2d 362, 364 (1973) (the ambiguous language of the policy is not definitive of the limits of liability and must therefore be construed strongly against the insurer); Madden v. Farm Bureau Mut. Auto. Ins. Co., 82 Ohio App. 111, 113, 79 N.E.2d 586, 588 (1948) (insurance policies must be construed strongly against the insurer and any ambiguity should be resolved in favor of the insured); Sherman v. New York Cas. Co., 78 R.I. 393, 397, 82 A.2d 839, 841 (1951) (when language in the policy is susceptible to two reasonable constructions, such ambiguity will be resolved in favor of the insured).

31. *See* cases cited note 19 *supra*.

32. Christoffer v. Hartford Accident & Indem. Co., 123 Cal. App. 2d Supp. 979, 981, 267 P.2d 887, 890 (1954); United Farm Bureau Mut. Ins. Co. v. Pierce, 152 Ind. App. 387, 389-90, 283 N.E.2d 788, 789-90 (1972); Green v. Farm Bureau Mut. Auto. Ins. Co., 139 W.Va. 475, 479, 80 S.E.2d 424, 426 (1954).

33. 139 W.Va. 475, 80 S.E.2d 424 (1954).

jack slipped and caused the vehicle to fall on his arm.[34] The court found that the terms "in," "upon," "entering" and "alighting from" are not ambiguous but rather are of plain meaning, easily understood and of common use.[35] The court thus denied the plaintiff coverage under the insurance policy provision because he was outside of the automobile and not in physical contact with it and hence not "upon" the vehicle as the term is commonly understood.[36]

The strict, literal construction behind the physical contact theory may lend a degree of uniformity to courts' decisions.[37] However, the physical contact theory has one major drawback. If insurance coverage is wholly dependent upon physical contact in every situation, then recovery may often be based entirely upon the fortuitous circumstance of whether a touching occured.[38] Thus, construction of the term "upon" as requiring physical contact may lead to illogical, arbitrary coverage.[39]

Some jurisdictions, recognizing that arbitrary coverage results from application of the physical contact theory, have expressed the view that mere physical contact alone is not the test of whether a claimant was "upon" the vehicle.[40] For instance, in *Ferguson v. Aetna Casualty & Surety Company*,[41] the plaintiff was holding the door handle of another person's car in order to steady herself as she made her way to her own car.[42] In the process, she fell and broke both legs.[43] The

34. *Id.* at 476, 80 S.E.2d at 425.

35. *Id.* at 479, 80 S.E.2d at 426; *see* text & note 29 *supra*.

36. 139 W.Va. at 479, 80 S.E.2d at 426.

37. 1 R. LONG, note 7 *supra*. The decisions in various jurisdictions illustrate the "unsound result of confused thinking" in the construction of the insurance policy provision. *Id.* Uniformity in courts' decisions is desirable because it would allow a plaintiff a greater degree of certainty as to his chances for recovery. In addition, uniformity among the various jurisdictions might help eliminate forum shopping.

38. Nickerson v. Citizens Mut. Ins. Co., 393 Mich. 324, 331, 224 N.W.2d 896, 899 (1975). The *Nickerson* court stated that

> While getting out of the auto, a person would be an occupant and covered; after closing the door but still touching it, there would be coverage; after removing his hand from the door there would be no coverage; while walking to the front of the auto, there would be no coverage; after arriving at the front of the auto, and placing his hand on the front hood, there would be coverage again . . . .

Id. at 331, 224 N.W.2d at 899 (quoting plaintiff's brief). *Accord*, Manning v. Summit Home Ins. Co., 128 Ariz. 79, 82, 623 P.2d 1235, 1238 (Ct. App. 1980); Robson v. Lightning Rod Mut. Ins. Co., 59 Ohio Misc. 61, 64, 393 N.E.2d 1056, 1059 (1978).

39. *See* cases cited note 38 *supra*; notes 40-45 *infra*.

40. *E.g.*, Lokos v. New Amsterdam Cas. Co., 197 Misc. 40, 42, 93 N.Y.S.2d 825, 826 (1949), *aff'd. mem.*, 197 Misc. 43, 96 N.Y.S.2d 153 (1950) (insurance policy covered person sustaining injuries while "upon" the automobile only if the injury arose out of the use of the vehicle by or with the permission of the named insured); Ferguson v. Aetna Cas. & Sur. Co., 369 S.W.2d 844, 845-46 (Tex. Civ. App. 1963) (the court found plaintiff, holding onto door handle of a car to steady herself as she walked around it, was not "in" or "upon" the car and could not recover after she fell and was injured); Bowlin v. State Farm Mut. Auto. Ins. Co., 46 Tenn. App. 260, 262-63, 327 S.W.2d 66, 67 (1959) (plaintiff sustained injuries from straining his back while pushing his truck which had stalled in the snow, but the court found that despite the physical contact, plaintiff was not "upon" the insured vehicle within the meaning of the insurance policy).

41. 369 S.W.2d 844 (Tex. Civ. App. 1963).

42. *Id.* at 845.

plaintiff then sought to recover under the medical payments provision of her insurance policy, which required the plaintiff to be "upon" a vehicle.[44] The court stated that to hold the plaintiff was "upon" the other person's vehicle merely because she was in physical contact with it would result in a distorted and unreasonably strained construction of the insurance policy's coverage.[45]

A second possible construction of the term "upon" is that intent to occupy an insured vehicle may be enough by itself to allow recovery under the insurance policy.[46] Some courts, by expressly rejecting such a construction, have inversely implied that a construction based upon intent to occupy is conceivable. Apparently, however, no court has gone so far as to adopt this construction for the term "upon."[47] One difficulty with a construction of the term "upon" in terms of the claimant's intent is the inherent subjectivity of the claimant's state of mind. Such a construction also lacks any sort of guidelines which would provide some degree of consistency for court decisions.[48]

The third possible construction of the term "upon" arose because many courts felt the language of the standard uninsured motorist provision to be ambiguous.[49] Ambiguity in an insurance policy provision allows a court to liberally construe the language so as to favor the insured.[50] The liberal judicial construction of the term "upon" permits the court to invoke some formulation of the "use" rule, which provides that as long as the injury results from the use of the insured automobile the injured claimant is covered.[51]

Most courts have adopted some variation of the "use" rule[52] and

---

43. *Id.*

44. *Id.* The plaintiff's insurance policy provided medical payments for "*bodily injury, caused by accident, while occupying or through being struck by an automobile.*" *Id.* "Occupying" was defined by the policy as "*in or upon or entering into or alighting from an automobile.*" *Id.*; *cf.* text & note 13 (language of the uninsured motorist coverage).

45. 369 S.W.2d at 845-46.

46. *See* note 20 *infra*. At least, plaintiff's counsel must have believed that these were grounds to support the pleadings. *See* FED. R. CIV. P. 11.

47. *See, e.g.*, Manning v. Summit Home Ins. Co., 128 Ariz. 79, 83, 623 P.2d 1235, 1239 (Ct. App. 1980) (intention alone is insufficient to create coverage); Testone v. Allstate Ins. Co., 165 Conn. 126, 134, 328 A.2d 686, 691 (1973) (intent to enter is not sufficient to allow recovery); New Amsterdam Cas. Co. v. Fromer, 75 A.2d 645, 648 (D.C. 1950) (intent to enter does not convert an act of approaching into an act of entering). *But see* text & note 81 *infra* (the Arizona court will consider intent in applying the "use" rule).

48. See text & note 37 *supra*.

49. *See, e.g.*, Wolf v. American Cas. Co., 2 Ill. App. 2d 124, 130, 118 N.E.2d 777, 780 (1954); Nelson v. Iowa Mut. Ins. Co., 163 Mont. 82, 86, 515 P.2d 362, 364 (1973); Sherman v. New York Cas. Co., 78 R.I. 393, 397, 82 A.2d 839, 841 (1951).

50. *See generally* cases cited note 30 *supra*. *See* text & notes 28-30 *supra*.

51. R. LONG, *supra* note 7, § 8.02, at 8-13; 2 I. SCHERMER, AUTOMOBILE LIABILITY INSURANCE § 21.07, at 21-10 (rev. ed. 1981) (The use rule covers "[a] person outside the vehicle, whose presence in proximity to it bears some degree of direct relationship to its use for automotive purposes or for entry or departure").

52. Nelson v. Iowa Mut. Ins. Co., 163 Mont. 82, 86, 515 P.2d 362, 363 (1973); *see, e.g.*, Cocking v. State Farm Mut. Auto. Ins. Co., 6 Cal. App. 3d 965, 969-70, 86 Cal. Rptr. 193, 197 (1970);

allow recovery for a person outside the vehicle when either his proximity to the vehicle or his conduct has some relationship to the use of the vehicle.[53] These courts have not restricted the term "occupying" to mean entry, departure, or presence within or upon the vehicle in the strict sense of occupancy.[54] For example, *Cocking v. State Farm Mutual Automobile Insurance Company*[55] involved a situation similar to Manning in which a plaintiff recovered under the "use" rule. In *Cocking*, the plaintiff was standing approximately four feet behind the insured car when he was struck by an uninsured motorist.[56] At the time of the impact, the plaintiff was preparing to put snow chains on the car tires.[57] The California court found that coverage extended to a person using an insured vehicle, either as the named insured or with the named insured's permission, when the person using the vehicle is "in such a position in relation thereto as to be injured in its use."[58] The court further stated that the plaintiff's purpose and intent at the time of injury are considered in determining whether the plaintiff was in such a position as to be injured in the "use" of the insured vehicle.[59] Applying this "use" rule to the facts, the court in *Cocking* allowed the plaintiff to recover because he was "upon" the insured vehicle within the meaning of the policy provision.[60]

The "use" theory is based upon the same policies that underlie the standard uninsured motorist coverage statutes. Those statutes, which require the incorporation of uninsured motorist coverage in automobile insurance policies,[61] protect an insured while he is "using" the insured vehicle.[62] The policy behind the uninsured motorist coverage statutes

---

Robson v. Lightning Rod Mut. Ins. Co., 59 Ohio Misc. 61, 65, 393 N.E.2d 1056, 1058 (1978); Pennsylvania Nat'l. Mut. Cas. Ins. Co. v. Bristow, 207 Va. 381, 385, 150 S.E.2d 125, 128 (1966). The "use" rule has not been applied solely to construing the term "upon." *See* Stoddard v. "Aid" Ins. Co. Mut., 97 Idaho 508, 547 P.2d 1113 (1976). The *Stoddard* court found that the plaintiff's temporary absence from the car to investigate a noise did not change his status as an occupant because he had not completed all the acts that could reasonably be expected from one "alighting from" a car. *Id.* at 510, 547 P.2d at 1115. The insured's action involved continued use of the car as a means of transportation. *Id.* at 511, 547 P.2d at 1116. Thus, Stoddard was entitled to recover under the policy.

53. 2 I. SCHERMER, note 51 *supra*. *See generally* cases cited note 88 *infra*, denying coverage when the claimant is neither engaged in an activity directly related to the use or operation of the insured vehicle, nor within a reasonable zone of proximity to the insured vehicle.

54. 2 I. SCHERMER, note 51 *supra*; see cases cited at note 52 *supra*.

55. 6 Cal. App. 3d 965, 86 Cal. Rptr. 193 (1970).

56. *Id.* at 967, 86 Cal. Rptr. at 195.

57. *Id.*

58. *Id.* at 969-70, 86 Cal. Rptr. at 196-97.

59. *Id.* at 970, 86 Cal. Rptr. at 197.

60. *Id.* at 971, 86 Cal. Rptr. at 198.

61. A. WIDISS, *supra* note 1, § 1.11, at 15. As of 1968, only four states, Maryland, New Jersey, North Dakota and Wyoming, had not required uninsured motorist coverage to be included in all automobile liability insurance policies. *Id.* As of 1980, however, Wyoming, § 31-10-101 (1977) has enacted mandatory uninsured motorist coverage.

62. 2 I. SCHERMER, *supra* note 51, § 21.08, at 21-12. Arizona's uninsured motorist statute is found at ARIZ. REV. STAT. ANN. § 20-259.01 (1975). This statute, which requires all automobile

is to protect the innocent victim of an automobile accident involving a negligent uninsured motorist by making available to the innocent victim the fullest benefits of insurance coverage.[63] Similarly, a broad, liberal interpretation of the term "upon," as it is used in the uninsured motorist coverage provision to define "insured,"[64] protects the innocent victim[65] by providing the broadest possible insurance coverage.[66]

One danger with the "use" rule, however, is the ambiguity which stems from its various formulations. In one jurisdiction the plaintiff may be required to prove that his injury was the "direct result" of his use of the vehicle.[67] Another jurisdiction may apply a formulation whereby the plaintiff's actions must be connected with the use of the automobile in some "reasonable" manner.[68] Some courts use broad language in their formulation of the "use" rule, allowing a plaintiff whose connection with the vehicle "immediately relates" to his occupancy to recover.[69] A narrower formulation, however, may require that the injury occur within a "reasonably close proximity" to the insured vehicle and that the injury involve an activity "directly related" to the vehicle.[70] This diversity in the language adopted by courts to articulate their "use" rule lends a degree of uncertainty to the elements of the plaintiff's *prima facie* case. Thus, in jurisdictions that have adopted a form of the "use" rule, it is important to note the exact language used by the particular jurisdiction in which the plaintiff intends to bring suit.

Application of the "use" Rule in Manning

In *Manning v. Summit Home Insurance Company*,[71] the Arizona Court of Appeals adopted a form of the "use" rule.[72] The court specifi-

liability insurance policies to include uninsured motorist coverage, provides protection for the insured for injuries suffered at the hands of uninsured motorists which arise out of the "ownership, maintenance or use of a motor vehicle." *Id.* at § 20-259.01 (A).

63. *E.g.*, State Farm Mut. Auto. Ins. Co. v. Tarantino, 114 Ariz. 420, 422-23, 561 P.2d 744, 746-47 (1977); Bacchus v. Farmers Ins. Group Exch., 106 Ariz. 280, 283-84, 475 P.2d 264, 267-68 (1970); Welch v. Hartford Cas. Ins. Co., 221 Kan. 344, 348, 559 P.2d 362, 366 (1977).

64. See note 13 *supra*.

65. See text & note 5 *supra*.

66. Application of the "use" rule, however, does not always lead to recovery. *See* Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Bristow, 207 Va. 381, 150 S.E.2d 125 (1966). In *Bristow*, the court found that Bristow's contact with the insured automobile was merely incidental to a neighborly act and not connected with Bristow's use of the automobile; hence, Bristow was not "upon" the vehicle. *Id.* at 385, 150 S.E.2d at 128.

67. Madden v. Farm Bureau Mut. Auto. Ins. Co., 80 Ohio App. 111, 113, 79 N.E.2d 586, 588 (1948); *see* R. H. LONG, *supra* note 6, § 8.02, at 8-13.

68. Nelson v. Iowa Mut. Ins. Co., 163 Mont. 82, 86, 515 P.2d 362, 363 (1973).

69. Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Bristow, 207 Va. 381, 385, 150 S.E.2d 125, 128 (1966).

70. Robson v. Lightning Rod Mut. Ins. Co., 59 Ohio Misc. 61, 65, 393 N.E.2d 1056, 1058 (1978).

71. 128 Ariz. 79, 623 P.2d 1235 (Ct. App. 1980).

72. *Id.* at 83, 623 P.2d at 1239; *see* text & note 80 *infra*.

cally rejected the "physical contact" theory as an overly narrow construction of the term "upon."[73] The *Manning* court also rejected the notion that intention alone is sufficient to create coverage under the policy language.[74] The court did, however, adopt a formulation of the "use" rule which takes the injured person's intent into account in determining coverage.[75]

The court reasoned that the fact various jurisdictions reach different conclusions as to the meaning of specific language in an insurance contract is strong evidence that the language is ambiguous.[76] Other jurisdictions have reached conflicting conclusions in construing the term "upon."[77] Consequently, the Arizona court found the term "upon" to be ambiguous.[78] The court was then compelled to construe the provision most favorably to the insured and strictly against the insurer.[79]

After considering the various possible constructions of the term "upon," the court settled on a form of the "use" rule—"if one's activities are in such close proximity to the car and so related to its operation and use that they are an integral part of one's occupancy and use of the car, then one may be said to be 'upon' the car."[80] In determining whether a plaintiff's conduct is an integral part of the occupancy and use of the car, the Arizona court will take into consideration not only the act in which the plaintiff was engaged in at the time of injury, but also the plaintiff's purpose and intent.[81]

In applying its formulation of the "use" rule, the court held that Manning's activity was in such close proximity to the insured vehicle and so related to its use that the activity was an integral part of her occupancy.[82] This conclusion resulted from the fact that Manning was regarded as a participant in the tire-chaining effort at the time of the injury.[83] Despite her temporary lack of physical participation at the time of the impact, the court found that Manning had not abandoned her purpose to lend assistance nor had she done anything inconsistent with that purpose.[84] She was, therefore, "upon" the car for purposes of

73. *Id.* at 82, 623 P.2d at 1238.
74. *Id.* at 83, 623 P.2d at 1239. According to the court, however, the *Manning* case was not a case of mere intention. *Id.*
75. *See* text & notes 80-81 *infra*.
76. *Id.* at 81, 623 P.2d at 1237; *see* text & note 7 *supra*.
77. 128 Ariz. at 81-82, 623 P.2d at 1237-38.
78. *Id.*
79. *Id.* at 82, 623 P.2d at 1238.
80. *Id.*
81. *Id.*
82. *Id.* at 83, 623 P.2d at 1239.
83. *Id.*; *see* text & note 86 *infra*.
84. 128 Ariz. at 83, 623 P.2d at 1239.

the policy provision.[85]

Attaching snow chains to the car's tires appears integrally related to the use and operation of the car.[86] The court in *Manning* seemed to indicate, however, that Manning's photographic activity immediately preceding the tire-chaining effort would not, by itself, justify recovery under the policy provision.[87] Lack of coverage for the photographic activity would be consistent with the holdings in several other jurisdictions which also deny coverage when the claimant is neither engaged in an activity directly related to the use or operation of the vehicle nor within a reasonable zone of proximity to the insured vehicle.[88]

Under the facts of the *Manning* case, it would seem that Manning's photographic activity was probably not integrally related to the use and occupancy of the car. If, however, a car was used on a sightseeing trip and the car momentarily stopped to enable the plaintiff to open the door, stand up and quickly take a photograph, a strong argument might then be made in favor of recovery under the court's formulation of the "use" rule.[89]

---

85. *Id.*

86. *See, e.g.*, Cocking v. State Farm Mut. Auto. Ins. Co., 6 Cal. App. 3d 965, 971, 86 Cal. Rptr. 193, 199 (1970) (person holding tire chains prior to putting them on the car held to be occupying the car); Smith v. Girley, 260 La. 223, 235, 255 So.2d 748, 760 (1971) (person standing near car in order to attach jumper cables held to be occupying the car); Motor Vehicle Accident Indem. Corp. v. Oppedisano, 41 Misc. 2d 1029, 1029, 246 N.Y.S.2d 879, 879-80 (1964) (claimant continued "occupying" the vehicle after exiting to extricate the car from a snowbank because the brief period necessary to enable continued use of the vehicle should not bar recovery under the scope of the statutory protection).

87. 128 Ariz. at 83, 623 P.2d at 1239. The court stated,

> While her preceding photographic activities could not be said to be a part of the tire chaining effort, appellant had put the camera away and had been expressly summoned to the rear of the vehicle by Santa Maria to assist him in fastening the chains to the left rear tire.

Id.

88. Government Employees Ins. Co. v. Keystone Ins. Co., 442 F. Supp. 1130, 1134 (E.D. Pa. 1977) (plaintiff who alighted from the insured vehicle and walked up to physically confront the driver who had been "tailgating" him was struck and injured by an uninsured motorist); Fajen v. Allstate Ins. Co., 96 Idaho 886, 886, 538 P.2d 1190, 1190 (1975) (plaintiff who left his insured automobile upon witnessing his wife's automobile accident sustained a back injury from lifting the Mercedes to free his wife); Greer v. Kenilworth Ins. Co., 60 Ill. App. 3d 22, 25, 376 N.E.2d 346, 349 (1978) (plaintiff was 10 to 15 feet away from the insured vehicle when struck and there was no relationship between the insured vehicle and the cause of the injuries); Ostendorf v. Arrow Ins. Co., 288 Minn. 491, 494, 182 N.W.2d 190, 192 (1970) (plaintiff got out of insured vehicle, crossed the street to a dairy store and was injured while walking back to the car); Aetna Ins. Co. v. Espinosa, 92 Misc.2d 200, 203, 399 N.Y.S.2d 975, 977 (1977) (plaintiff who had temporarily stopped his insured vehicle to go across the street was struck by another vehicle and thrown onto his car's hood); Insurance Co. of N. Am. v. Perry, 204 Va. 833, 838, 134 S.E.2d 418, 421 (1964) (plaintiff who met his death when he was serving a warrant 150 feet away from the insured vehicle was not an occupant under the policy provision). *But see* Rau v. Liberty Mut. Ins. Co., 21 Wash. App. 326, 331, 585 P.2d 157, 162 (1978) (truck driver, who left his truck to seek directions and was returning to the truck when he was struck by an uninsured motorist 20 feet away from the insured truck, was using the truck at the time of the accident and was allowed to recover under the policy provision).

89. The "use" rule adopted by the court in *Manning* allows recovery if a plaintiff's activity is in such close proximity to the insured vehicle and so related to the operation and use of the car that the activity is an integral part of his occupancy of the vehicle. The plaintiff's purpose and

The Arizona Court of Appeals' interpretation of the language in the policy is a reasonable and just resolution of the coverage issue. As the court itself pointed out, "this approach is consistent with the policy and principles of interpretation accorded the statutorily mandated uninsured motorist coverage [in Arizona]."[90] In addition, a liberal construction of the term "upon" implements the time-honored maxim of construing ambiguous policy language against the insurer.[91]

Some Implications of Manning

One implication of the *Manning* holding is that the court's interpretation of the word "upon" is likely to make it difficult for Arizona courts to decide whether a particular set of facts falls within the meaning of the provision as it has been construed.[92] The court's formulation of the "use" rule contains several ambiguities. How close to the vehicle must the plaintiff be in order to be in sufficiently "close proximity?" What constitutes "operation" of the car? What constitutes "use" of the car? What degree of relationship between the plaintiff's conduct and his use and operation of the car will render his conduct an "integral part" of the occupancy and use of that car?

The "use" rule articulated by the Arizona court must thus be interpreted as future cases arise. There is obviously potential uncertainty in the application of the Arizona court's formulation of the "use" rule to the facts of various cases. Ultimately, however, each case must stand on its own facts.[93]

Conclusion

In *Manning*, the Arizona Court of Appeals dealt with the construction of the term "upon" as found in the uninsured motorist provision of

---

intent, as well as the specific activity, will be considered in the determination of whether the plaintiff's conduct is integrally related to the use and occupancy of the car. 128 Ariz. 79, 82-83, 623 P.2d 1235, 1238-39 (Ct. App. 1980).

One could argue that the hypothetical plaintiff was in a very close zone of proximity to the vehicle while she was standing between the open car door and the vehicle to take a picture. Further, the activity she was engaged in was closely related to the use of the automobile as a sightseeing tool. The hypothetical plaintiff's purpose at the time of the injury was to take a quick photograph of the scenery, after which she intended to immediately resume her place in the car to continue the sightseeing trip. Thus, the application of the facts to the Arizona court's formulation of the use rule reveals that the photographic activity in *Manning* might conceivably be regarded as part of the occupancy of the insured vehicle.

90. 128 Ariz. at 82, 623 P.2d at 1238; see text & note 62 *supra*.

91. State Farm Mut. Ins. Co. v. Paynter, 122 Ariz. 198, 204, 593 P.2d 948, 954 (1979); Parks v. American Cas. Co., 117 Ariz. 339, 341, 572 P.2d 801, 803 (1977). See text & notes 28, 30 *supra*.

92. See text & notes 86-89 *supra*.

93. *See* Tyler v. Insurance Co. of N. Am., 331 So.2d 641, 645 (Ala. 1976). Consider in this regard the hypothetical at note 89 *supra*; *see* Saint Paul-Mercury Indem. Co. v. Broyles, 230 Miss. 45, 49, 92 So.2d 252, 254 (1957) ("no general rule of interpretation can be formulated *in vacuo*" with regard to the term "while alighting").

an automobile liability insurance policy. Although the various jurisdictions are in disagreement as to which construction should be applied, the Arizona court found the term to be ambiguous, requiring liberal construction in favor of the insured. The court rejected the narrow physical contact theory which would require actual physical contact with the insured vehicle before allowing recovery. In addition, the plaintiff's intent to occupy the vehicle would not by itself be sufficient to allow recovery. The court instead settled on a formulation of the "use" rule. The finding that Manning continuously intended and acted to assist in putting snow chains on the tires led the court to conclude Manning was "upon" the vehicle within the meaning of the policy.

Although several articulations of the "use" rule exist, the one chosen by the Arizona court requires a finding that the plaintiff's activities are in such close proximity to the insured vehicle and so related to its operation and use as to be an integral part of the plaintiff's occupancy and use of the vehicle. This interpretation of the "use" rule may, at first glance, appear straightforward and unambiguous. In the future, however, given the myriad of factual situations which can arise, much inconsistency in court decisions may result in applying the rule. In light of the purpose of Arizona's uninsured motorist statutes, the "use" rule is, nevertheless, the most reasonable and just approach for providing uninsured motorist coverage for the injuries of the innocent victim.

Carrie L. Pavlich

EXTENSION OF THE NEGLIGENT SUPERVISION DOCTRINE IN THE AREA OF HOSPITAL LIABILITY

Most jurisdictions recognize two distinct legal theories underlying hospital liability in medical malpractice cases: vicarious liability[1] and negligent supervision.[2] In recent years, however, the clear distinction between the two has eroded. One commentator has even gone so far as to say it has been all but obliterated.[3]

In *Fridena v. Evans*,[4] the Arizona Supreme Court, presented with a choice between the two theories, predicated liability solely on a negligent supervision theory.[5] In so doing, the court clarified the distinction between negligent supervision and vicarious liability[6] and thus maintained the traditional dual theory concept in Arizona. It appears, however, that the court expanded the currently perceived doctrine of negligent supervision[7] or, at a minimum, liberalized the constructive knowledge principle in the process.[8] This liberalization may have deleterious consequences for the small hospital, especially when the hospital is controlled by operating surgeons.[9]

On a separate issue, *Fridena* held that a doctor of medicine was properly permitted to testify as to the standard of care which should have been exercised by a doctor of osteopathy.[10] In so doing, the court

---

1. Evans v. Bernhard, 23 Ariz. App. 413, 417, 533 P.2d 721, 725 (1975); Beeck v. Tucson Gen. Hosp., 18 Ariz. App. 165, 170-71, 500 P.2d 1153, 1158-59 (1972); *see* text & notes 22-58 *infra*.

2. Tucson Medical Center, Inc. v. Misevch, 113 Ariz. 34, 36, 545 P.2d 958, 960 (1976); Purcell v. Zimbelman, 18 Ariz. App. 75, 81, 500 P.2d 335, 341 (1972); *see* text & notes 59-100 *infra*.

3. Southwick, *The Hospital as an Institution—Expanding Responsibilities Change Its Relationship with the Staff Physician*, 9 CAL. W. L. REV. 429, 452 (1973) [hereinafter *The Hospital as an Institution*]. *See generally* Southwick, *The Hospital's New Responsibility*, 17 CLEV.-MAR. L. REV. 146 (1968); Southwick, *Vicarious Liability of Hospitals*, 44 MARQ. L. REV. 153 (1960) [hereinafter *Vicarious Liability of Hospitals*].

4. 127 Ariz. 516, 622 P.2d 463 (1980).

5. *Id.* at 519-20, 622 P.2d at 466-67.

6. In rejecting the vicarious liability argument advanced by the hospital, the court at least recognized its viability. See *id.* at 518, 622 P.2d at 465. It did not merely hold the hospital liable because the negligent physician was a part of the total medical care organization, as Professor Southwick has suggested the test is gradually becoming. See note 51 *infra*. Only in this way would the traditional distinction between the theories have been further clouded. Although various parts of the opinion speak of "agency," "scope of authority," and "knowledge imputable to the hospital"—language commonly seen in a *respondeat superior* context, the court did not, in fact, further cloud the distinction. 127 Ariz. at 519, 622 P.2d at 466. Rather, it clarified the appropriate use of each theory to impose liability in a particular hospital-physician relationship. This is the traditional choice of theory approach in the hospital liability setting. See text & notes 22-100 *infra*.

7. *See, e.g.*, Purcell v. Zimbelman, 18 Ariz. App. 75, 83, 500 P.2d 335, 343 (1972); Moore v. Board of Trustees of Carson-Tahoe Hosp., 88 Nev. 207, 211-12, 495 P.2d 605, 607-08, *cert. denied*, 409 U.S. 879 (1972); Corleto v. Shore Memorial Hosp., 138 N.J. Super. 302, 307-09, 350 A.2d 534, 537-38 (1975).

8. Fridena v. Evans, 127 Ariz. 516, 519, 622 P.2d 463, 466 (1980).

9. See text & notes 95-100 *infra*.

10. 127 Ariz. at 520, 622 P.2d at 467.

followed a generally recognized exception to the "same school of medicine" rule as to expert testimony in medical malpractice cases.[11]

In *Fridena*, the plaintiff seriously injured her right femur in a motorcycle-automobile accident.[12] Dr. Fridena performed surgery on plaintiff at Physicians & Surgeons Hospital, after which it was discovered that her right leg was one-and-a-half inches shorter than her left.[13] Six months later, Fridena negligently performed a second operation at Physicians & Surgeons Hospital in an attempt to lengthen the leg.[14] Rather than lengthening it, however, the leg became further shortened so that it was now three inches shorter than the left leg.[15] Suit was brought against both Dr. Fridena and the hospital.[16]

At trial, the hospital moved for a directed verdict on the ground that Fridena was an independent contractor[17] and, therefore, the hospital was not responsible for his negligence in performing the operation.[18] The superior court denied the motion and ruled that, as a matter of law, the relationship between the hospital and Dr. Fridena was such that the negligence of Fridena would also be the negligence of the hospital.[19] The Arizona Supreme Court upheld this view on appeal.[20]

This casenote initially will review the history and current trends of the different legal concepts underlying institutional liability. The *Fridena* decision will be evaluated in light of each of the legal theories presented and the potential ramifications of the case will be discussed. Finally, the casenote will examine the exception applied in *Fridena* to the "same school of medicine" rule[21] regarding expert witness testimony in a malpractice action.

---

11. *Id.*

12. *Id.* at 517, 622 P.2d at 464.

13. *Id.*

14. *Id.*

15. *Id.* at 518, 622 P.2d at 465.

16. *Id.* Suit was actually brought against the estate of Dr. Fridena because he died shortly after the incident. The plaintiff received $300,000 in damages at the trial court level. *Id.*

17. Evans v. Bernhard, 23 Ariz. App. 413, 415, 533 P.2d 721, 723 (1975). Suit was also brought against Dr. Bernhard, appellee's family physician, because he assisted in the operation. *Id.* at 414, 533 P.2d at 722. Bernhard was called to Physician's & Surgeon's Hospital immediately following the accident. Because of his limited surgical experience, he called in Dr. Fridena, an orthopedic specialist. Although Dr. Bernhard was present during the negligent performance of surgery on plaintiff a motion for summary judgement was granted Bernhard on the issue of his independent negligence. *Id.* at 415, 533 P.2d at 723.

18. *Id.* at 418, 533 P.2d at 726. *See* text & notes 28-30 *infra*.

19. *See* 127 Ariz. at 518, 622 P.2d at 465.

20. *Id.* at 520, 622 P.2d at 467. *Fridena* wasn't heard at the intermediate appellate court level because the Arizona Supreme Court took jurisdiction pursuant to ARIZ. R. CIV. APP. P. 19(e). According to this rule, the Arizona Supreme Court may, upon its own motion, transfer any case pending before the court of appeals to itself.

21. See text & notes 101-16 *infra*.

A HISTORICAL PERSPECTIVE OF HOSPITAL LIABILITY

A. *Vicarious Liability*

As previously noted, hospital liability is generally based on either of two legal principles: vicarious liability[22] or negligent supervision.[23] Vicarious liability is embodied in the doctrine of *respondeat superior*, which holds an employer liable to a third person for the tort of an employee committed within the scope of employment.[24] Under this doctrine, liability is based on the somewhat fictional right of the employer to control the means and methods of the employee's work performance.[25] The vicarious liability doctrine is as applicable to the physician-hospital relationship as to any other. Thus, if a hospital employs a doctor and the doctor negligently performs an operation, the hospital can be held liable for the doctor's negligence.[26]

Historically, however, a staff physician[27] who uses hospital facilities to treat his private patients is considered an independent contractor,[28] and is not subject to the hospital's control over his actual physical performance.[29] Therefore, the courts do not hold a hospital liable for the negligence of a physician operating as an independent contractor.[30] Various courts, though, have circumvented the independent contractor doctrine by employing the doctrine of ostensible agency[31] or by liber-

22. See authorities cited in note 1 *supra*. *See also* Bernardi v. Community Hosp. Ass'n, 166 Colo. 280, 290, 443 P.2d 708, 713 (1968) (hospital vicariously liable for negligence of employee nurse); Bing v. Thunig, 2 N.Y.2d 656, 666, 143 N.E.2d 3, 8-9, 163 N.Y.S.2d 3, 11 (1957) (same).

23. See authorities cited in note 2 *supra*; Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 332-33, 211 N.E.2d 253, 257-58 (1965), *cert. denied*, 383 U.S. 946 (1966) (hospital liable for failure to adequately supervise staff physician and nurses); Corleto v. Shore Memorial Hosp., 138 N.J. Super. 302, 307-08, 350 A.2d 534, 537 (1975) (hospital liable for allowing negligent surgeon staff privileges knowing of his incompetence).

The term "corporate negligence" is synonomous with negligent supervision and is frequently used in the hospital liability area. *See, e.g.*, articles cited in note 3 *supra*.

24. *See* W. PROSSER, THE LAW OF TORTS §§ 69-70, at 458 (4th ed. 1971).

25. *Id.* § 69, at 460.

26. Evans v. Bernhard, 23 Ariz. App. 413, 417, 533 P.2d 721, 725 (1975); Beeck v. Tucson Gen. Hosp., 18 Ariz. App. 165, 170-71, 500 P.2d 1153, 1158-59 (1972); Seneris v. Haas, 45 Cal. 2d 811, 826, 291 P.2d 915, 926-27 (1955).

27. A staff physician is simply a physician who is privileged to bring his case to the hospital and use the hospital facilities. *See* Mayers v. Litow, 154 Cal. App. 2d 413, 417, 316 P.2d 351, 354 (1957). *See also* JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, ACCREDITATION MANUEL FOR HOSPITALS 93-109 (1980).

28. *E.g.*, Barfield v. South Highlands Infirmary, 191 Ala. 553, 559, 68 So. 30, 33 (1915); Mayers v. Litow, 154 Cal. App. 2d 413, 417, 316 P.2d 351, 354 (1957); Konnoff v. Fraser, 62 Cal. App. 2d 788, 791, 145 P.2d 368, 370 (1944).

29. Hoke v. Harrisburg Hosp., Inc. 281 Ill. App. 247, 252 (1935); *see* Brown v. Moore 247 F.2d 711, 716-17 (3d Cir. 1957). *See also* RESTATEMENT (SECOND) OF AGENCY § 2, at 12 (1957).

30. *See* authorities cited in note 28 *supra*. *See also* Hull v. Enid Gen. Hosp. Foundation, 194 Okla. 446, 448, 152 P.2d 693, 695 (1944); Jenkins v. Charleston Gen. Hosp. & Training School, 90 W. Va. 230, 232, 110 S.E. 560, 561 (1922).

31. Seneris v. Haas, 45 Cal. 2d 811, 831-32, 291 P.2d 915, 926-27 (1955); Stanhope v. Los Angeles College of Chiropractic, 54 Cal. App. 2d 141, 146, 128 P.2d 705, 708 (1942); Adamski v. Tacoma Gen. Hosp., 20 Wash. App. 98, 115, 579 P.2d 970, 977-78 (1978).

ally construing the definition of "employee."[32]

An agency is ostensible when the principal intentionally or negligently causes a third person to believe another, who is not actually employed by him, to be his agent.[33] For example, when a hospital contracts with a group of independent doctors to staff its emergency room facility,[34] the negligence of one of these doctors technically should not be imputed to the hospital because of the doctor's independent status.[35] Many courts, however, find a "representation" by the hospital that the emergency room physicians are employed by it.[36] If a patient justifiably relies on the care or skill of such an apparent agent, the hospital will be deemed liable to this third person for harm negligently caused by the physician.[37] This application reflects the present-day structure of a hospital and the realistic expectation of one who avails himself of hospital facilities.[38]

Similarly, some courts have expanded hospital liability by applying *respondeat superior* in nonconventional business relationships—usually a special salaried arrangement[39] or contract for services[40] between the hospital and the physician. In *Beeck v. Tucson General Hospital*,[41] for example, a negligent radiologist had an exclusive contract with the hospital to perform professional services, and was compensated by a percentage of departmental income.[42] Although the contract between the hospital and the radiologist stated that the latter was to be

32. *See* Beeck v. Tucson Gen. Hosp., 18 Ariz. App. 165, 169, 500 P.2d 1153, 1157 (1972), discussed in text & notes 41-48 *infra*.

33. Stanhope v. Los Angeles College of Chiropractic, 54 Cal. App. 2d 141, 146, 128 P.2d 705, 708 (1942) (appellant never informed that x-ray laboratory was not integral part of the hospital); *see* Seneris v. Haas, 45 Cal. 2d 811, 831-32, 291 P.2d 915, 926 (1955) (defendant anesthesiologist not an employee but gave all appearances as one in performing duties for hospital); Adamski v. Tacoma Gen. Hosp., 20 Wash. App. 98, 115, 579 P.2d 970, 977-78 (1978) (physician contracted with hospital to work in emergency room; the contract expressly classified physician as independent contractor, but court said it could be found that plaintiff believed physician to be an employee of the hospital).

34. This was the situation in Schagren v. Wilmington Medical Center, Inc., 304 A.2d 61, 63 (Del. 1973).

35. *See* authorities cited in note 31 *supra*.

36. *Id.*

37. *Id. See also* RESTATEMENT (SECOND) AGENCY § 267, at 578 (1958).

38. *See* Bing v. Thunig, 2 N.Y.2d 656, 666, 143 N.E.2d 3, 8, 163 N.Y.S.2d 3, 8 (1957). A modern hospital no longer just provides facilities for the physician to use as was the case years ago. Most hospitals actually employ a number of physicians, and charge the patient directly for medical treatment. Many times, a physician is part of a team of specialists and hospital support personnel that provide a total care package to the patient. *Id.*

39. Gilstrap v. Osteopathic Sanitorium Co., 224 Mo. App. 798, 810, 24 S.W.2d 249, 255 (1929) (physician was given room and board at the sanitorium in addition to a salary paid by the defendant).

40. Beeck v. Tucson Gen. Hosp., 18 Ariz. App. 165, 169, 500 P.2d 1153, 1157 (1972). *But see* Pogue v. Hospital Auth., 120 Ga. App. 230, 231, 170 S.E.2d 53, 54 (1969) (agreement between hospital authority and partnership of doctors as to operation of emergency room did not change partnership's expressly designated status of independent contractor).

41. 18 Ariz. App. 165, 500 P.2d 1153 (1972).

42. *Id.* at 169-70, 500 P.2d at 1157-58.

considered an independent contractor,[43] the court found an employment relationship and held the hospital vicariously liable for the physician's negligence.[44] The court's decision was based upon the following factors: first, the plaintiff had no choice as to which radiologist in the department would perform the work; the choice was up to the hospital.[45] Second, the hospital had the right to control the radiologist's standard of performance.[46] Third, the radiologist had been employed by the hospital for a number of years to perform radiological services which were an "inherent function of the hospital."[47] Finally, the hospital provided instruments and administrative services for the radiology department.[48]

The current trend in the law, then, is to impose vicarious liability in fact situations where it would not have been found in the past.[49] The notion of an independent contractor who uses the operating room as a "workshop,"[50] and therefore shields the hospital from liability, is generally on the decline.[51] A hospital is frequently being perceived as an institutional unit that supplies, and is responsible for, the complete range of medical services.[52]

Fridena presented the court with a clear opportunity to follow the trend of expanding vicarious liability in the hospital setting. In addition to being a staff physician, Dr. Fridena held various other positions with the hospital.[53] Thus, the court could have stretched the concept of "employee" and applied it to him. This application of the concept, however, would have expanded the underlying philosophy of *Beeck* and diluted the independent contractor doctrine in the process.[54] Con-

43. *Id.* at 171, 500 P.2d at 1159.
44. *Id.*
45. *Id* at 170, 500 P.2d at 1158.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Vicarious Liability of Hospitals*, *supra* note 3, at 182.
50. *See The Hospital as an Institution*, *supra* note 3, at 434. (A hospital used to be thought of as simply the physical building where the private physician practiced his profession). *See also* note 38 *supra*.
51. *See Vicarious Liability of Hospitals*, *supra* note 3, at 182. Professor Southwick states that
> "[b]y some leading decisions it no longer follows that a professional person using his own skill, judgment and discretion in regard to the means and methods of his work is an independent contractor. . . . Gradually, the test of hospital liability for another's act is becoming simply a question of whether or not the actor causing injury was a part of the medical care organization."

Id. at 182.
52. A. SOUTHWICK, THE LAW OF HOSPITAL AND HEALTH CARE ADMINISTRATION 423 (1978); *see* Beeck v. Tucson Gen. Hosp., 18 Ariz. App. 165, 169, 500 P.2d 1153, 1157 (1972); Hull v. North Valley Hosp., 159 Mont. 375, 389, 498 P.2d 136, 143 (1972) ("the integration of a modern hospital becomes readily apparent as the various boards, reviewing committees, and designation of privileges are found to rest on a structure designed to control, supervise and review the work within the hospital").
53. See text & notes 96-97 *infra*.
54. The *Fridena* court, like the *Beeck* court, could have looked to a salary agreement or a

sequently, the court rejected the *respondeat superior* argument and based liability on the alternative theory of negligent supervision.[55] The court thus indicated that, absent an unconventional salaried arrangement[56] or contract for services,[57] Arizona will regard a hospital staff physician as an independent contractor.[58] Therefore, the distinction between the dual theories—vicarious liability and negligent supervision—remains intact. In fact, the latter theory may be taking on new dimensions because of *Fridena*.

B. *Negligent Supervision*

The second theory of liability applicable to hospitals, and the one advanced in *Fridena*, is that of negligent supervision or "corporate negligence."[59] Negligent supervision differs from vicarious liability principally because it is based on a non-delegable duty of care that the hospital owes directly to the patient.[60] The doctrine had its origin in the Illinois case of *Darling v. Charleston Memorial Hospital*.[61] In *Darling*, the plaintiff fractured his leg and was admitted to the hospital emergency room where he was treated by a staff physician.[62] He was then admitted to the hospital as a patient of the same staff physician.[63] Complications with the leg cast developed and, although the patient complained of pain, neither the doctor nor the hospital nurses on duty

---

contract Dr. Fridena might have had with the hospital and found a *Beeck*-type employment relationship. In *Beeck*, although the hospital-physician contract expressly stated that the physician was an independent contractor, the court nevertheless found existence of an employment relationship based on various liability-imposing factors. See text & notes 45-48 *supra*. The significance of the *Beeck* decision lies in the fact that the court found this relationship without ever finding an apparent agency or representation by the hospital that the physician was an employee.

Similarly, in *Fridena*, the administrative positions Fridena held with the hospital could have lead the court to find an employment relationship, based perhaps on *Beeck*-type factors. However, since Fridena's positions with the hospitals were strictly administrative, to find him an employee would have extended even *Beeck*. The factors expressed in *Beeck* do not lend support to the factual situation in *Fridena* because these factors center around the nature of the hospital department. See text & notes 45-48 *supra*. Thus, it would have been stretching the *Fridena* facts greatly to have found Dr. Fridena an "employee." *See* Riverbend Country Club v. Patterson, 399 S.W.2d 382, 383 (Tex. Civ. App. 1966). A finding of "employee" here also would have virtually wiped out the independent contractor doctrine, which shields the hospital from liability. Use of the *Beeck* factors here, or ones similar to fit the facts of *Fridena*, would have opened a floodgate to the imposition of liability on hospitals. Almost any position or relationship with the hospital could thereafter render the physician an "employee" if *Fridena* had been decided on vicarious liability grounds.

55. Fridena v. Evans, 127 Ariz. 516, 518, 520, 622 P.2d 463, 465, 467 (1980).

56. See note 39 *supra*.

57. See note 40 *supra*.

58. *See* 127 Ariz. at 518, 622 P.2d at 465.

59. Purcell v. Zimbelman, 18 Ariz. App. 75, 81, 500 P.2d 335, 341 (1972); Moore v. Board of Trustees of Carson-Tahoe Hosp., 88 Nev. 207, 211-12, 495 P.2d 605, 608, *cert. denied*, 409 U.S. 879 (1972); Corleto v. Shore Memorial Hosp., 138 N.J. Super. 302, 307, 350 A.2d 534, 537 (1975). *See* notes 2 & 23 *supra*.

60. Purcell v. Zimbelman, 18 Ariz. App. 75, 81, 500 P.2d 335, 341 (1972).

61. 33 Ill. 2d 326, 211 N.E.2d 253 (1965), *cert. denied*, 383 U.S. 946 (1966).

62. *Id.* at 328, 211 N.E.2d at 255.

63. *Id.*

took any action.[64] In addition, a medical staff bylaw requiring consultation was ignored by both the doctor and the hospital administration.[65] By the time the patient received proper attention, it was too late to save his leg, and suit was brought against the hospital.[66] Although there has been much confusion concerning the holding and ramifications of *Darling*,[67] the court essentially held that even if a surgeon was an independent contractor,[68] the hospital could be liable for negligently supervising the physician.[69]

The *Darling* philosophy was adopted by the Arizona Court of Appeals in *Purcell v. Zimbelman*.[70] In *Purcell*, a physician negligently performed abdominal surgery.[71] The plantiff sued Tucson General Hospital on the theory that the hospital breached its duty to the public when it allowed Dr. Purcell the use of its facilities.[72] Evidence was offered that twice previously the physician had been successfully sued for malpractice in the performance of the identical surgical procedure.[73] Therefore, the plaintiff argued, the hospital knew, or should have known, that Purcell lacked the skill to treat the condition in question and should have prevented him from using the hospital facilities.[74]

The hospital defended the action on the ground that Purcell was an independent contractor and, therefore, the hospital was not liable for the doctor's negligence.[75] The hospital further argued it was not responsible for supervising staff doctors because it had set up a board of independent staff physicians charged with that duty.[76] The hospital maintained that because the two previous malpractice cases had been presented to the hospital's review board, the hospital itself should not be liable for the board's breach of duty in failing to discipline the negli-

64. *Id.*

65. *Id.* at 329, 211 N.E.2d at 256.

66. *Id.*

67. *See* Comment, *Piercing The Doctrine of Corporate Hospital Liability*, 17 SAN DIEGO L. REV. 383, 391 n.49 (1980). Cases such as Collins v. Westlake Community Hosp., 12 Ill. App. 3d 847, 851, 299 N.E.2d 326, 328 (1973), *rev'd on other grounds*, 57 Ill. 2d 388, 312 N.E.2d 614 (1974); Lundahl v. Rockford Memorial Hosp. Ass'n, 93 Ill. App. 2d 461, 466, 235 N.E.2d 671, 674 (1968); and Hull v. North Valley Hosp., 159 Mont. 375, 385-86, 498 P.2d 136, 141 (1972), have interpreted *Darling* as considering the doctor involved in the case as a hospital employee. If this were the case, however, *respondeat superior* would apply and thus render the commonly accepted view of *Darling* as a negligent supervision case invalid.

For a sampling of articles commenting on the doctrine of corporate hospital liability after *Darling* see Comment, *supra*, at 385 n.14.

68. See notes 28-30 *supra*.

69. 33 Ill. 2d at 328-33, 211 N.E.2d at 255-58.

70. 18 Ariz. App. 75, 500 P.2d 335 (1972).

71. *Id.* at 79-80, 500 P.2d at 339-40.

72. *Id.* at 80, 500 P.2d at 340.

73. *Id.* at 83, 500 P.2d at 343.

74. *Id.* at 80, 500 P.2d at 340.

75. *Id.*

76. *Id.* at 81, 500 P.2d at 341.

gent physician.[77]

The court dismissed the hospital's contentions and stated that the hospital had assumed the duty of supervising the competency of its staff doctors.[78] The review board was therefore acting on behalf of the hospital, and its negligence in not taking action against Purcell made the hospital negligent.[79] It was thus a jury question whether or not the hospital, acting through its department of surgery, was negligent.[80]

As *Purcell*, and later, *Tucson Medical Center, Inc. v. Misevch*[81] noted, to find a hospital liable it is necessary to show that it had actual or constructive knowledge[82] of the negligent physician's shortcomings.[83] Since organized medical staffs and review committees act on behalf of the hospital, however, their knowledge and omissions become the hospital's and liability may be imposed.[84] In sum, the negligent supervision doctrine recognizes a hospital's duty to review the general competence of independent physicians and surgeons.[85] As the cases prior to *Fridena* note, the governing body[86] of a hospital has the ultimate responsibility for the quality of patient care rendered in a hospi-

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. 113 Ariz. 34, 545 P.2d 958 (1976). In *Misevch*, the plaintiff alleged that an anesthesiologist who was under the influence of alcohol during surgery negligently administered anesthesia which resulted in the patient's death. The complaint also alleged that T.M.C. was negligent in retaining the anesthesiologist on its staff. *Id.* at 35, 545 P.2d at 959.

82. "Constructive knowledge" is that knowledge that one can acquire in the exercise of ordinary care. Attoe v. State Farm Auto Ins. Co., 36 Wis. 2d 539, 546, 153 N.W.2d 575, 579 (1967). In Johnson v. Misericordia Community Hosp., 99 Wis. 2d 708, 301 N.W.2d 156 (1981), a case involving hospital liability, the court discussed constructive knowledge as follows:

> It is a general rule of law sustained by the authority of many cases that whatever fairly puts a person on inquiry with respect to an existing fact is sufficient notice of that fact if the means of knowledge are at hand. If under such circumstances one omits to inquire, he is then chargeable with all the facts which, by proper inquiry, he might have ascertained.

Id. at 741, 301 N.W.2d at 173.

83. Tucson Medical Center, Inc. v. Misevch, 113 Ariz. 34, 36, 500 P.2d 958, 960 (1976); Purcell v. Zimbelman, 18 Ariz. App. 75, 83, 400 P.2d 335, 343 (1972).

84. ARIZ. REV. STAT. ANN. § 36-445 (1971) (amended 1976) requires that physicians admitted to hospital practice organize into committees or other organizational structures to review the professional practices within the hospital. Although the hospital's duty of supervision is nondelegable, the evaluation of professional proficiency is best left to specialized experts. *See* Peterson v. Tucson Gen. Hosp., Inc., 114 Ariz. App. 66, 72, 559 P.2d 186, 192 (1976); text & notes 78-79 *supra*. In Arizona, *see also* DEPARTMENT OF HEALTH SERVICES, OFFICIAL COMPILATION, ADMINISTRATIVE RULES AND REGULATIONS, R-10-213, 214 (Supp. 1979); *see generally* JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, *supra* note 27, at 105-08.

85. *See generally* Mitchell County Hosp. Auth. v. Joiner, 229 Ga. 140, 142, 189 S.E.2d 412, 414 (1972); Corleto v. Shore Memorial Hosp., 138 N.J. Super. 302, 307, 350 A.2d 534, 537 (1975); Johnson v. Misericordia Community Hosp., 99 Wis. 2d 708, 725, 301 N.W.2d 156, 165 (1981). *Joiner* extended this duty of review to include a duty to see that only competent physicians are granted staff privileges in the first place. 229 Ga. at 142, 189 S.E.2d at 414.

86. The governing body of a hospital is ordinarily the board of trustees or board of directors. Comment, *supra* note 67, at 392 n.54; *see* JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, *supra* note 27, at 51-56.

tal.[87] Therefore, it must be careful to select competent staff physicians and supervise the medical care given by the physicians.

In general, a hospital usually "delegates" the duty of physician review to the medical staff.[88] The staff then becomes an "agent" or "arm" of the hospital so that, if the staff negligently performs these duties, the hospital is legally responsible.[89] Ordinarily, a staff physician's incompetence will be discovered by the review committee[90] which can either discipline the physician[91] or fail to take action, in which case the hospital is susceptible to liability if that physician is found negligent in the future while operating at that hospital.[92] Usually, there is sufficient time to guarantee that potential future negligence never occurs.[93] Consequently, negligent supervision has typically arisen only in cases where a physician was allowed continued use of the hospital facilities despite actual or constructive knowledge of his incompetence.[94] In *Fridena*, however, there is no indication that Dr. Fridena had ever operated negligently before.[95] How, then, did the court impute liability to the hospital?

In *Fridena*, the defendant hospital was in a peculiar situation. Dr. Fridena was the hospital's chief of surgery, chairman of the board of trustees, medical director, and controlling stockholder.[96] Therefore,

87. *See, e.g.*, Tucson Medical Center, Inc. v. Misevch, 113 Ariz. 34, 36, 545 P.2d 958, 960 (1976); Purcell v. Zimbelman, 18 Ariz. App. 75, 81, 500 P.2d 335, 341 (1972); Mitchell County Hosp. Auth. v. Joiner, 229 Ga. 140, 142, 189 S.E.2d 412, 414. *See also* DEPARTMENT OF HEALTH SERVICES, *supra* note 84, R-9-10-213.

88. *See* note 76 *supra*.

89. Mitchell County Hosp. Auth. v. Joiner, 229 Ga. 140, 142, 189 S.E.2d 412, 414 (1972) ("the delegation of the authority to screen applicants for staff membership on the medical staff does not relieve the Authority of its responsibility, since the members of such staff act as agents for the Authority"); Comment, *supra* note 67, at 392 n.52.

90. *See* ARIZ. REV. STAT. ANN. § 36-445 (1971) (amended 1976); DEPARTMENT OF HEALTH SERVICES, *supra* note 84, at R9-10-214.

91. *See generally* Scappatura v. Baptist Hosp., 120 Ariz. 204, 209, 584 P.2d 1195, 1200 (1978). Discipline is usually in the form of exclusion from staff privileges. *Id.*

92. See authorities cited in note 59 *supra*.

93. For example, in Purcell v. Zimbelman, 18 Ariz. App. 75, 83, 500 P.2d 335, 343 (1972), the court pointed out that the hospital *could* have taken action against the doctor in the form of suspension, remonstration, or restriction. *See* authorities cited in note 23 *supra*, and Johnson v. Misericordia Community Hosp., 99 Wis. 2d 708, 743-44, 301 N.W.2d 156, 174 (1981).

94. *See* authorities cited in note 23 *supra*. For a definition of "constructive knowledge," see note 82 *supra*.

95. Dr. Fridena had encountered some problems in 1964 and 1965 with the Committee on Ethics, but the complaints involving him generally dealt with overcharging and continuing to treat patients when his services were no longer necessary. *See* Arizona Osteopathic Medical Ass'n. v. Fridena, 10 Ariz. App. 232, 233, 457 P.2d 945, 946 (1969), *vacated on other grounds*, 105 Ariz. 291, 463 P.2d 825 (1970). In that opinion, there was no indication that any complaints had ever been lodged against him involving his competency as a surgeon in the operating room. In fact, no mention of Dr. Fridena's past performance as a physician or unfitness as a surgeon is ever made in the present case.

96. 127 Ariz. at 519, 622 P.2d at 466. The fact that Dr. Fridena was also the controlling stockholder would not appear to matter. *See* Carter v. Harlan Hosp., 278 Ky. 84, 87, 128 S.W.2d 174, 176 (1939); and Penland v. French Broad Hosp., 199 N.C. 314, 320, 154 S.E. 406, 409 (1930) holding that no liability would attach on this basis alone.

the court held, he was an agent of the hospital and, like any other agent, his knowledge of any staff negligence was imputed to the hospital.[97] Fridena, however, was not only an agent of the hospital—he was the operating physician as well. Because of his dual role—agent and operating physician—the court concluded that Fridena, the agent, instantaneously gave the hospital knowledge of any negligence of Fridena, the operating physician.[98] What the court in essence held is that Fridena, the hospital's agent, should have prevented the negligence in this operation from occurring by ordering Fridena, the surgeon, to use more care.[99]

The *Fridena* opinion thus appears to spell trouble for the hospital controlled by a small group of practicing physicians. It seems to say that any operating physician who also acts as chairman of the board, medical director, chief of surgery, or holds another such position of authority places the entire hospital in jeopardy whenever he is negligent. This is especially true in the case of a hospital's chief of surgery who is most often a practicing surgeon himself and has complete operating privileges. Although the unique facts of this case could limit its broad future application in the area of hospital liability, it also could prove to be a troublesome precedent from a hospital's perspective. Because of *Fridena*, a plaintiff's attorney may now be able to build a negligent supervision case by finding an agency relationship between the hospital and physician when the negligent physician also holds a position in the administrative wing of the hospital. One response to *Fridena*, from the hospital's point of view, would be to reorganize the hospital hierarchy in such a way as to exclude current medical practitioners from serving in certain capacities.[100] At the least, a small, closely held hospital may wish to consider this option.

EXPERT WITNESS TESTIMONY—"SAME SCHOOL OF MEDICINE" RULE

Evidence of Dr. Fridena's negligence was presented through the testimony of Dr. Warren Colton, a medical doctor and orthopedic surgeon.[101] Since Fridena was a doctor of osteopathy (D.O.) and an orthopedic surgeon, the appellants objected to Dr. Colton testifying as to

97. 124 Ariz. at 519, 622 P.2d at 466.

98. *See id.*

99. *Id.*

100. It may be argued, however, that medical practitioners would be better able to judge the professional abilities of other doctors. See note 84 *supra*. Furthermore, Arizona statutes require that *physicians* review the professional practices within the hospital. *See* ARIZ. REV. STAT. ANN. § 36-445 (1971) (amended 1976). Thus, this solution may not be a legally viable one as to certain positions in the hospital.

101. 127 Ariz. at 520, 622 P.2d at 467.

Fridena's deviation from the applicable standard of care.[102] Colton had never received osteopathic training and was unfamiliar with the osteopathic surgeon's standards or training methods.[103] The superior court, however, allowed Colton's testimony,[104] and the Arizona Supreme Court affirmed.[105]

As the *Fridena* court pointed out, the general rule is that a member of one school of medicine is not competent to testify against a member of another school.[106] It is thought that inequities will result by testing the care and skill of a practitioner of one school of medicine by the opinion of a practitioner of another school because learning and practice often vary between schools. There are numerous exceptions to this rule,[107] one of which the *Fridena* court found to apply: testimony of an expert witness will be allowed when the standard applicable to the particular procedure in question is the same, or should be the same, in each of the two schools.[108]

This exception has in the past been applied in Arizona.[109] In *Gaston v. Hunter*,[110] the court held that the witness need not be of the same speciality as the defendant.[111] A witness is competent to testify as to those points in which the standards of medical care do or should concur.[112] In *Fridena*, Dr. Colton, although not an osteopath, did testify that he was familiar with the standard of care of orthopedic surgery in the community.[113] Allowing the testimony was therefore fully consis-

102. *Id.* The applicable standard of care was the standard of "practice in the community with respect to orthopedic surgery." *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. There are at least nine exceptions to the same school of medicine rule. They are as follows:

1) Where the method of treatment in defendant's school and witness' school is the same. Hundley v. St. Francis Hosp., 161 Cal. App. 2d 800, 803, 327 P.2d 131, 133 (1958); 2) Where the method of treatment in defendant's school and witness' school are, or *should* be the same. Wemett v. Mount, 134 Or. 305, 312-13, 292 P. 93, 96 (1930); 3) Where testimony of the witness is based on knowledge of the defendant's own school. Hutter v. Hommel, 213 Cal. 677, 681-82, 3 P.2d 554, 556 (1931); 4) Where testimony of witness is as to matters of common observation and experience. Ellenwood v. McCoy, 8 Cal. App. 2d 590, 594, 47 P.2d 796, 797 (1935); 5) Where in administering treatment defendant adopts methods of another school. Sheppard v. Firth, 215 Or. 268, 271, 334 P.2d 190, 192 (1959); 6) Where defendant seeks to justify his course of treatment by the standards of another school. James v. Falk, 226 Or. 535, 538-39, 360 P.2d 546, 548 (1961); 7) Where opinion of witness is as to diagnosis and not as to treatment. Cook v. Moats, 121 Neb. 769, 772, 238 N.W. 529, 530 (1931); 8) Where witness testifies as to use of x-ray, since it is a matter about which the schools do not differ. Dorr, Gray & Johnson v. Headstream, 173 Ark. 1104, 1107, 295 S.W. 16, 17-18; 9) Where defendant's school is not recognized. Hansen v. Pock, 57 Mont. 51, 59-62, 187 P. 282, 284-85 (1920).

108. 127 Ariz. at 520, 622 P.2d at 467.

109. Gaston v. Hunter, 121 Ariz. 33, 54, 588 P.2d 326, 347 (Ct. App. 1978); *see* Korljan v. Johnson, 96 Ariz. 25, 27-28, 391 P.2d 584, 585 (1964).

110. 121 Ariz. 33, 588 P.2d 326 (Ct. App. 1978).

111. *Id.* at 54, 588 P.2d at 347.

112. *Id.*

113. 127 Ariz. at 520, 622 P.2d at 467.

tent with this previously recognized exception to the general rule in Arizona.[114] Further, there was no material difference between the two schools that would reflect on Dr. Colton's competency as a witness in light of the surgical procedure employed by Fridena.[115] Finally, the determination of the competency of an expert witness rests in the sound discretion of the trial court, and will not be reviewed except for a clear abuse or an error of law.[116] Neither of these was present.

CONCLUSION

In *Fridena v. Evans*, the Arizona Supreme Court found a hospital liable under a corporate negligence theory for failing to supervise a negligent surgeon. In rejecting the argument that Fridena was an "employee" and that, therefore, the hospital was vicariously liable, the court indirectly reaffirmed the independent contractor status of a staff physician. However, because Fridena held various administrative positions with the hospital, the court found him to be an agent of the hospital. Thus, his knowledge of the operation he negligently performed was imputed to the hospital. Such a holding extends the constructive knowledge concept and goes beyond current notions of the negligent supervison doctrine in Arizona. Although the unique facts of the case may limit its broad future application in the hospital liability area, it could prove to be a perilous precedent for the small, closely held hospital.

Chris Skelly

114. Gaston v. Hunter, 121 Ariz. 33, 54, 588 P.2d 326, 347 (Ct. App. 1978); *See* Korljan v. Johnson, 96 Ariz. 25, 27-28, 391 P.2d 584, 585 (1964).

115. 127 Ariz. at 520, 622 P.2d at 467.

116. Carrel v. Lux, 101 Ariz. 430, 441, 420 P.2d 564, 575 (1966); Smith v. John C. Lincoln Hosp., 118 Ariz. 549, 551, 578 P.2d 630, 632 (Ct. App. 1978); W. R. Skousen Contractor, Inc. v. Gray, 26 Ariz. App. 100, 103, 546 P.2d 369, 372 (1976).

THE TAVERNKEEPER'S DUTY TO PROTECT PATRONS FROM VIOLENCE

Under the common law, a tavernkeeper has a duty to exercise reasonable care to protect patrons from injury while they are on his premises.[1] Arizona has recognized this duty in conformity with the majority view.[2]

The scope of the tavernkeeper's duty of reasonable care was addressed in *McFarlin v. Hall*.[3] The plaintiff, John McFarlin, was a musician in a band appearing at the defendants' bar.[4] At about 1 a.m., the bar's closing time, McFarlin was walking through the parking lot with two companions when he was shot without warning by Frank Dominguez.[5] Dominguez and McFarlin did not know each other.[6] Dominguez had been in the defendants' bar that night but had left shortly before 1 a.m.[7] and had not even spoken to McFarlin that evening.[8] Dominguez had not caused any trouble in the bar that night, other than "pestering" women to dance.[9]

After the shooting, however, the bar owner defendants, Clarence and Joan Hall, told a number of people that they considered Dominguez a "troublemaker."[10] Dominguez had been a regular patron of the defendants' bar in the late 1960s but had disappeared for several years, reappearing only a few weeks before the assault.[11] The defendants allegedly believed Dominguez had been in a jail or a mental hospital for several years before the shooting.[12] There was also evidence that Dominguez had been in fights at the bar before his disappearance, that he had in the past been ejected from the bar and that the defendants were afraid of him.[13]

McFarlin sued the owners of the bar for negligence in failing to

---

1. Pierce v. Lopez, 16 Ariz. App. 54, 57, 490 P.2d 1182, 1185 (1971); Bartosh v. Banning, 251 Cal. App. 2d 378, 383-84, 59 Cal. Rptr. 382, 386 (1967); Carey v. New Yorker of Worcester Inc., 255 Mass. 450, 452, 245 N.E.2d 420, 422 (1969); Waldron v. Hammond, 71 Wash. 2d 361, 363, 428 P.2d 589, 591 (1967); RESTATEMENT (SECOND) OF TORTS § 314A(3) (1965).

2. Pierce v. Lopez, 16 Ariz. App. 54, 57, 490 P.2d 1182, 1185 (1971); *see* McFarlin v. Hall, 127 Ariz. 220, 224-25, 619 P.2d 729, 733-34 (1980); *see* authorities cited at note 1 *supra*.

3. 127 Ariz. 220, 619 P.2d 729 (1980).

4. *Id.* at 223, 619 P.2d at 732.

5. *Id.* at 222, 619 P.2d at 731.

6. Brief for Appellant at 5, Brief for Appellee at 4, McFarlin v. Hall, 127 Ariz. 220, 619 P.2d 729 (1980).

7. *See* Brief for Appellant at 8.

8. *Id.* at 5; Brief for Appellee at 4.

9. 127 Ariz. at 223, 619 P.2d at 732.

10. *Id.*

11. *Id.* at 222-23, 619 P.2d at 731-32.

12. *Id.* at 223-24, 619 P.2d at 732-33.

13. *Id.* There was testimony that Clarence Hall, an owner of the bar, had "86'd" Dominguez at one time. *Id.* at 223, 619 P.2d at 732. Although Hall said he believed that term meant ejection for one night, other testimony from a bouncer at an area bar indicated it meant permanent exclusion from a bar. *Id.*

exercise reasonable care to protect him from Dominguez.[14] The jury returned a verdict for the plaintiff and awarded McFarlin $85,000.[15] On appeal by the defendants, the judgment was reversed by the Arizona Court of Appeals in an unpublished opinion.[16] On subsequent appeal, the Arizona Supreme Court vacated the appeals court decision and affirmed the jury verdict for the plaintiff.[17] The supreme court held that, although a bar owner is not an insurer of his patrons' safety, he has a duty to protect invitees[18] from harm caused by a patron with a known propensity for violence.[19] That duty exists as long as the person posing the risk remains intoxicated on the premises.[20] To fulfill that duty, the owner is required to exercise the power of control or expulsion that his occupation of the premises gives him over dangerous persons.[21]

This casenote first will consider the tavernkeeper's duty to protect patrons from an unreasonable risk of harm, which is based on the tavernkeeper's status as an occupier of land. Next, the requirement

---

14. *Id.* at 222, 619 P.2d at 731.

15. *Id.*

16. *Id.*

17. *Id.*

18. An invitee is a business visitor who enters the premises for a purpose connected with the business of the possessor of the premises. *See* Rowland v. Christian, 69 Cal. 2d 108, 113-14, 443 P.2d 561, 565, 70 Cal. Rptr. 97, 101 (1968); RESTATEMENT (SECOND) OF TORTS § 332, Comment a (1965). The patrons of a tavern are invitees. *See, e.g.*, McFarlin v. Hall, 127 Ariz. 220, 224-25, 619 P.2d 729, 733-34 (1980); Pierce v. Lopez, 16 Ariz. App. 54, 57-58, 490 P.2d 1182, 1185-86 (1971); Rosensteil v. Lisdas, 253 Ore. 625, 632, 456 P.2d 61, 64 (1969) (Langtry, J., dissenting).

19. 127 Ariz. at 224-25, 619 P.2d at 733-34. Under the common law rule, the tavernkeeper would be under a duty to protect the invitee from any risk of harm on the premises, not just from a risk attributable to another patron. *See* RESTATEMENT (SECOND) OF TORTS § 314A(3), Comments d, e; § 344 (1965); text & notes 1-2 *supra*, 20, 28-35 *infra*.

20. 127 Ariz. at 225, 619 P.2d at 734. Although the court said the duty exists as long as the dangerous person "remains intoxicated" on the premises, *id.*, it does not appear that the assailant's intoxication is a necessary element of the risk. As long as the patron is on the premises, the common law requires the tavernkeeper, as an occupier of land, to exercise reasonable care to protect the patron. RESTATEMENT (SECOND) OF TORTS § 344 (1965); *see id.* § 314A(3); text & note 1 *supra*. Under this duty of care, it would not matter whether the person posing a risk to patrons was intoxicated or not—in either case the tavernkeeper would be required to protect his patrons from harm occurring on the premises. See text & notes 1-2 *supra* & 28-35 *infra*. Moreover, Arizona has specifically rejected sale or furnishing or alcoholic beverages as a basis for a tavernkeeper's liability. See text & notes 23-27 *infra*. It is true, however, that the intoxication of those on the premises, which can lead to unpredictable behavior, is one of the factors to which a tavernkeeper must be alert in order to meet his duty of reasonable care. See text & notes 36-38 *infra*.

21. *Id.* The majority opinion concluded that the defendants, using their power of expulsion and control, could have expelled Dominguez, refused to serve him or done one "of a myriad of acts" a reasonable bar owner would do. *Id.* The only prior Arizona case discussing a tavernkeeper's duty to patrons is Pierce v. Lopez, 16 Ariz. App. 54, 58, 490 P.2d 1182, 186 (1971). *Pierce* mentions lack of any opportunity to intervene as a factor in finding no liability for a bar owner, citing a Wyoming case, Fisher v. Robbins, 78 Wyo. 50, 319 P.2d 116 (1957). *Fisher* held there must be an opportunity to intervene as well as a relationship between the incident giving notice of the risk and the harm suffered before a bar owner can be found liable. 78 Wyo. at —, 319 P.2d at 118. The *McFarlin* court, however, concluded that the defendants need not have an opportunity to intervene in the violent incident for them to be found liable. 127 Ariz. at 225, 619 P.2d at 734.

that the risk be reasonably foreseeable will be discussed in the context of *McFarlin*. Particular attention will be given to the issue of foreseeability of the manner in which harm occurs and of the assailant's propensity for violence. Other jurisdictions' views on foreseeability will then be compared with the Arizona view. Finally, the potential effect of *McFarlin* on future cases will be examined in light of the court's deference to the jury verdict.

THE TAVERNKEEPER'S DUTY OF REASONABLE CARE

In a negligence action, the plaintiff must show that the defendant owed a duty to the plaintiff and that a breach of that duty was the proximate cause of the plaintiff's injury.[22] The duty of a tavernkeeper to protect patrons from others historically has been based on either of two grounds:[23] first, the tavernkeeper's sale or furnishing of intoxicating beverages,[24] and second, the tavernkeeper's status as the occupier of land.[25]

Arizona has followed the traditional common law rule that civil liability cannot be founded merely on the sale or furnishing of liquor in the absence of a civil damages (dramshop) act.[26] Arizona has not

22. *E.g.*, Berne v. Greyhound Parks Inc., 104 Ariz. 38, 39, 448 P.2d 388, 389 (1968); Morris v. Ortiz, 103 Ariz. 119, 121, 437 P.2d 652, 654 (1968); Pierce v. Lopez, 16 Ariz. App. 54, 57, 490 P.2d 1182, 1185 (1971). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30, at 143-45 (4th ed. 1971).

23. Pierce v. Lopez, 16 Ariz. App. 54, 57, 490 P.2d 1182, 1185 (1971).

24. In the absence of a dramshop act, some courts have founded common law liability on violations of laws regulating the liquor industry. *See, e.g.*, Waynick v. Chicago's Last Department Store, 269 F.2d 322, 325 (7th Cir.), *cert. denied*, 362 U.S. 903 (1959); Vesely v. Sager, 95 Cal. Rptr. 623, 631, 486 P.2d 151, 159 (1971); Rappaport v. Nicholas, 31 N.J. 188, 202-03, 156 A.2d 1, 8 (1959). Jurisdictions basing liability on the sale or furnishing of intoxicating beverages have interpreted statutes regulating the liquor industry—for example, those statutes that forbid the sale of liquor to intoxicated persons or minors—as being for the protection of the public. Waynick v. Chicago's Last Department Store, 269 F.2d 322, 325 (7th Cir.), *cert. denied*, 362 U.S. 903 (1959); Vesely v. Sager, 95 Cal. Rptr. 623, 631, 486 P.2d 151, 159 (1971); Rappaport v. Nichols, 31 N.J. 188, 202, 156 A.2d 1, 8 (1959). The statute imposes a duty of reasonable care on the seller, with the scope of that duty extending to any member of the public who may be injured by the purchaser of the liquor. Waynick v. Chicago's Last Department Store, 269 F.2d 322, 325 (7th Cir.), *cert. denied*, 362 U.S. 903 (1959); Vesely v. Sager, 95 Cal. Rptr. 623, 631, 486 P.2d 151, 159 (1971); *see* Rappaport v. Nichols, 31 N.J. 188, 201-02, 156 A.2d 1, 8-9 (1959). Violation of these liquor control regulations is a breach of the duty of reasonable care, *see* Waynick v. Chicago's Last Department Store, 269 F.2d 322, 325 (7th Cir.), *cert. denied*, 362 U.S. 902 (1959), and may give rise to a presumption of negligence, Vesely v. Sager, 95 Cal. Rptr. 623, 631, 486 P.2d 151, 159 (1971), or be evidence of negligence, Rappaport v. Nichols, 31 N.J. 188, 203, 156 A.2d 1, 9 (1959). For liability based on civil damages (dramshop) acts, *see, e.g.*, Morehead v. Rock Tavern Inc., 89 Ill. App. 2d 111, 113, 231 N.E.2d 259, 260 (1967); Walton v. Stokes, 270 N.W.2d 627, 627 (Iowa 1978); O'Rorke v. John Day, Oregon, Lodge No. 1824, Benevolent and Protective Order of Elks, 270 Ore. 533, 534, 528 P.2d 1030, 1031 (1974).

25. *See, e.g.*, Pierce v. Lopez, 16 Ariz. App. 54, 57, 490 P.2d 1182, 1185 (1971); Bartosh v. Banning, 251 Cal. App. 2d 378, 384, 59 Cal. Rptr. 382, 386 (1967); Carey v. New Yorker of Worcester Inc., 355 Mass. 450, 452, 245 N.E.2d 420, 422 (1969).

26. Collier v. Stamatis, 63 Ariz. 285, 288-89, 162 P.2d 125, 126-27 (1945) (seller of liquor not liable at common law for damage caused by voluntary intoxication because proximate cause of injury is act of drinker; purpose of statute regulating liquor industry is not to enlarge civil remedies); *see* Pratt v. Daly, 55 Ariz. 535, 537-38, 104 P.2d 147, 148 (1949) (stating common law rule

passed a civil damages act.[27] Therefore, if a tavernkeeper in Arizona is to be found liable for harm caused by one patron to another, such liability must rest on his duty as an occupier of land.[28]

An occupier of land has long been recognized to have a duty to exercise reasonable care to protect those who are on his property in response to his business invitation.[29] While the occupier of land is not an insurer of the safety of his business invitees, he is required to exercise reasonable care to maintain the premises in a reasonably safe condition.[30] A business proprietor is an occupier of land.[31]

The duty of reasonable care of the business proprietor includes the duty to protect invitees from the harmful acts of third persons on the premises.[32] The proprietor's duty applies regardless of whether the third person's conduct is accidental, negligent or intentional.[33] When the proprietor should anticipate that the activities of persons on the premises may create an unreasonable risk of harm to the invitee, the proprietor has a duty to warn or otherwise protect the invitee.[34] If necessary to prevent harm to customers, the proprietor must exercise the power of expulsion or exclusion of potentially dangerous persons that his control of the premises provides.[35]

The tavernkeeper, like all other business proprietors, has a duty to

---

but finding cause of action for sale to habitual drunkard because he has no power to resist and cannot be superseding cause); Pierce v. Lopez, 16 Ariz. App. 54, 57, 490 P.2d 1182, 1185 (1971). For criticism of the common law rule, see Lewis v. Wolf, 122 Ariz. 567, 596 P.2d 705 (Ct. App. 1979).

27. Pratt v. Daly, 55 Ariz. 535, 539, 104 P.2d 147, 149 (1949); Pierce v. Lopez, 16 Ariz. App. 54, 57, 490 P.2d 1182, 1185 (1971); *see* Collier v. Stamatis, 63 Ariz. 285, 290, 162 P.2d 125, 127 (1945).

28. *See* Pierce v. Lopez, 16 Ariz. App. 54, 57, 490 P.2d 1182, 1185 (1971). *See generally* Comment, *Sale of Intoxicating Liquor as Proximate Cause of Inebriate's Tort*, 3 ARIZ. L. REV. 98 (1961); Casenote, *Duty of Possessor of Land to Take Affirmative Steps to Protect a Business Invitee from a Known Danger*, 8 ARIZ. L. REV. 398 (1967).

29. Berne v. Greyhound Parks, 104 Ariz. 38, 41, 448 P.2d 388, 391 (1968); J. PAGE, THE LAW OF PREMISES LIABILITY § 4.8 (1976); W. PROSSER, *supra* note 22, § 61, at 385; RESTATEMENT (SECOND) OF TORTS § 314A(3) (1965).

30. *E.g.*, Hlavaty v. Song, 107 Ariz. 606, 608, 491 P.2d 460, 462 (1971); Berne v. Greyhound Parks, 104 Ariz. 38, 41, 448 P.2d 388, 391 (1968); Sherman v. Arno, 94 Ariz. 284, 290, 383 P.2d 741, 744 (1963).

31. See text & note 33 *infra*.

32. Pierce v. Lopez, 16 Ariz. App. 54, 57-58, 490 P.2d 1182, 1185-86 (1971); Waldron v. Hammond, 71 Wash. 2d 361, 363, 428 P.2d 589, 591 (1967); J. PAGE, *supra* note 29, § 4.11; W. PROSSER, *supra* note 22, § 61, at 395; RESTATEMENT (SECOND) OF TORTS §§ 314A, 344 (1965).

33. RESTATEMENT (SECOND) OF TORTS § 344 (1965); *see* Pierce v. Lopez, 16 Ariz. App. 54, 57-58, 490 P.2d 1182, 1185-86; Bartosh v. Banning, 251 Cal. App. 2d 378, 383, 59 Cal. Rptr. 382, 386 (1967).

34. J. PAGE, *supra* note 29, § 4.11; RESTATEMENT (SECOND) OF TORTS § 344 (1965); *see* Pierce v. Lopez, 16 Ariz. App. 54, 58, 490 P.2d 1182, 1186 (1971); Waldron v. Hammond, 71 Wash. 2d 361, 363, 428 P.2d 589, 591 (1967); W. PROSSER, *supra* note 22, § 61 at 395.

35. Pierce v. Lopez, 16 Ariz. App. 54, 58, 490 P.2d 1182, 1186 (1971); Bartosh v. Banning, 251 Cal. App. 2d 378, 384, 59 Cal. Rptr. 382, 386 (1967); W. PROSSER, *supra* note 22, § 61, at 395. *See* J. PAGE, *supra* note 29, § 4.11; RESTATEMENT (SECOND) OF TORTS § 344, Comment d (1965). In *McFarlin*, the court refers to this duty to exercise the power of control or expulsion, as well as the duty of reasonable care to prevent harm at the hands of third persons, as the "predicate for liability." 127 Ariz. at 226, 619 P.2d at 735; see text & notes 30-31 *supra*.

exercise reasonable care to protect patrons.[36] It is clear that the proprietor has a duty to act only if he has reason to believe the conduct of a third person (such as another patron) will be dangerous to the invitee.[37] Because the reasonable tavernkeeper knows that intoxication can lead to unpredictable and dangerous behavior, however, the tavernkeeper must be alert to the risks of intoxication and be prepared to act to prevent harm by intoxicated persons.[38]

FORESEEABILITY OF THE RISK

The tavernkeeper's duty to protect patrons while they are on the premises encompasses only those risks of harm that are reasonably foreseeable.[39] In *McFarlin*, the defendants-appellants argued that the injuries to the plaintiff were not reasonably foreseeable because they neither knew nor should have known, first, that the assailant would use a gun or, second, that he had a propensity for violence.[40] In addition, the *McFarlin* dissent took the view that the finding of foreseeability was unwarranted in view of the place of the shooting.[41]

Manner and Extent of Harm

In addressing the question of the foreseeability of Dominguez's use of the gun, the *McFarlin* court held that the foreseeability of the extent of an injury and the manner in which it occurs is immaterial.[42] Although both the risk and the plaintiff must be foreseeable to a rea-

36. *See, e.g.*, Pierce v. Lopez, 16 Ariz. App. 54, 57-58, 490 P.2d 1182, 1185-86 (1971); Bartosh v. Banning, 251 Cal. App. 2d 378, 383, 59 Cal. Rptr. 382, 386 (1967); Waldron v. Hammond, 71 Wash. 2d 361, 363, 428 P.2d 589, 591 (1967).

37. Pierce v. Lopez, 16 Ariz. App. 54, 58, 490 P.2d 1182, 1186 (1971); Bartosh v. Banning, 251 Cal. App. 2d 378, 384, 59 Cal. Rptr. 382, 386 (1967); RESTATEMENT (SECOND) OF TORTS § 344, Comments d, f (1965).

38. Pierce v. Lopez, 16 Ariz. App. 54, 59, 490 P.2d 1182, 1187 (1971) (intoxication may excite emotions leading to violence); Reilly v. 180 Club Inc., 14 N.J. Super. 420, 424, 82 A.2d 210, 212 (Super. Ct. App. Div. 1951) (standard of care is that of ordinarily prudent person, but degree of care must be commensurate with risks, including those caused by consumption of liquor); Priewe v. Bartz, 249 Minn. 488, 492, 83 N.W.2d 116, 120 (1957) (presence of an intoxicated person exposes proprietor to liability for hazards resulting from drunk's unpredictable behavior); J. PAGE, *supra* note 29, § 4.11.

39. Pierce v. Lopez, 16 Ariz. App. 54, 57-58, 490 P.2d 1182, 1185-86 (1971); Bartosh v. Banning, 251 Cal. App. 2d 378, 384, 59 Cal. Rptr. 382, 386 (1967); RESTATEMENT (SECOND) OF TORTS § 344, Comments d, f (1965).

40. 127 Ariz. at 222, 619 P.2d at 731. These arguments are somewhat difficult to keep separate, since part of the argument concerning an assailant's violent propensities is that the defendants lacked knowledge he would commit *this type* of act, that is, shoot someone. *See* Brief for Appellant at 21-23, which makes that point in discussing Jones v. Leon, 3 Wash. App. 916, 478 P.2d 778 (1971), which considered an assailant's propensity for violence in connection with the use of a gun. *See also* text & notes 71-79 *infra*.

41. 127 Ariz. at 227, 619 P.2d at 736 (Gordon, J., dissenting).

42. *Id.* at 222, 619 P.2d at 731; *accord*, Tucker v. Collar, 79 Ariz. 141, 147, 285 P.2d 178, 182 (1955); Carey v. New Yorker of Worcester, Inc., 355 Mass. 450, 452, 245 N.E.2d 420, 422 (1969); Palsgraf v. Long Island R. Co., 248 N.Y. 339, 344, 162 N.E.2d 99, 100 (1928).

sonable person,[43] *McFarlin* takes a "broad view" of the classes of risks and victims that are foreseeable.[44] This broad view is consistent with the language of *Palsgraf v. Long Island Railroad Co.*,[45] which has been adopted by Arizona.[46] *Palsgraf* established the principle that the risk of danger to the plaintiff or one in the plaintiff's position must be reasonably foreseeable.[47] Once some risk to the plaintiff is foreseeable, however, the defendant may be liable for all the consequences resulting from the risk even if the injury occurs in an unanticipated manner.[48] Thus, the defendant tavernkeeper could be held liable for injuries caused by Dominguez's unanticipated use of a gun if some risk of harm from Dominguez was foreseeable.[49]

McFarlin's view of foreseeability of the manner in which harm occurs is consistent with the majority view.[50] Nevertheless, other jurisdictions, when faced with cases involving bar shootings, have been reluctant to apply the rule to hold a tavernkeeper liable to a patron who has been shot.[51] For example, it has been held that although the bar owner breached his duty by allowing a "troublemaker" into the bar, his duty ended when the potentially dangerous patron left the bar because the tavernkeeper had no way of knowing the assailant would return with a gun.[52] Some courts have found no foreseeability, and thus no duty to act, even where the assailant threatened to return with a gun[53]

---

43. 127 Ariz. at 222, 619 P.2d at 731; *accord*, Tucker v. Collar, 79 Ariz. 141, 146, 285 P.2d 178, 181 (1955); West v. Cruz, 75 Ariz. 13, 19-20, 251 P.2d 311, 315 (1952).

44. 127 Ariz. at 222, 619 P.2d at 731; see text & notes 43-46 *infra*.

45. *See* 248 N.Y. 339, 341-46, 162 N.E. 99, 99-101, (1928). The defendant railroad in *Palsgraf* was held not liable for injuries caused to the plaintiff by a falling scale on the platform. *Id.* at 341, 162 N.E. at 99. The scale had fallen after an explosion that occurred when the defendant's employee pushed a passenger trying to get on the train and a package of explosives fell. *Id.* at 340-41, 162 N.E. at 99. The employee did not know the package contained explosives. *Id.* at 541, 162 N.E. at 99. Thus, he could not foresee the risk of harm to the plaintiff. *Id.* For discussion of the "broad view" of risks in connection with *Palsgraf*, see text & notes 47-48 *infra*.

46. *E.g.*, Tucker v. Collar, 79 Ariz. 141, 146, 285 P.2d 178, 181 (1955); Crouse v. Wilbur-Ellis Co., 77 Ariz. 359, 365, 272 P.2d 352, 356 (1954); West v. Cruz, 75 Ariz. 13, 19, 251 P.2d 311, 315 (1952).

47. 248 N.Y. at 341-46, 162 N.E. at 99-101; *see* Tucker v. Collar, 79 Ariz. 141, 146, 285 P.2d 178, 181 (1955); West v. Cruz, 75 Ariz. 13, 19-20, 251 P.2d 311, 315 (1952).

48. *See* Tucker v. Collar, 79 Ariz. 141, 147, 285 P.2d 178, 182 (1955) ("once a person has committed the wrong, he is liable for all the consequences proximately resulting therefrom even though the injury be of a form or to an extent not anticipated"); Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 344, 162 N.E. 99, 100 (notice of particular way an accident occurs is not needed if the possibility of the accident is clear to the ordinarily prudent eye); RESTATEMENT (SECOND) OF TORTS § 281, Comment f (1965); F. HARPER & F. JAMES, THE LAW OF TORTS § 18.2, at 1026, § 20.5, at 1147 (1956).

49. McFarlin v. Hall, 127 Ariz. 220, 222, 619 P.2d 729, 731.

50. See text & notes 43-48 *supra*.

51. *See* text & notes 52-56 *infra*. *But see* Carey v. New Yorker of Worcester Inc., 355 Mass. 450, 452, 245 N.E.2d 420, 422 (1969) (bar owner held liable where there was disturbance just before shooting).

52. *See, e.g.*, Kipp v. Wong, 163 Mont. 476, 481-82, 517 P.2d 897, 901 (1974); Schwartz v. Cohen, 204 Misc. 142, 144, 119 N.Y.S.2d 124, 126 (Sup. Ct. 1953); Popovich v. Pechkurow, 145 N.E.2d 550, 552 (Ohio Ct. App. 1956).

53. Huddleston v. Clark, 186 Kan. 209, 213, 349 P.2d 888, 892 (1960); Popovich v.

or had been involved in an altercation with the plaintiff earlier the same day.[54] Further, courts in the state of Washington have refused to hold tavernkeepers liable for shootings even if the assailant previously was removed from the bar for carrying a gun[55] or if the assailant was known to have threatened the life of a patron.[56]

Propensity for Violence

The defendants in *McFarlin* also argued that their duty to the plaintiff did not extend to preventing harm from Dominguez, because they had no knowledge that Dominguez posed any risk of harm.[57] Indeed, Dominguez had not exhibited any violent or hostile behavior in the bar that night.[58] The court held, however, that a duty to protect the bar's patrons exists not only when the assailant has been hostile or violent in the period before the attack,[59] but also when the tavernkeeper knows or has reason to know from experience that the assailant poses a risk to patrons.[60]

The *McFarlin* court relied on *Pierce v. Lopez*,[61] for the proposition that experience may support a duty of care.[62] In *Pierce*, the Arizona Court of Appeals found that the bar owners were not negligent toward an injured patron because the bartender had no knowledge of the assailant's propensity for violence and no opportunity to intervene to protect the patron.[63] Despite the fact that the bartender knew the assailant was intoxicated, the assailant had shown no hostility before the incident and there was an interval of only seconds between the start of an

Pechkurow, 145 N.E.2d 550, 551-52 (Ohio Ct. App. 1956); Moore v. Mayfair Tavern Inc., 75 Wash. 2d 401, 402-03, 451 P.2d 669, 671-72 (1969).

54. Popovich v. Pechkurow, 145 N.E.2d 550, 551-52 (Ohio Ct. App. 1956); Moore v. Mayfair Tavern Inc., 75 Wash. 2d 401, 402-03, 451 P.2d 669; 671-72 (1969).

55. *See* Shelby v. Keck, 85 Wash. 2d 911, 913, 915, 541 P.2d 365, 367, 379 (1975) (without further evidence to alert a reasonable person that Keck was likely to be armed, the fact that he once was told to leave the bar because of possession of a weapon is not sufficient to impose liability). Both the Arizona and Washington courts have premised the tavernkeeper's duty on language in Waldron v. Hammond, 71 Wash. 2d 361, 363, 428 P.2d 589, 592 (1967), although with different results. *Compare* McFarlin v. Hall, 127 Ariz. 220, 224-25, 619 P.2d 729, 733-34 (1980) (tavernkeeper liable) *with* Shelby v. Keck, 85 Wash. 2d 911, 914, 541 P.2d 365, 368 (1975) (tavernkeeper not liable) and Jones v. Leon, 3 Wash. App. 916, 922, 478 P.2d 778, 782 (1971) (tavernkeeper not liable).

56. Jones v. Leon, 3 Wash. App. 916, 945-46, 478 P.2d 778, 783-84 (1971) (no notice to bar owners that assailant was so violent he would use a gun); see text & notes 62-69 *infra*.

57. 127 Ariz. at 224, 619 P.2d at 733. The defendants argued particularly that the risk was not reasonably foreseeable because Dominguez had not been involved in any disturbance earlier the night of the shooting. *Id.*

58. See text & note 5 *supra*.

59. 127 Ariz. at 224, 619 P.2d at 733.

60. *Id.*

61. 16 Ariz. App. 54, 490 P.2d 1182 (1971). *Pierce* is the only prior Arizona case setting out the tavernkeeper's duty.

62. *Id.* at 58, 490 P.2d at 1186.

63. *Id.* at 58-59, 490 P.2d at 1186-87.

angry exchange and the injurious act.[64]

As distinguished from *Pierce*, however, *McFarlin* found that there was sufficient evidence for the jury to conclude that the defendants believed Dominguez was violent and perhaps an ex-convict or former mental patient.[65] In contrast, the *Pierce* court had found that, although the bartender had known the assailant for some time, there was no evidence she knew before the incident that he had a "bellicose nature."[66]

Whether a violent act is reasonably foreseeable also was addressed by the Arizona Supreme Court in *Parsons v. Smithey*.[67] In *Parsons*, the court held that the defendants could be found to have reasonably foreseen only the same type of conduct that the assailant previously had exhibited, not the more violent conduct that caused the plaintiff's injury.[68] In contrast, *McFarlin* charges the defendants with knowledge of Dominguez's propensity for violence despite the lack of evidence that Dominguez ever had committed an act similar to the shooting.[69]

In tavern shooting cases considered by other jurisdictions, findings of foreseeability most often are based on previous conduct of the same sort by the assailant.[70] For example, in *Jones v. Leon*,[71] the defendant

64. *Id.* at 58, 490 P.2d at 1186.

65. 127 Ariz. at 224, 619 P.2d at 733. The court said that the jury, if it believed the evidence, could have found that the defendants thought Dominguez had spent recent years in jail or a mental hospital; that in the past Dominguez had fought in the bar and was such a troublemaker that the defendant had permanently expelled him from the bar; and that Dominguez was feared by the defendants, who believed they could not control him. *Id.* While the dissent agrees that *Pierce* states the applicable law, it argues that the effect of the holding in *McFarlin* is to expand the duty of a tavernkeeper far beyond *Pierce* by requiring a bar owner to possess "extraordinary powers of foreseeability greater than those of a reasonable person in similar circumstances." *Id.* at 227, 619 P.2d at 736 (Gordon, J., dissenting).

The court of appeals, like the dissent, found no foreseeability. McFarlin v. Hall, No. 1 Ca-Civ 4407, at 5 (Ariz. Ct. App., April 24, 1980). In a memorandum decision, the court of appeals held as a matter of law that the defendants had no duty to protect McFarlin because there was nothing in the record "from which the appellants or their employees might reasonably have anticipated the grievous injury under consideration." *Id.* The court of appeals also emphasized that on the night of the shooting Dominguez was not hostile, aggressive or threatening and noted "a lack of evidence" that Dominguez had ever engaged in violent or threatening conduct at the bar. *Id.* at 2-3. "As much of a pest and a nuisance as Dominguez may have been, and as intoxicated as he may have been, there is simply nothing to reasonably suggest that he would engage in an act of acute violence toward another patron." *Id.* at 5.

66. Pierce v. Lopez, 16 Ariz. App. 54, 58, 490 P.2d 1182, 1186.

67. 109 Ariz. 49, 504 P.2d 1272 (1973). The *McFarlin* court uses the signal *cf.* and *see* when it cites *Parsons*, 127 Ariz. at 222, 224, 619 P.2d at 731, 733, indicating that *Parsons* lends support to the Court's statements. *McFarlin* found foreseeability from past acts that were unlike the act complained of, while *Parsons* did not. See text & notes 68-69 *infra*.

68. 109 Ariz. at 54, 504 P.2d at 1277. *See also* Huddleston v. Clark, 186 Kan. 209, 213, 349 P.2d 888, 892 (1960); Jones v. Leon, 3 Wash. App. 916, 926, 478 P.2d 778, 783 (1971).

69. *See* 127 Ariz. at 222-24, 619 P.2d at 731-33; text & note 65 *supra*.

70. *See, e.g.*, Vigil v. Pine, 176 Colo. 384, 386, 490 P.2d 934, 935 (1971) (assailant who beat plaintiff previously had struck another in bar); Smith v. 601 Liquors, 101 Ill. App. 2d 306, 312-23, 243 N.E.2d 367, 369 (1968) (beating by ex-boxer who was known as vicious and was sought by police for attack on officer); Mettling v. Mulligan, 303 Minn. 8, 9-10, 225 N.W.2d 825, 827 (1975) (assailant had been in numerous fights in bar before night he struck plaintiff); *cf.* Jones v. Leon, 3 Wash. App. 916, 926, 478 P.2d 778, 783 (1971) (injury not foreseeable where assailant was not known to use gun).

71. 3 Wash. App. 916, 478 P.2d 778 (1971).

bar owner knew that the assailant had slapped the woman involved two weeks earlier at the bar, and the woman told the bar's manager on the day of the shooting that the assailant would kill her because she left him.[72] She asked the manager to call the police if her ex-boyfriend showed up at the bar.[73] The assailant came into the bar and shot the plaintiff, who was dancing at the time with the assailant's estranged girlfriend.[74]

The Washington Court of Appeals held as a matter of law that the conduct was so highly extraordinary as to be beyond the range of foreseeability.[75] Thus, the result of the act was not within the ambit of the risks covered by the tavernkeeper's duty.[76] The plaintiff argued that the manager could have excluded the assailant from the premises or even required the woman to leave because her presence posed a risk of harm to other patrons.[77] The court, however, ruled that the slapping did not give the bar owner sufficient notice of the assailant's violent nature.[78] Despite the assailant's threats to the woman, his arrival at the bar that day was regarded by the Washington court as too speculative to be the basis of a duty imposed on the bar owner.[79]

Place of the Shooting

McFarlin also presents a foreseeability issue concerning the place of the shooting, which is not addressed by the majority opinion.[80] The shooting occurred in the bar's parking lot after Dominguez had left the bar.[81] The *McFarlin* dissent, which considers the location of the shooting an important factor, argues that the majority opinion would require a bar owner to patrol the parking lot for an indefinite time on the vague chance a dangerous patron might return, even though there might be

72. *Id.* at 921, 478 P.2d at 781-82.

73. *Id.*

74. *Id.* at 921-22, 478 P.2d at 781-82.

75. *Id.* at 926, 478 P.2d at 783; see text & note 70 *supra* for cases in which similar previous conduct was the basis for liability. Also compare McFarlin v. Hall, 127 Ariz. at 222, 224, 619 P.2d at 731, 733 (holding that Dominguez's violent act was within the range of foreseeability); text & notes 57-60, 65 *supra*.

76. 3 Wash. App. at 926, 478 P.2d at 783; see text & notes 57-60 *supra*; *cf.* 127 Ariz. at 22, 619 P.2d at 731.

77. 3 Wash. App. at 926, 478 P.2d at 783; *cf.* text & notes 21, 35 *supra* (power to control or expel).

78. 3 Wash. App. at 925, 478 P.2d at 783. The majority said:

> We do not believe it can be inferred from this incident (the slapping) that Bird's temper was so violent and uncontrollable that it was reasonably foreseeable to the respondents that he would use a gun under similar circumstances. There is no evidence, nor inference from evidence, that respondents had knowledge of any propensity of Bird to use a gun.

Id.

79. *Id.* at 926, 478 P.2d at 784.

80. 127 Ariz. at 227, 619 P.2d at 736 (1980) (Gordon, J., dissenting). The majority merely notes that the shooting occurred in the parking lot. *Id.* at 222, 619 P.2d at 731.

81. *Id.* at 222, 619 P.2d at 731.

no indication the patron planned to do so.[82]

Other jurisdictions have required a strong showing that an injury occurring in a parking lot was foreseeable before extending the tavernkeeper's duty of care to that part of the premises.[83] For instance, liability has been predicated on a showing that disturbances in the parking lot were frequent,[84] or that the bar owner had actual knowledge either that an attack was occurring[85] or that the assailant was waiting.[86] A dramshop act also can provide the basis for liability for such an incident.[87] None of these factors was present in *McFarlin*, however.[88] Further, Arizona does not have a dramshop act.[89]

SCOPE OF THE DECISION

Although the existence of a duty to act is considered a question of law for the court,[90] whether such a duty exists depends upon rules of law and the application of these rules to the particular facts.[91] The court determines the applicable rules, but the application of the rules to the facts of each case usually is committed to the jury.[92] When reasonable people can disagree about the facts and the inferences to be drawn from them, the jury must decide whether a given hazard was foreseeable enough to be within the scope of the defendant's duty.[93] In *McFarlin*, the jury verdict constituted a finding that the risk of McFarlin's shooting was reasonably foreseeable and thus the type of risk the defendants had a duty to avert.[94] The Arizona Supreme Court simply ruled there was sufficient evidence to support this jury verdict.[95]

---

82. *Id.* at 227, 619 P.2d at 736 (Gordon, J., dissenting).

83. *See* Taylor v. Centennial Bowl, 65 Cal. 2d 114, 117-19, 416 P.2d 793, 795-96, 52 Cal. Rptr. 561, 563-64 (1966); Kerby v. Flamingo Club Inc., 35 Colo. App. 127, 129-33, 532 P.2d 975, 978-79 (1974).

84. *See* Taylor v. Centennial Bowl, 65 Cal. 2d 114, 119, 416 P.2d 793, 800, 52 Cal. Rptr. 561, 564 (1966); Kerby v. Flamingo Club Inc., 35 Colo. App. 127, 130, 532 P.2d 975, 977-78 (1974).

85. *See* Kerby v. Flamingo Club Inc., 35 Colo. App. 127, 131, 532 P.2d 975, 978.

86. Taylor v. Centennial Bowl, 65 Cal. 2d 114, 118, 416 P.2d 793, 795, 52 Cal. Rptr. 561, 563 (1966).

87. Morehead v. Rock Tavern, Inc., 89 Ill. App. 2d 111, 113, 231 N.E.2d 259, 260 (1967).

88. *See* 127 Ariz. at 222-24, 619 P.2d at 731-33.

89. *See* note 27 *supra*.

90. Griffith v. Valley of the Sun Recovery & Adjustment Bureau, 126 Ariz. 227, 230, 613 P.2d 1283, 1286 (Ct. App. 1980); Chavez v. Tolleson Elementary School Dist. 122 Ariz. 472, 477, 595 P.2d 1017, 1022 (Ct. App. 1979); W. PROSSER, *supra* note 22, § 37, at 206.

91. F. HARPER AND F. JAMES, *supra* note 48, § 18.8, at 1059; *see* Arizona Pub. Serv. Co. v. Brittain, 107 Ariz. 278, 280, 486 P.2d 176, 178 (1971); Griffith v. Valley of the Sun Recovery & Adjustment Bureau, 126 Ariz. 227, 230, 613 P.2d 1283, 1286 (Ct. App. 1980).

92. F. HARPER AND F. JAMES, *supra* note 48, § 18.8, at 1059; *see* Arizona Pub. Serv. Co. v. Brittain, 107 Ariz. 278, 280, 486 P.2d 176, 178 (1971); Griffith v. Valley of the Sun Recovery & Adjustment Bureau, 126 Ariz. 227, 230, 613 P.2d 1283, 1286 (Ct. App. 1980).

93. *See* Bullard v. Stonebraker, 101 Ariz. 584, 585-86, 422 P.2d 700, 701-02 (1967); Jones v. Leon, 3 Wash. App. 916, 924, 478 P.2d 778, 783 (1971). F. HARPER AND F. JAMES, *supra* note 48, § 18.8, at 1059.

94. *See* 127 Ariz. at 224, 226, 619 P.2d at 733, 735; text & notes 92-93 *supra*.

95. 127 Ariz. at 224, 619 P.2d at 733. Arizona appellate courts will uphold a verdict sup-

The jury verdict for the plaintiff appears to be the key to the outcome in *McFarlin* in view of the court's reluctance to overturn such a verdict.[96] The question of the foreseeability of a given hazard is clearly within the jury's province as fact-finder.[97] The court can rule as a matter of law only if there can be no disagreement about the facts and the inferences to be drawn from them.[98] Furthermore, a reviewing court will reverse a jury's verdict only if it is clearly erroneous and without substantial evidentiary support.[99] Because the jury in *McFarlin* found that the hazard was reasonably foreseeable, and because the supreme court was unwilling to find the verdict clearly erroneous, the court pushed the limits of the defendant's duty under the circumstances beyond those set by other jurisdictions.[100] Under the standards for reviewing a jury's findings, the existence of a duty will thus depend almost entirely on the particular facts and the jury's conclusions about them.[101]

CONCLUSION

The basic duty of the tavernkeeper, as stated in *McFarlin v. Hall*, is a restatement of the duty imposed in *Pierce v. Lopez*. Tavernkeepers must take steps to protect patrons when they have reason to know that one patron poses a threat of harm to others. A tavernkeeper's observation of the dangerous person before harm occurs or the tavernkeeper's experience with that person may give notice of the risk. Past experi-

---

ported by substantial evidence. 127 Ariz. at 224, 619 P.2d at 733; Siegrist v. Carrillo, 112 Ariz. 218, 222, 540 P.2d 690, 694 (1975); State *ex rel.* Herman v. Schaffer, 110 Ariz. 91, 96, 575 P.2d 593, 598 (1973); Parrish v. Camphuysen, 107 Ariz. 343, 345, 488 P.2d 657, 659 (1971).

96. *See* 127 Ariz. at 224, 619 P.2d at 733; Parrish v. Camphuysen, 107 Ariz. 343, 345, 488 P.2d 657, 659 (1971) (jury verdict will be overridden only if clearly erroneous); see text & notes 97-99 *infra*.

97. See text & notes 92-93 *supra*.

98. Arizona Pub. Serv. Co. v. Brittain, 107 Ariz. 278, 280, 486 P.2d 176, 178 (1971); Griffith v. Valley of the Sun Recovery & Adjustment Bureau, 126 Ariz. 227, 230, 613 P.2d 1283, 1286 (Ct. App. 1980); see text & note 93 *supra*.

99. Siegrist v. Carrillo, 112 Ariz. 218, 222, 540 P.2d 690, 694 (1975); Parrish v. Camphuysen, 107 Ariz. 343, 345, 488 P.2d 657, 659 (1971); *see* State *ex rel.* Herman v. Schaffer, 110 Ariz. 91, 96, 575 P.2d 593, 598 (1973). The *McFarlin* court did find a nonprejudicial error in an instruction to the jury, which said that "[t]he test of whether the duty of reasonable care is discharged is the probability or possibility of injury to the plaintiff." 127 Ariz. at 225, 619 P.2d at 734. Although the use of the word "possibility" was error, the court held the rest of the instruction, which was taken from *Pierce*, was adequate to dispel the jury's confusion, especially when it stated that a bar owner is not the insurer of his patron's safety. *Id.* For a statement of the jury instructions given, see 16 Ariz. App. at 57-58, 490 P.2d at 1185-86.

100. See text & notes 42-89 *supra*. It is interesting to note in this context two Washington cases in which bar owners were found not to be liable to patrons shot on the premises, despite greater foreseeability than that in *McFarlin*. See text & notes 55-56, 71-79 *supra*, unlike *McFarlin*, in neither case was the court in the position of reviewing a jury verdict for the plaintiff. Shelby v. Keck, 85 Wash. 2d 911, 913, 541 P.2d 365, 367 (1975) (directed verdict for the defendant); Jones v. Leon, 3 Wash. App. 916, 917, 478 P.2d 778 (1971) (a jury verdict for the defendant was changed to a directed verdict for the defendant after a motion for a new trial). In both cases, the directed verdict was upheld.

101. See text & notes 90-100 *supra*.

ence is sufficient to indicate that a person has a propensity for violence, and knowledge of such a propensity is a sufficient predicate for a tavernkeeper's liability to a patron injured by that person on the premises. Although this rule is followed by other jurisdictions, those courts often require that the previous conduct giving notice of a propensity for violence be similar to the conduct causing the injury before imposing a duty of care. *McFarlin*, however, requires only that a tavernkeeper could foresee, or should have foreseen, any risk of harm resulting from the person's presence before finding a duty to protect patrons from that person.

The *McFarlin* decision thus appears to expand liability beyond *Pierce*. The court's ruling, however, was an affirmance of a jury verdict finding that the risk was foreseeable under the particular circumstances. Because the decision can be explained by the court's deference for the jury's verdict in matters of negligence, it is not clear whether *McFarlin* will have far-reaching effects in future cases. The question of foreseeability still will be one for the jury. If the Arizona Supreme Court applies the same standards it did in *McFarlin*, the court will be reluctant to overturn a jury's conclusions regarding reasonably foreseeable risks that define the scope of a defendant tavernkeeper's duty.

Ellen Wheeler