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I. CIVIL PROCEDURE

A. ARIZONA PERSONAL JURISDICTION: PURPOSEFUL CONTACTS OF SISTER STATES

Personal jurisdiction is a court's power over the person of a defendant.¹ Without it a court cannot make a valid and binding judgment against the defendant.² When the defendant is a nonresident, the forum state may not exercise personal jurisdiction unless it has a "long-arm" or "single-act" statute³ and the defendant has such "minimum contacts" with the state that it is fair to assert jurisdiction over him.⁴

The fairness of an assertion of personal jurisdiction over a nonresident defendant was recently addressed by the Arizona Supreme Court in *Chavez v. Indiana*.⁵ The *Chavez* court held that it was not fair to subject nonresident defendants to suit in Arizona when it was not foreseeable that their actions in Indiana would cause effects in Arizona.⁶

In 1973, a young Arizona girl was stabbed to death by a former inmate of two Indiana state mental hospitals.⁷ The girl's father subsequently brought suit in Arizona against Indiana, the two hospitals, and a doctor at one of the hospitals.⁸ The complaint charged the defendants with negligence in releasing the inmate.⁹ The trial court dismissed the action with prejudice.¹⁰ The Arizona Supreme Court reversed on

1. See *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).

2. *Id.* at 733. The Court stated "that proceedings in a court of justice to determine the personal rights and obligations of parties over whom the court has no jurisdiction do not constitute due process of law." *Id.*

3. See *Powder Horn Nursery, Inc. v. Soil & Plant Lab., Inc.*, 20 Ariz. App. 517, 520 n.1, 514 P.2d 270, 273 n.1 (1973); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971). In its discussion of the necessity of a statute for the exercise of personal jurisdiction over nonresidents, Comment b of § 37 states:

The causing of effects in a state by an act done elsewhere was not generally recognized as a basis of judicial jurisdiction at common law. When the question has arisen, the courts have usually held themselves without authority under their local law to exercise jurisdiction on bases not recognized at common law unless authorized to do so by statute.

Id.

"Long-arm" or "single-act" statutes permit states to exercise jurisdiction over nonresidents. The statutes predicate judicial jurisdiction upon the commission of a specified (single) act or a series of enumerated acts outside the jurisdiction which have consequences inside it. 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1068, at 243 (1969).

4. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

5. 122 Ariz. 560, 596 P.2d 698 (1979).

6. *Id.* at 562, 596 P.2d at 700.

7. Record at 5, *Chavez v. Indiana*, 122 Ariz. 560, 596 P.2d 698 (1979).

8. 122 Ariz. at 561, 596 P.2d at 699.

9. *Id.*

10. *Id.* The trial court granted the defendant's ARIZ. R. Civ. P. 12(b) motion. *Id.* The defendants had argued four grounds in support of their motion: (1) Lack of personal jurisdiction over defendants; (2) lack of subject matter jurisdiction; (3) insufficient process; and (4) running of

technical grounds, remanding the case with instructions to dismiss without prejudice because the plaintiff failed to establish sufficient grounds for personal jurisdiction over the defendants.¹¹

This casenote will initially examine the development of both federal and Arizona personal jurisdiction law. A critical analysis of the *Chavez* decision will then be undertaken. The advantages of the *Restatement* standard which was adopted by the *Chavez* court will be considered. Finally, the *Chavez* court's analysis of the contacts between the defendants and Arizona will be examined.

The Evolution of Personal Jurisdiction

At early common law, the basis for a court's power over a defendant was his consent or the court's ability to exert power over him.¹² Later courts asserted jurisdiction over persons residing in the state whether present or not.¹³ Nonresident defendants who were formerly present in the state were sometimes held to have consented to be sued in the state because of their actions while present.¹⁴ The law of corporate personal jurisdiction developed along similar lines,¹⁵ but despite ever-expanding theories in both areas the law was inadequate to meet

the statute of limitations. Record at 8-10. The trial court granted the motion without reference to any of the asserted grounds. *Id.* at 52.

11. 122 Ariz. at 563, 596 P.2d at 701. Since the court disposed of the case on personal jurisdiction grounds, it did not consider the statute of limitations issue nor the problem of asserting jurisdiction over a sister state. *Id.* at 562-63, 596 P.2d at 700-01.

Indiana was a party because the plaintiff alleged that an Indiana state hospital negligently released the inmate who murdered his daughter. *Id.* at 561, 596 P.2d at 699. This raised the problem of an Arizona court resolving a dispute between one of its citizens and a sister state. *See id.* at 562, 596 P.2d at 700.

Although the *Chavez* court acknowledged that the United States Supreme Court had recently permitted a state court to exercise jurisdiction over another state in *Nevada v. Hall*, 440 U.S. 410, 426-27 (1979), the *Chavez* court observed that it was not required to do so: "Each state must decide whether as a matter of comity to grant immunity to a sister state sued in its courts." 122 Ariz. at 563, 596 P.2d at 701.

12. *See, e.g.*, *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 486 (1813) (Johnson, J., dissenting). Wright and Miller refer to the opinion as "[o]ne of the earliest expressions of the territoriality principle." 4 C. WRIGHT & A. MILLER, *supra* note 3, § 1064, at 207 n.36.

13. *See, e.g.*, *Milliken v. Meyer*, 311 U.S. 457, 462 (1940); *Blackmer v. United States*, 284 U.S. 421, 436 (1932).

14. *See Hess v. Pawloski*, 274 U.S. 352, 354 (1927). In *Pawloski*, the Supreme Court upheld an assertion of in personam jurisdiction based upon an "implied consent" statute. The statute provided that nonresidents driving their autos on New Jersey highways were deemed to appoint a New Jersey official to receive process for actions arising out of the use of the highways. *Id.* Wright and Miller state that the implied consent statute upheld by the *Pawloski* Court served as a precedent for similar statutes covering other activities. 4 C. WRIGHT & A. MILLER, *supra* note 3, § 1065, at 215-16.

15. Corporate personal jurisdiction was originally governed by a "legal existence theory" articulated by Chief Justice Taney in *Bank of Augusta v. Earle*, 38 U.S. 519 (1839). *See* 4 C. WRIGHT & A. MILLER, *supra* note 3, § 1066, at 217. The *Earle* Court stated: "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created." 38 U.S. at 520.

It soon became apparent that the "legal existence" theory would be inadequate because of the extensive nature of corporate-related activity outside the state of incorporation. *See* 4 C. WRIGHT & A. MILLER, *supra* note 3, § 1066, at 218. To meet the problem a "consent" theory was adopted.

the needs of a rapidly changing society.¹⁶ The United States Supreme Court responded to this need in *International Shoe Co. v. Washington*.¹⁷

International Shoe involved a nonresident corporation doing business in Washington through resident salesmen.¹⁸ The corporation balked when the state demanded that it contribute to a state unemployment compensation fund.¹⁹ The firm lost both administrative and judicial battles in Washington before appealing to the United States Supreme Court.²⁰

The corporation argued that it was not "present" in Washington and that permitting personal jurisdiction and suit against it were violative of due process principles.²¹ The Supreme Court rejected the presence theory and held that personal jurisdiction is proper when a defendant has such "minimum contacts" with the forum that "traditional notions of fair play and substantial justice" are not offended.²² The Court found that the corporation's continuous and systematic ac-

Under this theory, a nonresident corporation was required to consent to suit before it would be allowed to conduct business in the state. *Id.* § 1066, at 218-19.

Two problems made the "consent" theory unworkable and unjust. First, although a state could require that a nonresident corporation consent to suit in the state, it could not prohibit the corporation from doing business if it refused to consent. *See International Harvester Co. v. Kentucky*, 234 U.S. 579, 588 (1914); 4 C. WRIGHT & A. MILLER, *supra* note 3, § 1066, at 220. Second, a corporation filing an express consent to suit could be sued for actions arising from business outside the state, but a corporation that merely impliedly consented to suit could be sued only for its actions within the state. *Id.* § 1066, at 220-21.

Courts subsequently adopted a "presence theory," which made jurisdiction contingent upon the existence of forum-related corporate activities sufficient to deem the corporation present in the forum. *See Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U.S. 264, 265 (1917); 4 C. WRIGHT & A. MILLER, *supra* note 3, § 1066, at 221-22. But even this theory created problems when the cause of action did not relate to the business conducted in the state or when the corporation stopped doing business in the state. *See, e.g., Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 U.S. 213, 215 (1921) (corporation no longer present); *Simon v. Southern Ry. Co.*, 236 U.S. 115, 128 (1915) (action not related to forum business). When the cause of action was unrelated to the corporation's business, the courts were divided as to whether jurisdiction was proper. *Compare Simon v. Southern Ry. Co.*, 236 U.S. 115, 130 (1915) (jurisdiction denied) with *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 268, 115 N.E. 915, 918 (1917) (jurisdiction upheld). *See* 4 C. WRIGHT & A. MILLER, *supra* note 3, § 1066, at 221-22.

16. The commentators reaching this conclusion have pointed to changes in industrialization, highspeed transportation, population mobility, and communication. *See, e.g.,* 4 C. WRIGHT & A. MILLER, *supra* note 3, § 1067, at 224; Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts from Pennoyer to Denckla: A Review*, 25 UNIV. CHI. L. REV. 569, 573 (1958).

17. 326 U.S. 310 (1945).

18. *Id.* at 313-14.

19. *See id.* at 312. When *International Shoe* refused to contribute to the fund, the corporation was served with an assessment notice pursuant to Washington law. *International Shoe Co. v. State*, 22 Wash. 2d 146, 150-51, 154 P.2d 801, 801-03 (1945). To set aside the assessment the corporation argued:

[T]hat the service upon appellant's salesman was not proper service upon appellant; that appellant was not a corporation of the State of Washington and was not doing business within the state; that it had no agent within the state upon whom service could be made; and that appellant is not an employer and does not furnish employment within the meaning of the statute.

326 U.S. at 312.

20. 326 U.S. at 313.

21. *Id.* at 315.

22. *Id.* at 316.

tivities in Washington constituted sufficient contacts for the exercise of jurisdiction.²³

The minimum contacts doctrine was further defined in *McGee v. International Life Insurance Co.*²⁴ In *McGee*, the Supreme Court upheld the assertion of jurisdiction over a nonresident corporation that had a "substantial connection" with the forum state.²⁵ The "substantial connection" consisted of a single insurance contract between the defendant and a resident who made premium payments from the forum and subsequently died there.²⁶

Perhaps the most important exposition of the minimum contacts-fairness doctrine came in *Hanson v. Denckla*.²⁷ In *Hanson*, a divided court made clear that the trend toward expansion of state jurisdiction over nonresidents did not herald the demise of all limits on in personam jurisdiction.²⁸

Hanson involved a Delaware trust and a will probated in Florida.²⁹ The settlor established the trust while living in Pennsylvania.³⁰ After moving to Florida, she contacted the trustee and appointed beneficiaries of the trust.³¹ She also devised all property over which she had an existing power of appointment in a will executed in Florida.³² Upon her death, a Florida court held that her appointment of beneficiaries under the trust was invalid and that the money in question passed under the Florida will.³³ A parallel action was instituted in Delaware

23. *Id.* at 320. The Supreme Court took note of the following activities of International Shoe within the state: (1) The solicitation of orders; (2) the distribution of products into Washington; (3) the display of samples in display rooms; and (4) the residence of the salesmen, all over a long period of time. *Id.* at 314-15. The Court concluded:

[T]he activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights.

Id. at 320.

24. 355 U.S. 220 (1957). In *McGee*, Lowell Franklin bought an insurance policy naming his mother, Lulu McGee, as beneficiary. *Id.* at 221-22. When International Life Insurance Company of Texas assumed the obligations of the company that issued the policy, Franklin accepted an offer of re-insurance and continued to pay the premiums. *Id.* The company refused to pay McGee when Franklin died. *Id.* at 222. McGee was awarded a California judgment. *Id.* at 221. When she attempted to enforce it in Texas the court held that California lacked jurisdiction to render a judgment over the insurance company. *Id.*

25. *Id.* at 223.

26. *Id.*

27. 357 U.S. 235 (1958).

28. *Id.* at 251.

29. *Id.* at 238-39.

30. *Id.* at 238. The settlor created a revocable trust in Delaware; the document named a Delaware company as trustee of certain securities. *Id.* She reserved the trust income for life but the remainder was to go to her appointees. *Id.*

31. *Id.* at 239. The settlor designated beneficiaries to receive \$400,000 of the trust property. *Id.*

32. *Id.*

33. *Id.* at 242. This decision was affirmed by the Supreme Court of Florida, which held that Florida had personal jurisdiction over the Delaware trust company. *Id.* at 242-43. The trust

and its courts refused to honor the Florida judgment because the Florida court was without personal jurisdiction over the Delaware trustee.³⁴

Although there had been correspondence between the Florida settlor and the Delaware Corporation, the *Hanson* court distinguished these contacts from the solicitation of the insurance contract by the defendant in *McGee*.³⁵ Finding no substantial connection between Florida and the Delaware trust agreement,³⁶ the Court held that the unilateral activity of a forum resident in initiating contact with a foreign defendant cannot satisfy the minimum contacts requirement.³⁷ The Court stated that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."³⁸

The restraint placed upon the expansion of state authority by *Hanson* was not well-defined³⁹ and in its most recent personal jurisdiction decisions the Court has added but little clarification. In *Shaffer v. Heitner*,⁴⁰ the Court considered the limits of quasi-in-rem jurisdiction.⁴¹

company was given notice by mail and publication but failed to appear in the Florida proceeding. *Id.* at 241.

34. *Id.* at 238. A Delaware court with jurisdiction over the trust company sustained the validity of the trust and the appointment. *Id.* at 242. The Delaware Supreme Court affirmed and held that the Florida judgment was not binding because Florida lacked jurisdiction. *Id.* at 243.

35. *Id.* at 251-52. The Court found that the settlor had administered the trust from Florida and compared this to the mailing of the insurance premiums in *McGee*. *Id.* at 252. The Court distinguished the cases on the ground that the plaintiff in *McGee* sought to "enforce an obligation that arose from a privilege the defendant exercised" in California. *Id.* The Court could find "no instance in which the trustee performed any acts in Florida that bear the same relationship to the agreement as the solicitation in *McGee*." *Id.* (emphasis in original). The Court also noted that California had enacted special legislation to regulate nonresident insurance companies. *Id.*

36. *Id.* at 253.

37. *Id.*

38. *Id.*

39. See M. GREEN, BASIC CIVIL PROCEDURE 39 (2d ed. 1979). Green states that "[t]he generality of the language in *Hanson* was not much more helpful than the language of *International Shoe* in aiding lower courts—state or federal—in determining whether the test of *International Shoe* had been met." *Id.*

Cases which demonstrate the confusion engendered by the *Hanson* decision are discussed in Comment, *Long-Arm and Quasi In Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300 (1970). See, e.g., *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706, 713 n.14 (4th Cir. 1966) (stating that *Hanson* required voluntary association plus minimum contacts); *Knight v. San Jacinto Club, Inc.*, 96 N.J. Super. 81, 87, 232 A.2d 462, 466 (Law Div. 1967) (limiting *Hanson* to cases not arising out of defendant's forum-related acts).

The author of the Comment refers to *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732 (1966), as "[p]erhaps the clearest example of the confusion that followed *Hanson*." Comment, *supra*, at 308.

40. 433 U.S. 186 (1977).

41. *Id.* at 194. The Court defined quasi-in-rem jurisdiction as "traditionally based on attachment or seizure of property present in the jurisdiction, not on contacts between the defendant and the State." *Id.* at 196.

In *Shaffer*, the plaintiff had sought to acquire jurisdiction based on the situs of stock in a Delaware corporation. *Id.* at 189. Plaintiff owned a single share of stock in the corporation but did not reside in the forum state. *Id.* He filed suit against the corporation, its wholly owned subsidiary, and a number of present and past officers of the corporation. *Id.* at 189-90. The suit alleged that the defendants were responsible for damages and fines, resulting from civil and criminal liability, incurred by the corporations in Oregon. *Id.* at 190. The district court granted plain-

The Court concluded that the standard of *International Shoe* and its progeny must be applied whenever a state attempts to assert jurisdiction.⁴² The *Shaffer* court observed that the nexus among defendant, forum, and litigation is the key consideration in determining personal jurisdiction.⁴³ The Court held that neither the minimum contacts standard of *International Shoe* nor the purposeful activity standard of *Hanson* are satisfied when a nonresident became a director of an enterprise incorporated in the forum state and where such directors "had no reason to expect to be haled before a Delaware court."⁴⁴

In *Kulko v. Superior Court*,⁴⁵ the Supreme Court considered a child support modification claim brought by the child's mother in California.⁴⁶ The Court considered whether a New York father, who had acquiesced in his daughter's decision to live in California with her mother, had "purposefully availed himself of the benefits and protections of California's laws" so as to render him subject to personal jurisdiction.⁴⁷ The Court concluded that a reasonable parent could not reasonably "anticipate being haled before a California court" from such an act.⁴⁸

The preceding Supreme Court personal jurisdiction decisions⁴⁹ have served as the basis for Arizona law. An analysis of Arizona personal jurisdiction cases is undertaken in the next section.

Personal Jurisdiction in Arizona

In Arizona, the assertion of in personam jurisdiction over nonresidents is governed by a court-promulgated rule of civil procedure.⁵⁰ The relevant portion of the rule provides: "When the defendant . . . has caused an event to occur in this state out of which the claim which is the subject of the complaint arose, service may be made as herein provided, and when so made shall be of the same effect as personal service within the state."⁵¹ The purpose of the rule is "to give Arizona

tiff's motion for sequestration of common stock and options held by the officers in order to compel their appearance. *Id.* at 190-92. The officers appeared specially and moved to quash service of process and to vacate the sequestration order on the ground that the order violated due process, that the property could not be attached in Delaware, and that their contacts with Delaware did not satisfy the requirements of *International Shoe*. *Id.* at 192-93. The trial court ruled against the defendants and the decision was affirmed by the Delaware Supreme Court. *Id.* at 193-94.

42. *Id.* at 212.

43. *Id.* at 204.

44. *Id.* at 216.

45. 436 U.S. 84 (1978).

46. *Id.* at 94.

47. *Id.*

48. *Id.* at 97-98.

49. The decision of the Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*, 48 U.S.L.W. 4079 (1980), will not be discussed in this section because it was decided after *Chavez*.

50. ARIZ. R. CIV. P. 4(e)(2).

51. *Id.*

residents the maximum privileges permitted by the Constitution of the United States.”⁵²

The minimum contacts standard was first adopted by the Arizona Supreme Court in *Phillips v. Anchor Hocking Glass Corp.*⁵³ In *Phillips* an Arizona plaintiff sued a nonresident corporation under the “causing an event to occur” portion of the Arizona long-arm rule.⁵⁴ The plaintiff alleged that she was injured when a baking dish manufactured by the defendant broke in her hand.⁵⁵ The court assumed that the defendant’s sole contact with Arizona at the time of the injury was the presence of the injury-causing product in the state.⁵⁶ The court found this contact sufficient to meet the Arizona long-arm requirement and then proceeded to determine the fairness of exercising personal jurisdiction.⁵⁷

The *Phillips* court was especially concerned with the *Hanson* purposeful act language because it observed that defendants who commit tortious acts do not purposefully avail themselves of the protection of state laws.⁵⁸ Fearing that a literal reading of *Hanson* would prohibit the assertion of jurisdiction over nonresidents in products liability cases, the court treated *Hanson* as only reaffirming the *McGee* notion “that a defendant renders himself amenable to jurisdiction by committing a single act within the forum state.”⁵⁹

With the *Hanson* obstacle behind it, the *Phillips* court enumerated three factors for a trial court to utilize in determining the fairness of the assertion of personal jurisdiction: (1) The nature and size of defendant’s business; (2) the plaintiff’s economic status; and (3) the nature of the cause of action.⁶⁰

In *Maloof v. Raper Sales, Inc.*,⁶¹ plaintiffs were injured when their recreational vehicle burst into flames in Arizona.⁶² Two nonresident firms that had performed mechanical work on the vehicle were dismissed from the ensuing action by the trial court for lack of personal

52. ARIZ. R. CIV. P. 4(e)(1) (State Bar Committee Note, at 23 (1973)).

53. 100 Ariz. 251, 413 P.2d 732 (1966).

54. *Id.* at 253, 413 P.2d at 734.

55. *Id.*

56. *Id.*

57. *Id.* at 254, 413 P.2d at 734.

58. *Id.* at 256, 413 P.2d at 735.

59. *Id.* The *Phillips* decision has been criticized. See Woods, *Pennoyer's Demise: Personal Jurisdiction After Shaffer and Kulko And A Modest Prediction Regarding World-Wide Volkswagen Corp. v. Woodson*, 20 ARIZ. L. REV. 861, 871 (1978) (*Phillips* is a “confusing opinion” in which the court either interpreted the *Hanson* foreseeability test to require an “invocation of the ‘benefits and protection’ of state law,” or read the test narrowly and refused to apply it); Comment, *supra* note 39, at 308-09 (*Phillips* court’s distinction between intentional and negligent misconduct should not affect a determination of jurisdiction under *Hanson*).

60. 100 Ariz. at 260, 413 P.2d at 738.

61. 113 Ariz. 485, 557 P.2d 522 (1976).

62. *Id.* at 487, 557 P.2d at 524.

jurisdiction.⁶³ The defendants argued that personal jurisdiction was improper on foreseeability and purposeful activity grounds;⁶⁴ the *Mallof* court, however, held that foreseeability and purposeful activity were not absolute constitutional requirements.⁶⁵ The court noted that the *Phillips* court had held the *Hanson* purposeful activity standard to be "improper and unreasonable" where tortious conduct is involved.⁶⁶ The court thus rejected the defendant's argument but nevertheless held that dismissal was proper because the plaintiff had not shown that the *Phillips* fairness standard was satisfied.⁶⁷

In *Manufacturers' Lease Plans, Inc. v. Alverson Draughton College*,⁶⁸ the court had little trouble finding that the *Hanson* purposeful activity requirement was met. In *Alverson*, a nonresident defendant had agreed that Arizona law would govern one contract and had subsequently entered into a second agreement with an Arizona assignee of the first contract.⁶⁹ The court stated that defendant's conduct constituted an "intentional, purposeful act."⁷⁰ The court reaffirmed, by way of dictum, its view that the *Hanson* requirement was inappropriate in tort actions.⁷¹ The court stated that *Hanson* precludes a finding of personal jurisdiction only where all contacts result from plaintiff's initiative.⁷²

The Chavez Decision

The court in *Chavez* acknowledged Arizona's adoption of the minimum contacts doctrine and applied the two-pronged standard employed by the *Mallof* court.⁷³ The first prong of that test requires a showing that the defendant has done business or caused an event to occur in Arizona giving rise to the claim.⁷⁴ The second prong requires that the assertion of jurisdiction be consistent with the requirements of the due process clause of the fourteenth amendment.⁷⁵ The *Chavez* court ruled that the allegations of the complaint were sufficient to meet the first requirement, but affirmed dismissal of the claim because the plaintiff failed to show that it was fair for Arizona to exercise jurisdiction over the nonresident defendants.⁷⁶ The court specifically distin-

63. *Id.* at 486-87, 557 P.2d at 523-24.

64. *Id.* at 488, 557 P.2d at 525.

65. *Id.*

66. *Id.*

67. *Id.*

68. 115 Ariz. 358, 565 P.2d 864 (1977).

69. *Id.* at 360, 565 P.2d at 866.

70. *Id.*

71. *Id.*

72. *Id.*

73. 122 Ariz. at 561-62, 596 P.2d at 699-700. See text & notes 64-70 *supra*.

74. 113 Ariz. at 487, 557 P.2d at 524.

75. *Id.*

76. 122 Ariz. at 562, 596 P.2d at 700.

guished the *Chavez* facts "from those in *Maloof* and *Phillips* in which products or commercial transactions were involved."⁷⁷

In reaching the conclusion that the assertion of jurisdiction was not fair, the *Chavez* court used the *Restatement (Second) of Conflicts* analysis of acts which occur outside the forum state but which cause effects inside the state.⁷⁸ The court quoted the *Restatement* description of the three situations in which a plaintiff may seek to assert personal jurisdiction over a nonresident defendant.⁷⁹

The first situation involves an act done with the intention of causing effects in the state.⁸⁰ The *Restatement* provides that the state may assert jurisdiction under these circumstances "as it could have exercised if [the] effects had resulted from an act done within its territory."⁸¹

In the second situation, the act was not done with the intention of causing effects in the state but "could reasonably have been expected to do so."⁸² The *Restatement* suggests that a state's exercise of jurisdiction in this situation depends upon the extent of the relationship between the state and the parties, the characteristics of the effects caused in the state, and the amount of inconvenience the defendant would suffer if required to defend in the state.⁸³

The third situation involves an act that was not done with the intention of causing effects in the state and "could not reasonably have been expected to do so."⁸⁴ To be immune from personal jurisdiction under these circumstances, the defendant must have "no reason to suppose that his act outside the state would result in effects within the state."⁸⁵ If the defendant could not have reasonably foreseen the effects of his act, there must be an extensive relationship between the state and the parties in order for personal jurisdiction to be properly maintained.⁸⁶

The *Chavez* court decided that the facts before it fell into the third situation, because there was "no evidence that the defendants knew or had any reason to believe" that the inmate would come to Arizona.⁸⁷ Justice Gordon, specially concurring, joined in the decision but not in

77. *Id.*

78. *Id.*; see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37, Comment a (1971).

79. 122 Ariz. at 562, 596 P.2d at 700.

80. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37, Comment a (1971).

81. *Id.*

82. *Id.*

83. *Id.* The *Restatement* rationale suggests that jurisdiction in this situation will depend on "a variety of factors." *Id.* The factors enumerated in the text are the only factors specifically mentioned in the comment.

84. *Id.*

85. *Id.*

86. *Id.*

87. 122 Ariz. at 562, 596 P.2d at 700.

the reasoning of the court.⁸⁸ Gordon, who authored personal jurisdiction opinions in *Maloof* and *Alverson*, stated that it was foreseeable that the released inmate might come to Arizona, but urged that the *Phillips* fairest-forum standard, rather than the foreseeability test, should be applied to determine the due process issue.⁸⁹ He concurred because the plaintiff's complaint failed to allege that Arizona was the fairest forum.⁹⁰

The *Restatement* analysis adopted by the *Chavez* court will both clarify and simplify the determination of in personam jurisdiction in Arizona. The *Restatement* analysis covers all of the possibilities associated with the effects caused in Arizona by a nonresident's acts done outside the state. In addition, the standard simplifies the fairness determination, which is a prerequisite to the assertion of personal jurisdiction; the factors considered in resolving the fairness question are built into the *Restatement* test.⁹¹ Thus, Arizona courts no longer need apply the *Phillips* fairness factors on a case-by-case basis to resolve personal jurisdiction questions. The court must simply decide into which of the three *Restatement* situations the facts before it fit.⁹²

Chavez Court's "Contacts" Analysis

The *Chavez* court might be criticized for ignoring the mobility of the American people were it not for *World-Wide Volkswagen Corp. v. Woodson*.⁹³ In *World-Wide Volkswagen*, decided after *Chavez*, the

88. *Id.* at 563, 596 P.2d at 701.

89. *Id.*

90. *Id.*

91. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971). That the *Restatement* authors considered the fairness of the assertion of jurisdiction in establishing the test for each of the situations can be inferred from language in the rationale provided by the *Restatement*:

A state has a natural interest in the effects of an act within its territory even though the act itself was done elsewhere. The state may exercise judicial jurisdiction on the basis of such effects over the individual who did the act, or who caused the act to be done, provided that the nature of these effects and of the individual's relationship to the state are such as to make the exercise of jurisdiction fair to the individual and reasonable from the standpoint of international and interstate systems.

Id.

92. See *Chavez v. Indiana*, 122 Ariz. at 562, 596 P.2d at 700.

93. 48 U.S.L.W. 4079 (1980). Indeed, Justice Gordon did think that mobility was important. 122 Ariz. at 563, 596 P.2d at 701 (Gordon, J., concurring). In arguing that the court should not distinguish products or commercial transactions cases from *Chavez*, Gordon said the "mobility of the people within the United States" made the distinction illogical. *Id.*

Moreover, the mobility of the American people could be used to argue that it was foreseeable that the released inmate would come to Arizona. Since 48.5% of the American people moved in the five-year period preceding the inmate's release, UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1978, at 39 (99th ed. 1978), and 15.8% of the population moved interstate, abroad, or to an unknown location, *id.* (percentages combined for interstate and abroad/unknown categories), it could be argued that Indiana could foresee the departure from Indiana of the inmate made mobile by his release. Nor would it be surprising that the inmate would come to Arizona which was the third-fastest growing state at that time. See *id.* at Supp.

If it were foreseeable that the released inmate would come to Arizona, personal jurisdiction is

mobility argument did not persuade the United States Supreme Court that personal jurisdiction was proper in an automobile products liability suit where the sole contact between the automobile's retailer and regional distributor and the forum was the presence of the auto in Oklahoma.⁹⁴ The Court recognized that the mobility of the auto made it foreseeable that it would be found in Oklahoma, but held that such foreseeability was not sufficient to meet the requirement of due process in the assertion of personal jurisdiction.⁹⁵ Instead, the Court held that the conduct and connection of the defendant with the forum state must be such that "he should reasonably anticipate being haled into court there."⁹⁶

Since the *Chavez* court found no direct contact between the Indiana defendants and Arizona⁹⁷ its decision would appear to fit nicely within the rubric of the *World-Wide Volkswagen* holding. Despite the seemingly close parallel between *Chavez* and *World-Wide Volkswagen*, however, there are important differences that merit exploration. First, in *World-Wide Volkswagen* the defendant's sole contact with the forum arose from the unilateral activity of the plaintiffs.⁹⁸ The Court reaffirmed its *Hanson v. Denckla* language that a plaintiff's unilateral forum activity is insufficient to permit the assertion of personal jurisdiction over a nonresident defendant.⁹⁹ In *Chavez*, however, the plaintiff played no part whatsoever in bringing the instrumentality of his injury to Arizona.¹⁰⁰ In such a case the relative innocence of the plaintiff ought to be afforded more weight in considering the exercise of

proper under the *Restatement (Second)* position on the ground that "the effects which could have been anticipated and which actually occurred are of a sort highly dangerous to persons or things." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 Comment a (1971). Since the released inmate had previously been arrested for slashing the bodies of two or three young females, Record at 3, *Chavez v. Indiana*, 122 Ariz. 560, 596 P.2d 698 (1979), and in fact stabbed a young girl in Arizona, *id.* at 5, the *Restatement* would permit in personam jurisdiction without the showing of any further contact between the defendants and the forum state. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37, Comment a (1971).

The mobility argument would have been persuasive to the dissent in *World-Wide Volkswagen*. Justice Brennan would not have permitted the defendants to plead ignorance of the mobility of the automobile. 48 U.S.L.W. at 4085. To Justice Brennan, the automobile was designed to be used in more than one place and its sale purposefully injects the vehicle into the stream of interstate commerce. *Id.* Justice Marshall thought that the utility of the automobile derived from its mobility and that defendants knew that cars were designed and purchased for long distance travel. *Id.* at 4087. Justice Blackmun thought that the automobile was intended to travel long distances and found it likely that the automobile would "wander far from its place of licensure or from its place of distribution or sale." *Id.* at 4088.

94. 48 U.S.L.W. at 4082.

95. *Id.*

96. *Id.*

97. See 122 Ariz. at 562, 596 P.2d at 700.

98. 48 U.S.L.W. at 4082.

99. *Id.* at 4083.

100. See 122 Ariz. at 561, 596 P.2d at 699. In *World-Wide Volkswagen*, the plaintiff brought defendant's product into the forum state. 48 U.S.L.W. at 4080. In *Chavez* the plaintiff had nothing to do with the released inmate's coming to Arizona.

personal jurisdiction than when the contact arose as the result of plaintiff's unilateral activity in the forum.

Second, the *World-Wide Volkswagen* decision involved only a single demonstrable contact.¹⁰¹ Because the contact was fortuitous, the Supreme Court concluded that defendants had not purposefully conducted business in the forum state. Thus they had no notice that they were subject to suit there.¹⁰² It appears that the Court weighed both the intent of the defendant and the quantity of the contacts between the defendant and the forum.¹⁰³

In *Chavez* the Arizona Supreme Court examined only the contacts between Indiana and Arizona that related to the released inmate.¹⁰⁴ Under the *World-Wide Volkswagen* standard, if the presence in Arizona of the released inmate had been the sole and fortuitous contact between Indiana and Arizona, the *Chavez* court properly denied jurisdiction.

Nevertheless, from legislation passed by both states, the *Chavez* court could have taken judicial notice of other affiliating circumstances linking Arizona and Indiana. If, for instance, the released hospital inmate had been sentenced and paroled or had been placed on probation, the Interstate Compact For The Supervision of Parolees and Probationers would permit Arizona to supervise his probation or parole for the state of Indiana.¹⁰⁵ The same act would permit Indiana officers to enter Arizona to apprehend or retake him for violating his probation or parole.¹⁰⁶ Or, if the inmate was serving time in a Arizona prison for a crime committed in Arizona, the agreement on detainers would permit Indiana to take temporary custody of the inmate if charges were pending against him in Indiana.¹⁰⁷ Similarly, if Indiana wanted to send the inmate for treatment or rehabilitation to Arizona, the Interstate Corrections Compact would permit Arizona to accept the inmate into its correctional system.¹⁰⁸ Finally, if the inmate was married and subject to a support obligation in Indiana, the Revised Uniform Reciprocal Enforcement of Support Act would permit Indiana to have Arizona prosecute the inmate in an action on the obligation and even collect the

101. 48 U.S.L.W. at 4080. The Court indicated "there was no showing that any automobile sold by World-Wide or Seaway has ever entered Oklahoma with the single exception of the vehicle involved in the present case." *Id.*

102. *See id.* at 4082.

103. This conclusion follows from the Court's discussion of the "fortuitous circumstance" of a single automobile sold in New York becoming involved in an Oklahoma accident and its language dealing with the foreseeability of litigation. *See id.* at 4082-83.

104. *See* 122 Ariz. at 562, 596 P.2d at 700.

105. ARIZ. REV. STAT. ANN. §§ 31-461 to -465 (1976); IND. CODE §§ 35-8-6-1 to -3 (1976).

106. ARIZ. REV. STAT. ANN. § 31-461 (1976).

107. *Id.* §§ 31-481 to -482 (1976); IND. CODE §§ 11-1-7-1 to -7; 35-2.1-2-4 (1976).

108. ARIZ. REV. STAT. ANN. §§ 31-491 to -492 (1976); IND. CODE §§ 11-1-6-1 to -20 (1976).

support payments while the inmate was in Arizona.¹⁰⁹

The foregoing clearly establish purposeful contact between Indiana and Arizona. These agreements permit Indiana to use Arizona courts, correctional programs, and facilities to accomplish its governmental purposes. It will remain for a future court to determine whether such contacts are sufficient to assert personal jurisdiction over a sister state.

CONCLUSION

In *Chavez v. Indiana*, the Arizona Supreme Court clarified the requirements for the assertion of personal jurisdiction over nonresidents in Arizona by adopting the *Restatement's* position. The *Restatement* analysis will provide a clearer and simpler standard for Arizona courts and attorneys in their determination of when personal jurisdiction is proper.

In deciding that jurisdiction was not proper the *Chavez* court did not examine those contacts between Arizona and Indiana that resulted from legislation passed by both states. It is not clear, however, whether such contacts would permit the assertion of jurisdiction.

Dwight W. Connely

B. PREJUDICIAL EFFECT OF FINDINGS OF ARIZONA'S MEDICAL MALPRACTICE REVIEW PANELS

Medical malpractice screening panels are a recent innovation designed to relieve the burden on the courts resulting from the "malpractice crisis."¹ At least thirty states have created pretrial screening panels,² although these panels vary a great deal in composition and in

109. ARIZ. REV. STAT. ANN. §§ 12-1651 to -1679 (1976 & Supp. 1979); IND. CODE §§ 31-2-1-1 to -39 (1976).

1. Comment, *The Constitutional Considerations of Medical Malpractice Screening Panels*, 27 AM. L. REV. 161, 163 (1977). The Insurance Services Organization estimates that malpractice claims have been increasing at the rate of 12% annually. AMERICAN MEDICAL ASSOCIATION, MALPRACTICE IN FOCUS 12 (1975) [hereinafter cited as A.M.A. REPORT]. The number of successful claims and the amounts awarded have also increased, resulting in sky-rocketing medical malpractice insurance premiums. *Id.* at 20-21. For example, between 1960 and 1970 medical malpractice insurance premiums increased 262% for hospitals, 949.2% for surgeons, and 540.8% for physicians other than surgeons. *Id.* at 20. In some jurisdictions, these increases have threatened the availability of insurance. *Id.* at 18-19.

2. ALASKA STAT. § 09.55.536 (Supp. 1978); ARIZ. REV. STAT. ANN. § 12-567 (Supp. 1979); ARK. STAT. ANN. § 34-2603 (Supp. 1978); CONN. GEN. STAT. ANN. § 38-19b (West Supp. 1979); DEL. CODE ANN. tit. 18, § 6803 (Supp. 1978); FLA. STAT. ANN. § 768.44 (West Supp. 1979); HAW. REV. STAT. § 671-11 (1976); IDAHO CODE § 6-1001 (1979); ILL. REV. STAT. ch. 110, § 58.3 (Supp.

the procedures they follow. The panels review medical malpractice claims prior to trial and provide a nonbinding ruling on the ultimate issue of liability. In some states the panels also determine damages.³ The parties may either settle in accordance with the panel's decision, or proceed to trial.⁴ The statutes of nineteen states make some provision for admitting the panel's decision into evidence in a subsequent court proceeding.⁵

Screening panels are designed to accomplish a number of objectives. First, the panels help restrict the role of formal litigation by discouraging frivolous suits and promoting the settlement of claims that are obviously meritorious.⁶ This should theoretically reduce the cost of both liability insurance and medical care.⁷ Second, screening panels assist in controlling the "conspiracy of silence"⁸ by arranging for expert testimony in those cases where it is required. Third, by discouraging

1979) (declared unconstitutional in *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976)); IND. CODE § 16-9.5-9-2 (1976); KAN. STAT. ANN. 65-4901 (Supp. 1979); LA. REV. STAT. ANN. § 40:1299.47 (West 1977); ME. REV. STAT. ANN. tit. 24 § 2802 (Supp. 1979-80); MD. CTS. & JUD. PROC. CODE ANN. § 3-2A (Supp. 1979); MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1979); MO. ANN. STAT. § 538.020 (Vernon Supp. 1979); MONT. REV. CODES ANN. § 17-1304 (Supp. 1977); NEB. REV. STAT. § 44-2840 (1978); NEV. REV. STAT. § 41A.020 (1977); N.H. REV. STAT. ANN. § 519-A:1 (1974); N.M. STAT. ANN. § 41-5-14 (1978); N.J. CIV. PRAC. R. 4:21 (1979); N.Y. JUD. LAW § 148-a (McKinney Supp. 1978-80); N.D. CENT. CODE § 32-29.1-01 (Supp. 1979); OHIO REV. CODE ANN. § 2711-21 (Page Supp. 1978); PA. STAT. ANN. tit. 40, § 1301.308 (Purdon Supp. 1979-80); R.I. GEN. LAWS § 10-19-1 (Supp. 1978); TENN. CODE ANN. § 23-3403 (Supp. 1979); VA. CODE § 8.01-581.3 (1979); WIS. STAT. ANN. § 655.02 (West Supp. 1979).

3. *E.g.*, HAW. REV. STAT. § 671-15(b) (1976); ILL. REV. STAT. ch. 110, § 58.7(1) (Supp. 1979); MO. ANN. STAT. § 538.045 (Vernon Supp. 1979).

4. Screening panels are thus distinguished from arbitration panels, which provide binding determinations. Comment, *supra* note 1, at 167; Alexander, *State Medical Malpractice Screening Panels in Federal Diversity Actions*, 21 ARIZ. L. REV. 964 (1979). Screening panels are not an alternative to the current tort system, but an additional prelitigation procedural step. Comment, *supra* note 1, at 167.

5. ALASKA STAT. § 09.55.536(e) (Supp. 1979); ARIZ. REV. STAT. ANN. § 12-567(M) (Supp. 1979); CONN. GEN. STAT. ANN. 38-19(f) (West Supp. 1979); DEL. CODE ANN. tit. 18, §§ 6811(c), 6812 (Supp. 1978); FLA. STAT. ANN. § 768.47(2) (West Supp. 1979); IND. CODE ANN. § 16-9.5-9-9 (Burns Supp. 1979); LA. REV. STAT. ANN. § 40:1299.47(H) (West Supp. 1980); MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(d) (Supp. 1979); MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1979); NEB. REV. STAT. § 44-2844(2) (1978); N.J. CIV. PRAC. R. 4:21-5(e) (1979); N.Y. JUD. LAW § 148-a(8) (McKinney Supp. 1978-79); N.D. CENT. CODE § 32-29.1-02(1) (Supp. 1979); OHIO REV. CODE ANN. § 2711.21(C) (Page Supp. 1978); PA. STAT. ANN. tit. 40, § 1301.510 (Purdon Supp. 1979-80); R.I. GEN. LAWS § 10-19-8 (Supp. 1978); TENN. CODE ANN. § 23-3409 (Supp. 1979); VA. CODE § 8.01-581.8 (Supp. 1979); WIS. STAT. ANN. § 655.19(1), (2) (West Supp. 1979) (formal panels only).

6. DEPARTMENT OF HEALTH, EDUCATION & WELFARE, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 91 (1973) [hereinafter cited as H.E.W. REPORT]; Comment, *Recent Developments in Medical Malpractice Law*, 1977 ARIZ. ST. L.J. 163, 178.

7. *But see Medical-Legal Screening Panels as an Alternative Approach to Medical Malpractice Claims*, 13 WM. & MARY L. REV. 695, 717 (1972) [hereinafter cited as Research Project].

8. The phrase "conspiracy of silence" is a shorthand expression for the allegation that doctors are seldom willing to testify against their colleagues, making it difficult for aggrieved patients to prove a physician's negligence. H.E.W. REPORT, *supra* note 6, at 36. The existence of such a "conspiracy" has not been satisfactorily demonstrated. *Id.* In its 1973 study, the Secretary's Commission on Medical Malpractice opined that if such a "conspiracy" did indeed exist, it is much less prevalent today. *Id.* Expert testimony is more readily available due to the increasing acceptance of national standards of care and greater cooperation from physicians and medical societies. *Id.* at 36-37.

baseless claims, the panels help prevent unwarranted and possibly irreparable damage to the reputations of innocent physicians.⁹ Finally, pretrial screening panels seek to enable a fair and equitable disposition of legitimate suits resulting from medical malpractice.¹⁰ Despite these proposed benefits, the constitutionality¹¹ and effectiveness¹² of these panels has been questioned.

Problems in Arizona's newly created medical review panels were revealed in the recent Arizona Supreme Court case, *Campbell v. Arnold*.¹³ The petitioner Dr. Campbell and his assistant surgeon Dr. Hicks performed surgery on the plaintiff in August of 1972.¹⁴ Subsequently, the plaintiff brought a medical malpractice action against Dr. Campbell, Dr. Hicks, and Magma Copper Company.¹⁵ Pursuant to title 12, section 567(A) of the Arizona Revised Statutes, the claim was referred to a Medical Liability Review Panel.¹⁶

In its first decision, the panel specified how each member had voted on the issue of liability.¹⁷ Dr. Hicks moved for reconsideration

9. MARICOPA COUNTY BAR ASSOCIATION & MARICOPA COUNTY MEDICAL SOCIETY, THE PIMA PLAN FOR MEDICAL MALPRACTICE CLAIMS I (1970).

10. *Id.*

11. In *Eastin v. Bloomfield*, 116 Ariz. 576, 570 P.2d 744 (1977), it was alleged that state medical review panels: (1) Violate the right to a jury trial, *id.* at 580, 570 P.2d at 748; (2) abridge state constitutional provisions proscribing judicial comment on matters of fact, *id.* at 581, 570 P.2d at 749; and (3) usurp the judicial functions of the court, *id.* at 582, 570 P.2d at 750. These claims were all rejected. *Id.* at 586-87, 570 P.2d at 754-55. The only aspect of the review procedure held unconstitutional was the requirement that the nonprevailing party post a \$2000 bond before proceeding to trial. *Id.* at 586, 570 P.2d at 754. The underlying rationale of the *Eastin* decision is discussed in text notes 96-97, 102, 105, *infra*.

12. See Research Project, *supra* note 7, at 709-23. The purpose of this 1970-71 research project was to survey the operational efficiency of joint medical-legal panels in handling medical malpractice claims. *Id.* at 694. More specifically, the study focused on the extent to which screening panels: (1) Reduce the number of medical malpractice claims filed in court; (2) stabilize or reduce the cost of liability insurance; (3) increase the number of voluntary settlements of claims; and (4) guarantee and actually provide expert testimony to a patient who is adjudged to have a reasonable claim. *Id.* at 710-11. The study also explored the extent to which parties are bound by adverse decisions of the panel. *Id.* at 711.

Results indicate that some panels successfully reduce the number of cases filed in the courts. *Id.* at 715. In addition, the panels have significantly increased the number of prompt settlements of provable claims, *id.* at 717, and claimants are being provided with expert medical testimony when the case proceeds to trial after a panel decision for the claimant. *Id.* at 719. Nevertheless, the panels probably have not helped stabilize the cost of malpractice insurance, *id.* at 717, and where there is a lack of cooperation between attorneys and physicians, the panels have failed to reduce the number of cases filed in court. *Id.* at 715. Finally, the study found that the decisions of the screening panels are not binding on the parties. *Id.* at 720. See text & note 4 *supra*. The author concluded that, while medical-legal panels have been successful in some areas, they are not an acceptable alternative method of handling malpractice claims because submission of cases to the panel is voluntary and the decision of the panel is not binding. Research Project, *supra* note 7, at 721-23.

13. 121 Ariz. 370, 590 P.2d 909 (1979).

14. Memorandum of Points and Authorities in Support of The Response to Petition for Special Action at 1, *Campbell v. Arnold*, 121 Ariz. 396, 590 P.2d 935 (Ct. App. 1978).

15. Complaint at 2, *Daniel v. Magma Copper*, No. 164920 (Ariz. filed Dec. 21, 1976). Magma Copper Company operates the hospital that employs Drs. Campbell and Hicks.

16. The panel consists of a superior court judge who serves as chairman of the panel, one attorney member, and one physician member. ARIZ. REV. STAT. ANN. § 12-567(B) (Supp. 1979).

17. 121 Ariz. at 370, 590 P.2d at 909. The physician member voted in favor of defendant

of the panel's decision, arguing that the panel had failed to render its decision in the form mandated by title 12, section 567(F) of the Arizona Revised Statutes.¹⁸ The panel responded by amending its decision to provide a general finding for the plaintiff.¹⁹ Dr. Campbell then moved for reconsideration of the panel's decision,²⁰ insisting that the form of the panel's decision still was not in accordance with section 567(F), which required that a determination be made with respect to each claim.²¹ When Dr. Campbell's motion was denied, he brought a spe-

Daniels. *Id.* While both of the other panel members voted in favor of the plaintiff, the attorney member requested that the panel's decision indicate that he had voted for the plaintiff only on the issue of informed consent. *Id.*

18. Motion by Dr. Hicks for Reconsideration of Medical Liability Review Panel's Decision and/or Motion to Dismiss Claim at 2, Daniel v. Magma Copper, No. 164920 (Ariz., filed Dec. 21, 1976). Dr. Hicks objected to the fact that the panel failed to make separate determinations of liability for "each defendant" as required by the Arizona statute. *Id.* ARIZ. REV. STAT. ANN. § 12-567(F) (Supp. 1979) requires: "The panel shall determine, with respect to each claim against each defendant, whether the evidence presented to the panel by all parties supports a judgment for the plaintiff or for the defendant." ARIZ. REV. STAT. ANN. § 12-567(G) (Supp. 1979) requires: "The panel shall state its decision, with respect to each claim against each defendant, in substantially the following language: 1. 'After considering all evidence presented to the panel, we find for the plaintiff'; or 2. 'After considering all evidence presented to the panel, we find for the defendant.'"

19. 121 Ariz. at 371, 590 P.2d at 910. The decision then read, "After considering all evidence presented to the panel, the panel finds for the plaintiff, and against all defendants." *Id.*

20. *Id.*

21. Dr. Campbell adopted the motion filed by Dr. Hicks for reconsideration. Motion of Dr. Campbell for Reconsideration at 1, Campbell v. Arnold, 121 Ariz. 396, 590 P.2d 935 (1978). Dr. Campbell's claim that the panel failed to comply with the statute is based on the assertion that failure to obtain informed consent and surgical malpractice are in fact two separate claims for purposes of § 12-567, and not merely two species of the same claim for malpractice. The Arizona Supreme Court has determined that an action involves multiple claims when the factual bases for recovery state a number of different claims that could be separately enforced. Stevens v. Mehagian's Home Furnishings, Inc., 90 Ariz. 42, 44, 365 P.2d 208, 209 (1961).

The term "claim" is more articulately defined for purposes of Rule 54(b) of the Federal Rules of Civil Procedure in 10 C. WRIGHT, A. MILLER, E. COOPER, & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 2657, at 47-54 (1973) [hereinafter cited as WRIGHT & MILLER]. ARIZ. R. CIV. P. 54(b) is identical to FED. R. CIV. P. 54(b). Wright & Miller define multiple claims for purposes of Fed. R. Civ. P. 54(b) as follows: "A single claimant presents multiple claims for relief . . . when his possible recoveries are more than one in number and not mutually exclusive, or, stated another way, when the facts give rise to more than one legal right or cause of action." WRIGHT & MILLER, *supra*, § 2657, at 52-53 (citations omitted).

Referring to Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956), where the defendant could have been held liable both under the antitrust acts and the common law, Wright & Miller go on to say:

Since there were two possible recoveries and they were not mutually exclusive, there were two claims for relief, even though at least in part they both were based on the same facts. However, when a claimant presents a number of legal theories, but will be permitted to recover only on one of them, his basis for recovery are mutually exclusive, or simply presented in the alternative, and he has only a single claim for relief for purposes of Rule 54(b).

WRIGHT & MILLER, *supra*, at 53 (citations omitted).

In a more recent case, it has been stated that multiple claims exist for purposes of Rule 54(b) if one count "is not so inherently inseparable from or closely related to" the other. Gas-A-Car, Inc. v. American Petrofina, Inc., 484 F.2d 1102, 1105 (10th Cir. 1973).

ARIZ. REV. STAT. ANN. § 12-561 (2) (Supp. 1979) defines "medical malpractice action" or "cause of action for medical practice" as "an action for injury or death against a licensed health care provider based upon such provider's alleged negligence, misconduct, errors or omissions, . . . or for the rendering of such health related services, without express or implied consent." Thus, the plaintiff in *Campbell* had grounds for two separate causes of action for medical malpractice: surgical malpractice, and failure to obtain informed consent. *Id.* Each of these two separate

cial action in the court of appeals to compel the medical review panel to revise its decision to conform with the statutory requirements.²² Dr. Campbell argued that two claims were made against him—one for surgical malpractice, and one for failure to obtain informed consent—and that the panel should have ruled in his favor on the issue of surgical malpractice.²³

The court of appeals accepted jurisdiction because the public importance of the question required prompt resolution.²⁴ The decision to grant relief was appealed to the supreme court, which found that the court of appeals did not have jurisdiction to review the decision of the Medical Liability Review Panel.²⁵ The decision of the court of appeals was vacated and the order accepting jurisdiction of the action was set aside.²⁶

This casenote will discuss the conditions under which a special action in the nature of mandamus²⁷ is an appropriate remedy. The jurisdiction of the Arizona courts to issue such special action relief will then be discussed. Finally, the constitutionality of Arizona's medical review panels with respect to jury trials will be re-examined comparing Arizona's screening panels with those of other states to determine how the Arizona panels might be improved.

Special Action Relief

In *Campbell*, the issue that had been presented to the court of appeals was whether the decision of the Medical Liability Review Panel was rendered in a proper form.²⁸ A second and related question was whether the respondent judge acted properly in denying Dr. Camp-

acts of negligence constituted a breach of duty owed to the plaintiff. Therefore, the panel should make a determination with respect to each claim against each defendant. *See id.* § 12-567(F).

Moreover, the court of appeals found evidence in UNIFORM RULE OF PROCEDURE FOR MEDICAL LIABILITY REVIEW PANELS 3(B) to support its conclusion that the words "each claim" as used in ARIZ. REV. STAT. ANN. § 12-567 mean each alleged act of negligence. 121 Ariz. at 398, 590 P.2d at 937. Rule 3(B) of the Uniform Rules states: "Within five (5) days from the date of receipt of the above records, plaintiff shall serve upon defendant a . . . description of the manner in which defendant's *acts or omissions* caused injury to plaintiff. . ." (emphasis added). The court of appeals determined that the supreme court, in promulgating the rule, had equated the word "claim" with a separate act of negligence. 121 Ariz. at 398, 590 P.2d at 937.

22. 121 Ariz. at 371, 590 P.2d at 910.

23. Memorandum in Support of Petition for Special Action at 1-2, *Campbell v. Arnold*, 121 Ariz. 396, 590 P.2d 935 (Ct. App. 1978). See note 17 *supra*.

24. 121 Ariz. at 371, 590 P.2d at 910.

25. *Id.* at 371-72, 590 P.2d at 910-11.

26. *Id.* at 372, 590 P.2d at 911.

27. Relief previously obtained by the extraordinary writs of certiorari, mandamus, and prohibition is now obtained by special action, effective January 1, 1970. ARIZ. R.P. SPECIAL ACTIONS 1. The scope of relief traditionally granted under the writs has not been altered by the new rules of procedure. *Id.*

28. Petition for Special Action at 2, *Campbell v. Arnold*, 121 Ariz. 396, 590 P.2d 935 (Ct. App. 1978); Response to Petition for Special Action at 2, *Campbell v. Arnold*, 121 Ariz. 396, 590 P.2d 935 (Ct. App. 1978).

bell's motion for reconsideration and amendment of the panel decision.²⁹ Nevertheless, the supreme court stated that the issue presented in *Campbell* was whether or not parties dissatisfied with a decision of a medical review panel could bypass the superior court and seek direct relief in the court of appeals.³⁰ The issue stated by the supreme court was inappropriate because the court of appeals made no attempt to review the merits of the panel's decision, as the supreme court suggested.³¹ Although it is sometimes necessary and proper for a court to address issues other than those presented by the parties,³² that was not the situation in this case. Dr. Campbell sought only an order to compel the panel to comply with the statute, not a review of the merits of the panel's decision.³³

A special action in the nature of mandamus would have compelled the panel to render its decision in compliance with the statutory requirements.³⁴ This would have been a proper remedy for Dr. Campbell.³⁵ Mandamus is the proper remedy to compel the performance of an act that the law specifically imposes as a duty.³⁶ Such duty may result from an office, trust, or station.³⁷

Generally, three conditions must be met before a writ of mandamus can be obtained: (1) The act to be compelled must be ministerial as opposed to discretionary;³⁸ (2) the act must be a plain duty imposed by the law;³⁹ and (3) there must be no plain, adequate, and speedy remedy available at law.⁴⁰

In Arizona, a Medical Liability Review Panel has very little dis-

29. Petition for Special Action at 2; Response to Petition for Special Action at 2.

30. 121 Ariz. at 370, 590 P.2d at 910.

31. See text & note 55 *infra*.

32. See *Katz v. United States*, 389 U.S. 347, 350 (1967).

33. 121 Ariz. at 396-98, 590 P.2d at 935-37.

34. See text & notes 36-43 *infra*.

35. See text & notes 38-43 *infra*.

36. See *Board of Educ. v. Scottsdale Educ. Ass'n*, 109 Ariz. 342, 344, 509 P.2d 612, 614 (1973); *State Bd. of Tech. Registration v. Bauer*, 84 Ariz. 237, 239, 326 P.2d 358, 360 (1958); *Adams v. Bolin*, 77 Ariz. 316, 323, 271 P.2d 472, 476 (1954).

37. ARIZ. REV. STAT. ANN. § 12-2021 (1956).

38. See *Rhodes v. Clark*, 92 Ariz. 31, 35, 373 P.2d 348, 350 (1962); *Tempe Union High School Dist. v. Hopkins*, 76 Ariz. 228, 235, 262 P.2d 387, 392 (1953); *Davis, Arizona Administrative Mandamus*, 9 ARIZ. L. REV. 1, 4-5 (1967). *But see* note 40 *infra*.

39. ARIZ. REV. STAT. ANN. § 12-2021 (1956).

40. *Id.* These principles are no longer strictly adhered to in Arizona. See *Leshner, Extraordinary Writs in the Appellate Courts of Arizona*, 7 ARIZ. L. REV. 34, 43 (1965). Recent cases have tended to broaden the scope of special writs. *Id.* For example, no longer does the availability of an appeal necessarily bar the writ. *Id.* This is due, in part, to the courts' recognition of the "long and costly procedures inherent in the ordinary processes of appeal." Application of *Trico Elec. Coop., Inc.*, 92 Ariz. 373, 389, 377 P.2d 309, 321 (1962). See *Phelps Dodge Corp. v. Superior Court*, 7 Ariz. App. 277, 280, 438 P.2d 424, 427 (1968). In addition, the Arizona courts have indicated that mandamus will lie to correct an abuse of discretion. ARIZ. R.P. SPECIAL ACTIONS 3(C). See *Board of County Supervisors v. Rio Rico Volunteer Fire Dist.*, 119 Ariz. 361, 364, 580 P.2d 1215, 1218 (1978); *Stevenson v. Arizona Bd. of Pardons and Paroles*, 109 Ariz. 412, 413, 510 P.2d 384, 385 (1973); *Rhodes v. Clark*, 92 Ariz. 31, 35, 373 P.2d 384, 352 (1962).

cretion as to the form of its decision.⁴¹ Opinions must be rendered in substantially the same form as outlined in the statute.⁴² A duty, specifically prescribed by law to be performed without personal judgment as to its propriety, is a ministerial duty.⁴³ Thus, the panel has a ministerial duty to render its decision only in the form the law dictates.

The statute creating the Medical Liability Review Panel contains no provisions for appeal of the panel's decision.⁴⁴ The supreme court cited this lack of appealability as a justification for denying review of the panel's decision;⁴⁵ yet, lack of appealability is one of the factors warranting use of a special action.⁴⁶ "When there is no statutory right of appeal from the act sought to be reviewed, the court commonly finds the necessary absence of a plain, speedy and adequate legal remedy."⁴⁷ If review of the panel's decision were provided for, special action might not be appropriate.⁴⁸

Moreover, the fact that the panel's decision is not final does not preclude the use of mandamus.⁴⁹ On denial of a motion for summary judgment, the court of appeals has indicated that the "lack of final adjudicatory effect does not preclude . . . review of the negative ruling by means of special action."⁵⁰

Finally, since there is no statutory provision for interlocutory appeal of the panel's decision,⁵¹ it could be argued that the supreme court implied in *Campbell* that the petitioner's only recourse is to proceed to trial with the prejudicial panel finding entered into evidence; and if he loses, an appeal may be taken.⁵² Apparently, the court of appeals could order an amendment of the panel's finding and a new trial.⁵³ Nevertheless, relief by special action could obviate this type of repetitive liti-

41. ARIZ. REV. STAT. ANN. § 12-567(F), (G); see note 18 *supra*.

42. See note 41 *supra*.

43. *People v. California Ins. Co.*, 43 Cal. App. 3d 423, 431, 117 Cal. Rptr. 623, 628 (1975).

44. See *Campbell v. Arnold*, 121 Ariz. at 372, 590 P.2d at 911.

45. *Id.* at 371-72, 590 P.2d at 910-11.

46. See text & notes 34-40 *supra*.

47. *Leshner*, *supra* note 40, at 45.

48. See text & note 40 *supra*.

49. See *Kilpatrick v. Superior Court*, 105 Ariz. 413, 415, 466 P.2d 18, 20 (1970); *Renck v. Superior Court*, 66 Ariz. 320, 323-24, 187 P.2d 656, 659 (1947).

50. *Southwest Coop. Wholesale v. Superior Court*, 13 Ariz. App. 453, 455, 477 P.2d 672, 674 (1970).

51. See *Campbell v. Arnold*, 121 Ariz. at 371, 590 P.2d at 910. An interlocutory appeal is a review of a particular point or question during the progress of an action; it is not a final determination of the whole controversy. BLACK'S LAW DICTIONARY 952 (4th ed. rev. 1976). The case is then returned to the trial court for further proceedings. See *Osteen v. Seaboard Coast Line R.R.*, 283 So. 2d 379, 381 (Fla. Dist. Ct. App. 1973). In Arizona, appeals prior to the final disposition of the entire case are available only where an interlocutory order is made appealable by statute. See *Connolly v. Great Basin Ins. Co.*, 5 Ariz. App. 117, 119, 423 P.2d 732, 735 (1967).

52. "If the decision of the medical review panel is erroneous and that error has not been corrected by the trial judge, then, on appeal the Court of Appeals may speak." 121 Ariz. at 371, 590 P.2d at 910.

53. *Id.*

gation.⁵⁴ Since the panel failed to comply with the statute, special action is an appropriate remedy for this situation.

Jurisdiction of the Arizona Courts to Issue Special Writs

In *Campbell*, the supreme court held that the court of appeals did not have jurisdiction to directly review the panel's decision prior to determination by the superior court.⁵⁵ This conclusion, however, is of no great consequence. Although Arizona courts have applied special writs to correct an abuse of discretion,⁵⁶ the courts have generally not applied special writs to compel an act that is judicial or discretionary in character.⁵⁷ On the other hand, if the court's decision is read to mean that the court of appeals has no jurisdiction to issue special writs to the Medical Liability Review Panel, more serious consequences would seem to follow.

Mandamus will issue to compel judges of inferior tribunals to perform an act specifically enjoined as a duty.⁵⁸ Nevertheless, the court of appeals has adopted from the supreme court a limitation upon its jurisdiction to issue special writs:⁵⁹ Whenever a petition for a special writ might lawfully have been made in a lower court, that petition must set forth the circumstances that make its issuance from the higher court appropriate.⁶⁰ Consequently, writs issued by the court of appeals are generally limited to those cases in which the superior court is the respondent.

The supreme court implied in *Campbell* that the trial court could correct errors in the panel's decision,⁶¹ which suggests that if the writ of mandamus should issue, it should issue from the superior court. By promulgating the Uniform Rules of Procedure for the Medical Liability Review Panels in the Superior Court,⁶² however, the supreme court has treated the medical review panels as part of the superior court.

54. See text & notes 34-43 *supra*.

55. 121 Ariz. at 371-72, 590 P.2d at 910-11. Nevertheless, as Vice Chief Justice Struckmeyer argued in his dissent, Dr. Campbell was not seeking a review of the merits of the panel decision: "Jurisdiction was only accepted by the Court of Appeals to resolve the question of whether the panel acted pursuant to the mandate of the legislature." *Id.* at 373, 590 P.2d at 912. The form of the panel decision is neither judicial nor discretionary; it is specifically mandated by the statute. See text & note 18 *supra*.

56. See *Board of County Supervisors v. Rio Rico Volunteer Fire District*, 119 Ariz. 361, 364, 580 P.2d 1215, 1218 (1978); *Stevenson v. Arizona Bd. of Pardons and Paroles*, 109 Ariz. 412, 413, 510 P.2d 384, 385 (1973); *Rhodes v. Clark*, 92 Ariz. 31, 35, 373 P.2d 348, 352 (1962).

57. See *Johnson & Douglas v. Superior Court*, 101 Ariz. 373, 374, 419 P.2d 730, 731 (1966); *Greater Ariz. Sav. & Loan Ass'n v. Tang*, 97 Ariz. 325, 327, 400 P.2d 121, 123 (1965); *Milburn v. Burns*, 1 Ariz. App. 147, 152, 400 P.2d 354, 359 (1965).

58. ARIZ. REV. STAT. ANN. § 12-2021 (1956).

59. ARIZ. SUP. CT. R. 47.

60. *Id.* 1(b).

61. See note 38 *supra*.

62. Effective March 1, 1977.

Thus, it would appear that the court of appeals, as the next higher tribunal, would be the proper court to issue the writ. Otherwise, if the panels are not part of the superior court but considered as something less, then the superior court, as the next higher tribunal, would be the proper court to issue the writ. This position, however, would create a paradox because the supreme court has the power to promulgate rules of procedure only for "courts of the state."⁶³ Therefore, if the panels are not an arm of the superior court, the rules promulgated by the supreme court for the panels would be void.⁶⁴

Even assuming that the panels are a part of the superior court, the argument might still be made that the superior court is the proper court to issue the writ. The superior court has jurisdiction to issue writs of mandamus to "any person . . . or board."⁶⁵ If the superior court judge is not acting within his judicial capacity while sitting on the panel, then that judge is subject to orders from the presiding judge. Thus, the superior court judge issuing the writ would not be in the anomalous position of issuing a writ of mandamus to another superior court judge.⁶⁶

It would appear, however, that while sitting on the panel, the superior court judge is acting within his judicial capacity. The judge may make such orders at the preliminary conference governing the hearing as deemed proper.⁶⁷ In addition, he shall make all procedural and evidentiary rulings in connection with the review panel proceedings and hearings.⁶⁸ Apparently, the medical liability review panels are a part of the superior court. Therefore, title 12, section 2021 of the Arizona Revised Statutes does not grant to a superior court judge the power to issue special writs to the superior court judge sitting on the medical review panel.⁶⁹ This conclusion is supported by the practice in Arizona that a superior court judge will not issue an order to another superior court judge.⁷⁰

Having determined that the superior court does not have jurisdiction to issue special writs to the medical malpractice panels, the jurisdiction of the court of appeals to issue such writs must be examined. By statute, the court of appeals has jurisdiction to issue special writs "necessary and proper to the complete exercise of its appellate jurisdiction."⁷¹ In addition, the court has appellate jurisdiction "in all actions

63. ARIZ. REV. STAT. ANN. § 12-109(A) (1956).

64. Telephone interview with Robert O. Leshner, Partner, Leshner, Kimble, Rucker & Lindamood, Tucson, Arizona, in Tucson (June 29, 1979).

65. ARIZ. REV. STAT. ANN. § 12-2021 (1956).

66. See text & note 70 *infra*.

67. ARIZ. MEDICAL MALPRACTICE REVIEW PANEL R. 4(F).

68. *Id.* 5(A).

69. Interview, *supra* note 64.

70. *Id.*

71. ARIZ. REV. STAT. ANN. § 12-120.21(A)(3) (Supp. 1979).

and proceedings originally in or permitted by law to be appealed from the superior court."⁷² Medical malpractice actions originate in the medical review panels.⁷³ If pursued, such actions are litigated in the superior court⁷⁴ and are appealable to the court of appeals.⁷⁵ Thus, by facially examining the statute, it appears that the court of appeals has jurisdiction to issue special writs to the Medical Liability Review Panel. Nevertheless, in *Campbell*, the supreme court held that the court of appeals does not have jurisdiction to issue such writs.⁷⁶

The courts have experienced difficulty interpreting the statute granting special writ jurisdiction to the court of appeals. The two divisions of the court of appeals have differing opinions as to when they may issue writs "necessary and proper to the complete exercise of its appellate jurisdiction."⁷⁷

In *Crouch v. Justice of Peace Court*,⁷⁸ division one held that where the decision of the superior court is final the court of appeals does not have jurisdiction to entertain an extraordinary writ in relation to the judge of the superior court presiding in an appeal from a sub-superior court.⁷⁹

Prompted by the *Crouch* decision to consider its jurisdiction in *Shenfield v. City Court*,⁸⁰ division two refused to equate "appellate jurisdiction" with "direct appeal."⁸¹ In that case, the appellate court found that it could issue a special writ to a city court even though there was no appeal past the superior court for the criminal matter in question, because there was a "potential indirect appeal" available from the superior court.⁸² The court explained that had petitioner sought extraordinary relief in the superior court with respect to the matter pending in the city court, the petitioner could have challenged a denial of such extraordinary relief in the court of appeals.⁸³

In *Morrison v. Superior Court*,⁸⁴ division one rejected the "potential indirect appeal" as satisfying the necessary element of ultimate appellate jurisdiction required under title 12, section 120.21(A)(3) of the

72. *Id.* § 12-120.21(A)(1).

73. *Id.* § 12-567(A).

74. ARIZ. CONST. art. 6, § 6.

75. ARIZ. REV. STAT. ANN. § 12-120.21(A)(1) (Supp. 1979).

76. 121 Ariz. at 372, 570 P.2d at 911.

77. *See, e.g.*, *Goodrich v. Industrial Comm'n*, 11 Ariz. App. 244, 246, 463 P.2d 550, 552 (1970); *Morrison v. Superior Court*, 10 Ariz. App. 601, 607, 461 P.2d 170, 176 (1969).

78. 7 Ariz. App. 460, 440 P.2d 1000 (1968).

79. *Id.* at 463, 440 P.2d at 1003.

80. 8 Ariz. App. 81, 443 P.2d 443 (1968).

81. *Id.* at 85, 443 P.2d at 447.

82. *Id.* at 84, 443 P.2d at 446.

83. *Id.*

84. 10 Ariz. App. 601, 461 P.2d 170 (1969).

Arizona Revised Statutes.⁸⁵ The court held that it did not have jurisdiction to issue writs in matters over which it had no direct appellate jurisdiction.⁸⁶ Consequently, since there was no direct appeal in juvenile proceedings, the court of appeals also lacked jurisdiction to grant an extraordinary writ to review an order entered in such proceedings.⁸⁷

The Supreme Court of Arizona has not yet ruled on the question of whether the "potential indirect appeal" theory is sufficient to satisfy the appellate jurisdiction requirement of title 12, section 120.21(A)(3). In the *Campbell* decision, however, the supreme court denied the court of appeals jurisdiction to issue the writ to the medical malpractice panel because there was no statutory authority for the court of appeals to directly review the decisions of the medical liability review panels.⁸⁸ Thus, without addressing the conflict in this area, the court has impliedly rejected the "potential indirect appeal" theory asserted by division two in *Shenfield*, upholding the stricter appellate jurisdiction requirement espoused by division one in *Morrison*.⁸⁹ With the court of appeals' jurisdiction so curtailed, the inevitable conclusion is that any relief from improper panel decisions by way of special action must be sought in the supreme court.⁹⁰

Re-examination of the Constitutionality of Arizona's Medical Liability Review Panels: Right to a Fair Jury Trial

As previously noted, the court of appeals accepted jurisdiction in *Campbell* because of the public importance of the question involved.⁹¹ Evidently, the court realized the potential prejudice arising from misleading panel decisions. This potential invites a re-examination of the constitutionality of Arizona's medical review panels.⁹²

In *Eastin v. Broomfield*,⁹³ the Arizona Supreme Court held that the

85. *Id.* at 607, 461 P.2d at 176.

86. *Id.*

87. *Id.*

88. 121 Ariz. at 371-72, 590 P.2d at 910-11. The court found that "jurisdiction to review the decisions of the medical review panels . . . is not 'necessary and proper' for the 'complete exercise' of the Court of Appeals' appellate jurisdiction." *Id.*

89. See text & notes 84-87 *supra*.

90. The supreme court has original jurisdiction to issue writs of mandamus to state officers, pursuant to the ARIZ. CONST. art. 6, § 5(1). Superior court judges are state officers. See ARIZ. REV. STAT. ANN. § 16-724 (1975); *id.* § 12-121 (Supp. 1979). The supreme court also has jurisdiction to issue writs "necessary and proper to the complete exercise of its appellate and revisory jurisdiction." ARIZ. CONST. art. 6, § 5(4).

91. 121 Ariz. at 371, 590 P.2d at 910.

92. This discussion of the constitutionality of Arizona's medical review panels will be limited to denial of the right to a fair jury trial. For a further discussion of constitutional challenges to medical malpractice review panels see Alexander, *supra* note 4, at 1008-1012; Comment, *supra* note 6, at 182-90.

93. 116 Ariz. 576, 570 P.2d 744 (1977).

admission of the panel's findings in evidence at trial⁹⁴ does not violate the right to jury trial.⁹⁵ The court reasoned that the finding of the panel is merely evidence which "the jury may reject or accept as the case may be."⁹⁶ Not knowing which facts the panel relied on, however, makes its conclusion particularly difficult to attack.⁹⁷

The weight a jury accords a panel's finding may depend, in part, on whether or not the panel members can testify in a subsequent trial.⁹⁸ In Arizona, the panel members may not be called upon to testify as to the merits of the case.⁹⁹ The physician and attorney member are also prohibited from participating either as counsel or witness in a trial arising out of the same claim.¹⁰⁰ This would preclude the petitioner in *Campbell* from demonstrating to the jury that the panel actually found in favor of the defendant on one of the issues in the case—that of surgical malpractice.¹⁰¹

The *Eastin* court reasoned that a party could show that relevant evidence had not been presented to the panel and that either party could thereby impeach the panel's conclusion by competent evidence.¹⁰² The situation presented in *Campbell*, however, is substantially different. Dr. Campbell did not seek to impeach the panel's decision.¹⁰³ Instead, he desired to show what the decision was by requiring the panel to indicate that it found for the petitioner on the issue of surgical malpractice.¹⁰⁴ At trial, Dr. Campbell might possibly be able to show that the panel should have found for him on the issue of surgical malpractice. Yet, all the evidence that he could present would not demonstrate that the panel actually did find for him on that issue.

The *Eastin* court stated that the inability of the panel members to testify at trial supported its conclusion that Arizona's screening panels

94. ARIZ. REV. STAT. ANN. § 12-567(M) (Supp. 1979) provides that "the conclusion of the panel may be admitted into evidence in any subsequent trial."

95. 116 Ariz. at 580, 570 P.2d at 748.

96. *Id.* To support this conclusion, the court stated:

Once the panel has considered the evidence and a decision has been rendered, either party is free to proceed to trial and present his case to a jury. . . . The jury remains the final arbiter of the issues raised and the facts presented. The statute does not take away the right of the party to have the matter finally and fully determined by the jury.

Id. (citation omitted).

97. See Comment, *supra* note 6, at 184 n.163. See also *Eastin v. Broomfield*, 116 Ariz. at 581, 570 P.2d at 749 ("panel's finding constitutes an expert opinion which the jury may hear, evaluate, accept or reject just as it would any other expert opinion"). Expert testimony can be distinguished, however, in that experts may be required to disclose the underlying facts or data on cross-examination. ARIZ. R. EVID. 705. The underlying facts of panel decisions are not available where the panel members are not allowed to testify at the subsequent trial.

98. Comment, *supra* note 6, at 184; see Alexander, *supra* note 4, at 1010 & n. 288.

99. ARIZ. REV. STAT. ANN. § 12-567(M) (Supp. 1979).

100. *Id.* § 12-567(L).

101. See note 17 *supra*.

102. 116 Ariz. at 580-81, 570 P.2d at 748-49.

103. See text & notes 20-23 *supra*.

104. *Id.*

were constitutional, concluding that such bolstering of the panel decision would so aid the prevailing party as to deny the right to jury trial.¹⁰⁵ Ironically, the testimony in *Campbell* by panel members would give petitioner the relief he needs. If the attorney member of the panel were able to testify, it could be established that he voted for the plaintiff only on the issue of informed consent.¹⁰⁶

The right to a jury trial is guaranteed by the Arizona Constitution.¹⁰⁷ While the right to proceed to jury trial still exists under section 12-567 of the Arizona Revised Statutes, it is hampered by the influence of the panel's decision on the jury.¹⁰⁸ This influence is especially obnoxious where, as in *Campbell*, the panel's conclusion is misleading in that it fails to reflect the actual findings of the panel.¹⁰⁹ Dr. Campbell's right to a fair trial will be denied if he is compelled to proceed to trial with the misleading panel finding entered into evidence.

Many states avoid prejudice to the parties at trial by excluding the panel findings from evidence at subsequent trial.¹¹⁰ Many of the states that admit panel findings into evidence at trial¹¹¹ provide for more detailed findings than mere conclusions as to liability.¹¹² Delaware, for example, requires the panel to state the grounds upon which liability is based¹¹³ and, if requested, provides that there must be judicial review of the panel's decision before trial.¹¹⁴ In Virginia, the litigants may present testimony by any member of the panel except the chairman.¹¹⁵ In Ohio, the panel's findings are admissible only if the trial court determines that the decision is "in accordance with applicable law"¹¹⁶ and that the requisite procedures "were followed fairly and properly with-

105. 116 Ariz. at 581, 570 P.2d at 749.

106. See note 17 *supra*.

107. ARIZ. CONST. art. 2, § 23.

108. See Alexander, *supra* note 4, at 1008-1009.

109. See note 17 *supra*.

110. ARK. STAT. ANN. § 34-2609 (Supp. 1979); HAW. REV. STAT. § 671-16 (1976); IDAHO CODE § 6-1001 (1979); ILL. REV. STAT. ch. 110, § 58.8 (4) (Supp. 1979); KAN. STAT. ANN. § 65-4904(c) (Supp. 1978); ME. REV. STAT. ANN. tit. 24, § 2807 (Supp. 1978-79); MO. ANN. STAT. § 538.050 (Vernon Supp. 1979); MONT. REV. CODES ANN. § 17-1312(4) (Supp. 1977); N.H. REV. STAT. ANN. § 519-A:8 (1974); N.M. STAT. ANN. § 41-5-20(D) (1978).

111. See statutes cited note 5 *supra*.

112. *E.g.*, ALASKA STAT. § 09.55.536(c) (Supp. 1978); DEL. CODE ANN. tit. 18, § 6811(b) (Supp. 1978); LA. REV. STAT. ANN. § 40.1299.47(G) (West Supp. 1978). The Alaska statute, for example, requires that the panel make a written report answering specific questions concerning the treatment selected, cause in fact of the injury, and the patient's probable outcome without medical care. ALASKA STAT. § 09.55.536(c) (Supp. 1978). The report must also include copies of all written statements, opinions, or records relied on by the panel, transcriptions or other record of any oral statements or opinions, medical or scientific authority relied upon, and results of any physical or mental examination performed on the plaintiff. *Id.* § 09.55.536(d). This report, along with any dissenting or concurring opinion, is admissible as evidence at trial. *Id.* § 09.55.536(e).

113. DEL. CODE ANN. tit. 18, § 6811(c) (Supp. 1978).

114. *Id.* § 6811(d).

115. VA. CODE § 8.01-58.8 (Supp. 1978).

116. OHIO REV. CODE ANN. § 2711.21(C)(2) (Page Supp. 1978).

out prejudice to either party."¹¹⁷

In contrast, the Arizona statute merely requires the panel to determine "whether the evidence presented to the panel by all parties supports a judgment for the plaintiff or for the defendant."¹¹⁸ While the statute does require that the panel's determination be made "with respect to each claim against each defendant,"¹¹⁹ the practice of the panels has been to make only one finding for the general claim of malpractice.¹²⁰ Hence, the only provision in the statute requiring specificity has been ignored in practice. Where more than one defendant or malpractice claim is involved, this lack of specificity results in panel decisions that are too general and inflexible to represent an accurate account of the panel's findings.

The result in *Campbell* underlines the need for Arizona's medical review panels to follow the example of its sister states.¹²¹ Apparently, more specific panel decisions would still encourage pretrial settlements.¹²² Yet, if the case should proceed to trial, the aggrieved party could refute more effectively the panel's conclusion by presenting evidence to challenge the facts or data underlying the panel's decision.¹²³ This would make the panel's decision more analogous to expert opinions.¹²⁴

CONCLUSION

The result of *Campbell v. Arnold* is that the supreme court is the proper tribunal to obtain special action relief with respect to improper medical liability review panel decisions. Contrary to the supreme court's implication in *Campbell*, the superior court appears not to have jurisdiction to issue special writs to the medical liability review panels. Moreover, the supreme court implied that direct appellate jurisdiction

117. *Id.* § 2711.21(C)(3).

118. ARIZ. REV. STAT. ANN. § 12-567(G) (Supp. 1979).

119. *Id.*

120. Telephone interview with Jack J. Rapoport, Professor of Law, University of Arizona, in Tucson, Arizona, June 19, 1979.

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

122. The admission of the decisions is clearly an inducement to the parties to settle at the panel stage. *See Halpern v. Gozan*, 85 Misc. 753, 756, 381 N.Y.S.2d 744, 747 (Sup. Ct. 1976). Nevertheless, the inducement should not result from the fact that a general and misleading panel decision might preclude a fair trial.

123. *See* note 97 *supra*.

124. It might be argued that more specific decisions would invade even more the functions of the jury as the ultimate finder of fact. It is the introduction of the panel's conclusion, however, that is the ultimate invasion of the jury's function. Any additional information as to how the panel arrived at its conclusion would aid the jury in evaluating that conclusion, and make the panel decisions more analogous to expert testimony. *See* note 80 *supra*. This would reduce the probability of the jury arbitrarily accepting the panel's findings. *See Alexander, supra* note 4, at 1011.

is a prerequisite to the court of appeals' jurisdiction to issue special action relief.

The decisions rendered by Arizona's screening panels, though extremely general, might suffice if they complied with the statute. At the very least, the panels should make distinctions with respect to each defendant and each distinct claim. In addition, in order that the panel decisions more closely resemble expert opinions, one of two statutory amendments might be made. Either the panel members should be allowed to testify at trial, or the panel decisions should reveal the underlying facts. In either event, the panel decision would more closely resemble an expert opinion in that it would be subject to some degree of cross-examination.

Lorna Blackburn

II. CIVIL RIGHTS

A. TITLE VII AND BUSINESS NECESSITY—INDIVIDUALITY OR CONVENIENCE?

Congress passed the Civil Rights Act of 1964, *inter alia*, to “eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment.”¹ Title VII of that act proscribes sex discrimination against actual or prospective employees.² An aggrieved party who cannot find relief through specified administrative procedures³ can bring a civil action against an offending employer.⁴ To establish a *prima facie* case of sex discrimination, the plaintiff must show that the challenged employment practice is facially discriminatory or is discriminatory as applied.⁵

1. S. REP. NO. 872, 88th Cong., 2d Sess., *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2355, 2401.

2. 42 U.S.C. § 2000e-2(a) (1976) provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex

3. *Id.* § 2000e-5. The aggrieved party has 180 days from the occurrence of the alleged unlawful employment practice to file a complaint with the Equal Employment Opportunity Commission [EEOC]. *Id.* § 2000e-5(e). The EEOC gives notice to the employer and conducts an investigation. *Id.* § 2000e-5(b). If the EEOC finds an unlawful practice and the employer fails to make a conciliation agreement satisfactory to the EEOC, the EEOC can bring a civil action against the employer. *Id.* § 2000e-5(f).

4. *Id.*

5. A practice is discriminatory “on its face” if by its terms it evinces unequal treatment. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 527 (1978) (hereinafter cited as J. NOWAK). For example, a policy forbidding employment of all females would be facially discriminatory against females. A facially neutral practice that is discriminatory in effect is considered discriminatory “as applied.” *See id.* For example, assume an employer requires a personal interview of all prospective employees. *A priori*, this would seem to be nondiscriminatory. But further assume that the interviewer is biased against women and refuses to hire women at all or hires men in favor of women who have equal or better qualifications. This interview practice discriminates as applied since in effect it tends to preclude female employees. A practice discriminatory in effect need not be motivated by malice. Suppose in the above example that the interviewer bases his decision on answers to a given set of questions. If the questions are sexually biased through the ignorance of the questionmaker, and thereby operate to preclude female employees, the interview practice would still be discriminatory as applied. A showing of either facial discrimination or discrimination as applied establishes a *prima facie* case of title VII discrimination. *See, e.g.,* Nashville Gas Co. v. Satty, 434 U.S. 136, 141 (1977); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). It is important to note that a discrimination case brought under the equal protection clause cannot be based on a showing of discriminatory impact alone but also requires a showing of discriminatory intent. *See* Washington v. Davis, 426 U.S. 229, 238-39 (1976). Thus, it may be more advantageous to an employee or applicant for employment to bring an action under title VII rather than under the equal protection clause.

Once a plaintiff establishes a prima facie case of title VII discrimination, an employer is afforded two affirmative defenses. The Civil Rights Act provides the "bona fide occupational qualification" [BFOQ] defense,⁶ and courts have developed the "business necessity" defense.⁷ If the business necessity defense is successful, the BFOQ defense need not be considered since either defense will justify the employment practice.⁸ Either defense may be used against a charge of any practice discriminatory under title VII.⁹

In *deLaurier v. San Diego Unified School District*,¹⁰ a female teacher brought a title VII suit against her employer. She alleged sex discrimination in the district's policies of mandating a leave of absence at the beginning of the ninth month of pregnancy and denying the use of accumulated sick leave benefits during that leave.¹¹ The district court, relying on the decision in *Geduldig v. Aiello*,¹² granted summary judgment for the school district on the sick leave benefits issue.¹³ After trial of the mandatory leave issue, the district court found that the school district's mandatory leave policy was justified as a business necessity and a BFOQ.¹⁴ In a split decision, the Ninth Circuit affirmed the district court's finding that the mandatory leave policy was valid as

6. 42 U.S.C. § 2000e-2(e)(1) (1976) states:

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business

7. The business necessity defense originally required only that an employer must show that an alleged discriminatory practice bore "a demonstrable relationship to successful performance of the jobs for which it was used." *See* *Griggs v. Duke Power Co.*, 410 U.S. 424, 431 (1971) (where Negro employees challenged an employer's educational requirements for hiring or transferring, the Court found that the practice illegally discriminated because it failed the job relatedness test and was, therefore, not justified as a business necessity).

Although the BFOQ defense is similar to the business necessity defense, the business necessity defense is generally used when an employer defends an employment practice neutral on its face but discriminatory as applied whereas the BFOQ defense is generally used to justify overt discrimination. *See* G. COOPER, H. RABB, & H. RUBIN, *FAIR EMPLOYMENT LITIGATION* 269 (1975) (hereinafter cited as G. COOPER); note 5 *supra*. Also, because the BFOQ defense is used to defend a facially discriminatory practice, the EEOC has issued guidelines narrowly construing the BFOQ defense, and it is rarely used successfully. G. COOPER, *supra*, at 269-70.

8. *deLaurier v. San Diego Unified School Dist.*, 588 F.2d 674, 678 (9th Cir. 1978). The business necessity defense is designed to allow a discriminatory practice only if the business cannot continue without the practice. *See* text & note 57 *infra*. Similarly, 42 U.S.C. § 2000e-2(e)(1) (1976) states that a BFOQ must be "reasonably necessary to the normal operation of" the business. Thus, if the employer proves either defense, the business needs the practice to operate, and it would serve no useful purpose to examine the other defense.

9. *deLaurier v. San Diego Unified School Dist.*, 588 F.2d 674, 678 (9th Cir. 1978).

10. 588 F.2d 674 (9th Cir. 1978).

11. *Id.* at 675. California, after the decision of the district court but before the decision of the court of appeals in *deLaurier*, enacted statutes prohibiting both types of policies in dispute in *deLaurier*. *See* CAL. EDUC. CODE §§ 44965, 44978 (West 1978).

12. 417 U.S. 484 (1974). *See* text & notes 23-25 *infra*.

13. 9 EMPL. PRAC. DEC. (CCH) ¶ 9893 (S.D. Cal. 1974), *aff'd in part, vacated in part, rev'd in part*, 588 F.2d 674 (9th Cir. 1978).

14. *Id.*

a business necessity,¹⁵ but reversed the grant of summary judgment on the sick leave benefits issue.¹⁶ Hence, the case was remanded to determine whether the school district could justify the sick leave benefit policy.¹⁷

This casenote initially will discuss some of the major cases dealing with the mandatory pregnancy leave and sick leave benefits issues as well as the business necessity defense. A superior test of business necessity will be derived from the business necessity cases. In light of this test, the *deLaurier* court's treatment of the sex discrimination and business necessity issues will then be analyzed. Finally, a few remarks on the impact of the *deLaurier* court's decision will be made.

Sex Discrimination and deLaurier

The United States Supreme Court in *Cleveland Board of Education v. LaFleur*¹⁸ held, on constitutional grounds, that an employer may not force all pregnant employees to begin a leave of absence by the end of the fourth month of pregnancy.¹⁹ The Court left open the question of whether a mandatory cutoff date to commence leave during the last few weeks of pregnancy might be constitutionally justified.²⁰ The defect in the mandatory leave policies considered in *LaFleur* was the failure to consider the individual abilities or disabilities of each employee.²¹ Partially for this reason, subsequent lower court cases have found title VII discrimination when the mandatory cutoff date was placed as late as the first day of the eighth month of pregnancy.²² Thus, a mandatory

15. 588 F.2d at 685. Since the court of appeals found the business necessity defense valid, it never considered the district court's finding of a valid BFOQ defense. See note 8 *supra*. Judge Hufstedler dissented in part, stating that the school district had not and could not justify either of its policies as business necessities. 588 F.2d at 685-92. Judge Hufstedler did not consider the BFOQ defense, possibly because there was no showing of facial discrimination. *Id.* See note 7 *supra*.

16. 588 F.2d at 685. The court found the practice discriminatory under *Geduldig*, see text & notes 23-25 *infra*, and *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

17. 588 F.2d at 685.

18. 414 U.S. 632 (1974).

19. *Id.* at 647-48. In consolidated cases, pregnant teachers challenged the practices of the school boards in Cleveland, Ohio, and Chesterfield County, Virginia. The Cleveland school board required a teacher to begin a leave of absence at least five months before the expected birth of her child. *Id.* at 634. The Virginia board allowed the teacher to work until four months before the expected birth of her child. *Id.* at 636. Both school districts tried to justify the rules as being necessary to preserve continuity of instruction and to keep physically unfit teachers out of the classroom. *Id.* at 640-41. The Court held the practice unconstitutional under either justification. *Id.* at 647-48. It found "that the arbitrary cutoff dates . . . [bore] no rational relationship to the valid state interest of preserving continuity of instruction." *Id.* at 643. It further reasoned that the school districts violated due process by setting up an irrebuttable presumption that all pregnant teachers are unfit to continue teaching by the fifth or sixth month of pregnancy. *Id.* at 644. This presumption ignored the fact that many women are capable of working much further into the pregnancy. *Id.* at 646.

20. *Id.* at 647 n.13.

21. *Id.* at 644.

22. See *Vineyard v. Hollister Elementary School Dist.*, 64 F.R.D. 580, 583 (N.D. Cal. 1974) (where no other temporary disability is similarly treated, an employer violates title VII by requir-

pregnancy leave policy constitutes prima facie title VII sex discrimination unless it is applied only when there is a determination that the individual employee can no longer adequately perform her job.

In later cases, the Supreme Court dealt with other practices that can constitute sex discrimination. The Court ruled in *Geduldig* that the equal protection clause only requires that one sex neither receives a protection not enjoyed by the other sex nor suffers a burden not imposed on the other sex.²³ This will be referred to as the equal benefits-burdens test. A program is not underinclusive,²⁴ however, merely because it fails to extend a potential benefit that only one sex could enjoy where the other sex receives no comparable benefit.²⁵ The Court subsequently applied the equal benefits-burdens test to a title VII case in *General Electric Co. v. Gilbert*.²⁶ In *Gilbert*, the female plaintiffs failed to show that the challenged employer's insurance plan²⁷ discriminated on the basis of sex, either facially or as applied.²⁸ The Supreme Court later held in *Nashville Gas Co. v. Satty*,²⁹ however, that a policy of stripping accumulated seniority from employees on mandatory pregnancy leave is prima facie title VII sex discrimination where employees on all other types of disability leaves retain their seniority.³⁰ Applying the equal benefits-burdens test, such a policy burdens female employees by denying them a contractual entitlement³¹ that male employees

ing all pregnant employees to take a leave of absence by the beginning of the eighth month of pregnancy); *Schattman v. Texas Employment Comm'n*, 330 F. Supp. 328, 329 (W.D. Tex. 1971), *rev'd on other grounds*, 459 F.2d 32 (5th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973) (an employer who could not prove that "substantially" all pregnant employees would be unable to continue safely and efficiently in performing their jobs past the beginning of the eighth month of pregnancy, could not as a general rule force them to begin a leave of absence at that time). *But see Nashville Gas Co. v. Satty*, 384 F. Supp. 765, 771-72 (M.D. Tenn. 1974), *aff'd*, 552 F.2d 850 (6th Cir. 1975), *aff'd in part*, 434 U.S. 136 (1977) (an employer does not violate title VII by compelling an employee to begin a leave of absence by what turns out to be 25 days before giving birth, especially where the employee is experiencing some physical problems).

23. 417 U.S. at 496-97. In dispute was California's employment insurance plan. The plan excluded from coverage any disability lasting less than eight days, or more than 26 weeks, as well as any disability due to pregnancy, dipsomania, drug addiction, or sexual psychopathy. *Id.* at 488-89.

24. A classification is underinclusive if it excludes without a rational basis some persons similarly situated to those in the class. *See J. NOWAK, supra* note 5, at 521. For example, assume an employer grants sick leave benefits only to blond-haired women on maternity leave. The plan is underinclusive because it irrationally excludes brunettes, redheads, etc., from the class receiving the benefit. On the other hand, assume an employer only grants maternity leaves to females. This plan is not underinclusive because it excludes males since males presently cannot become pregnant.

25. *See* 417 U.S. at 495.

26. 429 U.S. 125 (1976).

27. For purposes of title VII analysis, the Court said that the insurance plan was practically identical to the one challenged in *Geduldig*. *Id.* at 132. *See* note 23 *supra*.

28. 429 U.S. at 132. *See* note 5 *supra*.

29. 434 U.S. 136 (1977).

30. *Id.* at 139-40.

31. Entitlements are discussed by the Supreme Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970):

Society today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, con-

cannot lose.³² In *Satty*, the Court also had to determine whether it was sexually discriminatory to deny sick leave pay to an employee on mandatory maternity leave, where it was not denied to employees on disability leave.³³ Since sick leave pay was also denied to employees on voluntary leaves of absence, the Court decided no facial discrimination existed.³⁴ The Court remanded, however, for a determination of whether the policy discriminated in effect.³⁵

Applying these precedents, the *deLaurier* court found it "plain that mandatory maternity leave is not the withholding of a potential benefit, but is a restriction on pregnant women's employment opportunities."³⁶ Thus, "it follows that such a policy does constitute a gender based discrimination."³⁷ Even though the mandatory cutoff date to commence leave in *deLaurier* was one month prior to the predicted date of birth, this ruling is consistent with past decisions.³⁸ The reasoning of *deLaurier* is independent of the timing of the cutoff date and indicates that any general mandatory cutoff date to begin pregnancy leave would be prima facie title VII sex discrimination due to a failure to examine the individual employee's abilities.³⁹ In addition, the denial of accumulated sick leave benefits while on maternity leave discriminates because it denies the pregnant employee a contractual entitlement that employees on at least one other type of long-term leave retain.⁴⁰

tract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of the entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations, long term contracts for defense, space, and education, social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity.

Id. at 262 n.8 (quoting Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965)).

32. 434 U.S. at 142. Entitlements can be property interests within the protection of the fourteenth amendment. See *Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970) (holding that termination of welfare benefits without a hearing at which the recipient can be heard, constitutes a deprivation of an entitlement without due process of law). One type of constitutionally protected entitlement is that defined by an explicit employment contract. See *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (holding that tenure provided by contract is an entitlement). An implied understanding between employer and employee can also constitute an entitlement. See *Perry v. Sindermann*, 408 U.S. 593, 602 (1972) (holding that "tenure" implied by the employer college's guidelines and past practices constitutes an entitlement).

33. 434 U.S. at 143-46.

34. *Id.* at 143-44.

35. *Id.* at 145-46.

36. 588 F.2d at 677.

37. *Id.*

38. See text & note 22 *supra*.

39. It is assumed that an employer would not force a male employee to take a leave of absence unless the employee could not physically perform his duties or would endanger his or his coworker's safety by continuing. Therefore, an employer could not, consistent with title VII and *deLaurier*, force a pregnant employee to take a leave of absence and thereby restrict her employment opportunities without a similar individualized determination of her present abilities.

40. 588 F.2d at 684-85. The other long-term leave explicitly mentioned is that for industrial accidents.

Thus, the *deLaurier* court found prima facie sex discrimination both where every pregnant teacher is forced to begin a leave of absence no later than the ninth month of pregnancy⁴¹ and where she is denied sick leave pay that male employees on similar long-term leaves of absence retain.⁴² Through this part of its opinion, then, the court merely follows prior case law.⁴³ A court's finding that an employment practice is prima facie discriminatory, however, does not conclude a title VII suit.

Developing Standards for a Business Necessity Defense

Once the plaintiff makes out a prima facie case of sex discrimination, the burden of proof shifts to the employer to justify the practice as a business necessity.⁴⁴ Some Negro employees in *Griggs v. Duke Power Co.*⁴⁵ established that an employer's use of educational requirements and intelligence tests for hiring or transferring employees was prima facie discriminatory.⁴⁶ In rejecting the employer's justifications, the Court said, "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is

41. *Id.* at 677.

42. *Id.* at 684-85.

43. The *deLaurier* court based its decision on title VII grounds alone, but the EEOC has enacted interpretive guidelines that cover the issues in dispute. 29 C.F.R. § 1604.10(b) (1978) requires an employer to treat pregnancy and childbirth like any other temporary disability for insurance or sick leave plans as well as for any other employment practice. The Supreme Court has declined to follow this guideline to the extent that it mandates that pregnancy be treated like other disabilities under employment insurance plans. *See General Elec. Co. v. Gilbert*, 429 U.S. 125, 145-46 (1976) (holding that an employer's plan which excluded pregnancy from protection in contravention of the EEOC guidelines did not violate title VII). The Court reasoned that the guideline, *inter alia*, contradicted previous EEOC decisions and conflicted with congressional intent. *Id.* at 142-45.

Reacting to *Gilbert*, Congress declared in an amendment to title VII that the EEOC guideline did reflect congressional intent for the implementation of title VII. *See* SEN. REP. NO. 331, 95th Cong., 1st Sess. 1-3 (1977); H.R. REP. NO. 948, 95th Cong., 2d Sess. 1-4 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4749, 4749-52. Accordingly, the EEOC reenacted 29 C.F.R. § 1604.10(b) with slight amendments. The new guideline, effective April 20, 1979 reads:

Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, . . . the accrual of seniority . . . reinstatement, and payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms and conditions as they are applied to other disabilities.

29 C.F.R. § 1604.10(b) (1979).

The Court failed to find the same infirmities with the guideline to the extent it required the accrual of seniority to be applied to pregnancy leaves the same as to other leaves of absence. *See Nashville Gas Co. v. Satty*, 434 U.S. 136, 142-43 n.4 (1977).

44. *See, e.g., Nashville Gas Co. v. Satty*, 434 U.S. 136, 143 (1977); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). In most instances, the employer will prefer the business necessity defense over the more restrictive BFOQ defense. *See* note 7 *supra*.

45. 401 U.S. 424 (1971).

46. *Id.* at 425-26.

prohibited."⁴⁷ The Court did not cite any authority for this "job relatedness" criterion although it had appeared in lower court decisions.⁴⁸ Job relatedness alone, however, is an unsatisfactory test for business necessity.

The problem with using job relatedness as the only criterion of the business necessity test is twofold. An employer might find some tangential relationship between a challenged practice and the safe and efficient operation of a business which would then permit continued discrimination.⁴⁹ On the other hand, some discriminatory practices must be tolerated if a business is to continue when an employer has no reasonable less discriminatory alternative available.⁵⁰ About four months after *Griggs* was decided, the Fourth Circuit in *Robinson v. Lorillard Corp.*⁵¹ further developed the business necessity defense. In *Lorillard*, Negro employees filed a class action suit alleging that an employer's seniority system perpetuated the effects of past discrimination.⁵² Citing *Griggs* and earlier cases, the *Lorillard* court held that a business necessity defense must satisfy three standards.⁵³ First, the business purpose must "compellingly" outweigh the discriminatory effect.⁵⁴ Second, the challenged practice must "effectively" advance the purported interest.⁵⁵ Finally, there must be no equally effective alter-

47. *Id.* at 431.

48. See Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 989 (5th Cir. 1969) (a seniority system that perpetuated the effects of past racial discrimination held to violate title VII because the system bore no essential relation to the training of craftsmen); Gregory v. Litton Systems, Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970), *aff'd*, 427 F.2d 631 (9th Cir. 1972) (finding unlawful discrimination in a withdrawal of an employment offer to a Negro because the fact that he had been arrested on a "number of occasions" bore no essential relation to the job of sheet metal mechanic). Both cases required that the challenged practice be related to the "safe and efficient operation" of the business to qualify as a business necessity. Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d at 989; Gregory v. Litton Systems Inc., 316 F. Supp. at 403.

49. Consider *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), as an example. The Supreme Court held certain intelligence tests, which racially discriminated as applied, to be unlawfully discriminatory because they bore no relation to the successful performance of the jobs for which they were used. *Id.* at 431. Assume that the tests could be redesigned to relate tangentially to the jobs but without removing the discriminatory impact. Under a job relatedness test, the redesigned procedure would be upheld.

50. Consider stewardesses on a commercial airline. The safety of the passengers often depends upon a stewardess being able to function adequately in an emergency in the best interests of the passengers. See *Harris v. Pan Am. World Airways, Inc.*, 437 F. Supp. 413, 434 (N.D. Cal. 1977). A stewardess in advanced pregnancy, however, is susceptible to pregnancy complications and a conflict of interest that would impede her ability to provide for the safety of the passengers. *Id.* The sudden onset of pregnancy problems is potentially more catastrophic at forty thousand feet than in a classroom. If the safety of the passengers is to be insured, a mandatory pregnancy leave policy, which is admittedly sexually discriminatory and administered without individualized ability determinations, must be allowed because there is no reasonable alternative to grounding the stewardess. *Id.*

51. 444 F.2d 791 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971).

52. *Id.* at 794.

53. *Id.* at 798.

54. *Id.*

55. *Id.*

native practice which would be less discriminatory.⁵⁶ The purpose of the test is to require "an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."⁵⁷

This test resolves some of the problems of a pure job relatedness standard because it allows for a balancing between the value of the practice and the harm the discrimination causes. Under the first prong of the *Lorillard* test, a policy with a strong discriminatory impact but without a compelling justification will be overturned. Nevertheless, a discriminatory practice without a reasonable alternative would be allowed under the third *Lorillard* standard. The *Lorillard* test, however, has its own problems and can also be refined.

Lorillard unnecessarily complicates the analysis of the business necessity defense. The first step calls for a balancing of the business purpose against the discriminatory effect, thus requiring the court to strike a balance between the relative societal interests of the employer in the asserted business purpose and the employee in the practice's proven discriminatory impact. This will be the most difficult prong of the test to apply since the judge has great discretion but few standards to use in discerning the relative importance society as a whole attaches to a business purpose with respect to its accompanying discriminatory impact. Also, it makes better sense to engage in complex policy determinations only if one first determines that a challenged employment practice meets the simpler *Griggs* job relatedness criterion.

The portion of the *Lorillard* test requiring examination of equally effective but less discriminatory practices can be utilized to avoid forcing an individual judge to balance amorphous social values. The *Lorillard* balancing of the business purpose and discriminatory effect cannot be performed in a vacuum without regard to the consequences of the decision. The less discriminatory alternative standard has built into it a solution to the balance in realistic terms. Under the less discriminatory alternative prong, a discriminatory employment practice without an equally effective alternative will be permitted to continue.⁵⁸ If one can find a less discriminatory but equally effective alternative, however, the more discriminatory employment practice must be replaced.⁵⁹ Rather than balance societal interests as in *Lorillard*'s first prong, the judge, using the less discriminatory alternative prong, would only need to de-

56. *Id.* The Supreme Court has recently adopted this less discriminatory but equally effective alternative requirement for a business necessity defense. See *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977).

57. 444 F.2d at 798.

58. See note 50 *supra*.

59. See *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980, 990 (5th Cir. 1969).

cide the relative discriminatory impact and business effectiveness of two employment practices. The aggrieved employee or applicant for employment can provide insight into the discriminatory impact and the employer can provide input as to the effectiveness of the business practice. Therefore, to avoid complicated policy decisions, an improved business necessity defense test would start with the simpler requirements of business necessity. Only if the challenged practice passes the initial tests would more complex requirements be considered.

A recent case utilizes such a straightforward analysis. In *Harriss v. Pan American World Airways, Inc.*,⁶⁰ female flight attendants filed a class action suit alleging sex discrimination in Pan Am's practice of requiring pregnant employees to take a leave of absence of specified duration without the use or accumulation of any fringe benefits.⁶¹ The court articulated a three-pronged test to determine if an employment practice constituted a business necessity.⁶² First, the employer must assert an interest necessary to the "primary purpose" of the business.⁶³ "The test is business necessity, not mere business convenience."⁶⁴ Next, the employer must show that the practice is "reasonably calculated" to advance the asserted interest.⁶⁵ Finally, it must be shown that no alternative practice is available that is equally effective while less discriminatory.⁶⁶ As with the *Lorillard* test, the purpose of the *Harriss* test is to insure that a challenged practice is "necessary to the safe and efficient operation of a business."⁶⁷

Both standards require an employer to demonstrate that a prima facie discriminatory practice is a business necessity.⁶⁸ Unlike *Lorillard*, however, the first prong of the *Harriss* test considers the business value of the practice alone without complicating the analysis with a consideration of the discriminatory effect at the initial stage.⁶⁹ As with the

60. 437 F. Supp. 413 (N.D. Cal. 1977).

61. *Id.* at 414.

62. *Id.* at 432. All three prongs are essential elements of a business necessity defense. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 432-33.

67. *Id.* at 432.

68. "[T]he business necessity doctrine must mean more than that [employment] policies serve legitimate management functions. Otherwise, all but the most blatantly discriminatory plans would be excused even if they perpetuated the effects of past discrimination. . . . Necessity connotes an irresistible demand." *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971).

69. In comparing the two tests, the second prong of both tests is a requirement that the challenged practice must reasonably advance the asserted business purpose. *Compare* *Robinson v. Lorillard Corp.*, 444 F.2d at 798 *with* *Harriss v. Pan Am. World Airways, Inc.*, 437 F. Supp. at 432. Also, both tests use as a third prong the less discriminatory but equally effective alternative standard. *Compare* 444 F.2d at 798 *with* 437 F. Supp. at 432-33. Both tests are based on the idea that the employment practice must be necessary to the safe and efficient operation of the business. *Compare* 444 F.2d at 798 *with* 437 F. Supp. at 432. Further, *Harriss* explicitly relies on *Lorillard* (as well as other cases) as authority for its three-pronged test. *See id.* at 433 n.38. The difference

Lorillard test, the last prong of the *Harriss* test allows an employer to preserve a discriminatory practice only if no better method exists.⁷⁰ Alone, the job relatedness test set out in *Griggs* fails to provide for this contingency. Although the *Harriss* and *Lorillard* tests are similar, the former is arguably simpler to apply. The business necessity reasoning of the *deLaurier* court seems to be based on *Griggs* and is therefore unsatisfactory.⁷¹ Therefore, the decision of the *deLaurier* court will now be analyzed under the three-pronged test promulgated in the *Harriss* decision.

The Mandatory Leave Policy as Business Necessity

Whereas *deLaurier* desired to work until the onset of labor,⁷² the school district argued that a mandatory leave of absence was necessary. The district offered two justifications for its discriminatory mandatory leave policy. First, it alleged that the practice was necessitated by the administrative and educational objectives of the district.⁷³ The district argued that it is difficult to obtain quality long term substitute teachers unless a firm starting date is known well in advance.⁷⁴ The educational objective at stake is the importance of continuity of teachers to the welfare of the students in a class.⁷⁵ Second, the district contended that the impaired physical condition and lesser abilities of a teacher late in a pregnancy require that she leave the classroom.⁷⁶ The focus of this argument is that advanced pregnancy makes the teacher unfit for her classroom duties.⁷⁷ The court accepted the school district's reasons and accompanying proof as a valid business necessity defense.⁷⁸ These justifications, however, would not have met the burden of the *Harriss* business necessity test.

Applying the first prong of the *Harriss* business necessity test, one must determine whether the school district asserted an interest neces-

between the tests is *Harriss'* simplification of *Lorillard's* first prong balancing of the business purpose and discriminatory effect into a focus on only the business purpose.

70. This assumes the first two prongs of *Harriss* are satisfied. See note 62 *supra*.

71. The *deLaurier* court apparently viewed the business necessity defense solely as a job relatedness test. See 588 F.2d at 679. Once it mentioned this standard, however, the court never analyzed the school district's justifications in terms of job relatedness but rather talks only of business necessity generally. See *id.* at 674-85. If the employer successfully presents this job relatedness defense, the *deLaurier* court would still give the plaintiff the opportunity to show that practice is purposely discriminatory or that a less discriminatory but equally effective alternative exists. *Id.* at 681.

72. 588 F.2d at 675.

73. *Id.* at 679.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 680.

78. *Id.* at 681. The business necessity test utilized by the *deLaurier* court is discussed in note 71 *supra*.

sary and not merely convenient to the district's primary purpose of education. The district's first argument was that the mandatory cutoff date is necessary to insure continuity of teachers in the classroom. While it struck down a mandatory cutoff date as early as the end of the fifth month of pregnancy, the Supreme Court in *LaFleur* enumerated a few circumstances under which a mandatory cutoff date late in the pregnancy might be constitutionally justified.⁷⁹ If no substitute teacher could be found unless assured of a firm starting date, a mandatory cutoff date would be justified.⁸⁰ If that were the case in *deLaurier*, no substitute could ever be found when a teacher is suddenly forced from the classroom—by long-term illness, for example. Even assuming that no other method but a mandatory cutoff date could assure the district of classroom continuity, the district offered no evidence that setting the date at the beginning of the ninth month of pregnancy was necessary to achieve this objective.⁸¹

Another valid reason offered in *LaFleur* for a firm cutoff date would be if no other method could reasonably guarantee that labor would not start in the classroom.⁸² In *deLaurier*, no reasonable certainty existed that any particular teacher who wanted to continue work into the ninth month of pregnancy would be forced unexpectedly by labor from the classroom.⁸³ Where the sudden onset of labor is likely to force only one or two teachers from the classroom, nothing indicates that the district could not continue safely and efficiently by using its normal emergency substitute teacher process.⁸⁴ Those one or two teachers would not disrupt the educational and administrative objectives of the school district any more than would any other emergency long-term absence. The school district has merely avoided the trouble of setting up a procedure to make individualized determinations based on each pregnant teacher's circumstances and abilities. The mandatory cutoff date is convenient to the district's administrative and educational objectives, but it is not necessary to attaining them.

Neither does the impaired physical condition of the pregnant teacher necessitate the mandatory cutoff date to commence pregnancy leave. Another circumstance mentioned by *LaFleur* to justify a

79. 414 U.S. at 647 n.13.

80. *Id.*

81. 588 F.2d at 688 (Hufstедler, J., dissenting).

82. 414 U.S. at 674 n.13.

83. 588 F.2d at 688 (Hufstедler, J., dissenting). The dissent pointed out that based on statistics and reasonable inferences perhaps one or two out of 110 teachers for the school year in question would have commenced labor in the classroom. *Id.* Also, it is impossible to predict with accuracy the precise date of delivery. *Id.* at 680. The burden on the school district, nevertheless, is to justify the uniform cutoff date as a business necessity for all pregnancies, not just *deLaurier's* since a discriminatory practice directed at only one or a few individuals does not comport with the spirit of the business necessity defense. See text and note 57 *supra*.

84. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 642 n.10 (1974).

mandatory cutoff date late in the pregnancy would be a widespread medical consensus that teachers could no longer perform their jobs past a particular time in the pregnancy.⁸⁵ The *deLaurier* court admitted, however, that there was no medical consensus that teachers in general could not perform their duties late in the pregnancy.⁸⁶ In fact, the *La-Fleur* Court found that the ability of a particular woman to work at any particular time during the pregnancy is "very much an individualized matter."⁸⁷ No evidence in the record of *deLaurier* suggested that the beginning of the ninth month of pregnancy was a critical time before which a teacher could work effectively but after which she was unfit to continue her duties.⁸⁸ Also, if an impaired physical condition accompanies the approach of labor, that condition itself would remove the pregnant teacher from the classroom without the onerous mandatory cutoff date. The mandatory cutoff date may assist in keeping physically unfit teachers out of the classroom, but it is not necessary to accomplish that purpose.

Thus, while the district's system of applying a blanket mandatory leave policy to all pregnant teachers is convenient to its business purposes, it is not a business necessity.⁸⁹ The district's proffered justifications fall short of demonstrating a necessary relation to the safe and efficient operation of the school district. Therefore, its business necessity defense would have died on the first prong of the *Harriss* test.

The second prong of analysis under *Harriss* requires that the discriminatory practice be reasonably calculated to advance the asserted business interest. Undoubtedly a policy of mandatory leave simplifies the district's administrative process, allows more continuity in the classroom, and keeps physically unfit teachers out of the classroom. Thus, if the mandatory leave is necessary to these business purposes under the first prong of *Harriss*, then the second prong is also satisfied. Advancement of nonessential interests, however, cannot be a business necessity

85. *Id.* at 647 n.13.

86. 588 F.2d at 682-83.

87. 414 U.S. at 645.

88. 588 F.2d at 690 (Hufstедler, J., dissenting).

89. "The sole permissible reason for discrimination against actual or prospective employees involves the individual's capability to perform the job effectively. This approach leaves no room for arguments regarding inconvenience, annoyance, or even expense to the employer." *Johnson v. Pike Corp. of America*, 332 F. Supp. 490, 495 (C.D. Cal. 1971). *But see* 35 LA. L. REV. 146 (1974) criticizing this approach: "An employer seeks to make a profit from his business. An employee who consistently burdens his employer with administrative costs and thereby diminishes that profit, is an undesirable worker despite his job skills." *Id.* at 153 (citation omitted). But this criticism contains two serious flaws. First, this administrative burden issue only arises after an employee has made out a case of prima facie discrimination. Second, it elevates profits above consideration for human beings who are essential to the operation of businesses. "This result may seem harsh to the employer, but it is required by Title VII. In passing the 1964 Act, Congress was fully aware that putting an end to . . . discriminatory employment practices would place a burden on employers in terms of their time, inconvenience, and expense." *Johnson v. Pike Corp. of America*, 332 F. Supp. at 496.

justifying discrimination. Therefore, the validity of the school district's business necessity defense in *deLaurier* at the second stage of examination depends on its validity at the first stage under *Harriss*.

Assuming, arguendo, that the district could demonstrate valid job related criteria reasonably advanced by its discriminatory maternity leave practice, the district must still prove under *Harriss* that no less discriminatory but equally effective alternative exists. Although an employer cannot logically prove the nonexistence of such an alternative, this burden can be met if the plaintiff is required to suggest a less discriminatory alternative whereupon the employer then must show that the proposed alternative is not equally effective.⁹⁰ The *LaFleur* decision suggests an alternative scheme to a mandatory cutoff date. The school district could accomplish its purposes by making an agreement with each teacher as to a definite cutoff date.⁹¹ The district can require the teacher to submit periodically an obstetrician's certificate that the teacher is medically fit to continue her work.⁹² Finally, if the teacher is forced from the classroom before the agreed upon date, the school can resort to its usual emergency teacher system.⁹³ The district can still bring the planned substitute into the classroom on the previously agreed upon date.⁹⁴

If this scheme had been suggested to the court, the school district under the *Harriss* test then would have had the burden of demonstrating its ineffectiveness. The *deLaurier* court did recognize the less dis-

90. "The best approach would appear to be one that places on the plaintiff the burden of proposing a reasonable alternative practice while leaving on the employer the ultimate burden of demonstrating that the suggested alternative is not as efficient or safe as the challenged practice." Note, *Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 113-14 (1974) (citation omitted). Many cases allow the plaintiff the opportunity to suggest a reasonable alternative. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *deLaurier v. San Diego Unified School Dist.*, 588 F.2d 674, 681 (9th Cir. 1978). On whom the burden of proof on this issue lies, however, is not clear. Note, *supra*, at 113. The author points to several advantages of the approach that places the burden of proposing on the plaintiff but leaves the ultimate burden of proof on the employer. First, the plaintiff is the party most interested in finding an alternative. *Id.* at 114 n.68. Second, the plaintiff's burden prevents suits where the practice is otherwise a business necessity and no reasonable alternative exists. *Id.* Further, the distribution of the burden presents both sides with tasks they can realistically accomplish. *Id.* Finally, the employer is best situated to evaluate the impact of any employment practice on the safe and efficient operation of the business. *Id.*

91. 414 U.S. at 642. This allows the individual teacher some input into when she will leave her job rather than placing the decision solely in the hands of the school board. It also gives the district a firm date on which a substitute can start.

92. *Id.* at 647 n.14. This assures the district that the teacher can physically perform her duties.

93. *Id.* at 642 n.10. This preserves continuity in the classroom to the extent that it can be preserved in any emergency.

94. *deLaurier* wanted to work until the onset of labor, however. 588 F.2d at 675. This probably would be an ineffective alternative compared to the district's mandatory cutoff date since the district would have no firm date at all with which to work. Thus, the *deLaurier* court properly rejected *deLaurier's* suggestions as an alternative to the school district's mandatory cutoff date practice.

criminatory alternative prong of the test although it bifurcated the business necessity defense and this part of the test.⁹⁵ The court dealt with this part of the *Harriss* business necessity defense by correctly noting that the employee had failed to argue any such alternative scheme.⁹⁶ The court explicitly placed the entire burden of proving an alternative on the plaintiff rather than on the employer.⁹⁷ The burden of proving the entire business necessity defense, however, rests with the employer.⁹⁸ While procedurally it is better for the plaintiff to suggest an alternative, it would not be unreasonable for the court to consider any alternative scheme presented before it.⁹⁹ The dissent indicated that evidence of such alternatives was before the district court through evidence presented by both sides and the court's own findings of fact.¹⁰⁰ Thus, even if the district had proven that its mandatory leave policy was job related and advanced legitimate business interests, if it failed to rebut the reasonable alternative scheme outlined in *LaFleur*, which is arguably less discriminatory while equally effective in preserving the district's primary purpose of education, judgment would have favored deLaurier under the *Harriss* test. The district prevailed because the majority of the *deLaurier* court applied a watered down version of the business necessity defense.

The Sick Leave Benefits Policy as Business Necessity

Since the *deLaurier* district court granted summary judgment for the school district on the sick leave benefits issue,¹⁰¹ the school district had no reason to raise a business necessity defense at trial or on appeal to justify that policy. As with the mandatory leave policy, though, the Ninth Circuit ruled that the sick leave benefit practice did discriminate on the basis of sex since it imposed a burden on women that men did

95. *Id.* at 681. The bifurcation was apparently due to the court's reading of prior business necessity cases.

96. *Id.* at 681 n.12. Rather than argue an alternative, deLaurier intended to work until the onset of pregnancy. This is not as effective as the mandatory leave policy in carrying out the district's objectives.

97. *Id.* at 681.

98. See text & note 44 *supra*. The *deLaurier* court's reallocation of the burden may have been due in part to its bifurcation of the business necessity defense and the less discriminatory alternative argument. See *id.*

99. This is not to suggest that a court should engage in a *sua sponte* search for alternatives. Nevertheless, a court should not just close its eyes to alternatives it is aware of regardless of the source of the knowledge. Of course, the court must allow both parties to argue the merits of any alternative before making a decision.

100. *Id.* at 691 (Hufstедler, J., dissenting). Other than alluding to "individualized decision making," the dissent did not specify what these alternatives were. At least, however, the court was aware of the *LaFleur* decision and therefore presumably knew of the alternative scheme outlined in that case for providing a firm beginning date for a long term substitute.

101. 9 EMPL. PRAC. DEC. (CCH) ¶ 9893 (S.D. Cal. 1974), *aff'd in part, vacated in part, rev'd in part*, 588 F.2d 674 (9th Cir. 1978). The district court upheld the school district's practice of denying accumulated sick leave benefits to teachers on mandatory maternity leave. *Id.*

not have to suffer.¹⁰² Therefore, it remanded the case for presentation of the business necessity defense or any other justification of the practice.¹⁰³

To support the grant of summary judgment below, the school district alluded to increased costs if the sick leave policy was revised.¹⁰⁴ Additional expense alone does not justify an unlawful employment practice as a business necessity.¹⁰⁵ Thus, it is doubtful that the district will be able to raise a defense valid under proper analysis.¹⁰⁶

Conclusion

Congress enacted title VII to end, *inter alia*, employment discrimination. The courts, however, have developed the business necessity defense to allow employers to preserve essential business practices. Nevertheless, the defense is not designed to permit an employer to justify discriminatory practices with arguments short of a business necessity. *Harriss* guarantees this result by requiring the employer to: (1) Assert an interest necessary to the "primary purpose" of the business; (2) show that the challenged practice is "reasonably calculated" to advance the asserted interest; and (3) to prove that no alternative practice exists which is equally effective but less discriminatory. In *deLaurier*, the Ninth Circuit failed to provide the guaranteed protections of the business necessity defense by requiring the employer only to show that the challenged employment practice was related to the job for which it was used, and placing the burden of proving a less discriminatory but

102. 588 F.2d at 684-85.

103. *Id.* at 685.

104. *Id.*

105. See, e.g., *Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 n.8 (4th Cir.), cert. denied, 404 U.S. 1006 (1971) (holding that while economics may be considered, dollar cost alone is never conclusive of business necessity); *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252, 271 (N.D. Ind. 1977) ("dollar cost alone is an immaterial consideration under the business necessity doctrine, except when expenditures of money may curtail operations to the extent that incumbent employees may lose their jobs"); *Purvine v. Boyd Coffee Co.*, 13 E.M.P.L. PRAC. DEC. (CCH) ¶ 11394, 6346, 6347 (D. Or. 1976) (holding that expense incurred in covering pregnancy under an employer's medical insurance plan is not a business necessity defense to a charge of sex discrimination); *Johnson v. Pike Corp. of America*, 332 F. Supp. 490, 495 (C.D. Cal. 1971). The exception noted in *Chrapliwy* does not apply here. Since the *deLaurier* school district had to change its policies to conform to new state laws, see note 11 *supra*, the only increased cost in revising the old policy would be reimbursing *deLaurier*. As the dissent noted, this added expense does not rise to the level of a business necessity defense. *Id.* at 691-92 (Hufstedler, J., dissenting).

106. This assumes the district will rely on theories similar to those used to support the mandatory leave policy: that the administrative and educational objectives of the district and the impaired physical condition of a pregnant teacher make denial of sick leave benefits a business necessity. See 588 F.2d at 679. Since the sick leave benefits are a contractual entitlement, see note 31 *supra*, it is hard to understand why denial of benefits to employees on pregnancy leave is a business necessity but denial of them to employees on other disability leaves is not. The California legislature subsequently decided that the operation of a business does not necessitate the employment practices used by the school district. See note 11 *supra*. Also, the sick leave policy conflicts both with the EEOC guideline in effect at the time the case arose and the 1979 revision of the guideline.

equally effective alternative on the plaintiff. The *Harriss* business necessity defense is more consistent with the spirit of title VII than is the business necessity reasoning of *deLaurier*. The *deLaurier* court's dilution of the business necessity requirements makes it much more difficult for a wronged employee or applicant for employment to correct a discriminatory situation—whether intentional or a result of indifference by the employer.

James A. Bush

B. TITLE VII AND PRIVATE SECTOR EMPLOYMENT DISCRIMINATION AGAINST HOMOSEXUALS

In recent years, state and federal courts have provided homosexual public employees with limited protection under the due process clause of the Constitution against employment practices that discriminate on the basis of sexual preference.¹ Homosexuals who seek or hold jobs in the private sector have not received even the minimal protection afforded gay persons in public sector employment.² Although a private employer's discriminatory employment practices are not circumscribed by federal constitutional guarantees,³ private employers are subject to regulation under title VII of the Civil Rights Act of 1964.⁴ Title VII prohibits employment discrimination because of race, color, religion,

1. See, e.g., *Norton v. Macy*, 417 F.2d 1161, 1165 (D.C. Cir. 1969) (dismissal of civil servant on basis of off-duty homosexual conduct without a showing of a deleterious effect on the efficiency of service violates due process); *Saal v. Middendorf*, 427 F. Supp. 192, 203 (N.D. Cal. 1977) (Navy policy automatically excluding homosexuals as unfit violates due process); *Morrison v. State Board of Educ.*, 1 Cal. 3d 214, 239-40, 461 P.2d 375, 394-95, 82 Cal. Rptr. 174, 194-95 (1969) (revocation of teaching certificate because of homosexual activity reversed because no showing was made that the individual was unfit to teach).

2. Friedman, *Constitutional and Statutory Challenges to Discrimination in Employment Based on Sexual Orientation*, IOWA L. REV. 527, 561-71 (1979); Siniscalco, *Homosexual Discrimination in Employment*, 16 SANTA CLARA L. REV. 495, 500-12 (1976).

3. The fourteenth amendment applies only to the actions of governmental entities. For the provisions of the fourteenth amendment to control the policies of a private employer, the actions of the employer must constitute "state action." The Civil Rights Cases, 109 U.S. 11, 14, 15 (1883).

4. See 42 U.S.C. § 2000e to 2000e-17 (1976). Section 2000e-2 provides in pertinent part:

It shall be an unlawful employment practice for any employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000(e)-2.

sex, or national origin,⁵ but it has never been extended to allow relief for discrimination due to sexual orientation.⁶

In *DeSantis v. Pacific Telephone & Telegraph Co.*,⁷ the Ninth Circuit affirmed the dismissal of three separate federal district court actions for failure to state a claim under title VII.⁸ The actions were brought by male and female homosexuals and an effeminate male, and alleged discrimination by private employers on the basis of sexual orientation and effeminacy.⁹

The plaintiffs argued that Congress intended title VII's prohibition against sex discrimination to include discrimination on the basis of sexual orientation.¹⁰ The Ninth Circuit held that title VII prohibited discrimination on the basis of gender but not on the basis of sexual preference.¹¹ In addition, the plaintiffs advanced a claim of disparate impact based on *Griggs v. Duke Power Co.*¹² In *Griggs*, the Supreme Court held that an employment practice that disproportionately impacts upon a class of persons protected under title VII constitutes a prima facie case of employment discrimination.¹³ The male plaintiffs in *DeSantis* asserted that they could prove that discrimination against homosexuals disproportionately affects men both because of the greater incidence of homosexuality among males and because of the greater likelihood of discovery of male homosexual activity by employers.¹⁴ The *DeSantis* court denied the male plaintiffs the opportunity to make a *Griggs* claim.¹⁵ The court also affirmed the trial courts' rejection of three additional claims under title VII¹⁶ and claims under 42 U.S.C. § 1985(3).¹⁷

5. Title VII of the Civil Rights Act of 1964 was enacted as a comprehensive federal fair employment act. See note 4 *supra*.

6. See text & notes 18-20, 34, 35 *infra*.

7. 608 F.2d 327 (9th Cir. 1979).

8. *Id.* at 328.

9. *Id.* at 328-29. The male and female homosexuals claimed that several alleged practices of the employers were impermissible: (1) Denial of employment due to homosexuality; (2) failure to control harassment of homosexuals by coworkers and supervisors; (3) dismissal from employment due to homosexuality; and (4) refusal to rehire homosexuals. *Id.* The effeminate male alleged that dismissal from a job for wearing a small gold earring was illegal employment discrimination. *Id.* at 328.

10. *Id.* at 329.

11. *Id.* at 329-30.

12. 401 U.S. 424 (1971).

13. *Id.* at 431.

14. 608 F.2d at 330.

15. *Id.* at 331.

16. In the three title VII claims not discussed in this casenote, the *DeSantis* plaintiffs contended that: (1) treating male employees who prefer males as sexual partners differently from females who prefer male partners constitutes the use of different employment criteria for men and women in violation of title VII's prohibition against discrimination on the basis of sex; (2) unequal treatment because of the sex of the employee's sexual partner constitutes discrimination based on sex; and (3) discrimination due to effeminacy falls within the purview of sex discrimination. *Id.* at 331-32. The court rejected all three claims. *Id.*

17. 42 U.S.C. § 1985(3) (1976). In affirming the dismissal of the claims under § 1985(3) the

This casenote will offer a critical review of the *DeSantis* decision. First, the Ninth Circuit's conclusion that Congress did not intend to protect homosexuals from disparate treatment because of their sexual practices will be examined. Next, the *DeSantis* court's holding that the *Griggs* disproportionate impact approach may not be utilized by male homosexuals seeking relief from employment discrimination will be challenged. Reasons for granting male homosexuals an opportunity to make a *Griggs* claim will then be advanced. Finally, the proof required to make a prima facie case of discrimination using the *Griggs* approach and the defenses available to employers will be discussed.

Congressional Intent in Prohibiting "Sex" Discrimination

The Ninth Circuit, in dismissing the plaintiffs' claim that sex discrimination includes discrimination on the basis of sexual orientation, concluded that "Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality."¹⁸ The *DeSantis* court relied heavily on a prior Ninth Circuit case, *Holloway v. Arthur Anderson & Co.*¹⁹ The court in *Holloway* articulated the reasons why title VII protection should not be extended to persons who allege discrimination on the basis of sexual orientation.²⁰ The legislative history of the sex discrimination amendment, subsequent attempts to amend the Civil Rights Act to prohibit discrimination against homosexuals, and prior Ninth Circuit sex discrimination cases persuaded the *Holloway* court that Congress had "only the traditional notions of 'sex' in mind."²¹

In addition to its reliance on the reasoning suggested in *Holloway*, the *DeSantis* court noted that the Equal Employment Opportunity Commission [EEOC]²² had concluded that the word "sex" in title VII was intended by Congress to refer to a person's gender and not to sexual practices.²³

DeSantis court noted that § 1985(3) was adopted in order to protect the civil rights of groups that require and warrant such assistance. Since homosexuals have not been designated a "suspect" or "quasi-suspect" classification, they are not a "class" entitled to a right of action under § 1985(3). 608 F.2d at 332-33.

18. 608 F.2d at 329-30.

19. 566 F.2d 659 (9th Cir. 1977). *Holloway* involved a claim by a transsexual that discharge of an employee for initiating the process of sex transformation violates title VII's proscription against discrimination on the basis of sex. *Id.* at 661. The Ninth Circuit held that title VII does not embrace transsexual discrimination. *Id.*

20. *Id.* at 662-63.

21. *Id.* at 662.

22. The EEOC is the agency created by Congress to administer and interpret title VII. 42 U.S.C. § 2000e-4 (1976).

23. *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d at 330 n.3; see EEOC Decision No. 76-67, 2 EEMPL. PRAC. GUIDE (CCH) ¶ 6493 (March 2, 1976) (applicant refused employment because of

The legislative history of the sex discrimination provisions of title VII must be examined in order to assess the correctness of the *DeSantis* decision. The meager legislative history provides little guidance to those seeking to discern congressional intent.²⁴ Courts and commentators have relied as much on what was not said as on what was said in divining the meaning which Congress attached to the word "sex."

The sex discrimination provisions of title VII were a last minute addition to the Civil Rights Act of 1964 and were probably what one commentator has labeled "a stroke of misfired political tactics."²⁵ Most supporters of the Act were preoccupied with the prohibition of discrimination based on race, religion, and national origin.²⁶ Some proponents of the sex discrimination amendments were motivated by the "apparently cynical purposes"²⁷ of delaying or defeating title VII or the entire Act.²⁸ As a result, a clear expression of congressional intent is notably

homosexual tendencies); EEOC Decision No. 76-75, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6495 (March 2, 1976) (former employee refused reemployment because of homosexuality).

24. The four volumes and 2780 pages of the House Judiciary Committee's hearing record on civil rights proposals submitted to the 88th Congress contain no reference to discrimination on the basis of sex. See generally *Hearings Before Subcommittee No. 5 of the Committee on the Judiciary of the House of Representatives on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States* pts. I-IV, 88th Cong., 1st Sess. (1963). Moreover, the sex discrimination provisions of title VII had no legislative forerunners. The President's Commission on the Status of Women had recommended an executive order, not a statutory guarantee of equal employment opportunities for women. Kanowitz, *Sex-Based Discrimination In American Law III: Title VII and the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 308-09 (1968).

25. Kanowitz, *supra* note 24, at 312.

26. SEN. REP. NO. 872, 88th Cong., 2d Sess., reprinted in [1964] U.S. CODE CONG. & AD. NEWS 2355-91; H.R. REP. NO. 914, 88th Cong., 1st Sess., reprinted in [1964] U.S. CODE CONG. & AD. NEWS 2391-2519.

27. Kanowitz, *supra* note 24, at 312. See discussion note 28 *infra*.

28. The bill as reported out of the House Judiciary Committee prohibited discrimination on the basis of race, color, religion, or national origin but not sex. Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880 (1967). From the House Judiciary Committee the bill moved to the Rules Committee. On the last day of consideration in the Rules Committee the word "sex" first appeared in the form of a motion to add "sex" as a prohibited basis for discrimination. The motion was defeated eight votes to seven. 20 CONG. Q. 344 (1964). During almost two weeks of heated floor discussion of the Civil Rights Act of 1964 the sex discrimination amendment was forgotten. The intense debate focused on the protections the bill offered to racial minorities. 110 CONG. REC. 1511-52, 1582-1647, 1677-1709, 1899-1933, 1961-2001, 2250-2300, 2462-2513, 2548-77 (1964).

Two days before passage of the Act by the House, Representative Smith, Chairman of the House Rules Committee and an arch opponent of the bill, rose to offer an amendment to add sex as a prohibited basis for discrimination under title VII. In introducing the amendment, he stated: "Now I am very serious about this amendment. . . . I do not think it can do any harm to this legislation; maybe it can do some good. I think it will do some good for the minority sex." *Id.* at 2577. Representative Smith's motives were questioned by a strong supporter of women's rights, Congresswoman Green of Oregon. She reluctantly opposed the amendment, asserting that it "would clutter up the bill and it might later—very well—be used to help destroy this section of the bill by some of the very people who today support it." *Id.* at 2581. Representative Celler, Chairman of the House Judiciary Committee, opposed the amendment as "illogical, ill timed, ill placed, and improper." *Id.* at 2578.

A succession of Congresswomen spoke in favor of the amendment. The Congresswomen regarded the amendment as a means to protect women against employment discrimination. Congresswoman Griffiths warned the House that if sex were not added to the bill, "white women will be last at the hiring gate." *Id.* Many Southern Congressmen also spoke in support of the amend-

absent. Nonetheless, supporters and opponents alike perceived the addition of the word "sex" as a promise of equal employment opportunities for women.²⁹ No one suggested that the word "sex" was intended to encompass discrimination based on a person's sexual practices.³⁰ Thus, on the basis of the plain meaning of the statute and by negative inference, it is reasonable to conclude that Congress did not intend the sex discrimination provisions of title VII to include a prohibition against discrimination on the basis of sexual orientation.

Subsequent attempts to amend title VII to include affectional or sexual preference as a prohibited basis of discrimination reinforce this conclusion.³¹ In introducing a bill in the 94th Congress to prohibit discrimination against homosexuals in a broad spectrum of activities, including employment, Representative Bella Abzug observed that the bill would provide gay persons with a legal remedy against deprivation of their rights and opportunities.³² The unstated assumption behind Representative Abzug's remarks is that existing statutes do not confer on homosexuals a means of legal redress. Although bills to add sexual or affectional preference to the list of illegal classifications under title VII have been repeatedly introduced, Congress has taken no action on the proposed revisions.³³

Finally, interpretation of title VII by other courts also supports the Ninth Circuit's conclusion that Congress did not intend to extend protection to homosexuals. A federal district court in Georgia has concluded that Congress, in enacting title VII, did not proscribe discrimination on the basis of affectional or sexual preference.³⁴ A year after the Ninth Circuit decision in *Holloway*, the Fifth Circuit affirmed

ment. They focused on the potential discrimination in employment against white women in favor of Negro women which would result from an unamended bill. *Id.* at 2583-84. After about two hours of debate the sex discrimination amendment was adopted by a teller vote of 168-133. *Id.* at 2584. The Act passed the House two days later. *Id.* at 2805.

The bill then went to the Senate. The Senate debates extended over several months but they shed no additional light on congressional intent in prohibiting sex discrimination. Miller, *supra*, at 883.

29. 110 CONG. REC. 2577-84 (1964). Representative Green, in extended remarks inserted at the close of debate, did point out that the prohibition against sex discrimination would, based on the ordinary meaning of the word "sex," apply to men as well as women. *Id.* at 2720.

30. *Id.* at 2577-84, 2720-21.

31. Bills to prohibit discrimination based on affectional or sexual preferences have been introduced in the last three Congresses. *E.g.*, S. 2081 96th Cong., 1st Sess., 125 CONG. REC. S17,854 (daily ed. Dec. 5, 1979); H.R. 451, 95th Cong., 1st Sess., 123 CONG. REC. 354 (1977); H.R. 166, 94th Cong., 1st Sess., 121 CONG. REC. 188 (1975).

32. 121 CONG. REC. 8581 (1975).

33. *E.g.*, S. 2081, 96th Cong., 1st Sess. (1979), CONGRESSIONAL INDEX (CCH), 96th Cong., 20,502 (Feb. 6, 1980); H.R. 451, 95th Cong., 1st Sess. (1977), LIBRARY OF CONGRESS, DIGEST OF PUBLIC GENERAL BILLS AND RESOLUTIONS pt. 1, 95th Cong., 2d Sess. 443 (1978); H.R. 166, 94th Cong., 1st Sess. (1975), LIBRARY OF CONGRESS, DIGEST OF PUBLIC GENERAL BILLS AND RESOLUTIONS, 94th Cong. 2d Sess. 367 (1976).

34. *Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098, 1101 (N.D. Ga. 1975), *aff'd*, 569 F.2d 325, 327 (5th Cir. 1978).

that title VII "cannot be strained" to reach affectional or sexual preference.³⁵ No other court has confronted the question of whether title VII's proscription against sex based discrimination extends to discrimination based on sexual preference. Thus, in refusing to extend title VII's protection to homosexuals, the *DeSantis* court followed the established precedent.³⁶

The Disproportionate Impact Approach

Dismissal of the *DeSantis* plaintiffs' claim that disparate treatment of homosexuals is illegal discrimination does not exhaust all possible rights of action for homosexuals under title VII. An alternative approach, advanced by the plaintiffs, is the disproportionate impact theory. This approach was first adopted by a unanimous Supreme Court in *Griggs v. Duke Power Co.*,³⁷ a class action suit brought by a group of black employees. The Supreme Court held that title VII prohibited an employer from requiring applicants for employment or for transfer within the employer's company to possess a high school diploma or to pass a standardized general intelligence test, where both requirements excluded blacks at a substantially higher rate than white applicants and where neither requirement was shown to bear a demonstrable relationship to job performance.³⁸ Thus, an employment practice that is neutral on its face but whose application results in a disproportionate exclusion of blacks or other groups protected under title VII is prima facie violative of the Act.³⁹ Subsequent decisions have applied the disproportionate impact approach to a variety of employment criteria challenged by blacks, Mexican-Americans, and women.⁴⁰

The *DeSantis* plaintiffs claimed that they could make the required showing of disproportionate impact upon men for a policy that ex-

35. *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978).

36. The *DeSantis* court failed to cite an additional precedent, *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973), which supports its interpretation of the word "sex." The Supreme Court in *Espinoza*, in rejecting a claim that title VII proscribes discrimination on the basis of alienage, held that only those classifications explicitly enumerated in the Act—race, color, religion, sex, or national origin—are illegal bases for discrimination. *Id.* at 95. The Court chose to read the statute narrowly and refused to include discrimination on the basis of alienage under the umbrella of discrimination on the basis of national origin. *Id.* Since sexual preference is not an enumerated classification under title VII and since an interpretation of the word "sex" to include sexual preference would require an expansive reading of congressional intent, *Espinoza* buttresses the *DeSantis* court's construction of title VII's sex discrimination provisions.

37. 401 U.S. 424 (1971).

38. *Id.* at 425-26, 431-32.

39. *Id.* at 431.

40. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 328-29 (1977) (height and weight requirements for prison guards challenged by women); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 408-09, 425 (1975) (high school diploma requirement and standardized intelligence tests challenged by blacks); *Maldonado v. Yellow Freight Sys.*, 10 FEP 1290, 1293-94 (C.D. Cal. 1975) (class 1 driver's license requirement challenged by a Mexican-American).

cludes homosexuals from employment.⁴¹ The basis of the claim was the greater incidence of homosexuality among males and the greater likelihood of an employer discovering male, as opposed to female, homosexual activities.⁴²

The *DeSantis* court upheld the trial court's refusal to give the male plaintiffs an opportunity to make such a showing.⁴³ In the court's words, the plaintiffs were "ask[ing the court] to employ the disproportionate impact decisions as an artifice to 'bootstrap' Title VII protection for homosexuals under the guise of protecting men generally."⁴⁴ The court concluded that allowing homosexuals to make a claim of disproportionate impact would bring title VII protection to homosexuals, an outcome clearly not intended by Congress.⁴⁵

A strong argument can be made that the *DeSantis* court improperly affirmed the dismissal of the disproportionate impact claims. As Judge Sneed contended in dissent, the male homosexuals stated a legally cognizable claim under title VII and should have been allowed to make their case at trial.⁴⁶ Courts have permitted a variety of persons, including arrestees, misdemeanants and felons, garnishees, and short and lightweight persons to use their race⁴⁷ or sex⁴⁸ to "bootstrap" their claims of illegal employment discrimination. Similarly male homosexuals in *DeSantis* attempted to use their status as males to support their claims of illegal discrimination.⁴⁹ Since males are a protected class under title VII,⁵⁰ the distinction between permissible bootstrap efforts and the allegedly impermissible bootstrap efforts of homosexuals is dif-

41. 608 F.2d at 330.

42. *Id.*

43. *Id.* at 331.

44. *Id.* at 330.

45. *Id.*

46. My point of difference with the majority is merely that the male appellants in their *Griggs* claim are not using that case "as an artifice to 'bootstrap' Title VII protection for homosexuals under the guise of protecting men generally." Their claim if established properly, would in fact protect males generally. I would permit them to try to make their case and not dismiss it on the pleadings.

Id. at 333-34 (Sneed, J., dissenting) (citation omitted).

47. See, e.g., *Green v. Missouri Pac. R.R.*, 523 F.2d 1290, 1298-99 (8th Cir. 1975) (holding invalid policy of refusing employment to persons convicted of a crime other than a minor traffic offense); *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970) (holding invalid policy of excluding from employment persons arrested, although not convicted for offenses other than minor traffic violations), *aff'd*, 472 F.2d 631 (9th Cir. 1972); *Johnson v. Pike Corp. of America*, 332 F. Supp. 490, 496 (C.D. Cal. 1971) (holding invalid policy of discharging employee whose wages have been garnished several times).

48. See *Dothard v. Rawlinson*, 433 U.S. 321, 328-29 (1977) (holding invalid height and weight requirements for prison guards).

49. 608 F.2d at 330.

50. *Diaz v. Pan Am. World Airways Inc.*, 442 F.2d 385, 386 (5th Cir. 1971). The *Diaz* court noted the sparse legislative history of title VII's sex discrimination provisions but stated that, "it is reasonable to assume, from a reading of the statute itself, that one of Congress' main goals was to provide equal access to the job market for both men and women." *Id.* See note 28 *supra*.

difficult to discern.⁵¹ No other employment criterion has been singled out by the federal courts for exclusion from the disproportionate impact approach.⁵² Permitting a disproportionate impact claim by homosexuals would not extend title VII's provisions to all homosexuals but only to those who could make a *prima facie* showing of disparate impact upon males *qua* males. The difficulties that plaintiffs would encounter in making such a showing and potential defenses available to employers are discussed below.

The Making of a Griggs Claim by Male Homosexuals

Male homosexuals, if granted an opportunity to make a disproportionate impact claim, would be required to follow the guidelines set down by *Griggs* and its progeny.⁵³ As the complaining party or class, male homosexuals carry the initial burden of establishing a *prima facie* case of discrimination.⁵⁴ The male plaintiffs must make a showing that the facially neutral standard operates to exclude a disproportionate percentage of males.⁵⁵ The *prima facie* case in a *Griggs* claim focuses not on the intent of the employer in imposing a particular employment requirement but on the consequences of that requirement.⁵⁶ Because of the need to make assessments of the consequences of an employment practice for a specified class and to compare the impacts upon other classes, statistical evidence is a primary element in a plaintiff's *prima*

51. The *DeSantis* court rejected plaintiffs' *Griggs* claim on the grounds that to extend title VII protection to homosexuals would frustrate congressional intent. "It would violate the rule that our duty in construing a statute is to 'ascertain . . . and give effect to the legislative will.'" 608 F.2d at 330-31 (citation omitted). The *DeSantis* court apparently found in the legislative history of title VII and subsequent amendment attempts an intent to exclude homosexuals from any protection under title VII. The legislative record does not support this conclusion. Although Congress has not expressed an intent to protect homosexuals *qua* homosexuals, see text & notes 5, 24-29, 32 *supra*, it has not addressed the question of whether homosexuals may use their status as males to make a title VII claim.

52. See generally B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 65-181, 360-65 (1976); *id.* at 4-47, 100 (1979 Supp.).

53. *Griggs* sets forth the framework for the order and allocation of proof in a disproportionate impact case. *Griggs* held that title VII prohibits the use of employment requirements that have a substantial discriminatory impact upon a protected group unless the employer demonstrates that the requirement has a manifest relationship to job performance. 401 U.S. at 425-26, 431-32. That framework has been supplemented by *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975):

"[T]he burden [is on the defendant] of showing that any given requirement [has] . . . a manifest relationship to the employment in question." This burden arises, of course, only after the complaining party or class has made out a *prima facie* case of discrimination. . . . If an employer does then meet the burden of proving that its tests are "job related" it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in "efficient and trustworthy workmanship."

Id. at 425 (citations omitted). Although the *Albemarle* court put the burden on the plaintiff to prove the existence of effective, less discriminatory alternatives, the EEOC guidelines place the burden on the employer to demonstrate the nonexistence of such alternatives. See 29 C.F.R. § 1607.3(b) (1978).

54. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

55. *Id.*

56. 401 U.S. at 432.

facie case; often it is the sole element.⁵⁷

A disproportionate impact upon males may be established by three alternative types of statistical proof:⁵⁸ (1) By proving that males as a class or in a specified geographical area are excluded by the bar against employment of homosexuals at a substantially higher rate than females;⁵⁹ (2) by proving that actual male applicants are excluded by the bar at a substantially higher rate than females;⁶⁰ or (3) by showing that the percentage of males actually employed by the defendant is substantially less than the percentage of males in the relevant geographic area.⁶¹

57. See *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 n.6 (1971); *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1296 (8th Cir. 1978). The Supreme Court has recently emphasized that statistical proof should be closely scrutinized: "We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." *Teamsters v. United States*, 431 U.S. 324, 340 (1977).

58. *Green v. Missouri Pac. R.R.*, 523 F.2d 1290, 1293-94 (8th Cir. 1975).

59. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (minimum height requirement would exclude 33.29% of the women in the United States between the ages of 18 and 79, while excluding only 1.28% of men in the same age bracket; minimum weight restriction would exclude 22.29% of the women between ages 18 and 79 but only 2.35% of the men in this age group); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 n.6 (1971) (high school diploma requirement can be met by 34% of the white males in North Carolina but only 12% of the black males in the state); *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970) (policy of disqualifying frequently-arrested persons excludes blacks at a disproportionate rate; blacks constitute 11% of the national population but account for 27% of reported arrests and 45% of arrests reported as "suspicion arrests"), *aff'd*, 472 F.2d 631 (9th Cir. 1972).

Proof of a substantial disparate exclusion rate for potential applicants in a protected class normally establishes without additional evidence a prima facie case. *Dothard v. Rawlinson*, 433 U.S. at 330; *Griggs v. Duke Power Co.*, 401 U.S. at 431. Where, however, the challenged employment practice affects present employees as opposed to potential applicants, or where the general population is clearly not qualified for the position in question, the use of general population data in determining the rate of exclusion has been rejected. In such cases courts have required use of data on the relevant population group, e.g., employees or qualified persons. *Robinson v. City of Dallas*, 514 F.2d 1271, 1273-74 (5th Cir. 1975); *Harper v. Trans World Airlines*, 525 F.2d 409, 412-14 (8th Cir. 1975); *Hester v. Southern R.R.*, 497 F.2d 1374, 1379, n.6 (5th Cir. 1974).

60. See, e.g., *Kirkland v. State Dept. of Correctional Serv.*, 520 F.2d 420, 425 (2d Cir. 1975) (30.8% of the whites who took a civil service examination passed, as contrasted with 7.7% of the blacks and 12.5% of the hispanics); *Green v. Missouri Pac. R.R.*, 523 F.2d 1290, 1294-95 (8th Cir. 1975) (policy of excluding applicants with a conviction for an offense other than a minor traffic offense excluded two and one-half times as many black applicants as white applicants); *Vulcan Soc'y v. Civil Serv. Comm'n*, 490 F.2d 387, 392 (2d Cir. 1973) (11.5% of the applicants were black or hispanic but only 5.6% of those who passed the written, physical, and mental examinations belonged to these groups; 18.4% of white applicants but only 6.6% of minority applicants ranked in top 4000 on the written examination and passed the physical examination). Several decisions have suggested that comparative pass-fail rates for actual applicants are the best evidence of discriminatory impact. See, e.g., *Smith v. Troyan*, 520 F.2d 492, 497-98 (6th Cir. 1975); *Hester v. Southern R.R.*, 497 F.2d 1374, 1379 (5th Cir. 1974); *Rowe v. EEOC*, 16 FEP 199, 201 (W.D. Tenn. 1976). Actual applicant flow data, however, may be unobtainable or biased by the chilling effect of the job prerequisite being challenged or by the recruiting efforts or other acts of the employer. *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) (actual applicant data not required because challenged requirement may make actual applicant pool unrepresentative of potential applicant pool); *League of United Latin Am. Citizens v. City of Santa Ana*, 410 F. Supp. 873, 897 (C.D. Cal. 1976) (applicant flow data skewed by recruiting efforts).

61. See, e.g., *Gibson v. ILWU*, Local 40, 543 F.2d 1259, 1266 (9th Cir. 1976) (blacks constituted 2% of population in Portland metropolitan area and black males between the ages of 18 and 64 constituted 5.2% of the population of the city but no blacks were employed as casual clerks); *United States v. Hayes Int'l Corp.*, 456 F.2d 112, 120 (5th Cir. 1972) (918 whites and 6 blacks were

Commentators⁶² and homosexual plaintiffs⁶³ have offered the relative percentages of male and female homosexuals in the general population as statistical evidence of the disproportionate impact of antihomosexual policies. Most surveys estimate that male homosexuals constitute four to five percent of all adult males and outnumber female homosexuals by a factor of two or three.⁶⁴ This evidence suggests that an antihomosexual policy, applied evenhandedly to males and females, would result in the exclusion of two to three times as many men as women. Proof that males as a class are excluded at a substantially higher rate than females satisfies the first of the three categories of statistical proof.⁶⁵ The prima facie case would be buttressed if the male plaintiffs could prove that the adverse impact on males of an antihomosexual policy is magnified by disparate treatment of male homosexuals. If male homosexual behavior is more likely to be discovered by or reported to employers than female homosexual activity, a homosexual bar would exclude male homosexuals at a disproportionate rate.⁶⁶

Male plaintiffs could argue that such a magnification of disparate impact results from the fact that society is less accepting of physical and emotional intimacy between men than between women.⁶⁷ This prejudice could lead, for example, to more complaints by customers and employees against males than against females alleged to be homosexuals. Thus, an employer's facially neutral policy of enforcing the antihomosexual policy against those homosexuals whose sexual preference is brought to the employer's attention by complaints might enhance the disproportionate impact felt by males due to the greater number of male homosexuals in the population. Plaintiffs who wish to support their claim of disparate impact with such an argument would need more than mere conjecture about the incidence of complaints against males and females.⁶⁸ Experts might be sought out to testify

employed in office and technical positions; subsequent to filing of suit 285 whites and 14 blacks were hired for those positions; however, 30% of population of urban area was black); *League of United Latin Am. Citizens v. Santa Ana*, 410 F. Supp. 873, 879, 897-98 (C.D. Cal. 1976) (Mexican-Americans comprised 25.8% of the population of Santa Ana but comprised only 9.2% of the city policemen and 4.5% of the firefighters). Since defendants can argue that the general population is not qualified for skilled jobs, work force/general population comparisons are most effective for plaintiffs where the jobs at issue are unskilled positions. B. SCHLEI & P. GROSSMAN, *supra* note 52, at 1164.

62. Friedman, *supra* note 2, 566-67; Siniscalco, *supra* note 2, at 495.

63. *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327, 330 (9th Cir. 1979); *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 65 Cal. App. 3d 608, 617, 135 Cal. Rptr. 465, 470 (1977).

64. D. WEST, *HOMOSEXUALITY RE-EXAMINED* 12-13 (1977).

65. See text & note 59 *supra*.

66. Friedman, *supra* note 2, at 567.

67. *Id.*; Siniscalco, *supra* note 2, at 509.

68. There is some evidence of the greater likelihood of discovery of male homosexual activity. A study conducted by the UCLA Law Review found that of 968 persons arrested in Los Angeles County on charges of homosexual activity only six were female. Project, *The Consenting*

regarding the societal pattern of discrimination against male homosexuals. Fellow employees might testify regarding the existence of such prejudice within the work force.

Making a prima facie showing of disproportionate impact by use of the second category of statistical evidence—proving that male applicants are excluded by the bar against employment of homosexuals at a substantially higher rate than females⁶⁹—presents substantial problems. Data on the sexual preference of actual applicants might be difficult, if not impossible, to obtain. The small size of the sample might reduce the ability to show a statistically significant disparate impact.⁷⁰ In addition, the employer's bar to employment of homosexuals might have distorted the composition of the actual applicant pool, because knowledge of the policy might have discouraged homosexuals from submitting job applications.⁷¹

Use of the third method of proof, comparison of the percentage of males in the employer's work force with the percentage in the general population,⁷² is also an uncertain route. As long as men comprise well over half of the total work force⁷³ but less than half of the general population,⁷⁴ the percentage of males in most jobs will exceed the percentage of males in the population.

Rebutting a Griggs Claim Advanced by Male Homosexuals

After a prima facie case under *Griggs* has been made, the burden of going forward with the evidence shifts to the defendant, who may adduce evidence to expose fallacies or deficiencies in the plaintiff's data in order to rebut the inference of discrimination.⁷⁵ If, for example, the male homosexual plaintiffs base their showing of disparate impact on national statistics, the employer may present countervailing evidence

Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County, 13 U.C.L.A. L. REV. 647, 740 n.329 (1966). Draft and military service records will also bring more male than female homosexual activity to the attention of employers. Siniscalco, *supra* note 2, at 508-09. Although males are no longer required to register for the draft, such records are available for no generation of women. Moreover, military service records are available for far fewer women than men. If employers rely on arrest, draft, and military service records in the employment selection process, a disproportionate amount of male homosexual activity will come to their attention.

69. See note 60 *supra*.

70. See note 61 *supra*.

71. See note 60 *supra*.

72. See note 61 *supra*.

73. The Department of Labor reports that as of July 1979 there were 58,350,000 men (59%) and 40,541,000 women (41%) in the work force. U.S. BUREAU OF LABOR STATISTICS, DEPARTMENT OF LABOR, EMPLOYMENT AND EARNINGS 34-35 (Aug 1979).

74. In 1978 the number of males in the U.S. was estimated at 106,043,000. The number of females was estimated at 112,016,000. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 28 (1979).

75. See *Rowe v. General Motors Corp.*, 457 F.2d 348, 358 (5th Cir. 1972); *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir. 1971).

that the requirement as applied to actual applicants has not resulted in a disparate impact. Although there is no clear precedent for resolving instances of conflicting statistical conclusions, courts have given greater weight to a comparison between the percentage of the protected class among applicants for the position and the percentage of the protected class among persons actually accepted for the job.⁷⁶

The successful demonstration of the disproportionate impact of an antihomosexual policy upon males would then shift the burden of proof to the employer to present an acceptable defense of the practice.⁷⁷ The employer must show that the requirement is demonstrably related to successful job performance.⁷⁸ Since neither of the *Griggs*-based challenges to exclusion of male homosexuals from employment opportunities has survived beyond the pleading stage,⁷⁹ there are no decisions defining the types of defenses that the courts will find to be job-related. Public sector employment cases, however, suggest a number of grounds that private employers could adopt.⁸⁰

Although courts no longer uphold policies that automatically exclude homosexuals from public employment due to their sexual practices,⁸¹ they have recognized that such factors as (1) the susceptibility of homosexuals to coercion and blackmail,⁸² (2) the lower efficiency levels of homosexual employees and employers publicly identified with their homosexual employees,⁸³ or (3) the adverse impact of homosexuals on

76. See *Kirkland v. State Dept. of Correctional Serv.*, 520 F.2d 420, 425 (2d Cir. 1975); *Green v. Missouri Pac. R.R.*, 523 F.2d 1290, 1294-95 (8th Cir. 1975).

77. *Albemarle Paper Co. v. Moody*, 424 U.S. 405, 425 (1975).

78. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

79. *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 330 (9th Cir. 1979); *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 65 Cal. App. 3d 608, 617-18, 135 Cal. Rptr. 465, 470 (1977).

80. See text & notes 82-86 *infra*.

81. In the landmark case of *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969), the discharge of an employee based solely upon off-duty homosexual activity was held to be so arbitrary as to violate due process requirements. *Id.* at 1167. The court invalidated a blanket policy of dismissing homosexuals:

[T]he notion that it could be an appropriate function of the federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity. . . . [A] finding that an employee has done something immoral or indecent could support a dismissal without further inquiry only if all immoral or indecent acts of an employee have some ascertainable deleterious effect on the efficiency of the service.

Id. at 1165. The court found no "reasonably foreseeable, specific connection between [the] employee's potentially embarrassing conduct and the efficiency of the service." *Id.* at 1167.

Other courts have similarly required the government to establish a rational nexus between the homosexual conduct and the "efficiency of the service." See, e.g., *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247, 255 (9th Cir. 1976); *Martinez v. Brown*, 449 F. Supp. 207, 212 (N.D. Cal. 1978); *Marks v. Schlesinger*, 384 F. Supp. 1373, 1379 (D.C. Cal. 1974).

82. See, e.g., *McKeand v. Laird*, 490 F.2d 1262, 1263 (9th Cir. 1974); *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970); *Norton v. Macy*, 417 F.2d 1161, 1166 (D.C. Cir. 1969).

83. See, e.g., *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247, 255 (9th Cir. 1976); *Norton v. Macy*, 417 F.2d 1161, 1166 (D.C. Cir. 1969); *Richardson v. Hampton*, 345 F. Supp. 600, 609 (D.D.C. 1972).

coworkers, customers, and children⁸⁴ may serve as a valid basis for dismissal of or refusal to hire homosexuals. The courts have, in fact, been prone to accept any defense by the employer that rests on potential problems in the job environment created by the employment of homosexuals.⁸⁵ The standard of proof as to the likelihood of such problems has not been exacting. Unsubstantiated assertions that job morale and efficiency would be reduced by retention of a homosexual employee have been accepted by the courts as justifying discriminatory practices by employers.⁸⁶

If the public sector cases are any indication of the disposition of the courts toward claims of homosexual discrimination in employment, employers will have little difficulty in meeting the burden of devising a job-related defense. Courts can be expected to reject the view that homosexuality *per se* evidences unfitness for employment, while accepting, with minimal scrutiny, employers' contentions of adverse impact on the job environment.

Conclusion

With the increase in homosexual activism on the streets and within the legal system, the courts will continue to be faced with the difficult issue of what protection, if any, should be provided to homosexuals subjected to private sector employment discrimination. The Ninth Circuit in *DeSantis* properly held that sexual preference is not a prohibited basis for discrimination under title VII. Neither the meager legislative history of the sex discrimination provisions nor subsequent judicial interpretation support an expansion of title VII to encompass discrimination on the basis of sexual preference. The *DeSantis* court also denied male homosexuals the opportunity to use the *Griggs* disproportionate impact approach to make a claim that an antihomosexual employment rule discriminated against males *qua* males. Even if this approach were permitted, it would not provide a right of action for female homosexuals. It is also littered with obstacles for the male plaintiff in the form of opportunities for the employer to attack the statistical evidence offered

84. See, e.g., *Norton v. Macy*, 417 F.2d 1161, 1166 (D.C. Cir. 1969) (customers and coworkers); *Schlegel v. United States*, 416 F.2d 1372, 1378 (Ct. Cl. 1969) (coworkers); *Richardson v. Hampton*, 345 F. Supp. 600, 609 (D.D.C. 1972) (children).

85. See, e.g., *Schlegel v. United States*, 416 F.2d 1372, 1378 (Ct. Cl. 1969); *Berg v. Claytor*, 436 F. Supp. 76, 80 (D.D.C. 1977); *Gaylord v. Tacoma School Dist. No. 10*, 88 Wash. 2d 286, 298-99, 559 P.2d 1340, 1346-47 (1977).

If an employer meets the burden of proving that the requirements are job-related, the complainant may still demonstrate the existence of alternative selection devices with a lesser discriminatory impact that would serve the employer's interest in an efficient and trustworthy work force. See note 53 *supra*. Male homosexual complainants could, for example, challenge an employer's reliance on arrest and military records as evidence of homosexual activity and suggest instead reliance on a series of questions on the job application or in the job interview.

86. See cases cited note 85 *supra*.

by the plaintiffs and to defend the requirement as job-related. Despite these difficulties, male homosexuals who allege employment discrimination should be granted an opportunity to make a *Griggs* claim. Along with arrestees, misdemeanants, felons, garnishees, and short and lightweight persons, homosexuals should be permitted to use their membership in a class protected under title VII to "bootstrap" their claims of illegal employment discrimination.

Betsy Rieke

III. COMMERCIAL LAW

A. POLICE-ASSISTED REPOSSESSIONS

For two centuries, secured creditors in America have had a common law, statutory, or contractual right to repossess collateral upon the default of the debtor.¹ Correspondingly, a common-law limitation has been imposed on this right to repossess: A secured creditor may not breach the peace when repossessing the collateral.² This limitation is also embodied in section 9-503 of the Uniform Commercial Code.³ Under this section of the Code, the creditor is not required to give notice to the debtor prior to repossession.⁴ Controversy still remains, however, over the desirability of self-help repossessions.⁵

In *Walker v. Walthall*,⁶ the Arizona Court of Appeals addressed two issues arising out of police-assisted repossessions: (1) Whether a police officer's presence at a repossession constituted a breach of the peace; (2) whether the officer's presence constituted "state action," thereby invoking the due process clause of the fourteenth amendment.⁷

Bruce Walthall, the debtor, purchased a 1971 Buick from Allen Walker by a conditional sale contract.⁸ The contract required the debtor to maintain insurance on the car, payable to Walker.⁹ After the debtor defaulted on the insurance covenant, Walker, the creditor, obtained the assistance of a deputy sheriff to accompany him to the debtor's home.¹⁰ The deputy sheriff, dressed in full uniform, was with-

1. McCall, *The Past as Prologue: A History of the Right to Repossess*, 47 S. CAL. L. REV. 58, 81 (1973).

2. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE, § 26-6, at 966-67 (1972).

3. U.C.C. § 9-503 is codified in ARIZ. REV. STAT. ANN. § 44-3149 (1967). See note 14 *infra*.

4. W. DAVENPORT & J. MURRAY, SECURED TRANSACTIONS § 6.03, at 265-66 (1978); see ARIZ. REV. STAT. ANN. § 44-3149 (1967); U.C.C. § 9-503 (quoted at note 14 *infra*).

5. Compare Dauer & Gilhool, *The Economics of Constitutional Repossession: A Critique for Professor Johnson and a Partial Reply*, 47 S. CAL. L. REV. 116 (1973) with Johnson, *A Response to Dauer and Gilhool: A Defense of Self-Help Repossession*, 47 S. CAL. L. REV. 151 (1973).

6. 121 Ariz. 121, 588 P.2d 863 (Ct. App. 1978).

7. *Id.* at 122-24, 588 P.2d at 864-66.

8. *Id.* at 122, 588 P.2d at 864. Bruce Walthall made a down payment and agreed to pay the balance in monthly installments. *Id.* at 121-22, 588 P.2d at 863-64. In a conditional sale, the seller extends credit and reserves a security interest. A "security interest" is an "interest in personal property or fixtures which secures payment or performance of an obligation." ARIZ. REV. STAT. ANN. § 44-2208 (37) (1967); U.C.C. § 1-201(37); see J. WHITE & R. SUMMERS, *supra* note 2, § 22-3, at 758-62. Through this security device, the debtor's property is subject to the creditor's security interest until the obligations of the sales contract have been performed. ARIZ. REV. STAT. ANN. § 44-3105(a)(4), (5) (Supp. 1979-80); U.C.C. § 9-105(1)(c), (d).

9. 121 Ariz. at 122, 588 P.2d at 864. This casenote assumes that the creditor had a right to repossess the collateral upon default and, therefore, focuses on the creditor's method of repossession.

10. *Id.*

out legal process.¹¹ Together, they elicited the debtor's consent to the repossession.¹² Subsequently, the debtor sued the Walkers for unlawful repossession.¹³

The Arizona Court of Appeals framed the first issue as whether the presence of the deputy sheriff in full uniform removed this repossession from the parameters of Arizona's self-help repossession statute.¹⁴ Under the Arizona repossession statute, a secured creditor has the right to use self-help repossession if, and only if, it can be done without a breach of the peace.¹⁵ Otherwise, the creditor must proceed by judicial process.¹⁶

In reversing the trial court, the court of appeals held that the deputy sheriff's presence constituted constructive force, intimidation, and oppression, thereby breaching the peace and violating the repossession statute.¹⁷ Second, and uniquely, the *Walker* court held that the officer's presence during the repossession constituted "state action."¹⁸ Thus, the debtor's constitutional right to due process was invoked, requiring a proper notice and hearing.¹⁹

Initially, this casenote will discuss the case law involving self-help repossessions where a police officer, acting without legal process, accompanies the reposessor. The *Walker* decision will then be compared with that case law. Finally, the due process holding of the *Walker* court will be analyzed.

Repossessions with Police Assistance

A breach of the peace invalidates every repossession, either by statute or at common law.²⁰ Accordingly, a discussion of the elements that constitute a breach of the peace is appropriate. While the term has

11. *Id.* In other words, the police officer did not have a writ of replevin. See text & note 16 *infra*.

12. 121 Ariz. at 122, 588 P.2d at 864.

13. *Id.* An action for "unlawful repossession" is a statutory action imposing liability upon a creditor for violating the repossession statute. See generally J. WHITE & R. SUMMERS, *supra* note 2, § 26-14, at 997. If the creditor breaches the peace during the repossession, he is liable for any loss caused by his noncompliance with the repossession statute. See ARIZ. REV. STAT. ANN. 44-3149 (1967); U.C.C. § 9-503. See also ARIZ. REV. STAT. ANN. § 44-3153 (1967); U.C.C. § 9-507(1).

14. 121 Ariz. at 122, 588 P.2d at 864. ARIZ. REV. STAT. ANN. § 44-3149 (1967) and U.C.C. § 9-503 provide in part: "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. . . ."

15. See *Walker v. Walthall*, 121 Ariz. at 122, 588 P.2d at 864; ARIZ. REV. STAT. ANN. § 44-3149 (1967); U.C.C. § 9-503.

16. *Walker v. Walthall*, 121 Ariz. at 122, 588 P.2d at 864; ARIZ. REV. STAT. ANN. § 44-3149 (1967). An example of judicial process is replevin. See ARIZ. REV. STAT. ANN. §§ 12-1301 to -1314 (1976 & Supp. 1979).

17. 121 Ariz. at 123, 588 P.2d at 865 (citing *Stone Machinery Co. v. Kessler*, 1 Wash. App. 750, 757, 463 P.2d 651, 655 (1970)).

18. 121 Ariz. at 124, 588 P.2d at 866.

19. *Id.* This second holding refers to the officer's presence as constituting state action, not to the enactment of the statute itself. See text & note 76 *infra*.

20. See J. WHITE & R. SUMMERS, *supra* note 2, § 26-6 at 966-67.

suffered definitional problems,²¹ for the purposes of this casenote, the *Restatement of Torts* definition of a breach of the peace will be adopted: "A breach of the peace is a public offense done by violence, or one causing or likely to cause an immediate disturbance of public order."²² In applying this definition, courts have focused on: (1) Whether there was entry upon the debtor's premises; and (2) whether the debtor or one acting on his behalf consented to the entry and repossession.²³ Generally, a creditor's entry into the debtor's residence, without consent, is *per se* a breach of the peace;²⁴ but if the debtor freely consents to the repossession, no breach of the peace ensues.²⁵

Except for a few anomalous cases,²⁶ every self-help repossession aided by a police officer without legal process has been invalidated.²⁷ While occasionally a police officer has used physical violence during a repossession,²⁸ it is well settled that a repossession accomplished through physical violence by anyone will be invalidated as a breach of the peace.²⁹ Therefore, the validity of repossessions effectuated with the aid of a police officer, lacking legal process and absent any physical

21. See J. WHITE & R. SUMMERS, *supra* note 2, § 26-6, at 966-69; Boyd, *The Revised Uniform Consumer Code as a Replacement for Piecemeal Consumer Legislation: The Arizona Context*, 18 ARIZ. L. REV. 1, 32 (1976).

22. RESTATEMENT (SECOND) OF TORTS § 116 (1965). See *Stone Machinery Co. v. Kessler*, 1 Wash. App. 750, 754, 463 P.2d 651, 653-54 (1970). The use of the *Restatement* definition is not inappropriate. An Arizona court will give great weight to the *Restatement* when it is not bound by precedent or by legislative enactment. See, e.g., *Maricopa County v. Leppla*, 89 Ariz. 220, 222, 360 P.2d 227, 228 (1961); *Reed v. Real Detective Publishing Co.*, 63 Ariz. 294, 302-03, 162 P.2d 133, 137-38 (1945); *Shetter v. Rochelle*, 2 Ariz. App. 358, 368, 409 P.2d 74, 84 (1965). Arizona has neither precedent nor statute defining a civil breach of the peace.

23. J. WHITE & R. SUMMERS, *supra* note 2, § 26-6, at 967. See *Walker v. Walthall*, 121 Ariz. at 122, 588 P.2d at 864; *Raffa v. Dania Bank*, 321 So. 2d 83, 85 (Fla. Dist. Ct. App. 1975); *Benschoter v. First Nat'l Bank*, 218 Kan. 144, 154, 542 P.2d 1042, 1050 (1975).

24. See *Strahan v. Simmons*, 15 So. 2d 164, 165 (La. Ct. App. 1943); *Kirkwood v. Hickman*, 223 Miss. 372, 384, 78 So. 2d 351, 356 (1955); *Hileman v. Harter Bank & Trust Co.*, 174 Ohio St. 95, 97, 186 N.E.2d 853, 854-55 (1962); Casenote, *Common Law Replevin and Self-Help Repossession*, 18 ARIZ. L. REV. 653, 655 n.12 (1976).

25. See *Besner v. Smith*, 178 A.2d 924, 926 (D.C. 1962); *Benschoter v. First Nat'l Bank*, 218 Kan. 144, 153, 542 P.2d 1042, 1049 (1975). Cf. *Dorsey v. Central Finance Co.*, 65 So. 2d 137, 138 (La. Ct. App. 1953) (repossession struck down because the debtor's consent was not voluntary).

26. E.g., *Holloway v. Arnold*, 92 Mo. App. 293, 299, 5 S.W. 277, 279 (1887) (where police assisted in the repossession, the court inexplicably found no actions done *colore officii*; *Day v. National Bond and Inv. Co.*, 99 S.W.2d 117, 119 (Mo. App. 1936) (repossession upheld even though the creditor's attorney introduced a private citizen as a constable); *Grossman v. Weiss*, 129 Misc. 234, 235, 221 N.Y.S. 266, 268 (App. Term, Sup. Ct. 1927) (no breach of the peace where the court "transferred" the creditor's right to repossess to the sheriff, treating the sheriff as the creditor's "agent"). See discussion note 47 *infra*.

27. See *Kidd v. Johnson*, 49 Mo. App. 486, 488 (1892); *Beneficial Finance Co. v. Wiener*, 405 P.2d 691, 696 (Okla. 1965); *Stone Machinery Co. v. Kessler*, 1 Wash. App. 750, 757, 463 P.2d 651, 655 (1970).

28. See, e.g., *State v. Boynton*, 75 Iowa 753, 754, 38 N.W. 505, 506 (1888) (creditor's attorney and a hired constable handcuffed the debtor, broke his finger, and dislocated his thumb); *Ray v. Navarre*, 47 Okla. 438, 443, 147 P. 1019, 1021 (1915) (deputy, without process, used threats, force, and a display of firearms to effectuate the repossession); *Roberts v. Speck*, 169 Wash. 613, 614, 14 P.2d 33, 34 (1932) (police, without process, completed the repossession by dragging the debtor out of her car).

29. See *Besner v. Smith*, 178 A.2d 924, 926 (D.C. 1962); *Morris v. First Nat'l Bank & Trust Co.*, 21 Ohio St. 2d 25, 29, 254 N.E.2d 683, 686 (1970); *Harris Truck & Trailer Sales v. Foote*, 58 Tenn. App. 710, 717-18, 436 S.W.2d 460, 464 (1968).

violence, must be analyzed.

Typically, this issue arises where the police officer accompanying the repossession creditor mistakenly believes that he has legal process, but subsequently discovers that the process is void because of a jurisdictional defect.³⁰ The courts' rationale in invalidating such repossessions is that the police officer's mere presence has intimidated the debtor, even though the officer might have acted nonviolently.³¹ Through such intimidation, the officer has forced the debtor into acquiescence³² and, concomitantly, into foregoing his right to resist the repossession.³³ This force by intimidation is a breach of the peace by definition because violence, in a loose sense, has been used.³⁴ A policy argument is usually appended to the above rationale: A repossession obtained under such a show of authority is impermissible because it mockingly tampers with the citizens' obedience to the law and its officers.³⁵

With all self-help repossessions, the debtor has a right to resist by demanding that the creditor go through judicial proceedings.³⁶ Nevertheless, the police officer's presence certainly constrains the debtor's exercise of this right.³⁷ While the officer's presence is construed by some courts to be intimidation,³⁸ other courts have equated the officer's mere

30. See *Day v. National Bond & Inv. Co.*, 99 S.W.2d 117, 118 (Mo. App. 1936); *Beneficial Finance Co. v. Wiener*, 405 P.2d 691, 694 (Okla. 1965); *McClellan v. Gaston*, 18 Wash. 472, 475, 51 P. 1062, 1063-64 (1898).

31. See *Walker v. Walthall*, 121 Ariz. at 123, 588 P.2d at 865; *Beneficial Finance Co. v. Wiener*, 405 P.2d 691, 695 (Okla. 1965); *Stone Machinery Co. v. Kessler*, 1 Wash. App. 750, 757, 463 P.2d 651, 654 (1970).

32. Although the courts have not stated this proposition explicitly, it is apparent in their decisions. See generally cases cited note 31 *supra*.

33. See *Walker v. Walthall*, 121 Ariz. at 123, 588 P.2d at 865; *Stone Machinery Co. v. Kessler*, 1 Wash. App. 750, 757, 463 P.2d 651, 654 (1970); accord, A. LAFRANCE, M. SCHROEDER, R. BENNETT, & W. BOYD, *LAW OF THE POOR* § 122, at 77 (1973). See also discussion note 61 *infra*.

34. See *Walker v. Walthall*, 121 Ariz. at 123, 588 P.2d at 865; *Beneficial Finance Co. v. Wiener*, 405 P.2d 691, 696 (Okla. 1965); *Stone Machinery Co. v. Kessler*, 1 Wash. App. 750, 757, 463 P.2d 651, 654 (1970).

35. L. JONES, *JONES ON CHATTEL MORTGAGES* § 705, at 697 (4th ed. 1894); see *Beneficial Finance Co. v. Wiener*, 405 P.2d 691, 695 (Okla. 1965); *Burgin v. Universal Credit Co.*, 2 Wash. 2d 364, 374-75, 98 P.2d 291, 296 (1940); *Stone Machinery Co. v. Kessler*, 1 Wash. App. 750, 757, 463 P.2d 651, 654 (1970). When a creditor introduces a police officer into the repossession, the peace has been breached, conferring upon the debtor not only the shield of the Arizona repossession statute, ARIZ. REV. STAT. ANN. § 44-3149 (1967), but also the sword of a trespass action against the creditor. Upon default, a conditional seller has a qualified privilege to peaceably enter the debtor's land but not the debtor's residence, see text & note 24 *supra*, to repossess the collateral. RESTATEMENT (SECOND) OF TORTS, § 183 (1965). This qualified privilege is defeated, however, if the repossession is not peaceable. *Id.*, Comment h. Therefore, if the creditor introduces a police officer into the repossession, the peace has been breached, the qualified privilege is defeated, and the creditor becomes a trespasser. See cases cited this note *supra*.

36. See *Walker v. Walthall*, 121 Ariz. at 122-23, 588 P.2d at 864-65; *Burgin v. Universal Credit Co.*, 2 Wash. 2d 364, 375, 98 P.2d 291, 296 (1940); *Stone Machinery Co. v. Kessler*, 1 Wash. App. 750, 757, 463 P.2d 651, 654 (1970); accord, A. LAFRANCE, M. SCHROEDER, R. BENNETT, & W. BOYD, *supra* note 33, § 122, at 77.

37. See *Beneficial Finance Co. v. Wiener*, 405 P.2d 691, 693 (Okla. 1965).

38. See, e.g., *Beneficial Finance Co. v. Wiener*, 405 P.2d 691, 695 (Okla. 1965) (intimidation); *Firebaugh v. Gunther*, 106 Okla. 131, 132, 233 P. 460, 461 (1925) ("intimidation amounting to force"); *Stone Machinery Co. v. Kessler*, 1 Wash. App. 750, 757, 463 P.2d 651, 655 (1970) (constructive force, intimidation, and oppression).

presence with force.³⁹ Whether the officer's presence is considered to be intimidation, force, oppression, or constructive force, however, has never been determinative of the validity of a police-assisted repossession.⁴⁰ Nor does the degree of the officer's participation seem to correspond with the label given it. For instance, although it would be tidy analytically to equate a small amount of police participation with "intimidation," and a larger amount of police participation with "constructive force," the courts have not established such a relationship.⁴¹ While the courts have recognized these same concepts, it is apparent that they have been callous in the use of different terminology.

In sum, the amount of police participation, when considered alone, has not been dispositive of a repossession's validity. Indeed, the courts seem oblivious to the *degree* of police participation when they confront police-assisted repossessions.⁴² Instead, debtor intimidation is the result of the officer's sheer presence, not of the officer's degree of participation.⁴³ While the officer's degree of participation does not affect the repossession's validity, it is essential that the officer be uniformed and lack legal process for the police-assisted repossession to be invalidated.⁴⁴ Conversely, if the officer⁴⁵ is not in uniform,⁴⁶ or if the officer

39. McClure v. Hill, 36 Ark. 268, 273 (1880) (force); Kidd v. Johnson, 49 Mo. App. 486, 488 (1892) (compulsion).

40. See, e.g., McClure v. Hill, 35 Ark. 268, 272-73 (1880) (where the constable used "force" by displaying a void writ to elicit the debtor's consent to the repossession); Kidd v. Johnson, 49 Mo. App. 486, 488 (1892) (where the officer used "compulsion" by saying it was his duty to repossess the cows, which elicited the debtor's consent); Beneficial Finance Co. v. Wiener, 405 P.2d 691, 696 (Okla. 1965) (where the constable used "intimidation" by displaying a void writ to elicit the debtor's consent to the repossession); Firebaugh v. Gunther, 106 Okla. 131, 132, 233 P. 460, 461 (1925) (where the effect of the officer's presence and his demand that the mortgaged property be turned over to him constituted intimidation amounting to force); Stone Machinery Co. v. Kessler, 1 Wash. App. 750, 757, 463 P.2d 651, 655 (1970) (where the officer used "constructive force, intimidation, and oppression" by saying he was repossessing the tractor, inducing acquiescence in the debtor). In each of the above cases, the court struck down the repossession.

41. See cases cited in note 40 *supra*.

42. See text at notes 57-58 *infra*. But see Walker v. Walthall, 121 Ariz. at 124, 588 P.2d at 866 (Eubank, J., dissenting).

43. See Stone Machinery Co. v. Kessler, 1 Wash. App. 750, 756-57, 463 P.2d 651, 655 (1970) (where the debtor was intimidated, even though the officer did not physically participate in retaking the collateral); see also text & note 61 *infra*.

44. See authorities cited in note 35 *supra*. A uniformed officer lacking legal process, is acting *colore officii*—beyond his legal authority. See, e.g., Drake v. State, 53 Ariz. 93, 98-99, 85 P.2d 984, 986 (1939) (where tax collector imposing unauthorized delinquency payments was found to be acting *colore officii*); Yuma County v. Wisener, 45 Ariz. 475, 481-82, 46 P.2d 115, 117-18 (1935) (where court clerk issuing counterfeit marriage licenses to nonresidents was found to be acting *colore officii*); accord, Washburn v. Foster, 87 Ga. App. 132, 136, 73 S.E.2d 240, 243 (1952) (where police officer collecting an unauthorized appearance bond in lieu of bail was acting *colore officii*).

45. In Day v. National Bond & Investment Co., 99 S.W.2d 117 (Mo. App. 1936), the debtor consented to the repossession after the creditor's attorney introduced a private citizen as a constable. *Id.* at 118. Since no officer had acted beyond his authority, the Day court held that there were no actions done *colore officii*, see text & note 44 *supra*, and thus no debtor intimidation. 99 S.W.2d at 119. The debtor had also been shown a void writ of replevin, *id.*, and so the debtor acquiesced after two showings of supposed legal authority. As a result of the Day court's complete disregard of the debtor's likely response to such a show of legal authority, the debtor's right to resist the repossession was precluded. See text & notes 60-61 *infra*.

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

has a valid writ of replevin, the repossession will be upheld.⁴⁷

Walker v. Walthall

The *Walker* decision followed the majority of decisions addressing police-assisted repossessions.⁴⁸ In *Walker*, the court observed that the deputy sheriff was uniformed and lacked legal process.⁴⁹ Moreover, the debtor's consent and, ultimately, the repossession of the car, were obtained under a show of authority.⁵⁰ The court found that this show of authority elicited obedience from the debtor, Bruce Walthall.⁵¹ Consequently, the court stated that the officer's presence intimidated the debtor,⁵² restraining Walthall from exercising his right to resist the repossession.⁵³ The court concluded that were it not for the officer's presence, Walthall would not have consented to the repossession.⁵⁴ Therefore, despite the absence of physical violence, the unauthorized actions of the sheriff amounted to constructive force,⁵⁵ intimidation, and oppression, constituting a breach of the peace.⁵⁶

Nevertheless, an interesting feature of the *Walker* case distinguishes it from prior police-assisted repossessions—the officer's passivity during the repossession. In *Walker*, the deputy sheriff did not say nor do anything during the repossession, except appear at the debtor's residence in full uniform.⁵⁷ Although prior cases have not weighed the amount of police participation when deciding whether to invalidate the

47. See *Day v. National Bond & Investment Co.*, 99 S.W.2d at 118-19. Two anomalous cases have upheld police-assisted repossessions even though the officers were uniformed and lacked legal process. In *Holloway v. Arnold*, 92 Mo. 293, 5 S.W. 277 (1887), the debtor acquiesced in the repossession, which was aided by a constable without legal process. *Id.* at 299, 5 S.W. at 279. Without explanation, the Missouri Supreme Court simply concluded that there was nothing done *colore officii*. *Id.* at 299, 5 S.W. at 279. In *Grossman v. Weiss*, 129 Misc. 234, 221 N.Y.S. 266 (Sup. Ct. 1927), the court treated the sheriff, acting under a void writ of seizure, as the creditor's "agent." *Id.* at 235, 221 N.Y.S. at 268. The *Grossman* court then transferred the creditor's right to repossess to the sheriff, and upheld the repossession. *Id.* This view also overlooks the debtor's intimidation resulting from the sheriff's mere presence. See text & note 78 *infra*.

48. *E.g.*, *Kidd v. Johnson*, 49 Mo. App. 486, 487-88 (1892); *Beneficial Finance Co. v. Wiener*, 405 P.2d 691, 695 (Okla. 1965); *Stone Machinery Co. v. Kessler*, 1 Wash. App. 750, 757, 463 P.2d 651, 654 (1970).

49. 121 Ariz. at 122, 588 P.2d at 864. See note 44 *supra*.

50. *Id.* at 122-23, 588 P.2d at 864-65.

51. *Id.*

52. *Id.* at 123, 588 P.2d at 865.

53. *Id.*

54. *Id.*

55. *Id.* While a police officer's presence at a repossession arguably reduces the likelihood of a breach of the peace, see 121 Ariz. at 124-25, 588 P.2d at 866-67 (Eubank, J., dissenting), a repossession based on intimidation should never gain judicial approval. See *Levy v. Address-Hanna, Inc.*, 96 So. 2d 373, 376 (La. Ct. App. 1957); *Kidd v. Johnson*, 49 Mo. App. 486, 488 (1892); *Morris v. First Nat'l Bank*, 21 Ohio St. 2d 25, 29, 254 N.E.2d 683, 686 (1970).

56. 121 Ariz. at 123, 588 P.2d at 865.

57. *Id.* at 123, 125, 588 P.2d at 865, 867.

repossession,⁵⁸ there was not the minimal degree of police participation as in *Walker*.⁵⁹ The *Walker* court found that the amount of police participation was not controlling, but that the sheriff's presence and accompanying intimidation were the determinative factors.⁶⁰ This refusal by the *Walker* court to attach controlling significance to the sheriff's minimal participation appears correct for three reasons. First, because of the sheriff's show of authority, a citizen might infer the existence of legal process. Second, because a debtor might be intimidated by the sheriff's mere presence, his "consent" to the repossession would be tainted.⁶¹ Finally, because the repossession statute⁶² contemplates a *self-help* remedy, the creditor should not gain the benefit of police assistance, however minimal, unless a writ of replevin has been procured with attendant due process protections.⁶³

While the *Walker* majority emphasized the debtor's subjective response to the officer's show of authority,⁶⁴ the dissent argued that the subjective thoughts of the debtor regarding the sheriff's presence "add nothing to the event" and should be ignored.⁶⁵ According to Judge Eubank, the debtor's objective acts in the relinquishment of the automobile should govern the repossession's validity, not his subjective response to the officer's presence.⁶⁶ This argument ignores that a debtor's subjective response to the sheriff's presence might strongly influence the debtor's objective acts and his subsequent consent.⁶⁷ Thus, the debtor's

58. See text & notes 40-42 *supra*.

59. Typically, the sheriff either expresses an intent to repossess the collateral, or physically, repossesses the collateral. See cases cited in note 40 *supra*.

60. 121 Ariz. at 123, 588 P.2d at 865. Specifically, the *Walker* court noted: "[W]e believe the presence of the deputy sheriff and its accompanying intimidation is the same kind of conduct condemned by the Washington court [in *Stone Machinery Co. v. Kessler*, 1 Wash. App. 750, 757, 463 P.2d 651, 655 (1970)]. The fact that the deputy did not say anything is not significant." *Id.*

61. Consent to a repossession following a show of supposed authority is analogous to the situation where an illegal search and seizure is carried out on the basis of consent elicited by a show of authority. For example, in *Bumper v. North Carolina*, 391 U.S. 543 (1968), the Supreme Court held that before a search can be justified on the basis of consent, the prosecutor must prove that such consent was given voluntarily. *Id.* at 548. This burden of proof is not met by showing mere acquiescence to a claim of lawful authority. *Id.* Hence, an officer's false claim of authority to search a home under a warrant creates a coercive situation, precluding both the occupant's right to resist the search and his voluntary consent. *Id.* at 549-50.

62. ARIZ. REV. STAT. ANN. § 44-3149 (1967); U.C.C. § 9-503.

63. See generally ARIZ. REV. STAT. ANN. §§ 12-1301 to -1314 (1976 & Supp. 1979).

64. See 121 Ariz. at 123, 588 P.2d at 865.

65. *Id.* at 125, 588 P.2d at 867 (Eubank, J., dissenting).

66. *Id.* In his dissent, Judge Eubank made three major points: (1) The sheriff had a statutory duty to prevent breaches of the peace, ARIZ. REV. STAT. ANN. § 11-441(A)(3) (1977), and he accompanied the creditor as a representative of the State of Arizona to keep the repossession peaceful; (2) the debtor had voluntarily relinquished the car without objection, in compliance with his contract; and (3) *Stone Machinery Co. v. Kessler*, 1 Wash. App. 750, 463 P.2d 651 (1970), followed by the majority, was distinguishable because the *Stone* sheriff actively participated in the repossession, while the *Walker* sheriff played a passive role. 121 Ariz. at 124-25, 588 P.2d at 866-67.

67. See *Walker v. Walthall*, 121 Ariz. at 123, 588 P.2d at 865; *cf. Morris v. First Nat'l Bank*,

subjective thoughts are central to determining whether a debtor has been intimidated by a uniformed officer during a repossession; if it is determined that the debtor's consent was based on such intimidation, it is not voluntary, and must not support the repossession.⁶⁸

Due Process

The due process clause of the fourteenth amendment does not protect against private conduct, but only against state action.⁶⁹ The *Walker* court acknowledged that the great majority of jurisdictions have found insufficient state action in a state legislature's mere enactment of section 9-503 of the Uniform Commercial Code to invoke due process protections.⁷⁰ Sufficient state action is lacking because the statute is a mere codification of the pre-existing common-law right of self-help repossession⁷¹ and, therefore, creates no new right.⁷² Moreover, application of the due process clause to all statutes codifying common-law rights would be an excessively broad application of the fourteenth amendment.⁷³ Although dictum, the *Walker* court's acknowledgement of this majority view strongly indicates that a due process attack on Arizona's repossession statute would fail.⁷⁴

Nevertheless, the *Walker* court acknowledged that the repossession statute *qua* state action issue was independent of a second related issue: whether the officer's presence constituted state action sufficient

21 Ohio St. 2d 25, 29, 254 N.E.2d 683, 685-86 (1970) (where the debtor's son was surrounded by three men and placed in fear of being beaten).

68. See *Kidd v. Johnson*, 49 Mo. App. 486, 487 (1892); *Beneficial Finance Co. v. Wiener*, 405 P.2d 691, 696 (Okla. 1965); *Stone Machinery Co. v. Kessler*, 1 Wash. App. 750, 752, 757, 463 P.2d 651, 653, 655 (1970). See also text & note 61 *supra*.

69. *E.g.*, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

70. *Walker v. Walthall*, 121 Ariz. at 123-24, 588 P.2d at 865-66.

71. See, *e.g.*, *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324, 332 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974); *John Deere Co. v. Catalano*, 186 Colo. 101, 106, 525 P.2d 1153, 1155 (1974); *Benschoter v. First Nat'l Bank*, 218 Kan. 144, 148, 542 P.2d 1042, 1046 (1975). By implication, *Adams* also holds that the common-law right of self-help repossession, in itself, is not state action. 492 F.2d at 330. *Accord*, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-6, at 1169 (1978). For a persuasive argument that the common law right to self-help repossession is state action, see *id.* § 18-6, at 1167-71.

72. Casenote, *supra* note 24, at 665. *Cf.* *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 157 (1978) (holding that a New York self-help statute, an analogue of the Uniform Commercial Code, allowing a private warehouseman to sell bailed goods to recover unpaid storage charges, lacked the requisite state action to invoke due process).

73. See Casenote, *supra* note 24, at 665.

74. 121 Ariz. at 123-24, 588 P.2d at 865-66. In *Fuentes v. Shevin*, 407 U.S. 67 (1972), the Supreme Court held that the Florida and Pennsylvania prejudgment replevin statutes violated due process because prior notice and hearing had not been given. *Id.* at 96-97. The *Walker* decision is distinguishable, however, on the state action issue because in *Fuentes* the writ of replevin was issued by a court clerk and a state officer seized the property, supplying the requisite state action. *Id.* at 74-75.

to invoke the due process clause.⁷⁵ Despite the officer's minimal participation in the repossession, the *Walker* court held that the sheriff's presence constituted state action.⁷⁶ As a result, the repossession constituted a deprivation of property without proper notice and hearing.⁷⁷ The *Walker* court's position is unique. In fact, no other police-assisted repossession has been invalidated under this state action theory.⁷⁸

To support its holding, the *Walker* court relied upon a Kansas Supreme Court decision⁷⁹ stating that if a state official, such as a judge, court clerk, or police officer is involved, sufficient state action is present.⁸⁰ Similarly, the United States Supreme Court has held that where a public official, clothed with the state's power, acts in the name of the state, sufficient state action is present to invoke the due process clause.⁸¹

Insofar as a uniformed officer represents the state, the police officer in *Walker* was "clothed with the state's power" and, therefore, sufficient state action existed for the due process clause to apply.⁸² This is true even if the officer's acts have not been authorized by the state.⁸³ Consequently, a police officer's presence constitutes state action even though the officer may be acting in violation of state law.⁸⁴ Since there had been a deprivation of property⁸⁵ by the state without proper notice and a hearing, the *Walker* court found that the due process clause of the fourteenth amendment was violated.⁸⁶

75. 121 Ariz. at 124, 588 P.2d at 866.

76. *Id.*

77. *Id.*

78. *See generally* cases cited at note 40 *supra*. This theory could serve as an alternate basis for overruling those cases that upheld police-assisted repossessions. *See text & note 47 supra*.

79. *Benschoter v. First Nat'l Bank*, 218 Kan. 144, 542 P.2d 1042 (1975). In the Kansas case, the creditor repossessed the debtor's farm equipment under the state's self-help repossession statute. *Id.* at 146, 542 P.2d at 1045. The court held that the legislature's enactment of U.C.C. § 9-503 was insufficient state action to invoke due process. *Id.* at 151, 542 P.2d at 1048.

80. 121 Ariz. at 124, 588 P.2d at 866; *accord*, *Brown v. United States Nat'l Bank*, 265 Or. 234, 241, 509 P.2d 442, 445-46 (1973).

81. *Ex parte Virginia*, 100 U.S. 339, 347 (1879); *accord*, *Iowa-Des Moines Bank v. Bennett*, 284 U.S. 239, 245-46 (1931); *Home Tel. and Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 290-91 (1913); *Catlette v. United States*, 132 F.2d 902, 905 (4th Cir. 1943).

82. *See* 121 Ariz. at 122, 124, 588 P.2d at 864, 866.

83. [T]he theory of the [Fourteenth] Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant. . . .

Home Tel. and Tel. Co. v. City of Los Angeles, 227 U.S. 278, 287 (1913). *See generally* L. TRIBE, *supra* note 71, § 18-4, at 1161-62.

84. *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 244 (1931); *accord*, *Snowden v. Hughes*, 321 U.S. 1, 11 (1944).

85. The *Walker* debtor had clearly been deprived of his property interest in the automobile. *See Fuentes v. Shevin*, 407 U.S. 67, 86-87 (1972) (though debtor had not yet fully paid for the household goods acquired by conditional sales contract, possessory interest in the goods was sufficient to invoke the protection of the due process clause).

86. 121 Ariz. at 124, 588 P.2d at 866. Although the *Walker* court held that due process had been violated, it did not specify what type of notice was required, nor when a hearing on the matter was due. *Id.* Conceivably, the court might require that a creditor follow the replevin

Conclusion

The courts have treated the police officer's presence at a repossession as the equivalent of coercive intimidation. Such presence is a show of authority, restricting the debtor's right to resist and earning the judicial response of invalidation of the repossession. The *Walker* court thus joined the majority of cases by holding that a police officer's presence at a repossession, without process, was a breach of the peace. The second holding, that the police officer's presence constituted state action, is also supported by precedent. As a result, a police-assisted repossession in Arizona violates its repossession statute and the due process clause of the fourteenth amendment.

John A. Harwood

B. FAILURE OF LIMITED REMEDIES AND WAIVER OF CONSEQUENTIAL DAMAGES

Modern sales law in most of the United States is derived from article two of the Uniform Commercial Code [U.C.C.].¹ Article two imposes numerous warranty provisions upon sellers² and, accordingly, buyers are given several remedies for the breach of those warranties.³ Both the buyers and sellers are free, however, to bargain for, alter, or eliminate various warranty provisions of the U.C.C.⁴ Section 2-316(2) allows parties to exclude or modify implied warranties of fitness for a particular use and implied warranties of merchantability.⁵

statute, ARIZ. REV. STAT. ANN. §§ 44-1301 to -1314 (1976), should he wish an officer to be present at the repossession.

1. The Uniform Commercial Code has been enacted in all of the states except Louisiana, the District of Columbia, and the Virgin Islands. Eddy, *On the "Essential" Purposes of Limited Remedies: The Metaphysics of U.C.C. Section 2-719(2)*, 65 CAL. L. REV. 28, 28 n.1 (1977). The U.C.C. was enacted in Arizona in 1967 and became effective on January 1, 1968. 1967 Ariz. Sess. Laws 31 (codified at ARIZ. REV. STAT. ANN. §§ 44-2201 to -3202 (1968)).

2. See, e.g., U.C.C. § 2-313 (express warranty); *id.* § 2-314 (implied warranty of merchantability); *id.* § 2-315 (implied warranty of fitness for a particular purpose).

3. U.C.C. § 2-711 provides the general remedy section for a buyer who has rightfully rejected or justifiably revoked acceptance of goods or where the seller fails to make delivery or repudiates. *Id.* § 2-711, Official Comment 1. U.C.C. § 2-714 provides remedies in cases where there has been a breach of warranty as to goods accepted by the buyer. *Id.* § 2-714, Official Comment 1. The U.C.C. rejected the earlier election of remedies doctrine that required the buyer to make a choice between rescission, return of the goods, and recovery of the purchase price, or affirmation of the sales contract allowing the buyer to sue for damages. Eddy, *supra* note 1, at 28 n.3.

4. U.C.C. § 1-102(3). See also *id.* § 2-316.

5. U.C.C. § 2-316 deals principally with clauses in sales contracts that seek to exclude both express and implied warranties. *Id.* § 2-316, Official Comment 1. Subsection (1) protects a buyer from unexpected and unbargained language when it is inconsistent with the language of an ex-

Section 2-719 provides for contractual modification or limitation of remedies.⁶ A common example of a section 2-719(1)(a) remedy limitation is where the seller stipulates in the sales contract that the exclusive remedy available to the buyer is repair or replacement of nonconforming parts.⁷ Section 2-719 also allows consequential damages to be limited or excluded unless that limitation is unconscionable.⁸

Perhaps the most debated clause of section 2-719 is subsection (2) which allows the buyer to resort to the other remedies provided in article two in the event that his exclusive or limited remedy against the seller fails of its "essential purpose."⁹ What constitutes a remedy to fail of its essential purpose has been subject to different interpretations.¹⁰ Additionally, where it is found that a limited remedy has failed its essential purpose, courts have differed as to the extent of available remedies.¹¹

In *S.M. Wilson & Co. v. Smith International, Inc.*,¹² the Ninth Circuit Court of Appeals recently construed section 2-719(2).¹³ The court's decision was two-fold. First, the court held that when a limited

press warranty in the contract. *Id.* Subsection (2) permits exclusions of implied warranties of merchantability and fitness for a particular purpose so long as they are in writing and conspicuous. *Id.*, Official Comment 3. Subsection (3) allows other exclusions of implied warranties not in writing pursuant to subsection (2). *Id.*, Official Comment 7. Subsection (4) provides for the governing of the seller's limitations of buyer's remedies by U.C.C. §§ 2-718, -719. *Id.* § 2-316(4).

6. U.C.C. § 2-719 provides in part:

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article . . . as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

Id.

7. *Id.* § 2-719(1)(a).

8. *Id.* § 2-719(3). U.C.C. § 2-302 contains the only mention in article two of the effect of unconscionability in sales agreements. This section provides that if a court as a matter of law finds any clause of the contract to be unconscionable, the court may either refuse to enforce the whole contract or it may enforce the contract without the unconscionable clause. *Id.* § 2-302. Additionally, the court may limit the application of any unconscionable clause so that such effect will be avoided. *Id.*

9. See text & note 5 *supra*. See also U.C.C. §§ 2-711, -714.

10. Compare *Adams v. J.I. Case Co.*, 125 Ill. App. 2d 388, 403, 261 N.E.2d 1, 8 (1970) with *Riley v. Ford Motor Co.*, 442 F.2d 670, 673 (5th Cir. 1971) and *Beal v. General Motors Corp.*, 354 F. Supp. 423, 427 (D. Del. 1973).

11. Compare *Adams v. J.I. Case Co.*, 125 Ill. App. 2d 388, 406, 261 N.E.2d 1, 9 (1970) (all remedies available under U.C.C. including those previously waived by buyer) with *American Elec. Power Co. v. Westinghouse Elec. Corp.*, 418 F. Supp. 435, 459 (S.D. N.Y. 1976) (remedies available to buyer limited to those not previously disclaimed in sales contract).

12. 587 F.2d 1363 (9th Cir. 1978).

13. *Id.* at 1372-74. The Ninth Circuit actually construed CAL. COM. CODE § 2719 (West

remedy of repair or replacement fails to give the buyer the benefit of his contract, an implied warranty of fitness does not arise where the parties had agreed to exclude all warranties.¹⁴ Second, the court held that when a limited remedy fails of its "essential purpose," the buyer will be allowed all remedies available under the U.C.C. except those that the buyer had previously agreed to bear by himself, in this case consequential damages.¹⁵

Accordingly, this casenote will examine the facts of *Wilson* to determine the elements that formed the basis of the court's holding. Both parts of the court's decision will then be analyzed, focusing on how other courts have decided similar questions. Finally, other courts' solutions to these questions will be compared with the Ninth Circuit's decision.

In 1971, S.M. Wilson & Co. contracted to construct a mine shaft in Illinois.¹⁶ Wilson began negotiations with Smith International, Inc., for the purchase of a tunnel boring machine required for the mining project.¹⁷ After a period of negotiations, Wilson agreed to pay \$550,000 for the machine which Smith agreed to design, build, and deliver.¹⁸ After Wilson decided to buy the machine, Smith sent it a price quotation in which Smith warranted the machine to be free from defects in material and workmanship under normal use.¹⁹ Smith limited its liability on the warranty, however, to repair or replacement of defective parts.²⁰ Smith also excluded itself from any liability for consequential damages which Wilson might suffer as a result of the machine's failure.²¹ In addition, Smith agreed to provide a competent tunnel boring machine specialist to supervise the installation of the machine, demonstrate its initial operation, and train Wilson's operators for a period of thirty working days.²² Wilson accepted the price quotation by mailing Smith its purchase order.²³ Thereafter, Smith constructed the tunnel

Supp. 1980). Since that section is essentially identical to U.C.C. § 2-719, all references in this casenote will be to the U.C.C.

14. 587 F.2d at 1374.

15. *Id.* at 1375.

16. *Id.* at 1366.

17. *Id.* The parties to the negotiations were actually McGuire Shaft & Tunnel Corp., a predecessor of S.M. Wilson who in 1974 merged into Wilson, and the Calweld Division of Smith Int'l, Inc. *Id.* at 1366 & n.1.

18. *Id.* at 1366.

19. *Id.* at 1366 & n.2.

20. *Id.* at 1366-67.

21. *Id.* at 1366-67 n.2.

22. *Id.* at 1367 n.3.

23. *Id.* at 1367-68 & n.4. Wilson's purchase order contained a printed liability provision substantially different from that in Smith's proposal requiring Smith to indemnify Wilson for all liability and damages arising out of Smith's performance. *Id.* These conflicting liability provisions were resolved through a letter in which Smith objected to Wilson's liability provisions and reiterated the terms of Smith's proposal. *Id.* Subsequently, Wilson signed an acceptance of Smith's letter, assenting to Smith's original terms in the proposal. *Id.*

boring machine at its California plant and disassembled the machine into component parts for shipment to the Illinois mine site.²⁴ In accordance with the contract, Smith's tunnel boring expert supervised the reassembly of the machine in Illinois with Wilson's employees.²⁵

The tunnel boring machine did not perform as expected from the beginning of the mining operation.²⁶ Wilson alleged it had various problems with the machine.²⁷ Several attempts were made by Smith to determine and remedy the cause of the machine's problems but each of these attempts failed.²⁸ As a result, the tunneling project required 210 days to complete rather than the expected 80 days.²⁹ Just prior to completing the tunneling project, it was discovered that the machine's thrust rollers had been installed in a reverse position.³⁰ After notification of this mistake, Smith replaced the thrust rollers as well as other parts requested by Wilson.³¹ Despite these repairs, the machine still failed to work properly.³² When the Illinois tunneling project was completed, Wilson disassembled the machine and moved it to Pennsylvania to begin another project where additional problems with the machine were encountered.³³

Wilson brought suit against Smith in federal district court³⁴ alleging damages resulting from the difficulties with the tunnel boring machine in the amount of \$1,844,559.³⁵ In its complaint, Wilson alleged eight causes of action against Smith.³⁶ The district court in two separate orders gave final summary judgment to Smith.³⁷ The first order dismissed Wilson's claims of breach of implied warranty, negli-

24. *Id.* at 1368.

25. *Id.*

26. *Id.*

27. *Id.* Wilson alleged that the machine was boring at a slower rate than expected, overheating, breaking down, and wearing out cutting blades faster than had been projected. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 1368. At trial, Wilson claimed that the major cause of the machine's poor performance was the backward installation of the thrust rollers and that this installation had taken place during the machine's reassembly in Illinois. *Id.*

31. *Id.* at 1368.

32. *Id.*

33. *Id.* During the Pennsylvania job, Wilson discovered that one of the ten hydraulic motors in the machine was working in opposition to the other nine because of a reversal of an internal valve in the motor. *Id.* The hydraulic motors were built by a different manufacturer but had been installed in the tunnel boring machine at the Smith factory. *Id.* at 1368-69.

34. *Id.* at 1368. Suit was originally brought in Illinois, but upon Smith's motion the case was moved to California. *Id.*

35. *Id.*

36. *Id.* Wilson's eight causes of action were: (1) Breach of contract for failure to properly reassemble the machine; (2) breach of contract for failure to provide a competent installer; (3) breach of implied warranty of fitness; (4)-(7) negligence in design, construction, reassembly, and in failure to provide a competent reassembly supervisor; and (8) misrepresentation as to the machine's boring rate. *Id.*

37. *Id.* at 1368-69.

gence, and misrepresentation on the part of Smith.³⁸ The second order excluded evidence of consequential damages as to Wilson's first two claims against Smith and granted final judgment.³⁹ This order was based on a stipulation by Wilson's attorney that Wilson suffered only consequential damages as a result of the machines defects.⁴⁰ The district court based its exclusion of evidence of consequential damages on two grounds. First, although the consequential damages resulted from the breach of warranty that the machine would be free from defects of workmanship, the remedy of repair or replacement provided the exclusive remedy.⁴¹ In addition, Smith had expressly limited its liability barring the recovery of any consequential damages for loss resulting from the use of the machine.⁴²

On appeal, Wilson asserted that the trial court had erred on two major issues. First, Wilson claimed that because the limited remedy of repair or replacement failed to achieve its essential purpose, an implied warranty of fitness arose that was unfulfilled.⁴³ Second, Wilson argued that the failure of the limited remedy also destroyed the sales contract's proscription against recovery of consequential damages and, therefore, such damages were recoverable.⁴⁴

The Ninth Circuit found that Wilson's limited remedy of repair or replacement had failed of its essential purpose since Smith was unable to repair the machine.⁴⁵ Nevertheless, the court concluded that the failure of the limited remedy did not negate the disclaimer of express or implied warranties in the sales contract.⁴⁶ In particular, the court said that a disclaimer of an implied warranty of fitness was not excised from the contract upon the failure of the limited remedy.⁴⁷ The court also held that when the limited remedy fails of its essential purpose, the provisions of section 2-719(2) permit the injured buyer to seek any remedy provided by the U.C.C. except those remedies expressly waived in the sales contract.⁴⁸ The court's opinion was demonstratively influ-

38. *Id.* at 1369. See also note 35 *supra*.

39. 587 F.2d at 1369.

40. *Id.*

41. *Id.* at 1370.

42. *Id.* See text & notes 20-21 *supra*. The lower court also held that consequential damages resulting from the defects of the hydraulic motor were not recoverable because, by the terms of the contract, only the warranty of the manufacturer existed. 587 F.2d at 1369-70 n.6. Smith, however, gave no warranty on the motor. *Id.* The trial court further reasoned that Wilson was barred from recovering consequential damages resulting from the use of the machine on the Pennsylvania project because those damages were too remote and speculative. *Id.*

43. 587 F.2d at 1370.

44. *Id.* See text & notes 6-8 *supra*.

45. 587 F.2d at 1375.

46. *Id.*

47. *Id.* at 1374.

48. *Id.* at 1375. See text & note 6 *supra*.

enced by the particular circumstances of this case.⁴⁹ In *Wilson*, the parties were of relatively equal bargaining position and the terms of the contract had been carefully negotiated.⁵⁰ Under these circumstances, the court was apparently determined to hold the parties to their agreement in waiving certain warranties and remedies under the U.C.C.⁵¹

While the Ninth Circuit was determined to hold the parties to their agreement, the unfortunate effect of its decision was to leave *Wilson* without a remedy.⁵² In effect, *Wilson* never received the benefit of its bargain, but instead became the purchaser of a defective, irreparable machine which caused it consequential damages of almost two million dollars.⁵³ In treating the remedy of repair and the limitation of consequential damages as independently significant, the Ninth Circuit enhanced this effect.⁵⁴ Accordingly, a comparison of other courts' decisions on similar facts will aid in analyzing the Ninth Circuit's decision to determine whether the seemingly harsh results in *Wilson* were justified.

Presence of an Implied Warranty of Fitness

In arguing that an implied warranty of fitness existed, *Wilson* relied on a series of cases beginning with *Adams v. J.I. Case*.⁵⁵ *Wilson* contended that these cases⁵⁶ supported its assertion that a failure of the limited remedy to achieve its essential purpose eliminated any disclaimer of implied or express warranties to which the parties might have previously agreed.⁵⁷

In *Adams*, the plaintiff purchased a tractor from the defendant.⁵⁸

49. See 587 F.2d at 1375-76.

50. *Id.* at 1365-66.

51. See *id.* at 1375-76. See text & notes 20-21 *supra*.

52. 587 F.2d at 1378 (Enright, J., dissenting).

53. *Id.*

54. *Id.* at 1374. Although the Ninth Circuit does not explicitly acknowledge independent treatment of the repair remedy and the limitation of consequential damages, the court's reliance on *County Asphalt v. Lewis Welding & Eng'r*, 323 F. Supp. 1300 (S.D. N.Y. 1970), *aff'd*, 444 F.2d 372 (2d Cir.), *cert. denied*, 404 U.S. 939 (1971), and its rationale impliedly suggests such treatment. See text & note 118 *infra*. As the dissent in *Wilson* pointed out, the interpretation of the contract should be subject to the intentions of the parties at the time the contract was made. 587 F.2d at 1377 (Enright, J., dissenting). As such, it is highly improbable that *Wilson* would have bargained away its right to consequential damage recovery absent Smith's concurrent promise to include the repair or replacement remedy. In this respect, it would seem that the parties intended the two clauses to be dependent on each other. By according the clauses independent treatment, the court leaves *Wilson* without the benefit of its bargain for remedy but still barred from obtaining consequential damages. *Id.* at 1375. This result "would seem anomalous at best and is, . . . in no way compelled by established principles of contract interpretation." *Id.* at 1378.

55. 125 Ill. App. 2d 388, 261 N.E.2d 1 (1970).

56. See *Soo Line R.R. v. Fruehauf Corp.*, 547 F.2d 1365, 1373 (8th Cir. 1977); *Riley v. Ford Motor Co.*, 442 F.2d 670, 673 (5th Cir. 1971); *Koehring v. A.P.I., Inc.*, 369 F. Supp. 882, 890 (E.D. Mich. 1974); *Beal v. General Motors Corp.*, 354 F. Supp. 423, 427-28 (D. Del. 1973); *Jones & McKnight Corp. v. Birdsboro Corp.*, 320 F. Supp. 39, 42, 43 (N.D. Ill. 1970).

57. 587 F.2d at 1374. See cases cited note 55 *supra*.

58. 125 Ill. App. 2d at 392, 261 N.E.2d at 3.

The sales agreement contained clauses similar to those at issue in *Wilson* which limited the buyer's remedies to repair or replacement of defective parts.⁵⁹ The seller had disclaimed all other warranties implied or express and excluded consequential damages.⁶⁰ Soon after the tractor was purchased, the buyer alleged that it overheated and that the hydraulic system was defective.⁶¹ While the defects were brought to the attention of the seller, the buyer contended that the seller took an unreasonable amount of time in repairing the tractor.⁶² As a result of the delay, the buyer claimed that the limited remedy had failed of its essential purpose thereby negating the warranty disclaimer.⁶³ Consequently, an implied warranty of fitness arose that the defendants failed to fulfill by not fixing the tractor in a reasonable amount of time.⁶⁴ Conversely, the seller argued that under section 2-316,⁶⁵ parties to a contract may agree to exclude warranties of fitness and that under the terms of the sales contract the buyer had agreed to do so.⁶⁶ The Illinois Appellate Court found that the section 2-316 warranty disclaimers were proper under the Code, but held that the seller's dilatory conduct in failing to repair the buyer's tractor promptly constituted a repudiation of the disclaimer.⁶⁷ Thus, the court found that an implied warranty for reasonably prompt and timely repairs arose under section 2-316.⁶⁸

For breach of the warranty of reasonably prompt and timely repairs, the buyer was permitted to recover damages at least equal to the difference between the value of the machine when it was accepted and the value of the machine as warranted.⁶⁹ The court also held that because the seller knew of the buyer's business needs and existing contracts, "special circumstances" were sufficiently shown under section 2-714(2)⁷⁰ to warrant a finding for the recovery of consequential damages

59. *Id.* at 398-99, 261 N.E.2d at 607; see text & note 20 *supra*.

60. 125 Ill. App. 2d at 399, 261 N.E.2d at 6.

61. *Id.* at 397, 261 N.E.2d at 5.

62. *Id.* The buyer alleged that notice was first given to the seller in April of 1966 that the tractor was defective. *Id.* The seller did not repair the tractor, however, until July, 1967, causing the buyer to lose 810 work hours. *Id.*

63. 125 Ill. App. 2d at 400, 261 N.E.2d at 67.

64. *Id.*

65. See text & note 5 *supra*.

66. 125 Ill. App. 2d at 400, 261 N.E.2d at 6-7.

67. *Id.* at 402-03, 261 N.E.2d at 7-8.

68. *Id.* at 403, 261 N.E.2d at 8.

69. *Id.* at 406, 261 N.E.2d at 9. The measure of damages for breach of warranty under U.C.C. § 2-714(2), (3) provide:

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section [2-715] may also be recovered.

Id.

70. 125 Ill. App. 2d at 406, 261 N.E.2d at 9. The term "special circumstances" used in § 2-

pursuant to section 2-715(2)(a).⁷¹

The Ninth Circuit concluded that *Adams* did not support Wilson's claim that the failure of the limited remedy eliminated the disclaimer of implied warranties.⁷² Instead, the court stated that the failure of a limited remedy to meet its essential purpose did not permit an implied warranty to arise when the parties had previously disclaimed that warranty.⁷³ As the court pointed out, *Adams* only held that the limited remedy's failure raised an implied warranty of reasonably prompt and timely repairs.⁷⁴ There was no allegation by Wilson that Smith did not promptly endeavor to fix the machine.⁷⁵ Indeed, as the Ninth Circuit explained, the *Adams* court expressly said that the existence of an implied warranty of fitness was prevented by the disclaimer.⁷⁶

Failure of the Limited Remedy to Meet its Essential Purpose

Wilson's second claim on appeal was that the failure of the limited remedy of repair or replacement eliminated the contract's bar to consequential damages.⁷⁷ In order for Wilson to prevail on this point, it was first necessary for the court to find that the limited remedy had in fact failed of its essential purpose.⁷⁸

In analyzing this issue the Ninth Circuit used a three-part test prescribed by Professor Eddy.⁷⁹ According to Eddy, three assumptions are used in determining whether the failure of the limited remedy has occurred under section 2-719(2):⁸⁰ (1) The warrantor will diligently make the repairs; (2) the repairs will indeed "cure" the defects; and (3) the consequential loss suffered by the buyer will be negligible.⁸¹ Under Eddy's test, these three factors must result in the buyer receiving the substantial benefit of his bargain in order for the limited remedy to meet its essential purpose.⁸² Consequently, in a situation where the buyer does not receive the substantial benefit of his bargain, the limited

714(2) was defined as the communication to the seller at the time the contract was entered of enough facts to make it clear that the subsequent lost profits sought by the buyer were within the reasonable contemplation of the parties. See *id.* at 404, 261 N.E.2d at 8 (citing Keystone Diesel Engine Co. v. Irwin, 411 Pa. 222, 225, 191 A.2d 376, 378 (1963)).

71. 125 Ill. App. 2d at 406, 261 N.E.2d at 9. U.C.C. § 2-715 (2)(a) (1978 version) provides in part: "Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise. . . ."

72. 587 F.2d at 1374.

73. *Id.*

74. *Id.*

75. See *id.*

76. *Id.*; see 125 Ill. App. 2d at 408, 261 N.E.2d at 10.

77. 587 F.2d at 1370.

78. *Id.* at 1374. See text & note 10 *supra*.

79. 587 F.2d at 1374-75; see Eddy, *supra* note 1, at 63.

80. Eddy, *supra* note 1, at 63.

81. *Id.*

82. *Id.* As Eddy states:

remedy of repair or replacement of defective parts has failed of its essential purpose.⁸³ The Ninth Circuit agreed with Eddy and the *Adams* line of cases that the first consequence of the failure of a limited remedy to fulfill its essential purpose is to give the buyer a right to the remedies provided in section 2-714(2), which entitles the buyer to breach of warranty damages.⁸⁴ In applying Eddy's three-part test, the court found that Wilson had not received the benefit of his bargain, because Smith's attempted repairs did not cure the defects and Wilson's consequential damages were not negligible.⁸⁵ The court further acknowledged that Wilson would have been entitled to section 2-714(2) damages were it not for the stipulation by its counsel that Wilson had suffered only consequential damages.⁸⁶

The Bar to Recovery of Consequential Damages

Wilson's purpose in arguing that the limited remedy of repair had failed of its essential purpose was to convince the court that it should be entitled to recover consequential damages even though the contract expressly stated that the seller would not be liable for such damages.⁸⁷ The court held, however, that the failure of the limited remedy did not negate the contractual bar to consequential damages.⁸⁸ To support its holding, the court followed three cases⁸⁹ which in its view supported Smith's claim that the limitation on consequential damages should survive.⁹⁰ Accordingly, Wilson's position and the conclusion of the Ninth

Whether the repair remedy fails of its purpose because the warrantor repudiates the repair obligation, or is not diligent, or is diligent but unable to repair the defect, or is diligent and able to repair the defect but there is an unceasing flow of defects, it is not determinative. For in each instance the buyer is deprived under circumstances of the substantial value of the bargain.

Id. at 71.

83. *Id.*

84. 587 F.2d at 1375; see *Soo Line R.R. v. Fruehauf Corp.*, 547 F.2d 1365, 1373 (8th Cir. 1977); *Riley v. Ford Motor Co.*, 442 F.2d 670, 674 (5th Cir. 1971); *Koehring v. A.P.I., Inc.*, 369 F. Supp. 882, 890 (E.D. Mich. 1974); *Beal v. General Motors Corp.*, 354 F. Supp. 423, 427 (D. Del. 1973); *Jones & McKnight Corp. v. Birdsboro Corp.* 320 F. Supp. 39, 44 (N.D. Ill. 1970); Eddy, *supra* note 1, at 87.

85. 587 F.2d at 1375. See text & note 82 *supra*.

86. 587 F.2d at 1375. The *Wilson* court in this regard said: "A remedy under [§ 2-714(2)] did exist which Wilson chose not to assert. We need not, therefore, reverse and remand to permit Wilson to recover this sum, a course of action we would adopt but for the stipulation." *Id.* While the court did not elaborate as to why Wilson's counsel made this stipulation, it appears that counsel's mistake was a costly one to his client.

87. *Id.* at 1374. See text & note 21 *supra*.

88. 587 F.2d at 1375.

89. *American Elec. Power Co. v. Westinghouse Elec. Corp.*, 418 F. Supp. 435 (S.D. N.Y. 1976); *Potomac Elec. Power Co. v. Westinghouse Elec. Corp.*, 385 F. Supp. 572 (D.D.C. 1974), *rev'd on other grounds*, 527 F.2d 853 (D.C. Cir. 1975); *County Asphalt, Inc. v. Lewis Welding & Eng'r Corp.*, 323 F. Supp. 1300 (S.D. N.Y. 1970), *aff'd*, 444 F.2d 372 (2d Cir.), *cert. denied*, 404 U.S. 939 (1971).

90. 587 F.2d at 1374.

Circuit will be analyzed to see if the contractual bar to consequential damages should have fallen.

Wilson's strongest support for its claim that the consequential damages waiver should be eliminated when the limited remedy of repair fails of its essential purpose comes from section 2-719(2).⁹¹ Section 2-719(2) states that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act."⁹² The language of the commentary to section 2-719(2), at first glance, seems to state that the general remedy provisions of article two become available to a buyer where an apparently fair limited remedy fails.⁹³ Apparently, the general remedy provisions available would include section 2-714(2) benefit of the bargain damages⁹⁴ and section 2-715 incidental and consequential damages.⁹⁵ Under the U.C.C., however, consequential damages receive substantially different treatment than the basic benefit of the bargain remedies of section 2-714(2).⁹⁶ Section 2-714(3) states that consequential damages will only be allowed in a proper case.⁹⁷ Section 2-719(3) permits parties to a sales contract to limit the buyer's recovery of consequential damages unless that limitation is unconscionable.⁹⁸ This same section provides for a prima facie finding of unconscionability if consequential damages are limited in a consumer situation.⁹⁹ Nevertheless, in a commercial situation, the language of the commentary to section 2-719, which defines the limitation of consequential damages as a mere allocation of unknown and undetermined risks among the parties, suggests that such allocation of risks is valid absent a finding of unconscionability.¹⁰⁰ Therefore, in order to remove a bar to consequential damages in a commercial case, it would appear that a plaintiff must show: (1) That the limited remedy has failed to accomplish its essential purpose; and (2) that the consequential damage limitation is unconscionable under 2-719(3).¹⁰¹

The *Wilson* court could have used this statutory construction argument to arrive at its result. Wilson's failure to raise the issue of the

91. See text & note 6 *supra*.

92. U.C.C. § 2-719(2); see text & note 6 *supra*.

93. U.C.C. § 2-719(2), Official Comment 1.

94. See text & note 68 *supra*.

95. U.C.C. § 2-715. See text & note 72 *supra*.

96. See U.C.C. §§ 2-714(3), -715(2); text & notes 68-70 *supra*.

97. U.C.C. § 2-714(3). See text & note 68 *supra*.

98. U.C.C. § 2-719(3).

99. *Id.*; see J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 12-11, at 384-85 (1972); text & note 6 *supra*.

100. U.C.C. § 2-719(3), Official Comment (3); see J. WHITE & R. SUMMERS, *supra* note 98 § 12-11, at 384.

101. U.C.C. § 2-719(3), Official Comment (3); see J. WHITE & R. SUMMERS, *supra* note 98 § 12-11, at 382.

unconscionability of the consequential damage limitation would have provided the court the only reason necessary to uphold the validity of the consequential damage limitation.¹⁰² Had the issue been raised, the court's finding that the terms of the contract were negotiated by two parties of relatively equal bargaining position in a commercial situation would have made any finding of unconscionability highly improbable.¹⁰³

In addition to its statutory construction argument under the U.C.C.,¹⁰⁴ Wilson argued that its position was supported by the *Adams* line of cases.¹⁰⁵ While it appears that this line of cases does, indeed, stand for Wilson's proposition that the consequential damage limitation should fall with the failure of the limited remedy, upon close examination this result would not extend itself to the facts of the *Wilson* case.¹⁰⁶ Three of the *Adams* line of cases involve the sale of consumer goods.¹⁰⁷ Such transactions would automatically cast the consequential damage limitation as *prima facie* unconscionable.¹⁰⁸ Although none of these courts nor the Ninth Circuit in *Wilson* explicitly mentioned this factor, the resulting recovery by the buyer of consequential damages is mandated by this finding of *prima facie* unconscionability under section 2-719(3) rather than a result of the failure of the limited remedy.¹⁰⁹ In the other three cases from the *Adams* line, which involved commercial situations, the courts followed the *Adams* rationale without distinguishing the difference between the commercial and consumer situations.¹¹⁰ In light of the language of section 2-719(3), the holdings of these courts that the consequential damage limitation must fall upon the failure of the limited remedy would appear to be a misconstruction of the Code's language.¹¹¹

Although failing to dispose of Wilson's claim with a U.C.C. statutory construction argument, the *Wilson* court did come to the same re-

102. See text & notes 97-100 *supra*.

103. 587 F.2d at 1375; see text & note 98 *supra*.

104. See text & notes 94-102 *supra*.

105. 587 F.2d at 1374; see *Adams v. J.I. Case*, 125 Ill. App. 2d 388, 406, 261 N.E.2d 1, 9 (1970); *Soo Line R.R. v. Fruehauf Corp.*, 547 F.2d 1365, 1373 (8th Cir. 1977); *Riley v. Ford Motor Co.*, 442 F.2d 670, 674 (5th Cir. 1971); *Koehring v. A.P.I., Inc.*, 369 F. Supp. 882, 890 (E.D. Mich. 1974); *Beal v. General Motors Corp.*, 354 F. Supp. 423, 428 (D. Del. 1973); *Jones & McKnight v. Birdsboro Corp.*, 320 F. Supp. 39, 44 (N.D. Ill. 1970).

106. See U.C.C. § 2-719(3); text & note 100 *supra*.

107. *Adams v. J.I. Case*, 125 Ill. App. 2d 388, 392, 261 N.E.2d 1, 3 (1970) (sale of a tractor); *Riley v. Ford Motor Co.*, 442 F.2d 670, 671 (5th Cir. 1971) (sale of an automobile); *Beal v. General Motors Corp.*, 354 F. Supp. 423, 424 (D. Del. 1973) (sale of a diesel tractor). See text & note 100 *supra*.

108. U.C.C. § 2-719(3); see text & note 98 *supra*.

109. See text & note 98 *supra*.

110. See *Soo Line R.R. v. Fruehauf Corp.*, 547 F.2d 1365, 1368 (8th Cir. 1977); *Koehring v. A.P.I. Inc.*, 369 F. Supp. 882, 884 (E.D. Mich. 1974); *Jones & McKnight v. Birdsboro Corp.*, 320 F. Supp. 39, 40 (N.D. Ill. 1970).

111. See text & notes 6, 100 *supra*.

sult¹¹² by following a line of cases that began with *County Asphalt, Inc. v. Lewis Welding and Engineering Corp.*¹¹³ *County Asphalt* involved the sale of asphalt plants.¹¹⁴ The buyer alleged that the seller failed to provide the exclusive remedy of repair of defective parts as required by the contract.¹¹⁵ In arguing that the contractual bar to consequential damages should be removed because the limited remedy had failed, the buyer asked the court to find that the consequential damage limitation was unconscionable and therefore, stricken from the agreement.¹¹⁶

The court held that the consequential damage limitation was not unconscionable because the parties were of relatively equal bargaining position, that the contract had been carefully negotiated, and that each party's risks had been bargained for.¹¹⁷ The court then went on to explain that even if the limited remedy were found to have failed its purpose, the consequential damage limitation need not also fail automatically.¹¹⁸ According to the *County Asphalt* court, the limitation of remedy clause and the exclusion of consequential damages clause should be read independently of each other and the consequential damage limitation clause should fall only if it was unconscionable when it was made.¹¹⁹

The basic position behind the *County Asphalt* court's reasoning is that in commercial settings where the buyer and seller are of equal bargaining position and the sales contract has been the subject of serious negotiations, the risks borne by each party to the contract are bargained for risks.¹²⁰ Only when failure of the limited remedy would produce an unconscionable result, should the provision be deleted from the contract.¹²¹ In such a case, section 2-719(2) operates to allow the injured buyer to recover other remedies available under article two of the U.C.C.¹²² Nevertheless, in the case where the buyer has waived the consequential damages in the sales contract, section 2-715 consequent-

112. 587 F.2d at 1374.

113. 323 F. Supp. 1300 (S.D. N.Y. 1970), *aff'd*, 444 F.2d 372 (2d Cir.), *cert. denied*, 404 U.S. 939 (1971); *see* American Elec. Power Co. v. Westinghouse Elec. Corp., 418 F. Supp. 435 (S.D. N.Y. 1976); Potomac Elec. Power Co. v. Westinghouse Elec. Corp., 385 F. Supp. 572 (D. D.C. 1974), *rev'd on other grounds*, 527 F.2d 853 (D.C. Cir. 1975).

114. 323 F. Supp. at 1301.

115. *See id.* at 1302.

116. *Id.* at 1308.

117. *Id.* at 1308-09.

118. *Id.* at 1309.

119. *Id.* The authority cited by the court was official comment (1) to section 2-719. *Id.* The major precepts of this comment are (1) any agreement between parties must have at least minimum adequate remedies; and (2) if any clause limits a remedy in an unconscionable manner, that clause is subject to deletion and the buyer will be entitled to whatever remedies would be available to it if the stricken clause had never existed. U.C.C. § 2-719, Official Comment (1).

120. 323 F. Supp. at 1309.

121. *Id.*; *see* U.C.C. § 2-719, Official Comment (1); text & note 100 *supra*.

122. 323 F. Supp. at 1309; *see* U.C.C. § 2-719, Official Comment (1); text & notes 95-100 *supra*.

ial damages will not be available to him because the buyer has at least the minimum adequate remedy required by the language of Comment (1) to 2-719 in the form of benefit-of-the-bargain damages under section 2-714(2).¹²³ Thus, the result obtained by the *Wilson* court under this reasoning was that *Wilson* could obtain benefit-of-the-bargain damages pursuant to 2-714(2) except for the fact that counsel had previously stipulated that the only damages suffered were consequential.¹²⁴

As can be seen, the *Wilson* court could have come to the same conclusion by using only the language of the U.C.C.¹²⁵ Nevertheless, the court in adopting the *County Asphalt* line of cases seems to be joining a growing number of courts that refuse to reallocate the risk of consequential damages to the seller when the parties are of equal bargaining position and it appears that the parties negotiated to allocate such risks to the buyer.¹²⁶

Conclusion

When a limited remedy of repair or replacement of defective parts in a sales contract fails of its essential purpose because the buyer did not receive the substantial benefit of his bargain, the Ninth Circuit in *Wilson* held: (1) An implied warranty of fitness does not arise where the parties had agreed to exclude all warranties; and (2) in commercial situations, the contractual bar to the buyer's recovery of consequential damages will not be excised from the contract absent a showing that the damage limitation is unconscionable. The unfortunate result in this case is that due to a stipulation by counsel, the buyer was left without the minimum remedy of benefit-of-the-bargain damages.

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123. 323 F. Supp. at 1309; see U.C.C. § 2-719, Official Comment (1).

124. 587 F.2d at 1375.

125. See text & notes 95-100 *supra*.

126. See, e.g., *AES Technology Systems, Inc. v. Coherent Radiation*, 583 F.2d 933, 941 (7th Cir. 1978); *V-M Corp. v. Bernard Dist. Co.*, 447 F.2d 864, 868-69 (7th Cir. 1971); *Lincoln Pulp & Paper Co. v. Dravo Corp.*, 436 F. Supp. 262, 278 (D. Me. 1977); *United States Fibres, Inc. v. Proctor & Schwartz, Inc.*, 358 F. Supp. 449, 465-66 (E.D. Mich. 1972), *aff'd*, 509 F.2d 1043, 1048 (6th cir. 1975).

IV. COMMUNITY PROPERTY

A. A NEW DIMENSION IN ARIZONA COMMUNITY PROPERTY LAW

The Arizona territorial legislature adopted the community property system in 1865.¹ Basically, under this system property acquired after marriage is presumed to be community in nature,² belonging to both the husband and the wife in equal shares.³ There must be a valid marriage before community property can be accrued⁴ and vested.⁵ Deprivations of this property right have been held unconstitutional.⁶

In the decision of *In re Marriage of Fong*,⁷ the Arizona Court of Appeals created a new version of community property rights under the "will-to-union" concept.⁸ Indirectly, the court may also have created a basis for the rights of putative spouses.

This casenote will examine the factual situation in *Fong* in order to analyze the court of appeal's application of the Spanish will-to-union concept and to explain the possible basis for a putative spouse

1. See 1865 Ariz. Sess. Laws 60; Lyons, *Development of Community Property Law in Arizona*, 16 LA. L. REV. 512, 513 (1955).

2. ARIZ. REV. STAT. ANN. § 25-211 (1976) states: "All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent . . . is the community property of the husband and wife." See generally *Nace v. Nace*, 104 Ariz. 20, 448 P.2d 76 (1968); *Blaine v. Blaine*, 63 Ariz. 100, 159 P.2d 786 (1945); *Malich v. Malich*, 23 Ariz. 423, 204 P.1020 (1922).

3. See ARIZ. REV. STAT. ANN. § 25-318 (A) (Supp. 1979). Furthermore, § 25-214 (B) and (C) provide that spouses have equal control over the community property, enabling either spouse to acquire, manage, or dispose of the property, and either spouse may bind the community. The exceptions to this general rule are the requirements that both spouses be joined when the transaction is to acquire, encumber, or dispose of real property other than unpatented mining claims or leases of less than one year, or any transcription of guaranty, indemnity, or surety. See *Schwartz v. Schwartz*, 52 Ariz. 105, 109, 79 P.2d 501, 502 (1938); *Guerrero v. Guerrero*, 18 Ariz. App. 400, 402, 502 P.2d 1077, 1079 (1972).

4. *Cross v. Cross*, 94 Ariz. 28, 31, 381 P.2d 573, 575 (1963); *Stevens v. Anderson*, 75 Ariz. 331, 334, 256 P.2d 712, 714 (1953); ARIZ. REV. STAT. ANN. § 25-111 (1976); C. SMITH, 1979 SUMMARY OF ARIZONA COMMUNITY PROPERTY LAW 15 (1979).

5. A spouse's share in property vests at the time of acquisition. *Arnett v. Reade*, 220 U.S. 311, 320 (1911). Justice Holmes stated in *Arnett* that "the wife has a greater interest than the mere possibility of an expectant heir." *Id.* Consequently, a husband could not convey community property unless his wife joined in the conveyance. *Id.* This case was the basis of the concept of vested interest in community property. See *Grimditch v. Grimditch*, 71 Ariz. 198, 203-04, 225 P.2d 489, 492 (1951); *Pendleton v. Brown*, 25 Ariz. 604, 609, 221 P. 213, 215 (1923).

6. *Hatch v. Hatch*, 113 Ariz. 130, 134, 547 P.2d 1044, 1048 (1976).

7. 121 Ariz. 298, 589 P.2d 1330 (Ct. App. 1978).

8. *Id.* at 304, 589 P.2d at 1336. Will to union describes a Spanish law concept meaning the willingness to continue in a marriage relationship. W. DEFUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 57, at 108-12 (1971). The Spanish legal concept from which will to union is derived describes the "mutual loyalty, the mutual sharing of the burdens of marriage, the joint industry and labor of the spouses to further and advance the success and well being of the marriage and the family, which entitled them to share in the profits." *Id.* at 108. See text & notes 40-57 *infra*.

doctrine.⁹ The more traditional community property concepts used by the court in framing this opinion will also be examined.

The Fong Decision

The factual situation in *Fong* is unusual, if not unique. One of the major issues facing the trial court was whether the woman seeking dissolution of the marriage was actually the woman the husband had married.¹⁰ Trial on this issue alone took fourteen days, after which the advisory jury decided that she was indeed the wife.¹¹ A summary of the facts surrounding this marriage will clarify the confusion as to the wife's identity.

Alfonso Fong married Ngan Woon Chow Fong in China in 1923.¹² A short time later, Alfonso moved to Cuba.¹³ From that time on, Alfonso's contacts with Ngan were minimal, consisting of two visits to China to see Ngan.¹⁴ Their only child John was born in 1936.¹⁵ Alfonso came to Arizona in 1937 or 1938.¹⁶ He began to accumulate real property, which was deeded in either his and Ngan's names as husband and wife, or his name as a married man.¹⁷

Alfonso attempted to bring his family to the United States in 1939, but war activity prevented his success.¹⁸ In 1946, Alfonso was informed of his wife's death.¹⁹ The following year, Alfonso married Lily Fong in Phoenix,²⁰ and secured John's passage to Arizona.²¹

In 1972, John brought Ngan to the United States "declaring she was his mother and his father's wife."²² Prior to this time, John had never told his father that his mother was alive,²³ nor had Ngan contacted Alfonso after her alleged death in 1946.²⁴ On Alfonso's visit to Hong Kong in 1957, he met Ngan who, however, represented herself as "his late wife's sister."²⁵

The trial court found that not only was Ngan Alfonso's wife,²⁶ but

9. See text & notes 58-90 *infra*. A putative spouse is one unaware of the invalidity of his or her marriage.

10. 121 Ariz. at 300, 589 P.2d at 1332.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 300-01, 589 P.2d at 1332-33.

15. *Id.* at 301, 589 P.2d at 1333.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* It is not evident from the case how Alfonso was informed.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 300, 589 P.2d at 1332.

that Alfonso had, in good faith, believed her dead.²⁷ The trial court therefore, dissolved the marriage between Ngan and Alfonso.²⁸ It awarded Ngan \$800.00 per month as spousal maintenance, \$25,000.00 in attorney's fees, and \$8,000.00 in costs.²⁹ Alfonso was awarded all of the community property acquired during the term of his marriage to Ngan.³⁰

On appeal, Ngan argued that by distributing the community property unequally, the trial court had deprived her of her vested rights in the community property contrary to the holding of *Hatch v Hatch*.³¹ In rejecting this argument, the *Fong* court noted that division of community property need not be absolutely equal.³² Rather, *Hatch* had held that unless there are valid reasons for dividing otherwise, divisions of community property should be substantially equal.³³ The court drew this conclusion from the fact that the *Hatch* court cited Arizona cases³⁴ where unequal distribution of community property was permitted.³⁵

In *Fong*, the situation is similar to these Arizona cases in that the circumstances of the marital relationship dictated that an equitable distribution of the community property necessitated unequal distribution.³⁶ Alfonso's good faith belief in Ngan's death, combined with her perpetuation of that belief through deception and lack of contact with Alfonso, could be construed as an abandonment. Following this abandonment, approximately \$250,000.00 worth of real property was accumulated through the mutual efforts of Lily and Alfonso.³⁷ Since this property was not earned through the mutual efforts of the community of Alfonso and Ngan, denying Ngan an equal share of the property

27. *Id.* at 304, 589 P.2d at 1336.

28. *Id.* at 300, 589 P.2d at 1332.

29. *Id.*

30. *Id.*

31. *Id.* at 302, 589 P.2d at 1334; *see Hatch v. Hatch*, 113 Ariz. 130, 134, 547 P.2d 1044, 1048 (1976).

32. 121 Ariz. at 303, 589 P.2d at 1335. ARIZ. REV. STAT. ANN. § 25-318 (A) (Supp. 1979) states, "[The court] shall also divide the community, joint tenancy and other property held in common equitably, though not necessarily in kind, without regard to marital misconduct."

33. 121 Ariz. at 303, 589 P.2d at 1335.

34. *Armer v. Armer*, 105 Ariz. 284, 288-89, 463 P.2d 818, 822-23 (1970) (fraudulent conveyance by husband); *Britz v. Britz*, 95 Ariz. 247, 249, 389 P.2d 123, 124 (1964) (wife paid for family expenses while husband squandered away his income on personal uses and abused his wife); *Honig v. Honig*, 77 Ariz. 247, 251, 269 P.2d 737, 740 (1954) (abandonment and abuse of the wife by the husband).

35. 121 Ariz. at 303, 589 P.2d at 1335.

36. *Id.* at 301, 589 P.2d at 1333. For example, in *Honig v. Honig*, 77 Ariz. 247, 269 P.2d 737 (1954) the "defendant was unwilling to cope with the realities of life, and shamefully disregarded his marital duties. It is apparent that if it had not been for the plaintiff's labors, and her frugality and business sense, there would have been little or no community property to be the subject of controversy in this litigation." *Id.* at 251, 269 P.2d at 740. Because of this and defendant's repeated abandonment of his wife and family, the court concluded that the trial court had not abused its discretion "in awarding to the plaintiff the 'lion's share' of the community property." *Id.*

37. 121 Ariz. at 301, 589 P.2d at 1333.

earned by Alfonso and Lily would have been appropriate.³⁸ The *Fong* court, however, did not choose to follow this line of Arizona cases involving unequal property distribution in making its decision.³⁹

Application of the Will-To-Union Concept

Rather than applying prior Arizona case law to justify the unequal division of property, the *Fong* court examined Spanish law to interpret the community property issues raised.⁴⁰ Under Spanish law, the cohabitation of the husband and wife is essential before their acquisitions and earnings may constitute community property.⁴¹ Spanish law considers the spouses' mutual labor in furthering and advancing the success of the marriage and the family as what entitles them to share in the profits.⁴² This mutual support continues even if the couple has to live apart as long as they retain a "will to union."⁴³

The *Fong* court held that the will to union between Ngan and Alfonso Fong continued at least until 1946 when Alfonso was informed of Ngan's death.⁴⁴ Up until 1946, Alfonso was in Cuba and the United States "seeking his fortune," while Ngan lived with Alfonso's family in China.⁴⁵ Alfonso demonstrated his will to union with Ngan during his long absence by taking property in either his name alone as a married man, or in both his and Ngan's names as husband and wife.⁴⁶ The court held, however, that the will to union validly ceased on Alfonso's part with his good faith belief in Ngan's death, and his subsequent marriage to Lily.⁴⁷ Furthermore, Ngan's conduct was held to be indicative of an end of the will to union on her part.⁴⁸

38. Compare *In re Marriage of Fong*, 121 Ariz. 298, 304, 589 P.2d 1330, 1336 (1978) with *Armer v. Armer*, 105 Ariz. 284, 288-89, 463 P.2d 818, 822-23 (1970) and *Honig v. Honig*, 77 Ariz. 247, 251, 269 P.2d 737, 740 (1954).

39. 121 Ariz. at 303-04, 589 P.2d at 1335-36. The court mentions unequal distribution cases such as *Armer v. Armer*, 105 Ariz. 284, 463 P.2d 818 (1970); *Honig v. Honig*, 77 Ariz. 247, 269 P.2d 737 (1954); and *Patterson v. Patterson*, 63 Ariz. 499, 163 P.2d 850 (1945) before turning to a consideration of the Spanish will to union.

40. 121 Ariz. at 303, 589 P.2d at 1335.

41. W. DEFUNIAK & M. VAUGHN, *supra* note 8, § 57, at 108.

42. 121 Ariz. at 303, 589 P.2d at 1335 (quoting W. DEFUNIAK & M. VAUGHN, *supra* note 8, § 57, at 108).

43. *Id.*

44. 121 Ariz. at 304, 589 P.2d at 1336.

45. *Id.* at 300-01, 589 P.2d at 1332-33.

46. *Id.* at 301, 589 P.2d at 1333.

47. *Id.* at 304, 589 P.2d at 1336. When Alfonso learned of Ngan's supposed death and married Lily, "the intangible support [he] derived from his marriage to petitioner ceased." *Id.*

48. *Id.* Though Ngan was aware of Alfonso's marriage to petitioner, she never told him of her existence. *Id.* Ngan even convinced Alfonso that she was her own sister when he visited China. *Id.* The court rebuffed Ngan's counsel for explaining that this conduct was consistent with the Chinese customs of the husband's dominance in the marriage and of his taking a second wife. *Id.* Further rebuttal to counsel's explanation for Ngan's reticence lies in Chinese custom itself. Although husbands in China could have more than one wife if they could afford this luxury, the first wife retained dominant position over the secondary wives. P. BUCK, CHINA PAST AND PRES-

The court stated that it would not go so far as to say that "property acquired after the 'union of wills' has ceased would not be considered community property."⁴⁹ Instead, the court used the will-to-union rationale to justify an equitable, though unequal, distribution of the community property.⁵⁰

Thus, although the result in *Fong* may be similar to cases in which the court awarded substantially unequal divisions of the community property,⁵¹ the court's approach is radically different. The most apparent reason for the different approach in *Fong* would appear to be the court's desire to protect the efforts of Lily, the putative spouse. More important is the court's recognition of the putative spouse's efforts. The court recognized these efforts by denying the legal spouse the benefits in the continued existence of the legal community.⁵² In prior unequal property distribution cases, the spouse that was awarded the smaller share was still given a share from the entire community, rather than from the community up to a certain date.⁵³ By using the will-to-union concept, the court was able to cut off Ngan's share in the community with the end of the mutual will to union,⁵⁴ thus providing a basis for allowing the putative spouse to share in the community from the time of the putative marriage.⁵⁵

Nevertheless, the court did not state the exact requirements necessary to end a spouse's interest in the community. It is clear, however, that mere participation in a second marriage ceremony would not be sufficient to cut off community property interests.⁵⁶ Additionally, it is apparent the unilateral actions of one spouse would be insufficient to terminate the will to union since there is ample evidence in earlier Arizona case law for unequal division of community property in such cir-

ENT 88 (1972). The children borne by these secondary wives were considered the legal children of the first wife. *Id.*

49. 121 Ariz. at 304, 589 P.2d at 1336. The court, in all probability, refused to actually say that the property acquired after the will to union ceased was not community property because it would be contrary to the concept that the community exists until death, dissolution, or transmutation by an express agreement. See text & notes 2-6 *supra*.

50. 121 Ariz. at 304, 589 P.2d at 1336. See text & note 37 *supra*.

51. See *Armer v. Armer*, 105 Ariz. 284, 288-89, 463 P.2d 818, 822-23 (1970); *Britz v. Britz*, 95 Ariz. 247, 249, 389 P.2d 123, 124 (1964); *Honig v. Honig*, 77 Ariz. 247, 251, 269 P.2d 737, 740 (1954).

52. 121 Ariz. at 304, 589 P.2d at 1336.

53. See *Armer v. Armer*, 105 Ariz. 284, 288-89, 463 P.2d 818, 822-23 (1970); *Honig v. Honig*, 77 Ariz. 247, 251, 269 P.2d 737, 740 (1954); *Patterson v. Patterson*, 63 Ariz. 499, 500, 163 P.2d 850, 850 (1945).

54. 121 Ariz. at 304, 589 P.2d at 1336.

55. Utilization of a will-to-union concept may have negative ramifications in creating a gray area of the law. The court would have to decide in each individual case whether the given facts would warrant a finding that the will to union ceased, and if so, when this occurred. Even in *Fong*, the court could not readily determine at what point in time the will to union had ceased. See *id* at 304-05, 589 P.2d at 1336-37.

56. *Id.* at 304, 589 P.2d at 1336.

cumstances.⁵⁷ Furthermore, as in *Fong*, the courts may choose to apply the will-to-union theory only to protect an innocent third party.

The Putative Spouse Doctrine

Another possible reason for denying Ngan any property rights in the property Alfonso acquired after 1947 could be that necessity of dealing fairly with the third party to this dissolution, Lily Fong. The status of Lily as the putative spouse, innocently unaware of the invalidity of the marriage, has never been addressed directly by the Arizona courts.⁵⁸ Nor was the putative spouse status directly addressed in *Fong*. The *Fong* decision, however, revolves around the putative spouse issue. The court stressed Alfonso's good faith belief in 1946 of Ngan's death.⁵⁹ In adjudicating Ngan's property interest, the court recognized that the post-1946 property was accumulated with the support of Lily, the putative spouse, rather than Ngan.⁶⁰

Although there is no Arizona law on the subject of a putative spouse's rights, Texas, Louisiana, and California have dealt with situations involving putative spouses.⁶¹ In Texas, the putative spouse has a right to half of the property gained during the putative marriage.⁶² The spouse who remarries, knowing of the invalidity of the second marriage, shares the remaining half with his or her legal spouse.⁶³ In contrast, the Louisiana court in *Prince v Hopson*,⁶⁴ protected the husband's full half of the community property and required the wives to distribute the remaining half equally between them where all three people

57. See, e.g., *Armer v. Armer*, 105 Ariz. 284, 463 P.2d 818 (1970) (wife was awarded nearly \$17,600 while the husband was given \$500); *Britz v. Britz*, 95 Ariz. 247, 389 P.2d 123 (1964) (wife was awarded stock and real estate valued at \$15,260; husband given \$240); *Patterson v. Patterson*, 63 Ariz. 499, 163 P.2d 850 (1945) (husband granted entire community except for horse, saddle, and bridle, which were given to the wife).

58. In dicta, the court in *Stevens v. Anderson*, 75 Ariz. 331, 334, 256 P.2d 712, 714 (1953), stated: "There is much authority for allowing an innocent one who in good faith erroneously thinks there is a valid marriage to recover a proportionate share of the property accumulated while cohabiting under the mistaken belief of lawful wedlock." *Id.* The term putative marriage "is utilized to describe myriad situations in which one or both prospective spouses are ignorant of some existing impediment rendering their attempted marriage void or voidable." Williams, *Property Rights of Putative Spouses*, 4 COMMUNITY PROP. J. 131, 131 (1977).

59. 121 Ariz. at 304, 589 P.2d at 1336.

60. *Id.*

61. See generally *Brown v. Brown*, 274 Cal. App. 2d 178, 79 Cal. Rptr. 257 (1969); *Prince v. Hopson*, 230 La. 575, 89 So.2d 128 (1956); *Davis v. Davis*, 521 S.W.2d 603 (Tex. 1975). Washington also recognizes the rights of putative spouses. Williams, *supra* note 58, at 144.

62. *Davis v. Davis*, 521 S.W.2d 603, 606-07 (Tex. 1975); *Caruso v. Lucius*, 448 S.W.2d 711, 712 (Tex. Civ. App. 1970); Williams, *supra* note 58, at 142. In *Caruso*, the court granted the putative wife of an Italian immigrant half of the property the couple had accumulated during their 37 year marriage. 448 S.W.2d at 712.

63. *Davis v. Davis*, 521 S.W.2d 603, 606-07 (Tex. 1975); *Caruso v. Lucius*, 448 S.W.2d 711, 712 (Tex. Civ. App. 1970). No Texas cases have been based on a factual pattern identical to that in *Fong* where both spouses in the putative marriage are unaware of its invalidity.

64. 230 La. 575, 89 So.2d 128 (1956).

involved were acting in good faith.⁶⁵ The legal wife, who had not participated in earning the property which the putative spouses accumulated, received a windfall of one fourth of the property which could be considered unjust enrichment.⁶⁶

Since 1970, California's putative spouses have been protected by statute.⁶⁷ Prior to 1970, however, putative spouse cases in California were decided on an individual basis governed by analogy to community property laws or general equitable principles.⁶⁸ In those cases the putative spouse was allowed to take a share of the putative "community" until the putative spouse learned of the invalidity of the marriage.⁶⁹ After that no further rights to the property earned during the marriage were available to the putative spouse.⁷⁰ Legal spouses who attempted to claim half of the property earned during the putative marriage have been denied such a share on a quasi-estoppel theory.⁷¹ Factors common to these California quasi-estoppel cases include: (1) The silence of the legal spouse over a long span of years while knowing of the illegal marriage; (2) the good faith reliance of the putative spouse on the validity of the putative marriage; (3) the spouse's apparent acceptance of the putative marriage as legal; and (4) the legal spouse's receipt of some intrinsic benefit by failing to reveal the invalidity of the marriage.⁷²

An examination of Arizona's emerging putative spouse doctrine reveals that it avoids the inequities of both the Texas and Louisiana systems. The Louisiana requirement that the legal and putative wives split the half of the community property that would normally vest in the putative wife, had she been legally married, seems unfair.⁷³ In con-

65. *Id.* at 586-91, 89 So.2d at 130-33.

66. Williams, *supra* note 58, at 142.

67. CAL. CIV. CODE § 4452 (West Supp. 1977) provides that where a marriage is void or voidable, the property will be considered as if it were community property had the marriage not been void or voidable.

68. Laughran & Laughran, *Property and Inheritance Rights of Putative Spouses in California: Selected Problems and Suggested Solutions*, 11 LOY. L.A.L. REV. 45, 47 (1977).

69. In *Lazzarevich v. Lazzarevich*, 88 Cal. App.2d 708, 718-19, 200 P.2d 49, 55 (1948), the court states: "The essence of the right of a putative wife to recover for services rendered the putative husband is her belief in the validity of a marriage between them." *Id.*

70. Laughran & Laughran, *supra* note 68, at 48.

71. See, e.g., *Brown v. Brown*, 274 Cal. App.2d 178, 190, 79 Cal. Rptr. 257, 264 (1969) (legal wife who remained silent for 28 years, lulling the putative spouses into combining their funds, was estopped from claiming any interest in the community property from the time of the putative marriage); *Estate of Shank*, 154 Cal. App.2d 808, 811-12, 316 P.2d 710, 712 (1957) (legal husband who had permitted the invalid marriage of his wife and her putative spouse to continue was estopped from contending the marriage was invalid since he had let the putative spouse care for and support his wife); *Union Bank and Trust Co. v. Gordon*, 116 Cal. App.2d 681, 690, 254 P.2d 644, 650 (1953) (because legal wife had knowingly permitted the putative spouse to care for her husband and pool earnings with him, thereby enhancing the community, she could not then take advantage of the putative spouse's contributions).

72. See note 71 *supra*.

73. See Note, *Community Property—Distribution of Property Acquired During Existence of a Putative Marriage*, 17 LA. L. REV. 489, 491 (1957).

trast, the Arizona approach would entitle the legal spouse to the portion of the community in which she participated, and the putative spouse would apparently be entitled to share the amount earned by the joint efforts of the two putative spouses.⁷⁴

The Texas approach of giving the husband's vested share of the community property to the putative spouse and allowing the husband and the legal wife to split the other half of the community property⁷⁵ seems harsh if none of the three people involved is aware of the invalidity of the marriage.⁷⁶ The spouse who was a good faith partner in both the valid and putative marriages should be allowed to benefit to the full extent of that spouse's community contributions.

The Arizona system seems to resemble California's treatment of putative spouses more closely than the systems of either Texas or Louisiana. In California, the legal spouses would be estopped from demanding their share of the community if they knew of, and by their actions condoned, the putative marriage.⁷⁷ The decisions of the California courts in denying the legal spouse a share in the community property that had been acquired by the joint efforts of the putative spouses most clearly parallel the Arizona court's result in *Fong*.⁷⁸ The *Fong* court rejected the estoppel theory used by the California courts only because it had not been properly raised at trial.⁷⁹ When the *Fong* court denied Ngan a share of the post-1946 property, the rights of the putative spouse, Lily Fong, were acknowledged by inference.⁸⁰

The court recognized Lily's contributions to the community.⁸¹ Lily bore Alfonso seven children, living with him as his wife for almost thirty years.⁸² By doing so, Lily enabled Alfonso to accumulate the post-1946 community property in which Ngan claimed an equal share.⁸³ These factors are considered by the Spanish as vital require-

74. This point is not made clear in *Fong*. The court intimates that the post-1946 property was earned with Lily's support. See 121 Ariz. at 304, 589 P.2d at 1336. The court, however, does not say that the post-1946 property belongs to Alfonso as his sole and separate property, or to both Lily and Alfonso as their joint property. *Id.* Finally, this division apparently only applies where both the husband and wife are truly putative spouses in the putative marriage. *Id.*

75. See Williams, *supra* note 58, at 142. The spouse who supported the marital relationship for a relatively short time should not share equally with the spouse who contributed to the marriage community for a much longer period of time. Otherwise, a legal spouse would be encouraged to delay voiding the illegal marriage until the putative spouse had helped the community accumulate a large amount of property.

76. The mutual spouse has been blameworthy in these Texas cases. See text & note 63 *supra*.

77. *Brown v. Brown*, 274 Cal. App.2d 178, 190, 79 Cal. Rptr. 257, 264 (1969); *Estate of Shank*, 154 Cal. App.2d 808, 811-12, 316 P.2d 710, 712 (1957).

78. Compare *In re Marriage of Fong*, 121 Ariz. at 232, 589 P.2d at 1334 with *Brown v. Brown*, 274 Cal. App.2d 808, 811-12, 79 Cal. Rptr. 257, 264 (1969).

79. 121 Ariz. at 302, 589 P.2d at 1334.

80. *Id.* at 304, 589 P.2d at 1336.

81. *Id.* at 301, 589 P.2d at 1333.

82. *Id.*

83. *Id.*

ments to establishing the community.⁸⁴ Since these requirements were provided by the putative spouse, the court apparently did not wish to deprive her of the share she contributed to the property through her efforts as a wife.⁸⁵ Unlike the situation of a meretricious relationship,⁸⁶ the *Fong* court appeared willing to allow putative spouses to recover their proportionate share from the community property.⁸⁷

In *Fong*, both Alfonso and Lily were unaware of the invalidity of their marriage.⁸⁸ Ngan, the legal spouse contributed to the deception.⁸⁹ In circumstances similar to this, Arizona courts may now be willing to deny the legal spouse any of the community property accumulated after the deception, which lead to the putative marriage, began. Circumstances in which legal spouses keep silent as to their knowledge of the invalidity of a putative marriage may now be considered when a court seeks an equitable distribution of the community property after a dissolution subsequently initiated by the legal spouse.⁹⁰

Conclusion

In *Fong*, the Arizona Court of Appeals returned to the roots of the community property system to fashion an equitable remedy for dividing property among three parties. In doing so, the court introduced the will-to-union concept into Arizona community property law. It may have also provided the basis for a putative spouse doctrine in Arizona.

Due to the unusual factual situation in *Fong*, Arizona courts may be tempted to limit use of the will-to-union doctrine. In cases where property must be divided among legal and putative spouses, however, the will-to-union concept may find expanded use.

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84. See W. DEFUNIAK & M. VAUGHN, *supra* note 8, § 57, at 108-09.

85. 121 Ariz. at 304, 589 P.2d at 1336.

86. A meretricious relationship is one in which a man and woman cohabit with full knowledge of the illicit nature of their relationship. *Garza v. Fernandez*, 74 Ariz. 312, 314, 248 P.2d 869, 870 (1952). Meretricious spouses in Arizona are allowed to recover whatever amount they agreed upon before beginning the relationship, or whatever amount they can prove they contributed to the relationship. *Stevens v. Anderson*, 75 Ariz. 331, 335, 256 P.2d 712, 714-15 (1953); *Garza v. Fernandez*, 74 Ariz. 312, 314-18, 248 P.2d 869, 871-72 (1952). See C. SMITH, *supra* note 4, at 15.

87. See 121 Ariz. at 304, 589 P.2d at 1336; C. SMITH, *supra* note 4, at 15.

88. 121 Ariz. at 304, 589 P.2d at 1336.

89. *Id.*

90. *Id.*

V. CONSTITUTIONAL LAW

A. INDETERMINATE JUVENILE SENTENCING: A DENIAL OF EQUAL PROTECTION?

In *In re Appeal of Juvenile Action No. J-86509*,¹ the Arizona Court of Appeals was presented with the question of whether Arizona's juvenile commitment scheme denies juveniles equal protection of the law.² Specifically at issue was the dispositional statute allowing commitment of juveniles for terms potentially longer than those imposed upon adults for committing the same offense.³

The court invoked minimal equal protection scrutiny⁴ and held that Arizona's juvenile commitment scheme was not a denial of equal protection.⁵ Since the lowest level of judicial scrutiny was used in reviewing the dispositional classification, the court did not examine the merits of the juvenile's equal protection argument.⁶ Rather, it implicitly accepted the state's proffered goal of rehabilitation as legitimate and indeterminate commitment as a rational way of achieving that

1. No. J-86509 (Ariz. Ct. App. May 8, 1979).

2. The juvenile in *Juvenile Action No. J-86509* was adjudicated delinquent by virtue of having committed the offense of shoplifting in violation of ARIZ. REV. STAT. ANN. § 13-673 (1956) (current version at ARIZ. REV. STAT. ANN. § 13-1805 (1978)). Slip op. at 6.

3. Slip op. at 3-4. Most juveniles who appear in the juvenile court are sent there by the police after committing a delinquent act. See MNOOKIN, CHILD, FAMILY AND STATE 764 (1978). Delinquent acts are those that would be criminal if committed by an adult as well as conduct that is not violative of the criminal law, such as curfew violation, truancy, incorrigibility, or running away from home. ARIZ. REV. STAT. ANN. § 8-201(8) (1974). ARIZ. REV. STAT. ANN. § 8-246(b) (1974) provides that a child shall remain committed to the corrections department "until the child attains the age of twenty-one years unless sooner discharged by the department of corrections." Since the juvenile in *Juvenile Action No. J-86509* was 16 years of age at the time of judgment, she faced the possibility of incarceration in a juvenile correctional institution for up to five and one-half years. Slip op. at 2. If, on the other hand, the juvenile had been adjudicated and convicted as an adult, she would have faced a maximum confinement term of only six months. See ARIZ. REV. STAT. ANN. § 13-707 (1978).

The rationale for justifying longer sentences for youthful offenders was succinctly stated by Judge (now Chief Justice) Burger:

[T]he basic theory of [the Youth Corrections Act] is rehabilitative and in a sense this rehabilitation may be regarded as comprising the *quid pro quo* for a longer confinement. . . . [This] affords youthful offenders, . . . not heavier penalties and punishment than are imposed upon adult offenders, but the opportunity to escape from the physical and psychological shocks and traumas attendant upon serving an ordinary penal sentence while obtaining the benefits of corrective treatment, looking to rehabilitation and social redemption and restoration.

Carter v. United States, 306 F.2d 283, 285 (D.C. Cir. 1962) (citations omitted). The term of a juvenile's commitment is indeterminate so that rehabilitative treatment can continue for as long as is considered appropriate. See MNOOKIN, *supra* at 762.

4. Slip op. at 5. See text & notes 46-48 *infra* for a discussion of this level of judicial scrutiny.

5. Slip op. at 6-7.

6. *Id.* See text & notes 44-48 *infra*.

goal.⁷

In re Juvenile Action No. J-86509 merits consideration because it represents Arizona's first affirmation of the rehabilitative rationale for indeterminate juvenile sentencing long used by the vast majority of state and federal courts. These courts have uniformly rejected equal protection challenges to indeterminate juvenile commitment statutes as a rational way to achieve the rehabilitative goal.⁸

This casenote will examine the equal protection issue raised in indeterminate dispositional orders for juveniles. Particular attention will be given to the argument that such orders are not a denial of equal protection if they serve the goal of rehabilitation. Evaluation of this argument will require a consideration of the rehabilitative goal itself. Finally, this casenote will explore the various legal strategies that might be employed in challenging indeterminate juvenile commitment.

The Juvenile Justice System: An Overview

The general justification for a separate juvenile justice system is found in the doctrine of *parens patriae*.⁹ This doctrine has historically been the rationale for the incarceration of juveniles who have become a community problem.¹⁰ Prior to the establishment of juvenile courts in the United States, the entire adjudicatory process, from indictment through incarceration, was carried on as if the child were an adult.¹¹ Few jurisdictions dealt separately with youthful offenders and fewer still made any attempt to rehabilitate them.¹² In most states, the only concession made to a child's youth was that a child under the age of seven was considered incapable of forming criminal intent.¹³ Children between the ages of seven and fourteen were favored with a rebuttable

7. Slip op. at 3-4, 6-7.

8. See, e.g., *Caldwell v. United States*, 435 F.2d 1079, 1081 (10th Cir. 1970); *Guidry v. United States*, 433 F.2d 968, 969 (5th Cir. 1970); *In re Aaron N.*, 136 Cal. Rptr. 102, 106, modified on other grounds, 70 Cal. App. 3d 931, 139 Cal. Rptr. 258 (1977); *Smith v. State*, 444 S.W.2d 941, 945 (Tex. Civ. App. 1969). But see *People v. Olivas*, 17 Cal. 3d 236, 251, 551 P.2d 375, 385, 131 Cal. Rptr. 55, 65 (1976).

9. *Parens patriae* is literally defined as the "role of the state as sovereign and guardian of persons under legal disability." BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). The *parens patriae* authority was originally one of the prerogatives of the feudal king. Under this authority the king, through the courts of chancery, was able to protect persons suffering from a mental disability from the unlawful acts of their guardian. See Cogan, *Juvenile Law Before and After the Entrance of "Parens Patriae,"* 22 S.C. L. REV. 147, 156 (1970). Gradually, the *parens patriae* authority evolved into an unrestricted and general power of the sovereign to assert protective jurisdiction over children and other legal incompetents whenever necessary to promote their well-being. See F. SUSSMAN & F. BAUM, THE LAW OF JUVENILE DELINQUENCY 5-6 (3d ed. 1968).

10. *In re Gault*, 387 U.S. 1, 16 (1967); Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205, 218 (1971); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1193 (1970). See, e.g., *Carter v. United States*, 306 F.2d 283, 285 (D.C. Cir. 1962); *Cunningham v. United States*, 256 F.2d 467, 471 (5th Cir. 1958).

11. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909).

12. *Id.*

13. *Id.* at 108.

presumption of inability to form such intent.¹⁴

Since the late 1800's, however, states have maintained separate systems for the disposition of juvenile offenders.¹⁵ The theory supporting separate systems is that juveniles should not be subjected to the same harsh treatment associated with an adult prison sentence.¹⁶ It is also believed that juveniles are particularly amenable to rehabilitative treatment and that separate institutions provide an environment that is more conducive to rehabilitation.¹⁷ Indeterminate dispositions exist in the juvenile justice system so that the rehabilitative mechanism can be adapted to the needs of each individual juvenile.¹⁸

Since the basic purpose of the juvenile justice system is to rehabilitate the juvenile offender, procedural informality is substituted for the adversary system.¹⁹ Indeed, prior to the Supreme Court's decisions in *In re Winship*²⁰ and *In re Gault*,²¹ many jurisdictions went so far as to deny juveniles the right to notice of charges,²² the right to counsel,²³ the right to confrontation and cross examination of witnesses,²⁴ the privilege against self-incrimination,²⁵ and the requirement that proof be beyond a reasonable doubt.²⁶

In exchange for the abbreviated procedural protections and non-adversary hearings, however, juveniles receive the benefits of an institutional environment less harsh than that found in prisons, a policy of confidentiality, and rehabilitation.²⁷ Specifically, rehabilitation has been held to provide the *quid pro quo* that compensates juveniles for the prolonged deprivation of liberty resulting from indeterminate confinement.²⁸

14. *Id.*

15. Fox, *Juvenile Justice in America: Philosophical Reforms*, 5 HUMAN RIGHTS 63, 66 (1975).

16. *In re Gault*, 387 U.S. 1, 15 (1967); *Sero v. Preiser*, 377 F. Supp. 463, 466 (S.D.N.Y.), *aff'd in part, remanded for factual determinations*, 506 F.2d 1115 (2d Cir. 1974), *cert. denied*, 421 U.S. 921 (1975); *Smith v. State*, 444 S.W.2d 941, 945 (Tex. Civ. App. 1969).

17. *In re Gault*, 387 U.S. 1, 15-16 (1967) (explaining the rationale behind the different treatment of juveniles).

18. *See, e.g., Abernathy v. United States*, 418 F.2d 288, 290 (5th Cir. 1969); *Cunningham v. United States*, 256 F.2d 467, 472 (5th Cir. 1958).

19. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME I (1967) [hereinafter cited TASK FORCE REPORT].

20. 397 U.S. 358 (1970).

21. 387 U.S. 1 (1967).

22. *See id.* at 31-34.

23. *See id.* at 34-42.

24. *See id.* at 42-57.

25. *See Breed v. Jones*, 421 U.S. 519, 530 (1975).

26. 397 U.S. at 367. Juveniles still remain deprived of a trial by jury because of the fear that it will put an end to the informal protective proceeding currently utilized. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

27. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545-46 (1971); *see* TASK FORCE REPORT, *supra* note 19, at 3.

28. *See* text & note 67 for a discussion of this theory.

Juvenile Justice in Arizona

To be subject to Arizona's juvenile dispositional scheme, juveniles must come within the jurisdiction of the juvenile court.²⁹ Arizona's juvenile court jurisdiction is defined by the age³⁰ and status³¹ of the individual offender.

The juvenile in *Juvenile Action No. J-86509* was found guilty of committing the delinquent act of shoplifting.³² Commission of a delinquent act by a youthful offender does not initiate proceedings to determine criminal responsibility, but rather alerts the court that the juvenile is in need of supervised care.³³ This supervised care can take the form of either probation and counseling, or commitment to an appropriate correctional institution for rehabilitative treatment.³⁴ The juvenile in *Juvenile Action No. J-86509* was committed to the State Department of Corrections for a potential period of confinement of five and one-half years.³⁵ Had this juvenile been given an adult penal sentence for shoplifting, the maximum term of incarceration would have been six months.³⁶

It may be claimed that this disparate treatment in the disposition of different aged offenders who have committed the same criminal act is a denial of equal protection.³⁷ Specifically the juvenile in *Juvenile Action No. J-85609* alleged that despite the fact that juveniles are adjudged delinquent by the same criminal statutes under which adults are

29. ARIZ. REV. STAT. ANN. § 8-202 (Supp. 1979-80).

30. The maximum age of a youth within the jurisdiction of the Arizona juvenile court is 18. *Id.* § 8-201(5). Jurisdiction obtained before the juvenile's eighteenth birthday is extended until that individual attains the age of 21 unless terminated by court order. *Id.* § 8-202(D).

31. See ARIZ. CONST. art. 6, § 15. A juvenile may be classified as a delinquent, a dependent, or an incorrigible. *Id.* Delinquency status denotes juveniles accused of committing an act that would be a criminal offense if committed by an adult; for example, the offense of shoplifting committed in *Juvenile Action No. J-86509*. Slip op. at 1-2. Delinquency status also includes juveniles accused of doing acts that constitute noncriminal public offenses. TASK FORCE REPORT, *supra* note 19, at 22. An example of such an act is running away from home. ARIZ. REV. STAT. ANN. § 8-201(8) (1974). Dependency status encompasses children who are in need of supervision and care which can not be provided by a parent or guardian. *Id.* § 8-201(10)(a)(b). Those who are dependent also include those who are destitute, deprived of the necessities of life, or subject to cruel or depraved treatment. *Id.* Incorrigible youths are those who have committed noncriminal, status offenses such as refusing to obey the commands of a parent or guardian, habitual truancy from school or home, or engaging in conduct injurious to the health and morals of oneself or others. *Id.* § 8-201(12).

32. Slip op. at 1-2. See ARIZ. REV. STAT. ANN. § 13-1802 (1978).

33. See Davis, *The Jurisdictional Dilemma of the Juvenile Court*, 51 N.C. L. REV. 195, 204 (1972). See generally Graves, Langley & Norris, *The Juvenile Court and Individualized Treatment*, 18 CRIME & DELINQUENCY 79 (1972).

34. ARIZ. REV. STAT. ANN. § 8-241 (Supp. 1979-80). See generally Gellhorn, *Administrative Prescription & Imposition of Penalties*, 1970 WASH. U. L.Q. 265.

35. At the time this juvenile was placed in the custody of the department of corrections she was 15 years of age and could be subject to detention until she was 21. See ARIZ. REV. STAT. ANN. § 8-246(B) (1974).

36. See note 3 *supra*.

37. *Juvenile Action No. J-86509*, slip op. at 3 (Ariz. Ct App. May 8, 1979); *People v. Olivas*, 17 Cal. 3d 236, 240, 551 P.2d 375, 379, 131 Cal. Rptr. 55, 59 (1976).

convicted, juveniles may be incarcerated for significantly longer terms solely because of their age.³⁸

The Basis of Equal Protection Analysis

The fourteenth amendment guarantees that "no state [shall] deny to any person within its jurisdiction the equal protection of the laws."³⁹ This guarantee does not translate into a demand that laws apply universally to all persons regardless of situation or circumstance.⁴⁰ Rather it is a guarantee that given a legitimate state purpose all persons similarly classified with respect to that purpose will be treated similarly.⁴¹ Alternatively, the guarantee demands that those persons treated differently by legislative classification⁴² be distinguished only on the basis of differences relevant to effectuating the desired goal.⁴³

Initially, a court presented with an equal protection claim must determine the appropriate standard of review to be employed.⁴⁴ This decision depends upon the nature of the claim presented in a particular case. In certain cases, particularly those that deal with social and economic welfare legislation, courts will accord a challenged statute a presumption of constitutionality.⁴⁵ This presumption of legislative reasonableness often translates into the rational basis standard of judicial review.⁴⁶ A classification reviewed under this standard will be upheld "if any state of facts reasonably may be conceived to justify it."⁴⁷ The practical effect of this standard of judicial inquiry is that it places upon the party attacking the statute the almost insurmountable burden of demonstrating that it is utterly lacking in rational justification.⁴⁸

38. Slip op. at 3.

39. U.S. CONST. amend. XIV, § 1.

40. Rinaldi v. Yeager, 384 U.S. 305, 309 (1966); Douglas v. California, 372 U.S. 353, 357 (1963); see Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344 (1949).

41. Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1948) (Jackson, J., concurring).

42. A legislative classification operates to divide members of an identifiable class into two smaller groupings for the purpose of either granting a privilege or imposing a burden on one of the groups. See Williamson v. Lee Optical, 348 U.S. 483, 489 (1955). Such a classification does not violate equal protection if the criteria employed to distinguish between groups are not "suspect" or do not burden a fundamental right. See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 16-1, -24 (1978).

43. See Tussman and tenBroek, *supra* note 40, at 344.

44. Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071, 1072-73 (1974).

45. See, e.g., Geduldig v. Aiello, 417 U.S. 484, 495 (1974) (disability insurance); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (welfare); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (Sunday closing laws).

46. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 51 (1973); see Note, *Developments in the Law of Equal Protection*, 82 HARV. L. REV. 1065, 1079-81 (1969).

47. McGowan v. Maryland, 366 U.S. 420, 426 (1961).

48. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). See Note, *supra* note 46, at 1078-80.

A second standard of judicial review is triggered only in cases involving suspect classifications⁴⁹ or touching upon fundamental rights.⁵⁰ This standard of review, often called the compelling state interest test, involves a much stricter degree of judicial scrutiny.⁵¹ When it invokes this standard, a court will not tolerate any conceivable rational connection between the legislative goal and the classification chosen to implement it.⁵² Rather, the state bears the burden of establishing both (1) that pursuit of the goal in question is not only reasonable, but is a compelling interest of the state and (2) that the classification in question is a necessary means of furthering that goal.⁵³ In other words, the state must demonstrate that no less restrictive or less intrusive means would serve the state's legitimate goals as well.⁵⁴

Indeterminate Sentences for Juveniles Do Not Deny Juveniles Equal Protection: The Dominant View

Indeterminate dispositional orders for juveniles may logically be challenged on equal protection grounds because a class of persons (those persons who have committed a particular offense) is being divided into two groups (adults and juveniles). These offenders are then being subjected to disproportionate terms of incarceration.

The liberty of juveniles has not generally been held to be a fundamental interest⁵⁵ and juveniles are not regarded as a suspect class.⁵⁶ Consequently, challenges to the constitutionality of the indeterminate juvenile commitment scheme are not subjected to strict scrutiny.⁵⁷ In-

49. For a discussion of what constitutes a suspect class, see text & notes 100-05 *infra*. Examples of suspect classifications include: *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (alienage); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (race); *Oyama v. California*, 332 U.S. 633, 644-46 (1948) (nationality).

50. See *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969) (travel); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (contraception); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (procreation).

51. See *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

52. See *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 632 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969).

53. See *Roe v. Wade*, 410 U.S. 113, 162-63 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972); *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

54. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). See generally *Spece, Justifying Invigorated Scrutiny and the Least Restrictive Alternative as a Superior Form of Intermediate Review: Civil Commitment and the Right to Treatment as a Case Study*, 21 ARIZ. L. REV. 1049 (1979).

55. See, e.g., *Caldwell v. United States*, 435 F.2d 1079, 1081, (10th Cir. 1970); *Smith v. State*, 444 S.W.2d 941, 947 (Tex. Civ. App. 1969). The California Supreme Court in *People v. Olivas*, 17 Cal. 3d 236, 251, 551 P.2d 375, 385, 131 Cal. Rptr. 55, 64 (1976), is the only court to recognize a fundamental right of personal liberty for juveniles. The holding in *Olivas*, however, seems to narrow the context in which that right will be recognized. Specifically, the holding encompasses the class of juveniles who are characterized as adults for purposes of conviction but characterized as juveniles for purposes of disposition. *Id.* at 243, 551 P.2d at 380, 131 Cal. Rptr. at 59. Arguably, the fundamental right of personal liberty recognized by the court in *Olivas* is limited to the class of juveniles who fall within the above scheme. See text & notes 78-85 *infra*.

56. *Smith v. State*, 444 S.W.2d 941, 947 (Tex. Civ. App. 1969).

57. *Id.* at 946-47.

stead, the vast majority of cases are scrutinized under the rational basis standard of review.⁵⁸

Where the rational basis standard of review has been applied, a distinction in the possible terms of incarceration for adult and juvenile offenders has been upheld as constitutionally permissible.⁵⁹ Out of the recognized penological purposes of adult incarceration (*e.g.* retribution, rehabilitation, and deterrence), rehabilitation is the most important goal chosen to be advanced by juvenile dispositional statutes.⁶⁰ A basic assumption underlying this choice is that juveniles are more susceptible to rehabilitation than are adult offenders.⁶¹ Judicial acceptance of the rehabilitative goal *per se* forecloses an inquiry into the validity of any of the assumptions upon which that goal relies.⁶² Consequently, dispositional classifications resulting in indeterminate commitment terms for juveniles are upheld as being rationally related to the attainment of the rehabilitative goal.

Challenges to Indeterminate Commitment of Juveniles: The Right to Treatment and the Rational Basis Standard of Review

Although numerous legal attacks have been aimed at the legitimacy of the juvenile dispositional classification, it has generally remained shielded by a presumption of reasonableness from any significant judicial scrutiny.⁶³ This presumption of reasonableness is afforded the juvenile dispositional classification because rehabilitation of juveniles is the motivation behind the enactment of the legislation.⁶⁴ The strength of this presumption weighs heavily in favor of utilizing a legal strategy that is able to challenge the classification within a rational basis framework. One such strategy has been labeled the "right

58. See cases cited at note 8 *supra*.

59. See *id.* This is because the legislative purpose of juvenile dispositional statutes is benign, rather than invidious. See *Smith v. State*, 444 S.W.2d 941, 947 (Tex. Civ. App. 1969).

60. *In re Gault*, 387 U.S. 1, 15-16 (1967); *McBeth v. Rose*, 111 Ariz. 399, 402, 531 P.2d 156, 159 (1975); *State v. Shaw*, 93 Ariz. 40, 46, 378 P.2d 487, 493 (1963); *Arizona State Dept. of Pub. Welfare v. Barlow*, 80 Ariz. 249, 252, 296 P.2d 298, 301 (1956).

61. *In re Herrera*, 23 Cal. 2d 206, 213, 143 P.2d 345, 348 (1943). See Chase, *Schemes and Visions: A Suggested Revision of Juvenile Sentencing*, 51 TEX. L. REV. 673, 683-86 (1973).

62. See, *e.g.*, *Caldwell v. United States*, 435 F.2d 1079, 1081 (10th Cir. 1970); *Guidry v. United States*, 433 F.2d 968, 969 (5th Cir. 1970); *United States v. Dancis*, 406 F.2d 729, 730 (2d Cir. 1969). *But see* *People v. Olivas*, 17 Cal. 3d 236, 251-52, 551 P.2d 375, 385, 131 Cal. Rptr. 55, 65 (1976). Courts, however, have rejected as empirically unfounded the assumption that female offenders are more amenable to rehabilitative treatment than are adult male offenders. See, *e.g.*, *Robinson v. York*, 281 F. Supp. 8, 13 (D. Conn. 1968); *State v. Chambers*, 63 N.J. 287, 292, 307 A.2d 78, 83 (1973); *Commonwealth v. Daniels*, 430 Pa. 642, 649, 243 A.2d 400, 404 (1968).

63. See *Cunningham v. United States*, 256 F.2d 467, 472-73 (5th Cir. 1958); *In re Aaron N.*, 136 Cal. Rptr. 102, 108, *modified on other grounds*, 70 Cal. App. 3d 931, 139 Cal. Rptr. 258 (1977); *Smith v. State*, 444 S.W.2d 941, 944-45 (Tex. Civ. App. 1969).

64. *In re Gault*, 387 U.S. 1, 15-16 (1967); *McBeth v. Rose*, 111 Ariz. 399, 402, 531 P.2d 156, 159 (1975); *Smith v. State*, 444 S.W.2d 941, 947 (Tex. Civ. App. 1969); *State v. Shaw*, 93 Ariz. 40, 46, 378 P.2d 487, 491 (1963).

to treatment."⁶⁵ Under the *parens patriae* rationale, the promise of treatment⁶⁶ is the *quid pro quo* justifying the extended deprivation of liberty.⁶⁷ Thus, if the deprivation of an individual's liberty has been justified on the grounds that treatment is needed, then that individual must actually receive treatment or else the state's asserted justification for the deprivation will lack a rational basis.⁶⁸ Absent a rationally based justification, the individual's liberty must be restored.

In determining whether a juvenile is receiving treatment, courts must assess the adequacy of the facilities and programs alleged to provide such treatment. Two different standards of evaluation are presently employed: one objective, the other subjective.⁶⁹ Under the objective standard, treatment facilities will be considered inadequate if certain minimum quantitative requirements, such as institution size, staff-patient ratio, recidivism rates, and percentage of patients released are not met.⁷⁰ The records of the particular institution are compared

65. The right to treatment has its legal foundation in the judicial recognition that involuntary confinement without treatment constitutes punishment. *Rouse v. Cameron*, 373 F.2d 451, 453 (D.C. Cir. 1966). The statutory right recognized in *Rouse* for mental patients was extended to juveniles in the case of *In re Elmore*, 382 F.2d 125, 127 (D.C. Cir. 1967), and *Creek v. Stone*, 379 F.2d 106, 111 (D.C. Cir. 1967). See *Kittrie, Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 GEO. L.J. 848, 873 (1969).

Although the above cases were based upon a statute authorizing treatment for those subject to nonpenal commitment, the right to treatment has also been authorized on constitutional grounds. In *Martarella v. Kelley*, 349 F. Supp. 575, 598-602 (S.D.N.Y. 1972), the court found the existence of a general right to treatment on due process grounds. The court specifically found that a denial of liberty for therapeutic reasons without the promised treatment constitutes a denial of due process of law. *Id.* at 585. The concept of a right to treatment has also been recognized within an equal protection framework. In *Wilson Appeal*, 438 Pa. 425, 264 A.2d 614 (1970) the court held that any distinction in the maximum sentences prescribed in cases of individuals guilty of similar conduct must be based on some relevant and reasonable classification. *Id.* at 431, 264 A.2d at 617. The court then ruled that there could be no constitutionally valid distinction unless the state clearly demonstrates that the longer commitment term will be accompanied by the juvenile's receiving appropriate rehabilitative treatment. *Id.* at 431-32, 264 A.2d at 617-18. The right to treatment finds another constitutional basis in the eighth amendment's prohibition of cruel and unusual punishment. The court in *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354, 1366-67 (D.R.I. 1972), held that the confinement of juveniles in "cold, dark, isolation cells" without treatment, constituted cruel and unusual punishment.

66. Within the context of involuntarily confined juveniles, treatment can be defined as the assistance and therapeutic programs provided to juveniles who have been institutionalized by the state, city, or local government. See generally INSTITUTE OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO DISPOSITIONS 134 (1976).

67. See *Carter v. United States*, 306 F.2d 283, 285 (D.C. Cir. 1962); *Cunningham v. United States*, 256 F.2d 467, 472 (5th Cir. 1958). The *quid pro quo* rationale is that involuntarily committed persons are given less procedural or substantive safeguards than others who are subject to involuntary confinement, and that in return, treatment must be tendered as compensation for such disparity in protections. Spece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 ARIZ. L. REV. 1, 47 (1978); see *Martarella v. Kelley*, 349 F. Supp. 575, 585 (S.D.N.Y. 1972).

68. *Morales v. Turman*, 383 F. Supp. 53, 71 (E.D. Tex. 1974), *rev'd on procedural grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd per curiam*, 430 U.S. 322 (1977); *Nelson v. Heyne*, 355 F. Supp. 451, 458-59 (N.D. Ind. 1972); *Martarella v. Kelley*, 349 F. Supp. 575, 585 (S.D.N.Y. 1972).

69. *Bailey & Pyfer, Deprivation of Liberty and the Right to Treatment*, 7 CLEARINGHOUSE REV. 519, 526-27 (1974).

70. *Id.*

with established minimum requirements.⁷¹ If the institution meets these requirements, it has established a prima facie case for the adequacy of its treatment and further inquiry into the level of individual treatment is foreclosed.⁷² Should the institution fail to meet these quantitative standards of care, there would be a per se violation of the individual's right to treatment.⁷³

The subjective standard is more qualitative in its focus. It evaluates facilities, staff, and resources to determine whether they offer individualized treatment appropriate for a patient's particular problem.⁷⁴ Although the subjective standard does not require a cure, it does require that a bona fide effort be made to tailor treatment to the particular needs of the individual.⁷⁵

The right to treatment challenge has the advantage of working

71. *Id.* at 527. The source of these requirements varies. In some cases, the necessary requirements are legislatively defined. See *Director of Patuxent Inst. v. Daniels*, 243 Md. 16, 40-42, 221 A.2d 397, 411-12 (1966) (deferring to legislative judgment that the Maryland Defective Delinquent Act was properly structured to achieve the necessary therapeutic objectives). In other cases, minimum requirements have been judicially created. See *Wyatt v. Stickney*, 325 F. Supp. 781, 784-85 (M.D. Ala.), enforced, 334 F. Supp. 1341 (M.D. Ala. 1971), supplemented, 344 F. Supp. 373 (M.D. Ala.), *aff'd in part, rev'd in part, remanded in part*, 344 F. Supp. 387 (M.D. Ala. 1972).

The objective or structural approach has been criticized on the grounds that there is presently a lack of reliable objective treatment standards. Schwitzgebel, *Right to Treatment for the Mentally Disabled: The Need for Realistic Standards and Objective Criteria*, 8 HARV. C.R.-C.L. L. REV. 513, 523-28 (1973).

72. Birnbaum, *The Right to Treatment*, 46 A.B.A. J. 499, 504 (1960). In *Director of Patuxent Inst. v. Daniels*, 243 Md. 16, 221 A.2d 397 (1966), the court adopted the objective approach and made no attempt to evaluate the adequacy of the petitioner's individual treatment. After analyzing the overall structure of the institution's program, the court distinguished it from mere penal detention. *Id.* at 48-49, 221 A.2d at 416.

73. See *Tribby v. Cameron*, 379 F.2d 104, 105 (D.C. Cir. 1967); Note, *Juvenile Law—An Important Step Towards Recognition of the Constitutional Right to Treatment*, 16 ST. LOUIS L.J. 340, 350 (1971).

74. See *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala.), enforced, 334 F. Supp. 1341 (M.D. Ala. 1971), supplemented, 344 F. Supp. 373 (M.D. Ala.), *aff'd in part, rev'd in part, remanded in part*, 344 F. Supp. 387 (M.D. Ala. 1972).

75. *Id.*; *Rouse v. Cameron*, 373 F.2d 451, 456 (D.C. Cir. 1966); *Nason v. Superintendent of Bridgewater State Hosp.*, 353 Mass. 604, 614, 233 N.E.2d 908, 914 (1968); *Bailey & Pyfer*, *supra* note 69, at 527; Bazelon, *Foreword* (Right to Treatment Symposium), 57 GEO. L.J. 676 (1969). With regard to juveniles, the court in *In re Elmore*, 382 F.2d 106, 111 (D.C. Cir. 1967), employed the subjective standard to examine the nature of the actual treatment provided to the juveniles. The court in *Elmore* specifically directed the state to provide care that would satisfy the juvenile's particular needs. *Id.* at 127-28. In *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974), the court, in conducting an extensive subjective analysis of the treatment programs, found that they were comprised more of form than substance. *Id.* at 360.

Judge Bazelon has compared the judicial role under the subjective approach to the review of an administrative agency decision. Bazelon, *supra*, at 677-78. Under this logic, the court's function is not to make an independent judgment concerning the adequacy of treatment or among the various schools of psychotherapy, "but rather to scrutinize the record to ensure that an expert . . . has made a responsible exercise of his professional judgment." *Id.* at 674. In essence this means that the institution having custody of the juvenile would be required to show that treatment is appropriate for the patient's particular problem. *Bailey & Pyfer*, *supra* note 69, at 527. The subjective standard is criticized as being necessarily imprecise, because of the medical controversy on the nature of mental illness. See Birnbaum, *supra* note 72, at 759, 774. The subjective standard often requires a battle between medical experts to establish which treatment method is best in a particular case. See Halpern, *A Practicing Lawyer Views the Right to Treatment*, 57 GEO. L.J. 782, 792 (1969). The court is placed in the posture of having to choose between the methods that are presented. See Birnbaum, *supra* note 72, at 753.

within the rational basis framework. The challenge is limited, however, in one important respect. It assumes, without defense or further inquiry, that rehabilitation is a legitimate goal. This limitation forecloses any opportunity to challenge rehabilitation itself as the justification for indeterminate juvenile commitment.

Strict Judicial Scrutiny

The opportunity to challenge the rehabilitative goal is presented when a court employs strict scrutiny in reviewing a classification.⁷⁶ Strict judicial scrutiny is triggered either when a classification burdens the exercise of a fundamental right or when suspect criteria have been used in formulating a classification.⁷⁷ At least one court has applied this standard of review in scrutinizing juvenile commitment statutes.

In *People v. Olivas*,⁷⁸ the California Supreme Court addressed the issue of whether a misdemeanor between the ages of sixteen and twenty-one who has been tried as an adult may be committed to the California Youth Authority for a period in excess of the maximum adult jail sentence that might be imposed for the same offense.⁷⁹ The court held such commitments to be violative of the equal protection clause of the California Constitution and of the fourteenth amendment to the United States Constitution.⁸⁰ In reaching this result, the court declared "personal liberty" to be a fundamental right.⁸¹ It accordingly applied strict scrutiny in reviewing the age-based classification.⁸² Under this standard of review the burden was on the state to "first establish that it has a compelling interest which justifies the law and then demonstrate that the distinctions drawn by the law are necessary to further that purpose."⁸³ The state was unable to provide a satisfactory explanation for why indeterminate commitment was any more necessary to achieve rehabilitative success than was determinate commitment.⁸⁴ The classification was thus invalidated.⁸⁵

The decision rendered in *Olivas* was rejected by the Arizona court

76. See text & notes 49-54 *supra*.

77. See text & notes 49-50 *supra*.

78. 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976).

79. *Id.* at 237, 551 P.2d at 376, 131 Cal. Rptr. at 56. At the time of his arrest Olivas was 19 years of age. Pursuant to CAL. WELF. & INST. CODE § 1731.5 (West 1972), the court was authorized to exercise its discretion and commit him to the California Youth Authority. See note 88 *infra* for the content of § 1731.5.

80. *Id.* at 250, 551 P.2d at 389, 131 Cal. Rptr. at 69.

81. *Id.* at 246, 551 P.2d at 384, 131 Cal. Rptr. at 64. The court specifically defined personal liberty as the freedom from involuntary incarceration as well as the freedom from the restraints that accompany parole. *Id.* at 241-42, 551 P.2d at 380-81, 131 Cal. Rptr. at 60-61.

82. *Id.* at 246, 551 P.2d at 385, 131 Cal. Rptr. at 65. The classification in *Olivas* is explained in note 88 *infra*.

83. 17 Cal. 3d at 246, 551 P.2d at 385, 131 Cal. Rptr. at 65.

84. *Id.* at 255, 551 P.2d at 387, 131 Cal. Rptr. at 67.

85. *Id.* at 256, 551 P.2d at 388, 131 Cal. Rptr. at 68.

when it assessed the equal protection challenge to Arizona's juvenile commitment scheme presented in *In re Juvenile Action No. J-86509*.⁸⁶ The result reached by the California court was perceived deficient because of its implicit rejection of the rehabilitative goal.⁸⁷ The Arizona court, however, may have acted too quickly in distinguishing its philosophy from that of the California court. Although *Olivas* recognized personal liberty as a fundamental interest, the holding in that case turned on a traditional equal protection infirmity. That is, a similarly situated class of persons (those prosecuted and convicted as adults in adult court), were being divided into two groups for unequal dispositional treatment solely because of their age.⁸⁸ Age in this case was an arbitrary distinction upon which to base the classification since all those in the class were legally classified as adults for purposes of conviction.⁸⁹

This classification dilemma is not present under Arizona's juvenile commitment scheme.⁹⁰ Under Arizona's scheme all juveniles subject to the jurisdiction of the juvenile court are afforded the same range of dispositional alternatives.⁹¹ Indeed, in the subsequent case of *In re*

86. Slip op. at 5.

87. *Id.*

88. 17 Cal. 3d at 242, 551 P.2d at 379, 131 Cal. Rptr. at 59. CAL. WELF. & INST. CODE § 1731.5 (West Supp. 1979) permits a court to commit to the youth authority any person convicted of a public offense who

[i]s found to be less than 21 years of age at the time of apprehension. . . . The Youth Authority shall accept a person committed to it pursuant to this article if it believes that the person can be materially benefitted by its reformatory and educational discipline, and if it has adequate facilities to provide such care.

Id. The court stated that this section operates to divide one class of individuals, persons convicted of a public offense, into two groups. Of the entire class of persons who suffer such a conviction, only those who were under 21 years of age at the time of their apprehension and are otherwise eligible may be committed to the Youth Authority. The remainder of the class, persons 21 years of age and older, may be subjected to only the normal range of dispositional alternatives.

17 Cal. 3d at 239-40, 551 P.2d at 376-77, 131 Cal. Rptr. at 56.

89. The equal protection issue is clearly illustrated by CAL. WELF. & INST. CODE § 707 (West Supp. 1979), which provides for the transfer of certain youthful offenders to criminal court. Specifically, under § 707, any juvenile who is 16 years of age or older and has allegedly committed a criminal offense may be found to be unfit for consideration under the juvenile court law. *Id.* § 707(9). A determination of unfitness results from a finding that the juvenile "would not be amenable to the care, treatment, and training program available through the facilities of the juvenile court." *Id.* In such a case, the juvenile court can refer the minor to the criminal court for prosecution. *Id.* § 707(a). Inasmuch as *Olivas* was treated as an adult for purposes of prosecution without regard to his age, it is anomalous to draw a distinction between him and other adult offenders for purposes of disposition. The *Olivas* court seemed to be aware of this problem. In a footnote the court stated:

We are not confronted by a situation in which a juvenile adjudged *under the Juvenile Court Law as a juvenile* contends that his term of involuntary confinement may exceed that which might have been imposed on an adult or juvenile who committed the identical unlawful act and was thereafter convicted *in the criminal courts*. Since that situation is not before us, we reserve consideration of the issue should it arise in some future case and we express no opinion on the merits of such a contention.

17 Cal. 3d at 243 n.11, 551 P.2d at 379 n.11, 131 Cal. Rptr. at 59 n.11 (emphasis in original).

90. See text & notes 29-31 *supra*.

91. ARIZ. REV. STAT. ANN. § 8-241 (Supp. 1979-80).

Aaron N.,⁹² the California court upheld the indeterminate commitment of a juvenile who had not been convicted as an adult. In *Aaron N.*, the court reviewed the equal protection claim of a juvenile tried and committed pursuant to the jurisdiction of the juvenile court.⁹³ Relying on *Olivas* for support, the juvenile in *Aaron N.* claimed that the disparity in the terms of incarceration imposed upon juveniles and adults found guilty of committing the same offense violated the equal protection clause of the Constitution.⁹⁴ Contrary to the sentencing scheme presented in *Olivas*, which allowed either imposition of a penal sentence or commitment to the youth authority at the discretion of the adult court,⁹⁵ the scheme utilized in *Aaron N.* required commitment of the juvenile to the youth authority for the prescribed term.⁹⁶ Equal protection was not denied because the dispositional statute in question applied solely to one group of offenders—juveniles who had been committed by the juvenile court to the youth authority.⁹⁷ Personal liberty as a fundamental right was not mentioned by the court in *Aaron N.* and the rational basis test was once again employed to uphold the classification.⁹⁸

The court in *Olivas* employed strict scrutiny because the fundamental right to personal liberty was burdened by California's dispositional classification.⁹⁹ Focus on a fundamental right, however, is not the only means by which to trigger strict scrutiny analysis. In a number of cases, the United States Supreme Court has made clear that legislative classifications focusing upon certain group traits would trigger a "compelling state interest" analysis.¹⁰⁰

Although the Supreme Court held that classifications based upon race, alienage, and nationality were inherently "suspect," it did not explicitly enumerate the criteria for determining what constitutes a suspect class.¹⁰¹ The Court has, however, set forth indicia to determine whether a class is suspect: (1) Whether the class is saddled with "immutable characteristics over which individuals have little or no con-

92. 136 Cal. Rptr. 102, *modified on other grounds*, 77 Cal. App. 3d 931, 139 Cal. Rptr. 258 (1977).

93. *Id.* at 106.

94. *Id.* at 105.

95. *See* text & note 88 *supra*.

96. 136 Cal. Rptr. at 106.

97. *Id.*

98. *Id.* at 108.

99. *See* text & notes 80-84 *supra*.

100. *See* *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (alienage); *Loving v. Virginia*, 388 U.S. 1, 9 (1967) (race); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (nationality).

101. *See generally* Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237 (1974). The article discusses and applies a theory which attempts to define the characteristic elements of a suspect class. *Id.* at 1245-68.

trol";¹⁰² (2) whether the class has been subjected to a "history of purposeful unequal treatment";¹⁰³ and (3) whether the class is discrete and insular and has been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."¹⁰⁴

Clearly juveniles possess some, if not all of the indicia of suspectness enumerated thus far. Like blacks, juveniles are without power to change the classifying characteristic. When it is inherently impossible for people voluntarily to escape from a given classification, they are unable to exercise any control over their status. In such situations the Supreme Court has been reluctant to allow people to be "punished" for that which they cannot change.¹⁰⁵ It is not difficult to argue that juveniles have been historically subjected to unequal treatment. Despite the accompanying benevolent motivation, our culture unmistakably discriminates against youth in a variety of tangible ways. For example, juveniles lack the right to vote,¹⁰⁶ marry,¹⁰⁷ drive,¹⁰⁸ or drink alcoholic beverages.¹⁰⁹ They are also subject to compulsory education,¹¹⁰ and their access to certain forms of literature and kinds of movies is significantly curtailed.¹¹¹ Juveniles are uniquely susceptible to this kind of prejudicial treatment precisely because they lack the political power to redress such discriminatory treatment.¹¹² In fact, the political impotency of minors is more pronounced than that of other minority groups.¹¹³ Even though many of those groups are not always

102. *Kahn v. Shevin*, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting) (race, alienage, and national origin are such characteristics).

103. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (race, alienage, and national origin).

104. *Id.*

105. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972). The policy behind the Court's strict scrutiny of statutory classifications based on immutable characteristics is perhaps related to the policy behind penalties generally. If penalties are designed to exact retribution, then one who could not avoid his status because of characteristics over which he has no control is morally blameless and does not deserve punishment. If penalties are imposed to induce changes in conduct, then the penalties will be ineffectual, for there is no way the individual can change his status. *Id.*

106. See U.S. CONST. amend. XXVI which established the minimum age for voter qualification as 18 years of age.

107. See, e.g., CAL. CIV. CODE § 4101 (West Cum. Supp. 1979); N.Y. DOM. REL. LAW § 15 (McKinney 1977).

108. See, e.g., CAL. VEH. CODE §§ 12507, 12512 (West 1971 & Supp. 1979); ILL. REV. STAT. ch. 95 1/2, § 6-107 (Smith-Hurd Supp. 1979).

109. A. SUSSMAN, *THE RIGHTS OF YOUNG PEOPLE* 222 (1977) (state listing of legal age for sale of alcoholic beverages to minors).

110. See *Wisconsin v. Yoder*, 406 U.S. 205, 209 (1972) (mandatory education up to age 16).

111. See *FCC v. Pacifica*, 438 U.S. 726, 749 (1978); U.S. COMMISSION ON OBSCENITY AND PORNOGRAPHY, REPORT: DRAFT OF PROPOSED LEGISLATION—SALE AND DISPLAY OF EXPLICIT SEXUAL MATERIAL TO YOUNG PERSONS 66-67 (1970).

112. The thrust of the "discrete and insular" rationale is that when a group is precluded from access to the political process, the Court must take on a shielding role. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

113. The Supreme Court addressed the issue of whether age based classifications are suspect

able to redress their grievances effectively, they are at least afforded the opportunity to do so. Minors are denied any access to the political process.¹¹⁴ Extension of the vote to eighteen year-olds does not alter this political imbalance, since eighteen year-olds are not juveniles under the majority of juvenile court statutes.¹¹⁵ Given these reasons, it is at least arguable that juveniles should receive the same rigorous judicial protection afforded recognized suspect classes.

The Intermediate Standard of Review

Between the extremes of the rational basis and strict scrutiny standards of review, an intermediate standard has emerged.¹¹⁶ This standard of review is triggered when the court is presented with a legislative classification that exhibits some of the characteristics of a suspect class¹¹⁷ or interferes with the exercise of a right upon which "constitutionally guaranteed rights are dependent."¹¹⁸

The Court has employed an intermediate form of review in those cases where governmental deprivations have affected such important interests of the individual as the interest in obtaining a higher education at affordable tuition,¹¹⁹ or in receiving such subsistence benefits as

in *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976). There the Court faced the issue of whether compulsory retirement at age 50 violates the equal protection guarantee. *Id.* at 308. Utilizing the rational basis standard of review, the Court held that the statute was not wholly irrelevant to its objective of providing vigorous, youthful policemen and thus did not constitute an equal protection violation. *Id.* at 315-17. Although *Murgia* is a serious obstacle to the recognition of age as a suspect class, it is distinguishable from the classification in the present case in one important respect: elderly people have access to the political process. Thus, although old age may result in discriminatory treatment, the elderly, as a class, are not politically impotent and may redress grievances against their unequal treatment. *Cf.* *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966) (acknowledging voting as a fundamental right); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (same); *Gray & Rudovsky, The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glong v. American Guarantee & Liability Insurance Co.*, 118 U. PA. L. REV. 1, 6-7 (1969) (political impotency is a major factor in distinguishing a suspect class).

114. *But see Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) (Court upheld the first amendment rights of students to freely express their views by wearing black arm bands to protest the war in Viet Nam). *Id.* at 513-14. Despite the proclamation that students "are possessed of fundamental rights which the State must respect," the Court seemed to be cognizant of the particular facts in the case, including the full consent of the parents to their children's actions, the lack of disruption that resulted from the visual protest, and the limited degree of student participation in comparison to the school population as a whole. *Id.* at 511-13.

115. See A. SUSSMAN, *supra* note 109, at 220-21, for a comprehensive listing of the age of majority in every state.

116. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197-98 (1976); *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619, 620-21 (1973) (per curiam); *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (per curiam).

117. *Craig v. Boren*, 429 U.S. 190, 202 (1976); *Stanton v. Stanton*, 421 U.S. 7, 13-15 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 691-92 (1973).

118. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 102 (1973) (Marshall, J., dissenting) (close scrutiny should be utilized when the Court is presented with the infringement of rights interrelated with constitutional guarantees); *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 536-38 (1973) (classification affecting access to a basic instrumentality which was inextricably related to enjoyment of guaranteed liberties, i.e., food, deserved closer scrutiny).

119. See *Vlandis v. Kline*, 412 U.S. 441, 459 (1973) (White, J., concurring).

food stamps.¹²⁰ Thus, either a significant interference with liberty or a denial of a benefit vital to the individual triggers intermediate review.¹²¹ The right burdened by the juvenile dispositional classification is liberty in its most traditional sense—freedom from physical confinement. The right to liberty, upon which constitutionally recognized rights such as voting¹²² and travel¹²³ are dependent, has been recognized by at least one court to be fundamental in itself.¹²⁴ Arguably, then, the right to be free from physical confinement constitutes an important right, the violation of which should trigger the intermediate standard of review.

Intermediate review has also been triggered if “semi-suspect”¹²⁵ criteria of classification are employed. Most notably, this standard of review has been utilized in classifications based on the status of sex¹²⁶ or illegitimacy.¹²⁷ Classifications based on sex were explicitly dealt with by the Court in *Frontiero v. Richardson*.¹²⁸ In *Frontiero*, the statute under challenge provided servicemen, but not servicewomen, increased benefits upon claiming one’s spouse as a dependent.¹²⁹ In a plurality opinion, the Court agreed that this sexual classification violated the equal protection guarantee.¹³⁰ Four Justices specifically found that sex was a suspect classification.¹³¹ They rested their conclusion on the fact that women have suffered a “long and unfortunate history of sex discrimination,” are possessed of an immutable characteristic that impose special disabilities, and that a person’s sex “frequently bears no relation to ability to perform or contribute to society.”¹³²

As previously argued,¹³³ juvenile status, like sex, is an immutable characteristic incapable of voluntary change. Similarly, juveniles face pervasive discrimination in such areas as the job market¹³⁴ and the po-

120. See *United States Dep’t of Agriculture v. Murry*, 413 U.S. 508, 519 (1973) (Marshall, J., concurring).

121. But see *Maher v. Roe*, 432 U.S. 464, 471 (1977) (upholding, after minimal scrutiny, state decision to fund childbirth but not elective abortion).

122. *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964).

123. *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969).

124. *People v. Olivas*, 17 Cal. 3d 236, 250-51, 551 P.2d 375, 384, 131 Cal. Rptr. 55, 64 (1976).

125. L. TRIBE, *supra* note 42, § 16-29 at 1080.

126. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197-98 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 682-84 (1973); *Reed v. Reed*, 404 U.S. 71, 76 (1971).

127. See, e.g., *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 173 (1972); *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968).

128. 411 U.S. 677 (1973).

129. *Id.* at 678-79.

130. *Id.* at 690-91.

131. *Id.* at 682.

132. *Id.* at 684, 686.

133. See text & notes 105-15 *supra*.

134. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 168-70 (1944).

litical arena.¹³⁵ In addition, juveniles have also been relegated to inferior legal status without regard to the actual capabilities of individual members.¹³⁶

Application of the intermediate test requires that a classification bear a fair and substantial relationship to an important state interest.¹³⁷ Practically, this standard requires the court to determine whether a classification advances the state's interest "in fact."¹³⁸ Thus, the intermediate standard requires that the state factually demonstrate to the court both the importance of the desired goal and a substantial connection between the classification and that goal.¹³⁹

An analysis of the juvenile dispositional classification under the intermediate standard of review thus demands that rehabilitation be established as an important state goal and that indeterminate commitment substantially advance the rehabilitative goal. These inquiries are intimately related because rehabilitation will be an important state goal only if it is an obtainable state goal. To see this, one must understand that a goal can fail to be important in two senses. In one sense, a goal is unimportant if it is not desirable. In a second sense, a goal is unimportant if it is not workable or obtainable. While a court is hardly likely to call rehabilitation unimportant in the sense of not being a desirable goal, it might well be persuaded that it is unimportant in the sense of being unobtainable. The extent to which rehabilitation is an obtainable goal is in part a function of the success realized by the means chosen to pursue the goal. Thus, if it is found that indeterminate commitment terms do not substantially advance the goal of rehabilitation, the court would also be forced to call into question the state's choice of rehabilitation as a valid goal. Rehabilitation as a proper state goal has thus far been shielded from any searching judicial inquiry by a legislative presumption of reasonableness.¹⁴⁰ The demands made by

135. See text & notes 114-15 *supra*.

136. For example, the Arizona Constitution groups children with the insane or mentally deficient—"No person under guardianship, non compos mentis, or insane, shall be qualified to vote at any election. . . ." ARIZ. CONST. art. 7, § 2.

137. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197-98 (1976); *Reed v. Reed*, 404 U.S. 71, 76 (1971).

138. Nowak, *supra* note 44, at 1081. Two somewhat different formulations of the intermediate test exist. Professor Gerald Gunther, for example, suggests a means-focused inquiry in all non-strict scrutiny cases under which the means must substantially advance the ends. Purposes should be actual, not merely "conceivable," and reasonableness should be determined only by factual support. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-24 (1972). Professor Nowak proposes a "demonstrable basis" standard: Whenever the legislature creates a classification treating persons dissimilarly on the basis of some inherent human characteristic, or status other than race, or limits the exercise of a fundamental right, the Court will validate it only if there is a factually demonstrable rational relationship between a legitimate state interest and the means chosen. Nowak, *supra* note 44, at 1093-94.

139. Nowak, *supra* note 44, at 1081.

140. See text & notes 63-64 *supra*.

the intermediate standard of review, however, will force the state to factually support its continued use of rehabilitation as the goal of juvenile disposition. Recent empirical evidence measuring the success of the rehabilitative goal may cast serious doubt on its use as the justification for the prolonged deprivation of liberty suffered by juvenile offenders.¹⁴¹

Conclusion

The policy of indeterminate commitment of juveniles may logically be challenged as a denial of equal protection. The basis of this challenge is that juveniles are subjected to potentially longer terms of incarceration than are adults for committing the same offense. This distinction in the dispositional alternatives afforded the two classes has traditionally been justified by the goal of rehabilitation. The success of a challenge to the juvenile dispositional classification depends upon the standard of judicial review to be employed in reviewing the classification.

At present, as *In re Juvenile Action No. J-86509* reveals, Arizona has clearly adopted a standard of minimal judicial scrutiny in reviewing such classification. Such a standard leaves the goal of rehabilitation unchallenged and tolerates indeterminacy as a means to this goal. Nevertheless, both the status of juveniles and the nature of the right involved argue for a more exacting standard.

Ellen Canacakos

B. STATE ACTION AND EMPLOYMENT IN THE AGRICULTURAL IMPROVEMENT DISTRICT

In all claims arising from the fourteenth amendment to the United

141. The California Legislature has clearly reached this realization as is evidenced by the recent passage of the "definite" sentencing act. 1976 Cal. Stats. 4752 (codified at CAL. PENAL CODE §§ 1170-1170.6 (West Supp. 1979)). The new law declares "punishment" to be the purpose of incarceration and, *inter alia*, puts an end to the existing "indefinite" felony sentencing in California—which has been based on the principle of rehabilitation—replacing it with fixed prison and parole terms for most felonies. *Id.* § 1170. See also TASK FORCE REPORT, *supra* note 19, at 1 (citing the high recidivism rates of youthful offenders); INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, JUVENILE JUSTICE ADMINISTRATION 32 (1973); B. WOOTTON, SOCIAL SCIENCE AND SOCIAL PATHOLOGY 136, 158-59 (1959). In THE CHILDREN'S BUREAU, U.S. DEP'T. HEW JUVENILE COURT STATISTICS (1974) it was reported that one-third of all delinquency cases involved repeat offenders; in the District of Columbia the figure has reached 60%. In 1967, over 25% of the cases involved juveniles who had been previously referred to the court three or more times. 1 STANFORD RESEARCH INSTITUTE, A DESCRIPTION OF ACTIVE JUVENILE OFFENDERS IN THE DISTRICT OF COLUMBIA, JUVENILE OFFENDERS 7 (1966).

States Constitution,¹ and in those claims arising out of article 2, section 4 of the Arizona Constitution,² inquiry is directed initially toward the presence or absence of state action.³ Where wholly private conduct is in issue, the protections afforded by these provisions are inapplicable.⁴

The Arizona Supreme Court most recently considered the state action issue in *Niedner v. Salt River Project Agricultural Improvement and Power District*.⁵ In *Niedner*, the court held that the district's discharge of an employee without notice or opportunity to be heard was a purely private act and did not involve state action.⁶ As a result, the termination action fell outside the purview of the due process provisions of the federal and state constitutions.⁷

After being employed by the Salt River Project as Supervisor of Revenue Receipts for seven years⁸ George Niedner was fired in 1972.⁹ He was neither given notice of the grounds for the discharge nor an opportunity to be heard.¹⁰ Niedner filed suit against the Salt River Project, alleging violation of the due process provision of the Arizona Constitution and the due process and equal protection clauses of the fourteenth amendment to the United States Constitution.¹¹ The Salt River Project's motion to dismiss for failure to state a claim was granted by the trial court.¹² On appeal, the Arizona Supreme Court affirmed the judgment.¹³

This article will initially examine the reasoning of the *Niedner* court and the authority relied upon by it. The origin and development of state action as defined by the United States Supreme Court and other federal courts will then be examined. The history of the development of the Salt River Project Agricultural Improvement and Power District will also be considered. Finally, the *Niedner* decision will be analyzed in light of state action standards, as well as Arizona cases that have considered the nature of the district's functions.

1. U.S. CONST. amend. XIV provides in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. ARIZ. CONST. art. 2, § 4 provides: "No person shall be deprived of life, liberty, or property without due proces of law."

3. See, e.g., *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349-50 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972).

4. See cases cited note 3 *supra*.

5. 121 Ariz. 331, 590 P.2d 447 (1979).

6. *Id.* at 333, 590 P.2d at 449.

7. *Id.*

8. Record on Appeal at 1, 2, *Niedner v. Salt River Project Agricultural Improvement and Power Dist.*, 121 Ariz. 331, 590 P.2d 447 (1979).

9. 121 Ariz. at 332, 590 P.2d at 448.

10. *Id.*

11. *Id.*

12. *Id.* at 331-32, 590 P.2d at 447-48.

13. *Id.* at 333, 590 P.2d at 449.

The Reasoning of the Niedner Court

In holding that "the District's termination practices cannot be fairly characterized as state action,"¹⁴ the *Niedner* court initially noted the district's constitutionally and legislatively authorized status as a municipality.¹⁵ The court stated, however, that the district's sovereign powers are limited, and that it is primarily a business corporation with only incidental attributes of sovereignty.¹⁶ The court emphasized that the district does not pay its employees from the public treasury, nor is the district publicly owned.¹⁷ Employment is a business activity of the district.¹⁸ On the basis of these facts, the court ruled that the "regulated entity" nexus test articulated by the United States Supreme Court in *Jackson v. Metropolitan Edison Co.*¹⁹ was not satisfied: "[I]t has not been shown that the State regulates the termination procedures of the District and, in fact, no claim is made that there is a direct connection between Niedner's termination and the State."²⁰ Thus, the Arizona court declared the district a "regulated entity," with a purely private impetus for its alleged unconstitutional conduct.²¹ Whether this conclusion is correct depends in part upon an understanding of the state action concept as it has developed in the federal courts.

State Action: Historical Development in the Federal Courts

The decision of the United States Supreme Court in the *Civil Rights Cases*²² established the state action-private action dichotomy.²³ The Court stated that the fourteenth amendment regulates actions of the states, but not actions by private persons.²⁴ Sections 1 and 2 of the Civil Rights Act of March 1, 1875²⁵ were held void because they, by the

14. *Id.*

15. *Id.* at 332, 590 P.2d at 448.

16. *Id.*

17. *See id.* at 332-33, 590 P.2d at 448-49.

18. *Id.*

19. 419 U.S. 345 (1974). See text & notes 43-50 *infra*.

20. 121 Ariz. at 333, 590 P.2d at 449.

21. *See id.*

22. 109 U.S. 3 (1883).

23. *Id.* at 13, 17-18. The *Civil Rights Cases* involved a consolidation of cases involving alleged criminal and civil violations of the Civil Rights Act of 1875. The plaintiffs claimed that the defendants, four persons, and a railroad, denied them the accommodations of hotels, theaters, and instrumentalities of transportation. *See id.* at 7-9. The majority opinion, written by Justice Bradley, analyzed congressional power to legislate pursuant to § 5 of the fourteenth amendment. The Court noted that § 1 of the fourteenth amendment is a prohibition on state action. *Id.* at 10. Congress is not authorized to enact a code of positive law, but may only provide modes of redress against unconstitutional state law. *Id.* at 11-12. The first two sections of the Civil Rights Act of March 1, 1875 were declared void, since they were predicated not on a state's violation of the fourteenth amendment, but on purely private conduct. *Id.* at 14.

24. *Id.* at 11. The Court observed that "[i]t is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment." *Id.*

25. Civil Rights Act of March 1, 1875, ch. 114, §§ 1 & 2, 18 Stat. 335-36 (repealed 1883).

statutory language, prohibited racial discrimination at "inns, public conveyances on land or water, theaters, and other places of public amusement," irrespective of whether such discrimination was mandated by the state.²⁶ Thus, the Court concluded that a purely "private" act can not be regulated by the strictures of the fourteenth amendment.²⁷

In *Burton v. Wilmington Parking Authority*,²⁸ the Court broadened the scope of state action with respect to nominally private activity. In *Burton*, a parking garage was owned and operated by the Wilmington Parking Authority, "a public body corporate and politic, exercising public powers of the State as an agency thereof,"²⁹ and created pursuant to Delaware statute.³⁰ The authority leased space in the parking facility to a private restaurant.³¹ A black patron was refused service by the restaurant because of his race, and an equal protection claim ensued.³² The Supreme Court focused on the interdependent nature of the relationship between the restaurant and the authority. The Court noted that the restaurant's improvements to the property enjoyed the authority's tax-exempt status.³³ The leasehold was an integral part of a state-planned self-sustaining unit,³⁴ and the proximity of the restaurant and garage increased the demand for the services of both facilities.³⁵ The Court found state action, but disclaimed universal application of its analysis,³⁶ stating that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."³⁷

The Supreme Court also considered the state action question in *Moose Lodge No. 107 v. Irvis*.³⁸ A black guest of a white member was

26. 109 U.S. at 13, 25-26.

27. *Id.* at 13, 17-18.

28. 365 U.S. 715 (1961).

29. *Id.* at 717 (quoting DEL. CODE ANN. tit. 22, § 504(a)(1974)).

30. The enabling legislation for the creation of such parking authorities is found in DEL. CODE ANN. tit. 22, §§ 501-515 (1974). A number of these provisions are particularly relevant in the context of federal state action law development, and in comparison with the Salt River Project's enabling legislation, ARIZ. REV. STAT. ANN. §§ 45-901 to -1075 (1956 & Supp. 1979-80), discussed in text & notes 69, 76-81 *infra*.

Important in connection with the *Burton* Court's analysis is DEL. CODE ANN. tit. 22, § 504(a) (1974) which provides the parking authority with the power to lease space in and above the parking facility for commercial uses other than parking. Such parking authorities also have the power of eminent domain, *id.* § 504 (b)(12), and are exempt from property taxation. *Id.* § 514.

31. 365 U.S. at 716.

32. *Id.* at 716, 720.

33. *Id.* at 719. See note 30 *supra*.

34. 365 U.S. at 723-24.

35. See *id.* at 724.

36. "Because readily applicable formulae may not be fashioned, the conclusion drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested." *Id.* at 725.

37. *Id.* at 722.

38. 407 U.S. 163 (1972).

refused service in the Moose Lodge solely on the basis of race.³⁹ State action was predicated upon the fact that by issuing the lodge a private club license, the Pennsylvania Liquor Control Board had authorized liquor sales on the premises.⁴⁰ The Court held that the liquor board's regulatory scheme did not "sufficiently implicate the State in the discriminatory guest policies of Moose Lodge to make the latter 'state action' within the ambit of the Equal Protection Clause of the Fourteenth Amendment."⁴¹ The Court noted that "where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations, . . . in order for the discriminatory action to fall within the ambit of the constitutional prohibition."⁴²

The Supreme Court recently considered the state action question in *Jackson v. Metropolitan Edison Co.*⁴³ *Jackson* involved an extensively regulated, privately owned and operated Pennsylvania utility corporation.⁴⁴ Without notice or hearing, the company discontinued Jackson's service after a year-long feud over billing.⁴⁵ Jackson asserted that the Pennsylvania Public Utilities Commission had approved Metropolitan Edison's general tariff which contained a provision authorizing termination of service upon nonpayment.⁴⁶ Thus, she alleged that the commission had in effect "authorized and approved" Metropolitan Edison's termination practices.⁴⁷ The test applied by the *Jackson* Court to determine the existence of state action was "whether there is a

39. *Id.* at 165.

40. *Id.* at 171.

41. *Id.* at 177. While the Court found that the regulatory scheme in its entirety did not sufficiently implicate Pennsylvania in the private discrimination, the Court observed that one particular liquor control regulation required that "every club licensee shall adhere to all the provisions of its constitution and bylaws." *Id.* Since this regulation invoked state sanctions to enforce private discrimination, the Court enjoined its enforcement with respect to the lodge. *Id.* at 178-79.

42. *Id.* at 173. The Court in this context also discussed the applicability of the state action concept to tenuous state-private entity relationships:

The court has never held, of course that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to State regulation in any degree whatever. *Since State-furnished services include such necessities of life as electricity, water, and police and fire protection*, such a holding would utterly emasculate the distinction between private as distinguished from State conduct set forth in *The Civil Rights Cases* . . . and adhered to in subsequent decisions.

Id. at 173 (emphasis added).

43. 419 U.S. 345 (1974).

44. *Id.* at 345-46.

45. *Id.* at 347.

46. *Id.* at 346-48.

47. *Id.* at 354. The Court considered two other state action arguments proffered by Jackson. Initially, she argued for the presence of state action since the state had conferred a quasi-monopoly status upon Metropolitan Edison. *Id.* at 351. The Court stated that any alleged monopoly status conferred upon the company by the state was not determinative of the presence of state action. *Id.* at 351-52. Moreover, there was "insufficient relationship between the challenged actions of the [entity] involved and [its] monopoly status." *Id.* As to Jackson's argument that Metropolitan Edison Company provides an "essential public service," the Court stated that furnishing utility services was not a function exclusively reserved to the state. *Id.* at 352-53. The Court thus refused to adopt a broad "public function" state action doctrine. *Id.*

sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself."⁴⁸ The Court found that Metropolitan Edison's termination practices were not mandated by state law but were a matter within the utility's discretion.⁴⁹ As a result, Pennsylvania was not sufficiently connected with Metropolitan Edison's decision to terminate Jackson's electrical service to render the conduct state action.⁵⁰

There have been numerous lower federal court interpretations of the recent Supreme Court state action cases.⁵¹ Two of these decisions are particularly relevant to the *Niedner* dispute. *Capers v. Long Island Railroad*⁵² involved a due process claim by a management-level railroad employee.⁵³ The employee contended that he was unconstitutionally denied a hearing prior to his demotion.⁵⁴ In finding state action, the court observed that the Long Island Railroad is a wholly-owned subsidiary of a "public benefit corporation," the Metropolitan Transportation Authority.⁵⁵ The court noted that the railroad is owned by the statutorily-created authority, is subject to the restrictions imposed upon the authority, and enjoys the authority's privileges and immunities.⁵⁶ On the authority of *Burton*, the court found state action in the employment activities of a corporation twice removed from the state and owned by a public service corporation.⁵⁷

In another recent case, the organization of an entity pursuant to state statute, irrespective of the capacity in which the entity functions, was held to constitute state action. In *Handsome v. Rutgers University*,⁵⁸ the university refused to re-register a former student whose stu-

48. *Id.* at 351.

49. *Id.* at 357.

50. *Id.* at 357, 358-59.

51. *See, e.g.*, *Taylor v. Consolidated Edison Co.*, 552 F.2d 39, 46 (2d Cir.) (no state action found in termination of electrical services without a hearing despite statutory authorization to enter premises to effectuate termination), *cert. denied*, 434 U.S. 845 (1977); *New York City Jaycees, Inc. v. United States Jaycees, Inc.*, 512 F.2d 856, 858-59 (2d Cir. 1975) (no state action involved where national organization receiving federal funds and tax exemptions revokes charter of local affiliate of organization); *Kops v. New York Tel. Co.*, 456 F.Supp. 1090, 1094 (S.D.N.Y. 1978) (no state action in regulated entity's refusal to publish attorney advertisement in yellow pages).

52. 429 F.Supp. 1359 (S.D.N.Y.), *aff'd*, 573 F.2d 1291 (1977).

53. *Id.* at 1362.

54. *Id.*

55. *Id.* at 1367 n. 11. The statutory authorization of the authority is contained in the Metropolitan Transportation Authority Act, N.Y. PUB. AUTH. LAW tit. 11, §§ 1260-1278 (McKinney 1970 & Supp. 1979-80). Section 1263 establishes the Metropolitan Transportation Authority as a "body politic" and a "public benefit corporation." The purposes of the authority are to develop and improve commuter transportation for the citizens of New York; such functions are established as "essential governmental functions." *Id.* § 1264(1),(2).

56. 429 F.Supp. at 1367 n. 11.

57. 429 F.Supp. at 1367 n.11, *aff'd*, 573 F.2d 1291 (1977). *See also* text at notes 28-37 *supra*.

58. 445 F.Supp. 1362 (D.N.J. 1978).

dent loans had been duly discharged in a prior bankruptcy proceeding.⁵⁹ When the student advanced an equal protection claim, the university sought to avoid state action by showing that it acts in a proprietary, rather than governmental capacity.⁶⁰ The court rejected the argument, finding the requisite state action on the ground that the university was created pursuant to state statute.⁶¹

As the federal cases illustrate, the presence or absence of state action is contingent upon a proper analysis of all relevant facts, circumstances, and actor-state relationships.⁶² Therefore, before any extensive analysis of the *Niedner* decision may be undertaken, the nature of the Salt River Project Agricultural Improvement and Power District must be examined.

History of the Development of the Salt River Project

The Salt River Project was authorized by the Secretary of the Interior under the Reclamation Act of 1902.⁶³ This legislation provides for a "reclamation fund" to be established in the United States Treasury from the sale of public lands in sixteen Western States.⁶⁴ The funds are to be used for the construction and maintenance of irrigation works for the reclamation of arid and semiarid lands.⁶⁵

On February 9, 1903, in order to secure benefits of water storage, the Salt River Valley Water Users' Association [SRVWUA] was incorporated under the laws of the Territory of Arizona.⁶⁶ Subsequently, a conflict developed between the SRVWUA and the Federal Reclamation Service, which administered and operated the Salt River reclamation project.⁶⁷ This conflict resulted in a contract between the United States and the SRVWUA, which vested in the SRVWUA the operation, maintenance, and control of the irrigation system, as well as the

59. *Id.* at 1363-64.

60. *Id.* at 1367 n.7.

61. *Id.* *But cf.* *Sherman v. City of Pasadena*, 367 F. Supp. 1115, 1118 (C.D. Cal. 1973) (city's termination of employee is not "under color of law," since the city *qua* employer is acting in a proprietary, not governmental, capacity).

62. See cases cited notes 3, 51 *supra*.

63. D. MANN, *THE POLITICS OF WATER IN ARIZONA* 133 (1963); *The Reclamation Act*, ch. 1093, §§ 1-10, 32 Stat. 388-90 (1902) (codified at 43 U.S.C. §§ 371-573 (1976)).

64. 43 U.S.C. § 391 (1976) provides for the establishment of a reclamation fund from public land sales in the states of Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. *Id.*

65. *Id.* § 419. Pursuant to the Reclamation Act, the Secretary of the Interior is authorized to enter into the necessary contracts for the construction and completion of "practicable" projects, *id.*, and to provide for the return of the reclamation fund disbursements from per-acre charges on irrigated lands. *Id.* § 461. Title to irrigation works financed in this manner remains in the Federal Government. *Id.* § 491.

66. C. SMITH, *THE SALT RIVER PROJECT: A CASE STUDY IN CULTURAL ADAPTATION TO AN URBANIZING COMMUNITY* 15 (1972).

67. *Id.* at 16.

assumption of the reclamation fund-financed construction charges.⁶⁸

Acting pursuant to enabling legislation passed in 1922,⁶⁹ the SRVWUA created the Salt River Project Agricultural Improvement and Power District on January 25, 1937.⁷⁰ Shortly after the district's creation, the SRVWUA transferred all corporate properties to the district; the SRVWUA, however, retained the maintenance and operation of all electrical generation and irrigation facilities.⁷¹ Three years later, an amendment to the Arizona Constitution granted agricultural improvement and other districts full constitutional status as political subdivisions of the state.⁷²

As a result of an IRS tax challenge, the SRVWUA in 1949 transferred the administration and operation of the power facilities to the district.⁷³ This action created the almost complete division that exists today. The district (a political subdivision and municipal corporation) owns all properties of the project and operates, maintains, and administers the electricity generation service.⁷⁴ The SRVWUA (a private corporation) operates, maintains, and administers the irrigation works.⁷⁵

The Arizona statute describes the district as a political, taxing subdivision of the state, which exercises all powers and enjoys all privileges granted to municipal corporations, including tax immunity of its property and bonds.⁷⁶ All aspects of the district's organization and power are governed by statute.⁷⁷ State law defines the petitioning and notice requirements for organization,⁷⁸ the terms of office and compensation to which elected members of the board of directors are entitled,⁷⁹ and the powers of the board.⁸⁰ By statute the district has the right of emi-

68. *Orme v. Salt River Valley Water Users' Assoc.*, 25 Ariz. 324, 330-31, 217 P. 935, 937-38 (1923).

69. 1922 Ariz. Sess. Laws 59-83 (currently codified at ARIZ. REV. STAT. ANN. §§ 45-901 to -1075 (1956 & Supp. 1979-80)).

70. C. SMITH, *supra* note 66, at 17.

71. *Uhlmann v. Wren*, 97 Ariz. 366, 379, 401 P.2d 113, 121 (1965). *See also* C. SMITH, *supra* note 66, at 17.

72. ARIZ. CONST. art. 13, § 7 as amended, provides in part:

[A]gricultural improvement . . . districts, now or hereafter organized pursuant to law, shall be political subdivisions of the State, and vested with all the rights, privileges and benefits, and entitled to the immunities and exemptions granted municipalities and political subdivisions under this Constitution or any law of the State or of the United States

. . . .

Id.

73. C. SMITH, *supra* note 66, at 17.

74. SALT RIVER PROJECT, 1978 ANNUAL REPORT, inside front cover.

75. *Id.*

76. ARIZ. REV. STAT. ANN. § 45-902 (1956).

77. *See, e.g., id.* §§ 45-901 to -915 (formation), §§ 45-931 to -941 (administration), §§ 45-961 to -968 (alternate form of administration), §§ 45-981 to -992 (district elections) (1956 & Supp. 1979-80).

78. *Id.* § 45-904.

79. *Id.* §§ 45-931, -932.

80. *Id.* § 45-934. This section authorizes the board to manage the district's affairs, including the making of all necessary contracts, the payment of district debt, the employment of engineers,

ment domain.⁸¹

The foregoing discussion of the district's development tends to expose the district as a protected, yet powerful arm of the State of Arizona in its operation as a political subdivision. The *Niedner* court, however, reached a contrary conclusion. The reasoning utilized by the court in arriving at its decision will be considered in the next section.

Analysis of the Niedner State Action Doctrine

As has been indicated, the Salt River Project Agricultural Improvement and Power District is a municipal corporation and a political subdivision of the State of Arizona.⁸² Generally, municipalities possess and can exercise only those powers granted in express terms. If no such express grant is found, however, municipal power may be established by implication from the express terms, or the power may be established as being essential to the accomplishment of the declared objectives of the municipality.⁸³

The Arizona Supreme Court considered the nature of the district as a municipal corporation in *Local 266, International Brotherhood of Electrical Workers v. Salt River Project Agricultural Improvement and Power District (IBEW)*.⁸⁴ The *IBEW* court considered whether the district had the power to enter into binding collective bargaining agreements with organized labor, and whether its employees had the power to strike to enforce such agreements.⁸⁵ The district asserted its municipal status, contending that it was powerless to enter into collective bargaining negotiations, because to do so would constitute an improper delegation of a government agency's authority to control its internal operations.⁸⁶ The court noted that the district was not expressly granted the power to employ, but declared that the "authorization to do business in itself implies the necessity of hiring labor."⁸⁷ From a stat-

and the establishment of bylaws, rules, and regulations. *Id.* Beyond the foregoing administrative powers, the "general powers," defined by § 45-935, relate primarily to the acquisition, disposition, and pledging of district property. The "additional powers" defined by § 45-936, relate to the board's powers to contract and issue bonds.

81. *Id.* § 45-939.

82. ARIZ. CONST. art. 13, § 7; ARIZ. REV. STAT. ANN. § 45-902 (1956). *See also* text & notes 72, 76-81 *supra*.

83. *City of Glendale v. White*, 67 Ariz. 231, 234, 194 P.2d 435, 437 (1948). *See City of Mesa v. Salt River Project Agricultural Improvement and Power Dist.*, 92 Ariz. 91, 97, 373 P.2d 722, 726 (1962); *Local 266, International Bhd. of Electrical Workers v. Salt River Project Agricultural Improvement and Power Dist.*, 78 Ariz. 30, 38, 275 P.2d 393, 398 (1954); *Town of Holbrook v. Nutting*, 57 Ariz. 360, 362, 114 P.2d 226, 226-27 (1941).

84. 78 Ariz. 30, 275 P.2d 393 (1954).

85. *Id.* at 33, 275 P.2d at 395.

86. *Id.* at 35, 275 P.2d at 396-97.

87. *Id.* at 38, 275 P.2d at 399. The court began its analysis by noting that ARIZ. CONST. art. 13, § 7 conferred municipal status on the district. 78 Ariz. at 34-35, 275 P.2d at 396. The court went on to state that it had "consistently recognized" the district as a municipality since the constitutional amendment. *See id.* at 35, 275 P.2d at 396. Thus, the court framed the issue as "whether

ute that permitted the district's directors to enter into contracts⁸⁸ the court implied a state-conferred power to hire labor and to enter collective bargaining agreements.⁸⁹

As to the employees' power to strike to enforce the collective bargaining agreement, the court, after finding no statutory denial of such power, resolved the question by examining public policy and necessity.⁹⁰ In so doing, the court determined that the district's employees are not traditionally-defined public employees.⁹¹ It also stated that the district itself is essentially a business corporation with incidental attributes of sovereignty conferred to enable it to accomplish the economic purposes for which it was organized.⁹² Finding this construction of the district's status "compelling," under its statutory authorization,⁹³ the court held that public policy considerations confirmed the right of the

the statutory provisions which define and authorize such districts to exist intend to deny the District the power of entering into such agreements with its employees." *Id.* at 38, 275 P.2d at 398. In noting that the district's board of directors was given the administrative power "to make and execute all necessary contracts" (ARIZ. REV. STAT. ANN. § 45-934 (1956)), the court stated that if the board finds an agreement with its employees "necessary" then it has the power to so bind the district. *Id.* at 39, 275 P.2d at 399.

88. ARIZ. CODE ANN. § 75-714 (1939) (current version at ARIZ. REV. STAT. ANN. §§ 45-934, 935 (1956 & Supp. 1979-80)).

89. 78 Ariz. at 39, 275 P.2d at 399.

90. *Id.* at 40-41, 275 P.2d at 400.

91. *Id.* at 42, 275 P.2d at 401. The court stated: "To say that the employees of the District herein are actually 'public employees' is not the province of this court but a matter for the legislature." *Id.*

92. *Id.* at 43, 275 P.2d at 402. The court borrowed this language from *Taylor v. Roosevelt Irrigation Dist.*, 72 Ariz. 160, 163, 164, 232 P.2d 107, 109, 110 (1951), *aff'd on rehearing*, 71 Ariz. 254, 226 P.2d 154 (1950). In *Taylor*, the district asserted governmental immunity from tort liability because of its municipal status. *Taylor v. Roosevelt Irrigation Dist.*, 71 Ariz. 254, 256-57, 226 P.2d 154, 155 (1950) *aff'd on rehearing*, 72 Ariz. 160, 232 P.2d 107 (1951). In concluding that the district's activities at issue were proprietary, rather than governmental, the court explained:

[W]e experience no difficulty in determining that the appellee corporation is in essence a business corporation and that such attributes of sovereignty as have been conferred upon it are only incidental and were conferred for the purpose of better enabling it to function and accomplish the business and economic purposes for which it was organized.

72 Ariz. at 164, 232 P.2d at 110.

Thus, this "incidental sovereignty" characterization of the Roosevelt Irrigation District was proffered in the context of a determination of its "proprietary" functions for purposes of delineating its negligence liability. This characterization was subsequently attached to the Salt River Project in *IBEW*. 78 Ariz. at 43, 275 P.2d at 402.

The proprietary-governmental function distinction had its origin in tort law, for the purpose of determining the tort liability of governmental units. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 131, 977-84 (4th ed. 1971). Basically, this doctrine holds municipal corporations immune from tort liability when engaging in certain functions denominated "governmental" yet holds them liable for torts committed while acting in a "proprietary" capacity. *Id.* at 977-78.

The doctrine of sovereign immunity from tort liability was abrogated in Arizona in *Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 387, 381 P.2d 107, 109 (1963). Thus, the *Taylor* "incidental sovereignty" characterization is no longer relevant. The courts need no longer search for the "proprietary functions" of decidedly municipal corporations. The *Niedner* court, however, utilized this discredited and irrelevant tort doctrine characterization in a totally different context: the issue of the presence of state action. The state action concept is less interested in *how* an entity functions than in the *nature* of the functioning entity itself. See discussion in text & notes 60-63 *supra*.

93. 78 Ariz. at 43, 275 P.2d at 402.

project's employees to peacefully strike.⁹⁴ Thus, to resolve the dispute between the district and its employees, the court analyzed the scope and nature of the district's state-conferred municipal powers.

Bound as in *IBEW* by the general rules regarding the power of a municipality, the court in *City of Mesa v. Salt River Project Agricultural Improvement and Power District*⁹⁵ considered conflicting statutory authorizations respecting the city and the district.⁹⁶ Mesa had annexed an area of land where the district had traditionally supplied electricity.⁹⁷ Following annexation, the city sought to serve the area with electricity pursuant to a statute providing city councils with exclusive control over the municipal infrastructure.⁹⁸ The district sought to retain its service on the basis of a statute permitting the district to sell electricity in order to reduce irrigation costs.⁹⁹ The court noted that the district's statutorily authorized use of the public ways is protected as property under the Arizona Constitution and held that the city could not oust the district from the annexed area without just compensation.¹⁰⁰ The city had prior right in part because of its "exclusive" statutory reservation and because of its "more necessary public use" of the right-of-way.¹⁰¹ Thus, as in *IBEW*, the *City of Mesa* court resolved the conflict through an examination of the district's municipal powers.

The analysis of the Arizona Supreme Court in both *IBEW* and *City of Mesa* confirms that the Salt River Project Agricultural Improvement and Power District, however pervasive its statutorily authorized business and economic functions, remains a municipality and political subdivision of the state.¹⁰² Because of this status, the analysis in the two cases was directed primarily to the source of the authority for the district's actions. The Arizona Supreme Court in both cases was constrained by the long-established rule that municipalities cannot exercise any power not expressly or impliedly conferred upon them by the legislature.¹⁰³ The characterization of the district as an entity assumed importance only when the court was unable to find explicit statutory authority for its actions,¹⁰⁴ and when the district's authority conflicted

94. *Id.* at 44, 275 P.2d at 403.

95. 92 Ariz. 91, 373 P.2d 722 (1962).

96. *Id.* at 98, 373 P.2d at 727.

97. *Id.* at 96-97, 373 P.2d at 726.

98. *Id.* at 97, 98, 373 P.2d at 726, 727; see ARIZ. REV. STAT. ANN. § 9-240(B)(3)(a) (1977).

99. 92 Ariz. at 98, 373 P.2d at 727; see ARIZ. REV. STAT. ANN. § 45-936 (A)(4) (1956).

100. 92 Ariz. at 100, 373 P.2d at 728.

101. *Id.* at 104, 373 P.2d at 731.

102. Local 266, International Bhd. of Electrical Workers v. Salt River Project Agricultural Improvement and Power Dist., 78 Ariz. 30, 34-35, 275 P.2d 393, 396 (1954); *City of Mesa v. Salt River Project Agricultural Improvement and Power Dist.*, 92 Ariz. 91, 97, 373 P.2d 722, 726 (1962).

103. *IBEW*, 78 Ariz. at 38, 275 P.2d at 398; *City of Mesa*, 92 Ariz. at 97, 373 P.2d at 726. See also text at notes 82-83 *supra*.

104. Local 266, International Bhd. of Electrical Workers v. Salt River Project Agricultural

with that of another municipality.¹⁰⁵ Thus, the impetus for the district's actions does not result from any status as a private entity, but finds its roots in the powers conferred upon it by the state.¹⁰⁶

In addition to an examination of the source of the district's power, an analysis of the *Niedner* state action doctrine must include a discussion of the nature of the district as an entity. This discussion assumes importance in connection with the propriety of the *Niedner* court's application of its test for state action, and in relation to the foregoing analysis of the impetus for the district's actions. Emerging from this discussion is the inescapable conclusion that state action was indeed present in the district's termination of *Niedner's* employment, and that the *Niedner* court applied an inapplicable state action standard.

The *Niedner* court, in applying the state action test articulated by the United States Supreme Court in *Jackson v. Metropolitan Edison Co.*,¹⁰⁷ in effect characterized the district as a "regulated entity,"¹⁰⁸ the status ascribed to the Metropolitan Edison Company in *Jackson*.¹⁰⁹ Pursuant to Arizona law, "public service corporations" are essentially "regulated entities" as defined by the *Jackson* Court.¹¹⁰ The Arizona Constitution defines "public service corporations" as all corporations, other than municipal corporations, which are engaged in furnishing utility services.¹¹¹ Such public service corporations are subject to Arizona Corporation Commission regulation¹¹² and must secure from the commission a "certificate of public convenience and necessity," prior to commencing operations.¹¹³ The Salt River Project, however, is not subject to regulation by the Arizona Corporation Commission.¹¹⁴

The Arizona Supreme Court in 1953 considered whether the dis-

Improvement and Power Dist., 78 Ariz. at 40-41, 43-44, 275 P.2d at 400, 402-03 (public policy does not deny the power of the district's employees to strike to enforce collective bargaining agreements, given finding that there is no applicable statutory denial thereof).

105. *City of Mesa v. Salt River Project Agricultural Improvement and Power Dist.*, 92 Ariz. at 97-98, 104, 373 P.2d at 726-27, 731 (city has power to oust district from incorporated city limits).

106. *Cf. Taylor v. Consolidated Edison Co.*, 552 F.2d 39, 43 (2d Cir. 1977) (where a private party deprives rights at a state's express direction, it is subject to fourteenth amendment regulation).

107. See text at note 48 *supra*.

108. 121 Ariz. at 333, 590 P.2d at 449.

109. *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 350-51 (1974).

110. ARIZ. CONST. art. 15, § 2; ARIZ. REV. STAT. ANN. §§ 40-201 to -442 (1974 & Supp. 1979-80). In *Jackson*, the Court noted that the Metropolitan Edison Company is a privately owned and operated Pennsylvania corporation, subject to regulation by the Pennsylvania Public Utility Commission [PUC], and must obtain a certificate of public convenience prior to operation. 419 U.S. at 346, 351 n.8. This regulation extends to public notice and PUC approval requirements prior to rate changes. *Id.* at 346 n.1. Thus, the Court looked for the "sufficiently close nexus" between the State of Pennsylvania and the termination practices of the Metropolitan Edison Company—the "regulated entity."

111. ARIZ. CONST. art. 15, § 2.

112. ARIZ. CONST. art. 15, § 3; ARIZ. REV. STAT. ANN. § 40-202 (1974).

113. ARIZ. REV. STAT. ANN. § 40-281(A) (1974).

114. *City of Mesa v. Salt River Project Agricultural Improvement and Power Dist.*, 92 Ariz. 91, 97, 373 P.2d 722, 726 (1962).

tract was a "public service corporation"—a regulated entity—for purposes of a statute that prohibited charging utility service connection fees in *Rubenstein Construction Co. v. Salt River Project Agricultural Improvement and Power District*.¹¹⁵ The court rejected such a characterization.¹¹⁶ In *Rubenstein*, the district was sued for exacting a twenty-five dollar per unit electricity connection charge from Rubenstein Construction Company for five hundred dwellings the company had constructed.¹¹⁷ The district contended that the connection charge statute was inapplicable because of its status as a municipal corporation.¹¹⁸ The *Rubenstein* court noted that the district "is either at all times a political subdivision of the state, or it never is."¹¹⁹ Thus, the court rejected Rubenstein's contention that when municipal corporations operate in a proprietary capacity, they lose their municipal status and become "public service corporations," for purposes of the statute.¹²⁰

In view of these prior Arizona Supreme Court decisions, *Niedner* was wrongly decided. The *Niedner* court, in applying the *Jackson* "regulated entity" nexus test, in effect declared that the district is akin to a regulated "public service corporation." This conclusion flies in the face of the precedent established in *Rubenstein* and *City of Mesa*. Since "differences in circumstances beget differences in law,"¹²¹ it would seem that the *Moose Lodge* and *Jackson* tests, formulated in the context of purely private entities subject to some state regulation, are inapplicable where a political subdivision of a state is involved.

Because the Salt River Project is a municipality authorized by statute, the *Burton* "joint participation" theory would seem to apply.¹²² The municipal district as a corporation may be likened to the Wilming-

115. 76 Ariz. 402, 403, 265 P.2d 455, 455-56 (1953).

116. *Id.*

117. *Id.* at 402-03, 265 P.2d at 455.

118. *Id.* at 403, 265 P.2d at 455.

119. *Id.* at 404, 265 P.2d at 456.

120. *Id.* It is immaterial for state action purposes whether the municipal corporation acts pursuant to its legislative authorization in a predominantly proprietary capacity, rather than in a governmental capacity. The focus of the state action issue is upon the actions and nature of the functioning entity. This was brought out most clearly in *Capers v. Long Island R.R.*, 429 F. Supp. 1359 (S.D.N.Y. 1977), where state action was found in the employment activities of a subsidiary of a public transportation authority. *Id.* at 1367 n.11. See text & notes 52-57 *supra*. Likewise, the court in *Handsome v. Rutgers University*, 445 F.Supp. 1362 (D.N.J. 1978) focused attention on the nature of the university, and not on any particular characterization of its functions. *Id.* at 1367 n.7. See discussion text & notes 58-61 *supra*.

121. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358 (1974) (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 726 (1961)).

122. See discussion text & notes 28-37 *supra*. The *Burton* Court noted that "[t]he State has so far insulated itself into a position of interdependence with Eagle [Coffee Shoppe] that it must be recognized as a joint participant in the challenged activity which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." 365 U.S. at 725. This theory seems applicable to *Niedner* in that all powers of the district (including the power to employ) must be conferred upon it by the State of Arizona, due to the district's constitutional status.

ton Parking Authority, and the circumstances of Niedner's discharge may be likened to the discriminatory actions of the authority's private corporate lessee. Thus, because of the extremely interdependent nature of the discharge and the status of the district, state action should have been found.

Conclusion

A significant constitutional distinction exists between a "municipality," with a governmental impetus for its actions, and a purely private "regulated entity." The Arizona Supreme Court in *Niedner* directly applied the *Jackson* test and found no state regulation of the Salt River Project's employment practices. Thus, the court defined the district as a regulated private entity. This analysis is flawed, because it fails to acknowledge the governmental nature of the district's actions. The *Niedner* court was incorrect in concluding that since the district engages primarily in activities of an economic or business nature, the discharge of Niedner implied no state action. An arm of the state is always an arm, irrespective of how its muscles are flexed.

Jeffrey R. Parker

C. TIMELINESS OF PUBLIC EMPLOYEE DISMISSAL HEARINGS

Public employment has historically been considered a privilege rather than a right.¹ Recently, the right-privilege dichotomy² has been abrogated in many areas of government enterprise,³ including public employment,⁴ with the result that particular government employees may be deemed to have a property right in their employment worthy of procedural protection.⁵ If it is found that a public job constitutes prop-

1. See generally *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided court*, 341 U.S. 918 (1951); *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892); *Van Alstyne, Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977).

2. The right-privilege dichotomy refers to the notion that due process applies only to the deprivation of "rights." See *Van Alstyne, supra* note 1, at 445-46. According to this notion, mere "privileges" bestowed by government, such as welfare, public education, and government employment, can be given and taken away by the government free of constitutional limitations. *Id.*

3. See, e.g., *Goss v. Lopez*, 419 U.S. 565, 572-74 (1975) (public education); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (parole release); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (welfare benefits).

4. See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967).

5. See, e.g., *Arnett v. Kennedy*, 416 U.S. 134, 151-52 (1974); *Perry v. Sindermann*, 408 U.S. 593, 602-03 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972). See generally *Looney, Expected Continued Employment as a Protected Property Right*, 22 LOYOLA L. REV. 884 (1976).

erty, a public employee may not be discharged unless he is afforded procedural due process.⁶

The fundamental requirements of procedural due process are notice of the proposed deprivatory action and an opportunity to be heard at a meaningful time and in a meaningful manner.⁷ The timing aspect of the requirement of a meaningful opportunity to be heard in the public employment context was recently considered by the Arizona Supreme Court in *Roberts v. City of Tucson*.⁸ In *Roberts*, the court conceded that a public employee has a property right in his employment,⁹ but held that a termination hearing prior to discharge of an employee is not constitutionally required.¹⁰

Mr. Roberts was employed as a recreation administrator for the Tucson Parks and Recreation Department.¹¹ Having occupied this position for over one year, Roberts had attained the status of a permanent (as opposed to probationary) employee under the Tucson Civil Service Commission ordinances.¹² In February, 1976, as the result of a conflict with his supervisor, Roberts agreed to submit his resignation in exchange for a promise that his resignation would not be processed until May and that a favorable letter of recommendation would be written for him.¹³ Alleging that both promises had been broken, Roberts later withdrew his resignation.¹⁴ He was then informed that he was terminated, effective the following day.¹⁵ Roberts subsequently filed a timely notice of appeal.¹⁶

Roberts received a posttermination hearing before the Tucson Civil Service Commission,¹⁷ which upheld the termination.¹⁸ The tim-

6. See *Arnett v. Kennedy*, 416 U.S. 134, 164-66 (1974) (Powell, J., concurring); *id.* at 185 (White, J., concurring and dissenting); *id.* at 211 (Marshall, J. dissenting). In *Arnett*, six justices agreed that procedural due process applied to the discharge of a nonprobationary federal civil service employee. See *Perry v. Sindermann*, 408 U.S. 593, 602-03 (1972).

7. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

8. 122 Ariz. 91, 593 P.2d 645 (1979).

9. *Id.* at 92, 593 P.2d at 646.

10. *Id.* at 93, 593 P.2d at 647. Three justices joined the majority opinion; two justices dissented.

11. *Id.* at 91, 593 P.2d at 645.

12. *Id.* at 92, 593 P.2d at 646. See TUCSON, ARIZ. CODE §§ 10-3(20)(2), 10-3(24), 10-10(7)(1964). A civil service employee appointed to a permanent position must successfully complete a probationary or trial working period of one year before acquiring the status of a "permanent employee." *Id.* § 10-3(24). A "permanent employee" is one who has been given a permanent appointment upon completion of the probationary period. *Id.* § 10-3(20)(2). The significance of the distinction between probationary and permanent employees lies in the Tucson Charter, which provides that employees who have served through the probationary period "shall not be removed" without just cause. TUCSON, ARIZ. CHARTER, ch. XXII, § 3(c) (1964).

13. Brief for Appellant at 2, *Roberts v. City of Tucson*, 122 Ariz. 91, 593 P.2d 645 (1979).

14. *Id.*

15. *Id.*

16. *Roberts v. City of Tucson*, 122 Ariz. 125, 126, 593 P.2d 679, 680 (Ct. App. 1978), *aff'd*, 122 Ariz. 91, 593 P.2d 645 (1979).

17. *Id.* at 127, 593 P.2d at 681.

18. *Roberts v. City of Tucson*, 122 Ariz. 91, 91, 593 P.2d 645, 645 (1979).

ing of the hearing and decision were in violation of the Tucson Charter¹⁹ and the Tucson Civil Service Commission Rules and Regulations,²⁰ which at the time of Roberts' discharge required a hearing within thirty days of filing of the appeal and a decision within forty-five days of receipt of the termination notice.²¹ After the commission upheld the termination, Roberts filed a petition for special action, alleging a violation of the Commission Rules, City Charter, and City Code, and demanding reinstatement and back pay.²² The Superior Court denied relief, thus acquiescing in a four-month delay between the notice of termination and the final Commission decision.²³ Both the Court of Appeals²⁴ and the Supreme Court²⁵ upheld the termination.

This casenote will initially consider the procedural due process requirements established by the United States Supreme Court. The manner in which the Arizona courts have balanced the government and individual interests involved, resulting generally in denial of public employees' requests for pretermination hearings, will be examined. Finally, the Arizona Supreme Court's failure in *Roberts* to enforce strict compliance with the administrative requirements for a posttermination

19. TUCSON, ARIZ. CHARTER, ch. XXII, § 3(c) (1964) provides in pertinent part:

The civil service commission shall by rules and regulations provide for an appeal by the employee, a fair and impartial hearing of said appeal, and the rendering of a decision thereon within 45 days after receipt of such notice and reasons from the employing officers when an appeal is heard.

20. TUCSON, ARIZ. CIVIL SERVICE COMM. RULES & REGS., RULE XII, § 4(a)(d) (1974) provides in pertinent part:

Section 4. Appeal from Suspension, Demotion & Discharge

(a) A permanent employee who has been suspended, demoted, or reduced in pay or position, or discharged . . . shall have the right of appeal to the Commission. Such appeal shall be . . . filed with the Director not later than ten calendar days after the receipt by the employee of notice of the appointing officer's action . . . The Director shall . . . fix a time and place for the holding of a hearing thereon and notify all parties thereto at least five calendar days prior to such date. Such hearing shall be held within thirty calendar days after receipt of the appeal . . .

(d) Within forty-five calendar days after receipt by the employee of the appointing officer's action the Commission shall make its decision which shall consist of written findings of fact and its order for the disposition of the case . . . If the Commission orders the employee involved reinstated to his former status, it shall specify as a part of its decision whether he shall receive back pay for all or part of any time lost as a result of the appointing officer's action.

Id.

21. See notes 19-20 *supra*. RULE XII § 4(a) was amended in 1977 to read: "Such hearing on appeal shall be held within forty-five calendar days after receipt of the appeal." The remainder of the rule was not changed. The amendment did not affect Roberts' status, since he was terminated in May, 1976.

22. *Roberts v. City of Tucson*, 122 Ariz. 91, 91, 593 P.2d 645, 645 (1979).

23. *Id.*

24. *Roberts v. City of Tucson*, 122 Ariz. 126, 130, 593 P.2d 679, 684 (Ct. App. 1978).

25. *Roberts v. City of Tucson*, 122 Ariz. 91, 93, 593 P.2d 645, 647 (1979). The supreme court vacated that portion of the court of appeals' opinion dealing with pretermination hearings. The supreme court adopted the lower court's opinion as to all other issues. *Id.*

hearing, while simultaneously denying the employee a pretermination hearing, will be analyzed.

Constitutional Procedural Due Process Requirements

Procedural due process sets the conditions that must be met by the government before an individual can be deprived of life, liberty, or property.²⁶ This aspect of due process stems from the notion that individual freedom can be ensured only when procedural safeguards are imposed to guard against arbitrary government action.²⁷

The Supreme Court has adopted an instrumental approach to procedural due process.²⁸ This approach emphasizes the accuracy of, rather than individual participation in, governmental decisionmaking.²⁹ Due process thus requires the use of reliable procedures to adduce facts upon which the deprivation may be sustained.³⁰ The instrumental approach views the sole purpose of procedural protections as the minimization of the risk of erroneous deprivation of life, liberty, or property.³¹

Procedural due process has traditionally required notice and an opportunity to be heard.³² This opportunity must be afforded at a meaningful time and in a meaningful manner.³³ Thus, once it is determined that the property or liberty interest in question is protected, two determinations remain: What process is due—the form which procedural protections must take—and when that process is due—the timing of the protections.³⁴ With regard to the timing issue, attention has fo-

26. See Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 113 n.9 (1978); Van Alstyne, *supra* note 1, at 452, 455.

27. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 501 (1978).

28. See *id.* at 503.

29. *Id.* In contrast to the instrumental approach, the intrinsic approach to due process emphasizes the value of participation in the decisionmaking process: "the right to be heard from, and the right to be told why." *Id.* at 502-03. This approach focuses on achieving intrinsic values such as personal dignity and autonomy by affording an opportunity to be heard. *Id.* at 502. The Supreme Court has not, however, embraced the intrinsic approach to due process. *Id.* at 505. See, e.g., Mathews v. Eldridge, 424 U.S. 319, 343-47 (1976) (Court weighed the interests of the government and the individual against the risk of error in decisionmaking).

30. See, e.g., Morrissey v. Brewer, 408 U.S. 471, 484 (1972); Green v. McElroy, 360 U.S. 474, 496 (1959). See also Saphire, *supra* note 26, at 119.

31. L. TRIBE, *supra* note 27, at 506. It should be emphasized that the state, as well as the individual, has an interest in minimizing the risk of error. See Goss v. Lopez, 419 U.S. 565, 579 (1975) (unwarranted suspension of student disservices both student's interest and that of the state); Goldberg v. Kelly, 397 U.S. 254, 266 (1970) (Court noted state's interest that welfare benefits not be erroneously terminated); Comment, *Due Process and Public Employment in Perspective: Arbitrary Dismissals of Non-Civil Service Employees*, 19 U.C.L.A. L. REV. 1052, 1077 (1972) (to attract and keep superior government personnel, some protection of job security must be provided).

32. Grannis v. Ordean, 234 U.S. 385, 394 (1914); McVeigh v. United States, 78 U.S. (11 Wall.) 259, 267 (1870).

33. Goldberg v. Kelly, 397 U.S. 254, 267 (1970); Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

34. L. TRIBE, *supra* note 27, at 543-54. See also Board of Regents v. Roth, 408 U.S. 564, 569-71 (1972) (Court made clear that it was employing a two-tier test as to procedural due process:

cused on whether the meaningful opportunity to be heard requirement is satisfied only by a pretermination hearing, or whether a posttermination hearing is sufficient.³⁵

A balancing test has traditionally been employed to determine the timing of constitutionally mandated procedures.³⁶ To ascertain the time at which procedural protection must be afforded, the individual's interest in avoiding the deprivation is weighed against the government's interest in a speedy, efficient, and inexpensive determination.³⁷ A third factor has been added to this calculus: the risk of erroneous deprivation and the value of additional procedural safeguards must also be weighed.³⁸

In the past, the United States Supreme Court had adhered to a presumption that a hearing must be held prior to deprivation of some property or liberty interest in order to satisfy due process requirements.³⁹ The presumption could be rebutted, however, if the government was able to demonstrate some overriding interest justifying deferment of the hearing until after the deprivation.⁴⁰ The Court had given little credence to the government's asserted interest in conserving

The nature of the interest determines whether due process applies, while the weight of the interest governs what process is due).

35. See, e.g., *Mackey v. Montrym*, 99 S. Ct. 2612, 2617 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 260-61 (1970).

36. See, e.g., *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 17-19 (1978); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970) (Court concluded pretermination hearing is required after balancing interest of eligible recipient in need of funds against government interest in cutting off unqualified recipients).

37. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970); *Kelly v. Wyman*, 294 F. Supp. 893, 901 (S.D.N.Y. 1968).

38. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). In *Mathews*, the Court stated that three factors must be balanced in deciding what procedures must be afforded in each case:

[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Id.

39. See, e.g., *Goss v. Lopez*, 419 U.S. 565, 581-83 (1975) (pretermination hearing required before suspension from high school); *Morrissey v. Brewer*, 408 U.S. 471, 475-76 (1972) (pretermination hearing required before revocation of liberty interest in parole status); *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972).

In *Fuentes*, the Court explained why a pretermination hearing should be afforded:

If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. . . . But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process had already occurred. This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.

Id. at 81-82.

40. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). See, e.g., *Goss v. Lopez*, 419 U.S. 565, 582-83 (1975) (exception to general rule requiring hearing before suspension from school may be allowed if student threatens to disrupt school); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 600 (1950) (public interest in consumer protection justifies prehearing seizure of misbranded drugs).

fiscal resources,⁴¹ however, and often emphasized the drastic consequences of the deprivation on the individual.⁴² Thus, the risk of erroneous deprivation had been used to hold postdeprivation hearings inadequate.⁴³ As a result, the Court's traditional application of the balancing test reflected the view that the best time to afford a hearing is while the deprivation can still be prevented.⁴⁴

The continuing viability of the presumption favoring prior hearings is in doubt because of recent Supreme Court decisions. The Court has ruled in these cases that a hearing held promptly after deprivation may satisfy the requirements of due process.⁴⁵ Influenced by the burgeoning costs of providing procedural protections, the Court has attached increasing importance to the government's interest in cost-minimization and efficiency.⁴⁶ The rule mandating trial-like pretermination hearings has been denounced as imposing too great a burden on administrative agencies.⁴⁷ The Court has expressed a concern that the imposition of predeprivation hearings might result in the withdrawal of government-conferred entitlements in an effort to avoid the cost of providing due process.⁴⁸ In denying pretermination hearings, the Court has emphasized the importance of the government's interest and the noncompelling nature of the individual interest.⁴⁹ Alternatives to a formal pretermination hearing, such as an informal

41. See, e.g., *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18-19 (1978); *Goldberg v. Kelly*, 397 U.S. 254, 265-66 (1970). See L. TRIBE, *supra* note 27, at 544-47.

42. E.g., *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (termination of parole pending hearing would result in "grievous loss" to parolee); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (driver's license may be "essential in the pursuit of a livelihood"); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (termination of welfare pending hearing may deprive eligible recipient of "very means by which to live while he waits").

43. See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978); *Goldberg v. Kelly*, 397 U.S. 254, 265-66 (1970).

44. See *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

45. See, e.g., *Mackey v. Montrym*, 99 S. Ct. 2612, 2621 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 618-19 (1974); *Arnett v. Kennedy*, 416 U.S. 134, 163 (1974).

46. See, e.g., *Mackey v. Montrym*, 99 S. Ct. 2612, 2621 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 347-49 (1976) (balancing individual interest against public interest in avoiding increased administrative costs, Court concluded that pretermination evidentiary hearing was not required); *Arnett v. Kennedy* 416 U.S. 134, 168-69 (1974) (Powell, J., concurring) (emphasizing low risk of error and government interest in expedient dismissal of unsatisfactory employee). See also L. TRIBE, *supra* note 27, at 548-50.

This shift in policy might be attributable to the current Court's sensitivity to a caseload increasingly comprised of demands for procedural safeguards, its desire to avoid imposing formal procedures upon state administrative agencies, or its concern for maintaining a limited judicial role in our constitutional system. *Saphire, supra* note 26, at 130 n.82.

47. See *Dixon v. Love*, 431 U.S. 105, 114 (1977) ("substantial public interest in administrative efficiency would be impeded by the availability of a pretermination hearing in every case"); *Mathews v. Eldridge*, 424 U.S. 319, 347-48 (1976); *Goss v. Lopez*, 419 U.S. 565, 583 (1975).

48. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 618-19 (1974); *Fuentes v. Shevin*, 407 U.S. 67, 102-03 (1972) (White, J., dissenting); *Goldberg v. Kelly* 397 U.S. 254, 279 (1970) (Black, J., dissenting).

49. See, e.g., *Mackey v. Montrym*, 99 S. Ct. 2612, 2618, 2620-21 (1979); *Dixon v. Love*, 431 U.S. 105, 113-15 (1977); *Mathews v. Eldridge*, 424 U.S. 319, 342-43, 347 (1976).

pretermination right of reply or a hearing immediately after the deprivation, have been considered sufficient to ameliorate the risk of erroneous deprivation.⁵⁰ Thus, these recent decisions appear to have paved the way for abandonment, if not reversal, of the presumption favoring predeprivation hearings; as a result, posttermination hearings may become the rule rather than the exception in the future.⁵¹

Pretermination Hearings: Arizona Application of the Balancing Test

To determine the form and timing of procedural safeguards Arizona courts apply a balancing test.⁵² This test requires the court to assign relative values to the government's interest and to the employee's interest in order to determine which interest is more important.⁵³ The balancing test has proven to be quite flexible, permitting a court to reach differing conclusions depending on which factors are emphasized.⁵⁴

Arizona courts have generally been reluctant to impose upon government the requirement of a pretermination hearing. In Arizona, the only property interests clearly protected by a pretermination hearing are driver's licenses⁵⁵ and welfare benefits.⁵⁶ In other areas, Arizona courts have held that a posttermination hearing is adequate to protect property interests.⁵⁷

The government interest has consistently been favored by the Ari-

50. See, e.g., Mackey v. Montrym, 99 S. Ct. 2612, 2620 (1979); Dixon v. Love, 431 U.S. 105, 113-14 (1977); Mathews v. Eldridge, 424 U.S. 319, 345-49 (1976); Mitchell v. W. T. Grant Co., 416 U.S. 600, 616-20 (1974). Pretermination hearings have been held unnecessary even on the basis of the availability of state tort remedies for wrongful deprivation. See, e.g., Ingraham v. Wright, 430 U.S. 651, 677-78 (1977); Paul v. Davis, 424 U.S. 693, 712 (1976). The idea that postdeprivation checks may be relied on to correct erroneous decisions has been criticized as discounting the intrinsic participatory values of procedural due process. L. TRIBE, *supra* note 27, at 550; Saphire, *supra* note 26, at 161.

51. L. TRIBE, *supra* note 27, at 548-50. Compare Peacock v. Board of Regents, 510 F.2d 1324, 1328 (9th Cir.) (court stated that presumption favoring pretermination hearings would no longer be applied in the ninth circuit), *cert. denied*, 422 U.S. 1049 (1975) with Kennedy v. Robb, 547 F.2d 408, 415 (8th Cir. 1976) (court continued to require some sort of pretermination opportunity to respond).

52. See, e.g., Montes v. Lininger, 119 Ariz. 174, 175, 580 P.2d 6, 7 (1978); City of Flagstaff v. Superior Court, 116 Ariz. 382, 383, 569 P.2d 812, 813 (1977).

53. See generally Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

54. *Id.* For instance, in Roberts v. City of Tucson, 122 Ariz. 91, 593 P.2d 645 (1979), the majority and dissenting justices reached opposite conclusions based on application of the same balancing test. *Id.* at 93, 94, 593 P.2d at 647, 648.

55. Schecter v. Killingsworth, 93 Ariz. 273, 283, 380 P.2d 136, 143 (1963).

56. Camerena v. Department of Pub. Welfare, 9 Ariz. App. 120, 125, 449 P.2d 957, 962 (1969), *aff'd*, 106 Ariz. 30, 470 P.2d 111 (1970).

57. See, e.g., Montes v. Lininger, 119 Ariz. 174, 175, 580 P.2d 6, 7 (1978) (hearing held after discharge of parks maintenance worker satisfied due process); City of Flagstaff v. Superior Court, 116 Ariz. 382, 384, 569 P.2d 812, 814 (1977) (posttermination hearing satisfied due process rights of discharged fireman and pretermination hearing is not required).

zona courts over the individual interest.⁵⁸ The courts have evinced little regard for the employee's interest in a pretermination hearing.⁵⁹ In particular, the government's interest in efficiency and minimization of administrative burdens has been held to outweigh the employee's interest.⁶⁰ Exemplary is the court's decision in *City of Flagstaff v. Superior Court*.⁶¹ *Flagstaff* involved the prehearing removal of a nonprobationary fireman who allegedly threatened to kill a fellow employee.⁶² The government's interest in maintaining the "efficient operation of its fire department" was held to outweigh the employee's interest in a pretermination hearing.⁶³

The Arizona Supreme Court clearly adhered to precedent when it held in *Roberts* that the government interest outweighed the employee's need for a pretermination hearing. The court observed that a city government has a "substantial interest in the expeditious removal of an undesirable employee."⁶⁴ On the other hand, the primary detriment to the employee is "the temporary interruption of [his] income until the contest is heard."⁶⁵ Noting that the Tucson Civil Service Commission Rules require an evidentiary posttermination hearing within thirty days after the filing of notice of appeal,⁶⁶ and back pay if the discharge is not upheld,⁶⁷ the court concluded that the "temporary deprivation" suffered by the employee did not outweigh the government's "substantial interest" in prompt removal.⁶⁸

58. See cases cited at note 57 *supra*. But see *Camerena v. Department of Pub. Welfare*, 9 Ariz. App. 120, 123, 449 P.2d 957, 960 (1969), *aff'd*, 106 Ariz. 30, 470 P.2d 111 (1970).

59. See, e.g., *Roberts v. City of Tucson*, 122 Ariz. 91, 93, 593 P.2d 645, 647 (1979); *City of Flagstaff v. Superior Court*, 116 Ariz. 382, 384, 569 P.2d 812, 814 (1977).

60. See cases cited at note 57 *supra*.

61. 116 Ariz. 382, 569 P.2d 812 (1977).

62. *Id.* at 382-83, 569 P.2d at 812-13.

63. *Id.* at 384, 569 P.2d at 814. In *Flagstaff*, the court stated that "the need to prevent dissension or uproar in the department should allow a suspension or termination without hearing." *Id.* In *Roberts*, the court distinguished *Flagstaff* as a case involving emergency public safety services, in which the government had a compelling interest. 122 Ariz. at 92, 593 P.2d at 646. The *Roberts* court actually expanded *Flagstaff*, however, by holding that the government's interest need not be compelling in order to outweigh the employee's interest in a pretermination hearing: A "substantial" interest will suffice. *Id.* Whether denominated "substantial" or "compelling," it seems that an interest sufficient to deny a pretermination hearing need not be significant. In *Montes v. Linger*, 119 Ariz. 174, 175, 580 P.2d 6, 7 (Ct. App. 1978), a permanent parks maintenance worker was discharged for unsatisfactory performance, nonproductivity, noncooperation and "fooling around." The court of appeals held that no pretermination hearing was required and cited *Flagstaff* as controlling authority. *Id.* While conceding that the facts of *Flagstaff* were more aggravated, the court held that this was "a matter of degree only" and did not justify a different conclusion. *Id.* This holding seems questionable in light of the substantial difference between a discharge for threatening to kill a fellow employee and a discharge for "fooling around." In the latter case, the government interest is clearly not compelling.

64. 122 Ariz. at 92, 593 P.2d at 646.

65. *Id.* at 93, 593 P.2d at 647.

66. See TUCSON CIVIL SERVICE COMMISSION RULES & REGULATIONS, RULE XII, § 4(a), (d)(1974).

67. *Id.*

68. 122 Ariz. at 92-93, 593 P.2d at 646-47.

As in prior decisions, the main concern of the court in *Roberts* was the promotion of administrative efficiency and avoidance of the substantial administrative costs that accompany a pretermination hearing.⁶⁹ Apparently, the court believed that a grant of unfettered removal power promotes government efficiency.⁷⁰ Thus, although the court conceded that the government interest in efficiency is not "compelling," it held that this interest is "substantial" enough to outweigh the need for a pretermination hearing.⁷¹ The validity of this conclusion is considered in the following section.

Balancing of the Government and Employee Interests in Pretermination Hearings: A Critique of Roberts

Two cases cited in *Roberts* require examination in some detail. The majority relied on the decision of the United States Supreme Court in *Arnett v. Kennedy*⁷² as supporting its denial of a pretermination hearing.⁷³ *Peacock v. Board of Regents*,⁷⁴ a prominent Ninth Circuit case that had been cited extensively by Arizona courts in the past,⁷⁵ was not mentioned in the *Roberts* majority opinion. Chief Justice Cameron's dissenting opinion relied on *Peacock* as supporting the view that Roberts should have been afforded a pretermination hearing.⁷⁶ Close analysis of *Arnett* and *Peacock* demonstrates that the *Roberts* majority mistakenly elevated the government interest above the individual interest.

Arnett involved the dismissal of a nonprobationary federal civil service employee for allegedly having made defamatory statements about his superiors.⁷⁷ The controlling statute authorized dismissal only for cause and prescribed the procedures to be followed in discharging an employee.⁷⁸ Although this statute provided rather elaborate informal procedural safeguards for discharged employees, including a right of reply and an evidentiary posttermination hearing,⁷⁹ the employee

69. *Id.* at 92, 593 P.2d at 646 (citing *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).

70. *See* 122 Ariz. at 92, 593 P.2d at 646.

71. *Id.* at 92-93, 593 P.2d at 646-47.

72. 416 U.S. 134 (1974).

73. *Roberts v. City of Tucson*, 122 Ariz. at 92-93, 593 P.2d at 646-47.

74. 510 F.2d 1324 (9th Cir.), *cert. denied*, 422 U.S. 1049 (1975).

75. *E.g.*, *Wyatt v. Ruck Constr., Inc.*, 117 Ariz. 186, 191, 571 P.2d 683, 688 (1977); *City of Flagstaff v. Superior Court*, 116 Ariz. 382, 384, 569 P.2d 812, 814 (1977); *McClanahan v. Cochise College*, 25 Ariz. App. 13, 18, 540 P.2d 744, 749 (1975).

76. 122 Ariz. at 93, 593 P.2d at 647 (Cameron, C.J., dissenting).

77. 416 U.S. at 136-37.

78. *Id.* at 140-41. *Arnett* considered the constitutionality of the discharge procedures provided by the Lloyd-LaFollette Act, 5 U.S.C. §§ 7501-7543 (1976).

79. 416 U.S. at 143-45. The statute and implementing regulations provided, *inter alia*, for: 30 days advance notice of dismissal; a copy of the charges; a reasonable time for filing a written answer; an informal appearance before an agency official; notice of the agency's decision and the

argued that the failure to afford him a pretermination hearing violated his procedural due process rights.⁸⁰ A plurality, consisting of Justices Rehnquist, Stewart, and Chief Justice Burger, concluded that the employee did not have a property interest requiring procedures beyond those afforded by the statute.⁸¹ Six justices disagreed fundamentally with this positivist theory⁸² of due process, and analyzed the procedures provided by the statute in constitutional terms.⁸³

Justices Powell and Blackmun, in a concurring opinion, voted to uphold the statute in the absence of a provision for a pretermination evidentiary hearing because the procedures afforded adequately minimized the risks of error and delay.⁸⁴ Justice Powell stressed the importance of governmental control over its "internal affairs" in achieving "employee efficiency and discipline."⁸⁵

Justice Powell's opinion in *Arnett*—the only one cited by the *Rob-*

grounds therefor; and an appeal at which the employee is entitled to an evidentiary posttermination hearing. 5 C.F.R. §§ 752.202-203, 771.208, 210-212, 772.305 (1979). If the employee is reinstated on appeal, he receives back pay. 5 U.S.C. § 5596 (1976).

80. 416 U.S. at 138-39. The divided court collectively upheld the discharge. Six members of the Court agreed that in view of the protections provided by the Act, due process was not violated by the failure to provide a pretermination evidentiary hearing. *Id.* at 163 (Rehnquist, J.); *id.* at 170-71 (Powell, J., concurring); *id.* at 195-96 (White, J., concurring and dissenting). Thus, the crucial votes in *Arnett* were cast because these alternative procedures were believed to minimize the risk of error. *Id.* at 170-71 (Powell, J., concurring); *id.* at 195-96 (White, J., concurring and dissenting).

81. *Id.* at 163 (Rehnquist, J.). The plurality stated in explanation that "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet." *Id.* at 153-54. Thus, the Act, which conferred the entitlement, simultaneously limited and defined the procedures for its protection. *Id.* at 151-52.

82. The positivist theory looks to positive law to determine whether there is an entitlement. *L. TRIBE, supra* note 27, at 506. The Court has embraced this approach since *Board of Regents v. Roth*, 408 U.S. 564 (1972), where it held that property interests are created by "existing rules or understandings that stem from an independent source such as state law." *Id.* at 577. The Court has not, however, embraced the positivist theory in determining what process is due. *L. TRIBE, supra* note 27, at 506. See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978) (although underlying property interest is created by state law, federal constitutional law determines whether interest rises to level of a legitimate claim of entitlement protected by due process clause).

83. 416 U.S. at 167 (Powell, J., concurring); *id.* at 185 (White, J., concurring); *id.* at 211 (Marshall, J., dissenting).

84. *Id.* at 170-71 (Powell, J., concurring). The provision of an informal right of reply prior to discharge also proved decisive for Justice White, who concluded that the statute satisfied "minimum constitutional requirements." *Id.* at 195-96 (White, J., concurring). The dissenters (Justices Marshall, Douglas, and Brennan) believed that nothing short of a pretermination evidentiary hearing would satisfy due process. *Id.* at 226-27 (Marshall, J., dissenting).

85. *Id.* at 168 (Powell, J., concurring). Justice Powell recognized implicitly that the government interest in efficiency cannot justify denial of a pretermination hearing in all cases. Only when alternative procedural safeguards are provided to minimize the risk of error would Powell conclude that a pretermination hearing is not required. *Id.* at 170-71 (Powell, J., concurring). Thus, although Justice Powell recognized the government's interest in efficiency, he nevertheless acknowledged that it was necessary to impose several informal pretermination procedural hurdles, see procedures listed in note 79 *supra*, which, even he would admit, hinder the government in its goal of minimizing the length and cost of discharge proceedings. 416 U.S. at 168 (Powell, J., concurring). See *Peacock v. Board of Regents*, 510 F.2d 1324, 1330 (9th Cir.) (court acknowledged that the government's interest in efficiency might be overcome in a case involving a serious intrusion on a property interest), *cert. denied*, 422 U.S. 1049 (1975). See text & notes 90-102 *infra*.

erts majority—does not seem to support a denial of a pretermination hearing where, as in *Roberts*, an employee is fired on three-hours notice without any pretermination opportunity to respond and the post-termination hearing is not timely.⁸⁶ His opinion turned on the availability of notice and opportunity to be heard prior to the effective date of termination, as well as a full evidentiary hearing afforded promptly after discharge.⁸⁷ On the one hand, it could be argued that *Arnett* did not purport to decide the requirements of due process where no pretermination safeguards are provided,⁸⁸ and thus should not have been relied upon at all by the *Roberts* court. On the other hand, if *Arnett* is viewed as controlling authority, then *Roberts* was incorrectly decided under that case. On the basis of all the *Arnett* opinions, it appears that six justices would grant relief to an employee who has been afforded neither a pretermination opportunity to be heard nor a timely posttermination hearing.⁸⁹

An analysis of *Peacock v. Board of Regents*⁹⁰ further illustrates the improper application of the balancing test by the court in *Roberts*. At stake in *Peacock* was the government's interest in the "prevention of harm to and efficient administration of the [University of Arizona] medical school and the University Hospital."⁹¹ The court held that the threat to this interest presented by a "potentially recalcitrant or disloyal department head" was sufficient to outweigh the employee's "limited" interest in a presuspension hearing.⁹² *Peacock* explicitly rejected any presumption favoring a pretermination hearing.⁹³

The Ninth Circuit in *Peacock*, unlike the *Roberts* court, explored the interest of the employee in some detail.⁹⁴ The *Peacock* court found that there was no financial interest involved since the terminated position was a no-salary position.⁹⁵ Furthermore, the employee was reinstated in his position as professor of surgery and received a salary

86. Appellant's Opening Brief at 6, 12-13, *Roberts v. City of Tucson*, 122 Ariz. 91, 593 P.2d 645 (1979).

87. *Arnett v. Kennedy*, 416 U.S. at 170-71 (Powell, J., concurring). It must be noted that the statute under consideration in *Arnett* provided no time limit within which the posttermination hearing must be held.

88. See *Kennedy v. Robb*, 547 F.2d 408 (8th Cir. 1976). In *Robb*, another public employee dismissal case, the Eighth Circuit eschewed reliance on *Arnett* in the context of a Missouri statute that provided no pretermination opportunity to respond to the charges. *Id.* at 413. *Arnett* was deemed inapplicable since it "did not purport to mandate any procedure as essential to the meeting of minimal pretermination due process requirements" and thus "did not indicate what the result would have been had there been no pretermination safeguards whatever." *Id.*

89. *Arnett v. Kennedy*, 416 U.S. at 170-71 (Powell, J., concurring); *id.* at 195-96 (White, J., concurring and dissenting); *id.* at 226-27 (Marshall, J., dissenting).

90. 510 F.2d 1324 (9th Cir.), *cert. denied*, 422 U.S. 1049 (1975).

91. *Id.* at 1329.

92. *Id.*

93. *Id.* at 1328.

94. *Id.* at 1328-29.

95. *Id.* at 1328.

during the period of his suspension as department head.⁹⁶ The court added that any damage to the employee was "minimized by the requirement of a prompt post-suspension hearing."⁹⁷

Roberts is clearly distinguishable from *Peacock*. The severity of the deprivation was much greater in *Roberts*, since Roberts was terminated⁹⁸ while the employee in *Peacock* was merely demoted.⁹⁹ The petitioner in *Roberts* had no alternative employment; thus, his financial interest was greater than that of the *Peacock* plaintiff.¹⁰⁰ Roberts did not receive a "prompt" posttermination hearing as that term is defined by the Tucson Civil Service Commission Rules & Regulations.¹⁰¹ The circumstances of the employee in *Roberts* thus fall within the *Peacock* court's qualification of its holding that a pretermination hearing might be required in cases involving a "more serious intrusion on a protected property interest, such as the professorship, . . . or [on] an employment relationship in which loyalty and cooperation are less imperative."¹⁰²

Chief Justice Cameron, dissenting in *Roberts*, criticized the majority for its failure to cite the above language which he believed mandated a pretermination hearing.¹⁰³ He interpreted that language to mean that a pretermination hearing should be required whenever there is no compelling government need to remove the employee promptly.¹⁰⁴ The fact that the City of Tucson had agreed to keep Roberts on the job for three months after his promise to resign indicated to Justice Cameron that Robert's position was not one in which loyalty and cooperation were imperative, and thus militated against the necessity for quick removal.¹⁰⁵ Therefore, the government's interest in expedient removal was not sufficient to outweigh the interest of the employee and a pretermination hearing was required.¹⁰⁶

Close analysis of *Arnett* and *Peacock* reveals that those cases should be interpreted to grant a pretermination hearing to the peti-

96. *Id.* at 1326, 1328.

97. *Id.* at 1329.

98. 122 Ariz. at 92, 593 P.2d at 646.

99. 510 F.2d at 1326.

100. Appellant's Petition in Special Action at 3, *Roberts v. City of Tucson*, 122 Ariz. 91, 593 P.2d 645 (1979).

101. See text & notes 19-20 *supra*.

102. 510 F.2d at 1330.

103. 122 Ariz. at 93, 593 P.2d at 647 (Cameron, C.J., dissenting).

104. *Id.*

105. *Id.*

106. *Id.* at 93-94, 593 P.2d 647-48. Chief Justice Cameron distinguished *Roberts* from *City of Flagstaff v. Superior Court*, 116 Ariz. 382, 569 P.2d 812 (1977) and *Peacock v. Board of Regents*, 510 F.2d 1324 (9th Cir.), cert. denied, 422 U.S. 1049 (1975). In *Flagstaff*, the government had a compelling interest in protecting the public from a possibly violent fireman. 122 Ariz. at 93, 593 P.2d at 647 (Cameron, C.J., dissenting). In *Peacock*, the government interest in maintaining the operation of an important hospital was compelling. *Id.* In *Roberts* the government could point to no such compelling interest justifying Roberts' immediate removal. *Id.* at 93-94, 593 P.2d at 647-48.

tioner in *Roberts*. The *Roberts* court erroneously failed to distinguish *Arnett* from the case before it, in which the risk of erroneous discharge was not ameliorated by any pretermination procedures.¹⁰⁷ A pretermination hearing was mandated by the Ninth Circuit's decision in *Peacock*, which recognized that such a hearing may be required where, as in *Roberts*, there is a serious infringement on a government employee's property interest.¹⁰⁸ It is thus arguable that the *Roberts* court "misbalanced" the government and employee interests under the circumstances of that case.

Other arguments can be advanced in support of the necessity for a pretermination hearing. The employee's interest in job security outweighs the government's interest in an efficient and inexpensive determination of cause for removal because "the Constitution recognizes higher values than speed and efficiency."¹⁰⁹ Moreover, the temporary income deprivation may result in "severe and painful economic dislocations" for the employee, especially if he or she does not have substantial savings set aside.¹¹⁰ The impact of the deprivation varies directly with the length of the delay between discharge and hearing,¹¹¹ and the delay might be substantial.¹¹² The significant risk of erroneous termination, evidenced by the high reversal rate on appeal,¹¹³ is another factor favoring a pretermination hearing.¹¹⁴

Despite these considerations, the Arizona courts, in applying the balancing test, have generally devoted little attention to the employee's interest in job security.¹¹⁵ The *Roberts* court characteristically denigrated the individual's interest with the suggestion that the primary detriment to the employee is the temporary interruption of income.¹¹⁶ A proper application of the balancing test, giving weight to the em-

107. See note 85 *supra*.

108. *Peacock v. Board of Regents*, 510 F.2d 1324, 1330 (9th Cir.), *cert. denied*, 422 U.S. 1049 (1975).

109. *Fuentes v. Shevin*, 407 U.S. 67, 90-91 (1972). See also *Goldberg v. Kelly*, 397 U.S. 254, 265-66 (1970).

110. *Arnett v. Kennedy*, 416 U.S. 134, 220 (1974) (Marshall, J., dissenting). See also *Kennedy v. Robb*, 547 F.2d 408, 414 (8th Cir. 1976).

111. *Arnett v. Kennedy*, 416 U.S. 134, 219 (1974) (Marshall, J., dissenting); *id.* at 192 (White, J., concurring and dissenting). Justice White gave more weight to the employee's interest than did the plurality or Justice Powell. Justice White noted that "the impact of the deprivation increases, of course, the longer the time period between the initial deprivation and the opportunity to have a full hearing." *Id.* at 192 (White, J., concurring and dissenting).

112. *Id.* at 219 (Marshall, J., dissenting).

113. Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 VA. L. REV. 196, 204 n.35 (1973). According to Merrill, the reversal rate of discharges by agencies in 1970 was almost 20%; the rate of reversal by Civil Service Commission regional offices was 24%. *Id.*

114. *Arnett v. Kennedy*, 416 U.S. 134, 214 (1974) (Marshall, J., dissenting); *Kennedy v. Robb*, 547 F.2d 408, 414 (8th Cir. 1976).

115. See, e.g., *Roberts v. City of Tucson*, 122 Ariz. 91, 93, 593 P.2d 645, 647 (1979); *Montes v. Lininger*, 119 Ariz. 174, 175, 580 P.2d 6, 7 (1978); *City of Flagstaff v. Superior Court*, 116 Ariz. 382, 384, 569 P.2d 812, 814 (1977).

116. 122 Ariz. at 93, 593 P.2d at 647.

ployee's interest in job security, would support the analysis preferred by the dissent in *Roberts*.

The Need for a Timely Posttermination Hearing

The Tucson Civil Service Commission Rules provide for a post-termination hearing within thirty days of filing of appeal by the employee, and a decision within forty-five days after receipt by the employee of notice of the termination.¹¹⁷ The hearing in *Roberts* commenced fifty-seven days after the filing of appeal by the employee.¹¹⁸ The decision was rendered 125 days after the employee received his notice of termination.¹¹⁹ The issue raised was how a violation of administrative timeliness standards for posttermination hearings should be judicially analyzed. In terms of due process, the issue presented was how much delay can be tolerated without violating the constitutional requirement of a meaningful opportunity to be heard. In *Roberts*, the Arizona Supreme Court sidestepped these issues by adopting the opinion of the court of appeals.¹²⁰

In holding that a posttermination hearing satisfied the requirements of due process, the *Roberts* court emphasized that under the Commission rules an evidentiary hearing "must be held within thirty calendar days" after filing the appeal.¹²¹ The court's refusal to deal with a violation of this rule is indeed anomolous. On the one hand, the court relied upon the administrative definition of timeliness to hold that a pretermination hearing was not required.¹²² On the other hand, the court refused to impose any sanction for violation of the very rule on which it relied. Under this reasoning, the mere existence of the rule is apparently sufficient to satisfy the employee's need for procedures, rendering the requirement of a timely posttermination hearing meaningless. If the hearing requirement is intended to confer an important procedural safeguard upon employees, and is not merely hortatory, the majority's reasoning is clearly unsound. If administrative agencies are

117. See text & notes 19-21 *supra*.

118. See *id.*

119. See *id.*

120. *Roberts v. City of Tucson*, 122 Ariz. at 93, 593 P.2d at 647. The court of appeals devoted only one brief paragraph to the petitioner's argument that he should have been afforded a post-termination hearing within the time provided by rule. The court stated:

The city's rules do provide for a prompt post-termination hearing. When appellant was discharged, it was with the knowledge on the part of the city that the rules provided for such hearing. How was the city to know that it would not be heard within the thirty days, thus requiring a pre-termination hearing? We do not believe that the fact that there is delay in the post-termination hearing operates *ex post facto* to require a pretermination hearing.

Roberts v. City of Tucson, 122 Ariz. 125, 129, 593 P.2d 679, 683 (Ct. App. 1978).

121. *Roberts v. City of Tucson*, 122 Ariz. 91, 93, 593 P.2d 645, 647 (1979).

122. *Id.*

to be permitted to define when process is due, the courts should look beyond the face of the rule to its application in order to determine whether the meaningful time requirement has been met in each case.

The general rule is that such agency-promulgated rules must be strictly enforced. The Supreme Court has stated that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures."¹²³ The courts have generally invalidated agency violations of regulations promulgated to benefit a party either substantively or procedurally.¹²⁴ Invoking the rule that "an agency regulation has the force and effect of law, and is binding upon the body that issues it,"¹²⁵ the United States Supreme Court has made clear that federal employees may not be fired in violation of agency regulations governing discharge.¹²⁶

The notion that agencies may not violate their own regulations has a firm constitutional footing.¹²⁷ Courts applying the rule have reasoned that when an agency promulgates a rule establishing a procedural safeguard, the rule sets the minimum standards of due process.¹²⁸ Thus, while the agency may be under no compulsion to provide a procedural safeguard in the first instance, once such a safeguard has been promulgated compliance is necessary to satisfy due process.¹²⁹ The rule is bottomed on the individual interest in consistent treatment at the hands of the government: An agency should not be permitted to enforce or ignore a rule at whim.¹³⁰ Inconsistent treatment of this kind is arbitrary treatment, violative of the due process clause and perhaps even the Administrative Procedure Act.¹³¹

The rule prohibiting agencies from violating their own regulations is also firmly entrenched in Arizona law. Specifically, there is a wealth of Arizona authority for the proposition that civil service agencies must strictly comply with their own rules.¹³² Substantial compliance is insuf-

123. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974); see *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); *Service v. Dulles*, 354 U.S. 363, 388 (1957).

124. See, e.g., *Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *Nader v. Bork*, 366 F. Supp. 104, 108 (D.D.C. 1973); *United States v. Leahey*, 434 F. Supp. 7, 10-11 (1st Cir. 1970). See generally W. GELLHORN, C. BYSE, & P. STRAUSS, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 395-98 (7th ed. 1979); Note, *Violations by Agencies of their Own Regulations*, 87 HARV. L. REV. 629, 630, 652-55 (1974).

125. *Nader v. Bork*, 366 F. Supp. 104, 108 (D.D.C. 1973).

126. *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); *Service v. Dulles*, 354 U.S. 363, 388 (1957).

127. See L. TRIBE, *supra* note 27, at 189-93; Note, *supra* note 124, at 654-55.

128. See *Bridges v. Wixon*, 326 U.S. 135, 152 (1945); Note, *supra* note 124, at 654.

129. See *Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954).

130. Note, *supra* note 124, at 631-34, 654-55.

131. *Id.* at 651-55, 652 n.84. Cf. *Pace Co. v. Department of the Army*, 344 F. Supp. 787, 790 (W. D. Tenn. 1971) (court held that an award of a contract in violation of Army regulations was an abuse of discretion in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1976)).

132. See, e.g., *City of Tucson v. Simpson*, 84 Ariz. 39, 43, 323 P.2d 689, 692 (1958); *Civil Serv.*

ficient, because any violation of an agency rule enacted for the purpose of preserving government efficiency "weakens the system of competitive selection which is the basis of civil service legislation."¹³³ Although strict compliance may be waived,¹³⁴ it was not waived in *Roberts*; the employee demanded strict compliance at every stage of the proceeding.¹³⁵ Under the strict compliance rule, the *Roberts* court should have concluded that the violation of the administrative definition of timeliness was one that required a remedy.

The only Arizona court that has considered the issue of the timing of a posttermination hearing did not rely on the strict compliance rule. In *Civil Service Commission v. Superior Court*,¹³⁶ involving the same Commission rule at issue in *Roberts*, the court held in a brief opinion that a six-day delay beyond the thirty-day time limit did not divest the Commission of jurisdiction.¹³⁷ *Civil Service Commission* could be interpreted as holding that a *de minimis* violation—that is, substantial compliance—will be tolerated under some circumstances. Even under this construction of the case, the violation in *Roberts* cannot be overlooked. In *Roberts*, the delay beyond the hearing limit was almost a month, and the decision came almost three months after the limit set by the Rules.¹³⁸ Arguably, this violation is not *de minimis* and is thus distinguishable from that at issue in *Civil Service Commission*.

The *Roberts* court properly considered the provision for a prompt posttermination hearing as a legitimate factor in the balancing test.¹³⁹ The court erred, however, in ignoring the Commission's violation of that rule. Plainly, a rule providing for a posttermination hearing is in-

Comm'n v. Foley, 75 Ariz. 364, 370-71, 257 P.2d 384, 388 (1953); Civil Serv. Bd. v. Warren, 74 Ariz. 88, 90, 244 P.2d 1157, 1158 (1952). *But see* Civil Serv. Comm'n v. Superior Court, 14 Ariz. App. 286, 287, 482 P.2d 895, 896 (1971) (six-day delay in hearing beyond the 30-day time limit held not to divest the commission of jurisdiction).

133. Civil Serv. Bd. v. Warren, 74 Ariz. 88, 91, 244 P.2d 1157, 1159 (1952).

134. Walker v. Dunham, 78 Ariz. 419, 421, 281 P.2d 125, 127 (1955); Civil Serv. Bd. v. Warren, 74 Ariz. 88, 91, 244 P.2d 1157, 1159 (1952).

135. Appellant's Motion for Rehearing before the Arizona Supreme Court at 3-4, *Roberts v. City of Tucson*, 122 Ariz. 91, 593 P.2d 645 (1979). Mr. Roberts filed a timely notice of appeal on May 11, 1976. *Id.* at 3. On May 13, he filed a motion with the Commission for a hearing within the 30-day limit. *Id.* When the city's motion to continue the hearing until June 21 was granted, Roberts filed a petition for special action demanding a hearing within the 30-day limit. *Id.* at 4. The Superior Court ordered the Commission to hold a hearing within 30 days of June 18, thus permitting the Commission to violate its own administratively-promulgated time limits. *Id.*

136. 14 Ariz. App. 286, 482 P.2d 895 (1971).

137. *Id.* at 287, 482 P.2d at 896. *Civil Serv. Comm'n* involved TUCSON CIVIL SERVICE COMMISSION, RULE XII, § 4(a), which grants the right to a posttermination hearing within 30 days of receipt of appeal by the commission. *See* text & notes 19-21 *supra*. In dicta, the court suggested that such a delay might divest the commission of jurisdiction in cases where the employee could point to statutory language requiring a pretermination hearing or providing specifically for reinstatement upon failure to grant the hearing within the prescribed time. 14 Ariz. App. at 287, 482 P.2d at 896.

138. *See* text & notes 117-19 *supra*.

139. *See* *Montes v. Lininger*, 119 Ariz. 174, 175, 580 P.2d 6, 7 (1978); *City of Flagstaff v. Superior Court*, 116 Ariz. 382, 384, 569 P.2d 812, 814 (1977).

tended to confer a procedural benefit upon discharged employees; by promulgating the rule, the Commission effectively limits its own power *vis à vis* civil service employees. Because the rule erects a procedural hurdle against the agency, it must be viewed as embodying the minimum requirements of due process.¹⁴⁰ The requirement of a meaningful opportunity to be heard is thus administratively codified. Any delay beyond the established limit renders the hearing not meaningful and in violation of due process. Under the rule that agencies may not violate their own regulations, the *Roberts* court should have invalidated the Commission's action.

Conclusion

The result reached by the *Roberts* court was contrary to established precedent. The court, by finding that the employee had a property interest in his job, effectively conceded that a hearing at some meaningful time must be afforded. In deciding that due process did not require a pretermination hearing, the court apparently believed that the posttermination hearing provided by the Commission rules afforded an adequate safeguard against violation of due process rights. The *Roberts* court erred in at least two respects. First, the court improperly applied the balancing test by failing to consider adequately the employee's interest in job security. The balancing test demands objective consideration of both the individual and government interests in order to provide a rational body of precedent to guide courts in the future. The *Roberts* court also erred in treating the issue at an end after it held that no pretermination hearing was required. This disposition ignored the rule that due process requires a hearing at some meaningful time—whether before or after discharge. Even the commission recognized this requirement when it promulgated the thirty-day hearing rule. The argument that a posttermination hearing provides an adequate substitute for a pretermination hearing, seemingly embraced by the *Roberts* court, is plausible only if a posttermination hearing is held within a reasonable time. In upholding the commission's action in *Roberts*, the court not only ignored a settled body of administrative law prohibiting agencies from violating their own regulations, but also failed to enforce the petitioner's due process right to a hearing at a meaningful time.

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140. See text & notes 128-29 *supra*.

VI. CRIMINAL LAW

A. THE RIGHT TO NOTICE OF A SPECIFIC CHARGE—THE VALIDITY OF A SECOND DEGREE RAPE INSTRUCTION FOLLOWING A TRIAL FOR FIRST DEGREE RAPE

In *State v. Gray*,¹ the Arizona Supreme Court approved a trial court's instruction on second degree rape² where the defendant was charged by information³ solely with first degree rape.⁴ At the preliminary hearing the female victim testified that she was seventeen years old.⁵ The information, however, was not amended to reflect a charge of second degree rape and the trial proceeded on the basis of the first degree charge.⁶ Following the presentation of evidence the court instructed the jury and gave it a form of verdict on second degree rape.⁷

On appeal⁸ the Arizona Supreme Court acknowledged that a de-

1. 122 Ariz. 445, 595 P.2d 990 (1979).

2. ARIZ. REV. STAT. ANN. § 13-611(B) (1962) (current version at ARIZ. REV. STAT. ANN. § 13-1405 (1978)) provided: "Rape in the second degree is an act of sexual intercourse with a female, not the wife of the perpetrator, under the age of eighteen years, under circumstances not amounting to rape in the first degree."

3. Charge is defined as an accusation of a crime by formal complaint, information, or indictment. BLACK'S LAW DICTIONARY 211 (1979). See generally ARIZ. REV. STAT. ANN. § 13-105 (1978).

4. 122 Ariz. at 447, 595 P.2d at 992. ARIZ. REV. STAT. ANN. § 13-611(A) (1962) (current version at ARIZ. REV. STAT. ANN. § 13-1406 (1978)) provided:

A. Rape in the first degree is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under any of the following circumstances:

1. Where the female is incapable through lunacy or other unsoundness of mind . . . of giving legal consent.

2. Where the female resists, but her resistance is overcome by force or violence.

3. Where the female is prevented from resisting by threats of immediate and great bodily harm . . . or by an intoxicating, narcotic or anaesthetic substance. . . .

4. Where the female is at the time unconscious of the nature of the act. . . .

5. Where the female submits under a belief that the person committing the act is her husband. . . .

5. 122 Ariz. at 447-48, 595 P.2d at 992-93.

6. *Id.* at 447, 595 P.2d at 992.

7. *Id.*

8. Jurisdiction for the appeal was based on ARIZ. SUP. CT. R. 47(e)(5) which permits the Supreme Court to assume jurisdiction over cases pending before the court of appeals. 122 Ariz. at 446, 595 P.2d at 991. Although several issues are discussed and ruled upon in the majority opinion, the scope of this casenote is limited to the issue of whether an instruction and form of verdict for second degree rape is valid following a trial for first degree rape. This is the sole issue raised in Justice Gordon's dissent. *Id.* at 449, 595 P.2d at 994. Another prominent issue dealt with in *Gray* was whether ARIZ. REV. STAT. ANN. § 13-611(B) (1962) denies a male equal protection of the law. 122 Ariz. at 446-47, 595 P.2d 991-92. The appellant's claim was based on the fact that the statute proscribed consensual intercourse by an adult male with a minor female but did not prohibit the same act by an adult female with a minor male. *Id.* at 446, 595 P.2d at 991; see note 2 *supra*. The court held that this was not a denial of due process because only the female is likely to suffer physical injury and become pregnant. 122 Ariz. at 447, 595 P.2d at 992. Therefore, limiting protection to young females is substantially related to the objective of the statute which is to prevent unwanted pregnancies and abortions, and to prevent the attendant psychological and medical

defendant may be surprised and prejudiced if he is charged with first degree rape (forcible) and the evidence at trial only establishes culpability in relation to second degree rape (statutory).⁹ Nevertheless, the court noted that forcible and statutory rape are "merely different circumstances in which the crime of rape may be committed."¹⁰ Consequently, the court held that if the defendant had timely notice that second degree rape might be at issue, he was not prejudiced by a second degree instruction and verdict.¹¹

Initially, this casenote will review the legislative and judicial history of Arizona's rape laws. With this background the *Gray* decision will be evaluated. This analysis will emphasize two issues: (1) Whether or not forcible and statutory rape are merely different forms of the same general offense of rape, and, (2) whether the kind of notice in *Gray* comports with due process. In addition, this casenote will examine the relevant sections of Arizona's new sexual offense statute with specific focus on how this statute may affect the precedential value of *Gray*.

A Historical Perspective of Arizona's Rape Laws

In Arizona, forcible and statutory rape have always been construed as equivalent offenses.¹² Since 1864 rape has been defined as either nonconsensual sexual intercourse or sexual intercourse with a willing female¹³ under the age of consent.¹⁴ In 1962, the legislature amended the rape statute,¹⁵ dividing the offense into two degrees¹⁶ and prescribing separate terms of punishment.¹⁷

problems. *Id.* Interestingly, the legislature later corrected this possible equal protection infirmity of the sexual offense statute. The statute no longer distinguishes male and female offenders. See ARIZ. REV. STAT. ANN. §§ 13-1405-1406 (1978); note 119 *infra*.

9. 122 Ariz. at 447, 595 P.2d at 992.

10. *Id.*

11. *Id.* at 447-48, 595 P.2d at 992-93. See *State v. Carrico*, 116 Ariz. 547, 548, 570 P.2d 489, 490 (1977); *State v. Klem*, 108 Ariz. 349, 350, 498 P.2d 217, 218 (1972).

12. *Sage v. State*, 22 Ariz. 151, 155, 195 P. 533, 535 (1921); *Trimble v. Territory*, 8 Ariz. 281, 283, 71 P. 934, 934-35 (1903).

13. ARIZ. REV. STAT. ANN. § 13-611 (1954) (superceded); REV. STAT. OF ARIZ. § 9-231 (1913) (superceded); REV. STAT. OF ARIZ. § 9-230 (1901) (superceded); ARIZ. CODE ch. 10, § 47 (Howell 1864) (superceded).

14. The age of consent has ranged from ten years, ARIZ. CODE ch. 10 § 47 (Howell, 1864) (superceded), to fourteen years, REV. STAT. OF ARIZ. § 9-423 (1887) (superceded), and is presently eighteen years, ARIZ. REV. STAT. ANN. § 13-1405 (1978).

15. 1962 Ariz. Sess. Laws 85-86 (codified at ARIZ. REV. STAT. ANN. § 13-611 (1962) (superceded)).

16. The 1962 rape statute was divided into first degree rape (forcible) and second degree rape (statutory). See notes 2 & 4 *supra*.

17. Under the 1962 statute, the term of punishment for first degree rape was imprisonment for not less than five years, the maximum term being life imprisonment. For second degree rape a convicted offender was subject to a one year to life sentence or a term in the county jail not to exceed one year. ARIZ. REV. STAT. ANN. § 13-614(A), (B) (1962) (current versions at ARIZ. REV. STAT. ANN. §§ 13-601-602, -1405, -1406 (1978)).

Before the entire criminal code was revised in 1977¹⁸ first degree rape included situations in which intercourse was forcibly or otherwise nonconsensually perpetrated.¹⁹ Second degree rape was defined as intercourse with a female under the age of eighteen, "under circumstances not amounting to rape in the first degree."²⁰

In *State v. Vineyard*²¹ the Arizona Supreme Court made it clear that the division of the rape statute into two degrees did not create separate offenses.²² According to the court "[t]he legislature merely set this particular form of rape [statutory] apart from the other five [non-consensual] for the obvious purpose of allowing a different penalty to be assessed for its violation."²³

In *State v. Klem*,²⁴ the appellant challenged this proposition claiming that first and second degree rape were separate offenses.²⁵ In *Klem* the appellant was charged with first degree rape but, at the conclusion of the State's case, the prosecutor amended the information to charge second degree rape.²⁶ The defense objected on the ground that second degree rape was a separate crime, neither charged in the original information nor necessarily included²⁷ in first degree rape.²⁸ The trial judge allowed the State's amendment to stand and *Klem* appealed.²⁹ With this issue before it, the Arizona Supreme Court acknowledged that "procedural due process requires notice of a specific charge and the opportunity to be heard on the issues raised on that charge."³⁰ The court then rejected the appellant's contention that forcible and statu-

18. 1977 Ariz. Sess. Laws 729.

19. ARIZ. REV. STAT. ANN. § 13-611(A) (1962) (current version at ARIZ. REV. STAT. ANN. § 13-1406 (1978)). See note 4 *supra*.

20. ARIZ. REV. STAT. ANN. § 13-611(B) (1962) (current version at ARIZ. REV. STAT. ANN. § 13-1405 (1978)). See note 2 *supra*.

21. 96 Ariz. 76, 392 P.2d 30 (1964).

22. *Id.* at 79, 392 P.2d at 32-33.

23. *Id.* at 79, 392 P.2d at 32.

24. 108 Ariz. 349, 498 P.2d 216 (1972).

25. *Id.* at 350, 498 P.2d at 217.

26. *Id.*

27. An offense is included if either: (1) The greater offense cannot be committed without also committing the lesser offense; or (2) the document charging the offense alleges circumstances constituting a lesser offense which is not a constituent part of the greater. *In re Appeal, Juvenile Action No. J-75755*, 111 Ariz. 103, 105, 523 P.2d 1304, 1306 (1974) (criminal trespass is not a lesser included offense of burglary as elements of each offense differ); *State v. Westbrook*, 79 Ariz. 116, 119, 285 P.2d 161, 162 (1954) (conspiracy to commit burglary is not a lesser included offense of attempted burglary because two persons may conspire to commit burglary without performing the overt act required for the offense of attempted burglary); *State v. Hanks*, 58 Ariz. 77, 81, 118 P.2d 71, 73 (1941) (assault to commit murder includes aggravated assault because the former offense implies the use of means calculated to inflict great bodily injury, a necessary element of aggravated assault). If for either of the two reasons set forth above an offense is necessarily included, that offense need not be explicitly charged. ARIZ. R. CRIM. P. 13.2; see *State v. Parsons*, 70 Ariz. 399, 406, 222 P.2d 637, 644 (1950).

28. 108 Ariz. at 350, 498 P.2d at 217.

29. *Id.*

30. *Id.*

tory rape are separate offenses.³¹ It cited *State v. Vineyard* for the proposition that the rape statute, even as amended, merely defines the several situations in which intercourse is considered to be rape.³² The court bolstered its opinion by stating that for the purposes of preparing his defense Klem was not misled by the original information.³³ The court concluded that, because the victim testified at the preliminary hearing that she was seventeen years old, Klem had sufficient notice that second degree rape was at issue.³⁴ Therefore the appellant was not prejudiced by the mid-trial amendment.³⁵

In *State v. Gray*, a majority of the Arizona Supreme Court adhered to *Vineyard* and *Klem*.³⁶ A contrary opinion, however, was proffered by a lone dissenter who viewed forcible and statutory rape as separate offenses.³⁷ Based on this premise the dissent argued that notice of a charge of statutory rape, extrinsic to the charging document, which charges forcible rape, does not adequately ensure due process.³⁸

Forcible and Statutory Rape: Separate or Equivalent?

Relying on *State v. Klem*, the Supreme Court in *Gray* held that, although *Gray* was only charged with and tried for first degree rape, he was not prejudiced by a second degree rape instruction.³⁹ Central to the holding in *Gray* and other Arizona cases confronting this issue is the conclusion that forcible and statutory rape are not separate offenses.⁴⁰

31. *Id.*

32. *Id.*

33. *Id.* at 350-51, 498 P.2d at 217-18.

34. *Id.*

35. *Id.*

36. 122 Ariz. at 447, 595 P.2d 992.

37. *Id.* at 449-50, 595 P.2d at 994-95 (Gordon, J., dissenting). Until *State v. Gray*, the *Vineyard* and *Klem* decisions had been upheld unanimously. *State v. Carrico*, 116 Ariz. 547, 548, 570 P.2d 489, 490 (1977); *State v. Munoz*, 114 Ariz. 466, 469, 561 P.2d 1238, 1241 (Ct. App. 1976); *State v. Williams*, 27 Ariz. App. 279, 284, 554 P.2d 646, 651 (1976). Justice Gordon was not a member of the Arizona Supreme Court when *Klem* and *Vineyard* were decided and in *Carrico* he abstained from participating in the decision.

38. 122 Ariz. at 450, 595 P.2d at 995.

39. *Id.* at 447-48, 595 P.2d at 992-93.

40. See text & note 10 *supra*. The court's construction of first and second degree rape as equivalent offenses is significant in light of the procedural rule governing amendments to an information. ARIZ. R. CRIM. P. 13.5(b) provides:

The preliminary hearing or grand jury indictment limits the trial to the specific charge or charges stated in the magistrate's order or grand jury indictment. The charge may be amended only to correct mistakes of fact or remedy formal or technical defects, unless the defendant consents to the amendment. The charging document shall be deemed amended to conform to the evidence adduced at any court proceeding.

See also *State v. Butler*, 9 Ariz. App. 162, 165, 450 P.2d 128, 131 (1969) (amendment to information allowed only if the offense charged remains the same).

Since first and second degree rape are components of the general offense of rape, an amendment of a first degree rape charge to second degree rape would be valid because it would not alter the original charge. The majority in *Gray* did not explicitly address the question of whether or not an amendment charging second degree rape would be valid. The issue before the court was

The treatment of these crimes as either separate or equivalent varies among the jurisdictions in this country, and the cases reflect no steadfast rule which determines when either construction will prevail.⁴¹ A possible indication of whether a jurisdiction will consider these offenses separate or equivalent, however, appears to be the structure of the statute itself.⁴² Generally, where forcible and statutory rape are defined in separate statutes they are treated as distinct offenses.⁴³ Conversely, if forcible and statutory rape are defined together in the same statute, the courts usually hold that each is merely a form of the general offense of rape and not a separate offense.⁴⁴

Until 1978, the Arizona legislature had consistently subsumed forcible and statutory rape under one criminal code section entitled "rape."⁴⁵ It is possible that the Arizona courts have accepted such legislative action as a mandate to treat forcible and statutory rape as equivalent offenses.⁴⁶

whether the judge erred in submitting a second degree instruction and form of verdict following the trial for first degree rape. 122 Ariz. at 446, 595 P.2d at 991. The court has, however, held that a mid-trial amendment of an information changing first degree rape to second degree rape is valid. *State v. Klem*, 108 Ariz. 349, 350-51, 498 P.2d 216, 217-18 (1972).

41. *Compare* *Stewart v. State*, 27 Ala. App. 315, 318, 172 So. 675, 677 (1936) (carnal knowledge of a girl under the prohibited age is akin to rape but a distinct offense); *People v. Puckett*, 44 Cal. App. 3d 607, 611, 118 Cal. Rptr. 884, 887 (1975) (consensual intercourse with female under 18, though unlawful, is not a form of rape); *and* *Williams v. State*, 383 N.E.2d 416, 418 (Ind. Ct. App. 1978) (rape and statutory rape do not contain the same elements and consequently are not included offenses but are separate and distinct) *with* *Torres v. State*, 521 P.2d 386, 387 n.3 (Alaska 1974) (carnal knowledge of girl under 16 is rape); *Stapleton v. Commonwealth*, 305 S.W.2d 911, 912 (Ky. 1957) (statutory rape is lesser offense and included in rape since a person under 16 is legally incapable of consent); *and* *State v. Richardson*, 48 N.M. 544, 549, 154 P.2d 224, 227 (1945) (sexual intercourse with an underaged female with her consent is rape).

42. In this context "structure" refers to the manner in which a legislature has chosen to designate the statutory sections dealing with sexual offenses. Factors considered are the title of the statute, enumeration of offenses, and distinction of offenses by degree. *See* *Police Pension Bd. v. Warren*, 97 Ariz. 180, 185, 398 P.2d 892, 897 (1965); *Nunez v. Superior Court*, 18 Ariz. App. 462, 465, 503 P.2d 420, 423 (1972).

43. *See* 18 U.S.C. §§ 2031-2032 (1976), in which § 2031 designates the punishment for forcible rape and § 2032 defines and designates the punishment for statutory rape. These statutes have been construed as defining separate offenses. *Williams v. United States*, 327 U.S. 711, 715-16 n.11 (1946); *United States v. Smith*, 574 F.2d 988, 990 (9th Cir.), *cert. denied*, 438 U.S. 852 (1978); *United States v. Jacobs*, 113 F. Supp. 203, 206, *appeal dismissed on motion of appellant*, 436 U.S. 892 (1953). Evidence of this dichotomy is also found in state jurisdictions. *People v. Puckett*, 44 Cal. App. 3d 607, 612, 118 Cal. Rptr. 884, 888 (1975) (CAL. PENAL CODE § 261.5 (1970) entitled "Unlawful sexual intercourse with female under age 18" is not a form of rape as defined in § 261); ILL. ANN. STAT. ch. 38, § 11-1 (Smith-Hurd, 1961) (committee comments following section states that it covers only forcible rape and because of substantial differences between forcible and statutory rape, the two offenses are treated separately); N.Y. PENAL LAW § 130-20 (McKinney 1975) (practice commentary annotating statute explains that statutory rape was redesignated "Sexual misconduct" to eliminate stigma of being adjudicated rapist and such offense is treated strictly as misdemeanor).

44. *See* *Torres v. State*, 521 P.2d 386, 388 (Alaska 1974); *State v. Klem*, 108 Ariz. 349, 350, 498 P.2d 216, 217 (1972); *People v. Collins*, 54 Cal. 2d 57, 59, 351 P.2d 326, 328, 4 Cal. Rptr. 158, 160 (1969); *Stapleton v. Commonwealth*, 305 S.W.2d 911, 912 (Ky. 1957); *State v. Richardson*, 48 N.M. 544, 549, 154 P.2d 224, 227 (1945).

45. *See* statutes quoted notes 2, 4 *supra*.

46. *See* *State v. Gray*, 122 Ariz. 445, 447, 595 P.2d 990, 992 (1979); *State v. Carrico*, 116 Ariz. 547, 548, 570 P.2d 489, 490 (1977); *State v. Klem*, 108 Ariz. 349, 350, 498 P.2d 216, 217 (1972);

The Arizona Supreme court is not alone in its construction of statutory and forcible rape as equivalent offenses.⁴⁷ Such a treatment of rape is exhibited in the California case of *People v. Collins*.⁴⁸ In *Collins*, the information charged only forcible rape and was not amended during trial.⁴⁹ Sitting without a jury the court found the defendant guilty of statutory rape.⁵⁰ The defendant appealed and asserted that he had been convicted of an uncharged offense.⁵¹ The California Supreme Court affirmed the conviction declaring that forcible and statutory rape are not separate offenses.⁵²

Although the construction of the rape statute is well settled in Arizona,⁵³ Justice Gordon argues in dissent in *Gray* that first and second degree rape are separate and distinct offenses.⁵⁴ Based on this premise Justice Gordon contends that the majority has perpetuated an exception to the general rule in Arizona that a verdict may be rendered for an offense different from that charged only if it is included in the offense charged.⁵⁵

In arguing that forcible and statutory rape are separate offenses, Justice Gordon focuses solely on the elemental differences between forcible and statutory rape.⁵⁶ From this standpoint his position is logically sound. The crime of first degree rape entails a nonconsensual, forceful, or coercive act.⁵⁷ Second degree rape, a "statutory embellishment"⁵⁸ to the common-law forcible rape offense, differs in kind.⁵⁹ Statutory rape is not a crime of violence.⁶⁰ The charging of statutory rape, moreover,

State v. Vineyard, 96 Ariz. 76, 79, 392 P.2d 30, 32 (1964) (rape statute divided into degrees for purpose of designating punishment only). *But see* text & notes 118-21 *infra*.

47. See text & note 44 *supra*.

48. 54 Cal. 2d 57, 59, 351 P.2d 326, 328, 4 Cal. Rptr. 158, 160 (1960).

49. *Id.*

50. *Id.* at 58, 351 P.2d at 327, 4 Cal. Rptr. at 159.

51. *Id.* at 58-59, 351 P.2d at 327-28, 4 Cal. Rptr. at 159-60.

52. *Id.* at 59-60, 351 P.2d at 328-29, 4 Cal. Rptr. at 160-61. The court also stated that under an information charging forcible rape any of the circumstances set forth in the statute may be proved if the accused has received notice of the possibility of such a variance. *Id.* at 59, 351 P.2d at 328, 4 Cal. Rptr. at 160. Although *Collins* is illustrative of the treatment of forcible and statutory rape as equivalent offenses and was cited with approval in *State v. Klem*, some courts have declared that it is no longer controlling in California. *People v. Chapman*, 47 Cal. App. 3d 597, 604 n.3, 121 Cal. Rptr. 315, 319-20 n.3 (1975) (*Collins* no longer applicable after amendment of rape statute); *People v. Puckett*, 44 Cal. App. 3d 607, 611, 118 Cal. Rptr. 884, 887 (1975) (unlawful intercourse is not a form of rape). See text & notes 122-25 *infra*.

53. See text & notes 12, 46 *supra*.

54. 122 Ariz. at 450, 595 P.2d at 995.

55. *Id.*; see *In re Appeal, Juvenile Action No. J-75755*, 111 Ariz. 103, 105, 523 P.2d 1304, 1306 (1974); *State v. Estrada*, 27 Ariz. App. 183, 184, 552 P.2d 772, 773 (1976); *Peterson v. Jacobsen*, 2 Ariz. App. 593, 595, 411 P.2d 31, 33 (1966).

56. See 122 Ariz. at 450, 595 P.2d at 995.

57. ARIZ. REV. STAT. ANN. § 13-611(A) (1962) (current version at ARIZ. REV. STAT. ANN. § 13-1406 (1978)). See note 4 *supra*.

58. Gerber & Foreman, *Arizona's Criminal Law: The Critical Need for Comprehensive Revision*, 8 ARIZ. L. REV. 63, 84 (1976).

59. *Id.* at 85.

60. See ARIZ. REV. STAT. ANN. § 13-611(B) (1962) (current version at ARIZ. REV. STAT.

is contingent on the age of the victim.⁶¹ Consent, while a defense to a forcible rape charge is not a defense to second degree rape.⁶²

As Justice Gordon notes, first and second degree rape do contain different elements.⁶³ By their nature, they seem to constitute separate offenses. The structure of the rape statute itself,⁶⁴ and the parallel treatment of rape in jurisdictions with similarly fashioned code sections,⁶⁵ however, favors the treatment adhered to by the majority.⁶⁶ It seems apparent that the Arizona courts have properly perceived the intent of the legislature by construing the first and second degree offenses as merely forms of the general crime of rape.⁶⁷ It follows, then, that the second degree rape jury instruction and form of verdict presented in *State v. Gray* did not encompass an offense different from that charged in the original information.

Due Process and the Notice in Gray

The majority in *State v. Gray*, unlike Justice Gordon in dissent, did not pursue at length the question of whether or not first and second degree rape are equivalent offenses.⁶⁸ Important to the court was the factual determination of whether the appellant had notice that second degree rape was at issue.⁶⁹ Thus, the next issue analyzed is whether preliminary-hearing testimony that a rape victim is under the age of consent is sufficient notice of a possible prosecution for second degree rape.

The majority in *Gray* concluded that notice extrinsic to the information was sufficient to inform the defendant that second degree rape was at issue.⁷⁰ Justice Gordon, on the other hand, declared that "[t]o allow notice of a potential offense from sources other than the charging document is not a sufficiently stringent safeguard of due process."⁷¹

It is axiomatic that an accused has a right to notice of the specific charge against him.⁷² Notice, an essential element of due process, ensures that an accused will be able to prepare defenses to a charge and

ANN. § 13-1405 (1978)). See note 2 *supra*. By definition second degree rape occurs only under circumstances not set forth in § 13-611(A). Thus, a violent act of intercourse, regardless of the age of the victim, would amount to first degree rape.

61. ARIZ. REV. STAT. ANN. § 13-611(B) (1962) (current version at ARIZ. REV. STAT. ANN. § 13-1405 (1978)). See note 2 *supra*.

62. *State v. Snyder*, 25 Ariz. App. 406, 409, 544 P.2d 230, 233 (1976).

63. *Id.* See text & notes 56-62 *supra*.

64. See text & notes 12-23 *supra*.

65. See text & note 47 *supra*.

66. 122 Ariz. at 447, 595 P.2d at 992.

67. See *id.* But see text & notes 118-121 *infra*.

68. See *id.* at 447, 595 P.2d at 992.

69. *Id.*

70. *Id.*

71. *Id.* at 450, 595 P.2d at 995.

72. *Cole v. Arkansas*, 333 U.S. 196, 200-01 (1948); ARIZ. CONST. art. 2, § 24.

helps prevent surprise at trial.⁷³ The general rule is that notice of a charge is to be furnished to a defendant in the form of an indictment or information.⁷⁴

There is authority in Arizona, however, supporting the proposition that an accused may acquire sufficient notice of an offense from sources other than an information, indictment, or bill of particulars.⁷⁵ For example, in *State v. Benham*⁷⁶ the court determined that the defendant was entitled to a bill of particulars.⁷⁷ Nevertheless, even though the state had failed to supply written details of the charge, the court held that the prosecutor's opening statement was an adequate substitute.⁷⁸

Another example where an Arizona court has held that notice of an offense extrinsic to an information is sufficient for due process purposes is *State v. Rupp*.⁷⁹ In *Rupp*, the appellants were charged with and tried for involuntary manslaughter following the death of their son by starvation.⁸⁰ Generally, involuntary manslaughter must be pleaded with specificity because the statute itself is couched in general terms.⁸¹ Involuntary manslaughter occurs when death results from the commission of an act not amounting to a felony.⁸² This involuntary manslaughter charge in *Rupp* was based on violations of three misdemeanor statutes that dealt generally with the parental duty to provide for one's children.⁸³ These misdemeanor offenses were not charged in the information, but the trial judge instructed on them nevertheless.⁸⁴ *Rupp* was convicted of involuntary manslaughter and appealed claiming that she was not adequately apprised of the offenses

73. *State v. Branch*, 108 Ariz. 351, 355, 498 P.2d 218, 222 (1972); *Dunn v. State*, 50 Ariz. 473, 480, 72 P.2d 107, 110 (1937).

74. ARIZ. CONST. art. 2, § 30; ARIZ. R. CRIM. P. 2.2; *State v. Rogers*, 113 Ariz. 6, 8, 545 P.2d 930, 932 (1976); see ARIZ. R. CRIM. P. 13.5(b); note 40 *supra*.

75. See, e.g., *State v. Benham*, 58 Ariz. 129, 135-36, 118 P.2d 91, 93-94 (1941) (prosecutor's opening statement is valid substitute for bill of particulars); *State v. Puryear*, 121 Ariz. 359, 362, 590 P.2d 475, 478 (Ct. App. 1979) (full pretrial disclosure of prosecution's case including pretrial memorandum stating that proof of certain misdemeanors would be forthcoming was sufficient substitute for specificity required in pleading involuntary manslaughter); *State v. Rupp*, 120 Ariz. 490, 496-97, 586 P.2d 1302, 1308-09 (Ct. App. 1978) (pretrial motion stating that defendant violated certain misdemeanor statutes sufficient notice of charge though not mentioned in information).

76. 58 Ariz. 129, 118 P.2d 91 (1941).

77. *Id.* at 135, 118 P.2d at 93-94. A bill of particulars serves as a supplement to the formal charge set forth in the information. The purpose of such a bill is to provide details of the offense so that the accused will be able to prepare the applicable defenses. *State v. Hagen*, 27 Ariz. App. 722, 725, 558 P.2d 750, 753 (1976). A bill of particulars is granted only if the court, in its discretion, determines that the defendant lacks sufficient information to prepare a defense. *State v. Benham*, 58 Ariz. at 134, 118 P.2d at 93.

78. 58 Ariz. at 135, 118 P.2d 93-94.

79. 120 Ariz. 490, 586 P.2d 1302 (Ct. App. 1978).

80. *Id.* at 493, 586 P.2d at 1305.

81. See ARIZ. REV. STAT. ANN. § 13-456(A)(2) (1956) (current version at ARIZ. REV. STAT. ANN. § 13-1102 (1978)).

82. *Id.*; 120 Ariz. at 496, 586 P.2d at 1308.

83. 120 Ariz. at 496 n.1, 586 P.2d at 1308 n.1.

84. *Id.* at 496, 586 P.2d at 1308.

that constituted the basis of the involuntary manslaughter charge.⁸⁵ In response, the court of appeals concluded that actual notice of the offenses underlying the involuntary manslaughter charge was an adequate safeguard of due process.⁸⁶ Actual notice in this case consisted of the prosecutor's reference to the misdemeanor statutes at the preliminary hearing.⁸⁷ Moreover, in a pretrial response to a motion *in limine* by Rupp, the prosecutor replied that Rupp violated the three misdemeanor provisions.⁸⁸

On the matter of notice, *Gray* and *Rupp* differ in one sense. In *Rupp*, notice was derived from express oral and written statements of the prosecutor.⁸⁹ In *Gray*, however, second degree rape was not even mentioned until the court instructed the jury.⁹⁰ The notice in *Gray* hinged merely on the fact that the victim testified at the preliminary hearing that she was seventeen years old.⁹¹ This may be a distinction in form only. The sole defense exclusive to a second degree rape charge is that the victim is over the age of consent.⁹² In *Gray*, it was established that the victim was under the age of consent.⁹³ Therefore, it seems that even if second degree rape had been charged it is unlikely that the age defense could have been raised successfully.

Although the majority in *Gray* held that preliminary hearing testimony was adequate to apprise the defendant of an impending prosecution for second degree rape,⁹⁴ Justice Gordon, in dissent, argued that only a formal charge satisfies the due process notice requirement.⁹⁵ Justice Gordon relied on the United States Supreme Court case of *Cole v. Arkansas*⁹⁶ for the proposition that an accused may not be convicted for an offense that has not been charged.⁹⁷ The question of the adequacy of preliminary hearing testimony as notice of an offense was not raised in *Cole*. Nevertheless, the decision may, by analogy, be supportive of Justice Gordon's contention.

In *Cole*, the petitioner was convicted of unlawful assembly to prevent others from engaging in a lawful vocation.⁹⁸ On appeal, the Ar-

85. *Id.*

86. *Id.* at 497, 586 P.2d at 1309.

87. *Id.* at 496, 586 P.2d at 1308.

88. *Id.*

89. *Id.*

90. 122 Ariz. at 447-48, 595 P.2d at 992-93.

91. *Id.*

92. See ARIZ. REV. STAT. ANN. § 13-611(B) (1962) (current version at ARIZ. REV. STAT. ANN. § 1405 (1978)); note 2 *supra*.

93. 122 Ariz. at 447-48, 595 P.2d at 992-93.

94. *Id.*

95. *Id.* at 450, 595 P.2d at 995.

96. 333 U.S. 196 (1948).

97. 122 Ariz. at 450, 595 P.2d at 995 (citing *Cole v. Arkansas*, 333 U.S. 196, 201 (1948)).

98. 333 U.S. at 200.

kansas Supreme Court affirmed Cole's conviction on the basis of a similar but separate offense that includes the use of force or violence as an essential element.⁹⁹ The Arkansas Supreme Court indicated that there was evidence to support the finding of a violation of the uncharged offense.¹⁰⁰ Nevertheless, the United States Supreme Court reversed.¹⁰¹ The Court held that it was error to affirm a conviction on the basis of a statute that was not at issue during trial.¹⁰² Justice Black, for the Court, asserted that such an action violated the petitioner's right to notice of a specific charge.¹⁰³

Cole and *Gray* are factually dissimilar cases. The result in *Cole*, however, strengthens Justice Gordon's position. The Supreme Court reversed a conviction that was based on an uncharged offense.¹⁰⁴ The Court did so despite evidence supporting the conviction.¹⁰⁵ It might follow then that even facts established at trial cannot substitute for the formal notice provided by an indictment or information.¹⁰⁶ In light of his construction of first and second degree rape as separate offenses, Justice Gordon appeared to apply the analysis of *Cole* in *State v. Gray*. Thus, as Justice Gordon would contend, if evidence adduced at trial cannot suffice as a formal notice substitute, then preliminary hearing testimony would not either. Consequently, in accord with Justice

99. *Cole v. State*, 211 Ark. 836, 838-39, 202 S.W.2d 770, 771 (1947), *rev'd*, 333 U.S. 196 (1948).

100. *Id.*

101. 333 U.S. at 201.

102. *Id.* at 201-02.

103. *Id.*

104. *Id.*

105. See text & notes 100-03 *supra*.

106. Some state courts have also adopted the position that "a defendant cannot be convicted of an offense (other than a necessarily included offense) not charged against him by indictment or information whether or not there was evidence at his trial to show that he committed that offense." *People v. Cannady*, 8 Cal. 3d 379, 389, 503 P.2d 585, 592, 105 Cal. Rptr. 129, 136 (1972); see *Peterson v. Jacobson*, 2 Ariz. App. 593, 595, 411 P.2d 31, 33 (1966) (defendant charged only with driving while intoxicated could not be convicted of reckless driving even if evidence tended to prove such crime); *Bosnick v. State*, 248 Ark. 846, 849-50, 454 S.W.2d 311, 313-14 (1970) (where state elected from outset to charge premeditated murder it could not prove another "class" of murder even though evidence indicated such an offense); *State v. Brown*, 163 Conn. 52, 60-61, 301 A.2d 547, 552 (1972) (where information charged only illegal sale of narcotics defendant was not entitled to instruction on mere possession, regardless of evidence presented); *State v. Hall*, 86 Idaho 63, 68, 383 P.2d 602, 605 (1963) (murder information which alleged that commission of murder occurred during robbery did not purport to charge defendant with crime of robbery and was insufficient for that purpose).

Some appellate courts have held that a trial court does not have subject matter jurisdiction over an offense unless it is charged by indictment or information. See, e.g., *Peterson v. Jacobson*, 2 Ariz. App. 593, 595, 411 P.2d 31, 33 (1966) (where defendant charged with driving while intoxicated, court lacked jurisdiction to entertain trial for reckless driving); *Wisner v. State*, 216 Kan. 523, 523-26, 532 P.2d 1051, 1053 (1975) (where evidence of rape offered but information charged only aggravated kidnapping the court lacked jurisdiction to give rape instruction); *State v. Stevenson*, 2 Or. App. 38, 41, 465 P.2d 720, 722 (1970) (conviction of being accessory after the fact could not be sustained upon indictment charging arson since they are two separate offenses and as indictment charged only one offense the court lacked jurisdiction to try the other); *State v. Fennell*, 263 S. C. 216, 221, 209 S.E.2d 433, 434-35 (1974) (magistrate lacked jurisdiction to accept guilty plea for offense of reckless driving following charge and mistrial for driving under the influence).

Gordon's dissent, the failure to formally charge Gray with second degree rape violated the due process requirement that a defendant be given notice of a specific charge and thus constituted reversible error.¹⁰⁷

The issue of preliminary hearing testimony as adequate notice of an offense is addressed more directly in the California case of *People v. Leech*.¹⁰⁸ In *Leech* the court refused to allow the prosecutor to augment a charge with the preliminary hearing transcript.¹⁰⁹ The court distinguished *People v. Collins*,¹¹⁰ a case in which a similar practice was permitted.¹¹¹ The *Leech* court stated that notice extrinsic to the charging document was deemed sufficient in *Collins* because of the equivalency of the rape offenses involved.¹¹² In *Leech*, however, that which the prosecutor attempted to establish by means of the transcript and the crime charged were separate offenses.¹¹³

Thus, it is apparent that Justice Gordon's concept of what constitutes proper notice in a criminal prosecution is accepted by some courts.¹¹⁴ A key point, however, is that the courts mentioned above were dealing with separate and distinct offenses.¹¹⁵ Justice Gordon's dissent on the notice issue, therefore, is limited by the majority's determination that forcible and statutory rape are equivalent offenses.¹¹⁶ In light of the recent repeal of the rape statute in Arizona,¹¹⁷ however, Justice Gordon's analysis seems more appealing. It is conceivable that, by restructuring the statute, the legislature has mandated a fresh approach to the treatment of rape in this state.

107. See 122 Ariz. at 449-50, 595 P.2d at 994-95.

108. 232 Cal. App. 2d 397, 42 Cal. Rptr. 745 (1965).

109. *Id.* at 399-400, 42 Cal. Rptr. at 747. In *Leech* the defendant was charged with and tried for assault with a deadly weapon but convicted of drawing and exhibiting a firearm. *Id.* at 398, 42 Cal. Rptr. at 746. The court concluded:

[W]e do not believe that the preliminary transcript may be used to expand the information to include a different offense . . . Nothing in that [*Collins*] opinion indicates that a defendant may be found guilty at the trial of any offense shown by the preliminary transcript irrespective of what is charged by the information.

Id. at 397-400, 42 Cal. Rptr. at 747.

110. 54 Cal. 2d 57, 351 P.2d 326, 4 Cal. Rptr. 158 (1960). *Collins* involved a charge of forcible rape and a conviction for statutory rape. See text & notes 48-52 *supra*.

111. 54 Cal. 2d at 59, 351 P.2d at 328, 4 Cal. Rptr. at 160.

112. 232 Cal. App. 2d at 399-400, 42 Cal. Rptr. at 747; see *People v. Tatem*, 62 Cal. App. 3d 655, 658, 133 Cal. Rptr. 265, 266 (1976); *People v. Escarcega*, 43 Cal. App. 3d 391, 396 n.1, 117 Cal. Rptr. 595, 598 n.1 (1974); *People v. Ramos*, 25 Cal. App. 3d 529, 537 n.4, 101 Cal. Rptr. 230, 234 n.4 (1972). But see *People v. Cole*, 94 Cal. App. 3d 854, 862-64, 155 Cal. Rptr. 892, 896-97 (1979).

113. 232 Cal. App. 2d at 399-400, 42 Cal. Rptr. at 747. See note 109 *supra*.

114. See text & notes 96, 108 *supra*.

115. See text & notes 96-113 *supra*.

116. 122 Ariz. at 447, 595 P.2d at 992.

117. See text & notes 118-21 *infra*.

*Arizona Revised Statutes §§ 13-1405 and -1406:
The Demise of Gray?*

In 1977, the Arizona legislature enacted a revision of the entire criminal code, a task not undertaken since Arizona was a territory.¹¹⁸ In the area of sexual offenses, the Arizona legislature appears to have followed those jurisdictions affording forcible and statutory rape exclusive treatment. Rape is no longer divided into degrees.¹¹⁹ In addition, the former first and second degree rape offenses are now defined in separate sections.¹²⁰ A new defense to the former crime of statutory rape has also been added.¹²¹

California has undertaken a similar renovation of its rape statute.¹²² The California statute was amended and intercourse with a minor was relegated to a separate section of the penal code.¹²³ As in Arizona, rape in California had traditionally been defined as including both forcible intercourse and consensual intercourse with a minor.¹²⁴ This statutory revision has, however, prompted at least two courts in California to declare that consensual intercourse with a minor is not a form of rape.¹²⁵

The approach taken by the courts in California may now be relevant in Arizona. The legislature may have mandated the judicial treatment of "sexual assault" and "sexual conduct with a minor" as separate offenses by defining them in separate code sections. The enumerated purposes of the revised criminal code also seem to support this possibility.¹²⁶ In title 13, section 101 of the Arizona Revised Statutes, "fair

118. DeGraw, Twist, & Gerber, *The New Arizona Criminal Code*, ARIZ. B.J., August 1977, at 14.

119. Indeed, the term "rape" is no longer employed. ARIZ. REV. STAT. ANN. § 13-1405 (1978) provides:

A. A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age and who is not his or her spouse.

B. Sexual conduct with a minor under fifteen years of age is a class 2 felony. Sexual conduct with a minor over fifteen years of age is a class 6 felony.

Id. § 13-1406 (1978) provides:

A. A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person not his or her spouse without consent of such person.

B. Sexual assault is a class 2 felony.

120. See statutes cited note 119 *supra*.

121. Reasonable mistake of age is now a defense to sexual conduct with a minor where the victim is fifteen, sixteen or seventeen years of age. ARIZ. REV. STAT. ANN. § 13-1407(B) (1978).

122. See CAL. PENAL CODE §§ 261-261.5 (West 1970).

123. 1970 Cal. Stats. 2406 (codified at CAL. PENAL CODE § 261.5 (West 1970)).

124. CAL. PENAL CODE § 261 (West 1954) (current version at CAL. PENAL CODE §§ 261, 261.5 (West 1970)); *People v. Collins*, 54 Cal. 2d 57, 59, 351 P.2d 326, 328, 4 Cal. Rptr. 158, 160 (1960).

125. *People v. Chapman*, 47 Cal. App. 3d 597, 603-04 n.3, 121 Cal. Rptr. 315, 319-20 n.3 (1975); *People v. Puckett*, 44 Cal. App. 3d 607, 611, 118 Cal. Rptr. 884, 887 (1975).

126. See ARIZ. REV. STAT. ANN. § 13-101 (1978). In this section, the legislature has made it clear that one purpose of the new criminal code is to "define the act or omission and the accompanying mental state which constitute each offense."

warning” of proscribed conduct and the differentiation of offenses are stated goals of the new code.¹²⁷ Should the Arizona courts conclude that sexual assault and sexual conduct with a minor are indeed separate offenses, it will be more difficult for the courts to allow preliminary-hearing testimony to substitute as formal notice of a specific charge.

Conclusion

The defendant in *State v. Gray* was convicted of second degree rape although he was only charged with first degree rape. On appeal, the Arizona Supreme Court held that preliminary hearing testimony as to the age of the victim was sufficient notice that second degree rape, though not formally charged, was at issue. Justice Gordon, dissenting, stated that first and second degree rape are separate offenses. Therefore, he argued, in accord with the well-settled rule prohibiting convictions for uncharged offenses, only a formal charge would satisfy due process notice requirements. Justice Gordon contended that the majority’s decision hinged on their characterization of first and second degree rape as equivalent offenses. Since this characterization was a controlling factor, the *Gray* decision’s precedential value may be limited in light of the recent revision of the rape statute. If sexual assault and sexual conduct with a minor are construed as separate offenses, more meticulously fashioned charging documents will be in order.

Anthony Helm

B. “USE” OF A GUN UNDER 18 U.S.C. § 924(c)(1)

Under 18 U.S.C. § 924(c)(1), one who “uses a firearm to commit any felony”¹ in the United States is subject to a penalty of not less than one nor more than ten years imprisonment for a first offense² in addi-

127. *See id.*

1. 18 U.S.C. § 924(c) (1976), provides in part:

Whoever

(1) uses a firearm to commit any felony for which he may be prosecuted in court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States, shall in addition to punishment provided for commission of the felony be sentenced to a term of imprisonment of not less than one nor more than ten years. . . .

2. For first convictions under § 924(c), sentence may be imposed concurrently with the principal offense at the court’s discretion. *United States v. Sudduth*, 457 F.2d 1198, 1202 (10th Cir. 1972); Brief for Appellee at 8, *United States v. Moore*, 580 F.2d 360 (9th Cir.), *cert. denied*, 439 U.S. 970 (1978). An amendment to this section in 1970, however, prohibited concurrent sentences

tion to that imposed for the basic felony.³ Traditionally, convictions under section 924(c)(1) have ostensibly involved some aggressive act on the part of the defendant such as displaying or brandishing the weapon during the course of the crime.⁴ Nonetheless, in *United States v. Moore*,⁵ the Ninth Circuit interpreted "use" of a firearm under section 924(c)(1) to include "mere possession" of a gun in certain situations.⁶

In *Moore*, the defendant was arrested by F.B.I. agents outside a bank for attempted bank robbery.⁷ At the time of arrest, a loaded gun was found in the waistband of Moore's trousers.⁸ Moore was subsequently convicted of attempted robbery⁹ and using a firearm to commit a felony.¹⁰

On appeal, Moore claimed, *inter alia*, that his conviction under section 924(c)(1), prohibiting the use of a gun to commit a felony, was invalid because he simply had not "used" the gun in the attempted robbery.¹¹ The Ninth Circuit, however, upheld the findings of the district court and dismissed the claim.¹²

When Moore was arrested outside the bank, the gun was found tucked inside his trousers.¹³ There was no evidence that Moore touched the weapon or made any move to do so at any time during the attempted robbery or upon his arrest.¹⁴ Nevertheless, the Ninth Circuit found that Moore had "used" the gun within the meaning of section 924(c)(1) because it constituted an "integral part"¹⁵ of the attempted

for second or subsequent convictions. Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, 84 Stat. 1880 (amending 18 U.S.C. § 924(c) (1970)).

3. The penalties under section 924(c) have been judicially interpreted as creating a separate penalty rather than an enhanced penalty. *United States v. Howard*, 504 F.2d 1281, 1286 (8th Cir. 1974); *United States v. Sudduth*, 457 F.2d 1198, 1202 (10th Cir., 1972).

4. *See, e.g.*, *United States v. Basic*, 587 F.2d 577, 580 (3d Cir.), *vacated on other grounds*, 587 F.2d 587 (3d Cir. 1978) (firing gun at undercover agents); *United States v. Crew*, 538 F.2d 575, 578 (4th Cir. 1976), *cert. denied*, 429 U.S. 852 (1977) (employed gun in commission of robbery); *United States v. Williams*, 523 F.2d 1203, 1211 (5th Cir. 1975) (brandished weapon in front of kidnap victim).

5. 580 F.2d 360 (9th Cir.), *cert. denied*, 429 U.S. 970 (1978).

6. *Id.* at 362.

7. *Id.* at 361. Moore was arrested by F.B.I. agents as he approached the bank. Brief for Appellant at 2-3, *United States v. Moore*, 580 F.2d 360 (9th Cir.), *cert. denied*, 429 U.S. 970 (1978).

8. 580 F.2d at 361.

9. 18 U.S.C. § 2113(a) (1976).

10. *Id.* § 924(c)(1). Oddly, there is a federal statute covering the use of a weapon in an attempted bank robbery. *See id.* § 2113(d). Unlike the rather vague language of § 924(c), § 2113(d) provides for a separate penalty upon evidence of either assault or putting the life of a person in jeopardy by the use of a dangerous weapon. Moore was originally charged in the complaint under this provision but this charge was subsequently dropped in the indictment. *See Reply Brief for Appellant at 4, United States v. Moore*, 580 F.2d 360 (9th Cir.), *cert. denied*, 429 U.S. 970 (1978).

11. 580 F.2d at 361.

12. *Id.* at 362.

13. *Id.* at 361.

14. *Id.* at 361-62.

15. *Id.* at 362.

robbery that substantially increased the "likelihood of success."¹⁶ This finding expands not only the traditional definition of "use"¹⁷ but broadens previous judicial construction of section 924(c) as well.¹⁸ Prior to *Moore*, a defendant in possession of a gun but not actually employing the weapon during a felony, was subject only to section 924(c)(2)¹⁹ which prohibits the unlawful carrying of a gun.²⁰ Additionally, the defendant charged with a section 924(c)(2) violation could successfully defeat conviction upon a showing of a valid permit to carry a weapon.²¹

The *Moore* court's ruling on section 924(c)(1) is important in two respects. First, in finding that simple possession of a weapon constitutes its use, *Moore* brings the defendant who merely carries a weapon in a felony within the scope of section 924(c)(1).²² Second, and inherent in this judicial expansion of use under subsection (c)(1), *Moore* diminishes, if not altogether eliminates, the significance of the carrying prohibition contained in section 924(c)(2) as well as the subsection (c)(2) defense of a lawful permit to possess a weapon.²³

This casenote will examine prior federal case law establishing traditional notions of "use" under section 924(c)(1). The case of *United States v. Grant*,²⁴ the first appellate decision finding weapons possession a "use" under section 924(c)(1) will then be evaluated in light of *Moore*. Finally, the legislative history of section 924(c) will be considered in determining the impact of *Moore* on future cases.

Traditional "Use" of a Firearm before Moore

The two subsections contained in section 924(c) provide identical penalties.²⁵ The subsections, however, concern distinctly different activities. Section 924(c)(1) prohibits one from using a firearm to commit a felony.²⁶ Section 924(c)(2) proscribes the offense of carrying unlaw-

16. *Id.*

17. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2523-24 (1965) defines "use" as "to put into action or service; to carry out a purpose or action by means of."

18. See cases cited at note 4 *supra*. For further discussion of this point, see text & notes 30-48 *infra*.

19. 18 U.S.C. § 924(c)(2)(1976).

20. See, e.g., *United States v. Soria*, 519 F.2d 1060, 1063 (5th Cir. 1975); *United States v. Ramirez*, 482 F.2d 807, 813 (2d Cir.) *cert. denied*, 414 U.S. 1070 (1973); *United States v. Brant*, 448 F. Supp. 781, 782 (W.D. Pa. 1978).

21. 18 U.S.C. § 924(c)(2)(1976). This section provides that the weapon must be carried unlawfully to establish guilt. *Id.* Thus, a person involved in a felony found carrying a weapon which he is licensed to carry is not subject to the § 924(c)(2) penalty. See, e.g., *United States v. Bower*, 557 F.2d 499, 501 (5th Cir. 1978); *United States v. Akers*, 542 F.2d 770, 772 (9th Cir. 1976); *United States v. Soria*, 519 F.2d 1060, 1063 (5th Cir. 1975).

22. See 580 F.2d at 362.

23. See note 1 *supra*.

24. 545 F.2d 1309 (2d Cir. 1976), *cert. denied*, 429 U.S. 1103 (1977).

25. Compare 18 U.S.C. § 924(c)(1)(1976) with *id.* § 924(c)(2).

26. *Id.* § 924(c)(1).

fully a firearm during the commission of a felony.²⁷ This distinction between "using" a gun in subsection (c)(1) and "carrying" a gun in subsection (c)(2) is apparent not only in the specific language of the statute but is further illuminated in decisions under section 924(c) prior to *Moore*.

Admittedly, with the exceptions of *Grant* and *Moore*, federal appellate decisions concerning section 924(c) did not directly address the definitive boundaries of "use" of a gun under subsection (c)(1).²⁸ Nevertheless, in keeping with the statutory language, case law prior to *Moore* clearly separated the subsection (c)(1) "use" violation of aggressively displaying the firearm from that of the subsection (c)(2) "carrying" violation of simple possession of a weapon.

The type of conduct triggering a violation of the section 924(c)(2) "carrying" prohibition is demonstrated in *United States v. Brant*.²⁹ The defendant in *Brant* was convicted under section 924(c)³⁰ for the act of his coconspirator in concealing a weapon under the seat of the van driven by defendants to the scene of a drug sale.³¹ Like *Moore*, the defendants in *Brant* neither openly displayed nor employed the weapon.³² Instead, the weapon was carried in a manner not visible to the victims, and indeed, there was some question as to whether *Brant* had actual knowledge of the gun's presence.³³ Nevertheless, the court upheld the convictions noting that although the defendants did not "use" the weapon,³⁴ their crime was in carrying it to the felony scene.³⁵

A case presenting both the affirmative action of "use" under sub-

27. *Id.* § 924(c)(2).

28. *See, e.g.*, *United States v. Busic*, 587 F.2d 577 (3d Cir.), *vacated on other grounds*, 587 F.2d 587 (3d Cir. 1978); *United States v. Bower*, 575 F.2d 499 (5th Cir. 1978); *United States v. Williams* 523 F.2d 1203 (5th Cir. 1975).

29. 448 F. Supp. 781 (W.D. Pa. 1978).

30. *Id.* at 781-82. The court did not clearly state whether the defendants were convicted under § 924(c)(2) or (c)(1) but simply cites § 924(c). Given the language used by the court, however, a fair inference is that the defendants were guilty of a § 924(c)(2) violation rather than § 924(c)(1). *See* 448 F. Supp. at 782.

31. 448 F. Supp. at 782.

32. *Id.*

33. *Id.*

34. *Id.* The court, in language similar to that found in *Moore*, noted that the facts did not present evidence that the defendants "used" the weapon:

It cannot be denied that the possession of firearms at a narcotics transaction increases the probability of the transaction's success. . . . That Levrio [the coconspirator] did not have an opportunity to use his guns does not exonerate *Brant* or Levrio for Levrio's action in bringing them to the place of the deal.

Id. Since the evidence did not show any affirmative action by the defendants to employ the weapons, the defendants clearly "carried" the weapons in the felony. *Id.*

35. *Id.* at 782; *see United States v. Rodriguez*, 498 F.2d 302, 305 (5th Cir. 1974) (defendants arrested for conspiracy to sell marijuana convicted under § 924(c)(2) when found carrying weapons); *United States v. Ramirez*, 482 F.2d 807, 811 (2d Cir.) (defendant convicted under § 924(c)(2) for unlawfully carrying a firearm when, on his arrest, a pistol was found in the waistband of his trousers; reversed on appeal because prosecution had not presented evidence to show that defendant had carried the firearm unlawfully), *cert. denied*, 414 U.S. 1070 (1973).

section (c)(1) and the passive action of "carrying" under subsection (c)(2) is *United States v. Busic*.³⁶ In *Busic*, each of the two defendants carried a weapon tucked in his waistband during a narcotics transaction.³⁷ Only one of the defendants, however, fired his weapon at federal agents.³⁸ The other defendant stood by during the shootout and never touched his weapon.³⁹ The defendant who fired his weapon was convicted under section 924(c)(1) for "use" of a gun.⁴⁰ The second defendant was convicted under section 924(c)(2) for unlawfully carrying a weapon though at no time did he touch his weapon.⁴¹ Although the defendants received the same sentence for the convictions,⁴² the conduct that violated subsection (c)(1) (firing the gun) and that which violated subsection (c)(2) (simply carrying the gun) is aptly demonstrated.⁴³

The distinct treatment of subsections (c)(1) and (c)(2) in the above cases may reflect prosecutorial discretion in the crimes charged rather than judicial interpretation of section 924(c). Yet, given both the statutory language of section 924(c) and the decisions prior to *Moore*, the more reasonable conclusion is that convictions under subsection (c)(1) require evidence of an aggressive, affirmative act such as brandishing or discharging the gun.⁴⁴ This conclusion is further supported by language found in *United States v. Bower*.⁴⁵ In *Bower*, the Fifth Circuit upheld the conviction of a defendant under section 924(c)(2) when he was found carrying a pistol in the waistband of his trousers after his arrest for selling drugs to an undercover agent.⁴⁶ The court noted that the defendant had not been charged with a subsection (c)(1) violation because the defendant had not "affirmatively" used the weapon.⁴⁷

36. 587 F.2d 577 (3d Cir.), *vacated on other grounds*, 587 F.2d 587 (3d Cir. 1978).

37. *Id.* at 579.

38. *Id.*

39. *Id.*

40. *Id.* at 580.

41. *Id.*

42. 587 F.2d at 588 (3d Cir.), *vacating on other grounds*, 587 F.2d 577 (3d Cir. 1978). The defendants each received 20 years for violating § 924(c)(1) and (c)(2). The conviction of La Rocca (who fired his weapon) was overturned on appeal in light of *Simpson v. United States*, 435 U.S. 6, 15 (1978), where it was held that a defendant may not receive consecutive sentences under § 924(c) and 18 U.S.C. § 2113(d). 587 F.2d at 588. La Rocca's case was remanded for resentencing under either § 111 or § 924(c)(1), but not both. *Id.* at 589. *Busic's* conviction under § 924(c)(2) was affirmed. *Id.*

43. *See* 587 F.2d at 581. *Cf.* *United States v. Crew*, 538 F.2d 575, 578 (4th Cir. 1976) (court found that a defendant charged with violating both § 924(c)(1) and (c)(2) in robbing a bank could be charged with only a (c)(1) violation since the (c)(2) offense had merged into the offense of using a gun), *cert. denied*, 419 U.S. 852 (1977).

44. *See* *United States v. Busic*, 587 F.2d 577, 579-80 (3d Cir.), *vacated on other grounds*, 587 F.2d 587 (3d Cir. 1978).

45. 575 F.2d 499 (5th Cir. 1978).

46. *Id.* at 501.

47. *Id.* As the court stated: "The government has admitted from the outset that the defendant did not affirmatively use the firearm during the cocaine transaction. Thus, defendant did not

The common thread found in the conduct of the defendants in *Brant*, *Bower*, and *Busic* is inaction.⁴⁸ The defendants were guilty of simple possession, not of aggressively employing the weapon.⁴⁹ While prosecutorial discretion is an issue that should be considered in decisions under section 924(c), it should not obscure the manner in which the statute has been treated by the courts. Prior to *Moore*, such passive action of simple possession of a firearm during a felony was not indicative of a subsection (c)(1) "use" violation. To support its interpretation, *Moore* cited to the Second Circuit's opinion in *Grant*, the first decision to speak directly to the issue of "use" under section 924(c)(1).

"Use" Redefined By *Grant*

In *Grant*, the Second Circuit found that possession of weapons could constitute "use" under subsection (c)(1).⁵⁰ The defendant in *Grant* was the manager of an after-hours social club.⁵¹ In a raid by city police and federal drug agents, large quantities of cocaine and firearms were found in two rooms of the club.⁵² At trial *Grant* was convicted, *inter alia*,⁵³ of using a firearm to commit a felony under section 924(c)(1).⁵⁴

On appeal, *Grant* cited appropriate legislative history indicating that the subsection (c)(2) "carrying" provision was intended as a distinct and separate act from the subsection (c)(1) "use" provision.⁵⁵ Accordingly, *Grant* argued that at the very most the facts evidenced possession of firearms only.⁵⁶ The court ruled, however, that the weapons were so inextricably tied to the drug operation run by the defendant that they had been "used" within the meaning of section 924(c)(1).⁵⁷ Although the guns were neither discharged nor bran-

violate 18 U.S.C.A. § 924(c)(1), which makes it unlawful to use a firearm to commit a federal felony." *Id.*

48. See text & notes 29-47 *supra*.

49. See *id.*

50. 545 F.2d 1309, 1312 (2d Cir. 1976), *cert. denied*, 429 U.S. 1103 (1977).

51. *Id.* at 1310-11.

52. *Id.* at 1311.

53. *Grant* was also charged and convicted of possession of cocaine with intent to distribute. *Id.* at 1310.

54. *Id.*

55. *Id.* at 1312. *Grant's* counsel argued that the statute's legislative history mandated the separation of the two subsections into the act of "using" a gun and the act of "carrying" a gun. *Id.*

56. *Id.*

57. *Id.* at 1312-13. The Second Circuit stated:

The Piggy Back Social Club was a veritable fortress. It had television cameras to monitor the front door and corridors; special doors reinforced with sheets of metal; steel door frames set in concrete walls; and heavy duty locks and bars to prevent break-ins. Anyone who entered the club was put on notice of the extraordinary security arrangements. The guns which were found in the rooms amounted to a small arsenal. They were loaded and they were part and parcel of a tight security operation.

dished, they were nevertheless effectively facilitating the commission of the felony.⁵⁸

The possession of the weapons in *Grant* is not the same as that seen in the earlier possession cases. *Grant* is not similar to *Brant*, where the defendant concealed a weapon under the auto seat,⁵⁹ nor *Busic* or *Bower* where the defendants tucked a weapon in their pants.⁶⁰ The possession in these cases involved no more than simple carrying of a weapon during a felony. In *Grant*, however, the court found an unusually large amount of weapons placed in such a manner as to become inextricable from the underlying felony.⁶¹ The *Grant* finding that possession could constitute "use" was a significant departure from prior case law interpreting section 924(c).⁶² Nevertheless, because *Grant* did not find simple carrying of a firearm to constitute use,⁶³ earlier case law was not seriously disturbed.⁶⁴ Under the Ninth Circuit's treatment of section 924 (c)(1) in *Moore*, however, the "carrying" cases did not fare so well.

"Use" Interpreted By Moore

Unlike *Grant*, *Moore* found that mere carrying of a firearm during a felony could violate the "use" prohibition of section 924(c)(1).⁶⁵ The court, citing *Grant*, ruled that Moore "used" the gun to commit the attempted bank robbery, even though he never touched, much less brandished or fired, the gun.⁶⁶ According to the court, the mere fact that Moore did not have the opportunity to employ the weapon did not necessarily mean that he did not use it.⁶⁷

To support this holding, the Ninth Circuit relied upon three characteristics of Moore's possession in finding a "use" violation: (1) The weapon carried by the defendant played a significant role in the attempted felony;⁶⁸ (2) the weapon "increased the likelihood of success";⁶⁹ and (3) the crime was such that the defendant would not have

58. *Id.*

59. Compare *United States v. Grant*, 545 F.2d 1309, 1312 (2d Cir. 1976), *cert. denied*, 429 U.S. 1103 (1977) with *United States v. Brant*, 448 F. Supp. 781, 782 (W.D. Pa. 1978).

60. Compare *United States v. Grant*, 545 F.2d 1309, 1312 (2d Cir. 1976), *cert. denied*, 429 U.S. 1103 (1977) with *United States v. Busic*, 587 F.2d 577, 579 (3d Cir.), *vacated on other grounds*, 587 F.2d 587 (3d Cir. 1978) and *United States v. Bower*, 575 F.2d 499, 501 (5th Cir. 1978).

61. 545 F.2d at 1313.

62. See note 4 *supra*; text & notes 29-47 *supra*.

63. 545 F.2d at 1312. The court stated that it agreed with the government that § 924(c)(1) was not applicable to mere carrying of a firearm. *Id.*

64. See text & notes 29-61 *supra*.

65. 580 F.2d at 362.

66. *Id.* at 361-62.

67. *Id.* at 362.

68. *Id.*

69. *Id.*

"sallied forth" had the weapon not been in his possession.⁷⁰ The *Moore* criteria in finding use is consistent with *Grant* which also emphasized the intimate relationship between the weapon and the crime, whether the weapons found were vital to securing the felony and whether the weapons kept were tools of the trade for the particular crime.⁷¹ Despite the similarities in language and criteria used, however, *Moore* bears little factual resemblance to *Grant*. It is difficult to analogize the veritable arsenal found in *Grant* to the single weapon carried in the waistband of Moore's trousers.

This distinguishing characteristic of *Grant* did not escape the attention of the *Moore* court.⁷² The Ninth Circuit resolved this issue by a brief statement that the facts in *Moore* presented a stronger case than those in *Grant* because Moore admitted that he planned to rob the bank and the gun he carried was related to the commission of the robbery.⁷³ Apparently, on these grounds, the court found that Moore "obviously" intended to use the weapon.⁷⁴ Accordingly, the court concluded that this combination, possession of a weapon plus intent to use that weapon in a felony, constituted use under section 924(c)(1).

Certainly, this interpretation of "use" by the court is not an unreasonable one. Yet prior to *Moore*, such a combination would not have triggered a section 924(c)(1) violation. For instance, in *Brant*, the court noted that the defendants were not given the opportunity to use their weapons in the felony.⁷⁵ It is not, therefore, unreasonable to infer that the *Brant* court perceived an intent on the part of the defendants to use their weapons. Nevertheless, the *Brant* court found the defendants guilty of carrying the weapon to the crime.⁷⁶

Thus, despite borrowing language and criteria from *Grant*, *Moore* creates an entirely new dimension of "use" under section 924(c)(1). *Grant* did not find that the simple carrying of a weapon violated section 924(c)(1) and there is no indication the Second Circuit would have so found under the facts.⁷⁷ In contrast, *Moore* found that carrying, coupled with intent to use, violated subsection (c)(1). This reading of

70. *Id.* As the court stated: "Moore 'used' his gun, much as he used the gloves and ski mask. These items increased the likelihood of success; without them he probably would not have sallied forth." *Id.*

71. *United States v. Grant*, 545 F.2d at 1312. See text & notes 50-64 *supra*.

72. *See* 580 F.2d at 362.

73. *Id.*

74. *Id.*

75. 448 F. Supp. at 782.

76. *Id.*

77. *See* 545 F.2d at 1312. In *Grant*, the court was concerned not with the carrying of weapons but rather with an armed fortress that was effectively protecting a large drug operation. See note 57 *supra*. Furthermore, the *Grant* court stated: "The government concedes, and we agree, that Section 924(c)(1) was not intended to apply to either the mere carrying of a firearm or the carrying of a firearm with intent to use it during commission of a crime." 545 F.2d at 1312.

Moore may account for the odd refusal of the Ninth Circuit to approve the *Grant* ruling.⁷⁸

Additionally, the holding in *Moore*, unlike *Grant*, appears entirely unnecessary. As noted earlier, the facts in *Moore* easily support conviction under the subsection (c)(2) "carrying" provision which provides the identical penalties as subsection (c)(1).⁷⁹ It is difficult to understand the court's motive in extending itself unduly. Surely, had the Ninth Circuit wished to endorse the Second Circuit's expansion of subsection (c)(1), it could have waited until a more suitable factual setting was presented—one that, unlike *Moore*, did not so neatly fit within the subsection (c)(2) proscription.⁸⁰

The Ninth Circuit did not wait, however, and the result appears to create practically unlimited judicial discretion in finding "use" under subsection (c)(1). The three elements of possession found by the court to constitute "use"⁸¹ are of little guidance when applied to ordinary possession cases. Certainly, the defendants in *Brant*, *Busic*, and *Bower* would have easily met such standards, as these defendants were clearly in possession of weapons and their intent to use the weapons seems no less likely than defendant Moore's intent to use the weapons.⁸²

The Legislative History of Section 924(c)

Under the standards set forth in *Moore*, the only significant qualification to find a subsection (c)(1) "use" is that the weapon carried must be related to the crime.⁸³ *Moore* supports this assertion by concluding that the "sparse" legislative history of section 924(c) indicates Congress intended to limit the "use" of a gun violation only when possession of the weapon was unrelated to the felony committed.⁸⁴ Nevertheless, a cursory perusal of the House debates⁸⁵ surrounding section 924(c)

78. 580 F.2d at 362.

79. *Id.* See note 1 *supra*. The facts show that Moore was on parole at the time he was arrested for the instant crime and was found carrying a gun. 580 F.2d at 362. Thus, there could be no inference that Moore was carrying the weapon lawfully.

80. The obvious example of this type of case would be similar to *Grant* where the defendant was in possession of weapons, but not on his person. Another example would be where the defendant neither brandished nor fired the weapon but informed the victim that he had a weapon to intimidate the victim into compliance.

81. See text & notes 68-70 *supra*.

82. See text & notes 29-47 *supra*.

83. 580 F.2d at 362.

84. *Id.* The Ninth Circuit explained: "To the extent that the passages excerpted by Moore shed light on the meaning of § 924(c)(1) at all, they demonstrate only that Congress did not intend to penalize one who happens to have a gun in his possession when he commits an entirely unrelated offense." *Id.*

85. 114 CONG. REC. 22229 (1968). The original consideration of § 924(c) arose as a floor amendment to the Gun Control Act of 1968 in both the House and Senate. *United States v. Sudduth*, 457 F.2d 1198, 1200 (10th Cir. 1972). Representative Casey proposed the original amendment of the floor of the House, yet it was the amendment by Representative Poff that finally gained congressional approval, becoming the current § 924(c). 114 CONG. REC. 22248 (1968). See

stresses the legislators' intention to separate the act of affirmatively employing or discharging the weapon in a felony from that of simply carrying a firearm during a felony.⁸⁶ The main controversy in the extensive deliberations on the statute centered not on subsection (c)(1)'s penalizing "use" of a firearm but on the implications of the subsection (c)(2) penalty for "carrying" a firearm.⁸⁷ Some House members worried that one merely carrying a weapon would be punished as harshly as one aggressively employing or discharging the weapon.⁸⁸ Others argued that a person licensed to carry a weapon who subsequently became involved in a felony while the weapon was in his possession would be unjustly punished under the statute.⁸⁹ These concerns clearly evidence congressional separation of the two subsections, one penalizing the actual brandishing of the weapon and the other penalizing the

also United States v. Melville, 309 F. Supp 774, 777 (S.D. N.Y. 1970). An additional amendment to § 924(c) was considered in 1970, and the current language of this section was enacted once again as a floor amendment. United States v. Sudduth, 457 F.2d 1198, 1200 (10th Cir. 1972). The 1970 amendment changed the penalties for second offenders and prohibited concurrent sentences in such convictions. Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, 84 Stat. 1880 (amending 18 U.S.C. § 924(c)(1970)); *see* United States v. Sudduth, 457 F.2d 1198, 1200 (10th Cir. 1972).

86. Representative Casey offered his amendment because he felt that those persons using a gun in a felony should be liable for a separate crime. 114 CONG. REC. 21788 (1968). His amendment required that liability be imposed upon the interstate transportation of firearms. *Id.* Casey, distinguishing between the act of use and carrying in his amendment, stated:

In the general debate the other day it was noted that having the words . . . "or carries," poses a problem. One of my colleagues will propose to offer an amendment . . . which will . . . strike those words . . . so that it will apply only to those who actually use a gun in the commission of the offenses enumerated.

Id. at 22229-30.

87. *See generally id.* at 22229-40, 22247-48.

88. Representative Harsha, in a discussion concerning striking "or carries" from the proposed amendment, stated that "there are some problems with the provision that requires those merely having a gun in their possession to be subject to the same penalties as those who actually use that weapon in a commission of a crime." *Id.* at 22234. Representative Dowdy in advocating eliminating "or carries" from the amendment said:

I believe the onus should be on the use of a firearm in the commission of a crime. The fact that a person might be carrying a firearm could very well not have anything to do with the commission of a crime if the gun is not used or exhibited. Of course, exhibiting would be using the gun in the commission of a crime, and that is where the burden should be on the use of a gun.

Id. at 22235.

The House subsequently voted to eliminate the "or carries" provision from the Casey amendment. *Id.* at 22237. The amendment, which ultimately gained both House and Senate approval, however, contained the penalty for carrying a weapon, but it was emphasized that the weapon must be unlawfully carried. *Id.* at 22236, 22248.

89. Representative Yates posed the following question: "Suppose a licensee is carrying a pistol, as he is authorized to do pursuant to a license, and pushes somebody or assaults somebody, and he does not use the pistol but carries it on his hip?" *Id.* at 21788. Representative Scheuer similarly asked:

I have a pistol permit, issued by the New York City Police Department. If I am convicted of assault—if I push somebody in the street or punch somebody in the nose—with no use of the pistol, but merely carrying the pistol as I am licensed to do—in no way bringing the pistol into any aggressive act, am I going to suffer this kind of grievous penalty?

Id. at 21788. The above language clearly evidences the belief that "use" is an aggressive, affirmative act of putting the gun into action. Accordingly, Moore cannot be said to have used his weapon in this sense.

unlawful carrying of the weapon during the felony.⁹⁰

Nowhere in the House or Senate debates⁹¹ on section 924(c) is there any indication that one merely carrying a weapon at the time of arrest could be convicted under section 924(c)(1). It is true that some members expressed concern over the possibility that carrying a firearm would be punished regardless of the relation between the weapon and the crime.⁹² This worry, however, hardly suggests that any weapon carried in a related crime would constitute "use" of that weapon under subsection (c)(1). If, indeed, the intention of Congress was to punish the offender for "mere possession" of a gun under subsection (c)(1), as *Moore* holds, then it is unclear why the unlawful carrying provision of subsection (c)(2) was included in the statute. Surely, such a broad and amorphous concept of "use" under subsection (c)(1) could be easily adapted to fit those convictions presently occurring under subsection (c)(2).

Consequently, the effect of *Moore* is two-fold. First, section 924(c)(2)'s prohibition of "carrying" a gun during a felony is, for all practical purposes, meaningless. With the exception of the cases in which the firearm is clearly unrelated to the principal crime, the typical "carrying" case could well fall within *Moore*'s new interpretation of "use" of a gun. Second, in emasculating the subsection (c)(2) provision, *Moore* might deprive a gun carrying defendant of the long-recognized defense that the gun was lawfully carried.⁹³ The fact that *Moore* or others similarly situated might possess a permit to carry the weapon is irrelevant in a subsection (c)(1) charge.⁹⁴ This result is particularly ironic because it is the very one that worried Congress in adopting subsection (c)(2) and which they guarded against by adding the qualifier "unlawful" in that subsection.⁹⁵ *Moore*, however, subverts the congressional safeguard by bringing the "carrying" offenders within the ambit of subsection (c)(1).

90. Representative Horton stressed the definition of use as distinct from that of carrying: He who stoops to point its barrel at an innocent victim, for money, for revenge, for "kicks" or for any other purpose, deserves to be singled out by the law as the worst kind of social menace . . . I believe that this amendment which adds more severity to the punishment of such offenders, is a legislative necessity.

Id. at 22247.

91. The Senate passed the House version and again focus was on the "use" of a gun in the traditional sense. Senator Dominick commented:

My amendment is not designed to get at the gun itself but to get at the man who is using it in federal crimes of violence; because, after all, it is the fellow who pulls the trigger which really determines what the crime level is going to be, and it is that person we would be deterring.

Id. at 27142.

92. See *id.* 22235; note 88 *supra*.

93. See note 1 *supra*.

94. See *id.*

95. See text & notes 86-89 *supra*.

Conclusion

Moore held that a defendant, who upon his arrest for attempted bank robbery was found carrying a gun concealed in the waistband of his trousers, was guilty of “using” that weapon in violation of section 924(c)(1). Arguably, *Moore* presented no more than a typical case of possession—a case that ordinarily would have been disposed of under provisions of section 924(c)(2) prohibiting the carrying of a weapon during a felony.

The legislative history of section 924(c) establishes that Congress clearly intended to separate the “use” penalty under section 924(c)(1) from the unlawful “carrying” penalty under section 924(c)(2). The definition of “use” derived from the studied debates is that of an aggressive brandishing or discharging of the weapon and not “mere possession.”

The effect of *Moore*, therefore, may be read as a judicial repeal of section 924(c)(2). Although the two sections provide identical penalties, the subsection (c)(2) defense of a lawful permit to carry a weapon is eliminated under the *Moore* interpretation.

Denise Young

VII. CRIMINAL PROCEDURE

A. IN SEARCH OF A STANDARD GOVERNING INVESTIGATIVE DETAINMENTS

Prior to 1968, constitutional standards governing the stop or detainment of a citizen on less than probable cause to arrest were virtually nonexistent. With the advent of *Terry v. Ohio*,¹ the Supreme Court developed rough guidelines that permit a police officer to detain and conduct a limited body search of a suspect under circumstances not justifying a traditional arrest.² In *State v. Jarzab*,³ the Arizona Supreme Court drew upon language in *Terry* to fashion a standard under which the detainment of a criminal suspect for purposes of interrogation or investigation is permissible, in the absence of probable cause to arrest.⁴

In *Jarzab* an officer, while on routine patrol, noticed an apparently abandoned truck parked approximately one quarter of a mile off the road.⁵ Upon investigation, the officer encountered the defendant who asserted ownership of the vehicle and gave an explanation for its location.⁶ Smelling alcohol on the defendant's breath, the officer asked for a driver's license to verify that the defendant was of legal drinking age.⁷ After presentation of a valid Arizona license, the defendant was then instructed to produce the registration card for the truck.⁸ When the defendant opened the door of the truck activating the interior lights, the deputy observed a plastic bag containing marijuana on the console.⁹

On the basis of these facts, the trial court convicted Jarzab of pos-

1. 392 U.S. 1 (1968).

2. *Id.* at 30. The Court introduced the stop and frisk doctrine in a trilogy of cases. The less extensive companion cases of *Terry* are *Sibron v. New York*, 392 U.S. 40 (1968) and *Peters v. New York*, 392 U.S. 40 (1968). For an officer to make a traditional arrest he must possess "probable cause to believe that the suspect has committed a crime." *See Terry v. Ohio*, 392 U.S. at 10. The standards for a stop and frisk are less demanding. *Terry* allows an officer to conduct a limited detention and "frisk" of a suspect based upon a reasonable suspicion that "criminal activity may be afoot" and that "the person with whom he is dealing may be armed and dangerous." *Id.* at 30.

3. 123 Ariz. 308, 599 P.2d 761 (1979).

4. *Id.* at 311, 599 P.2d at 764.

5. *Id.* at 309, 599 P.2d at 762.

6. *Id.* Defendant claimed to have left the road in order to "relieve himself" in some nearby bushes. *Id.*

7. *Id.*

8. *Id.* Authority for such a request is found in ARIZ. REV. STAT. ANN. § 28-305(D) (1977), which provides in pertinent part: "The registration card [of a motor vehicle] shall at all times be carried within the driver's compartment of the vehicle for which issued, and shall be subject to inspection by . . . members of the highway patrol or any peace officer."

9. 123 Ariz. at 309, 599 P.2d at 762.

session of marijuana.¹⁰ On appeal, Jarzab argued that the officer acted upon unsubstantiated suspicion in continuing his investigative detention after it was ascertained that the vehicle belonged to the defendant.¹¹ As a result, the defendant contended his fourth amendment rights were violated because the officer's conduct did not meet the test of reasonable police action enunciated by the Arizona Supreme Court in *State v. Hocker*.¹² The court of appeals, finding that the search conducted amounted to a constitutional violation of Jarzab's fourth amendment rights against unreasonable searches and seizures, overturned the conviction in a memorandum decision.¹³ Rather than focusing on the deputy's initial authority to investigate the apparently abandoned vehicle, the Arizona Supreme Court scrutinized the deputy's ability to continue his investigation and detainment of the defendant once ownership of the truck had been asserted and a driver's license produced.¹⁴ Upholding the deputy's action, the court reaffirmed the trial court's conviction, holding that the investigation was constitutionally warranted since the officer was not obligated to terminate his investigation simply because ownership of the vehicle had been asserted by the defendant.¹⁵ Balancing the interest of the defendant to be free from arbitrary interference by the police against the public's interest in law enforcement, the court deemed the officer's action to be "reasonably related to the circumstances justifying it."¹⁶ In making its determination, the court reversed two earlier decisions¹⁷ that had governed the investigative detainment question in Arizona and instead opted for the application of federal guidelines.¹⁸

This casenote will initially attempt to delineate the appropriate federal standard pertaining to the investigative detainment of an individual. To this end, constitutional perimeters involving investigative searches and detainments predicated upon less than probable cause to arrest will be reviewed. The Arizona Supreme Court's interpretation of the federal standard will then be analyzed. Finally, the authority of a police officer to stop or detain a suspect for the purpose of checking a driver's license or car's registration will be discussed in light of recent United States Supreme Court and Arizona cases.

10. *Id.*

11. *Id.*

12. *Id.* See *State v. Hocker*, 113 Ariz. 450, 457, 556 P.2d 784, 791 (1976).

13. 123 Ariz. at 309, 599 P.2d at 762.

14. *Id.*

15. *Id.* at 311, 599 P.2d at 764.

16. *Id.*

17. *State v. Fortier*, 113 Ariz. 332, 553 P.2d 1206 (1976); *State v. Hocker*, 113 Ariz. 450, 556 P.2d 784 (1976).

18. *State v. Jarzab*, 123 Ariz. at 311, 599 P.2d at 764.

Constitutional Guidelines

In establishing a standard under which the officer's detention of the driver of the truck was proper, the *Jarzab* court overturned the standard previously articulated by the court in *State v. Fortier*¹⁹ and *State v. Hocker*.²⁰ In these decisions, the court had declared that a temporary investigative detention is proper when an officer, on the basis of an "objective perception of events" supported by "specific and articulable facts," could "distinguish the activity of the detained person from that of any other citizen."²¹ Accordingly, a law enforcement official must possess a reasonable suspicion connecting the detained individual to an unusual and crime-related activity prior to conducting an investigative detention.²²

In disapproving the *Fortier-Hocker* test, the court in *Jarzab* claimed to embrace the federal standard set forth in *Terry v. Ohio*²³ and subsequent Supreme Court cases.²⁴ In interpreting *Terry* and its progeny as not requiring suspicion of criminal activity as a prerequisite for an officer's initiation of investigative detentions, the *Jarzab* court purported to liberalize the circumstances under which a police officer may initiate such detentions in the State of Arizona.²⁵

In *Terry*, the Court legitimized an initial stop and cursory body search or "frisk" of a criminal suspect, despite the lack of probable cause that would justify a traditional arrest.²⁶ Recognizing the need of the police to utilize a set of flexible responses when confronted by a potentially violent situation,²⁷ the Court employed a balancing test that weighed the interest of the state in crime detection and police safety against the intrusion upon individual rights occasioned by an investigative stop and subsequent frisk.²⁸ The Court recognized that a police

19. 113 Ariz. 332, 553 P.2d 1206 (1976).

20. 113 Ariz. 450, 556 P.2d 784 (1976).

21. *Id.* at 457, 556 P.2d at 791; *State v. Fortier*, 113 Ariz. at 334, 553 P.2d at 1208. The standard adopted by the court in both decisions was borrowed from *Irwin v. Superior Court*, 1 Cal. 3d 423, 462 P.2d 12, 82 Cal. Rptr. 484 (1969).

22. *State v. Fortier*, 113 Ariz. at 334, 553 P.2d at 1208; *State v. Hocker*, 113 Ariz. at 457, 556 P.2d at 791.

23. 392 U.S. at 20-30.

24. *Brown v. Texas*, 99 S. Ct. 2637, 2641 (1979); *Pennsylvania v. Memms*, 434 U.S. 106, 111-12 (1977); *Adams v. Williams*, 407 U.S. 143, 145-46 (1972).

25. 113 Ariz. at 311, 559 P.2d at 764.

26. 392 U.S. at 30. In *Terry*, the officer observed three men walk back and forth along an identical route, pausing to look into a store window a total of twelve times. *Id.* at 6. Upon the completion of each trip, the men would stop and confer at the end of the block. *Id.* Based on a suspicion supported by past experience with robberies in the area, the officer approached the men and indicated he wished to ask them a few questions. *Id.* at 6-7. Upon receiving a mumbled response, the officer proceeded to pat each man down for weapons subsequently found on two of the suspects. *Id.* at 7.

27. As the *Terry* Court explained: "In dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess." *Id.* at 10.

28. *Id.* at 26.

officer may approach and address questions to any person on the street but that the person may refuse to cooperate and is free to leave.²⁹ The Court made patently clear, however, that the fourth amendment serves as a relevant limitation on any forceable stop or seizure made by the police, including those detentions that fall short of a full-scale arrest.³⁰ The Court enunciated a two-prong test for determining whether a frisk is constitutionally permissible.³¹ Such a test turned on an assessment of the reasonableness of the officer's suspicion.³² Initially a court must determine "whether the officer's action was justified at its inception."³³ This involves an inquiry into the officer's observation of "unusual conduct which leads him to conclude . . . that criminal activity may be afoot."³⁴ Once such a determination is made, the second line of inquiry focuses on whether the action was "reasonably related in scope to the circumstances which justified the interference in the first place."³⁵ To evaluate the reasonableness of a particular intrusion, the police officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts," reasonably warrant the intrusion.³⁶

The efficacy of the *Terry* rationale standing alone is questionable when it is applied to a police detention that does not involve a frisk. A footnote to the opinion indicates that the Court's analysis in *Terry* did not encompass those situations where a police officer, absent an articulated fear for his personal safety, sought to detain a private citizen for investigative purposes only.³⁷

Unlike *Terry* and its stop and frisk counterparts,³⁸ the recent Supreme Court decision of *Brown v. Texas*³⁹ dealt squarely with the investigative detention question raised in *Jarab*. In *Brown*, the Court focused on the legality of an investigative detention predicated upon a police officer's assessment of suspicious circumstances involving no apparent threat to the officer's safety.⁴⁰ Declaring that any seizure

29. *Id.* at 34 (White, J., concurring).

30. *Id.* at 16. The *Terry* Court emphatically rejected the suggestion that an investigative stop does not constitute a seizure. *Id.*

31. *Id.* at 19-20.

32. *Id.* at 20.

33. *Id.*

34. *Id.* at 30.

35. *Id.* at 20.

36. *Id.* at 21.

37. *Id.* at 19 n.16.

38. See *Adams v. Williams*, 407 U.S. 143 (1972); *Sibron v. New York*, 392 U.S. 40 (1968).

39. 99 S. Ct. 2637 (1979).

40. *Id.* at 2639-40. In *Brown*, police officers observed two men in an alley walking away from each other in an area known to have a high incidence of drug traffic. *Id.* at 2639. The officer testified that he stopped Brown because "the situation looked suspicious and we had never seen that subject in that area before." *Id.* The officer had no reason to believe that Brown was armed, nor could he articulate a supportable suspicion of any specific misconduct. *Id.* Brown was ar-

must meet the fourth amendment requirement of reasonableness,⁴¹ the *Brown* Court held that a police officer, in order to justify a detention, must point to objective facts amounting to a reasonable suspicion that the individual is involved in criminal activity.⁴² Citing *Terry*, the Court in *Brown* recognized that a determination of reasonableness turned on a balancing of the public interest in law enforcement against the individual's "right to personal security free from arbitrary interference by law officers."⁴³ This test is qualified, however, by the added stipulation that in the absence of any basis for suspecting the person detained of misconduct, the balance between the public interest and the suspect's right to personal security and privacy tilts in favor of freedom from police interference.⁴⁴ Thus, by adding flesh to the skeletal outline set forth in *Terry*, *Brown* makes possible the construction of a standard regarding the constitutional permissibility of an investigative detention.

In deciding *Terry*, the Supreme Court has recognized the desirability of allowing a police officer to approach and address questions to any person on the street⁴⁵ provided that the person may refuse to cooperate and is free to leave.⁴⁶ Once a person is forcibly detained, however, a seizure has occurred⁴⁷ and fourth amendment limitations on the police power of the state are applicable.⁴⁸ Forceable detentions that stop short of an arrest must then be analyzed in terms of the two-prong test as first established in *Terry*⁴⁹ and subsequently explained in *Brown*.⁵⁰

Under this test, a court must initially determine whether the officer's action was justified at its inception.⁵¹ To carry this burden of proof, the state must be able to point to objective facts that show that the detaining officer possessed reasonable suspicion that the suspect had or was about to engage in some criminal activity.⁵² The court then must establish whether the officer's action was reasonably related in scope to the circumstances that justified the interference in the first

rested and subsequently convicted for refusing to identify himself to the investigating officer, a misdemeanor under Texas law. *Id.* at 2639-40.

41. *Id.* at 2640.

42. *Id.* at 2641. The Court concluded that *Brown's* fourth amendment rights were violated because "the officers lacked any reasonable suspicion to believe appellant was engaged or had engaged in criminal conduct." *Id.*

43. *Id.* at 2640.

44. *Id.* at 2641.

45. See 392 U.S. at 34 (White, J., concurring).

46. *Id.* at 34.

47. *Id.* at 16. A forceable detention can involve either physical restraint or a reasonable perception on the part of the detainee that he is not free to leave. See *Brown v. Texas*, 99 S. Ct. 2637, 2640 (1979); *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

48. *Brown v. Texas*, 99 S. Ct. 2637, 2640 (1979); *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

49. 392 U.S. at 19-20.

50. 99 S. Ct. at 2640. See text & notes 28-36 *supra*.

51. *Terry v. Ohio*, 392 U.S. at 20.

52. *Id.* at 21; *Brown v. Texas*, 99 S. Ct. at 2641.

place.⁵³ Determining the permissible scope of an investigative detainment involves a balancing of the public's concerns served by the seizure against the intrusion upon that person's individual liberty.⁵⁴ Factors a court should consider in making this determination include the potential danger confronting the police officer,⁵⁵ the need for an immediate response,⁵⁶ the length of detention,⁵⁷ and the degree of intrusion occasioned by the confrontation.⁵⁸ Since such a line of inquiry represents the Supreme Court guidelines concerning the propriety of an investigative detainment, a state court purporting to comply with such federal standards would be expected to apply them in its proceedings.

Comparison of Federal Guidelines to the Jarzab Decision

The *Jarzab* court stated that it would apply the federal standard regarding investigative detainments to the facts of this case.⁵⁹ In so doing, the court overruled two of its prior decisions.⁶⁰ Nevertheless, when the *Jarzab* decision is analyzed in terms of the constitutional standards set forth in *Terry* and *Brown*, a number of ambiguities become apparent.

The court initially rejected the California standard⁶¹ adopted in Arizona via *Hocker*⁶² and *Fortier*⁶³ presumably because of its requirement that a law enforcement official base an investigative detention on a reasonable suspicion that the detained individual's unusual conduct must be related to some criminal activity.⁶⁴ In the court's view such a standard was unduly restrictive of lawful police activities because a police officer would need to be convinced that criminal activity was afoot prior to commencing an investigation.⁶⁵ Neither the language of the displaced *Fortier-Hocker* test⁶⁶ nor that of the United States Supreme Court,⁶⁷ however, requires a law enforcement official to be convinced

53. *Terry v. Ohio*, 392 U.S. at 20.

54. *Brown v. Texas*, 99 S. Ct. at 2640; *Terry v. Ohio*, 392 U.S. at 21.

55. *Terry v. Ohio*, 392 U.S. at 29.

56. *Adams v. Williams*, 407 U.S. 143, 146 (1971).

57. *Dunaway v. New York*, 99 S. Ct. 2248, 2256 (1979).

58. *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1975).

59. 123 Ariz. at 311, 599 P.2d at 764.

60. See text & notes 19-22 *supra*.

61. See *Irwin v. Superior Court*, 1 Cal. 3d 423, 427, 462 P.2d 12, 14, 82 Cal. Rptr. 484, 486 (1969).

62. *State v. Hocker*, 113 Ariz. at 457, 556 P.2d at 791.

63. *State v. Fortier*, 113 Ariz. at 334, 553 P.2d at 1208.

64. See 123 Ariz. at 311, 599 P.2d at 764.

65. *Id.*

66. See *State v. Fortier*, 113 Ariz. at 334, 553 P.2d at 1208; *State v. Hocker*, 113 Ariz. at 457, 556 P.2d at 791. *Hocker* requires an officer to possess a reasonable suspicion that the activity investigated is connected with criminal conduct. 113 Ariz. at 457, 556 P.2d at 791. Thus under the *Hocker* standard, an officer need only suspect criminal activity, not be convinced of its existence before initiating an investigation.

67. *Terry v. Ohio*, 392 U.S. at 30.

that a crime has occurred or is in progress prior to initiating an investigation. On the contrary, the Supreme Court has recognized that it is the essence of good police work to adopt lawful means of preventing crime prior to its inception.⁶⁸ Nevertheless, when an officer in the course of his investigation forcibly detains an individual so as to constitute a "seizure" within the meaning of the fourth amendment,⁶⁹ constitutional limitations are applicable.⁷⁰ Accordingly, the Supreme Court has unequivocally stated that before an officer initiates a forcible detention he must possess a reasonable suspicion, based on objective facts, that the intended detainee is involved in some unusual, crime-related activity.⁷¹

Thus the ruling in *Jarzab* has two possible interpretations. First, in overruling *Hocker* and *Fortier*, the court may have intended to abolish the requirement that an officer, upon observing unusual conduct, must relate such conduct to suspected criminal activity prior to initiating an investigative detention.⁷² Such an interpretation would not only appear to run afoul of the constitutional mandate in *Brown*,⁷³ but would seem to give little guidance to Arizona courts responsible for applying the test. The confusion is heightened by the court's observation that the detention at issue was permissible because the officer had observed unusual events that could reasonably lead him to suspect that the vehicle was stolen.⁷⁴ As the dissent points out, the adoption of such a line of inquiry in the majority opinion is an attempt to justify the officer's action by the very test the court rejected.⁷⁵

On the other hand, if the *Jarzab* court merely intended to insure the ability of the police to investigate and detain a suspect for questioning on less than probable cause to arrest, but in conformity with established constitutional guidelines, then that portion of the opinion that purports to overrule the earlier cases appears to be superfluous.⁷⁶

The standard enunciated in both *Hocker* and *Fortier* appears fully consistent with federal guidelines.⁷⁷ Like *Brown*, the standard in *Hock-*

68. See *Adams v. Williams*, 407 U.S. 143, 145 (1971); *Terry v. Ohio*, 392 U.S. at 22.

69. See note 47 *supra*.

70. *Terry v. Ohio*, 392 U.S. at 16.

71. *Brown v. Texas*, 99 S. Ct. 2637, 2641 (1979). The Court declared that "we have required the officer to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Id.*

72. See *State v. Jarzab*, 123 Ariz. at 311, 599 P.2d at 764; *id.* at 312, 599 P.2d at 765 (Gordon, J., dissenting).

73. See 99 S. Ct. at 2640; text & note 70 *supra*.

74. 123 Ariz. at 311, 599 P.2d at 764.

75. *Id.* at 313, 599 P.2d at 766 (Gordon, J., dissenting).

76. See *id.* at 311, 599 P.2d at 764.

77. Compare *State v. Hocker*, 113 Ariz. 450, 457, 556 P.2d 784, 791 (1976) and *State v. Fortier*, 113 Ariz. 332, 334, 553 P.2d 1206, 1208 (1976) with *Brown v. Texas*, 99 S. Ct. 2637, 2641 (1979). See *State v. Jarzab*, 123 Ariz. at 315, 599 P.2d at 766 (Gordon, J., dissenting).

er and *Fortier* requires an officer to possess a reasonable suspicion connecting the suspect with criminal activity prior to initiating an investigative detention.⁷⁸ *Jarzab*, however, seems to be in conflict with federal pronouncements on the subject since the *Jarzab* test does not require the detaining officer to have a reasonable suspicion that criminal activity is present prior to commencing an investigative stop.⁷⁹ As a result, the court's ruling appears to leave Arizona case law in a state of confusion as it pertains to those standards governing the legality of an investigative detention where probable cause to arrest is lacking.

Notwithstanding this confusion, there seems to be little doubt that when analyzed in terms of the federal standard, the officer in *Jarzab* was justified in initiating his investigation of an apparently abandoned vehicle located some distance off the roadway.⁸⁰ Similarly, a request for the identification of a driver smelling of alcohol, whom the officer suspected of being under the legal drinking age, does not appear inconsistent with the *Brown* decision.⁸¹ After the defendant had produced his driver's license, confirming that he was of legal age, the inquiry of the court should have focused on whether the officer's continued investigation constituted a sufficient imposition on the suspect's individual liberty to warrant the application of fourth amendment safeguards.⁸² If a determination were made that a seizure did occur, the court's next line of inquiry should have been to ascertain whether the officer possessed a reasonable suspicion of criminal activity so as to justify a further detention of the suspect.⁸³

Limitations on the State's Ability to Detain a Criminal Suspect for the Purpose of a Driver's License or Car Registration Check

Although never specifically addressed by the majority opinion, the real issue in *Jarzab* appears to involve the officer's request to inspect

78. *State v. Hocker*, 113 Ariz. at 457, 556 P.2d at 791; *State v. Fortier*, 113 Ariz. at 334, 553 P.2d at 1208.

79. 123 Ariz. at 311, 599 P.2d at 764.

80. An apparently abandoned vehicle parked off the road in the early morning hours would appear to justify a reasonable suspicion on the part of the arresting officer that the car was stolen. See 123 Ariz. at 311, 599 P.2d at 764.

81. See *Brown v. Texas*, 99 S. Ct. at 2641.

82. See *Terry v. Ohio*, 392 U.S. at 16. See also note 47 *supra*.

83. See *State v. Jarzab*, 123 Ariz. at 314, 599 P.2d at 767 (Gordon, J., dissenting). Whether the arresting officer had sufficient suspicion to continue his investigation once ownership of the truck had been asserted is questionable. The majority opinion concludes that since the vehicle appeared to be abandoned, the officer could have reasonably concluded that it was stolen. *Id.* at 311, 599 P.2d at 764. Once it became apparent that the truck was occupied, however, the officer is left with little support for his suspicion. See *id.* at 313; 599 P.2d at 766 (Gordon, J., dissenting). As the dissent pointed out, the officer had no reports of a stolen vehicle or disturbance in the area. *Id.* Additionally, the officer testified that he had no idea why the truck was there when he went to investigate it. *Id.* Finally, the defendant's truck was located on land that may have belonged to his father. *Id.*

the vehicle's registration card and the defendant's detainment from that point until his arrest.⁸⁴ In essence, the question is whether a police officer can use Arizona's driver's license or vehicle registration statutes to "discover crime in the first instance," after the officer has legitimately investigated a stopped vehicle but has failed to reveal any possible criminal activity.⁸⁵

A significant limitation on the ability of the state to stop or detain an individual for the purpose of checking a driver's license or vehicle registration is found in the recent United States Supreme Court decision of *Delaware v. Prouse*.⁸⁶ In *Prouse*, the Court held that a license or registration check involving the stop of a vehicle and the detainment of its occupant was unreasonable under the fourth amendment, absent a reasonable and articulable suspicion that the car or occupant was in violation of the law.⁸⁷ The test for determining reasonable suspicion in *Prouse* is the same as that used for a street stop.⁸⁸ Although *Jarzab* did not involve the stop of a moving vehicle, the *Prouse* Court's finding of impermissibility would logically extend not only to the stop of a vehicle, but also the subsequent detainment of its occupant.⁸⁹ Since the detainment at issue in *Jarzab* was initiated pursuant to a demand to view the suspect's car registration, the test elucidated in *Prouse* is applicable to the fact situation in *Jarzab*.

Notwithstanding the Supreme Court's decision in *Prouse*, the Arizona Supreme Court itself has adopted the same standard in *State v. Ochoa*.⁹⁰ In *Ochoa*, the court held that neither the state's licensing nor

84. *State v. Jarzab*, 123 Ariz. at 314, 599 P.2d at 767 (Gordon, J., dissenting). Justice Gordon argued that the officer's request to see the defendant's registration was based on nothing more than an "inarticulate hunch" and as such should not have constituted a reasonable suspicion that would justify an investigative detention. *Id.* at 314, 599 P.2d at 767 (Gordon, J., dissenting). See generally note 75 *supra*.

85. See 123 Ariz. at 314, 599 P.2d at 767 (Gordon, J., dissenting). ARIZ. REV. STAT. ANN. § 28-423 (1976) states in part: "Every licensee shall have his operator's or chauffeur's license in his immediate possession at all times when operating a motor vehicle and shall display the same, upon demand of a justice of the peace, a police officer or a field deputy or inspector of the department." ARIZ. REV. STAT. ANN. § 28-305(D) (1977), regarding auto registration requirements, provides in part: "The registration card shall at all times be carried within the driver's compartment of the vehicle for which issued, and shall be subject to inspection by the director or his authorized agent, members of the highway patrol or any peace officer."

86. 99 S. Ct. 1391 (1979).

87. *Id.* at 1401. *Prouse* involved the investigative stop of a moving vehicle that resulted in the seizure of marijuana found in plain view on the car floor. *Id.* at 1394. To justify the stop the officer could point to no reasonable suspicion that the car or its occupant had violated any law. *Id.* Rather, the detention was made solely to run a driver's license and registration check. *Id.*

88. Although the Court in *Prouse* never specifically stated that the test for determining reasonable suspicion to justify an auto stop was the same as that used to justify the detention of an individual on the street, such a conclusion can be implied from its opinion. See *Delaware v. Prouse*, *id.* at 1396-97. Such an implication is permissible because, in arriving at its conclusion, the Court points to the same factors considered in resolving an investigative detainment question. *Id.* See *Brown v. Texas*, 99 S. Ct. at 2640; text & notes 48-58 *supra*.

89. See *Delaware v. Prouse*, 99 S. Ct. at 1401.

90. 112 Ariz. 582, 544 P.2d 1097 (1976). For a more in-depth analysis of the case, see Case-

its registration statute authorizes the stopping of travelers upon public highways for the purpose of ascertaining whether the driver is violating the law.⁹¹ In arriving at its decision, the court distinguished stops made to investigate a known crime from those made for the purpose of discovering crime in the first instance.⁹² *Ochoa* would permit a registration or license check only upon a "founded suspicion" of some criminal or traffic violation.⁹³ Accordingly, the court permitted a vehicle stop and a license and registration check where the suspect vehicle matched a police profile of vehicles likely to be stolen.⁹⁴

Hence, both the United States Supreme Court and Arizona's highest judicial body have required a reasonable suspicion of some criminal or traffic law violation prior to the initiation of a vehicle stop.⁹⁵ Implicit in such a principle is the notion that a law enforcement official may not use a license or registration stop as a mere pretext for discovering incriminating evidence of a suspected crime. From this principle, it logically follows that a suspect who has been lawfully stopped may not be further detained by a registration check once the officer's initial suspicion has been dispelled.⁹⁶

Thus the court's inquiry in *Jarzab* should have properly focused on the arresting officer's suspicion that the vehicle in question might have been stolen.⁹⁷ If the court found specific and articulable facts to

note, *Reasonable Suspicion, Investigatory Stops, and the Use of Profiles*, 18 ARIZ. L. REV. 696 (1976).

91. 112 Ariz. at 584, 544 P.2d at 1098; see note 77 *supra*.

92. *Id.* at 584, 544 P.2d at 1099. As the court explained:

We, however, are convinced that neither statute authorizes the stopping of travelers upon public highways for the purpose of ascertaining whether the driver is violating the law. In this we think there is a valid distinction between a stop made for the purpose of investigating a crime already known to have been committed and a stop for the purpose of discovering crime in the first instance.

Id.

93. *Id.* Founded suspicion is defined by the court as "some reasonable ground for singling out a person who was involved or about to be involved in criminal activity." *Id.*

94. *Id.* at 585, 544 P.2d at 1000. The police profile relied upon in *Ochoa* was developed to help curtail the large number of trucks stolen in Phoenix and Tucson and subsequently sold in Mexico. *Id.* The profile listed a number of factors as characteristic of the stolen trucks in question. *Id.* at 586, 544 P.2d at 1001.

95. Arizona courts have applied the principles enunciated in *Ochoa* with varying results. In *State v. Becerra*, 111 Ariz. 538, 534 P.2d 743 (1975), an overloaded pickup truck observed near the Mexican border with a driver of apparent Mexican descent was held to justify a license-registration stop. *Id.* at 541, 534 P.2d at 746. The stopping of an individual who was known by the arresting officer to have been previously in violation of an Arizona licensing law was also held to be permissible. *State v. Gutierrez*, 27 Ariz. App. 226, 227, 553 P.2d 1211, 1212 (1976). On the other hand, an Arizona court has interpreted *Ochoa* as invalidating the stop of an apparently overloaded vehicle whose driver looked nervous as a "proscribed stop for the purpose of discovering crime in the first instance." *State v. Villagrana*, 115 Ariz. 285, 286, 564 P.2d 1252, 1253 (1976). In another instance, an officer's demand for a license and registration card from the sleeping occupants of a parked car was held to violate the fourth amendment since the officer had no reason to distinguish the auto from others parked in the area. See *State v. Rosenberg*, 24 Ariz. App. 341, 343, 538 P.2d 770, 772 (1975).

96. See text & notes 78-81 *supra*.

97. 123 Ariz. at 313-14, 599 P.2d at 766-67 (Gordon, J., dissenting).

support that suspicion, the officer's demand for the truck's registration card and subsequent seizure of marijuana found in plain view⁹⁸ would have been proper.⁹⁹ If the same suspicion was unreasonable according to the test outlined above, the marijuana seized should not have been admitted to convict the defendant pursuant to the application of the exclusionary rule.¹⁰⁰ Unfortunately, it is not possible to deduce from the majority opinion whether it adhered to such a line of inquiry.

Conclusion

The Arizona Supreme Court in *State v. Jarzab* considered the legality of an investigative detention that resulted in a conviction for possession of marijuana. In upholding the conviction, the court overruled the existing state standard that had required a law enforcement officer to possess a reasonable suspicion of criminal activity prior to effectuating a forcible detention. Such a holding appears to be in conflict with recent United States Supreme Court decisions that would allow an investigative detention only upon a showing of reasonable suspicion that the detainee was involved in some crime related activity. In rejecting the old test, the court in *Jarzab* gives little guidance to the lower courts in fashioning a new standard.

T.H. Hinderaker

B. THE INDIGENT'S RIGHT TO A FREE TRANSCRIPT

The equal protection clause of the fourteenth amendment requires states to provide indigent defendants with free transcripts of prior proceedings whenever transcripts are needed for an effective defense or appeal.¹ This principle, first enunciated by the United States Supreme Court in *Griffin v. Illinois*,² is based upon the idea that states cannot deprive defendants of the basic tools needed for defense or appeal merely because of an inability to pay.³ Although the *Griffin* court held

98. The plain-view doctrine provides that an object is admissible as evidence if discovered by an officer from a place where he is legally present. See *Coolidge v. New Hampshire*, 403 U.S. 443, 465-68 (1971).

99. See text & notes 91-94 *supra*.

100. The exclusionary rule prohibits the admission of evidence in court that was acquired in an illegal search. See generally *Mapp v. Ohio*, 367 U.S. 643 (1961).

1. *Britt v. North Carolina*, 404 U.S. 226, 227 (1971).

2. 351 U.S. 12, 19 (1956).

3. *Britt v. North Carolina*, 404 U.S. 226, 227 (1971); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956); see *Williams v. Oklahoma City*, 395 U.S. 458, 460 (1969); *Roberts v. LaVallee*, 389 U.S. 40, 42 (1967). See generally Comment, *Free Transcripts for Indigent Misdemeanants*, 8 GONZAGA

that indigents are entitled to trial transcripts for use on direct appeal only,⁴ later cases have expanded the scope of the right.⁵ Today, indigents subject to retrial are entitled to free transcripts of prior mistrials if the requirements of a two-pronged test developed by the Court are met.⁶

The two-pronged transcript test was recently applied by the Arizona Court of Appeals in *State v. Tomlinson*.⁷ The defendant's first trial for rape ended in a mistrial because the jury failed to reach a verdict.⁸ Approximately ten days later, Tomlinson requested a free transcript of the mistrial for use in preparation for the retrial.⁹ This request was denied.¹⁰ Tomlinson renewed his request during the second trial.¹¹ He asserted that there were "gross inconsistencies"¹² between the victim's trial and retrial testimony and that he needed the transcript to impeach her.¹³ The request was denied,¹⁴ and Tomlinson was found guilty of forcible rape at the second trial.¹⁵

On appeal, Tomlinson argued that the trial court's denial of his motion for a free transcript of the mistrial violated the equal protection clause.¹⁶ Tomlinson contended that the transcript was necessary for proper presentation of his defense.¹⁷ Since transcripts are available to anyone who pays for them under Arizona law,¹⁸ Tomlinson, an indi-

L. REV. 321 (1974); Comment, *The Indigent's Right to a Transcript of Record*, 20 KAN. L. REV. 745 (1972).

4. 351 U.S. at 19.

5. See *Wade v. Wilson*, 396 U.S. 282, 284 (1970) (implied that trial transcript was required for preparing habeas corpus petition, but reserved question); *Williams v. Oklahoma City*, 395 U.S. 458, 459 (1969) (per curiam) (right to transcript on direct appeal includes appeals for petty offenses); *Gardner v. California*, 393 U.S. 367, 371 (1967) (per curiam) (transcript of minutes of habeas corpus hearing required for use at a *de novo* post-conviction hearing); *Roberts v. LaVallee*, 389 U.S. 40, 42 (1967) (per curiam) (preliminary hearing transcript at which major prosecution witness testified must be provided); *Long v. District Court*, 385 U.S. 192, 194 (1966) (per curiam) (individual appealing denial of petition for collateral relief entitled to free transcript of collateral proceedings).

6. *Britt v. North Carolina*, 404 U.S. 226, 227 (1971).

7. 121 Ariz. 313, 589 P.2d 1345 (Ct. App. 1978).

8. *Id.* at 314, 589 P.2d at 1346.

9. *Id.*

10. *Id.* The trial court gave two reasons for denying the motion for a transcript: (1) There was no legal authority for furnishing the transcript; and (2) Tomlinson did not state specifically why he needed the transcript at that time. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 315, 589 P.2d at 1347. The trial court restated its position that it knew of no legal authority for supplying a transcript and added that the trial would be unduly delayed by the preparation of a transcript. *Id.*

14. *Id.*

15. *Id.* at 314, 589 P.2d at 1346.

16. *Id.*

17. *Id.*

18. ARIZ. REV. STAT. ANN. § 12-233(B) (1956) provides: "[U]pon payment or tender of the fees therefor, [the court reporter] shall furnish to any person a typewritten transcript of all or part of the proceedings reported by him, upon request, certify that such transcript is a correct and complete statement of such proceedings." *Id.*

gent defendant, argued that the fee for a transcript was an unconstitutional barrier to equal access to the courts.¹⁹ The Arizona Court of Appeals agreed and held that the refusal of the trial court to provide Tomlinson with a mistrial transcript denied him equal protection.²⁰ The court also found that the denial of the transcript was harmful error.²¹ Tomlinson's conviction was reversed and the case was remanded for a new trial.²²

This casenote will first explore the development of the two-pronged test under which the indigent's need for a transcript is determined. The Arizona application of this test will then be compared with similar applications in other jurisdictions; this comparison will focus upon the adequacy of various substitutes for a transcript.

Development of Free Transcript Standard

The right of an indigent to a free transcript of his prior trial was decided by the United States Supreme Court in *Britt v. North Carolina*.²³ In *Britt*, the defendant's first trial ended in a mistrial.²⁴ Britt then requested a transcript of the mistrial to prepare for the retrial.²⁵ This request was denied, and upon retrial the defendant was convicted.²⁶ The conviction was affirmed by the North Carolina Court of Appeals.²⁷

The issue, as articulated by the Supreme Court, was whether the denial of the transcript violated the defendant's right to equal protection under the fourteenth amendment.²⁸ The Court ruled that, under the narrow circumstances of the case, a transcript was not needed for an adequate defense;²⁹ the Court made it clear, however, that "the

19. 121 Ariz. at 314, 589 P.2d at 1346.

20. *Id.* at 319, 589 P.2d at 1351.

21. *Id.* The court applied the harmless error test enunciated in *Chapman v. California*, 386 U.S. 18 (1967). Under the *Chapman* rule, constitutional violations may be deemed harmless if the other evidence against the defendant is so overwhelming that the constitutional error beyond a reasonable doubt had no effect on the verdict. *Id.* at 24. In denial-of-transcript cases, this rule seems to be followed by a majority of courts. *See, e.g.*, *United States v. Jonas*, 540 F.2d 566, 573 (7th Cir. 1976); *Martin v. Rose*, 525 F.2d 111, 113 (6th Cir. 1975); *State v. Thacker*, 54 Ohio St. 2d 43, 44, 374 N.E.2d 642, 643 (1978). Under the minority view the erroneous denial of a transcript is harmful *per se*; courts espousing this view reason that such a denial so infects the entire trial that a reviewing court cannot conclude that the error had no effect on the verdict. *See People v. Hosner*, 15 Cal. 3d 60, 69-71, 538 P.2d 1141, 1148-49, 123 Cal. Rptr. 381, 388-89 (1975).

22. 121 Ariz. at 319, 589 P.2d at 1351.

23. 404 U.S. 226 (1971).

24. *Id.* at 226.

25. *Id.*

26. *Id.* at 227.

27. *Id.*

28. *Id.*

29. *Id.* at 230. The Court reasoned that a transcript was not needed because the defendant conceded that an alternative device was available to him before trial. *Id.* The alternative in *Britt* was a friendly court reporter who would have read back the notes from the mistrial, free of charge and well in advance of the retrial, if defense counsel had made an informal request. *Id.* at 229.

State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal."³⁰

The Court identified two factors as relevant in determining the need for a transcript: (1) The value of the transcript to the defendant in connection with the appeal or trial for which it is sought; and (2) the availability of alternative devices that would fulfill the same functions as the transcript.³¹ The Court stated that the value of a transcript can ordinarily be assumed without a showing of particularized need,³² since such transcripts are routinely used for impeaching prosecution witnesses.³³ Such a transcript is also useful for discovery purposes because a mistrial transcript reveals the prosecution's entire case against the defendant.³⁴ Thus, the *Britt* Court apparently resolved the "value of the transcript" question when it stated:

Our cases have consistently recognized the value to a defendant of a transcript of prior proceedings, without requiring a showing of need tailored to the facts of the particular case. . . . [E]ven in the absence of specific allegations it can ordinarily be assumed that a transcript of a prior mistrial would be valuable to the defendant. . . .³⁵

Under the second prong of the *Britt* test, a court must consider whether any alternative devices are available to the defendant which would fulfill the same functions as a transcript.³⁶ Possible alternatives might include the court reporter's notes³⁷ or a tape recording of the trial.³⁸ The Court placed the burden of proving the adequacy of such alternatives upon the prosecution.³⁹

Since the value of the mistrial transcript is presumed under *Britt*,

30. *Id.* at 227.

31. *Id.*

32. *Id.* at 228; see *United States v. Mullen*, 550 F.2d 373, 374 (6th Cir. 1977); *State v. Romero*, 87 N.M. 279, 281, 532 P.2d 208, 210 (1975).

33. 404 U.S. at 227; see *United States v. Jonas*, 540 F.2d 566, 570 (7th Cir. 1976); *United States v. Young*, 472 F.2d 628, 629 (6th Cir. 1972).

34. 404 U.S. at 227; *id.* at 232 (Douglas, J., dissenting).

35. *Id.* at 227. In keeping with the Supreme Court's statement in *Britt*, the *Tomlinson* court held that the value of a mistrial transcript could be assumed, and reversed the trial court's ruling that Tomlinson's motion for a transcript could only be granted if he could point to a specific use to which the transcript could be put. 121 Ariz. at 319, 589 P.2d at 1351.

36. 404 U.S. at 227.

37. See, e.g., *Britt v. North Carolina*, 404 U.S. 226, 228 (1971) (defendant conceded and court found court reporter could have been made available before retrial); *United States v. Gaither*, 527 F.2d 456, 458 (4th Cir. 1975) (upholding use of court's notes as an alternative where transcript was not yet available), *cert. denied*, 425 U.S. 952 (1976); *State v. Julian*, 212 Kan. 169, 171, 509 P.2d 1123, 1125 (1973) (recognizing use of court reporter's notes as adequate alternative).

38. Although no court has deemed a tape recording of the trial itself to be an acceptable alternative, recordings of preliminary hearings have met with approval. See, e.g., *United States v. Vandivere*, 579 F.2d 1240, 1243 (10th Cir. 1978) (tape recording of preliminary hearing is adequate, but tape recording of trial is inadequate); *State ex rel. Moreno v. Floyd*, 85 N.M. 699, 703, 516 P.2d 670, 674 (1973) (tape is adequate for preliminary hearing). Cf. *United States v. Jonas*, 540 F.2d 566, 570 (7th Cir. 1976) (portions of trial tapes are an inadequate substitute for a trial transcript).

39. 404 U.S. at 230.

the primary issue in an indigent-transcript case is whether the prosecution has met its burden of proving that an adequate alternative to a transcript was made available to the defendant prior to his retrial.⁴⁰ The proper judicial standard for resolving this question, and the analysis employed by the Arizona Court of Appeals in *Tomlinson*, will be considered in the next section.

Adequacy of Alternatives

Under the adequacy prong of *Britt*, an alternative to a transcript must be made available to the defendant before trial and must be the substantial equivalent of a transcript.⁴¹ The *Britt* test thus requires analysis of two factors to determine whether an alternative to a transcript is acceptable.⁴² The first factor involves the matter of timing, since the transcript substitute must be made available to the defendant before trial to be useful for trial preparation.⁴³ The second aspect of the *Britt* analysis involves an inquiry into the form and substance of the alternative,⁴⁴ since the alternative offered by the prosecution must appear to be the functional equivalent of a transcript.⁴⁵ Further, the burden is placed on the prosecution to prove that an alternative device meets both the timing and equivalency requirements.⁴⁶

A majority of courts require the prosecution to meet strict standards before an alternative is considered adequate.⁴⁷ For example, calling the court reporter to testify during the second trial is an inadequate alternative under this view because this technique cannot be used

40. See *United States v. Acosta*, 495 F.2d 60, 64 (10th Cir. 1974); *United States v. Young*, 472 F.2d 628, 629 (6th Cir. 1972); *State v. Tomlinson*, 121 Ariz. 313, 319, 589 P.2d 1345, 1351 (Ct. App. 1978).

41. 404 U.S. at 230.

42. *Id.*

43. See *United States v. Young*, 472 F.2d 628, 629 (6th Cir. 1972) (availability of court reporter's notes is inadequate where such availability was not made known to the defendant until three months after retrial).

44. 404 U.S. at 230; see *United States v. Acosta*, 495 F.2d 60, 64 (10th Cir. 1974) (limited access to court reporter's notes during second trial is not the equivalent of trial transcript); *United States ex rel. Wilson v. McMann*, 408 F.2d 896, 897 (2d Cir. 1969) (limited access to court reporter's notes during second trial is inadequate alternative).

45. 404 U.S. at 230; see *United States v. Jonas*, 540 F.2d 566, 570 (7th Cir. 1976) (holding that a tape recording is not the functional equivalent of a transcript); *United States ex rel. Wilson v. McMann*, 408 F.2d 896, 897 (2d Cir. 1969) (holding access to court reporter's notes inadequate).

46. See 404 U.S. at 230. The Court stated: "A defendant who claims the right to a free transcript does not, under our cases, bear the burden of proving inadequate such alternatives as may be suggested by the State or conjured up by a court in hindsight." *Id.* See also *Shuford v. Superior Court*, 11 Cal. 3d 903, 907, 523 P.2d 641, 643, 114 Cal. Rptr. 601, 603 (1974).

47. See, e.g., *United States v. Baker*, 523 F.2d 741, 743 (5th Cir. 1975) (trial court's provision of portion of transcript is an inadequate alternative); *State v. Williams*, 84 Wash. 2d 853, 857, 529 P.2d 1088, 1090 (1975) (the exception for alternatives in *Britt* is very narrow, and alternatives must truly approximate trial transcripts). Cf. *State v. Romero*, 87 N.M. 279, 281, 532 P.2d 208, 211 (1975) (*Britt* rule applied to suppression hearing where the court stated that the rule should be liberally construed in favor of the defendant).

for pretrial discovery,⁴⁸ and thus fails to satisfy the timing requirement.⁴⁹ Additionally this alternative fails the equivalency requirement.⁵⁰ While the court reporter is attempting to find the portion of the testimony that defense counsel believes is inconsistent, the witness has time to accommodate his answers to those given previously.⁵¹ Having the transcript itself at hand, however, provides an opportunity for immediate impeachment, and is thus superior to calling the court reporter as a witness.⁵²

Similarly, reliance upon counsel's notes and memory is inadequate because this substitute fails the equivalency requirement.⁵³ Even though counsel's notes are available before trial, such notes are often abbreviated and incomplete, and cannot be considered transcript equivalents.⁵⁴ Under the majority interpretation of the *Britt* adequacy test, however, a verbatim tape recording might be considered an adequate alternative if the recording is provided before trial;⁵⁵ the court, however, will closely scrutinize the facts of each case to ensure that the recording is in fact the equivalent of a transcript.⁵⁶

Not all courts, however, require the prosecution to meet such strict standards in proving the availability and equivalency of a transcript alternative.⁵⁷ Under what appears to be the minority interpretation, reliance on the memory of defendant or his counsel may be considered an adequate alternative where the first trial is short and seemingly un-

48. *United States v. Young*, 472 F.2d 628, 629 (6th Cir. 1972); *State v. Arrington*, 42 Ohio St. 2d 114, 117, 326 N.E.2d 667, 669 (1975) (holding availability of court reporter's notes combined with defendant's memory to be an inadequate alternative).

49. *United States v. Mullen*, 550 F.2d 373, 374 (6th Cir. 1977); *United States v. Acosta*, 495 F.2d 60, 64 (10th Cir. 1974); *United States ex rel. Wilson v. McMann*, 408 F.2d 896, 897 (2d Cir. 1969).

50. *See Britt v. North Carolina*, 404 U.S. 226, 227 (1971); *United States ex rel. Wilson v. McMann*, 408 F.2d 896, 897 (2d Cir. 1969); *People v. Peacock*, 31 N.Y.2d 907, 908, 292 N.E.2d 785, 786, 340 N.Y.S.2d 642, 643 (1972).

51. *See People v. Peacock*, 31 N.Y.2d 907, 908, 292 N.E.2d 785, 786, 430 N.Y.S.2d 642, 643 (1972) (having the transcript at hand would have permitted immediate cross-examination of the witness without him having the opportunity to accommodate his answers at trial with those given previously).

52. *See* note 51 *supra*.

53. 404 U.S. at 229; *see Gardner v. California*, 393 U.S. 367, 369 (1969); *State v. Williams*, 84 Wash. 2d 853, 857, 529 P.2d 1088, 1090 (1975). *Cf. United States v. Jonas*, 540 F.2d 566, 570 (7th Cir. 1976) (judge's notes do not allow for effective impeachment by reading back an original answer).

54. *Britt v. North Carolina*, 404 U.S. 226, 229 (1971); *State v. Arrington*, 42 Ohio St. 2d 114, 117, 326 N.E.2d 667, 669 (1975) (holding that defense counsel's memory combined with calling the court stenographer to testify was an inadequate alternative). *Cf. United States v. Jonas*, 540 F.2d 566, 570 (7th Cir. 1976) (stenographer's untranscribed tapes and judge's notes are inadequate).

55. *Cf. State ex rel. Moreno v. Floyd*, 85 N.M. 699, 703, 516 P.2d 670, 674 (1973) (tape recording of preliminary hearing is adequate).

56. *See, e.g., United States v. Vandivere*, 579 F.2d 1240, 1243 (10th Cir. 1979); *State ex rel. Moreno v. Floyd*, 85 N.M. 699, 703, 516 P.2d 670, 674 (1973). *But see United States v. Jonas*, 540 F.2d 566, 570 (7th Cir. 1976) (portion of trial tape recording is inadequate).

57. *See, e.g., State v. Wheeler*, 215 Kan. 94, 98, 523 P.2d 722, 725 (1974); *State v. Gibbs*, 29 N.C. App. 647, 648, 225 S.E.2d 837, 838 (1976).

complicated,⁵⁸ even though memory is arguably not the equivalent of a transcript and was rejected by the Court under the circumstances presented in *Britt*.⁵⁹ Similarly, calling the court reporter to testify during the second trial has been determined to be an adequate alternative under the minority view, even though this alternative is not available to the defendant for trial preparation,⁶⁰ and was also rejected by the *Britt* Court.⁶¹

The minority view not only accepts alternatives that do not appear to be the substantial equivalents of transcripts, but also allows the prosecution to present possible alternatives that the defendant could have used at retrial.⁶² Once the prosecution presents such an alternative, the burden shifts to the defendant to prove he unsuccessfully attempted to use the suggested alternative.⁶³ The defendant may meet this burden by showing he made an unsuccessful impeaching attempt, or by showing he was hampered in his cross-examination of a witness.⁶⁴ The Supreme Court in *Britt*, however, rejected the prosecution's contentions that a defendant should bear the burden of proving inadequate alternatives that are suggested in hindsight,⁶⁵ reasoning that a defendant should not be required to prejudice his defense in order to prove that an alternative is inadequate.⁶⁶ Yet the minority view permits such an after-the-fact determination of adequacy.⁶⁷

The Arizona Court of Appeals was faced with the decision of whether to follow the majority of minority view in *Tomlinson*. After retrial, the prosecution in *Tomlinson* suggested that the court reporter

58. *State v. Petta*, 354 So. 2d 563, 565 (La. 1978) (memory of defendant is an adequate alternative where it is apparent that defendant remembered the testimony from the first trial); *State v. Gibbs*, 29 N.C. App. 647, 648, 225 S.E.2d 837, 838 (1976) (memory of defendant combined with calling the court reporter to testify furnished adequate substitute).

59. 404 U.S. at 229.

60. *State v. Holland*, 534 S.W.2d 258, 263 (Mo. 1975) (court reporter's testimony plus trial court's offer of notes was an adequate alternative); *State v. Gibbs*, 29 N.C. App. 647, 649-50, 225 S.E.2d 837, 838 (1976) (availability of court reporter combined with counsel's memory furnished adequate substitute).

61. 404 U.S. at 229.

62. *State v. Wheeler*, 215 Kan. 94, 98, 523 P.2d 722, 725 (1974); *State v. McVeigh*, 213 Kan. 432, 438, 516 P.2d 918, 923 (1973).

63. *See State v. Jones*, 222 Kan. 56, 59, 563 P.2d 1021, 1023 (1977) (defendant must prove he explored alternatives); *State v. Julian*, 212 Kan. 169, 173, 509 P.2d 1123, 1126 (1973) (defendant must prove alternatives inadequate).

64. *State v. Petta*, 354 So. 2d 563, 565 (La. 1978) (defendant must show unsuccessful impeachment attempt); *Mosby v. State*, 253 Ark. 904, 906, 489 S.W.2d 799, 800 (1973) (defendant must show that court reporter's notes are unavailable).

65. 404 U.S. at 230.

66. *See id.* *See also United States ex rel. Wilson v. McMann*, 408 F.2d 896, 897 (2d Cir. 1969); *State v. Thacker*, 54 Ohio St. 2d 43, 44, 374 N.E.2d 642, 643 (1978) (defendant's unopposed motion for transcript must be granted because the prosecution failed to meet its burden of proof); *State v. Campbell*, 215 N.W.2d 227, 230 (Iowa 1974) (the logic of permitting a determination after trial that a transcript would not have helped before trial is open to serious question).

67. *See, e.g., State v. Petta*, 354 So. 2d 563, 565 (La. 1978); *State v. Jones*, 222 Kan. 56, 59, 563 P.2d 1021, 1023 (1977).

could have been made available before retrial to read back her notes free of charge.⁶⁸ Under the minority view, this alternative is adequate even though it is suggested after the fact and places the burden of proof on the defendant.⁶⁹

The *Tomlinson* court rejected the minority view as inconsistent with the Supreme Court's holding in *Britt*.⁷⁰ The court concluded that the exception to the general rule that mistrial transcripts must be provided for indigents is quite narrow and applies only where an equivalent alternative is presented before trial.⁷¹ Since the prosecution in *Tomlinson* did not show that the defendant had an alternative device that was the equivalent of a transcript available prior to trial, the court of appeals held the trial court's denial of the transcript to be constitutional error.⁷²

Conclusion

In *State v. Tomlinson* the Arizona Court of Appeals held that a state must ordinarily provide free mistrial transcripts for indigent defendants who are preparing for retrial. The court ruled that such transcripts need not be provided when the prosecution presents a substitute that is the equivalent of a transcript before trial. In so holding, the *Tomlinson* court adopted the majority interpretation of the *Britt* rule formulated by the United States Supreme Court.

The majority rule appears to be the better view for several reasons. First, the majority view seems more consistent with *Britt* in that this view requires the prosecution to present adequate alternatives before retrial. The majority position also recognizes that transcripts are useful in developing leads to new evidence, and in framing the cross-examination questions that might lead to impeachment at the retrial. Finally, courts which espouse this view closely scrutinize the equivalency of transcript substitutes, and thus insure that alternatives will closely approximate the verbatim transcripts that defendants of means purchase as a matter of course.

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68. 121 Ariz. at 319, 589 P.2d at 1351.

69. *State v. Wheeler*, 215 Kan. 94, 98, 523 P.2d 722, 725 (1974); *State v. McVeigh*, 213 Kan. 432, 438, 516 P.2d 918, 923 (1973).

70. 121 Ariz. at 319, 589 P.2d at 1351.

71. *Id.*

72. *Id.*

C. THE NEED FOR A WARRANT IN NONEXIGENT ARREST ENTRIES

In *United States v. Prescott*,¹ the Ninth Circuit Court of Appeals considered two fourth amendment issues: (1) Whether, when the police have probable cause to believe that a person has committed a felony and that he is in a particular house, they may forcibly enter, search for, and seize that person without first obtaining a warrant, in the absence of exigent circumstances; and (2) whether a refusal by the occupant of a house to allow a warrantless entry by police is admissible against him at trial.²

In January of 1977, federal agents set up a controlled delivery of packages to Duvernay, who was suspected of mail fraud. After the suspect signed for the packages and carried them into his apartment building, the agents followed. They did not have an arrest warrant, but did have a search warrant for Duvernay's apartment. Finding his apartment padlocked from the outside, the agents proceeded to the apartment of a neighbor, the defendant Sandra Prescott. One of the officers identified himself³ and asked Prescott if Duvernay was inside.⁴ Prescott lied, stating that only her husband and daughter were in the apartment.⁵ After searching the building, the officer returned and warned Prescott that she could be arrested if she were hiding Duvernay.⁶ She asked if the officers had a warrant, and they replied that they did not. Prescott refused to unlock the door. After searching the building again, and again being refused permission to enter the apartment, the officer warned Prescott that if the door were not unlocked the police would use force to enter. The door remained locked and the agents forced it open. They found Duvernay inside and arrested Prescott as an accessory after the fact.

Evidence that she refused to admit the officers and allow a search, and that Duvernay and the prepared packages were found inside her apartment was introduced at Prescott's trial. Prescott was convicted of assisting a suspected felon in order to prevent his apprehension⁷ and

1. 581 F.2d 1343 (9th Cir. 1978).

2. *Id.* at 1346.

3. The requirement that an officer make his presence known and state his purpose is well established. *See Ker v. California*, 374 U.S. 23, 46-59 (1963); *Miller v. United States*, 357 U.S. 301, 308 (1958).

4. 581 F.2d at 1346.

5. *Id.* In actuality, Prescott had voluntarily admitted Duvernay to her apartment a few minutes earlier. *Id.*

6. *Id.* at 1347.

7. Prescott was convicted as an accessory after the fact. 18 U.S.C. § 3 (1976) provides in part: "Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact." *Id.*

she appealed.⁸ The Ninth Circuit reversed, holding that absent exigent circumstances, law enforcement officers must obtain a warrant in order to enter a dwelling to carry out an arrest.⁹ The court also held that the refusal to allow the police to search may not be used as evidence where the agents have no warrant and no forcible resistance is offered.¹⁰ Judge Sneed, dissenting in part, disagreed with the majority holding on the second issue and argued that evidence of resistance to a warrantless search should be admissible.¹¹

This casenote will first examine current law with regard to warrantless felony arrests. The desirability and impact of the *Prescott* warrant requirement will be analyzed. The court's holding that evidence of an individual's refusal to allow a warrantless entry is inadmissible as evidence will also be examined. Finally, the dissent's analysis of the evidentiary issue will be presented and a critique of the majority's conclusion will be proffered.

The Warrant Requirement

A literal reading of the fourth amendment¹² would suggest that the protections of the amendment extend to both arrests and searches.¹³ The common law, however, allowed an officer not only to arrest a felony suspect in public without a warrant,¹⁴ but also to break into a home to make an arrest.¹⁵

Two different approaches have been utilized to determine the validity of a warrantless felony arrest. Under traditional fourth amendment analysis, arrests have been distinguished from searches and seizures.¹⁶ This distinction is grounded in the law's development

8. 581 F.2d at 1347. Since no evidence of exigent circumstances was admitted at trial, the Ninth Circuit remanded for further proceedings. *Id.* at 1350.

9. *Id.*

10. *Id.* at 1351.

11. *Id.* at 1357-58.

12. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. CONST. amend. IV.

13. A strict interpretation of the amendment would suggest that in order to arrest, a warrant is required. Because a warrant must describe either "the person or the things to be seized," it might be argued that the seizure of a person should be controlled by a warrant. *See id.*

14. *See State v. Brown*, 5 Del. (5 Harr.) 505, 507 (1853); *Holley v. Mix*, 3 Wend. 350, 353 (N.Y. Sup. Ct. 1829); *Wakely v. Hart*, 6 Binn. 316, 318-19 (Pa. 1814). "The authority of a constable, to arrest without a warrant, in cases of felony, is most fully established by the elementary books, and adjudicated cases." *Rohan v. Sawin*, 59 Mass. 281, 284 (1850).

15. *See Shanley v. Wells*, 71 Ill. 78, 82 (1873); *Smith v. Tate*, 143 Tenn. 268, 275-77, 227 S.W. 1026, 1028 (1920). "An officer who has the right to arrest without a warrant because he suspects on reasonable grounds that the defendant has committed a felony, has the right to break open doors." *Commonwealth v. Phelps*, 209 Mass. 396, 407-08, 95 N.E. 868, 873 (1911).

16. *See Gerstein v. Pugh*, 420 U.S. 103, 111-16 (1975).

within a system that considered property rights to be more valuable than personal rights.¹⁷ The search and seizure of property necessitated a warrant,¹⁸ but no such requirement applied to the arrest of a person.¹⁹ It was thought that the purpose of the fourth amendment was not to curtail arrests but to protect property rights: The amendment sought to prevent the issuance of general writs by requiring specific descriptions of the items to be seized and the taking of an oath to support the warrant.²⁰ Thus, while warrantless searches were *per se* unreasonable except in certain exceptional circumstances,²¹ warrantless arrests were judicially approved.²² Today this dichotomy is embodied in the law of most states.²³

17. See generally N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 13-50 (1937); Comment, *Watson and Ramey: The Balance of Interests in Non-Exigent Felony Arrests*, 13 SAN DIEGO L. REV. 838, 844 (1976).

18. See *United States v. Jeffers*, 342 U.S. 48, 51 (1951); *Weeks v. United States*, 232 U.S. 383, 392-94 (1914).

19. See *Gerstein v. Pugh*, 420 U.S. 103, 114 n.14 (1975). For a felony arrest in public, the common law required only probable cause. See 2 M. HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 75-84 (1847); 1 J. STEPHENS, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 193 (1883). For a discussion of the common law requirements for an entry arrest, see *Accarino v. United States*, 179 F.2d 456, 460-63 (D.C. Cir. 1949).

20. See *Rohan v. Sawin*, 59 Mass. 281, 284-85 (1850). The Massachusetts Supreme Court expressed the judicial consensus in early American decisions when it stated:

It has been sometimes contended, that an arrest of this character, without a warrant, was a violation of the great fundamental principles of our national and state constitutions, forbidding unreasonable searches and arrests, except by warrant founded upon a complaint made under oath. Those provisions doubtless had another and different purpose, being in restraint of general warrants to make searches, and requiring warrants to issue only upon a complaint made under oath. They do not conflict with the authority of constables or other peace officers, or private persons under proper limitations, to arrest without a warrant those who have committed felonies. The public safety, and the due apprehension of criminals, charged with heinous offences, imperiously require that such arrests should be made without warrant by officers of the law.

Id. See N. LASSON, *supra* note 17, at 20.

21. *Coolidge v. New Hampshire*, 403 U.S. 443, 477-78 (1971). Four types of warrantless searches have been upheld by the Supreme Court: (1) Consent searches, *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); (2) searches incident to arrest, *Chimel v. California*, 395 U.S. 752, 762-63 (1969); (3) searches of a motor vehicle on an open highway, *Chambers v. Maroney*, 399 U.S. 42, 48-49 (1970); and (4) searches necessitated by exigent circumstances, *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967).

22. *Carroll v. United States*, 267 U.S. 132, 156-57 (1925). "The usual rule is that a police officer may arrest without warrant one believed by the officer to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence." *Id.*

23. See, e.g., ARIZ. REV. STAT. ANN. § 13-3891 (Supp. 1978); CAL. PENAL CODE § 844 (West 1970); WASH. REV. CODE § 10.31.040 (1961). The relevant Arizona statute provides:

An officer, in order to make an arrest either by virtue of a warrant, or when authorized to make such arrest for a felony without a warrant, as provided in § 13-3883, may break open a door or window of any building in which the person to be arrested is or is reasonably believed to be, if the officer is refused admittance after he has announced his authority and purpose.

ARIZ. REV. STAT. ANN. § 13-3891 (1978). Under § 13-3883 a peace officer can make a warrantless arrest "when he has probable cause to believe that a felony has been committed and probable cause to believe the person to be arrested has committed the felony."

Presently, 37 states have statutes that relate to forcible entries to arrest. Most of these laws allow entry whenever there is authority to arrest. See Comment, *supra* note 17 at 847 n.70.

In *United States v. Watson*²⁴ the Supreme Court has apparently adopted the majority approach for arrests made in a public place. The *Watson* Court upheld a warrantless public arrest, even though police had ample time to procure a warrant.²⁵ The Court noted that the purpose of the fourth amendment is to provide protection against searches but not arrests.²⁶ It made clear that it was not abandoning its preference for warrants but concluded that this judicial preference should not be transformed into a constitutional rule.²⁷

Several courts have, however, adopted a different approach where the arrest necessitates a warrantless entry into a home. These courts have reasoned that the sanctity of the home, which the fourth amendment was designed to protect, "is no less threatened when the object of police entry is the seizure of a person rather than a thing."²⁸ The basic premise is that there is no valid distinction between an arrest and a seizure for the purpose of fourth amendment protection where the arrest necessitates warrantless entry into a home.²⁹ Thus a warrant must be obtained for entry arrests.³⁰

The leading case adopting the warrant requirement is *Dorman v. United States*.³¹ In *Dorman*, the defendant challenged, on fourth amendment grounds, the warrantless entry of his home to arrest him for robbery.³² The District of Columbia Circuit reasoned that "[f]reedom from intrusion into the home . . . is the archetype of the

24. 423 U.S. 411 (1976).

25. *Id.* at 423-24.

26. *Id.* at 429-30.

27. *Id.* at 423-24.

28. *United States v. Prescott*, 581 F.2d 1343, 1349 (9th Cir. 1978). See *United States v. Reed*, 572 F.2d 412, 422-24 (2d Cir. 1978); *United States v. Shye*, 492 F.2d 886, 891 (6th Cir. 1974); *Vance v. North Carolina*, 432 F.2d 984, 990 (4th Cir. 1970).

29. The first case to apply such a philosophy to warrantless nonexigent entry arrests was *Accarino v. United States*, 179 F.2d 456 (D.C. Cir. 1949). The court seemed to assume that for fourth amendment purposes, an entry into a dwelling to arrest and an entry to search are identical. See *id.* at 458. The court then stated:

The right to break open a door to make an arrest requires something more than the mere right to arrest. If nothing additional were required, a man's right of privacy in his home would be no more than his rights on the street; and the right to arrest without a warrant would be precisely the same as the right to arrest with a warrant.

Id. at 464. The court held that a police officer cannot enter a home to arrest unless he has a warrant or unless "an immediate major crisis in the performance of duty affords neither time nor opportunity to apply to a magistrate." *Id.*

30. See cases cited note 22 *supra*. The Supreme Court has discussed the question only in dicta, specifically reserving judgment on the issue. See *United States v. Santana*, 427 U.S. 38, 45 (1976) (Marshall, J., dissenting); *United States v. Watson*, 423 U.S. 411, 418 n.6 (1976); *Gerstein v. Pugh*, 420 U.S. 103, 113 n.13 (1975).

The Ninth Circuit has historically avoided the issue by finding the existence of exigent circumstances. See, e.g., *United States v. Flickenger*, 573 F.2d 1349, 1355-56 (9th Cir. 1978) (totality of the circumstances indicating need to act); *United States v. McLaughlin*, 525 F.2d 517, 521 (9th Cir. 1975) (likelihood of escape); *United States v. Curran*, 498 F.2d 30, 35 (9th Cir. 1974) (potential removal and destruction of evidence).

31. 435 F.2d 385 (D.C. Cir. 1970) (en banc).

32. *Id.* at 386-87.

privacy protection secured by the fourth amendment,³³ and that the rights of police to enter, search, and seize are to be controlled by a warrant.³⁴ The court articulated six factors to be weighed in determining whether the warrant requirement may be excused: (1) The seriousness of the crime; (2) the probability that the suspect is armed; (3) the availability of reasonably trustworthy information beyond probable cause that the suspect committed the crime involved; (4) the existence of any strong reason to believe that the suspect is on the premises; (5) whether it is likely that the suspect will escape if not quickly apprehended; and (6) the force used in an uncontested entry.³⁵

Dorman has been followed extensively by other circuit courts³⁶ and was relied upon by the Ninth Circuit in *Prescott*.³⁷ The *Prescott* court initially noted that the Supreme Court has implicitly equated the entry of a dwelling to make an arrest with a search and seizure.³⁸ In *Coolidge v. New Hampshire*,³⁹ the Supreme Court observed in dicta that basic principles of fourth amendment law make warrantless searches and seizures inside an individual's home *per se* unreasonable and that permitting warrantless-entry arrests would conflict with those principles unless exigent circumstances exist.⁴⁰ The *Prescott* court noted that the Supreme Court has traditionally afforded the most stringent fourth amendment protection to the privacy of homes.⁴¹ Thus, the court in *Prescott* held that absent exigent circumstances, when police officers have probable cause to arrest a felony suspect, they may not enter a dwelling without first obtaining a warrant.⁴²

The position espoused by the *Prescott* court is supported by the weight of authority.⁴³ Public arrests and dwelling-entry arrests can be

33. *Id.* at 389.

34. *Id.*

35. *Id.* at 392-93. The time of entry can also be important. If late at night, the degree of probable cause necessary will be greater because of the general unreasonableness of nighttime entries and arrests. *Id.* at 393.

36. See cases cited note 21 *supra*.

37. 581 F.2d at 1350.

38. *Id.* at 1348.

39. 403 U.S. 443 (1971).

40. *Id.* at 477-78.

41. 581 F.2d at 1348-49.

42. *Id.* at 1350. Where the suspect is believed to be in the home of a third person, the Third Circuit has held that with arrest warrants police may enter only in exigent circumstances. *Government of V.I. v. Gereau*, 502 F.2d 914, 928 (3d Cir. 1974). The *Prescott* court argued that this distinction is artificial: "The warrant, whatever it be called, must describe 'the place to be searched,' and 'the persons or things to be seized.'" 581 F.2d at 1350.

Nevertheless, it is unclear whether an arrest warrant would be sufficient in the circumstances in *Prescott*. Generally, an arrest warrant contains three elements: (1) It must show facts sufficient to constitute a violation of law; (2) it must inform the accused of the crime with which he is charged; (3) it must include a name or a description of the person to be arrested. See E. FISHER, *LAWS OF ARREST* 105-07 (1967). An arrest warrant, therefore, could not authorize a search of the residence of a third party in order to arrest a suspect, because the warrant would contain no description of that place.

43. See cases cited note 21 *supra*.

distinguished. Warrantless public arrests are considered reasonable and necessary to provide efficient police operation.⁴⁴ Fourth amendment interests, however, tip the balance of policy considerations in favor of the individual's right to privacy where arrests involve entry into a home. The expectation of privacy is greater in the home than in public.⁴⁵ The fourth amendment guarantees as fundamental the right of personal security and privacy at home.⁴⁶ In addition, the entry into a home entails in every case some form of preliminary search of the premises to locate the person sought.⁴⁷ The search in reality is even more extensive since anything in "plain view" of the officers will come under their scrutiny.⁴⁸ There is the possibility of further expanding the search when the officers arrest the suspect and search him and the area within his control.⁴⁹ Absent exigent circumstances, such extensive in-

44. See notes 13-14, 17 *supra*. Congress has also authorized warrantless public arrests. 18 U.S.C. § 3061(a) (1976) provides in part:

(a) officers and employees of the Postal Service performing duties related to the inspection of postal matters may . . .

(2) make arrests without warrant for offenses against the United States committed in their presence . . .

(3) make arrests without warrant for felonies cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony.

Id. 18 U.S.C. § 3053 (1976) authorizes United States Marshalls and their deputies to "make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." *Id.*

45. *Johnson v. United States*, 333 U.S. 10, 14 (1948) ("The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance."). *Cf.* *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973) ("[t]he idea of a 'privacy' right and a place of public accommodation are . . . mutually exclusive").

46. *Berger v. New York*, 388 U.S. 41, 53 (1967); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); *Jones v. United States*, 357 U.S. 493, 498 (1958).

The sanctity of the home was well established even before the American Revolution: The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement.

Miller v. United States, 357 U.S. 301, 307 (1958). The remark is attributed to William Pitt, Earl of Chatham, made during a session of Parliament in 1763. *Id.* at 307 n.7.

47. *Warden v. Hayden*, 387 U.S. 294, 299-300 (1967). Pursuant to an entry of a home under the "hot pursuit" exception to the search warrant requirement, where the purpose of the entry is limited to seizing a suspect and contraband, police are allowed to search only in those places where either could reasonably be hidden. *Id.*

48. See *Harris v. United States*, 390 U.S. 234, 236 (1968). The court stated that "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *Id.*

49. *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. . . . In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule.

trusions should not be allowed in the absence of a warrant. The privacy interests protected by the fourth amendment dictate that such searches be controlled by a detached and impartial magistrate.⁵⁰ As a result, the different treatment of public arrests and home entry arrests is fully justified.

Evidentiary Admission of a Refusal to Allow Entry

The Ninth Circuit in *Prescott* also held that a passive refusal to consent to a warrantless search was privileged conduct which could not be considered as evidence of a crime.⁵¹ The court stated that the fourth amendment protects the right to refuse to allow the police to enter and search, regardless of the occupant's motivation.⁵² When an officer who does not have a warrant wants to search a home, there is a presumption that he may not do so, and the occupant need not surrender his fourth amendment right.⁵³

In support of its ruling, the court analogized the fourth amendment to the fifth amendment.⁵⁴ The court noted that the right to remain silent is available to both innocent and guilty and the exercise of the right cannot be used as evidence; the right to refuse permission for a warrantless search should be afforded similar protection.⁵⁵ The majority also noted that the use of a passive refusal as evidence would chill the exercise of the right by attaching costs to its assertion.⁵⁶

50. Mr. Justice Jackson in *Johnson v. United States*, 333 U.S. 10 (1948), stated: The point of the Fourth Amendment, which is often not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Id. at 13-14.

51. 581 F.2d at 1351.

52. *Id.*

53. *Id.* at 1350-51. *Cf.* *Camara v. Municipal Court*, 387 U.S. 523, 540 (1976) (right to refuse a warrantless administrative search is guaranteed without the risk of criminal penalties); *District of Columbia v. Little*, 339 U.S. 1, 6-7 (1950) (owners under no duty to assist health officers to enter and inspect their homes in absence of a search warrant).

54. 581 F.2d at 1351-52.

55. *Id.* *Cf.* *Doyle v. Ohio*, 426 U.S. 610, 617 n.8 (1976) (silence by defendant at the time of arrest is inherently ambiguous and thus of dubious probative value); *United States v. Hale*, 422 U.S. 171, 176-77 (1975) (silence is usually so ambiguous as to be of little probative value); *Griffin v. California*, 380 U.S. 609, 613-15 (1965) (use of the fifth amendment right of silence as evidence against a defendant is a penalty imposed for the exercise of a right).

The *Prescott* court concluded that its purpose was to protect the exercise of a constitutional right and not to deter illegal police conduct, the latter being the purpose of most fourth amendment rules. 581 F.2d at 1351. *See* *Griffin v. California*, 380 U.S. 609, 613-14 (1965) (the Court sought to remove the penalty imposed by California rule allowing prosecutors to comment to the jury on the defendant's failure to testify).

56. 581 F.2d at 1352. The court pointed out that the privilege can be waived by the defendant's failure to object to the introduction of the evidence or by testifying to it. *Id.* So long as the defendant does not waive the right, however, a refusal to allow a warrantless entry may not be used against the defendant as evidence. *Id.*

In dissent, Judge Sneed contended that evidence of the defendant's exercise of her fourth amendment right to refuse a warrantless entry should be admitted as long as limiting instructions are given.⁵⁷ The dissent noted that the exercise of a constitutional right need not be without cost.⁵⁸ Whether a cost is tolerable depends upon whether the forced election to forego one right because of the assertion of another "impairs to an appreciable extent any of the policies behind the right involved."⁵⁹ After examining the policies involved, the dissent concluded that no significant impairment of fourth amendment policies results from admission of such evidence.⁶⁰

The approach taken by Judge Sneed is superior. The need for a new appendage to the fourth amendment is not supported by the reasoning of the majority opinion. Both the majority and the dissent agreed that if the agents had procured a warrant, Prescott's refusal to permit the officers to enter her apartment would be admissible.⁶¹ There is no right to refuse a search under such circumstances.⁶² The dissent pointed out that if the entry were illegal, the fruits of the search and arrest⁶³ would be excluded from trial.⁶⁴ This exclusion would destroy the case against Prescott and the privilege established by the majority would not be needed. The dissent correctly observed that the real need for the privilege arises only when the warrantless search is based on valid exigent circumstances and the defendant's fourth amendment right against unreasonable searches and seizures is not violated.⁶⁵ Since the assertion of the right to refuse a warrantless search under such circumstances would involve no testimonial compulsion and since Prescott was not in custody when she refused, the dissent found no impairment of any of the policies behind the fifth amendment.⁶⁶

The majority's fear that a jury might draw an inference of guilt

57. *Id.* at 1358.

58. *Id.* at 1354-55. The dissent argued that tolerable costs can be attached to the proper exercise of a constitutional right. *Id.* See *United States v. Hearst*, 563 F.2d 1331, 1341 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978) (when the defendant waives the fifth amendment privilege by testifying in his own behalf, questions on cross-examination designed to elicit the assertion of the privilege are not prohibited as they would be had the right not been waived).

59. 581 F.2d at 1356. See *Chaffin v. Stynchcombe*, 412 U.S. 17, 32 (1973).

60. 581 F.2d at 1357.

61. *Id.* at 1350-51; *id.* at 1357 (Sneed, J., dissenting). See *Camara v. Municipal Court*, 387 U.S. 523, 539-40 (1967); *District of Columbia v. Little*, 339 U.S. 1, 5-7 (1950).

62. 581 F.2d at 1357 (Sneed, J., dissenting). See *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968) (occupant cannot resist a search under authority of a warrant).

63. The fruits would include evidence that Duvernay was found in Prescott's apartment.

64. 581 F.2d at 1356. The exclusionary rule prevents the fruits of an illegal search from being admitted into evidence. See *Weeks v. United States*, 232 U.S. 383, 398 (1914) (federal prosecutions).

65. 581 F.2d at 1357 (Sneed, J., dissenting). A search based on exigent circumstances without a warrant is as valid as a search carried out by officers with a proper warrant. See cases cited note 21 *supra*.

66. 581 F.2d at 1357 (Sneed, J., dissenting).

from such evidence, regardless of any limiting instructions given, is valid.⁶⁷ Nevertheless, if admission of the evidence will inevitably prejudice the defendant, the existing rules of evidence afford an adequate remedy.⁶⁸ Under these rules, a trial judge may refuse to admit relevant evidence that is unfairly prejudicial.⁶⁹ The trial judge must balance the need for the evidence and its probative value against the harm likely to result from its introduction.⁷⁰ This process adequately protects the defendant's fourth amendment right to refuse a warrantless entry. As a result, the majority's elevation of an evidentiary rule into a constitutional privilege is unwarranted.

Conclusion

The Ninth Circuit's approach to warrantless arrest entries, which balances the need of law enforcement against the citizen's fourth amendment rights, is in accord with the present trend. It reflects a growing judicial concern for the protection of the privacy of the home and is a valuable addition to fourth amendment law.

The absolute privilege to exclude evidence of a refusal to allow a warrantless search stands as an unnecessary and novel extension of the fourth amendment. The danger that the admissibility of such evidence might lead a jury to infer guilt can be eliminated through the use of rules of evidence that prevent the introduction of unfairly prejudicial evidence.

Jeffrey Glaser

D. UNCONSTITUTIONAL SUPPRESSION OF EVIDENCE THROUGH THE DESTRUCTION OF BREATHALYZER AMPOULES

The breathalyzer machine is commonly used by police to determine intoxication.¹ The machine tests the subject's breath and converts the result to a blood alcohol level through a judicially recognized scien-

67. *Id.* at 1352.

68. *Id.* at 1352 n.3.

69. FED. R. EVID. 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

70. Some of the judge's considerations should include whether other means of less prejudicial proof are available and whether limiting instructions would be sufficient protection against prejudice. See K. REDDEN & S. SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL 115 (1977).

1. See generally Bellotti, *The Preparation and Trial of a Drunken Driving Case Involving a Breathalyzer*, 1 NAT'L J. OF CRIM. DEF. 131, 134-35 (1975).

tific procedure.² In an attempt to impeach the breathalyzer results, those accused of driving while intoxicated often request production of the test ampoule.³ The test ampoule is a component of the breathalyzer machine through which the subject's breath is bubbled.⁴ Any alcohol contained in the subject's breath causes the solution within the ampoule to change in color.⁵ The change in color is used to calculate the subject's breath alcohol level.⁶ Police departments generally destroy the test ampoule immediately after use, rendering its production impossible.⁷ The constitutional validity of this practice was considered by the Arizona Supreme Court in *Scales v. City Court*.⁸

The defendants in *Scales* challenged the standard police procedure of destroying the test ampoule.⁹ They claimed that destruction of the ampoules was unconstitutional because it denied them the opportunity to impeach the breathalyzer test.¹⁰

The Arizona Supreme Court ruled that the defendants had demonstrated that the ampoules were material and that their destruction was prejudicial.¹¹ Thus, the court held that destruction of the ampoules violated the due process standards established by the United States Supreme Court in *Brady v. Maryland*.¹² The *Scales* court also ruled that the results of a breathalyzer examination cannot be introduced as evidence unless the ampoules are preserved for an independent examination by the defense.¹³

This casenote will initially examine the due process standards relating to suppressed evidence. The application of these standards in breathalyzer cases will be emphasized. The propriety of modifying the due process standards where evidence is suppressed because of loss or

2. *Scales v. City Court*, 122 Ariz. 231, 231, 594 P.2d 97, 99 (1979). The breathalyzer machine determines breath-alcohol level, which is converted to blood-alcohol level through a standard scientific procedure. Bellotti, *supra* note 1, at 138.

The blood-alcohol level is of statutory significance. ARIZ. REV. STAT. ANN. § 28-692(B) (Supp. 1979-80) provides that a blood-alcohol reading of .10 or greater raises a presumption of intoxication. A reading of .05 or less raises a presumption of nonintoxication and a reading between the two raises no presumption. *Id.*

3. See, e.g., *Lauderdale v. State*, 548 P.2d 376, 378 (Alaska 1976); *Scales v. City Court*, 122 Ariz. 231, 232, 594 P.2d 97, 98 (1979); *State v. Michener*, 25 Or. App. 523, 526, 550 P.2d 449, 451 (1976).

4. *Scales v. City Court*, 122 Ariz. 231, 233, 594 P.2d 97, 99 (1979). See Bellotti, *supra* note 1, at 137-38.

5. *Scales v. City Court*, 122 Ariz. 231, 233, 594 P.2d 97, 99 (1979).

6. *Id.*

7. Bellotti, *supra* note 1, at 148. See *Scales v. City Court*, 122 Ariz. 231, 232, 594 P.2d 97, 98 (1979).

8. 122 Ariz. 231, 594 P.2d 97 (1979).

9. *Id.* at 232, 594 P.2d at 98.

10. *Id.* at 233, 594 P.2d at 99.

11. *Id.* at 234, 594 P.2d at 100.

12. 373 U.S. 83 (1963).

13. 122 Ariz. at 235, 594 P.2d at 101.

destruction will be considered. Finally, the remedies for improper suppression will be examined.

Loss or Destruction of Evidence: Due Process Standards

In *Brady* the Supreme Court considered whether a prosecutor is obligated to tender evidence requested by the defense.¹⁴ The Court held that where the requested evidence is favorable to the defendant and material to a determination of guilt or punishment, its suppression by the prosecution violates the due process clause of the fourteenth amendment.¹⁵ The Supreme Court has not precisely defined what constitutes "material" and "favorable"¹⁶—yet there can be no due process violation if either element is lacking.¹⁷

Materiality refers to the effect the suppressed evidence would have had at trial.¹⁸ For suppressed evidence to be material, there must be some likelihood that had it been available it would have altered the outcome of the trial.¹⁹ The degree of likelihood required to obtain reversal depends upon the circumstances of the suppression. If the suppression involved prosecutorial misconduct characterized by a corruption of the trial's truth-seeking process, any reasonable likelihood that the suppressed evidence could have affected the judgement of the jury should result in a due process violation.²⁰

The required degree of likelihood also depends upon whether or not the evidence had been requested by the defense. If the prosecution suppressed evidence that had not been requested by the defense, the

14. 373 U.S. at 87. Although the *Brady* Court referred to "the prosecution," the holding arguably extends to any agent of the prosecutor or of the state. In *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971), the court stated: "*Brady* did speak of 'suppression by the prosecution' but in this context 'prosecution' is certainly broad enough to include investigation. In any event, we are confident that the Supreme Court would extend its holding to suppression by investigative agencies." *Id.* at 650 (footnote omitted). Since police are considered agents of the prosecutor, the duty clearly applies to them. See *United States v. Heiden*, 508 F.2d 898, 902 (9th Cir. 1974); *State v. Fowler*, 101 Ariz. 861, 862, 422 P.2d 125, 126 (1967).

15. 373 U.S. at 87.

16. See *Giles v. Maryland*, 386 U.S. 66, 73-74 (1966); *United States v. Bryant*, 439 F.2d 642, 648 (D.C. Cir. 1971).

17. *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972). In restating the *Brady* requirements, the *Moore* Court said: "Important, then, are . . . (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence. These are the standards by which the prosecution's conduct . . . is to be measured." *Id.*

18. *United States v. Bryant*, 439 F.2d 642, 648 (D.C. Cir. 1971). "Although the Supreme Court has not yet attempted to define this standard with precision, it is the law in this circuit that the due process requirement applies to all evidence which 'might have led the jury to entertain a reasonable doubt about [the defendants'] guilt. . . ." *Id.* (footnotes omitted).

19. *United States v. Agurs*, 427 U.S. 97, 108 (1976). The Court stated: "But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." *Id.* The Court explained that a fair trial is denied when the suppressed evidence could have altered the jury's verdict. *Id.*

20. *Id.* at 103-04; *Mooney v. Holohan*, 294 U.S. 103, 110 (1934). In *Mooney*, the prosecutor failed to expose perjured testimony or to reveal the evidence that would have impeached it. *Id.*

evidence must raise a reasonable doubt about the guilt of the accused which was not otherwise apparent.²¹ The *Brady* standard applies where the suppressed evidence was specifically requested by the defense.²² The standard contemplates a greater showing of materiality than where prosecutorial misconduct is involved, but a lesser showing of materiality than where the defense fails to request the evidence.²³

To meet the *Brady* requirement, the defense must show that a "substantial basis for claiming materiality exists."²⁴ That basis exists where the suppressed evidence "might have effected the outcome of the trial."²⁵ This kind of analysis was undertaken by the court in *United States ex. rel. Thompson v. Dye*.²⁶ In *Dye*, the prosecution suppressed the identity of witnesses who could have corroborated the defendant's claim that he was intoxicated at the time of the crime.²⁷ The court found that testimony by those witnesses "might well have induced the jury to believe" the defendant's claim, and that "the result could have been a finding of second degree murder" instead of first degree murder.²⁸ The Arizona Supreme Court has reached a similar conclusion on at least two occasions. In *State v. Fowler*,²⁹ the court stated that a new trial should be granted where new evidence "would probably have changed" the verdict or the finding of the court.³⁰ In *State v. Schreiber*³¹ the court found "evidence which may have a bearing on the defendant's guilt or innocence" to be material.³²

Thus, it is clear that materiality requires that an effect on the ultimate disposition of the case be shown.³³ In order to establish a due process violation, however, it must also be demonstrated that the suppressed evidence is favorable to the accused.³⁴ While materiality is concerned with the effect the suppressed evidence could have had at trial, "favorableness" refers to the content or character of the suppressed evidence.

21. *United States v. Agurs*, 427 U.S. 97, 112 (1976). Where there is no specific request for the desired evidence, the prosecution is said to have no notice of its value to the defense unless the evidence is so material that the prosecutor should have known of its value. *Id.* at 106-07.

22. *Moore v. Illinois*, 408 U.S. 786, 794 (1972); *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

23. *See United States v. Agurs*, 427 U.S. 97, 104 (1976).

24. *Id.* at 106.

25. *Id.* at 104.

26. 221 F.2d 763 (3rd Cir. 1955).

27. *Id.* at 764-65.

28. *Id.* at 767. In *Brady*, the Supreme Court noted: "The correct constitutional rule regarding materiality of suppressed evidence was stated in *United States ex. rel. Thompson v. Dye*." 373 U.S. at 86.

29. 101 Ariz. 561, 422 P.2d 125 (1967).

30. *Id.* at 562, 422 P.2d at 126. *See ARIZ. R. CRIM. P.* 310.

31. 115 Ariz. 555, 566 P.2d 1031 (1977).

32. *Id.* at 558, 566 P.2d at 1034.

33. *Id.* *Cf.* *United States v. Agurs*, 427 U.S. 97, 112 (1976) ("the omission must be evaluated in the context of the entire record").

34. *See* note 17 *supra*.

Where evidence has been suppressed, but not lost or destroyed, its content or character can be ascertained by merely examining it. In such cases, the favorableness of the evidence can be easily determined.³⁵ Where the evidentiary suppression resulted from its loss or destruction, however, the content or character of the evidence cannot be empirically verified.³⁶ Instead, the court must consider the probable content of the evidence to determine favorableness.³⁷ Such an examination was undertaken by the District of Columbia Circuit in *United States v. Bryant*.³⁸ In *Bryant*, a tape recording of a conversation that provided the basis for the defendant's conviction was lost by government agents.³⁹ In assessing favorableness, the *Bryant* court ruled that "the unavoidable possibility that the tape might have been significantly 'favorable' to the accused" satisfied the *Brady* favorableness requirement.⁴⁰

Similarly, the Arizona Supreme Court reversed an arson conviction in *State v. Hannah*⁴¹ because items allegedly used to set a fire were neither fingerprinted nor preserved.⁴² The court postulated that fingerprints other than the defendant's could have been discovered on the items.⁴³ Thus, the failure of the police to preserve the items deprived the defendant of possible exculpatory evidence.⁴⁴

Although courts accept a reasonable possibility of favorableness as sufficient to satisfy the *Brady* test, evidence that has been lost or destroyed is not automatically deemed favorable.⁴⁵ Evidence lending credibility to the claim of favorableness must be presented in order to

35. See, e.g., *United States v. Agurs*, 427 U.S. 97, 100 (1976) (suppressed evidence was the criminal record of the victim, salient due to the defendant's self-defense claim); *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972) (suppressed evidence was a misidentification of the defendant); *State v. Fowler*, 101 Ariz. 561, 562, 422 P.2d 125, 126 (1967) (prosecutor suppressed a knife belonging to the victim and found near location of the struggle, which would have supported the defendant's self-defense claim).

36. See, e.g., *United States v. Bryant*, 439 F.2d 642, 648 (D.C. Cir. 1971) (court conceded that there was "nothing except doubt" as to the content of a lost tape); *Lauderdale v. State*, 548 P.2d 376, 381 (Alaska 1976) (court found no means by which to determine the favorableness of the destroyed ampoule); *Trimble v. State*, 75 N.M. 183, 187, 402 P.2d 162, 165 (1965) ("[w]e can never know if defendant's story was true or false, or could have been supported . . .").

37. *United States v. Bryant*, 439 F.2d 642, 648 (D.C. Cir. 1971). "Were *Brady* and its progeny applicable only when the exact content of the non-disclosed materials was known, the disclosure duty would be an empty promise, easily circumvented. . . ." *Id.*

38. 439 F.2d 642 (D.C. Cir. 1971).

39. *Id.* at 646.

40. *Id.* at 648. The court determined that the content of evidence should be considered favorable where there is "substantial room for doubt as to what effect disclosure might have had [on the jury's determination of guilt or innocence]." *Id.*

41. 120 Ariz. 1, 583 P.2d 888 (1978).

42. *Id.* at 2, 583 P.2d at 889.

43. *Id.*

44. *Id.*

45. See *United States v. Agurs*, 427 U.S. 97, 108 (1976); *Killian v. United States*, 368 U.S. 231, 242 (1961).

demonstrate a reasonable possibility.⁴⁶ Thus, even absent a finding of bad faith,⁴⁷ minimal evidence of such a possibility can raise an inference of favorableness.⁴⁸ If, in the totality of the circumstances, the potential for desirable content seems apparent, favorableness is assumed.⁴⁹

The materiality and favorableness standards articulated in *Brady* have been applied in cases involving the destruction of breathalyzer ampoules. These cases, and the court's analysis in *Scales*, will now be examined.

Application of Due Process Standards to Destruction of Breathalyzer Ampoules

Courts in several jurisdictions have considered whether the destruction of breathalyzer test ampoules by the police violates the due process standards of *Brady*. The materiality of the ampoules has been assessed by considering the effect which an ampoule subsequently determined to be defective might have in impeaching the breathalyzer result.⁵⁰ Typically, the defense has presented expert scientific testimony suggesting that if the ampoule were available, defects could be exposed that could alter the breathalyzer result.⁵¹ The prosecution has presented contrary expert testimony and courts have made findings of

46. See *United States v. Bryant*, 439 F.2d 642, 647-48 (D.C. Cir. 1971); *United States v. Heath*, 147 F. Supp. 877, 878 (D.C. Hawaii 1957), *appeal dismissed*, 260 F.2d 623 (9th Cir. 1958); *State v. Hannah*, 120 Ariz. 1, 2, 583 P.2d 888, 889 (1978). Reasonable possibility differs from mere speculation; the latter lacks the logic of the former. See *United States v. Heiden*, 508 F.2d 898, 902-03 (9th Cir. 1974) (court rejected as groundless defense contention that production of destroyed marijuana, together with its container, would corroborate claim that the police had no probable cause to search); *State v. Maloney*, 105 Ariz. 348, 351, 464 P.2d 793, 796, *cert. denied*, 400 U.S. 841 (1970) (defendant's claim that a used condom would have substantiated his self-defense claim to a murder charge dismissed as "mere speculation").

47. Were a court to determine that bad faith existed in the loss or destruction of evidence by the prosecution, a due process violation would be found irrespective of the lack of a showing of favorableness or materiality. *United States v. Augenblick*, 393 U.S. 348, 355 (1969); *Killian v. United States*, 368 U.S. 231, 242 (1961); *State v. Hannah*, 120 Ariz. 1, 2, 584 P.2d 888, 889 (1978). A bad faith suppression by the prosecution through nondisclosure, but not loss or destruction, will result in a due process violation upon a minimal showing of materiality and favorableness is assumed. *United States v. Agurs*, 427 U.S. 97, 103-04 (1976).

48. *United States v. Bryant*, 439 F.2d 642, 648 (D.C. Cir. 1971). The court found a due process violation even though there was no evidence indicating the content of a lost tape. *Id.* In drawing an inference of favorableness, the court noted "that there is at the very least a hint of bad faith in the record." *Id.* at 647. See *Trimble v. State*, 75 N.M. 183, 186, 402 P.2d 162, 165 (1965). On the other hand, if there is no evidence of bad faith, nor indications as to the probable content of the destroyed evidence, there should be no finding of favorableness. *United States ex rel. Hyder v. Henry*, 487 F.2d 912, 912-13 (9th Cir. 1973); *State v. Hughes*, 119 Ariz. 261, 264, 580 P.2d 722, 725 (1978).

49. See text & notes 47-48 *supra*.

50. See, e.g., *People v. Stark*, 73 Mich. App. 331, 334, 251 N.W.2d 574, 575-76 (1977); *State v. Shutt*, 116 N.H. 495, 496, 363 A.2d 406, 407-08 (1976); *State v. Michener*, 25 Or. App. 523, 529-32, 550 P.2d 449, 452 (1976).

51. *Scales v. City Court*, 122 Ariz. 231, 233-34, 594 P.2d 97, 99-100 (1979); *State v. Michener*, 25 Or. App. 523, 527 n.5, 550 P.2d 449, 451 n.5 (1976); *Lauderdale v. State*, 548 P.2d 376, 379-80 (Alaska 1976).

fact.⁵² Courts in five jurisdictions have adopted the prosecution's position⁵³ and four other courts have accepted the testimony of the defense.⁵⁴

The courts adopting the defense position have been forced to make an additional inquiry: whether the ampoule was defective. While materiality depends upon the effect a subsequently determined defective ampoule might have on the initial breathalyzer result, favorableness depends upon whether or not the ampoule actually was defective.⁵⁵ In *People v. Hitch*,⁵⁶ the California Supreme Court found a reasonable possibility that the ampoule in question contained a defect, but did not specify how the determination was made.⁵⁷ In *State v. Michener*,⁵⁸ the defendant presented extrinsic evidence of sobriety.⁵⁹ From this evidence, the Oregon Court of Appeals inferred that the breathalyzer reading was subject to doubt and presumed a reasonable possibility that the ampoule was defective.⁶⁰ Thus, in both *Hitch* and *Michener*, the courts determined from the existing circumstances that there was a reasonable possibility that the ampoule contained a defect.⁶¹

52. *State v. Shutt*, 116 N.H. 495, 496, 363 A.2d 406, 407 (1976); *State v. Michener*, 25 Or. App. 523, 525 n.5, 550 P.2d 449, 451 n.5 (1976); *State v. Watson*, 48 Ohio App. 2d 110, 112, 355 N.E.2d 883, 885 (1975).

53. *See, e.g.*, *People v. Stark*, 73 Mich. App. 332, 334, 251 N.W.2d 574, 576 (1977) (the chances of an inaccurate breathalyzer result due to ampoule defect are minute); *State v. Shutt*, 116 N.H. 495, 496, 363 A.2d 406, 407 (1976) (no useful evidence obtainable from an examination of the ampoule); *State v. Teare*, 135 N.J. Super. 19, 21, 342 A.2d 556, 558 (1975) (subsequent analysis provides no acceptable scientific relation to the accuracy of the first test); *State v. Watson*, 48 Ohio App. 2d 110, 112, 355 N.E.2d 883, 885 (1975) (no evidence that analysis of the ampoule would produce conclusive results); *Edwards v. State*, 544 P.2d 60, 62 (Okla. Crim. 1975) (there is no proof that the ampoule could be used to impeach the breathalyzer result).

54. *See, e.g.*, *Lauderdale v. State*, 548 P.2d 376, 382 (Alaska 1976) (analysis of ampoule may well yield scientifically reliable data bearing on the guilt or innocence of the accused); *Scales v. City Court*, 122 Ariz. 231, 233-34, 594 P.2d 97, 99-100 (1979) (any of a variety of defects could cause the breathalyzer results to be incorrect); *People v. Hitch*, 12 Cal.3d 641, 644., 527 P.2d 361, 364, 117 Cal. Rptr. 9, 12 (1974) (it is possible to actually retest the chemical change within the ampoule); *State v. Michener*, 25 Or. App. 523, 526, 550 P.2d 449, 452 (1976) (a retest can be done with the same ampoule which might provide exculpatory evidence for the defendant).

Those courts holding that defective ampoules could alter the results obtained by the breathalyzer have reasoned that the ampoules were material because of their ability to impeach the breathalyzer results, which, according to the relevant statutory provision, see note 2 *supra*, provides weighty evidence by way of presumption. *Lauderdale v. State*, 548 P.2d 376, 382 (Alaska 1976); *Scales v. City Court*, 122 Ariz. 231, 234, 594 P.2d 97, 100 (1979); *People v. Hitch*, 12 Cal.3d 641, 645, 527 P.2d 361, 365, 117 Cal. Rptr. 9, 13 (1974). Absent any defects, however, the ampoule would not constitute evidence with which to impeach the breathalyzer. *See, e.g.*, *Scales v. City Court*, 122 Ariz. 231, 234, 594 P.2d 97, 100 (1979); *Lauderdale v. State*, 548 P.2d 376, 379 (Alaska, 1976).

55. *Lauderdale v. State*, 548 P.2d 376, 381 (Alaska 1976); *People v. Hitch*, 12 Cal. 3d 641, 647, 527 P.2d 361, 367, 117 Cal. Rptr. 9, 15 (1974); *State v. Michener*, 25 Or. App. 523, 527-28, 550 P.2d 449, 453-54 (1976).

56. 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974).

57. *Id.* at 642, 527 P.2d at 367, 117 Cal. Rptr. at 15. The court determined that if there is a "reasonable possibility that they would constitute favorable evidence. . . [the ampoules] must be disclosed." *Id.*

58. 25 Or. App. 523, 550 P.2d 449 (1976).

59. *Id.* at 526-28, 550 P.2d at 451-54.

60. *Id.* at 532, 550 P.2d at 454.

61. *See* text & notes 55-60 *supra*. The court in *Lauderdale v. State*, 548 P.2d 376 (Alaska

In *Scales* the ampoules were specifically requested and any inference of prosecutorial misconduct was rejected.⁶² Therefore, the court adopted the *Brady* standard, determined that the ampoules were material and that their destruction was prejudicial,⁶³ and held that the practice violated due process.⁶⁴

The *Scales* court determined materiality by examining the effect that defective ampoules could have on the breathalyzer result.⁶⁵ The court found that had the ampoule not been destroyed, defects such as imperfections or variations in the glass, foreign substances inside or outside of the ampoule, or variations in the amount or composition of the solution within the ampoule could have been discovered upon examination.⁶⁶

Having determined that a defective ampoule would have provided the accused with the material evidence, the *Scales* court should have analyzed favorableness—whether the ampoule actually was defective. Instead of undertaking the favorableness analysis, the *Scales* court applied a “prejudice” test. Unfortunately, the prejudice standard utilized by the court was intended to encompass both prongs of the *Brady* test.⁶⁷ The *Scales* court thus misapplied the prejudice test. Instead of understanding prejudice to encompass both *Brady* requirements, the court applied the test as if it were one of materiality and prejudice, rather than materiality and favorableness.

In applying the test, the *Scales* court recognized that the ampoule was “a crucial source of evidence with which to attack the validity of

1976) found a due process violation in the destruction of an ampoule without applying the *Brady* test. Since the court had “no idea as to whether the evidence sought . . . would be favorable,” it skirted *Brady* and held that where plausible evidence could be obtained through examination of the ampoule, its destruction constitutes a denial of the right to cross-examination, thus depriving the defendant of his right to a fair trial. *Id.* at 381. *But see* *People v. Eddington*, 53 Mich. App. 200, 203, 218 N.W.2d 831, 834 (1974) (court rejected the claim that nonproduction of scientifically analyzed evidence violates the constitutional right to confront witnesses).

62. 122 Ariz. at 234, 594 P.2d at 100.

63. *Id.* at 233-34, 594 P.2d at 99-100.

64. *Id.* at 234, 594 P.2d at 100. In so doing, the court reversed prior Arizona law. The court in *State v. Superior Court*, 107 Ariz. 332, 487 P.2d 399 (1971), held that the defendant's statutory right to secure independent medical information pursuant to ARIZ. REV. STAT. ANN. § 28-692(F) (Supp. 1979-80), vitiated any due process claims regarding the breathalyzer. 107 Ariz. at 334, 487 P.2d at 401. Under that statutory provision, the defendant, after learning of the breathalyzer result, may elect to have an independent blood test performed. ARIZ. REV. STAT. ANN. § 28-692(F) (Supp. 1979-80). If this opportunity is not provided, the court must dismiss the charge of driving while intoxicated. *Smith v. Ganske*, 114 Ariz. 515, 516-17, 562 P.2d 395, 396-97 (Ct. App. 1977); *Smith v. Cada*, 114 Ariz. 510, 513, 563 P.2d 390, 393 (Ct. App. 1977). In mandating production of the breathalyzer ampoules, the *Scales* court tacitly undermined the importance of the statutory provision, since the *Scales* defendants had the opportunity to secure the independent medical information.

65. 122 Ariz. at 234, 594 P.2d at 100.

66. *Id.* at 233-34, 594 P.2d at 99-100. Scientific testimony was used to show that defects could exist at the time of the breathalyzer test, that the defects could be later discovered, and that the defects could alter the breathalyzer result. *Id.*

67. *See id.* at 234, 594 P.2d at 100.

the test reading and hence the presumption of intoxication."⁶⁸ The analysis of prejudice undertaken by the *Scales* court was, in essence, an additional examination of materiality.⁶⁹ The court never did consider whether the ampoule might have been defective and thus ignored the favorableness prong of *Brady*. The *Scales* court should have considered the possibility that the destroyed ampoules were defective as did the *Hitch* and *Michener* courts.⁷⁰ Because it did not address the favorableness issue, the *Scales* court improperly applied the *Brady* standard and failed to make an accurate finding of prejudice.⁷¹

In so holding, the court may have inadvertently established undesirable precedent. Surely the *Scales* court did not intend to formulate a rule under which the suppression of any material evidence, whether favorable or unfavorable to an accused, would violate due process. Such an interpretation would reverse prior law and could lead to wind-fall acquittals of defendants who could otherwise have been convicted.⁷² The fact that the court did analyze the prejudicial nature of the evidence militates against this interpretation, however.⁷³ No defendant can be prejudiced by the suppression of unfavorable evidence. Thus, it can be argued that when the *Scales* court found that destruction of the ampoule was prejudicial, it also impliedly determined that the ampoule was favorable. As a result, even though the *Scales* court wrongly applied a prejudice test, some showing of favorableness might still be required in loss or destruction cases.

Remedy for Loss or Destruction of Evidence

Once a due process violation has been found, the remedy applied in loss or destruction cases differs from the remedy applied when the evidence is still available. Where the prosecution has suppressed evidence through concealment, rather than through loss or destruction, the evidence is made available to the defense and a new trial is held.⁷⁴ If

68. *Id.*

69. See text & notes 54-55 *supra*. The court mentioned no test by which it determined that the ampoule was "a crucial source" of impeachment evidence.

70. See notes 55-61 *supra*.

71. The court might have thought it was precluded from determining favorableness due to the obvious difficulty of showing that a defect actually existed in the already destroyed ampoules.

72. If favorableness were not required, the loss or destruction of any evidence, aided by a fertile imagination, could constitute a violation of due process. The defendant could merely propose that the evidence was favorable and could have altered the outcome of his trial. For example, in *State v. Maloney*, 105 Ariz. 348, 464 P.2d 793, *cert. denied*, 400 U.S. 841 (1970), the defendant contended that a condom discarded by the police would support his self-defense alibi to murder charges. *Id.* at 350, 464 P.2d at 795. He claimed that the condom would verify sexual relations between he and his mother, which, he claimed enraged his father and led to a struggle. The court dismissed the claim as mere speculation. *Id.* at 351, 464 P.2d at 796.

73. See 122 Ariz. at 234, 594 P.2d at 100.

74. See generally *United States v. Agurs*, 427 U.S. 97 (1976); *Moore v. Illinois*, 408 U.S. 786 (1971); *Brady v. Maryland*, 373 U.S. 83 (1963).

the unconstitutional suppression resulted from loss or destruction, however, the remedy applied depends upon the nature of the suppressed evidence. If affirmative evidence of innocence is lost or destroyed, the charges are dismissed.⁷⁵ If the evidence would have been used at trial for impeachment purposes, only, the evidence it would have impeached is suppressed.⁷⁶

The court in *Scales* applied the appropriate remedy when it suppressed the results of the breathalyzer and remanded the proceedings to allow the prosecution to present any other evidence⁷⁷ of intoxication.⁷⁸ The defendants would have achieved the same result had they been able to successfully impeach the breathalyzer with the requested ampoules. Thus, the *Scales* defendants were ultimately unharmed by the unconstitutional suppression.

The long-term result of *Scales* is that if the ampoules are preserved and made available to those accused of driving while intoxicated, the results of the breathalyzer test can be introduced without offending due process.⁷⁹ Assuming the ampoules are properly preserved, the hypothetical ability of the ampoule to impeach the breathalyzer result will be tested in reality. Because of administrative burdens⁸⁰ and the dangerous nature of the chemicals within the ampoule,⁸¹ the empirical advantage of hindsight might one day indicate that the preservation remedy does more harm than it provides evidence.

75. See generally *United States v. Heath*, 147 F. Supp. 877 (D. Haw. 1957), *appeal dismissed*, 260 F.2d 623 (9th Cir. 1958); *State v. Hannah*, 120 Ariz. 1, 583 P.2d 888 (1978); *Trimble v. State*, 75 N.M. 183, 402 P.2d 162 (1965).

76. See generally *Jencks v. United States*, 353 U.S. 657 (1957); *Lee v. United States*, 368 F.2d 834 (D.C. Cir. 1966); *United States v. Lornado*, 350 F.2d 523 (6th Cir. 1965).

77. ARIZ. REV. STAT. ANN. § 28-692(B) (Supp. 1979-80) allows the introduction of any evidence to refute or establish intoxication.

78. 122 Ariz. at 235, 594 P.2d at 101. The suppression remedy was applied in *Michener v. State*, 25 Or. App. 523, 524, 550 P.2d 449, 450 (1976) and *Lauderdale v. State*, 548 P.2d 376, 384 (Alaska 1976). In *People v. Hitch*, 12 Cal.3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974), this remedy was not applied, but the court made clear that in the future, a due process violation of the same nature would result in suppression of the breathalyzer result. *Id.* at 653, 527 P.2d at 369-70, 117 Cal. Rptr. at 17-18.

79. 122 Ariz. at 235, 594 P.2d at 101.

80. Pursuant to ARIZ. R. CRIM. P. 28.2(e), the accused must be notified by mail regarding the availability of the ampoule at least 10 days prior to its destruction. 122 Ariz. at 235, 594 P.2d at 101. Additionally, the defendant must sign a form exculpating the city from liability for any injuries resulting from handling the ampoule. Interview with William R. Call, Chief City Prosecutor, Pima County, Arizona, in Tucson (January 30, 1979). The burdens are substantial in light of approximately 2500 arrests for driving while intoxicated each year in Tucson alone. *Id.*

81. The solution within the ampoule contains sulphuric acid, which may cause blindness, and silver nitrate, which is a deadly poison with no known antedote. Interview with Dr. John Rund, Ph.D. in Chemistry, Pima County Arizona, in Tucson (June 14, 1979). The dangers associated with the ampoule were judicially recognized in *State v. Superior Court*, 107 Ariz. 332, 334, 487 P.2d 399, 401 (1971) and *State v. Shutt*, 116 N.H. 495, 496, 363 A.2d 406, 407 (1976).

Conclusion

The due process standards to be applied by courts where evidence is lost or destroyed have not been clearly articulated. The decision of the Arizona Supreme Court in *Scales v. City Court*, which requires preservation of the ampoule used in a breathalyzer test, is exemplary of this ambiguity. The *Scales* court correctly applied the materiality prong of *Brady v. Maryland*, but failed to address the favorableness prong. Instead, after noting that favorableness was required, *Scales* decided that the evidentiary suppression was prejudicial. Arguably, a finding of prejudice includes a determination that both prongs of *Brady* are satisfied. Thus, it is likely that favorableness will be required in loss or destruction cases in Arizona. Upon finding a due process violation, the *Scales* court applied the appropriate remedy by excluding the evidence that the ampoules might have impeached.

Tim Coker

VIII. INDIAN LAW

TRIBAL SOVEREIGNTY AND THE STATES' POWER TO TAX INDIANS

Although Indians are exempt from certain taxes that non-Indians must pay, they are still subject to taxation.¹ The question of the states' power to tax Indians has been the subject of litigation for over one hundred years.² A strong policy has emerged: state tax laws are generally inapplicable in Indian country.³ Increased interaction between Indians and non-Indians, congressional changes in Indian policies, changing economic conditions, and the sophistication of state tax laws have placed this policy under heavy strain.⁴

In *State Tax Commission v. Central Machinery Co.*, the Arizona Supreme Court recently considered a challenge to the state's legislative jurisdiction to tax reservation Indians.⁵ Central Machinery brought an action seeking a refund of a state transaction privilege tax⁶ which it had paid under protest.⁷ The parties stipulated that Central Machinery would remit any tax recovery to the Indians who purchased the farm machinery.⁸ The trial court granted a motion for summary judgment in favor of Central Machinery.⁹ On appeal, the Arizona Supreme Court held that the transaction privilege tax was a proper exercise of the state's legislative authority, and reversed the trial court.¹⁰ The court ruled that Arizona could levy the transaction privilege tax upon the sale of farm machinery to reservation Indians by an unlicensed trader.¹¹

1. See UNITED STATES DEP'T OF INTERIOR, FEDERAL INDIAN LAW 845 (1958) [hereinafter cited as DEP'T OF INTERIOR].

2. See *Kansas Indians*, 72 U.S. (5 Wall.) 737, 737-38 (1866); *New York Indians*, 72 U.S. (5 Wall.) 761, 769-70 (1866).

3. See, e.g., *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 690-91 (1965); *Kansas Indians*, 72 U.S. (5 Wall.) 737, 755-57 (1866). See D. GETCHES, D. ROSENFELT, & C. WILKINSON, FEDERAL INDIAN LAW 429 (1979) [hereinafter cited as D. GETCHES]; DEP'T OF INTERIOR, *supra* note 1, at 845.

4. See *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 465-66 (1976); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 147-48 (1973); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 165 (1973).

5. *State Tax Comm'n v. Central Mach. Co.*, 121 Ariz. 183, 183, 589 P.2d 426, 426 (1978), *prob. juris. noted*, *Central Mach. Co. v. Arizona State Tax Comm'n*, 100 S. Ct. 41 (1979).

6. Arizona's transaction privilege tax is two percent of the gross proceeds of sales or income from instate businesses engaged in selling tangible personal property at the retail level. ARIZ. REV. STAT. ANN. §§ 42-1309, -1312 (Supp. 1979).

7. 121 Ariz. at 183, 589 P.2d at 426.

8. *Id.* at 184, 589 P.2d at 427.

9. *Id.*

10. *Id.* at 184-85, 589 P.2d at 427-28.

11. *Id.*

This casenote will examine and analyze the Arizona Supreme Court's determination that the transaction privilege tax at issue in *Central Machinery* was properly levied. Judicial analysis of various states' attempts to regulate Indian tribes will be reviewed, and a framework for analyzing Indian taxation cases will be proposed. The Arizona Supreme Court's holding in *Central Machinery* will be discussed in light of the proposed analytical framework. Finally, the *Central Machinery* decision will be analyzed and criticized for its application and misinterpretation of existing precedent.

Development of Judicial Policy and Analytical Framework

The Indians' status as a conquered people was created by the influx of European explorers and settlers into North America. Conquest and discovery by the European nations and later acquisitions of land by the newly formed United States of America divested the Indians of any ownership rights to the land.¹² Since this time, the United States government and the courts have assumed the task of preventing state intrusions into tribal sovereignty.

Judicial policy in the area of Indian tribal powers has traditionally involved two basic principles. First, Indian tribal powers are like those of any sovereign state.¹³ Second, conquest or association with a stronger power such as the United States narrowly limits the external scope of tribal powers but does not affect the operations of sovereignty within the tribe.¹⁴

The principles of tribal sovereignty were first articulated by the Supreme Court in *Worcester v. Georgia*.¹⁵ In *Worcester*, the Court noted that Indian tribes have always been considered distinct, independent, political communities.¹⁶ In addition, the federal government is obliged to protect the tribes, treat them as nations, and keep the states from intruding upon their right to govern themselves.¹⁷ The *Worcester* analysis has been expanded by a series of cases¹⁸ and, as a

12. See *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 572-76 (1823). Chief Justice Marshall, applying principles of international and property law, concluded that the Indians were a conquered people. *Id.* at 595-96. The law of dominion by discovery gave the discovering nation exclusive title to the land, leaving the Indians with only a right to occupancy. *Id.* at 587.

13. See *Talton v. Mayes*, 163 U.S. 376, 380-81 (1896); *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131, 134-35 (10th Cir. 1959); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553, 556 (8th Cir. 1958), cert. denied, 358 U.S. 932 (1959); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (2d ed. 1971); D. GETCHES, *supra* note 3, at 253-54.

14. See F. COHEN, *supra* note 13, at 123.

15. 31 U.S. (6 Pet.) 515 (1832).

16. *Id.* at 559. "The Cherokee nation, then, is a distinct community, occupying its own territory, . . . in which the laws of Georgia can have no force. The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States." *Id.* at 561.

17. *Id.*

18. See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973); Warren Trad-

result, the United States Supreme Court has adopted a strong presumption against the validity of state laws in Indian country.¹⁹ From the efforts of the courts to protect tribal sovereignty, two judicial theories have evolved: the constitutional doctrine of preemption and the judicially created infringement test.²⁰

Generally, preemption operates in subject-matter areas where states have authority to legislate absent federal action.²¹ This constitutional doctrine permits the federal government to displace all or some state authority in a particular area.²² State laws are presumed valid and the burden is on the challenging party to prove them otherwise.²³

Preemption in Indian law differs from the general constitutional doctrine.²⁴ The term "preemption" was first employed in connection with Indian matters in *McClanahan v. Arizona State Tax Commission*.²⁵ In *McClanahan*, Arizona attempted to apply its personal income tax to income earned by a Navajo on the reservation.²⁶ The United States Supreme Court held that Arizona had no jurisdiction to impose such a tax.²⁷ The Court articulated the policy of analyzing assertions of state jurisdiction under a theory of federal preemption.²⁸ The source of the federal government's preemptive authority is Congress' power to make

ing Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 688-89 (1965); *Williams v. Lee*, 358 U.S. 217, 219-20 (1959).

19. See cases cited note 18 *supra*. In *Bryan v. Itasca County*, 426 U.S. 373 (1976), the Court stated that "Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate [a tax] immunity and allow states to treat Indians as part of the general community." *Id.* at 392 (quoting *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 613-14 (1943) (Murphy, J., dissenting)). See DEPT OF INTERIOR, *supra* note 1, at 845-46.

20. For an interesting discussion of these tests, see generally Note, *State Jurisdiction Over Indians as a Subject of Federal Common Law: The Preemption-Infringement Test*, 21 ARIZ. L. REV. 85 (1979).

21. See *DeCanas v. Bica*, 424 U.S. 351, 356 (1976); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963); *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 90-93 (1963).

22. See cases cited at note 21 *supra*.

23. D. GETCHES, *supra* note 3, at 295. See generally J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 267-70 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-23 through -31, at 376-404 (1978); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 624-26 (1975).

24. In Indian matters, the action of the state is presumed invalid. D. GETCHES, *supra* note 3, at 296. Federal preemption has usually been founded upon a general federal act to set aside land for a tribe—either by treaty, agreement, statute, or executive order. See *id.*

25. 411 U.S. 164, 172 (1973). Although *McClanahan* was the first case in which the Court actually used the term "preemption," preemption analysis was used in prior cases. See D. GETCHES, *supra* note 3, at 296. The *McClanahan* Court noted the prior use of a preemption-like analysis when it stated:

[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. . . . The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.

411 U.S. at 172 (citations omitted).

26. 411 U.S. at 165.

27. *Id.*

28. *Id.* at 171-72.

treaties and to regulate commerce with Indian tribes.²⁹ The *McClanahan* Court analyzed the relevant treaty and congressional legislation and determined that application of Arizona's tax would interfere with matters reserved to the federal government and to the Indians themselves.³⁰ The result of *McClanahan* is that state power is preempted where Congress has exercised its authority in the area over which the state seeks to assert its jurisdiction.³¹

A second level of judicial protection of Indian tribal sovereignty exists as a result of the Supreme Court's decision in *Williams v. Lee*.³² In *Williams*, a non-Indian trader who operated a general store on the Navajo reservation brought an action in state court to collect a bill owed him by Indians who lived on the reservation and who had purchased food on credit.³³ The Court stated that permitting state jurisdiction would undermine the tribal court's authority over reservation affairs and would result in an intrusion upon the right of the Indians to govern themselves.³⁴ The Court articulated what is now termed the "infringement test."³⁵ Under this test, absent governing acts of Congress, the issue is whether the action of the state infringes on the right of the reservation Indians to make and enforce their own laws.³⁶ If the action infringes upon this right, it is struck down.³⁷

The *Williams* infringement test has generally been applied in cases involving non-Indians.³⁸ Both the tribe and the state can fairly claim an interest in asserting jurisdiction in such cases.³⁹ The infringement test resolves this conflict by providing that the state can protect its interest only to the extent that tribal self-government is not affected.⁴⁰

As a result of *McClanahan* and *Williams*, a framework for analysis of Indian regulation cases has evolved. State attempts to directly regulate reservation Indians are analyzed under a two-step approach.⁴¹

29. *Id.* at 172 n.7.

30. *See id.* at 175-80. The Court examined, for example, 42 U.S.C. § 106(a) (1976). That section grants to the States general authority to impose an income tax on residents of federal areas, but § 109 expressly provides that § 106(a) does not authorize taxing Indians. The *McClanahan* Court concluded that Congress intended to maintain a tax-exempt status for reservation Indians. 411 U.S. at 176-77.

31. *See* D. GETCHES, *supra* note 3, at 296-99.

32. 358 U.S. 217 (1959).

33. *Id.* at 217-18.

34. *Id.* at 223.

35. *Id.* at 220.

36. *Id.* *See* Ranson & Gilstrap, *Indians—Civil Jurisdiction in New Mexico—State, Federal and Tribal Courts*, 1 N.M. L. REV. 196, 201-08 (1971).

37. 358 U.S. at 219, 223.

38. *See, e.g.*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 179 (1973); *Kennerly v. District Court*, 400 U.S. 423, 426-27 (1971); *Organized Village of Kake v. Egan*, 369 U.S. 60, 74-76 (1962).

39. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. at 179.

40. *Id.*

41. In reaching its decision, the *McClanahan* Court rejected the state's argument that the

First, a careful examination of all relevant treaties and statutes must be made to determine whether federal preemption applies. If preemption is not found, the infringement test must be applied and the tribe's self-governing powers *vis-à-vis* the state's interests must be analyzed.⁴² The application of the preemption-infringement standard in Indian taxation cases will be examined in the following section.

State Taxation and Tribal Sovereignty

The area of Indian taxation has been afforded special treatment by the courts;⁴³ nevertheless, even in cases involving state taxation of non-Indians on the reservation, the *McClanahan-Williams* analysis has been used.⁴⁴ The first step involves a careful analysis of the applicable federal statutes to determine whether the state taxation action has been preempted. This examination begins with an inspection of the treaty or act of Congress that created the tribe's status as a self-governing entity.⁴⁵ The purpose of this analysis is to determine whether Congress has indicated any intention to create a tax exemption. If this expression of intent is found, the state government must retreat.⁴⁶ If the court determines that there is no federal preemption, the *Williams* infringe-

Williams test was the only test that should be applied. *Id.* The Court applied the preemption analysis first and then turned to the infringement test of *Williams*. *Id.* at 173-79, 181.

42. *Id.*

43. State laws generally are presumed invalid on Indian reservations. See note 24 *supra*. It follows that Indians and Indian property on reservations are not subject to state taxation except by virtue of express authority conferred upon the state by Congress. See *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); note 19 *supra*. This jurisdictional immunity from state taxation has been consistently supported by the courts. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), the Court stated:

[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and . . . [*McClanahan*] lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.

Id. at 148. See F. COHEN, *supra* note 13, at 254-65. See generally Note, *State Taxation on Indian Reservations*, 1966 UTAH L. REV. 132.

44. See, e.g., *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253, 1255-58 (9th Cir. 1976); *White Mountain Apache Tribe v. Bracker*, 120 Ariz. 282, 286-90, 585 P.2d 891, 895-99 (Ct. App. 1978); *Department of Revenue v. Hane Constr. Co.*, 115 Ariz. 243, 245, 564 P.2d 932, 934 (Ct. App. 1977).

45. See, e.g., *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253, 1256-57 (9th Cir. 1976); *Francisco v. State*, 113 Ariz. 427, 429, 556 P.2d 1, 3 (1976); *Wauneka v. Campbell*, 22 Ariz. App. 287, 289, 526 P.2d 1085, 1087 (1974).

46. *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253, 1256 (9th Cir. 1976). Congress transferred criminal and civil jurisdiction to certain states under Public Law 280. 18 U.S.C. § 1162 (1976); 25 U.S.C. §§ 1321-1326 (1976); 28 U.S.C. § 1360 (1976). Arizona has not chosen to assert its jurisdiction over the reservation Indians within its boundaries under Public Law 280. In states that have decided to do so, the preemption analysis includes an examination of the jurisdiction asserted under Public Law 280. See *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253, 1256-57 (9th Cir. 1976). For a complete analysis of Public Law 280, see generally Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975).

ment test must be applied to determine whether the state tax is valid.⁴⁷

The Ninth Circuit recently applied the preemption-infringement analysis in *Fort Mojave Tribe v. County of San Bernardino*.⁴⁸ In *Fort Mojave*, California attempted to levy a possessory interest tax on non-Indian lessees of Indian land.⁴⁹ The Fort Mojave Indians entered into ninety-nine year leases with non-Indians as part of a plan for the economic development of the reservation. The Indians brought an action to oppose the tax. They argued that since the reservation is located within three states, and California is the only state that imposes such a tax, development of the California section of the reservation might be slowed. The Indians also objected to the California tax because the tribe has its own possessory interest tax.

The *Fort Mojave* court initially analyzed the applicable federal statutes and determined that the state tax action was not preempted.⁵⁰ The court then considered the infringement issue and found that any speculative effect of the tax on the Indians' right of self-government was too indirect to warrant striking down the tax.⁵¹

In analyzing California's tax, the *Fort Mojave* court added a new element to the analysis of state taxation in Indian country. By examining the ultimate economic benefits and burdens of the tax, the court created a new prong to be considered: whether, even though a tax is not levied directly upon Indians, its imposition has a substantial economic impact upon them.⁵² Unable to find either an economic burden upon the Indian lessors as a result of the tax,⁵³ or an infringement upon tribal self-government due to slightly reduced tax revenues,⁵⁴ the court upheld California's possessory interest tax.⁵⁵

The issue of Indian taxation was also addressed by the Supreme Court in *Warren Trading Post Co. v. Arizona Tax Commission*.⁵⁶ In

47. *Williams v. Lee*, 359 U.S. 217, 220 (1959); *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253, 1257-58 (9th Cir. 1976).

48. 543 F.2d 1253, 1255 (9th Cir. 1976). "The Supreme Court recently has outlined the general framework by which Indian jurisdiction and taxation cases are to be analyzed." *Id.*

49. *Id.* at 1255.

50. *Id.* at 1256-57. The *Fort Mojave* court stated that the effect of the possessory interest tax upon the Indians was minimal, the Indian-lessors would never be liable for delinquent taxes, and no encumbrance was placed upon the Indians' reversionary interest in the leased property. Thus, preemption did not create a tax exemption for non-Indian lessees of Indian land where no interference with Indian interests was shown. *Id.*

51. *Id.* at 1258.

52. *Id.* "Although the location of the ultimate economic burden of the tax in this case is uncertain, it is possible that the benefits of the exemption would be captured entirely by the non-Indian lessee." *Id.* The *Fort Mojave* court noted the rule that ambiguities should be construed to benefit the Indians. *Id.* at 1257. That rule, however, was never intended to authorize constructions that benefit non-Indians handsomely and Indians only marginally, if at all. *Id.*

53. *Id.* at 1258.

54. *Id.*

55. *Id.* at 1259.

56. 380 U.S. 685 (1965).

Warren, the federally licensed operator of a retail trading post on the Navajo Indian Reservation challenged Arizona's right to levy its transaction privilege tax on income derived from trade with reservation Indians.⁵⁷ The Court struck down the tax as applied,⁵⁸ holding that Congress had so extensively assumed regulation of trade with the Indians on the reservations⁵⁹ that no room remained for state laws imposing additional burdens upon traders.⁶⁰

It is clear that an analytical framework for resolving Indian taxation issues was available to the Arizona Supreme Court when it decided *Central Machinery*. This framework consists of the preemption-infringement analysis developed in *McClanahan* and *Williams*, and the precedent established by the Court in *Warren*. In the following section, the *Central Machinery* decision will be examined in light of this analytical framework.

Analysis and Critique of Central Machinery

Central Machinery Company is an Arizona corporation with an office located off the Indian reservation in Casa Grande, Arizona.⁶¹ The Gila River Farms is an enterprise of the Gila River Indian Community, an Indian entity existing under the authority of the Indian Reorganization Act.⁶² In 1973, agents of Central Machinery Company went onto the nearby Gila River Reservation to negotiate with Gila River Farms for the sale of farm machinery.⁶³ After negotiation, Gila River Farms executed a purchase order for eleven John Deere tractors.⁶⁴ Arizona's transaction privilege tax,⁶⁵ almost \$3,000, was included in the purchase price.⁶⁶ Central Machinery did not possess a federal license to trade on any Indian reservation and could have been prevented from soliciting business on the Gila River Indian Reserva-

57. *Id.* at 686.

58. *Id.* at 691-92.

59. An examination of the Code of Federal Regulations illustrates the extent of federal control over trade with the Indians. *See* 25 C.F.R. § 251.9(b) (1979) (requiring a license to trade with the Indians); *id.* § 251.5(a) (prohibiting government employees from trading with Indians); *id.* § 251.18 (regulating sale of intoxicating liquors); *id.* § 251.2 (prohibiting gambling in any Indian trader's store); *id.* § 251.22 (vesting superintendent with duty to see that prices charged by traders are fair and reasonable); *id.* § 251.13 (providing sanctions for trading without a license).

60. 380 U.S. at 690.

61. 121 Ariz. at 183, 589 P.2d at 426.

62. 25 U.S.C. §§ 461-479 (1976). Also called the Wheeler-Howard Act, the Indian Reorganization Act was enacted to encourage tribal governments and tribal courts "to become stronger and more highly organized." *Williams v. Lee*, 358 U.S. 217, 220 (1959). *See* 25 U.S.C. §§ 476-477 (1976) (providing for the adoption of an appropriate tribal constitution and bylaws vesting the tribes with certain powers). *See generally* Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972).

63. 121 Ariz. at 183, 589 P.2d at 426.

64. *Id.*

65. *See* note 6 *supra*.

66. 121 Ariz. at 183, 589 P.2d at 426.

tion.⁶⁷ The Bureau of Indian Affairs, however, gave its permission to Central Machinery to sell the tractors to Gila River Farms.⁶⁸ Central Machinery subsequently delivered the tractors to Gila River Farms on the Indian reservation at Sacaton, Arizona.⁶⁹ Payment by check was made to Central Machinery on the reservation.⁷⁰ The company paid the transaction privilege tax under protest and then commenced an action for refund of the tax.⁷¹ The trial court decided that the United States Supreme Court's decision in *Warren Trading Post Co. v. Arizona Tax Commission* prohibited the taxation on the sale of farm machinery to Gila River Farms.⁷² On appeal, the Arizona Supreme Court distinguished *Warren* and upheld the imposition of the tax.⁷³

While recognizing *Warren* as a case decided on the theory of federal preemption, the court in *Central Machinery* distinguished the case by finding that the company was not an "Indian trader" within the meaning of *Warren*.⁷⁴ The basis for this distinction was Central Machinery's lack of a trader's license and lack of a permanent place of business on the reservation.⁷⁵ The court also ruled that the ultimate economic impact of a tax should not be a controlling factor in the analysis of Indian taxation cases.⁷⁶

The approach taken by the court in *Central Machinery* can be criticized on two independent grounds. The first is the court's failure to utilize the preemption-infringement standard in deciding the case. Second, the *Central Machinery* court misinterpreted and improperly distinguished directly applicable Supreme Court precedent.

A surprising aspect of the *Central Machinery* case is the absence, from both the majority and dissenting opinions, of the preemption-infringement analysis derived from *McClanahan* and *Williams*. The Arizona Supreme Court employed this analytical approach in previous

67. *Id.* at 184, 589 P.2d at 427. Under congressional statutes and federal regulations, an individual must have a license in order to trade with reservation Indians. 25 U.S.C. § 262 (1976) provides:

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.

Id. 25 C.F.R. § 251.9 (1979) was enacted pursuant to 25 U.S.C. § 262 (1976). The power to regulate and license Indian traders is vested in the superintendent of the local Bureau of Indian Affairs agency supervising the reservation. 25 C.F.R. § 251.9(b) (1979). In *Central Machinery*, then, the Superintendent of the Pima Indian Agency could have prevented the sale.

68. 121 Ariz. at 184, 589 P.2d at 427.

69. *Id.* at 183-84, 589 P.2d at 426-27.

70. *Id.* at 183, 589 P.2d at 426.

71. *Id.*

72. *Id.* at 184, 589 P.2d at 427.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

cases to evaluate Indian law issues.⁷⁷ Had the court applied the preemption-infringement test, the outcome of *Central Machinery* would have been different.

Since the Gila River Indian Community is a self-governing tribe organized under the provisions of the Indian Reorganization Act,⁷⁸ a proper analysis of *Central Machinery* would begin with an inspection of that act to determine whether it preempts the tax levied by Arizona. Because the United States Supreme Court has found that the Indian Reorganization Act has no effect on traditional tax applications and immunities,⁷⁹ there is probably no preemption under the Act. The *McClanahan* Court, however, held that in the absence of congressional consent, states are preempted from taxing Indian reservation lands or Indian income generated from activities carried on within the boundaries of the reservation.⁸⁰ When the state's action is directed at non-Indians but affects Indians, the preemption rationale must be reconciled with the state's authority to regulate its citizens.⁸¹ As the effects of the tax upon the Indians become more extensive, the state's authority must give way to the federal policy of protecting the Indians from state intrusions into tribal self-government.⁸²

Application of the *McClanahan* test creates a strong argument that there was federal preemption in *Central Machinery*. The tax challenged in *Central Machinery* was directed at non-Indians,⁸³ but the effect of the tax upon the Indians was obvious. It was added directly to the purchase price, and the Indians actually paid the tax when they paid for the equipment.⁸⁴ The *McClanahan* Court found that such extensive effects upon Indians must force the state's taxation authority to retreat, because Congress intended that the Indians maintain a tax-exempt status.⁸⁵ Thus, in *Central Machinery*, the state's authority to tax should have been preempted under *McClanahan*.

If preemption were not found, the analysis would then shift to the *Williams* infringement test: whether the tax frustrated tribal self-government.⁸⁶ The effect of the tax at issue in *Central Machinery* was a

77. See, e.g., *Francisco v. State*, 113 Ariz. 427, 429, 556 P.2d 1, 3 (1976); *Wauneka v. Campbell*, 22 Ariz. App. 287, 289, 526 P.2d 1085, 1087 (1974).

78. 25 U.S.C. §§ 461-479 (1976).

79. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 153-54 n.9 (1973).

80. *Id.* at 80-81.

81. *Id.* at 171.

82. *Id.* at 179.

83. 121 Ariz. at 183, 589 P.2d at 426.

84. *Id.*

85. 411 U.S. at 176; see note 30 *supra*.

86. 358 U.S. at 220. See *Chino v. Chino*, 90 N.M. 203, 206, 561 P.2d 476, 479 (1977) (suggesting criteria to determine whether state law infringes upon the self-government of the Indian tribe).

direct out-of-pocket loss to the Indians.⁸⁷ The Indians were party to the sale, the interests sought to be protected were those of the Indians, and the Indians were directly affected by the state attempt to levy a tax.⁸⁸ Where such direct effects on the Indians result from state action, the tribe's power to govern its own affairs is frustrated by the state's intrusion. This frustration of tribal self-government was discussed in *McClanahan*.⁸⁹ The Court noted that legislation on Indian matters often deals with tribes as collective entities; those entities, however, are composed of individuals.⁹⁰ Thus, when the state collects a tax that burdens any of the Indians, or that violates Indian rights, such a tax infringes upon the right of reservation Indians to make and enforce their own laws under *Williams*' infringement test.⁹¹

The failure of the *Central Machinery* court to apply the preemption-infringement standard could be justified if the court had properly applied the Supreme Court's decision in *Warren* to the facts. The *Central Machinery* court distinguished *Warren* on its facts even though the two cases are factually similar. In both *Warren* and *Central Machinery*, non-Indians made sales to Indians on reservation land.⁹² The tax considered in both cases was Arizona's transaction privilege tax.⁹³ And although the non-Indian vendor was statutorily required to pay the tax in both cases, the impact was borne by the Indian-buyer.⁹⁴ There are only two factual differences between the cases. Unlike the trader in *Warren*, *Central Machinery* Company neither operated a permanent place of business on the reservation nor possessed a trader's license.⁹⁵ Inspection of the Code of Federal Regulations, however, reveals that these differences fail to support the decision in *Central Machinery*.

The *Central Machinery* court found that "Indian trader," as used by the *Warren* Court, refers to a vendor who has a permanent place of business on the reservation.⁹⁶ The regulations, however, provide for the licensing of "[i]tinerant peddlers . . . as traders."⁹⁷ A "peddler" is defined as "a person who offers goods for sale within the exterior boundaries of the Hopi, Navajo or Zuni Reservations, but does not do

87. 121 Ariz. at 186, 589 P.2d at 429 (Gordon, J., dissenting).

88. *Id.* at 183, 589 P.2d at 426; *id.* at 186, 589 P.2d at 429 (Gordon, J., dissenting).

89. 411 U.S. at 181.

90. *Id.*

91. *Id.*

92. Compare 380 U.S. at 686 with 121 Ariz. at 183, 589 P.2d at 426.

93. Compare 380 U.S. at 686 with 121 Ariz. at 183-84, 589 P.2d at 426-27.

94. 121 Ariz. at 185, 589 P.2d at 428.

95. Compare 380 U.S. at 685-86 with 121 Ariz. at 183-84, 589 P.2d at 426-27.

96. *Id.* at 184, 589 P.2d at 427.

97. 25 C.F.R. § 251.9(b) (1979). "Itinerant peddlers or purveyors of foodstuffs and other merchandise shall be considered as traders and shall obtain a license or permit from the Superintendent. . . ." *Id.*

business from a fixed location or site on any of those reservations.”⁹⁸ This portion of the regulations is the only definitional section pertaining to the term “peddler” in the Code of Federal Regulations.⁹⁹ It seems reasonable to apply this definition to the facts of *Central Machinery*. Central Machinery Company offered goods for sale but did not do business from a permanent location on the reservation;¹⁰⁰ thus, it was both a peddler and a “trader.” This construction invalidates the court’s conclusion that Central Machinery was not an Indian trader.¹⁰¹

The *Central Machinery* court also construed the words “Indian traders” to mean vendors licensed to trade with the Indians.¹⁰² Central Machinery sold tractors to Gila River Farms without first being licensed pursuant to federal regulations.¹⁰³ The Bureau of Indian Affairs, however, had given permission to the company to make the sale.¹⁰⁴ Since the Bureau approved the sale, it arguably waived the license requirement for Central Machinery.¹⁰⁵ In effect, by holding that Central Machinery had to have a license to be considered an Indian trader, the Arizona Supreme Court allowed the levy of a tax because of the Bureau of Indian Affairs’ failure to enforce its own regulations.¹⁰⁶

98. *Id.* § 252.3(i).

99. 121 Ariz. at 185, 589 P.2d at 428.

100. *Id.* at 185-86, 589 P.2d at 428-29.

101. *Id.* at 184, 589 P.2d at 427.

102. *Id.*

103. *Id.*

104. *Id.* at 185, 589 P.2d at 428.

105. *See id.* at 184, 589 P.2d at 427.

106. *See id.* at 186, 589 P.2d at 429. Although confident that its interpretation of *Warren* was sufficient to dispose of the case, the *Central Machinery* court also addressed the company’s argument that the tax was impermissible because its economic burden fell upon the Indians. *Id.* at 184, 589 P.2d at 427. The court cited a series of cases and dismissed Central Machinery’s argument by stating that “it has been repeatedly held that where the economic burden falls is not the controlling factor.” *Id.* One of the cases cited to support this reasoning was *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976).

The court in *Fort Mojave* allowed the imposition of a tax on non-Indians because the court could not find that the economic burden of the tax fell upon the Indians. *Id.* at 1258. In *Central Machinery*, on the other hand, the tax was added directly onto the purchase price. 121 Ariz. at 183, 589 P.2d at 426. The financial impact of the tax fell directly on the Indians as purchasers. *Id.* at 186, 589 P.2d at 429.

A second case cited by the *Central Machinery* court as authority for its statement was *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972). The *Agua Caliente* case is inapplicable to *Central Machinery* because the band of Indians involved in that case was not an entity created by statute, treaty, or executive order in contrast to the Gila River Indian Community.

The other case cited by the *Central Machinery* court in support of its position that the economic burden is not a controlling factor was *G.M. Shupe, Inc. v. Bureau of Revenue*, 89 N.M. 265, 550 P.2d 277 (1976). In *Shupe*, the court permitted taxation of a non-Indian corporation doing construction work on an Indian reservation pursuant to a contract with the United States government. *Id.* at 268, 550 P.2d at 280. The corporation was not an Indian trader within the meaning of *Warren* since its business was with the government and not with the Indians. *Id.* The *Shupe* court emphasized that although the activity took place on Indian lands, the tribe suffered no direct loss because of the tax. *Id.* The court stated that “the taxpayer has failed to point to any specific way in which the tribe will be affected. . . . There is no indication from the record that

Conclusion

Judicial policy in the area of state taxation of Indians has developed an analytical approach that can be applied to the facts of each particular case. First, it must be determined whether federal preemption precludes the state from regulating Indian matters. If no preemption is found, the court must consider whether the state's action infringes on the Indians' right to make and enforce their own laws. The Arizona Supreme Court chose to disregard that approach in *State Tax Commission of Arizona v. Central Machinery Company*. Rather, the court utilized reasoning similar to that previously overturned by the United States Supreme Court in *Warren Trading Post Co. v. Arizona Tax Commission*.¹⁰⁷ Insisting that the legal incidence of the tax fell upon the non-Indian seller rather than the Indian buyer, the court in *Central Machinery* ignored the fact that the tax was imposed upon the Indians as a part of the purchase price. Not only did the court ignore these considerations, but it also distinguished *Warren* on a narrow construction of the term "Indian trader" and an unreasonably stringent application of the licensing requirements for trading with the Indians.

the [Indians] will sustain any direct effects as a result of the tax, and therefore no conflict with tribal sovereignty is shown." *Id.*

In support of its determination that the tax levied in *Central Machinery* did not conflict with the federal government's policy of protecting the Indians, the Arizona Supreme Court also cited *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). In *Moe*, an Indian selling cigarettes on the reservation was required to pay a sales tax on cigarettes sold to non-Indians but not on cigarettes sold to other Indians. The only certainty was that if the tax was completely disallowed, the non-Indian buyer would benefit. *Id.* at 483. The Court held that the state could require the Indian proprietor simply to add the tax to the sales price and aid the state's collection and enforcement of the tax. *Id.* Such a requirement was held to be a minimal burden designed to avoid the likelihood that in its absence non-Indians would avoid payment of a lawful tax. *Id.* The Court found that this minimal effect upon the Indian seller did not frustrate tribal self-government or run afoul of any federal statute dealing with reservation Indians' affairs. *Id.*

Moe is inapplicable to the situation in *Central Machinery*. The tax at issue in *Moe* was a sales tax, the incidence falling directly on the buyer since the seller simply adds the tax to the sales price. 425 U.S. at 481-82. In *Central Machinery*, the challenged tax was a transaction privilege tax, a tax imposed upon the income of the seller. 121 Ariz. at 183, 589 P.2d at 426. See note 6 *supra*. *Central Machinery* involved the passing of a seller's tax on to the Indian buyer, but *Moe* involved the collection of a buyer's tax by an Indian seller. 425 U.S. at 483. The Court in *Moe* found that merely collecting the tax from the non-Indian buyer placed no burden upon the Indian seller. *Id.* In *Central Machinery*, however, the burden upon the Indian was obvious since the seller's tax was added directly onto the purchase price. 121 Ariz. at 183, 589 P.2d at 426.

107. *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), arose on appeal from an Arizona Supreme Court decision in *Warren Trading Post Co. v. Moore*, 95 Ariz. 110, 387 P.2d 809 (1963). In that case, the Arizona court characterized Arizona's transaction privilege tax as being the direct obligation of the seller and not that of the consumer. *Id.* at 113, 387 P.2d at 812. Arizona thus found that the legal incidence of the tax fell upon the trader, not the Indian-buyer. *Id.* On appeal, the United States Supreme Court reversed that decision, holding that Arizona could not impose its tax. 380 U.S. at 690-91. The Court held that the federal government had so completely taken over the business of Indian trading on reservations that no room remained for the state to impose additional burdens upon traders. *Id.* at 690.

The current case law and authority in the area of Indian taxation dictate a different result.

Patricia A. Ihnat

IX. INSURANCE LAW

A. DAMRON AGREEMENTS AND THE INSURER'S DUTY TO DEFEND

In *State Farm Mutual Automobile Insurance Co. v. Paynter*,¹ the Arizona Court of Appeals ruled upon the validity of a Damron agreement²—an agreement executed by an insured and an injured party after the insurer has breached either its duty to defend the insured or its duty to settle a claim in good faith.³ Generally, the agreement provides that the insured assign to the injured party any claim the insured has against his insurer arising from the insurer's breach.⁴ In return, the injured party promises not to execute against the insured on any judgment obtained.⁵ In affirming the trial court, the *Paynter* court held that the agreement was not collusive and that an insurer who wrongfully refuses to defend its insured will be bound by a judgment rendered against the insured, even when the insured failed to raise at trial all matters relating to a potential defense.⁶ In addition, the court ruled that the insurer's liability for refusing to defend is limited by the face amount of coverage provided for in the policy.⁷

This casenote will discuss the insurance carrier's duty to defend, when that duty arises, and alternatives open to the carrier who is uncertain whether the duty exists. The arguments of State Farm will then be analyzed as they relate to its duty to defend in *Paynter* and to the validity of Damron agreements in actions against a carrier.

Ted Paynter was injured when his vehicle collided with the back of a forklift that was being towed by a truck owned by the Joneses.⁸ Paynter was cited for driving at an unsafe speed and driving while intoxicated.⁹ He later filed a personal injury action against the Joneses alleging negligence in towing a forklift at a minimal speed with no warning signals.¹⁰ The Joneses forwarded a copy of the complaint to

1. 122 Ariz. 198, 593 P.2d 948 (Ct. App. 1979).

2. The term Damron agreement is derived from *Damron v. Sledge*, 105 Ariz. 151, 460 P.2d 997 (1969). See Casenote, *Torts and Liability Insurance*, 12 ARIZ. L. REV. 213, 213 (1970).

3. See *Damron v. Sledge*, 105 Ariz. 151, 152-53, 460 P.2d 997, 998-99 (1969) (duty to defend); *Critz v. Farmers Ins. Group*, 230 Cal. App. 2d 788, 792, 41 Cal. Rptr. 401, 403 (1964) (duty to settle).

4. *Damron v. Sledge*, 105 Ariz. 151, 153, 460 P.2d 997, 999 (1969).

5. *Id.* at 152, 460 P.2d at 998.

6. 122 Ariz. at 201, 593 P.2d at 951.

7. *Id.* at 205, 593 P.2d at 955.

8. *Id.* at 199, 593 P.2d at 949.

9. *Id.*

10. *Id.* at 200, 593 P.2d at 950. Although the forklift had no signs or flags, there was a man

their insurer State Farm¹¹ and requested that State Farm defend the action pursuant to a provision in their policy.¹² State Farm refused to defend, contending that the policy did not cover an accident occurring while the truck was towing a trailer.¹³ Seeking to avoid litigating at their own expense, the Joneses entered into an agreement with Paynter giving him five hundred dollars and an assignment of their rights in the policy that had resulted from State Farm's refusal to defend.¹⁴ In return, Paynter signed a covenant not to execute against the Jones on any judgment obtained in the then pending personal injury action.¹⁵ After the agreement was signed, the Joneses admitted liability in a pretrial statement and a judgment against them was entered for \$143,956.81.¹⁶ At no time was any defense of contributory negligence raised by the Joneses against Paynter.¹⁷

Paynter then sued State Farm to recover under this judgment.¹⁸ The trial court granted summary judgment in favor of Paynter for the entire amount of the judgment entered against the Joneses, and State Farm appealed.¹⁹

Duty to Defend

Damron agreements usually materialize when the insurer breaches its policy either by refusing to settle claims in good faith²⁰ or by refusing to defend the insured.²¹ Most liability policies require that the insurer defend actions filed against the insured when the injured party's claim falls within the risks covered by the insurer's policy.²² As long as the claims are within the policy's coverage, the insurer is obligated to

on the rear of the lift who attempted to signal Paynter as he approached. *Id.* at 199, 593 P.2d at 949.

11. *Id.* at 200, 593 P.2d at 950. State Farm had previously issued an automobile liability policy insuring the Joneses for a maximum of \$50,000. *Id.*

12. *Id.* The Joneses' insurance policy provided: "State Farm . . . [a]grees . . . to defend, with attorneys selected by and compensated by the company, any suit against the insured alleging such bodily injury or property damage and seeking damages which are payable hereunder even if any of the allegations of the suit are groundless, false or fraudulent" *Id.*

13. *Id.* See text & notes 33-39 *infra*.

14. 122 Ariz. at 200, 593 P.2d at 950.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* On appeal, State Farm argued first that there was no coverage under the policy and, therefore, no duty to defend the Joneses. *Id.* at 203, 593 P.2d at 953. Alternatively, State Farm claimed that if coverage did exist, the inherently collusive nature of the Damron agreement should act to bar enforcement of Paynter's judgment against them. *Id.* at 201, 593 P.2d at 951. Even if the Damron agreement was noncollusive, State Farm contended that the judgment against the Joneses was unenforceable against it because the Joneses failed to contest Paynter's negligence action. *Id.* Finally, State Farm argued that, in any event, it should not be subject to liability beyond the insurance policy's maximum coverage. *Id.* at 204, 593 P.2d at 954.

20. See Critz v. Farmers Ins. Group, 230 Cal. App. 2d 788, 792, 41 Cal. Rptr. 401, 403 (1964).

21. See Damron v. Sledge, 105 Ariz. 151, 152, 460 P.2d 997, 998 (1969).

22. R. KEETON, BASIC TEXT ON INSURANCE LAW § 7.6(d), at 483 (1971).

defend the insured even against groundless, false, or fraudulent claims.²³ In addition, most policies have provisions preventing the insured from assuming any liability or making any settlement without the consent of the insurer.²⁴ A breach by the carrier, however, relieves the insured from the operation of this provision and allows him to make a reasonable settlement agreement while preserving his right to recover under the policy.²⁵

Upon notification of a claim against its insured, the insurer must ascertain whether the particular claim is within the policy's coverage.²⁶ In the first instance, the insurer might compare the allegations of the complaint against the provisions of the policy.²⁷ If the allegations bring the claim within coverage, there is a duty to defend.²⁸ If the claim is outside of the policy's coverage, no duty to defend arises.²⁹ Because it is not equitable that an insured's contractual right to a defense depend solely upon the words chosen in the complaint, the pleading test is often considered not decisive.³⁰ Rather, the preferred course is for the insurer to look beyond the pleadings to the actual facts to determine whether the injured party's claim is within the coverage of the policy.³¹

State Farm refused to defend the Joneses because it believed that Paynter's personal injury claim was not covered under the Joneses' policy.³² Because of this refusal, State Farm had the burden of proving that the claim was excluded from coverage.³³ State Farm argued that

23. *Id.* at 462. See, e.g., *Pesqueria v. Factory Mut. Liab. Ins. Co.*, 16 Ariz. App. 407, 412, 493 P.2d 1212, 1217 (1972); *Lawrence v. Burke*, 6 Ariz. App. 228, 235, 431 P.2d 302, 309 (1967); *Klemmer v. Ohio Cas. Ins. Co.*, 188 Minn. 209, 212, 246 N.W. 896, 898 (1933).

24. 7C J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4714, at 521 (1979).

25. *Id.* at 526. See *St. Louis Dressed Beef & Provision Co. v. Maryland Cas. Co.*, 201 U.S. 173, 181 (1906); *Watson v. Ocean Accident and Guar. Corp.*, 28 Ariz. 573, 580, 238 P. 338, 341 (1925); *Nautilus Inc. v. Transamerica Title Ins. Co.*, 13 Wash. App. 345, 352, 534 P.2d 1388, 1393 (1975).

26. *Pacific Indem. Co. v. Kohlase*, 9 Ariz. App. 595, 597, 455 P.2d 277, 279 (1969).

27. See *Manny v. Estate of Anderson*, 117 Ariz. 548, 550, 574 P.2d 36, 38 (Ct. App. 1977); *Pesqueria v. Factory Mut. Liab. Ins. Co.*, 16 Ariz. App. 407, 412, 493 P.2d 1212, 1217 (1972); *Paulin v. Fireman's Fund Ins. Co.*, 1 Ariz. App. 408, 410, 403 P.2d 555, 557 (1965).

28. *Pesqueria v. Factory Mut. Liab. Ins. Co.*, 16 Ariz. App. 407, 412, 493 P.2d 1212, 1217 (1972).

29. *Id.*

30. *Kepner v. Western Fire Ins. Co.*, 109 Ariz. 329, 331, 509 P.2d 222, 224 (1973).

31. *Id.* Where the alleged facts in the complaint bring the claim within the policy's coverage, but such facts are erroneous or where there are other facts not pleaded that bring the claim outside the policy's coverage, there is no duty to defend. *Id.* If the facts as pleaded, however, take the claim outside the policy's coverage, but the carrier knows of other facts that bring the claim within coverage, there is a duty to defend. See *Texaco v. Hartford Accident and Indem.*, 453 F. Supp. 1109, 1114 (E.D. Okla. 1978); *Granite State Ins. Corp. v. Mountain States Tel. & Tel. Co.*, 117 Ariz. 432, 435, 573 P.2d 506, 509 (Ct. App. 1977); *New Hampshire Ins. Co. v. Christy*, 200 N.W.2d 834, 838 (Iowa 1972).

32. 122 Ariz. at 203, 593 P.2d at 953.

33. See *Hartford Accident and Indem. Co. v. Villasenor*, 21 Ariz. App. 206, 209, 517 P.2d 1099, 1102 (1974); *Pacific Indem. Co. v. Kohlase*, 9 Ariz. App. 595, 597, 455 P.2d 277, 279 (1969).

since the exclusionary provisions in the policy³⁴ explicitly denied coverage for accidents occurring while the Joneses' truck was towing a trailer, there should be no coverage while the truck towed a forklift.³⁵ The court, labeling the exclusionary provisions as a "model of obscurity," found that the language was inherently ambiguous.³⁶ Consequently, the *Paynter* court applied the well-established rule that ambiguous insurance policies are construed in a light most favorable to the insured³⁷ and held that there was coverage for Paynter's claim.³⁸ The court, therefore, found State Farm's refusal to defend a breach of the policy.³⁹

Although Damron agreements arise only after a carrier has breached the policy, such agreements have been criticized on the ground that they place insurance companies in an unfair position by requiring them to pay judgments obtained after a trial that may not have fully adjudicated the merits of the plaintiff's cause of action.⁴⁰

34. The exclusionary provision in the insurance policy upon which State Farm relied provided:

This insurance does not apply . . . while the owned motor vehicle is used for the towing of any trailer (other than a trailer as defined herein) owned or hired by the insured and not covered by like insurance in the company; or while any trailer covered by this policy is used with any motor vehicle owned or hired by the insured and not covered by like insurance in the company;

Trailer—means a trailer or a semi-trailer not so described if designed for use with a private passenger automobile and if not (1) a passenger trailer, (2) a trailer used for business purposes with other than a private passenger automobile, or (3) a trailer used as premises for office, store or display purposes.

122 Ariz. at 203-04, 593 P.2d at 953-54.

35. *Id.* at 203, 593 P.2d at 953.

36. *Id.* at 204, 593 P.2d at 954.

37. *Id.* See *Watson v. Ocean Accident and Guar. Corp.*, 28 Ariz. 573, 579, 238 P. 338, 340 (1925); *Ranger Ins. Co. v. Lamppa*, 115 Ariz. 124, 125-26, 563 P.2d 923, 924-25 (Ct. App. 1977); *State Farm Mut. Auto. Ins. Co. v. O'Brien*, 24 Ariz. App. 18, 21, 535 P.2d 46, 49 (1975).

38. 122 Ariz. at 204, 593 P.2d at 954. The court interpreted the word "trailer" as not to include forklift. *Id.*

39. *Id.* A breach of the defense duty requires only that there be coverage under the policy and a refusal to defend by the insurer. *Manny v. Estate of Anderson*, 117 Ariz. 548, 550, 574 P.2d 36, 38 (Ct. App. 1977). Moreover, a carrier's proof that it acted in good faith is not a defense to an action for wrongfully refusing to defend its insured. See *Lujan v. Gonzales*, 84 N.M. 229, 234, 501 P.2d 673, 678 (Ct. App. 1972).

40. See Casenote, *supra* note 2, at 218, where the writer suggests that *Elder v. Elder*, 9 Ariz. App. 140, 449 P.2d 977 (1969), implied that a carrier has a right to a judgment on the merits, notwithstanding the fact that its refusal to defend was wrongful and unjustified. In *Elder*, the plaintiff filed a negligence action against two defendants. *Id.* at 141, 449 P.2d at 978. One defendant settled out of court and the other defaulted after his insurer denied coverage and refused to defend him. *Id.* at 142, 449 P.2d at 979. Subsequently, the carrier sought to intervene on its own behalf and that of the defaulting defendant in order to set aside the default judgment. *Id.* Although the defaulting defendant opposed intervention, the court held that intervention by the carrier was proper because the defaulting defendant had neither hired an attorney nor attempted to defend himself in the underlying action. *Id.* at 143, 449 P.2d at 980. The court noted that if an attorney had been retained and a defense put on in the underlying action, the insurer's intervention could be successfully opposed. *Id.* Apparently, the court's primary reason for allowing the intervention was that the default judgment was not final but "subject to revision at any time." *Id.* See ARIZ. R. CIV. P. 54(b). It should be noted, however, that the *Elder* decision was rendered before the Arizona Supreme Court held in *Damron v. Sledge*, 105 Ariz. 151, 460 P.2d 997 (1969), that an insurer, after wrongfully refusing to defend, is bound by a default judgment entered against its insured. *Id.* at 155, 460 P.2d at 1001.

This criticism overlooks the fact that other options are available to carriers than to defend or not defend. First, a carrier may bring a declaratory judgment action to determine whether there is coverage under the policy.⁴¹ Generally, in Arizona, a controversy is suitable for resolution through a declaratory judgment action when an insured or an insurer seek to establish their respective rights under a policy.⁴² This option is recommended by the Arizona courts⁴³ because if the carrier waits to determine coverage until after the injured party's claim has reached judgment, it will be bound by that judgment's determination of the insured's liability, absent proof of fraud or collusion.⁴⁴

A second avenue open to the carrier is to execute either a reservation-of-rights notice or a nonwaiver agreement.⁴⁵ A reservation-of-rights notice is a unilateral statement by the carrier declaring that it reserves its right to contest coverage and that its investigation of the plaintiff's claim or its assumption of the defense will not prejudice this right.⁴⁶ The nonwaiver agreement, while substantially the same in substance, is a more effective device because it is a bilateral agreement.⁴⁷ The insured, however, may thwart the carrier's attempt to execute the agreement by not consenting to it.⁴⁸ Both of these devices allow the carrier to assume the defense of the claim while preserving its right to later deny coverage under the policy.⁴⁹

41. *Kepner v. Western Fire Ins. Co.*, 109 Ariz. 329, 332, 509 P.2d 222, 225 (1973); *Glen Falls Ins. Co. v. American Oil Co.*, 254 Md. 120, 136, 254 A.2d 658, 667 (1969); *Government Employees Ins. Co. v. Woods*, 59 Wash. 2d 173, 175, 367 P.2d 21, 22 (1961); Note, *Use of Declaratory Judgment to Determine a Liability Insurer's Duty to Defend—Conflict of Interest*, 41 IND. L.J. 87, 87 (1965).

42. *See State Farm Mut. Auto. Ins. Co. v. O'Brien*, 24 Ariz. App. 18, 21, 535 P.2d 46, 49 (1975); *Connolly v. Great Basin Ins. Co.*, 6 Ariz. App. 280, 286, 431 P.2d 921, 927 (1967).

43. *Kepner v. Western Fire Ins. Co.*, 109 Ariz. 329, 332, 509 P.2d 222, 225 (1973); *Granite State Ins. Corp. v. Mountain States Tel. & Tel. Co.*, 117 Ariz. 432, 436, 573 P.2d 506, 510 (Ct. App. 1977).

44. *Kepner v. Western Fire Ins. Co.*, 109 Ariz. 329, 332, 509 P.2d 222, 225 (1973). *See Lane v. Hartford Fire Ins. Co.*, 343 F. Supp. 79, 85 (E.D. Mo. 1972); *Dairyland Ins. Co. v. Richards*, 108 Ariz. 89, 91, 492 P.2d 1196, 1198 (1972); *Damron v. Sledge*, 105 Ariz. 151, 155, 460 P.2d 997, 1001 (1969).

45. *See Hartford Accident and Indem. Co. v. Crider*, 392 F. Supp. 162, 167 (N.D. Ill. 1974); *Allied Mut. Ins. Co. v. Hingst*, 360 F. Supp. 1204, 1208 (D. N.D. 1973); *Damron v. Sledge*, 105 Ariz. 151, 155, 460 P.2d 997, 1001 (1969).

46. R. KEETON, *supra* note 22, § 6.6(a), at 410-12; *see, e.g.*, *Popovich v. Gonzales*, 4 Ill. App. 3d 227, 229, 280 N.E.2d 757, 760 (1972); *Bogle v. Conway*, 199 Kan. 707, 712, 433 P.2d 407, 412 (1967).

47. R. KEETON, *supra* note 22, § 6.6(a), at 410-12; *see, e.g.*, *Motorists Mut. Ins. Co. v. Trainor*, 33 Ohio St. 2d 41, 45, 294 N.E.2d 874, 877 (1973); *Y.M.C.A. v. Commercial Standard Ins. Co.*, 552 S.W.2d 497, 502 (Tex. Civ. App. 1977). In *Y.M.C.A.*, the insurer, after executing a nonwaiver agreement, defended the insured for almost four years without informing him either of its belief that he had failed to comply with the "notice of occurrence" provision or of its right to withdraw its defense. *Id.* The court held that the insurer was estopped from denying coverage and required it to continue the defense without reservation. *Id.* at 504. *But see Allied Mut. Ins. Co. v. Hingst*, 360 F. Supp. 1204, 1209 (D. N.D. 1973) (notice of possible withdrawal by insurer was implicit in the nonwaiver agreement).

48. *See Glen Falls Ins. Co. v. American Oil Co.*, 254 Md. 120, 136, 254 A.2d 658, 667 (1969); *Motorists Mut. Ins. Co. v. Trainor*, 33 Ohio St. 2d 41, 46, 294 N.E.2d 874, 877 (1973).

49. R. KEETON, *supra* note 22, § 6.6(a), at 410.

Absent resort to the above options, a refusal to defend will result in the insurer being bound by all matters necessarily determined in the action against the insured, unless the carrier can prove that the judgment against its insured was secured through fraud or collusion.⁵⁰

The Defenses of Fraud and Collusion

When a carrier decides not to defend its insured, courts generally hold that it does so at its peril.⁵¹ If later sued on the policy by the insured or his assignee, the carrier will be collaterally estopped from contesting any issues necessarily determined at the trial of its insured.⁵² The carrier will not be estopped, however, if it can establish that the judgment against the insured was secured through fraud or collusion.⁵³

In *Paynter*, State Farm asserted two claims in an attempt to invalidate Paynter's judgment against the Joneses. First, State Farm argued that the Damron agreement was inherently collusive and thus should bar execution of the judgment against State Farm.⁵⁴ Second, State Farm argued that both the failure to inform the trial court and State Farm of the Damron agreement,⁵⁵ and the Joneses' failure to contest liability,⁵⁶ constituted fraud.

Responding to the collusion argument, the court, basing its author-

50. *Lane v. Hartford Fire Ins. Co.*, 343 F. Supp. 79, 85 (E.D. Mo. 1972); *Damron v. Sledge*, 105 Ariz. 151, 155, 460 P.2d 997, 1001 (1968); *State Farm Mut. Auto. Ins. Co. v. Paynter*, 122 Ariz. 198, 200, 593 P.2d 948, 950 (Ct. App. 1979).

51. *See, e.g.*, *Kepper v. Western Fire Ins. Co.*, 109 Ariz. 329, 332, 509 P.2d 222, 225 (1973) (if the insurer refuses to defend when there is coverage, it will be liable for breach of contract); *State Farm Auto. Ins. Co. v. Paynter*, 122 Ariz. 198, 200, 593 P.2d 948, 950-51 (Ct. App. 1979); *Thomas v. Western World Ins. Co.*, 343 So.2d 1298, 1304 (Fla. Dist. Ct. App. 1977) (an insurer denies coverage at its own risk).

52. *Dairyland Ins. Co. v. Richards*, 108 Ariz. 89, 91, 492 P.2d 1196, 1198 (1972); *Hartford Accident Indem. Co. v. Villasenor*, 21 Ariz. App. 206, 209, 517 P.2d 1099, 1102 (1974); *Herendeen v. United States Fidelity & Guar. Co.*, 19 Ariz. App. 399, 401, 507 P.2d 1011, 1013 (1973). Under the doctrine of collateral estoppel, the carrier is allowed to present any defenses not inconsistent with the judgment against its insured in an effort to prove there is no coverage for the injured party's claim. *Hartford Accident & Indem. Co. v. Villasenor*, 21 Ariz. App. 206, 209, 517 P.2d 1099, 1102 (1974); *see American Sur. Co. v. Coblenz*, 381 F.2d 185, 187 (5th Cir. 1967) (after a judgment had been rendered against insured for negligence, insurer could attempt to prove that its insured committed an intentional tort which would exclude him from coverage). *But see Globe Indem. Co. v. Blomfield*, 115 Ariz. 5, 7, 562 P.2d 1372, 1374 (Ct. App. 1977) (prior finding of negligence necessarily included a finding that the act was not intentional). If the question of whether there exists coverage under the policy is dependent upon an issue necessarily determined by the judgment against the insured, the carrier is prevented from relitigating the issue and is bound by its determination. *Lane v. Hartford Fire Ins. Co.*, 343 F. Supp. 79, 85 (E.D. Mo. 1972); *Dairyland Ins. Co. v. Richards*, 108 Ariz. 89, 91, 492 P.2d 1196, 1198 (1972). The doctrine of collateral estoppel is applicable to judgments entered by default. 10 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2684, at 262 (1973).

53. *Lane v. Hartford Fire Ins. Co.*, 343 F. Supp. 79, 85 (E.D. Mo. 1972). The fact that the insured does not contest liability will not by itself support a finding of fraud or collusion. *Id.* *See State Farm Mut. Auto. Ins. Co. v. Paynter*, 122 Ariz. 198, 201, 593 P.2d 948, 951 (Ct. App. 1979).

54. 122 Ariz. at 201, 593 P.2d at 951.

55. *Id.* at 202, 593 P.2d at 952.

56. *Id.* at 201, 593 P.2d at 951.

ity and rationale on *Damron v. Sledge*,⁵⁷ held that the agreement was not inherently collusive.⁵⁸ In *Damron*, the plaintiffs sought damages against defendant Sledge for negligently driving into their car, and against defendant Polk, the owner of the car Sledge drove.⁵⁹ Sledge's insurance company refused to defend on the ground that he drove Polk's car without his permission, which, if true, would have released the company from its duty to defend.⁶⁰ Sledge then entered into an agreement with the plaintiffs whereby he assigned to the plaintiffs whatever claim he had against his insurer for its refusal to defend in return for attorneys' fees and the plaintiffs' signing a covenant not to execute against him.⁶¹ Subsequently, the plaintiffs amended their complaint, dismissing with prejudice defendant Polk.⁶² Although he had not arranged it with the plaintiffs before hand, Sledge withdrew his answer and allowed a default to be taken.⁶³

The *Damron* court held that a claim against an insurer for failure to defend is assignable to an injured party and that the agreement between the plaintiffs and Sledge was not inherently collusive.⁶⁴ The rationale was that when an insurer refuses to defend, the policyholder should not be forced to litigate at his own expense,⁶⁵ but should be free to make any reasonable settlement so as to limit his personal liability.⁶⁶

State Farm's second argument in *Paynter* was that Paynter and the Joneses had committed fraud apart from the *Damron* agreement itself.⁶⁷ This claim was based upon three factual assertions: (1) That the trial court was not informed of all pertinent facts surrounding the accident,⁶⁸ (2) that the Joneses failed to raise a defense of contributory negligence,⁶⁹ and (3) that the parties failed to reveal the existence of the

57. 105 Ariz. 151, 460 P.2d 997 (1969).

58. 122 Ariz. at 201, 593 P.2d at 951.

59. 105 Ariz. at 152, 460 P.2d at 998.

60. *Id.*

61. *Id.* at 152-53, 460 P.2d at 998-99.

62. *Id.* at 153, 460 P.2d at 999. Polk's attorney, supplied by his insurance company, stated that the agreement was "tainted with conspiracy, chicanery and fraud" and was executed "for the sole purpose of sticking a couple of insurance companies." *Id.* The attorney argued that he had a right to remain in the action in order to rebut plaintiff's medical evidence of severe injury. *Id.* The court held, however, that the plaintiffs had an absolute right to dismiss with prejudice their complaint against Polk. *Id.* at 154, 460 P.2d at 1000.

63. *Id.* at 154, 460 P.2d at 1000.

64. *Id.* at 153, 460 P.2d at 999.

65. See *Western Cas. & Sur. Co. v. Herman*, 405 F.2d 121, 124 (8th Cir. 1968); *Damron v. Sledge*, 105 Ariz. 151, 154, 460 P.2d 997, 1000 (1969).

66. See *St. Louis Dressed Beef & Provision Co. v. Maryland Cas. Co.*, 201 U.S. 173, 182 (1906); *Watson v. Ocean Accident & Guar. Corp.*, 28 Ariz. 573, 580, 238 P. 338, 341 (1925); *Nautilus v. Transamerica Title Ins. Co.*, 13 Wash. App. 345, 352, 534 P.2d 1388, 1393 (1975). Cf. *Mustang Equip. Inc. v. Welch*, 115 Ariz. 206, 211, 564 P.2d 895, 900 (1977) (policy of the law is to favor prompt resolution of legal controversies through settlement).

67. 122 Ariz. at 201, 593 P.2d at 951.

68. *Id.*

69. *Id.* The court characterized this argument as "tantamount to a contention that the in-

Damron agreement to State Farm or the court.⁷⁰

Had the Joneses raised a contributory negligence defense, the trial court would have been informed of the fact that a person was on the forklift attempting to warn oncoming traffic and that Paynter was cited for speeding and driving while intoxicated.⁷¹ In response to State Farm's first argument, the court of appeals held that nondisclosure of all facts about the accident was not the sort of fraudulent and collusive conduct which would bar enforcement of Paynter's judgment against State Farm.⁷² Had the Joneses knowingly made false statements concerning material facts in their application for insurance, or had the Joneses and Paynter joined to create a sham accident, such conduct would constitute fraud and relieve State Farm of its duty to pay under the policy.⁷³

As to the second assertion, the court found no reversible error arising from the Joneses' failure to offer any defense to Paynter's complaint.⁷⁴ Indeed, a ruling that the Joneses were obligated to raise all facts and litigate all potential defenses would directly contradict the *Damron* court's holding that after a refusal to defend, the insured is free to execute a Damron agreement so as to limit his liability and defense costs.⁷⁵

Finally, State Farm argued that the judgment against the Joneses was invalid because the Damron agreement was not reported to State Farm or the trial court.⁷⁶ To support this contention State Farm relied upon *Mustang Equipment v. Welch*.⁷⁷ In *Welch*, one of two defendants privately agreed with the plaintiff to provide the identity of an unknown third defendant, named Mustang.⁷⁸ In return, the plaintiff promised not to execute against the agreeing defendant if a judgment were obtained against both the agreeing defendant and the then un-

sured was required to offer a vigorous defense at his own expense after his insurer had breached its contractual obligation to provide such a defense." *Id.*

70. *Id.* at 202, 593 P.2d at 952.

71. *Id.* at 201, 593 P.2d at 951.

72. *Id.*

73. *See Mutual Life Ins. Co. v. Moriarty*, 178 F.2d 470, 473-74 (9th Cir. 1949), *cert. denied*, 339 U.S. 937 (1950) (false statements); *American Nat'l Ins. Co. v. Caldwell*, 70 Ariz. 78, 79, 216 P.2d 413, 414 (1950) (false statements); *Venditti v. Mucciaroni*, 54 Ohio App. 513, 524, 8 N.E.2d 460, 466 (1936) (sham accident).

74. 122 Ariz. at 201, 593 P.2d at 951. *Cf. Lane v. Hartford Fire Ins. Co.*, 343 F. Supp. 79, 85 (E.D. Mo. 1972) (insured's failure to contest liability does not by itself support a finding of fraud or collusion).

75. 122 Ariz. at 201, 593 P.2d at 951. *See Damron v. Sledge*, 105 Ariz. 151, 155, 460 P.2d 997, 1001 (1969) (carrier who wrongfully refused to defend its insured assumed the risk that a large verdict might result from lack of cross-examination). *See also Lane v. Hartford Fire Ins. Co.*, 343 F. Supp. 79, 85 (E.D. Mo. 1972); *First Nat'l Indem. Co. v. Mercado*, 511 S.W.2d 354, 358 (Tex. Civ. App. 1974).

76. 122 Ariz. at 202, 593 P.2d at 952.

77. 115 Ariz. 206, 564 P.2d 895 (1977).

78. *Id.* at 208, 564 P.2d at 897.

known defendant.⁷⁹ After securing a judgment on a negligence theory against both defendants, the plaintiff, in accordance with the agreement, sought to execute solely against defendant Mustang.⁸⁰ Upon learning of the agreement, Mustang sought relief from the judgment on the ground that it was fraudulent not to have disclosed the agreement prior to trial.⁸¹ Although the *Welch* court found that the conduct of the parties at trial would not have been affected by disclosure of the agreement,⁸² the court ruled that Mustang was prejudiced because disclosure would have encouraged it to consider settlement more actively prior to trial.⁸³ Thus, the *Welch* court held that there was a duty to disclose to the other defendants the existence of such an agreement.⁸⁴

By analogy to *Welch*, an argument can be made that State Farm was prejudiced when it was not informed of the Damron agreement because it would have been more amenable to defending the Joneses had the agreement been disclosed. State Farm's knowledge of the Damron agreement, however, would not have changed the facts upon which it based its conclusion that there did not exist a duty to defend. As the Arizona Supreme Court stated in *Damron*, the carrier who refuses to defend its insured takes the risk that an excessive verdict might result from the insured's lack of cross-examination of the plaintiff.⁸⁵ Hence, State Farm must have been aware of the possibility that its refusal to defend the Joneses might lead to a Damron agreement. This possibility should have led State Farm to consider its defense obligations more carefully.⁸⁶ In any event, State Farm could have learned of the Damron agreement only *after* it had breached the policy since such agreements materialize only subsequent to the carrier's breach. Consequently, where there has been a refusal to defend, there is no reason to require disclosure of the Damron agreement to the carrier. Since the carrier has decided not to take part in the litigation, nondisclosure would not prejudice the carrier in any way. Accordingly, the *Paynter* court correctly found that nondisclosure of the Damron agreement was insufficient grounds to allow State Farm to relitigate the issue of the

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 210, 564 P.2d at 899. According to the court, the parties' relative positions to each other would not have been altered by disclosure of the agreement because Mustang knew that the agreeing defendant intended to deny liability and would try to prove that Mustang was the sole cause of the plaintiff's injuries. *Id.*

83. *Id.* at 211, 564 P.2d at 900.

84. *Id.*

85. 105 Ariz. at 155, 460 P.2d at 1001.

86. See *Critz v. Farmers Ins. Group*, 230 Cal. App. 2d 788, 801, 41 Cal. Rptr. 401, 408 (1964) (if the carrier is aware that its breach of the policy might lead to a Damron agreement, the carrier will more carefully consider its defense duties).

Joneses' liability when it had already breached its obligation to do so.⁸⁷

State Farm further argued that the judgment against the Joneses was invalid because the existence of the Damron agreement was not revealed to the trial court.⁸⁸ Responding to this claim, the *Paynter* court held that although disclosure was preferred in order to provide for a candid review of damages by the court, nondisclosure in *Paynter* was not reversible error.⁸⁹ According to the court, State Farm was not prejudiced by the concealment of the Damron agreement since its liability was less than Paynter's plea for damages.⁹⁰ Disclosure would not have enhanced the accuracy of the court's award of damages because Arizona trial courts have the authority to conduct a hearing to determine the extent of a plaintiff's damages when the defendant defaults.⁹¹ The plaintiff is therefore not released from his burden of substantiating the amount of his damages.⁹² Thus, it is doubtful whether nondisclosure of a Damron agreement to the court would ever constitute reversible error when the insured defaults, since the court on its own will assess the plaintiff's damages.⁹³

Insurer's Liability for Refusing to Defend

The trial court held State Farm fully liable on the judgment en-

87. 122 Ariz. at 202-03, 593 P.2d at 952-53. Where the carrier assumes the defense of its insured but refuses a settlement offer, the carrier would be prejudiced by nondisclosure of a Damron agreement executed after its refusal. Under these facts, the carrier would be at a great disadvantage in continuing with the defense of its insured, unaware that the insured no longer has any reason to vigorously defend the plaintiff's complaint. In such a case, the insured is not truly adverse to the plaintiff's interests and the carrier could be prejudiced by damaging testimony from its insured. *But cf.* *Critz v. Farmers Ins. Group*, 230 Cal. App. 2d 788, 802, 41 Cal. Rptr. 401, 409 (1964) (court ruled that there was no fraud because the agreement was known to the carrier before trial).

88. 122 Ariz. at 202, 593 P.2d at 952.

89. *Id.* at 202-03, 593 P.2d at 952-53.

90. *Id.* Paynter sought damages in excess of \$400,000.00, but the trial court entered judgment against the Joneses for \$143,956.81.

91. ARIZ. R. CIV. P. 55(b); *Southern Ariz. School For Boys, Inc. v. Chery*, 119 Ariz. 277, 282, 580 P.2d 738, 743 (Ct. App. 1978); *Dungan v. Superior Court*, 20 Ariz. App. 289, 290, 512 P.2d 52, 53 (1973); *see* ARIZ. R. CIV. P. 54(d) (default judgment shall not exceed the amount prayed for in the demand for judgment).

92. *Damron v. Sledge*, 105 Ariz. 151, 154, 460 P.2d 997, 1000 (1969); *Dungan v. Superior Court*, 20 Ariz. App. 289, 290, 512 P.2d 52, 53 (1973).

93. A Damron agreement executed after a carrier's refusal to defend should be disclosed to the court when a sole defendant, instead of defaulting, remains in the action. In this situation, the court would consider if the defendant's responsibility to contest damages and would, therefore, not be as active in questioning the accuracy and reasonableness of the plaintiff's plea for damages. The risk that the plaintiff and defendant might collusively inflate the extent of damages is sufficiently great to warrant a rule requiring disclosure.

In litigation involving multiple defendants where less than all defendants execute a Damron agreement with the plaintiff, the agreement should be disclosed to the court because of the risk that the agreeing defendant, if he remains in the action, might act to the prejudice of his co-defendant[s] in regard to the question of liability and damages. Since the agreement in such a case should be revealed to the nonagreeing defendant, the court will no doubt be informed of its existence. *See Mustang Equip., Inc. v. Welch*, 115 Ariz. 206, 211, 564 P.2d 895, 900 (1977); *State Farm Mut. Auto. Ins. Co. v. Paynter*, 122 Ariz. 198, 202, 593 P.2d 948, 952 (Ct. App. 1979).

tered against the Joneses.⁹⁴ State Farm argued, however, that it should not be liable beyond the amount of coverage provided for in its policy with the Joneses.⁹⁵ This argument follows the general rule that a carrier's liability for refusing to defend extends only the policy limits, plus the insured's defense costs.⁹⁶ Underlying this rule is the presumption that the abandoned insured will retain other counsel.⁹⁷ If the suit against the abandoned insured results in a judgment greater than policy limits, it is thought that judgment would not have been for a lesser sum had the carrier defended.⁹⁸ Therefore, since the excess over the policy limits is not attributed to the carrier's refusal to defend, the carrier is held liable only to the extent of coverage in the policy.⁹⁹ In compliance with this rule, the *Paynter* court reduced State Farm's liability to Paynter to the maximum coverage under the Joneses' policy.¹⁰⁰

The *Paynter* court's holding that a carrier's liability for refusing to defend does not exceed policy limits has the effect of making Damron agreements less desirable to plaintiffs. If the likelihood and extent of recovery are great, and the amount of coverage in the insured's policy is small, the plaintiff will naturally be reluctant to execute a Damron agreement insulating the insured from personal liability, knowing that

94. 122 Ariz. at 200, 593 P.2d at 950.

95. *Id.* at 204, 593 P.2d at 954.

96. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 536 F.2d 730, 736 (7th Cir. 1976); *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 659, 328 P.2d 198, 201 (1958); *Mannheimer Bros. v. Kansas Cas. & Sur. Co.*, 149 Minn. 482, 486, 184 N.W. 189, 191 (1921). The carrier's obligation to reimburse the insured's defense costs does not depend on the outcome of the trial determining the insured's liability, but only upon whether there is coverage under the policy for the plaintiff's claim. *Employers' Liab. Assurance Corp. v. Youngiogheny & Ohio Coal Co.*, 214 F.2d 418, 422 (8th Cir. 1954). The costs of an appeal are also recoverable from the insurer. *Frankfort v. Lafayette Tel. Co.*, 129 N.E. 329, 331 (Ind. 1920).

97. *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 659, 328 P.2d 198, 201 (1958).

98. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 536 F.2d 730, 736 (7th Cir. 1976).

99. *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 659, 328 P.2d 198, 201 (1958). The rule that liability cannot exceed coverage under the policy should not be interpreted as absolute. One court has held that if the carrier gives notice of its refusal to defend too late for its insured to prepare a defense, the carrier may be liable for the entire default judgment, notwithstanding the policy limits. *Thomas v. Western World Ins. Co.*, 343 So. 2d 1298, 1302 (Fla. Dist. Ct. App. 1977). In such a case, the insured's personal liability above policy limits would be causally related to the carrier's breach. *Id.* at 1302-03. Similarly, where an abandoned insured is financially unable to retain other counsel or enter into any sort of settlement with the plaintiff, the carrier's breach could likewise be characterized as directly responsible for the personal liability of the insured on a judgment exceeding coverage in the policy.

In contrast to a wrongful refusal to defend, policy limits do not restrict a carrier's liability for breach of its duty to settle. An insurer who assumes the defense of its insured but unjustifiably refuses a reasonable settlement offer is deemed to have breached the policy's implied covenant to consider in good faith the interests of the insured. *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 659, 328 P.2d 198, 201 (1958). Since a bad faith refusal to settle directly subjects the policyholder to the risk of increased personal liability for amounts beyond the policy's coverage limits, the insurer's breach renders it liable for the entire judgment entered against its insured. See *Johansen v. California State Auto. Ass'n Inter-Ins. Bureau*, 15 Cal. 3d 9, 12, 538 P.2d 744, 746, 123 Cal. Rptr. 288, 290 (1975); *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 660, 328 P.2d 198, 202 (1958); *Critz v. Farmers Ins. Group*, 230 Cal. App. 2d 788, 793, 41 Cal. Rptr. 401, 403 (1964).

100. 122 Ariz. at 204, 593 P.2d at 954.

the carrier's liability is limited by the policy. Instead, the plaintiff will opt for trial and execute any resulting judgment against the insured.

Conclusion

Damron agreements provide the insured with an opportunity to limit his personal liability and avoid the expense of defending a suit. After execution of a Damron agreement, the protected insured may, with apparent impunity, simply admit liability or default. While the possible consequences of Damron agreements for the carrier may appear unfair, the consequences of the carrier's breach of its duty to defend may be devastating for an insured. Since options other than to defend or not defend are available to a carrier uncertain of its defense obligations, the Damron agreement is a justifiable remedy for the abandoned insured.

Mike Shiel

B. FIRST PARTY INSURER BAD FAITH ARRIVES IN ARIZONA

In *Noble v. National American Life Insurance Co.*,¹ the Arizona Court of Appeals recognized a cause of action in tort for an insurer's bad faith refusal to pay a claim of its own insured.² The court reasoned that in every insurance contract there is a duty of good faith and fair dealing imposed upon the insurer.³ A breach of this duty is tortious.⁴ Consequently, an insured may recover all compensatory damages arising from the insurer's breach.⁵

The National American Life Insurance Company insured Ms. Noble against surgical and hospital expenses arising out of sickness.⁶ In January of 1975, Ms. Noble had surgery which resulted in expenses of \$1,503.53.⁷ The insurance company declined to pay Ms. Noble's claim, whereupon she filed suit.⁸ A breach of contract claim was dismissed.⁹ Ms. Noble then alleged that defendant insurer breached an implied-in-law duty of good faith and fair dealing, which entitled her to recover

1. No. C-332454 (Ariz. Ct. App. June 28, 1979).

2. *Id.* slip. op. at 1.

3. *Id.* at 3.

4. *Id.* at 6.

5. *Id.* at 5-6.

6. *Id.* at 1.

7. *Id.* at 2.

8. *Id.*

9. *Id.*

compensatory damages in the amount of \$50,000.¹⁰ Ms. Noble claimed that because of National American's breach of its duty to pay her just claim, she had become indebted to doctors, threatened with law suits, had her credit rating jeopardized, and had suffered severe anxiety, emotional distress, and physical injuries which had necessitated additional medical treatment.¹¹ After the trial court dismissed the tort claim,¹² the Arizona Court of Appeals reversed.¹³ The court acknowledged a cause of action in tort for a bad faith refusal of an insurer to pay a claim of its own insured.¹⁴

The casenote will explain the development in Arizona and other jurisdictions of the action in tort for a breach of an insurer's duty of good faith and fair dealing and the policy considerations that led to that development. The duty and remedies pertaining to this tort will also be discussed. Particular consideration will be paid to an insured's right to damages for mental distress in cases of an insurer's bad faith refusal to pay claims.

Development of the Tort of Bad Faith

Before the tort of bad faith was applied to breaches of insurance contracts, damages recoverable for an insurer's delay or refusal to pay a claim of its own insured were restricted to those obtainable in a breach of contract action.¹⁵ Recovery for the breach of an insurance contract was generally limited to the benefits due under the policy plus interest.¹⁶ Thus, when an insured suffered consequential property losses

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 1.

15. 16 J. APPLEMAN, *INSURANCE LAW & PRACTICE* § 8881, at 633-35 (1968).

16. See Savage, *The Availability of Excess Damages for Wrongful Refusal to Honor First Party Insurance Claims—An Emerging Trend*, 45 *FORDHAM L. REV.* 164, 167 (1976). In an action for breach of contract, three limitations restrict recovery of special or consequential damages. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 12.3, at 798 (1973). First, special damages must be proven to have been caused by the contract breach. *Id.* Second, they must be proven with reasonable certainty. *Id.* Third, the damages must have been within the contemplation of the parties at the time they contracted. *Id.* It is clear that what is foreseeable in a tort case may not be foreseeable in a contract case. A plaintiff may be able to recover for a given item of damage on the ground that it is foreseeable in tort, but may be denied that same item of damage if he sues in contract. *Id.* at 804. See *Hadley v. Baxendale*, 9 Exch. 341, 354, 156 Eng. Rep. 145, 151 (1854). For example, it is foreseeable that an insured might suffer economic loss and mental distress when his insurer refuses to pay under a policy. The specific consequences of the insurers breach, however, such as the foreclosure of a home, are not necessarily foreseeable. Thus, under the strict rule of foreseeability enunciated in *Hadley*, consequential damages for the loss of the home are unavailable. See Savage, *supra* at 167.

Damages for mental distress resulting from pecuniary losses encountered when a contract is breached are not recoverable in a breach of contract action. *Seidenbach's Inc. v. Williams*, 361 P.2d 185, 187 (Okla. 1961). This traditional view is illustrated by *RESTATEMENT OF CONTRACTS* § 341 (1932):

In actions for breach of contract, damages will not be given as compensation for mental suffering, except where the breach . . . was the wanton or reckless breach of a contract to

and emotional distress arising from the insurer's breach, contract law did not provide an effective means for him to redress his injuries. Consequently, many policyholders have looked to tort law as an alternative. Recoveries for an insurer's bad faith handling of an insured's claim have been based on such tort theories as fraud,¹⁷ intentional infliction of emotional distress,¹⁸ and intentional interference with a protected property interest.¹⁹ The tortious breach of the duty of good faith and fair dealing, however, offers the most promising theory of recovery to the insured.²⁰

In every insurance contract there is an implied-in-law covenant of good faith and fair dealing to the effect that neither party will do anything that will injure the right of the other to receive the benefits of the

render a performance of such a character that the defendant had reason to know when the contract was made that the breach would cause mental suffering for reasons other than mere pecuniary loss.

Therefore, in a contract action, damages for mental distress were denied even though there was a conscious neglect to perform a contractual duty. The *Restatement* recognized that poverty or bankruptcy arising out of a breach of contract might cause severe suffering, but for the mental distress so caused, no compensatory damages were to be given. *Id.* Comment a.

Punitive damages are also not available in a breach of contract action, no matter how malicious or wilful the breach. *Croghan v. Metz*, 47 Cal. 2d 398, 405, 303 P.2d 1029, 1033 (1956); *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 400, 89 Cal. Rptr. 78, 92 (1970).

17. See *Wetherbee v. United Ins. Co. of America*, 265 Cal. App. 2d 921, 931, 71 Cal. Rptr. 764, 769 (1968). The case involved a woman in her late fifties who had purchased a disability policy. *Id.* at 925, 71 Cal. Rptr. at 766. The insurer wrote her a letter assuring her that her policy could not be terminated if she became disabled. *Id.* The court held that defendant's fraudulent intent not to live up to its representations in its letter could be inferred from its subsequent discontinuance of benefits. *Id.* at 932, 71 Cal. Rptr. at 770.

18. See *Eckenrode v. Life of Am. Ins. Co.*, 470 F.2d 1, 4 (7th Cir. 1972); *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 401, 89 Cal. Rptr. 78, 93 (1970); *Amsden v. Grinnel Mut. Reinsurance Co.*, 203 N.W. 2d 252, 254 (Iowa 1972). In *Fletcher*, the court permitted an insured to assert a cause of action alleging intentional infliction of emotional distress. *Id.* at 401, 89 Cal. Rptr. at 93. The court stated, however, that the policyholder must prove the standard *prima facie* case for the tort of intentional infliction of emotional distress. These elements are: (1) Outrageous conduct by the defendant; (2) the defendant's intention of causing, or reckless disregard of the probability of causing, emotional distress; (3) the plaintiff's suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. *Id.* at 394, 89 Cal. Rptr. at 88.

19. See *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 401, 89 Cal. Rptr. 78, 93 (1970) (insurer's bad faith refusal to make payments under a policy constitutes a tortious interference with a protected property interest of the insured). The tort for interference with a protected property interest is usually enforced upon strangers who interfere with the property rights of others. *Id.* at 403, 89 Cal. Rptr. at 94. The *Fletcher* court, however, in analogizing the interference with protected property to the interference with contractual relations, stated that insurers who interfere with property rights of an insured may be liable even though they were not strangers to the insured. *Id.* The Court saw no reason why insurers who interfere with an insured's property should be held to a lower standard of care than would a stranger. *Id.* at 403, 89 Cal. Rptr. at 94-95.

20. Not only is this tort the simplest to plead and prove, it also allows recovery of all consequential and possibly punitive damages. See J. MCCARTHY, PUNITIVE DAMAGES IN BAD FAITH CASES § 3.37, at 230 (2d ed. 1978). The other tort theories have been unsatisfactory for various reasons. Fraud is only applicable to insurer misrepresentation and does not cover subsequent intentional bad faith breaches of the contract. *Id.* at 232. Intentional infliction of emotional distress requires findings of outrageous behavior and severe emotional distress, which are often difficult to prove. *Id.* at 231. A tort theory concerning an interference with a protected property interest has considerable potential, but has only been briefly discussed in one opinion. See *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 401-02, 89 Cal. Rptr. 78, 93-94 (1970).

agreement.²¹ A breach of this duty of good faith and fair dealing renders the insurer liable under the tort of bad faith.²² This tort was first recognized in third-party liability situations.²³ An insured could recover in tort for an insurer's bad faith refusal to settle claims brought by injured third parties.²⁴ The duty was then extended to insurers' dealings with claims of their own insured.²⁵

This extension of the duty of good faith and fair dealing to first-party insurance situations was first developed by the California courts.²⁶ In *Gruenberg v. Aetna Insurance Co.*,²⁷ the California Supreme Court held that insurers who deal in bad faith with claims of their own insureds will be liable in tort for breach of the duty of good faith and fair dealing.²⁸ This breach constituted the tort of bad faith,

21. *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 573, 510 P.2d 1032, 1036, 108 Cal. Rptr. 480, 484 (1973); *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 429, 426 P.2d 173, 176, 58 Cal. Rptr. 13, 16 (1967); *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 658, 328 P.2d 198, 200 (1958).

22. *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 573, 510 P.2d 1032, 1036, 108 Cal. Rptr. 480, 484 (1973); *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 430, 426 P.2d 173, 177, 58 Cal. Rptr. 13, 17 (1967); *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 658, 328 P.2d 198, 200 (1958).

23. See *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 430, 426 P.2d 173, 177, 58 Cal. Rptr. 13, 17 (1967); *Comunale v. Traders & General Ins. Co.*, 50 Cal. 2d 654, 658, 328 P.2d 198, 200 (1958). Third party insurance refers to policies that protect the insured against liability for injury to the person or property of a third person. See *Savage*, *supra* note 16, at 164 n.1. First party insurance refers to policies that indemnify the insured for a person loss he has sustained. *Id.*

24. See *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 430, 426 P.2d 173, 177, 58 Cal. Rptr. 13, 17 (1967).

25. See *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 573, 510 P.2d 1032, 1036, 108 Cal. Rptr. 480, 484 (1973).

26. Before 1973, a few California cases acknowledged the duty of good faith and fair dealing in the first party insurance context, although none recognized a tort for a breach of such a duty. In *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970), the court discussed in dicta the duty of good faith and fair dealing in the first party insurance context. *Id.* at 401, 89 Cal. Rptr. at 93. The insurer was held liable, however, under a finding of intentional infliction of emotional distress. *Id.* *Fletcher* was followed by *Richardson v. Employer's Liab. Assurance Corp.*, 25 Cal. App. 3d 232, 102 Cal. Rptr. 547 (1972). In *Richardson* the duty of good faith was breached when an insurer took the position that policy claims under an uninsured motorist provision were to be paid "only as a last resort." *Id.* at 237, 102 Cal. Rptr. at 550. The *Richardson* case did not strictly involve a first-party claim since the company "stood in the shoes" of the uninsured motorist.

27. 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).

28. *Id.* at 575, 510 P.2d at 1038, 108 Cal. Rptr. at 486. Jerome Gruenberg owned a restaurant and cocktail lounge. He was insured for fire loss by three insurance companies. *Id.* at 570, 510 P.2d at 1034, 108 Cal. Rptr. at 482. On November 9, 1969 the restaurant and lounge were destroyed by fire. *Id.* A few days later an adjuster for the companies told an arson investigator of the excessive insurance coverage. *Id.* In essence, the insurers encouraged the bringing of arson charges against the insured. Mr. Gruenberg was subsequently arrested and charged with arson and defrauding an insurer. *Id.* Aetna demanded that Gruenberg submit to an examination under oath required under the policy. *Id.* Mr. Gruenberg was advised by his attorney not to make any statement concerning the fire while criminal charges were pending. *Id.* at 571, 510 P.2d at 1035, 108 Cal. Rptr. at 483. The magistrate subsequently dismissed the charges. *Id.* After the dismissal, Mr. Gruenberg offered to appear for the examination. *Id.* Aetna refused to pay his claim because they stated his earlier failure to appear for the exam had released them of their duty to honor the claim. *Id.* As a result of Aetna's failure to pay, Gruenberg suffered substantial economic losses and considerable emotional distress. *Id.* at 572, 510 P.2d at 1035, 108 Cal. Rptr. at 483. The court determined that the company's actions gave rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing. *Id.* at 575, 510 P.2d at 1038, 108 Cal. Rptr. at 486.

notwithstanding the fact that it also constituted a breach of contract.²⁹ The court stated that the duty to accept reasonable settlements offered by third party claimants, and the duty not to unreasonably withhold insured's payments due under the policy, were merely "two different aspects of the same duty."³⁰

This duty of good faith and fair dealing emanates from the insurance contract but is completely separate from any contractual duties imposed upon the parties.³¹ The tort and contractual duties both arise from the contract but they are independent of each other.³² Therefore, even if an insured breaches his contractual duties, absent rescission of the contract, the tort duty of good faith and fair dealing will still be imposed upon the insurer.³³ The *Gruenberg* court differentiated the tort of bad faith from intentional infliction of emotional distress by holding that under the former the insurer's act need not be "outrageous"³⁴ nor the insured's mental distress "severe."³⁵

After *Gruenberg* the tort of bad faith was recognized in the first-party insurance context by subsequent cases in California³⁶ and other jurisdictions.³⁷ Some states, however, refuse to recognize actions in tort for an insurer's bad faith refusal to pay first-party insurance claims.³⁸ Still other jurisdictions have developed statutes that compensate the insured for an insurer's refusal to pay a valid claim.³⁹ These statutes

29. *Id.* at 575, 510 P.2d at 1038, 108 Cal. Rptr. at 486.

30. *Id.* at 573, 510 P.2d at 1037, 108 Cal. Rptr. at 485.

31. *Id.* at 578, 510 P.2d at 1040, 108 Cal. Rptr. at 488.

32. *Id.*

33. *Id.*

34. *Id.* at 579, 510 P.2d at 1040-41, 108 Cal. Rptr. at 488-89.

35. *Id.* at 580 n.10, 510 P.2d at 1042 n.10, 108 Cal. Rptr. at 490 n.10.

36. *See, e.g.*, *Egan v. Mutual of Omaha Ins. Co.*, 598 P.2d 452, 456, 157 Cal. Rptr. 482, 486 (1979); *Silberg v. California Life Ins. Co.*, 11 Cal. 3d 452, 460, 521 P.2d 1103, 1109, 113 Cal. Rptr. 711, 717 (1974) (custom of insurance industry that disability payments were denied until workmens compensation claim became final, held to violate insurer's duty of good faith and fair dealing); *Merlo v. Standard Life & Accident Ins. Co.*, 59 Cal. App. 3d 5, 12, 130 Cal. Rptr. 416, 421 (1976) (insured collected compensatory damages because insurer's failure to pay on time caused him to lose his mortgage and his home).

37. *See, e.g.*, *Escambia Treating Co. v. Aetna Ins. Co.*, 421 F. Supp. 1367, 1370 (N.D. Fla. 1976); *Grand Sheet Metal Prod. Co. v. Protection Mut. Ins. Co.*, 34 Conn. Supp. 46, 48, 375 A.2d 428, 430 (1977); *Ledingham v. Blue Cross Plan for Hosp. Care of Hosp. Serv. Corp.*, 29 Ill. App.3d 339, 350, 330 N.E.2d 540, 548 (1975), *rev'd on other grounds*, 64 Ill. 2d 338, 356 N.E.2d 75 (1976); *United States Fidelity and Guar. Co. v. Peterson*, 91 Nev. 617, 620, 540 P.2d 1070, 1071 (1975); *Chavez v. Chenoweth*, 89 N.M. 423, 429, 553 P.2d 703, 709 (1976); *Christian v. American Home Assurance Co.*, 577 P.2d 899, 904 (Okla. 1978).

38. *See, e.g.*, *Merrin Jewelry Co. v. St. Paul Fire & Marine Ins. Co.*, 301 F. Supp. 479, 481 (S.D.N.Y. 1969) (court disallowed an action in tort even when insurer willfully attempted to avoid its obligations under the contract); *Lawton v. Great Southwest Fire Ins. Co.*, 118 N.H. 607, 614, 392 A.2d 576, 581 (1978) (court recognized some recovery in excess of the benefits due under the policy by the way of contract, but did not allow any claim in tort for first-party situations); *Farris v. United States Fidelity & Guar. Co.*, 284 Or. 453, 465, 587 P.2d 1015, 1021 (1978) (court refused to recognize any action in tort for the breach of a first-party insurance contract).

39. *See, e.g.*, GA. CODE ANN. § 56-1206 (1977); KAN. STAT. ANN. § 40-256 (1973); OR. REV. STAT. § 763.114 (1953). *See generally* Keintz & Mann, *Extra-Contract Damages for Breach of Insurance Contracts: The Statutory Approach*, 1978 INS. L.J. 7

award attorney fees and/or penalty fees for an insurer's bad faith refusal or delay to pay a valid first-party insurance claim.⁴⁰

Prior to *Noble*, Arizona did not recognize a tort action for the bad faith refusal of an insurer to pay a claim of its own insured.⁴¹ The Arizona courts, however, had recognized insurers' liability for bad faith actions in settling third-party liability claims.⁴² The *Noble* opinion stated that a cause of action in tort would now exist in Arizona for an insurer's bad faith refusal to pay an insured's claims.⁴³ The *Noble* court applied and adopted California case law.⁴⁴ Consequently, it appears that Arizona is adopting California authority for all facets of the insurance tort of bad faith.

Policy Considerations Surrounding the Tort of Bad Faith

The roots of the emerging tort of bad faith refusal to pay valid first-party insurance claims are laced with strong policy considerations. These policy considerations support the imposition upon an insurer of an implied-in-law duty of good faith and fair dealing to pay claims of its own insured. This duty is necessitated by the economic and social realities of the insured-insurer relationship. Economically, American society is based on contract bargaining. The bulk of insurance contracts, however, are conducted with an inequality in bargaining power.⁴⁵ The financial power of the insurer and the substantial need for insurance by the insured, combine to create a great disparity of bargaining abilities between the two.⁴⁶ Due to the insured's weak bargaining position, the relationship he has with his insurer has been

40. See generally authorities cited note 39 *supra*.

41. *Noble v. National Am. Life Ins. Co.*, slip op. at 4. *But c.f.*, *John Hancock Mut. Ins. Co. v. McNeill*, 27 Ariz. App. 502, 508, 556 P.2d 803, 809 (1976) (court did not award damages in excess of the benefits due under the policy, but it did state in dicta that such a recovery may have been possible had plaintiff alleged the tort of bad faith failure to pay reasonable claims); *Stephen v. Allstate Ins. Co.*, 26 Ariz. App. 367, 368-69, 548 P.2d 1179, 1180-81 (1976) (court noted that unreasonable behavior by an insurer might justify damages separate and apart from any express coverage of the policy).

42. See *Parsons v. Continental Nat'l Am. Group*, 113 Ariz. 223, 229, 550 P.2d 94, 100 (1976); *General Accident Fire & Life Assurance Corp. v. Little*, 103 Ariz. 435, 439, 443 P.2d 690, 694 (1968); *Farmers Ins. Exch. v. Henderson*, 82 Ariz. 335, 341, 313 P.2d 404, 408 (1957). Prior to *Noble*, Arizona courts only recognized a few situations where a breach of contract could also constitute a tort. The cases allowing tort actions for breach of contract mostly involved common carriers and other public service corporations. See *McClure v. Johnson*, 50 Ariz. 76, 85, 69 P.2d 573, 577 (1937) (common carrier held liable for negligence independent of the contract duty); *Central Ariz. Light & Power Co. v. Bell*, 49 Ariz. 99, 104, 64 P.2d 1249, 1251 (1937) (gas company held liable in tort as well as contract when its equipment exploded injuring plaintiff).

43. Slip op. at 1.

44. *Id.* at 3, 6 (citing *Silberg v. California Life Ins. Co.*, 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974) and *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973) for the authority that an action in tort would lie for an insurer's bad faith refusal to make payments to its own insured).

45. *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 404, 89 Cal. Rptr. 78, 95 (1970).

46. *Id.*

considered one of a special nature.⁴⁷ Cases that invoke the implied duty of good faith and fair dealing have recognized this unequal yet special relationship between insurer and insured.⁴⁸ The inequality and need for protection within the relationship is especially acute when the insurance is for health or disability,⁴⁹ as was the case in *Noble*.⁵⁰ When the insured with health or disability coverage makes his claim, he is especially vulnerable to oppressive tactics on the part of the economically powerful insurer.⁵¹ It is in these situations that the insured is in the weakest physical and financial condition. Due to the insured's medical bills and physical condition he is particularly sensitive to pressure exerted by an insurer attempting to force a settlement smaller than what is due under the policy.

Apart from the nature of the insurer-insured relationship, the insurance business is one of a quasi-public nature⁵² where policyholders rely upon the insurer's implied-in-law covenant of good faith and fair dealing. Each insurance contract is affected with a public interest.⁵³ Consumers depend upon insurance companies to protect themselves and their families against monetary losses. It is this public dependence and trust that justify the imposition of the duty of good faith and fair dealing upon insurers.⁵⁴ People do not contract to obtain commercial advantages, but to protect themselves against the risks of accidental losses and to protect against the emotional distress that occurs after a noncompensated loss.⁵⁵

The duties imposed upon an insurer as a result of its relationship with its insured have been analogized to the special obligations of public utilities and other enterprises affected with the public interest.⁵⁶ Special liability is imposed upon insurers as it is upon other public utilities in order to encourage fair treatment of the public whom these en-

47. *See id.*; *Christian v. American Home Assurance Co.*, 577 P.2d 899, 902 (Okla. 1978).

48. *See Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 404, 89 Cal. Rptr. 78, 95 (1970); *Christian v. American Home Assurance Co.*, 577 P.2d 899, 902 (Okla. 1978).

49. *See cases cited note 48 supra.*

50. Slip. op. at 1.

51. *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 404, 89 Cal. Rptr. 78, 95 (1970).

52. *Id.* at 403, 89 Cal. Rptr. at 95. The insurance industry is quasi-public in nature due to the necessity of insurance and the vast number of insureds. *See generally* Comment, *Good Faith and Fair Dealing in Insurance Contracts: Gruenberg v. Aetna Insurance Co.*, 25 HASTINGS L.J. 699, 707 (1974).

53. *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 403, 89 Cal. Rptr. 78, 95 (1970).

54. *See id.*; *Christian v. American Home Assurance Co.*, 577 P.2d 899, 902 (Okla. 1978).

55. *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 434, 426 P.2d 173, 180, 58 Cal. Rptr. 13, 19 (1967).

56. *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 403, 89 Cal. Rptr. 78, 95 (1970). Special liability can be imposed upon common carriers and innkeepers because a breach of contract by them is likely to cause serious emotional disturbance. *See* RESTATEMENT (SECOND) OF CONTRACTS § 367 (Tent. Draft No. 14, 1979).

terprises serve.⁵⁷ This line of reasoning was specifically utilized by the Arizona Court of Appeals in *Noble* where the court noted that public interest was as highly implicated in insurance contracts as in contracts with common carriers and public utilities.⁵⁸ The public interest inherent in insurance contracts was held by the *Noble* court to justify the availability of a tort action for an insurer's bad faith refusal to pay a claim of its own insured.⁵⁹

The Duty of the Insurer

The duty of good faith and fair dealing has been characterized in California as an "implied covenant" that "neither party [would] injure the right of the other to receive the benefits of the agreement."⁶⁰ Many different terms have been used to describe what is meant by bad faith in the context of an insurer's refusal to pay claims of its insured.⁶¹ The terms defining bad faith that seem to be the easiest for courts to apply are either a refusal of an insurer to pay "without proper cause"⁶² or payment "withheld unreasonably."⁶³

The duty of good faith and fair dealing imposed upon insurers is not one that can be precisely analyzed. Good faith or a breach thereof must be determined under the facts of each case.⁶⁴ As in all tort actions, the determination of reasonableness or bad faith is ultimately one of degree. The jury must decide what degree of insurer misconduct will not be tolerated in much the same way it determines the reasonably prudent person standard in negligence cases.⁶⁵

The *Noble* opinion did not state any precise standard or guidelines for subsequent Arizona courts to follow in determining bad faith on the part of the insurer. In Arizona, therefore, it appears that the general duty of good faith and fair dealing imposed upon insurers will be interpreted on a case-by-case basis.⁶⁶

57. See *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 404, 89 Cal. Rptr. 78, 95 (1970); RESTATEMENT (SECOND) OF TORTS § 48 (1965).

58. Slip op. at 6.

59. *Id.*

60. *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 658, 328 P.2d 198, 200 (1958).

61. One such definition states that it is "any frivolous or unfounded refusal to pay; such refusal need not be fraudulent." 3 J. APPLEMAN, *supra* note 15, § 1612, at 368.

62. *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 574, 510 P.2d 1032, 1037, 108 Cal. Rptr. 480, 485 (1973); *United States Fidelity and Guar. Co. v. Peterson*, 91 Nev. 617, 620, 540 P.2d 1070, 1071 (1975); *Christian v. American Home Assurance Co.*, 577 P.2d 899, 904 (Okla. 1978).

63. *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 573, 510 P.2d 1032, 1037, 108 Cal. Rptr. 480, 485 (1973); *Grand Sheet Metal Prod. Co. v. Protection Mutual Ins. Co.*, 34 Conn. Supp. 46, 47, 375 A.2d 428, 429 (1977); *Christian v. American Home Assurance Co.*, 577 P.2d 899, 904 (Okla. 1978).

64. See Comment, *supra* note 52, at 712.

65. See W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* § 32, at 150 (4th ed. 1971).

66. See slip. op. at 3; text & notes 60-65 *supra*.

Remedies Available Under the Tort of Bad Faith

Compensatory Damages. The remedies available to insureds for a breach by an insurer of the implied-in-law duty of good faith and fair dealing vary with the jurisdiction. There are essentially three legal positions. The traditional view allows only contract law damages.⁶⁷ The only damages available to the insured is the sum that should have been paid under the policy, plus legal interest.⁶⁸ A second remedy permits recovery for all foreseeable and consequential pecuniary damages.⁶⁹ The third view is the most liberal. It permits a recovery in tort for mental distress in combination with either of the previous two types of recoveries.⁷⁰ This theory recognizes that when an insurer refuses in bad faith to settle a claim of its insured, an action can be brought in tort, separate from a contract claim.⁷¹ The general rule of damages for intentional torts is that the injured party may recover for all detriment caused whether it could have been anticipated or not.⁷² This affords the insured a full spectrum of potential damages in cases of insurer bad faith.

In situations where insurers breach the duty of good faith and fair dealing, the remedies available to insureds have been developed and analyzed most completely in California. In accordance with the general rule that damages may be recovered for all detriment caused, the California courts have allowed recovery for mental distress.⁷³ In *Gruenberg*, the court stated that an award for mental distress could be recovered in the absence of any physical injury where the tortious conduct was an interference with property rights.⁷⁴ Mental distress damages therefore, although not included in contract awards, may be recovered by an insured for a tortious breach by an insurer of the duty of good faith and fair dealing. They are a form of actual damages which must be proved as any other form of actual damages.⁷⁵ Total recovery for mental distress is preferable because if only contract damages could be recovered, insurers would be given strong incentives to

67. See text & notes 15-16 *supra*.

68. See *Savage*, *supra* note 16, at 167.

69. See *Lawton v. Great Southwest Fire Ins. Co.*, 118 N.H. 607, 613, 392 A.2d 576, 580 (1978).

70. See *Gruenberg v. Aetna Life Ins. Co.*, 9 Cal. 3d 566, 580, 510 P.2d 1032, 1041-42, 108 Cal. Rptr. 480, 489-90 (1973) (plaintiff was entitled to recover for all detriment proximately resulting from the tortious breach including economic loss and emotional distress).

71. *Id.* at 575, 510 P.2d at 1038, 108 Cal. Rptr. at 486.

72. *Id.* at 579, 510 P.2d at 1041, 108 Cal. Rptr. at 489.

73. See *Merlo v. Standard Life and Accident Ins. Co.*, 59 Cal. App. 3d 5, 16, 130 Cal. Rptr. 416, 423 (1976); *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 579, 510 P.2d 1032, 1041, 108 Cal. Rptr. 480, 489 (1973).

74. 9 Cal. 3d at 579, 510 P.2d at 1041, 108 Cal. Rptr. at 489.

75. *Merlo v. Standard Life and Accident Ins. Co.*, 59 Cal. App. 3d 5, 16, 130 Cal. Rptr. 416, 423 (1976) (insureds were entitled to recover compensatory damages for all their detriment resulting from the tortious breach including economic loss as well as emotional distress).

contest and delay claims brought by insureds.⁷⁶ The policy behind awarding recoveries for mental distress is to pressure insurers to contest claims only when they have just cause to do so.

Presently, in most jurisdictions, including California, damages for mental distress are recoverable under three aspects of tort law: (1) Negligence, (2) the tort of bad faith and some other intentional torts, and, considered separately, (3) intentional infliction of emotional distress.⁷⁷ The amount of corroborative evidence required to recover damages for mental distress varies with the tort action.⁷⁸ As the foreseeability of emotional distress increases, the need for a corroborative guaranty decreases.⁷⁹ Under a negligence theory, severe emotional distress evidenced by concurrent or resulting physical injury is required.⁸⁰ For intentional infliction of emotional distress, however, although the prima facie case must be met, there is no corroborative guaranty needed other than severe emotional distress.⁸¹ Requiring a guaranty between these two extremes, the tort of bad faith, like other intentional torts, requires that other substantial damages exist before an insured can recover for emotional distress.⁸² Either physical injuries or property losses would substantiate the legitimacy of an insured's mental distress claim in an intentional tort action.⁸³

The California Supreme Court observed in *Crisci v. Security Insurance Co.*⁸⁴ that the reason for excluding mental distress damages is to bar fictitious claims and trivialities.⁸⁵ The court held that where an insurer's misconduct causes substantial damages apart from those due to mental distress, the danger of a fictitious emotional distress claim is

76. See Note, *Damages for Mental Suffering Caused By Insurers: Recent Developments in the Law of Tort and Contract*, 48 NOTRE DAME LAW. 1303, 1312 (1973). If all that insureds stand to lose is the benefits due under the policy plus interest, insurers may well choose to take a chance and contest a valid claim. *Id.*

77. See Parks & Heil, *The Tort of Bad Faith—The Impact of Gruenberg v. Aetna Insurance Co.*, 24 FED. INS. COUNS. Q. 3, 14 (1974).

78. *Id.*

79. *Id.*

80. Valley Nat'l Bank v. Brown, 110 Ariz. 260, 265, 517 P.2d 1256, 1261 (1974); Logan v. St. Luke's Gen. Hosp., 65 Wash. 2d 914, 915, 400 P.2d 296, 296 (1965); Gadbury v. Bleitz, 133 Wash. 134, 136, 233 P. 299, 299 (1925). A requirement of accompanying physical injury is needed to weed out fraudulent and frivolous negligence claims which allege mental distress. W. PROSSER, *supra* note 65, § 54, at 328-30.

81. Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 396-97, 89 Cal. Rptr. 78, 90 (1970); Bennett v. City Nat'l Bank and Trust Co., 549 P.2d 393, 398 (Okla. Ct. App. 1975). With intentional infliction of emotional distress there is no need for a guaranty because the prima facie case requires outrageous conduct by an insurer calculated to inflict such emotional distress. See W. PROSSER, *supra* note 65, § 12, at 49.

82. See Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 579, 510 P.2d 1032, 1041, 108 Cal. Rptr. 480, 489 (1973); Crisci v. Security Ins. Co., 66 Cal. 2d 425, 434, 426 P.2d 173, 179, 58 Cal. Rptr. 13, 19 (1967).

83. See cases cited note 82 *supra*.

84. 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

85. *Id.* at 434, 426 P.2d at 179, 58 Cal. Rptr. at 19.

greatly reduced.⁸⁶ The California judiciary analogized the facts of *Crisci* to older cases that awarded damages for mental distress in situations where the only tortious conduct was an interference with property rights.⁸⁷ Thus the *Crisci* court awarded damages for mental distress for the breach of an insurance contract that was accompanied by "substantial damages apart from those due to mental distress."⁸⁸

If the claim is substantial, it is not clear whether benefits due under the policy alone will be held to constitute other substantial damages. The insured may argue that mental distress awards should be recoverable even when no consequential property losses are incurred because such coverage was purchased for protecting one's peace of mind and security. It seems reasonable, however, to require some proof of damages beyond the contract, such as ensuing property losses, in order to guaranty the genuineness of the insured's mental distress claim. For example, although aggravation may occur, normally no substantial mental distress will be caused by a simple breach of contract that causes no consequential losses. If the breach of contract causes another party to lose his home or other property, however, then it is quite probable that such person will suffer genuine mental distress. In that situation, a mental distress claim should be accepted.

The *Noble* court adopted the view that an action would lie in tort for full compensatory damages: all foreseeable and consequential damages resulting from an insurer's breach of the duty of good faith and fair dealing.⁸⁹ Possible recoveries include those for consequential pecuniary losses⁹⁰ and awards for mental distress.⁹¹ It seems logical that the Arizona judiciary will continue to follow the California courts. Arizona practitioners should therefore be aware that mental distress damages will probably not be recovered unless the insured suffers consequential losses in addition to his contract loss. The amount and gravity of damages, apart from the contract required to verify a mental distress claim, will be a variable which must be determined in each particular case.

86. *Id.*

87. *Id.* See *Acadia Cal. Ltd. v. Herbert*, 54 Cal. 2d 328, 337, 353 P.2d 294, 299, 5 Cal. Rptr. 686, 691 (1960) (mental suffering award was allowed when plaintiff's water supply was shut off); *Korniff v. Kingsburg Cotton Oil Co.*, 45 Cal. 2d 265, 273, 288 P.2d 507, 512 (1955) (damages for discomfort and annoyance were allowed for the nuisance of defendant's cotton gin mill); *Herzog v. Grosso*, 41 Cal. 2d 219, 226, 259 P.2d 429, 433 (1953) (discomfort and annoyance damages were allowed when defendant forced plaintiff to use a dangerous easement).

88. 66 Cal. 2d at 434, 426 P.2d at 179, 58 Cal. Rptr. at 19. The damages suffered by Mrs. Crisci included: (1) A loss of \$22,000 and 40% interest in an apartment building; (2) she became indigent and was forced to work as a babysitter, all of which resulted in her declining health and attempted suicide. *Id.* at 429, 426 P.2d at 176, 58 Cal. Rptr. at 16.

89. Slip op. at 5-6.

90. *Id.*

91. *Id.*

Punitive Damages. In a breach of contract action most jurisdictions deny punitive damages regardless of the wilfulness, maliciousness, or fraudulent manner of the breach.⁹² Punitive damages in tort cases, however, are recoverable in almost all jurisdictions in order to deter conduct characterized as malicious, oppressive, or wanton.⁹³ The California courts have made it clear that without "oppression, fraud, or malice" by the insurer, punitive damages will not be awarded for an insurer's tortious breach of the duty of good faith and fair dealing.⁹⁴ The insurance company must act with the intent to vex, injure, annoy, or act with a complete and conscious disregard of the insured's rights.⁹⁵ Proof of a violation of the duty of good faith and fair dealing, without more, does not establish that the insurer acted with the requisite intent to injure the insured.⁹⁶ Indiana courts, however, have stated that malicious intent may be inferred from the circumstances of the case.⁹⁷ If the insured's claim is such that an insurer could not, in good faith, dispute its validity the court may reasonably infer oppressive conduct from the insurer's refusal to pay the claim.⁹⁸ Punitive damages could then be awarded to the insured.⁹⁹

Arizona adopted the tort of bad faith from California, so it seems reasonable that the state will also conform to California's requirements for the recovery of exemplary damages. Therefore, Arizona will likely deny recovery of punitive damages under the tort of bad faith without some showing by the insured of oppression, fraud, or malice on the part of the insurer.

92. See, e.g., *Otto v. Imperial Cas. & Indem. Co.*, 277 F.2d 889, 893 (8th Cir. 1960); *McDowell v. Union Mut. Life Ins. Co.*, 404 F. Supp. 136, 145 (C.D. Cal. 1975); *Continental Nat'l Bank v. Evans*, 107 Ariz. 378, 382, 489 P.2d 15, 19 (1971); *Liberty Mut. Ins. Co. v. Coburn*, 132 Ga. App. 859, 861, 209 S.E.2d 655, 657 (1974).

93. See, e.g., *Walbrun v. Berkel, Inc.*, 433 F. Supp. 384 (E.D. Wis. 1976); *Acheson v. Shafter*, 107 Ariz. 576, 578, 490 P.2d 832, 834 (1971); *Henderson v. Security Nat'l Bank*, 72 Cal. App. 3d 764, 771-72, 140 Cal. Rptr. 388, 392 (1977); *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 407, 89 Cal. Rptr. 78, 98 (1970).

94. *Silberg v. California Life Ins. Co.*, 11 Cal. 3d 452, 462, 521 P.2d 1103, 1110, 113 Cal. Rptr. 711, 718 (1974); *Merlo v. Standard Life and Accident Ins. Co.*, 59 Cal. App. 3d 5, 20, 130 Cal. Rptr. 416, 426 (1976); *Beck v. State Farm Mut. Auto. Ins. Co.*, 54 Cal. App. 3d 347, 355, 126 Cal. Rptr. 602, 607 (1976).

95. *Silberg v. California Life Ins. Co.*, 11 Cal. 3d 452, 462, 521 P.2d 1103, 1110, 113 Cal. Rptr. 711, 718 (1974); *Beck v. State Farm Mut. Auto. Ins. Co.*, 54 Cal. App. 3d 347, 355, 126 Cal. Rptr. 602, 607 (1976); *Richardson v. Employers Liab. Assurance Corp.*, 25 Cal. App. 3d 232, 245, 102 Cal. Rptr. 547, 556 (1972).

96. See *Silberg v. California Life Ins. Co.*, 11 Cal. 3d 452, 462-63, 521 P.2d 1103, 1110, 113 Cal. Rptr. 711, 718 (1974); *Beck v. State Farm Mut. Auto. Ins. Co.*, 54 Cal. App. 3d 347, 355, 126 Cal. Rptr. 602, 607 (1976).

97. See *Sexton v. Meridian Mut. Ins. Co.*, 166 Ind. App. 529, 532, 337 N.E.2d 527, 529 (1975); *Rex Ins. Co. v. Baldwin*, 163 Ind. App. 308, 313-14, 323 N.E.2d 270, 274 (1975).

98. *Rex Ins. Co. v. Baldwin*, 163 Ind. App. 308, 313-14, 323 N.E.2d 270, 274 (1975).

99. *Id.*

Conclusion

In *Noble v. National American Life Insurance Co.*, the Arizona Court of Appeals imposed upon insurers the implied duty of good faith and fair dealing when paying first-party insurance claims. This duty requires that insurance companies neither refuse nor withhold payments to their insureds unreasonably or the insurer will be held liable under the tort of bad faith. The *Noble* court recognized the special relationship involved in the insurance contract situation and the public nature of the insurance business itself. Consequently, recovery in Arizona for the tortious breach by an insurer of the duty of good faith and fair dealing will include all consequential pecuniary damages as well as damages for mental distress. Arizona will most likely require that emotional suffering be accompanied by other substantial injury before mental distress damages will be recoverable. Punitive damages will also be available to the insured if the insurer is guilty of oppression, malice, or fraud.

This new cause of action in Arizona, recognized by *Noble*, will make insurance companies more accountable for their wrongful refusal to pay an insured's claim, and will require insurance companies to meet the reasonable expectations of the public.

Michael B. Withey

C. SELF-DEFENSE AS AN INTENTIONAL TORT

One common feature of insurance policies is a clause by which the insurer assumes liability for injuries occurring to third parties as a result of the insured's conduct. Such clauses normally specify the instances in which the insurer is not required to indemnify the insured.¹ The scope of a typical exclusion provision was considered by the Arizona Court of Appeals in *Lockhart v. Allstate Insurance Co.*²

The exclusion clause in *Lockhart* provided that the insurance company was not responsible for coverage if the injury to the third party

1. Throughout this casenote, such clauses will be identified as "intentional injury exclusion clauses." Typical exclusion clauses are found in *Butler v. Bahaeghe*, 37 Colo. App. 282, 283, 548 P.2d 934, 935 (1976) ("policy does not apply to bodily injury . . . which is either expected or intended from the standpoint of the insured" (emphasis deleted)); *Safeco Ins. Co. of America v. McKenna*, 90 N.M. 516, 518, 565 P.2d 1033, 1035 (1977) (coverage does not apply "to injury, sickness, disease, death, or destruction caused intentionally by or at the the direction of the insured" (emphasis deleted)); and *Alm v. Hartford Fire Ins. Co.*, 369 P.2d 216, 217 (Wyo. 1962) (policy does not apply "to injury, sickness, disease, death or destruction caused intentionally by or at the direction of the Insured").

2. 119 Ariz. 150, 579 P.2d 1120 (Ct. App. 1978).

was "either expected or intended from the standpoint of the Insured."³ In interpreting this provision, the court held that the exclusion provision applies to intentional injuries inflicted in self-defense.⁴ Thus, under *Lockhart*, where an insured inflicts an injury in self-defense and the insured is subsequently sued by the victim, the insurer need not defend nor indemnify the insured.⁵

In 1974, *Lockhart* was allegedly fired upon by Norman Owes.⁶ *Lockhart* returned the gunfire and Owes sustained a gunshot wound.⁷ Owes filed suit against *Lockhart*, alleging assault and battery.⁸ *Lockhart* asked the insurer, Allstate, to defend him pursuant to the terms of a homeowner's insurance policy.⁹ Allstate believed that *Lockhart's* conduct fell within the exclusion clause, but nevertheless defended him under a reservation of rights.¹⁰ Allstate then brought a declaratory judgment proceeding, seeking to resolve whether *Lockhart's* conduct was within policy coverage and whether the insurer was obligated to defend *Lockhart* in the pending tort action.¹¹

At trial, *Lockhart* testified that he had acted in self-defense and had tried to stop Owes from firing further shots.¹² Allstate moved for summary judgment on the grounds that the bodily injury inflicted by *Lockhart* was within the "expected or intended from the standpoint of the insured" exclusion of the policy.¹³ The trial court granted Allstate's motion and *Lockhart* appealed.¹⁴ The court of appeals agreed with Allstate and relieved the insurer of any obligation to defend *Lockhart*.¹⁵

This casenote will first consider Arizona's interpretation of insurance exclusion clauses. The Arizona view will then be contrasted with California's interpretation of the clauses. An analysis of the problems inherent in the Arizona view will be undertaken. Finally, the possible

3. *Id.* at 151, 579 P.2d at 1121.

4. *Id.* The court stated that "the possible legal justification of self-defense does not save an otherwise intentional act from the intentional injury exclusion." *Id.* at 152, 579 P.2d at 1122.

5. *Id.* at 153, 579 P.2d at 1123.

6. *Id.* at 152, 579 P.2d at 1122.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* Often an insurer believes that a claim by the insured is outside the terms of the policy. The insurer can protect his interest by relying upon a reservation-of-rights notice. A reservation-of-rights notice is a unilateral notice by the insurer, delivered to the insured, declaring that the insurer reserves its right to contest liability and any investigation or defense work on the claim by the insurer is not to be construed as a relinquishment of the insurer's right to contest coverage. See R. KEETON, INSURANCE LAW § 6.6(a), at 410 (1971).

11. 119 Ariz. at 151, 579 P.2d at 1121.

12. *Id.* at 152, 579 P.2d at 1122.

13. *Id.* at 151, 579 P.2d at 1121.

14. *Id.*

15. *Id.* at 152-53, 579 P.2d at 1122-23.

pleading problem created by adopting the California view will be examined.

Construction and Application of Exclusion Clauses

The issue in most exclusion clause cases is whether a specific risk or loss falls within the terms of the clause.¹⁶ If the risk or loss is within the scope of the exclusion clause, the insurer is relieved of liability for the injury.¹⁷ If the act falls outside the language of the clause, the insurer's responsibility is judged in accordance with the remaining terms of the policy.¹⁸

In interpreting exclusion clauses, courts adhere to the rule that since insurance policies are prepared by the insurer, any ambiguity is resolved against the insurer and in favor of the insured.¹⁹ The typical intentional injury clause²⁰ has been interpreted in two ways. Whereas California courts have held that the clause is ambiguous as to the duty to defend in an intentional-tort-self-defense case,²¹ *Lockhart v. Allstate Insurance Co.* held the same clause to be clear and unambiguous.²² These different interpretations will be explored in the next two sections.

16. See, e.g., *National Life Ins. Co. of United States v. Coughlin*, 72 Colo. 440, 441-42, 212 P. 486, 486 (1923); *Bourque v. Duplechin*, 331 So.2d 40, 43 (La. App. 1976); *Continental Cas. Co. v. Goodwin*, 182 Okla. 311, 312, 77 P.2d 742, 743 (1938).

17. *Clark v. Allstate Ins. Co.*, 22 Ariz. App. 601, 602-03, 529 P.2d 1195, 1196-97 (1975); *Safeco Ins. Co. of America, Inc. v. McKenna*, 90 N.M. 516, 520, 565 P.2d 1033, 1037 (1977); *Provident Life & Accident Ins. Co. v. Peace*, 75 Okla. 266, 269, 52 P.2d 769, 772-73 (1935).

18. See *Hendrix v. Employers Mut. Liab. Ins. Co.*, 98 F. Supp. 84, 86-88 (E.D.S.C. 1951); *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 271-75, 419 P.2d 168, 173-75, 54 Cal. Rptr. 104, 109-11 (1966); *Bourque v. Duplechin*, 331 So.2d 40, 42-43 (La. App. 1976).

19. See *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 269-70, 419 P.2d 168, 171-72, 54 Cal. Rptr. 104, 107-08 (1966); *Baldinger v. Consol. Mut. Ins. Co.*, 15 A.D. 2d 526, 222 N.Y.S.2d 736, 738 (1961), *aff'd*, 11 N.Y.2d 1026, 183 N.E.2d 908, 230 N.Y.S.2d 25 (1962); *General Accident, Fire & Life Assurance Corp. v. Hymes*, 77 Okla. 20, 22, 185 P. 1085, 1086 (1919).

20. See note 1 *supra*.

21. See *Gray v. Zurich Ins. Co.*, 65 Cal. App. 2d 263, 273, 419 P.2d 168, 174, 54 Cal. Rptr. 104, 110 (1966); *Walters v. American Ins. Co.*, 185 Cal. App. 2d 776, 782-83, 8 Cal. Rptr. 665, 669-70 (1960). Several other jurisdictions have held clauses which preclude policy coverage for injuries intentionally caused by the insured ambiguous on other grounds. See, e.g., *Baldinger v. Consol. Mut. Ins. Co.*, 15 A.D.2d 526, 528, 222 N.Y.S.2d 736, 738 (1961), *aff'd*, 11 N.Y.2d 1026, 183 N.E.2d 908, 230 N.Y.S.2d 25 (1962) (clause ambiguous because it did not clearly communicate an intention to exclude liability for unintended injuries caused by intentional acts). *Accord*, *Smith v. Moran*, 61 Ill. App. 2d 157, 162-63, 209 N.E.2d 18, 20-21 (1965); *Morrill v. Gallagher*, 370 Mich. 578, 588, 122 N.W.2d 687, 691 (1963).

22. 119 Ariz. at 153, 579 P.2d at 1123. Note, however, that *Lockhart* involved ambiguity in the clause only as it related to injuries inflicted in self-defense. *Id.* at 152, 579 P.2d at 1122. To the extent that an unintended injury is caused by an intentional act, Arizona follows the view expressed in *Baldinger v. Consolidated Mut. Ins. Co.*, 15 A.D.2d 526, 526, 222 N.Y.S.2d 736, 738 (1961), *aff'd*, 11 N.Y.2d 1026, 183 N.E.2d 908, 230 N.Y.S.2d 25 (1962). See note 21 *supra*. Thus, where the insured did not intend harm by his act, the insurer is not relieved of liability. *Vanguard Ins. Co. v. Cantrell*, 18 Ariz. App. 486, 489, 503 P.2d 962, 965 (1972). Note also that where the insured's intent to harm can be inferred as a matter of law, the insurer will be relieved of liability pursuant to the exclusion clause. *Clark v. Allstate Ins. Co.*, 22 Ariz. App. 601, 602, 529 P.2d 1195, 1196 (1975).

Arizona's Unambiguous View

Arizona courts have considered the scope of exclusion clauses.²³ In considering these clauses, the courts have begun with the proposition that an insurer need not indemnify nor defend a claim that falls outside of policy coverage.²⁴ Where a policy contains an intentional injury exclusion clause and the insured inflicts such an injury, claims arising from the injury need not be defended and the insured need not be indemnified.²⁵ As a result, the crucial issue in intentional-injury-exclusion-clause cases is whether the injury was intentionally caused by the insured.

Arizona has held that policy coverage should not be denied under an intentional injury exclusion clause if the insured intended the act that caused the injury, but did not intend the injury itself.²⁶ An intentional injury within the meaning of the clause may be found only if the insured intended to inflict the injury.²⁷

The situation in *Lockhart* fell within the above general rule. *Lockhart* testified that he intended to fire his rifle and that he intended to hit *Owes*.²⁸ Thus, *Lockhart* intended to injure *Owes*. It is at this point, however, that the similarity between the general rule and the

23. *Parkinson v. Farmer's Ins. Co.*, 122 Ariz. 343, 345, 594 P.2d 1039, 1041 (Ct. App. 1979); *Steinmetz v. American Ins. Co.*, 121 Ariz. 268, 270, 589 P.2d 911, 913 (Ct. App. 1978); *Vanguard Ins. Co. v. Cantrell*, 18 Ariz. App. 486, 487, 503 P.2d 962, 963 (1972).

24. *Manny v. Estate of Anderson*, 117 Ariz. 548, 550, 574 P.2d 36, 38 (1977); *Pesqueria v. Factory Mut. Liab. Ins. Co. of America*, 16 Ariz. App. 407, 412, 493 P.2d 1212, 1217 (1972); *Paulin v. Fireman's Fund Ins. Co.*, 1 Ariz. App. 408, 410, 403 P.2d 555, 557 (1965).

25. *Lockhart v. Allstate Ins. Co.*, 119 Ariz. 150, 153, 579 P.2d 1120, 1123 (Ct. App. 1978); *Clark v. Allstate Ins. Co.*, 22 Ariz. App. 601, 602-03, 529 P.2d 1195, 1196-97 (1975).

26. *Clark v. Allstate Ins. Co.*, 22 Ariz. App. 601, 602, 529 P.2d 1194, 1195 (1975); *Vanguard Ins. Co. v. Cantrell*, 18 Ariz. App. 486, 488, 503 P.2d 962, 964 (1972).

27. *Vanguard Ins. Co. v. Cantrell*, 18 Ariz. App. 486, 489, 503 P.2d 962, 965 (1972). In *Cantrell*, the defendant, while driving his car away from a liquor store, fired a shot and struck the plaintiff in the eye. *Id.* at 487, 503 P.2d at 963. The defendant testified that he had fired the shot to scare the plaintiff, but had not intended to injure him. *Id.* After being awarded a judgment of \$55,000, the plaintiff filed garnishment proceedings against *Vanguard*, the defendant's homeowner's insurance carrier. *Id.* *Vanguard* argued that the defendant's act was intentional and therefore not within the scope of policy coverage. *Id.* The *Vanguard* policy excluded "bodily injury or property damage which is either expected or intended from the standpoint of the Insured." *Id.* The trial court ruled that the defendant did not intend to injure the plaintiff although he may have intended the act of shooting. *Id.* It therefore concluded that *Cantrell's* injuries were covered by the policy. *Id.* at 488, 503 P.2d at 964. The court stated that since the exclusionary clause did not clearly exclude liability for unintentional injuries caused by deliberate acts of the insured, the insurer may not be relieved of liability where the insured's intentional act causes unintended harm. *Id.* at 488-89, 503 P.2d at 964-65.

The *Cantrell* rule was qualified by the Arizona Court of Appeals in *Clark v. Allstate Ins. Co.*, 22 Ariz. App. 601, 529 P.2d 1195 (1975). In *Clark*, the insured's son intentionally struck another person, but claimed that he had not intended to harm him. *Id.* at 602, 529 P.2d at 1196. The court, however, held that the act of striking another would be so certain to cause injury that it must be said that the person who struck the blow intended the harm. *Id.* *Clark* does not conflict with the rule in *Cantrell* that there must be an intent to injure in order for an exclusion clause to deny coverage. The *Clark* court merely held that the insured did have the requisite intent to injure, since the intentional act of the insured was certain to cause harm. *Id.* Since in such situations to act is to injure, the intent to commit the act encompasses the intent to injure.

28. 119 Ariz. at 152, 579 P.2d at 1122.

factual situation in *Lockhart* ends. Although Lockhart intended to injure Owes, he was not motivated by a desire to injure, but rather by a desire to protect himself from an aggressor.²⁹ The court was thus confronted with determining whether the absence of a motive to injure renders the act nonintentional for purposes of interpreting the exclusion clause. The *Lockhart* court clearly believed the answer to be no.³⁰

The *Lockhart* court defined "injuries intentionally caused by the insured" as injuries intended by the insured regardless of motive.³¹ This ruling reflects the court's belief that the language of the insurance policy was unambiguous. The court held that the rights and responsibilities of the parties are to be determined by looking to the strict language of the insurance contract.³² Other factors, such as the insured's expectations, were not considered by the court. The essence of the Arizona view is that an insurer need not defend an insured in an intentional tort action where the insured pleads self-defense.³³ An opposite conclusion has been reached by California courts.

The California View

California courts consider several factors in determining whether an insurer must defend in a self-defense case. First, the California courts consider the language of the insurance policy.³⁴ Second, any

29. *Id.*

30. *Id.* at 153, 579 P.2d at 1123.

31. *Id.* at 152, 579 P.2d at 1122. The court of appeals stated that the "plain and unambiguous language" of the contract excluded injury intended by the insured, regardless of motive. *Id.* at 153, 579 P.2d at 1123. The court also indicated that "[t]he question of self-defense presents an issue of motive or justification for an intentionally caused harm, but does nothing to avoid the inference of intent to harm. . . ." *Id.* at 152, 579 P.2d at 1122.

32. *Id.* at 152, 579 P.2d at 1122. The court apparently believed the word "intended" to be unambiguous, but it did not justify this conclusion. There exist a variety of possible explanations for this position. First, the court might have assumed that because factors such as motive and self-defense are not mentioned in the exclusion clause, they were meant to be excluded from consideration. This interpretation might be indicated by the court's view that the language of the policy precluded injuries intended by the insured regardless of motive. *Id.* at 153, 579 P.2d at 1123. The court may have also concluded that the words "intended by" should be construed according to their legal meaning. If this was the court's position, the court was correct in stating that the self-defense claim presents an issue of justification, but does nothing to avoid an inference of intent to harm. *Id.* at 152, 579 P.2d at 1122. Under this reasoning, once the insured's intent to inflict injury is established, the exclusion clause is applicable and the insurer has no duty to defend.

33. *Id.* at 152, 153, 579 P.2d at 1122, 1123. It is unclear from the *Lockhart* decision whether the insurer would have had a duty to defend if the insured had answered that the injuries were not intentionally inflicted. The court made reference to the fact that "despite Lockhart's affidavit stating he fired his gun only to protect himself and to prevent Owes from shooting him, there is no factual issue as to his intent which would preclude granting summary judgment." *Id.* at 153, 579 P.2d at 1123. This statement, particularly when considered in light of the facts in *Vanguard Insurance Co. v. Cantrell* and *Clark v. Allstate Insurance Co.*, indicates that a determination of intent and duty to defend is based on the policy language, the pleadings, and the facts of the case. See text & note 27 *supra*. Thus, the *Lockhart* decision suggests that if the insured faces an intentional injury suit and answers that the injury was not intentional, the insurer might be required to defend. See 119 Ariz. at 153, 579 P.2d at 1123. See also R. KEETON, *supra* note 10, § 7.6(a), at 470-73.

34. See *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 269-70, 419 P.2d 168, 171-72, 54 Cal. Rptr.

ambiguities in the language of the policy must be construed against the insurer.³⁵ Third, the California courts have stated that exclusion clauses should express the public policy that a defendant should not be insured against his own wrongful conduct.³⁶ Finally, exclusion clauses must be interpreted in light of California statutory law.³⁷

The two major California cases addressing the exclusion clause question are *Walters v. American Insurance Co.*³⁸ and *Gray v. Zurich Insurance Co.*³⁹ The courts in *Walters* and *Gray* reached two conclusions with regard to exclusion clauses: (1) The typical intentional injury exclusion is ambiguous in terms of what constitutes an intentional act;⁴⁰ and (2) such clauses are ambiguous as to the insured's duty to defend.⁴¹ As a result, California courts construe the clauses strongly against the insurer.⁴² Thus, in self-defense cases, California courts have found both a duty to defend and a duty to indemnify.⁴³

To justify such a conclusion, the *Gray* court observed that the typical exclusion clause is unclear whether intentional injuries inflicted in self-defense were meant to be included.⁴⁴ The court stated that the word "intent" is ambiguous. Thus, the court felt a layman might believe that intentional conduct refers to collusive, wilful, or planned conduct that would not fall within the parameters of an intentional tort.⁴⁵

104, 107-08 (1966); *Maxon v. Security Ins. Co.*, 214 Cal. App. 2d 603, 611, 29 Cal. Rptr. 586, 590 (1963); *Walters v. American Ins. Co.*, 185 Cal. App. 2d 776, 782, 8 Cal. Rptr. 665, 669 (1960).

35. *Maxon v. Security Ins. Co.*, 214 Cal. App. 2d 603, 611, 29 Cal. Rptr. 586, 590 (1963); *Walters v. American Ins. Co.*, 185 Cal. App. 2d 776, 782, 8 Cal. Rptr. 665, 669 (1960).

36. See *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 277-78, 419 P.2d 168, 177, 54 Cal. Rptr. 104, 113 (1966); *Walters v. American Ins. Co.*, 185 Cal. App. 2d 776, 783, 8 Cal. Rptr. 665, 670 (1960).

37. See *Arenson v. National Auto. & Cas. Ins. Co.*, 45 Cal. 2d 81, 84, 286 P.2d 816, 818 (1955); *Russ-Field Corp. v. Underwriters at Lloyd's, London, England* 164 Cal. App. 2d 83, 95-96, 330 P.2d 432, 439-40 (1958).

38. 185 Cal. App. 2d 776, 8 Cal. Rptr. 665 (1960).

39. 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966).

40. *Gray v. Zurich Ins. Co.*, 65 Cal. App. 2d at 273, 419 P.2d at 174, 54 Cal. Rptr. at 110; see *Walters v. American Ins. Co.*, 185 Cal. App. 2d at 782-83, 8 Cal. Rptr. at 669-70.

41. *Gray v. Zurich Ins. Co.*, 65 Cal. 2d at 271-73, 419 P.2d at 173, 54 Cal. Rptr. at 109; see *Walters v. American Ins. Co.*, 185 Cal. App. 2d at 785, 8 Cal. Rptr. at 669-71.

42. *Gray v. Zurich Ins. Co.*, 65 Cal. 2d at 269, 419 P.2d at 171, 54 Cal. Rptr. at 107; *Walters v. American Ins. Co.*, 185 Cal. App. 2d at 781, 8 Cal. Rptr. at 669.

43. See cases cited note 40 *supra*. The duty to defend is different than the duty to indemnify. The duty to indemnify is activated by a showing that an event occurred that was within the scope of the policy under which the insurer agreed to assume liability for damages. R. KEETON, *supra* note 10, § 7.6(a), at 462 n.2. The duty to defend, on the other hand is established when a suit is filed alleging such an incident has taken place regardless of whether that incident has in fact occurred. *Id.* Thus, the insurer may have a duty to defend a suit although the facts proven at trial may relieve the insurer of liability. 7C J. APPLEMAN, *INSURANCE LAW AND PRACTICE*, § 4684, at 83-85 (W. Berdal ed. 1979). Normally, an insurer's wrongful refusal to defend the insured against a claim that is subsequently determined to be outside the scope of policy coverage may entitle the insured to recover expenses incurred in defending the action. *Id.* at 85. But see *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966). In *Gray*, the measure of recovery allowed for breach of the duty to defend included the amount of the tort judgment against the insured even though the acts causing the injuries were outside the coverage of the policy. *Id.* at 280, 419 P.2d at 179, 54 Cal. Rptr. at 115.

44. *Gray v. Zurich Ins. Co.*, 65 Cal. 2d at 280, 419 P.2d at 174, 54 Cal. Rptr. at 110.

45. *Id.* at 280 & n.11, 419 P.2d at 174 & n.11, 54 Cal. Rptr. at 110 & n.11.

Another justification offered by the California courts is that insurance contracts are contracts of adhesion.⁴⁶ Because the weaker party to a contract of adhesion has no choice as to contract terms, California courts interpret the standardized insurance form contract to conform to the insured's expectations.⁴⁷ Therefore, in an intentional-tort-self-defense case, an insured may reasonably expect injuries inflicted in self-defense to be included in policy coverage.⁴⁸ Where the insured could reasonably expect coverage and the standardized insurance policy contains an unclear exclusionary clause, the ambiguity is construed against the insurer and coverage is allowed.⁴⁹

California courts have also ruled that exclusion clauses should reflect the rule that a party cannot be insured for his wrongful acts.⁵⁰ The courts begin from the premise that it is against public policy to insure a party against the results of a wrongful act.⁵¹ An exclusion clause is meant to ensure that a person is not indemnified for the consequences of his wrongful acts.⁵² According to California case law, an injury inflicted in self-defense, though intentional, is not wrongful.⁵³ Because an act in self-defense is not committed with a preconceived motive to injure, the act is not wrongful and thus does not fall within the exclusion clause.⁵⁴

Lockhart presents an opposing view of the insured's duty to defend in the intentional-tort-self-defense cases. A critique of this posi-

46. *Id.* at 269, 419 P.2d at 171, 54 Cal. Rptr. at 107. In *Gray*, the court described a contract of adhesion as a "contract entered into between two parties of unequal bargaining strength, expressed in the language of a standardized contract, written by the more powerful bargainer to meet its own needs, and offered to the weaker party on a 'take it or leave it basis.'" *Id.*

47. *Id.* at 269-70, 419 P.2d at 171-72, 54 Cal. Rptr. at 107-08; *Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 878, 377 P.2d 284, 294, 27 Cal. Rptr. 172, 182 (1962); *Coast Mut. Bldg-Loan Ass'n v. Security Title Ins. & Guar. Co.*, 14 Cal. App. 2d 225, 229, 57 P.2d 1392, 1393 (1936). The *Gray* court offered an explanation of the insured's reasonable expectations. The court accepted the view that an ordinary lay person would expect his insurance carrier to defend him whenever he is faced with a threat of liability. This would include potential liability stemming from the insured's acts of self-defense. 65 Cal. 2d at 277, 419 P.2d at 177, 54 Cal. Rptr. at 113. For discussion of an insured's reasonable expectations, see R. KEETON, *supra* note 10, § 6.3(a), at 350-57.

48. *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 273-75, 419 P.2d 168, 174-75, 54 Cal. Rptr. 104, 110-11 (1966). See generally R. KEETON, *supra* note 10, § 6.3(a), at 350-57.

49. *Gray v. Zurich Ins. Co.*, 65 Cal. 2d at 268-72, 419 P.2d at 171-75, 54 Cal. Rptr. at 107-11 (1966); *Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d at 878, 377 P.2d at 294, 27 Cal. Rptr. at 182 (1962).

50. *E.g.*, *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 277-78, 419 P.2d at 168, 177, 54 Cal. Rptr. 104, 113 (1966); *Walters v. American Ins. Co.*, 185 Cal. App. 2d 776, 783, 8 Cal. Rptr. 665, 669-70 (1960). For collected cases from other jurisdictions that have adopted the same rule, see generally 18 G. COUCH, COUCH ON INSURANCE § 74:638, at 571 (R. Anderson, ed. 1968); Simon, *Insurance Coverage for Illegal Acts*, 8 AM. BUS. L. J. 38 (1970).

51. See authorities cited note 50 *supra*.

52. *Id.*

53. *Walters v. American Ins. Co.*, 185 Cal. App. 2d 776, 783, 8 Cal. Rptr. 665, 669-70 (1960). Thus, in *Walters* the California Court of Appeals stated: "If plaintiff acted in self-defense then although he intended the act, plaintiff acted by chance and without a preconceived design to inflict injury. . . . Acts committed in self-defense are not unlawful. . . ." *Id.* at 783, 8 Cal. Rptr. at 670.

54. *Id.*

tion, in light of the California view, will be proffered in the next section.

The Problems with Lockhart

Initially, it appears that the *Lockhart* court misinterpreted the *Gray* decision. The court acknowledged the California decisions holding that an insurer must defend in the intentional-tort-self-defense case.⁵⁵ In disagreeing with the California rule, the court assumed that the major reason for the opposing view is the California insurance statute that prohibits insuring wrongful acts.⁵⁶ Unfortunately, such an interpretation suggests only a casual reading of the California Supreme Court's decision in *Gray v. Zurich Insurance Co.*⁵⁷

The *Lockhart* court stated that the *Gray* decision "stand[s] for the proposition that coverage exclusion requires an element of wrongfulness or misconduct."⁵⁸ The *Gray* court, however, clearly indicated that the principle justification for upholding the insurer's duty to defend is that the insurance policy is an ambiguous contract of adhesion that should be strictly construed against the insurer.⁵⁹ The *Gray* court reached the statutory argument only because the insurer argued that it was against public policy to insure an intentional tort.⁶⁰ Thus, the *Gray* holding that an insurer must defend a claim of self-defense was not based on statute, but on principles of contract law.⁶¹ This conclusion serves to point out the second weakness in the *Lockhart* decision.

Both *Lockhart* and *Gray* were decided on the terms of the insurance contract.⁶² The *Lockhart* court, however, did not reach the question of whether the insurance policy was an adhesion contract. The court failed to consider that the consumer had no choice as to the presence of the exclusion clause in the policy. Since the insurance policy is a contract written by a more powerful bargainer and offered to the weaker bargainer on a "take it or leave it basis," the insurance contract is one of adhesion.⁶³ As a result, the contract should be interpreted in accordance with the weaker party's expectations.⁶⁴ Further, any ambiguities should be construed against the stronger party, in this case, the

55. See 119 Ariz. at 153, 579 P.2d at 1123.

56. See *id.* at 153, 579 P.2d at 1123; CAL. INS. CODE § 533 (West 1972).

57. See text & note 39-45 *supra*.

58. 119 Ariz. at 153, 579 P.2d at 1123.

59. 65 Cal. 2d at 277-78, 419 P.2d at 178, 54 Cal. Rptr. at 114.

60. *Id.*

61. See *id.* at 268-74, 419 P.2d at 171-75, 54 Cal. Rptr. at 107-10.

62. *Lockhart v. Allstate Ins. Co.*, 119 Ariz. at 153, 579 P.2d at 1123; *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 269-71, 419 P.2d 168, 171-73, 54 Cal. Rptr. 104, 107-09 (1966).

63. *Gray v. Zurich Ins. Co.*, 65 Cal. 2d at 269, 419 P.2d at 171, 54 Cal. Rptr. at 107.

64. See text & notes 47-49 *supra*.

insurer.⁶⁵

Thus, the *Gray* court correctly held that in light of an insured's reasonable expectations, the typical exclusion clause cannot preclude the insurer's duty to indemnify and defend injuries inflicted in self-defense.⁶⁶

While the California view is superior to the Arizona view, one problem is created when it is adopted: how the insurer is to determine when he must defend the insured. The problem arises in the following circumstances. An insured is sued for an intentional tort and pleads self-defense. If the insured loses his claim of self-defense at trial, the act and injury become wrongful and fall within the exclusion clause. The insurer therefore has no duty to indemnify. If, however, the defense is valid, the act is not wrongful and falls outside the exclusion clause. In such a case, the insured would be entitled to full protection under the terms of the policy. These circumstances pose a dilemma for the insurer, because it cannot determine whether it must defend until the self-defense issue has been resolved at trial.⁶⁷

In *Gray*, the California Supreme Court stated that in view of the ambiguity of the exclusion concerning the duty to defend, an insurer must defend where there exists a possibility that the injury might fall outside the exclusion clause.⁶⁸ Since the exclusion clause did not clearly and conspicuously limit the promise to defend solely to nonintentional injuries,⁶⁹ the insured could reasonably expect that the insurance company would defend him in a self-defense situation.⁷⁰ Thus, under California law not only may a claim of self-defense remove an "intentional" injury from the scope of the exclusion clause, but also the insurer has a duty to defend regardless of the outcome of the self-defense claim.⁷¹

Conclusion

Under *Lockhart*, where a policy contains an intentional injury exclusion clause, an insurer need not defend an insured for injuries inflicted in self-defense. To justify this conclusion, the Arizona Court of

65. *Gray v. Zurich Ins. Co.*, 65 Cal. 2d at 273-74, 419 P.2d at 174-75, 54 Cal. Rptr. at 110-11; *Steven v. Fid. & Cas. Co.*, 58 Cal. 2d 862, 868, 377 P.2d 284, 288, 27 Cal. Rptr. 172, 176 (1962); *Coast Mut. Bldg.-Loan Ass'n v. Security Title Ins. & Guar. Co.*, 14 Cal. App. 2d 225, 229, 57 P.2d 1392, 1393 (1936).

66. 65 Cal. 2d at 275-76, 419 P.2d at 176, 54 Cal. Rptr. at 112.

67. *Id.* at 271-72, 419 P.2d at 173, 54 Cal. Rptr. at 109. As the *Gray* court stated, "[N]o one can determine whether the third party suit does or does not fall within the indemnification coverage of the policy until the suit is resolved. . . . [T]he determination of whether the insured engaged in intentional, negligent or even wrongful conduct depend[s] upon the judgment." *Id.*

68. *Id.* at 275, 419 P.2d at 176, 54 Cal. Rptr. at 112.

69. *Id.* at 274, 419 P.2d at 174-75, 54 Cal. Rptr. at 110-11.

70. *Id.* at 273, 419 P.2d at 174, 54 Cal. Rptr. at 110.

71. *Id.* at 274, 419 P.2d at 175, 54 Cal. Rptr. at 111.

Appeals held that the clause was clear and unambiguous. That decision, however, neglected to fully analyze the issues presented by the case.

The *Lockhart* court failed to consider that an intentional injury exclusion clause is part of a contract of adhesion. The court also failed to recognize that the clause is ambiguous in two respects: (1) As to what constitutes an intentional act; and (2) as to the insurer's duty to defend. The *Lockhart* court should have interpreted the exclusion clause in light of the above concerns. The insurance company would, therefore, have the duty to defend in an intentional-tort-self-defense case.

Margaret Krigbaum

X. MINING LAW

A. THE RESTRICTION OF THE DOCTRINE OF *PEDIS POSSESSIO* IN ARIZONA

Early prospectors on the public domain recognized discovery of a valuable mineral as the foundation of a miner's right to exclusive possession of the ground on which the mineral was discovered.¹ As the search became one for lodes and deposits that were not evident on the surface, the miners recognized a limited right of possession in a prospector who was conducting a diligent exploration for minerals, but who had not yet made a discovery.² Western courts first recognized these early customs and rules in the 1860's,³ but it was not until nine years after the enactment of the General Mining Law of 1872⁴ that this limited pre-discovery possessory right was first recognized in name and substance by a court.⁵ In deciding a dispute between competing prospectors on federal lands, the Colorado federal district court indicated by way of dicta that a prospector on such lands has a bare possessory right to the immediate area on which he is searching for minerals.⁶ The court termed this right *pedis possessionis*.⁷ From this language came the doctrine of *pedis possessio*, which means literally "a foothold."⁸

Pedis possessio was first recognized by the United States Supreme Court in 1919 in *Union Oil Co. v. Smith*.⁹ The Court identified the essential requirements that a prospector must satisfy to be entitled to possession of a disputed claim: (1) Actual occupancy; (2) diligent work directed towards making a discovery; and (3) exclusion of others.¹⁰

1. *Jennison v. Kirk*, 98 U.S. 453, 457-58 (1879).

2. *Id.*

3. *E.g.*, *Hess v. Winder*, 30 Cal. 349, 355-56 (1866); *English v. Johnson*, 17 Cal. 107, 116 (1860); *Attwood v. Fricot*, 17 Cal. 37, 43 (1860).

4. Act of May 10, 1872, ch. 152, § 1, 17 Stat. 91 (codified at 30 U.S.C. § 22 (1976)).

5. *See Crossman v. Pendery*, 8 F. 693, 694 (C.C.D. Colo. 1881).

6. *Id.*

7. *Id.* The issue before the court in *Crossman* was whether prospectors on the public domain who have not yet made a discovery of minerals acquire any right of possession that the law will protect. *Id.* The court concluded that the plaintiffs, who were the prior locators, had allowed the defendants to enter peacefully and make a discovery on the plaintiff's former claim; therefore, the defendants had the better possessory right. *Id.* The court recognized that the plaintiffs might have protected themselves in their *pedis possessionis* while searching for minerals had they not allowed the defendants' entry. *Id.*

8. *See Olson, New Frontiers in Pedis Possessio: MacGuire v. Sturgis*, 7 LAND & WATER L. REV. 367, 370 n.10 (1972).

9. 249 U.S. 337, 346-47 (1919).

10. *Id.* The Court indicated that a miner who has satisfied the three requirements is entitled to be protected against forcible, fraudulent, or clandestine intrusions upon his possession. *Id.* The Court further defined the doctrine of *pedis possessio* in *Cole v. Ralph*, 252 U.S. 286 (1920). In *Cole*, the Court stated that a prospector who relaxes his occupation or whose occupation is merely

The Arizona territorial court was among the earliest to apply the doctrine to resolve a controversy among miners claiming a possessory right to the same mining claim on public lands. In *Field v. Grey*,¹¹ the court concluded that a prior claimant had the right to hold the surface of the claim as against all other parties having no better right.¹² The prior claimant was also entitled to eject subsequent claimants if they intruded while he remained in possession, industriously exploring for the vein or lode.¹³ The court held that the earlier prospector was entitled to possession of the area lying within the boundaries of his claim.¹⁴

The doctrine of *pedis possessio* did not reappear in Arizona as the basis for a decision involving competing mineral claimants until the recent case of *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.*¹⁵ Relying on what it termed the "majority view," the Arizona Supreme Court held that *pedis possessio* protects a prior locator only as to those claims actually occupied and does not extend to contiguous, unoccupied claims on a group or area basis.¹⁶

This casenote will analyze the decision of the *Geomet* court to limit the application of the doctrine of *pedis possessio* to a determination of possession on a claim-by-claim basis. The continued vitality of the "majority view" on which the court relied will also be examined. Next, the position espoused by the *Geomet* court will be contrasted with recent decisions which have extended *pedis possessio* protection to miners with multiple, contiguous claims on a group or area basis. The policy considerations involved in the application of *pedis possessio* to award to a prior locator possession of a group of claims will then be analyzed. Finally, the impact of the *Geomet* decision on the pre-discovery rights of prospectors on public lands in Arizona will be considered.

Restriction of Pedis Possessio to Claim by Claim Application

In August and September of 1976, the Lucky Mc Uranium Corpo-

idental to some purpose other than a diligent search for mineral must respect the subsequent location of another who enters peacefully on the former's claims and begins exploring for minerals. *Id.* at 294-95.

These decisions have given rise to a number of questions. Among them are: (1) What are the geographic limits of the doctrine's protection?; (2) what constitutes "actual occupancy" sufficient to invoke *pedis possessio* protection?; and (3) against what manner of subsequent entry is the prior locator protected? See I REEVES, AMERICAN LAW OF MINING § 4.7, at 602 n.6 (1976); Olson, *supra* note 8, at 372-73.

11. 1 Ariz. 404, 25 P. 793 (1881).

12. *Id.* at 409, 25 P. at 794.

13. *Id.* The court did not define "actual occupancy" and did not determine whether the prospector would be entitled to possession of more than one claim.

14. *Id.*

15. — Ariz. —, 601 P.2d 1339 (1979).

16. *Id.* at —, 601 P.2d at 1342.

ration found in an area of Yuma County anomalies¹⁷ indicative of a uranium deposit.¹⁸ In early November, Lucky moved onto the area and located 200 mining claims, monumenting each with wooden posts and tags indicating the name and corners of each claim.¹⁹ Lucky did some cursory drilling to indicate that it was proceeding towards discovery²⁰ and recorded notices of the unpatented claims²¹ in the Yuma County Courthouse.²² Lucky then began a deep-drilling operation on claims other than those in dispute.²³

Geomet Exploration, Ltd. had been conducting extensive investigations of its own in the same area, and started a drilling operation on one of Lucky's claims.²⁴ Geomet ultimately located seven claims on a portion of Lucky's 200.²⁵ Sometime after Geomet's initial claims were located, Lucky's employees informed Geomet's employees that Geomet was trespassing on Lucky's claims.²⁶ After Geomet ignored this warning, Lucky brought an action to establish exclusive possession of the disputed claims and sought an order restraining Geomet from trespassing upon them. The trial court granted the order sought and Geomet appealed.²⁷ The court of appeals affirmed, holding that Lucky was entitled to exclusive possession of the claims on a group basis under the doctrine of *pedis possessio*.²⁸ Geomet petitioned the Arizona Supreme

17. An anomaly was defined by the court as a discontinuity in geologic formations. *Id.* at —, 601 P.2d at 1340.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* An unpatented mining claim is a claim on which the prospector has not yet received a federal patent through compliance with the statutory requirements. See 1 SWENSON, AMERICAN LAW OF MINING § 1.23, at 67 (1976). "Individual right in public mineral lands can be acquired and held, and an absolute title obtained through the land office, only upon terms and conditions prescribed by mining laws of Congress." *Bowen v. Chemi-Cote Perlite Corp.*, 102 Ariz. 423, 426, 432 P.2d 435, 438 (1967).

22. — Ariz. at —, 601 P.2d at 1340. ARIZ. REV. STAT. ANN. § 27-203 (Supp. 1979) requires that "the locator of a lode claim . . . cause to be recorded in the office of the county recorder a copy of the location notice . . . within ninety days from the time of the location." *Id.*

23. — Ariz. —, —, 601 P.2d 1344, 1346 (Ct. App. 1979). The trial court concluded that Lucky had complied with the Arizona requirements for the location of mining claims, and the court of appeals affirmed this conclusion. *Id.* The supreme court did not rule directly on the validity of Lucky's location of the claims, but stated that a location cannot be perfected, under either state or federal law, without an actual discovery of minerals in place. — Ariz. —, 601 P.2d 1339, 1340 (1979).

24. — Ariz. —, —, 601 P.2d 1344, 1345 (Ct. App. 1979).

25. *Id.* at —, 601 P.2d at 1345.

26. *Id.* Although Geomet was aware of Lucky's claims, it contended that since Lucky had made no discovery of mineral in place and Lucky was not in actual occupancy of the areas Geomet entered, Lucky's claims were invalid. *Id.* at —, 601 P.2d at 1345, 1346.

Geomet claimed at trial that it had discovered mineral on all seven of its claims. *Id.* at —, 601 P.2d at 1345. The court of appeals affirmed the trial court's determination that neither party had made a discovery. *Id.* at —, 601 P.2d at 1346. The Arizona Supreme Court subsequently affirmed that there was insufficient evidence to establish a valid discovery. — Ariz. —, —, 601 P.2d 1339, 1340 (1979).

27. — Ariz. —, —, 601 P.2d 1344, 1346 (Ct. App. 1979).

28. *Id.* The court of appeals relied on *MacGuire v. Sturgis*, 347 F. Supp. 580 (D. Wyo. 1971). *MacGuire* involved a dispute over the right of a prior locator to exclusive possession of eight

Court for review, and the court reversed and vacated the decision of the court of appeals.²⁹

The Supreme Court of Arizona relied on the traditional view that *pedis possessio* must be applied on a strictly claim-by-claim basis.³⁰ The court asserted that acceptance of the contrary view would eviscerate the actual occupancy requirement of the doctrine and substitute for it the theory of constructive possession without color of title.³¹ The court cited the decision of the United States Supreme Court in *Union Oil* as dispositive of the actual occupancy issue.³² The *Geomet* court thus believed that the Supreme Court in *Union Oil* had considered whether *pedis possessio* protection should be extended to contiguous claims and expressly rejected such an extension.³³ The *Geomet* court cited a number of cases as authority for the "majority view," which requires actual occupancy for *pedis possessio* protection.³⁴ The court also cited *Field v. Grey*³⁵ for the proposition that Arizona has recognized *pedis possessio* and the concomitant requirement of actual occupancy for a century.³⁶ In the next section, the "majority view" relied upon by the *Geomet* court will be examined.

The Majority View of Pedis Possessio Application

Upon closer scrutiny, the "majority view" upon which the Arizona Supreme Court relied in *Geomet* does not mandate the restrictive interpretation of the *pedis possessio* doctrine adopted by the court. The cases cited by the court for the majority view are all factually distinguishable from *Geomet*.³⁷ In addition, the nature of the prior locator's

groups of uranium mining claims on the public domain in Wyoming under *pedis possessio*. *Id.* at 583-84. The *MacGuire* court based its holding on its finding that the prior locator was in possession of the claims and the area claimed was reasonable. *Id.* at 584. The court also indicated that the geology of the area was "similar," all statutory location work had been completed, and the prior locator was diligently pursuing an overall work and exploration program for the entire area. *Id.* The factor that seemed dispositive was the court's finding that the nature of the mineral sought, uranium, is such that to award the prior locator only possession of the claim on which he is actually present and currently working would make it economically impractical to develop. *Id.* at 585. The Arizona Supreme Court, however, impliedly accepted *Geomet*'s argument that *MacGuire* is an aberration and contrary to three previous Wyoming Supreme Court decisions which have upheld the requirement of actual occupancy for *pedis possessio* protection. *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.*, — Ariz. —, —, 601 P.2d 1339, 1341 (1979).

29. — Ariz. —, —, 601 P.2d 1339, 1343 (1979).

30. *Id.* at —, 601 P.2d at 1341. See also Ladendorff, *Enlarging Prediscovery Rights of Mineral Locators*, 6 ROCKY MTN. MIN. L. INST. 1, 21 (1961).

31. — Ariz. at —, 601 P.2d at 1341. The court defined constructive possession to be possession based on color of title, which has the effect of enlarging the area actually occupied to the extent of the description in the title. *Id.* at —, 601 P.2d at 1340-41.

32. *Id.* at —, 601 P.2d at 1342 (citing *Union Oil Co. v. Smith*, 249 U.S. 337, 346-48 (1919)).

33. — Ariz. at —, 601 P.2d at 1342.

34. *Id.* See cases cited note 38 *infra*.

35. 1 Ariz. 404, 25 P. 793 (1881).

36. — Ariz. at —, 601 P.2d at 1341.

37. See note 38 *infra*.

occupancy, be it actual or otherwise, was not at issue in these cases.³⁸

The *Geomet* court cited *Union Oil* as specifically considering and rejecting the contention that *pedis possessio* can be applied on a group or area basis.³⁹ The *Union Oil* Court, however, expressly declined to decide this issue.⁴⁰ The *Union Oil* decision turned not upon application of the *pedis possessio* doctrine, but upon the construction of a 1903 act of Congress.⁴¹ The Court noted gratuitously that a prior locator must be in actual occupancy in order to receive *pedis possessio* protec-

38. — Ariz. at —, 601 P.2d at 1342. The court cited *Davis v. Nelson*, 329 F.2d 840 (9th Cir. 1964); *McLemore v. Express Oil Co.*, 158 Cal. 559, 112 P. 59 (1910); *United W. Minerals Co. v. Hannsen*, 147 Colo. 272, 363 P.2d 677 (1961); *Adams v. Benedict*, 64 N.M. 234, 327 P.2d 308 (1958).

The issue in *Davis* was whether the United States has authority to initiate a contest of an unpatented mining claim on the public domain. 329 F.2d at 843. The nature of the prospector's right of possession under *pedis possessio* as against another mining claimant was not focused upon and the actual possession issue was not in dispute.

The court in *United Western Minerals* decided the validity of a lease of unpatented mining claims. 147 Colo. at 179, 363 P.2d at 680-81. The case did not involve a conflict between claimants competing for possession of disputed mining claims and the court did not discuss the nature of possession required for *pedis possessio* protection.

McLemore can also be distinguished factually from *Geomet*. The dispute in *McLemore* was between a mineral claimant and a homesteader. 158 Cal. at 560-61, 112 P. at 59. The oil company had located a placer claim on public lands, but had not made a discovery. While the company was absent from its claim, a homesteader entered, and a dispute arose after the company returned to its claim. *Id.* at 561, 112 P. at 60. The court found that the oil company was not in possession of the land and had attempted to do no more than hold the claim under the assumption that assessment work was adequate for the purpose. *Id.* at 563, 112 P. at 61. The court also found that the oil company was not in diligent prosecution of work towards discovery. *Id.* at 563-64, 112 P. at 61-62. Thus, the mineral claimant had met none of the requirements for *pedis possessio* and would not have been entitled to possession under the doctrine even if the subsequent entrant had been a prospector. *Pedis possessio* was not, however, the basis of the *McLemore* decision. The court concluded that it was within the power of Congress to preempt the public lands from mineral exploration in favor of homestead entry or any other federal purpose if no discovery had been made. *Id.* at 562-66, 112 P.2d at 60-62. For a discussion of *Adams v. Benedict*, see text & notes 46-50 *infra*.

39. — Ariz. at —, 601 P.2d at 1342. See Fiske, *Pedis Possessio—Modern Use of an Old Concept*, 15 ROCKY MTN. MIN. L. INST. 181, 190 (1969) (author citing *Union Oil*, Ranchers Exploration & Dev. Co. v. Anaconda Co., 248 F. Supp. 708, 721 n.4 (D. Utah 1965), and *Adams v. Benedict*, 64 N.M. 234, 247, 327 P.2d 308, 317 (1958), as rejecting the contention that *pedis possessio* can be applied on a group or area basis). Cf. Ladendorff, *supra* note 30, at 21 ("in view of this holding in the *Union Oil* case, it can be reasonably concluded that . . . occupancy and exploration must actually extend to each claim and it would not be sufficient that the prospector be drilling and actually occupying only one claim of a group").

40. 249 U.S. at 348. The Court set out the issues not before it as follows:

To what extent the possessory right of an explorer before discovery is to be deduced. . . . [is a] question with which we are not now concerned. Nor need we stop to inquire whether the right is limited to the ground actually occupied in this process of exploration, or extends to the limits of the claim. These questions and others that suggest themselves are not raised by the present record. . . .

Id.

41. *Id.* at 350-53. The defendant in *Union Oil* had made a discovery of oil on his placer claim, and his annual assessment work determined the oil-bearing character of five contiguous claims, including the plaintiff's. *Id.* at 341. The defendant asserted a possessory right to these contiguous claims by virtue of his assessment work under a 1903 act of Congress entitled "An Act Defining What Shall Constitute and Providing for Assessments on Oil Mining Claims," Act of February 12, 1903, ch. 548, 32 Stat. 825. 249 U.S. at 342. The Court held that the Act did not confer on the defendant inchoate rights to the plaintiff's claim of which the defendant was not in possession and upon which he had made no discovery. *Id.* at 353.

tion,⁴² but the Court did not define "actual occupancy" in this context.⁴³ The *Union Oil* Court did not determine the limits of the doctrine⁴⁴ and thus the reliance upon the decision by the *Geomet* court was misplaced.⁴⁵

The *Geomet* court also relied upon the decision of the New Mexico Supreme Court in *Adams v. Benedict*⁴⁶ as authority for the majority view.⁴⁷ The *Adams* court stated that the doctrine of *pedis possessio* must be applied on a claim-by-claim basis and that the party asserting its protection must be in actual, physical occupation of his claim at the time of the subsequent entry.⁴⁸ The issue before the *Adams* court was, however, the relative possessory right of two competing claimants to a single claim in dispute.⁴⁹ For this reason, the portion of the opinion which rejects a group or area application of *pedis possessio* is mere dictum.⁵⁰

Finally, the *Geomet* court cited three other cases as holding that a prior locator must be in actual occupation of his claim to be entitled to possession under the doctrine.⁵¹ Not one of these cases explored the meaning of "actual occupancy" sufficient for *pedis possessio* protection, nor did any of the opinions consider application of such protection to multiple claims.⁵² In addition, none of the three cases resolved a dispute between competing mineral claimants. Thus each case can be distinguished from *Geomet* with little critical analysis.⁵³

The authority relied upon by the Arizona Supreme Court in *Ge-*

42. 249 U.S. at 348-49.

43. See *id.*; Olson, *supra* note 8, at 374 n.22.

44. 249 U.S. at 348. See Fiske, *supra* note 39, at 189; Olson, *supra* note 8, at 374-75.

45. The court in *Geomet* stated: "In *Union Oil* . . . the Court considered the precise question of extending protection to contiguous claims and refused to do so." — Ariz. at —, 601 P.2d at 1341-42. After making this comment, the court quoted the *Union Oil* holding:

In our opinion the Act [of 1903] shows no purpose to dispense with discovery as an essential of a valid oil location or to break down in any way the recognized distinction between the *pedis possessio* of a prospector doing work for the purpose of discovering oil and the more substantial right of possession of one who has made a discovery. . . .

Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp., — Ariz. —, 601 P.2d 1339, 1342 (1979) (quoting *Union Oil Co. v. Smith*, 249 U.S. 337, 343 (1919)). The language quoted by the *Geomet* court establishes that *Union Oil* resolved a question of statutory construction and involved the rights of a prospector after he had made a discovery. Neither the statute nor the discovery was at issue under the facts of *Geomet*.

46. 64 N.M. 234, 327 P.2d 308 (1958).

47. — Ariz. at —, 601 P.2d at 1342.

48. 64 N.M. at 247, 327 P.2d at 317.

49. *Id.* at 237, 327 P.2d at 310.

50. *Id.* at 247, 327 P.2d at 317. See Olson, *supra* note 8, at 375.

51. — Ariz. at —, 601 P.2d at 1342. For a discussion of these three cases, see note 38 *supra*.

52. See note 38 *supra*.

53. Cf. *Davis v. Nelson*, 329 F.2d 840, 843 (9th Cir. 1964) (dispute between the United States and a mineral claimant over challenge of unpatented mining claims on the public domain); *McLemore v. Express Oil Co.*, 158 Cal. 559, 560, 112 P. 59, 59 (1910) (dispute between homesteader and mineral claimant over right to possession of claim on which no discovery had been made); *United W. Minerals Co. v. Hannsen*, 147 Colo. 272, 273, 363 P.2d 677, 678 (1961) (dispute between lessor and lessee of unpatented mining claims).

omet is deficient for two reasons. First, the crux of the problem to be resolved was the meaning of the term "actual occupancy." The court's citation to cases indicating that *pedis possessio* requires actual occupancy⁵⁴ merely begged the question to be decided.⁵⁵ In none of the cases upon which the court relied for its position was the meaning of such actual occupancy disclosed, much less decided.⁵⁶ Furthermore, none of these cases cited by the *Geomet* court directly involved the application of the *pedis possessio* doctrine to a group of claims.⁵⁷

In contrast to the restrictive view adopted by the *Geomet* court are recent cases in which courts have applied *pedis possessio* to give a prior locator exclusive possession of a group of claims.⁵⁸ The courts in these cases confronted the issues directly. Thus, the cases are distinguishable from the cases cited by the *Geomet* court.

In *K.C.K. Mining Co. v. Senutovich*,⁵⁹ the New Mexico trial court held that a prior locator was entitled to possession of thirty-six claims covering 640 acres under the *pedis possessio* doctrine.⁶⁰ The court recognized the common practice among uranium prospectors of staking a block of claims, usually covering an entire section, for uranium exploration and development.⁶¹ The court also noted that experienced prospectors realize that such a block of claims is normally intended to be

54. — Ariz. at —, 601 P.2d at 1342.

55. The *Geomet* court characterized the issue to be decided in the following manner: "Should the actual occupancy requirement of *pedis possessio* be discarded in favor of constructive possession to afford a potential locator protection of contiguous, unoccupied claims as against one who enters peaceably, openly, and remains in possession searching for minerals?" — Ariz. at —, 601 P.2d at 1340. The court did not discuss the nature of *Geomet*'s entry onto Lucky's claims, whether peaceful or otherwise, but rather based its decision on the distinction between actual occupancy and constructive possession. By definition, color of title is a condition precedent to a claim of constructive possession. Lucky did not argue that it was entitled to possession of the disputed claims under color of title, so *a priori* Lucky did not argue that it was entitled to the claims under a theory of constructive possession. The court erred in characterizing Lucky's contention in this manner. Lucky merely argued that "actual occupancy" sufficient for *pedis possessio* protection can be attributed to a prospector who is in physical occupation of a claim in a group and is diligently pursuing a comprehensive plan of exploration that encompasses the entire group. *Id.* at —, 601 P.2d at 1341. Thus, the real issue to be decided was whether there is "actual occupancy" sufficient for the doctrine's protection where the prospector contends that he is entitled to possession of multiple claims. The *Geomet* court held that actual possession or occupancy is required, but did not define the term or cite any case in which the meaning of the term has been at issue. *See id.* at —, 601 P.2d at 1342.

56. See cases cited note 38 *supra*.

57. See note 38 *supra*.

58. *E.g.*, *MacGuire v. Sturgis*, 347 F. Supp. 580, 585-86 (D. Wyo. 1971); *K.C.K. Mining Co. v. Senutovich*, Civil No. 9072, at 3 (Dist. Ct., McKinley County, N.M., March 10, 1956) *Cf.* *Continental Oil Co. v. Natrona Service, Inc.*, 588 F.2d 792, 798 (10th Cir. 1978) (court declined to write guidelines for application of *pedis possessio* to large areas as requested by one party, but stated that it would not rule out such an application); *Kanab Uranium Co. v. Consolidated Uranium Mines*, 227 F.2d 434, 436-37 (10th Cir. 1955) (court awarded possession of group of uranium claims to prior locator on basis of color of title, rather than *pedis possessio*, which the court attributed to the locator's prospecting work, posting of notice of its claims, and the filing of the claims).

59. Civil No. 9072 (Dist. Ct., McKinley County, N.M., March 10, 1956).

60. *Id.* at 3.

61. *Id.* The court recognized the economic impracticality of exploring for uranium on a single claim. *Id.*

developed as a single operation.⁶²

The Wyoming federal district court held in *MacGuire v. Sturgis*⁶³ that a prior locator was entitled to possession of eight groups of claims under the *pedis possessio* doctrine.⁶⁴ Five factors were considered in determining the reasonableness of awarding possession to the prior locator under the circumstances.⁶⁵ The dispositive factor was that uranium cannot be developed economically if the locator is awarded possession of only those claims on which he is actually present and currently working.⁶⁶

62. *Id.*

63. 347 F. Supp. 580 (D. Wyo. 1971).

64. *Id.* at 581, 585. The court held that the prior locator was entitled to possession of the entire block of claims despite the fact that he was drilling on claims some distance from those on which the subsequent entry was made. *Id.* at 584.

65. The court held that a prior locator of uranium claims is entitled to exclusive possession of them on a group basis when

the following exists or was done for his benefit: (a) the geology of the area claimed is similar and the size of the area claimed is reasonable; (b) the discovery (validation) work referred to in the Wyoming mining statutes is completed; (c) an overall work program is in effect for the area claimed; (d) such work program is being diligently pursued. . . .; and (e) the nature of the mineral claimed and the cost of development would make it economically impractical to develop the mineral if the locator is awarded only those claims on which he is actually present and currently working.

Id.

66. *Id.* The cost to adequately "block out" even a portion of the *MacGuire* claims, taking the drilling, logging, and employee expenses into account, could well have exceeded \$1,000,000 in the prediscovery stage alone. Olson, *supra* note 8, at 369 n.8.

The Arizona Court of Appeals in *Geomet* applied standards similar to those applied in *MacGuire* in awarding possession of the disputed claims to the prior locator. — Ariz. —, —, 601 P.2d 1344, 1346-47 (Ct. App. 1979). The court found that Lucky was in actual possession of the claims, and that Geomet was aware of Lucky's claims when it entered. *Id.* at —, 601 P.2d at 1346. The court also found that the area claimed by Lucky was reasonable in size and consistent in geology, and that Lucky was diligently pursuing an overall work and exploration program for the entire area. *Id.* The court took notice of the fact that Lucky had spent more than \$60,000 on the overall exploration of its claims, including approximately \$48,000 in the conflict area. *Id.* Finally, the court found that Lucky had attempted to exclude others by posting, staking, and recording its claims, and by advising Geomet that it was trespassing upon Lucky's claims. *Id.*

The Arizona Supreme Court, however, rejected the *MacGuire* reasoning, impliedly accepting Geomet's characterization of the case as an aberration and contrary to prior opinions of the Wyoming Supreme Court which had upheld the requirement of "actual occupancy" for *pedis possessio* protection. — Ariz. at —, 601 P.2d at 1341. See note 28 *supra*. The *Geomet* court cited *Sparks v. Mount*, 29 Wyo. 1, 207 P. 1099 (1922); *Whiting v. Straup*, 17 Wyo. 1, 95 P. 849 (1908); and *Phillips v. Brill*, 17 Wyo. 26, 95 P. 856 (1908) for this position. — Ariz. at —, 601 P.2d at 1341.

Sparks involved a dispute over the right to possession of a single oil placer claim. 29 Wyo. at 1, 207 P. at 1099. The court stated, as to the actual occupancy issue, that confining possession to the ground actually occupied by the drilling outfit might lead to contests as to who should occupy the ground immediately surrounding the rig. *Id.* at 2, 207 P. at 1100. Thus, the court held that the prior locator's possession extended to the limits of the claim. *Id.* The court did not discuss whether the prior locator's actual occupancy of one claim might be sufficient to establish his right to possession of adjacent claims under *pedis possessio*; this issue was not raised.

The dispute in *Whiting v. Straup* concerned the relative rights of possession under *pedis possessio* of two claimants to a single forty-acre placer claim. 17 Wyo. at 9-10, 95 P. at 851. The court found that neither crossing the claim periodically on a country road that passed over it, nor watching the claim to see that others did not intrude upon it constituted "actual possession." *Id.* at 25, 95 P. at 856. The court did state that actual occupancy is required of a prior locator to entitle him to possession as against a subsequent entrant. See *id.* The court did not, however, suggest that a prior locator who is physically present on a portion of his claims, diligently working towards discovery and attempting to exclude others from the claims is not in "actual occupancy"

In *Continental Oil Co. v. Natrona Service, Inc.*,⁶⁷ Conoco faced a challenge to its right to possession of 1200 claims.⁶⁸ The case turned on two questions: (1) Whether Conoco's agents had substantially complied with the Wyoming location statutes,⁶⁹ and (2) whether Conoco could rely on the doctrine of *pedis possessio* to validate its possession of the claims as against a subsequent entrant.⁷⁰ In its discussion of the *pedis possessio* issue, the Tenth Circuit cited *Union Oil* for the same proposition of actual possession emphasized by the *Geomet* court.⁷¹ Nevertheless, the Tenth Circuit stated that the "actual occupancy" language in *Union Oil* must not be read literally to require that there be a continuing presence by the prior locator on the claims in dispute.⁷²

The better view and authority holds that actual occupancy is required for *pedis possessio* protection. Nevertheless, the courts that have directly confronted the multiple claim issue do not interpret the doctrine as restrictively as did the *Geomet* court. These courts have not utilized the actual occupancy requirement to foreclose the extension of *pedis possessio* protection to multiple claims. Instead they have interpreted the doctrine to comport with the reality of modern uranium mining, which is by necessity conducted over a wider area than was

of his claims and thus not entitled to *pedis possessio* protection. That issue was not before the court.

Phillips v. Brill involved a dispute over possession of a single oil placer claim, located by the defendants. 17 Wyo. at 31, 95 P. at 856-57. The plaintiffs subsequently made a discovery of gas on a corner of an adjoining claim. *Id.* at 34, 95 P. at 857. The plaintiffs then located an additional claim, including within its limits the defendant's previously staked claim. *Id.* at 34, 95 P. 857-58. The court ruled that the plaintiffs could not extend the boundaries of their claim to include the defendant's prior claim while the defendant was in actual possession. *Id.* at 38-39, 95 P. at 859. The *Phillips* court ultimately remanded the case to the trial court because it was unable to determine if the defendant had been in actual possession of his claim when the plaintiffs overstaked it. *Id.* at 39, 95 P. at 860. Thus, the court did not decide the actual occupancy issue. For this reason, and because the dispute was over possession of a single claim, *Phillips* is distinguishable on its facts from *MacGuire*.

67. 588 F.2d 792 (10th Cir. 1978).

68. *Id.* at 795.

69. *Id.* at 797-98. There was considerable evidence adduced at trial to support the conclusion that Conoco had not complied with the Wyoming statutes. *Id.* at 798.

70. *Id.* at 795.

71. *Id.* at 797. That portion of *Union Oil* quoted in both *Continental Oil* and *Geomet* is as follows: "Whatever the nature and extent of a possessory right before discovery, all authorities agree that such possession may be maintained only by continued actual occupancy by a qualified locator or his representatives engaged in persistent and diligent prosecution of work looking to the discovery of mineral." 249 U.S. at 348.

72. 588 F.2d at 797. The court stated that the quoted portion of *Union Oil* does, however, make clear the necessity for substantial compliance with the elements of possession and substantial work towards discovery. *Id.* A locator who "merely stakes the claims and performs colorable work . . . cannot justifiably maintain that he is in exclusive possession." *Id.* Conoco requested that the court write definitive guidelines for the application of *pedis possessio* to a group of claims or a large area. The court declined to do so in the case, but it did not rule out such an application. *Id.* at 797-98. The *Continental Oil* court ruled that the prior locator had not made a good faith effort to work diligently towards discovery and to satisfy the statutory location requirements. *Id.* at 798-99. As a result, he was not entitled to possession of the claims overstaked by Natrona. *Id.* at 799.

traditional lode or vein mining. This interpretation is also supported by several public policy considerations.

Analysis of Policy Considerations For and Against Extending Pedis Possessio Protection

The *Geomet* court devoted only a small portion of its opinion to analyzing policy considerations that militate for or against awarding to a prior locator exclusive possession of a group of claims under *pedis possessio*.⁷³ Nevertheless, some policy concerns can be drawn from the language of the opinion. First, the court suggested that extension of *pedis possessio* to multiple claims would be contrary to the customs of the miners themselves.⁷⁴ The court failed to acknowledge, however, that the customs of modern uranium miners have changed. At least one court has recognized that responsible mineral locators defer to the pre-discovery claims of one another, even if the claims extend over a substantial area.⁷⁵ This deference is the result of recognition by the miners of the vulnerability of block claims⁷⁶ and the difficulty and expense of discovering uranium.⁷⁷ The *Geomet* court's concern with customs that have long since changed seems misplaced.⁷⁸

The *Geomet* court also suggested that giving a prior locator exclusive possession of a group of claims under *pedis possessio* may permit monopolization⁷⁹ and preemption⁸⁰ of desirable public lands by the first entrant to stake claims over them.⁸¹ There is also the danger that a rule permitting an area-wide application of *pedis possessio*, even if reasonable when made, could become distorted in subsequent applications, thus eroding the remaining substantive requirements for the

73. — Ariz. at —, 601 P.2d at 1342.

74. *Id.*

75. *See* K.C.K. Mining Co. v. Senutovich, Civil No. 9072, at 3 (Dist. Ct., McKinley County, N.M., March 10, 1956). The court indicated that modern uranium miners customarily defer to block claims located by other miners and recognize that such blocks are intended to be developed as single operations. *Id.*

76. *See* Fiske, *supra* note 39, at 209.

77. *See* Olson, *supra* note 8, at 76-77.

78. Olson suggests that courts, in applying *pedis possessio* to protect a prospector in his possession of a block claim, would merely be adapting the law to current uranium mining practices. *Id.* at 381. He urges that such judicial interpretation of the doctrine is consistent with the traditional role of the courts in fashioning relief. *Id.* *See also* Fiske, *supra* note 39, at 214-15. *But see* Ranchers Exploration & Dev. Co. v. Anaconda Co., 248 F. Supp. 708, 724 (D. Utah 1965) (court indicated that to extend *pedis possessio* protection to block claims might well be consistent with the miners' customs, but would contravene federal and state mining laws).

79. — Ariz. at —, 601 P.2d at 1342. The court stated that if a prospector may secure exclusive possession of a large area under *pedis possessio*, only a small portion of which he is actually working, then he may exclude others who are prepared to enter the unoccupied sections to conduct their own exploration. *Id.* *See* Ladendorff, *supra* note 30, at 22.

80. — Ariz. at —, 601 P.2d at 1342. *See* Sherwood & Greer, *Possessory Interests in Wyoming Mining Claims*, 4 LAND & WATER L. REV. 337, 345 (1969).

81. — Ariz. at —, 601 P.2d at 1342.

doctrine and promoting speculation by mineral locators.⁸² In sum, it is argued that to extend *pedis possessio* protection to a group of claims would restrict competition among bona fide prospectors⁸³ and effectively frustrate the intent of the General Mining Law,⁸⁴ which is to promote the development of the mineral resources of the United States.⁸⁵

Careful application of the traditional requirements for *pedis possessio*, including a less rigid definition of "actual occupancy,"⁸⁶ and the standards enunciated in *MacGuire v. Sturgis*⁸⁷ can minimize or eliminate these potential problems.⁸⁸ First, the prior locator must meet the traditional *pedis possessio* prerequisites to be entitled to possession of

82. *Id.* The *Geomet* court noted that extending *pedis possessio* to award to a prior locator possession of multiple claims will cause future problems in determining how large an area might be held and for how long. *Id.* See Sherwood & Greer, *supra* note 80, at 347.

83. — Ariz. at —, 601 P.2d at 1342. See Sherwood & Greer, *supra* note 80, at 347, 372.

84. 30 U.S.C. § 22 (1976). See Ladendorff, *supra* note 30, at 22.

85. — Ariz. at —, 601 P.2d at 1342. The *Geomet* court stated that the policies of the United States are to make the public domain available for exploration and mining and to encourage prospectors prepared to demonstrate their sincerity and tenacity in pursuit of valuable minerals. *Id.* See generally Heydenfeldt v. Daney, 93 U.S. 634 (1877). See also Creede & Cripple Creek Mining Co. v. Uinta Tunnel Mining Co., 196 U.S. 337, 345 (1905); McKinley v. Wheeler, 130 U.S. 630, 632-33 (1889).

86. The *pedis possessio* doctrine requires that a prior locator be in possession of his claim, working diligently towards discovery, and attempting to exclude others. Union Oil Co. v. Smith, 249 U.S. 337, 346-47 (1919). A would-be monopolist who has merely located his claims and is attempting to exclude others but who is not diligently working towards discovery would not be entitled to *pedis possessio* protection. See Ranchers Exploration & Dev. Co. v. Anaconda Co., 248 F. Supp. 708, 724 (D. Utah 1965). Similarly, a locator who has staked his claims and then either has relaxed his occupation on them or has acquiesced in a peaceful subsequent entry will have lost his entitlement to *pedis possessio* protection. See Cole v. Ralph, 252 U.S. 286, 294-95 (1920). See also Fiske, *supra* note 39, at 191.

87. See note 65 *supra*.

88. A time limitation might also be imposed within which a prior locator must either make a discovery or relocate his claims—e.g., 120 days from the date of filing his claims. If no discovery had been made within the time allotted, the prior locator would be required to yield to a subsequent locator. If no other prospector was interested when the period expired, the prior locator would be permitted to renew his previous location for another 120 day period. This alternative suggests a statutory solution to the pre-discovery possession problem.

Some of the mining states have statutes requiring that certain acts be performed by a locator within a certain period from the time of location. See, e.g., WYO. STAT. § 30-1-107 (1977). Former ARIZ. REV. STAT. ANN. § 27-203(B) (1956), in effect when *Geomet* was tried, required that the locator of a lode mining claim sink a location shaft upon his claim within 120 days from the time of location. *Id.* A subsequent amendment deleted the requirement of sinking a shaft or drilling. 1978 Ariz. Sess. Laws 532 (codified at ARIZ. REV. STAT. ANN. § 27-203 (Supp. 1979)).

In *Geomet*, Lucky argued that this provision gives a locator 120 days in which to discover mineral in place, at the expiration of which the claims are open to relocation. — Ariz. at —, 601 P.2d at 1342. The court rejected this contention, ruling that prior to discovery one has a right to exclude others solely under *pedis possessio* and not under statutory law. *Id.* at —, 601 P.2d at 1343. The implication of this statement is that the 120 day period begins to run from the time the location is perfected by a discovery, and not before. This view directly conflicts with the decision of the Arizona Supreme Court in *McKenzie v. Moore*, 20 Ariz. 1, 176 P. 568 (1918). In *McKenzie*, the court construed the requirement (formerly 90 days) to mean that a location must be completed by a discovery within 90 days of the date the location is initiated. *Id.* at 3, 176 P. at 569.

Even if the ruling of the *Geomet* court that the statutory period begins with discovery is conceded, the legislature should redraft the statute to allow explicitly for a right of exclusive possession in a prior locator for 120 days from the time he files his claims. This solution would encourage diligent work towards discovery, eliminate many disputes over the right to possession of claims, and prevent monopolization of desirable claims.

even a single claim.⁸⁹ He must be present on his claim,⁹⁰ working diligently toward discovery on them,⁹¹ and attempting to exclude others.⁹² If he fails to meet any of these prerequisites, he is not entitled to protection under the doctrine.⁹³ In addition, a careful application of the factors articulated by the court in *MacGuire v. Sturgis*⁹⁴ can preclude many of the dangers presented above.⁹⁵ Under the *MacGuire* test, *pedis possessio* protection may be denied if the court finds that the area claimed is so excessive as to be considered unreasonable,⁹⁶ that there exist geologic discontinuities within it which make block location unreasonable,⁹⁷ or that the prior locator does not have the present ability or willingness to develop the area in accordance with a carefully detailed, well-organized exploration plan.⁹⁸ A court may also find that development of the mineral sought is practical on a claim-by-claim basis, or that it can be economically mined and developed within a block smaller than that originally located.⁹⁹ The prospector must also carefully block out a reasonable area within which the ore body is thought to exist,¹⁰⁰ draw up a development plan that he is capable of pursuing diligently and that will withstand attack in court,¹⁰¹ and properly locate

89. *Cole v. Ralph*, 252 U.S. 286, 294-95 (1920). See Olson, *supra* note 8, at 380-81.

90. See *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.*, — Ariz. —, —, 601 P.2d 1345, 1346 (Ct. App. 1979).

91. *Union Oil Co. v. Smith*, 249 U.S. 337, 347 (1919). See also *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708, 724 (D. Utah 1965).

92. *Cole v. Ralph*, 252 U.S. 286, 294-95 (1920) (prospector who relaxes his occupation or whose occupation is merely incidental to some purpose other than a diligent search for mineral must respect the subsequent location of another who enters peacefully and begins exploring for mineral).

93. See *Ranchers Exploration & Dev. Co. v. Anaconda Co.*, 248 F. Supp. 708, 724 (D. Utah 1965). See also Fiske, *supra* note 39, at 211. Fiske suggests that courts could test the right to possession of block claims by considering whether, and to what extent, the locator adheres to the following guidelines: (1) Compliance with state location requirements; (2) performance of discovery work on the claims; (3) active supervision and maintenance of them; (4) notice of the claims to the public; (5) the existence of a detailed, comprehensive plan for area exploration and development; and (6) the diligence with which the possessor is implementing such a plan in a timely and professional manner. *Id.* Fiske also cautions against court acceptance of mere paper plans as evidence of diligent work where the locator does not have the economic and technological ability nor the evident intention to implement them. *Id.*

94. See note 65 *supra*.

95. Olson, *supra* note 8, at 380. Olson points out that any judicial expansion of the doctrine of *pedis possessio* will only affect relationships between claimants. The federal government would not be precluded from challenging a claim or claims based on the absence of a discovery of valuable mineral or failure to perform required assessment work. *Id.* at 380-81.

96. 347 F. Supp. at 584-85. See *Velasco v. Mallory*, 5 Ariz. App. 406, 414, 427 P.2d 540, 548 (1967) (a mining claim so excessive as to indicate bad faith is void, and the determination of this factual issue is one for the trial court).

97. *MacGuire v. Sturgis*, 347 F. Supp. 580, 585 (D. Wyo. 1971). Under the *MacGuire* standards, natural breaks in the geology of an area might afford a court a means of limiting the possession of a prospector who has not yet made a discovery. *Id.*

98. *Id.* at 585. See Fiske, *supra* note 39, at 211.

99. See *MacGuire v. Sturgis*, 347 F. Supp. 580, 585 (D. Wyo. 1971). See also Fiske, *supra* note 39, at 209.

100. See *Smaller v. Leach*, 136 Colo. 297, 306, 316 P.2d 1030, 1036 (1957).

101. See *MacGuire v. Sturgis*, 347 F. Supp. 580, 585 (D. Wyo. 1971). See also Fiske, *supra* note 39, at 211.

each claim within the block.¹⁰² In other words, the miner must use prudence in deciding where to locate his block, and his claims may be subject to subsequent entry if a reviewing court, applying the *MacGuire* standards, finds the area claimed too large.¹⁰³

Reasonable judicial interpretation of *pedis possessio* will encourage orderly exploration for uranium.¹⁰⁴ Limiting the doctrine's applicability to only those claims on which the miner is actually present and currently working does more to frustrate than to advance the intent of the General Mining Law.¹⁰⁵ Without some form of reliable protection under the law, the risk that the efforts of the bona fide prospector might be appropriated by others after he has borne the considerable initial expense will serve to discourage this type of exploration.¹⁰⁶

Conclusion

The decision of the Arizona Supreme Court in *Geomet Exploration*

102. See *Continental Oil Co. v. Natrona Ser., Inc.*, 588 F.2d 792, 797 (10th Cir. 1978). In *Continental Oil*, the Tenth Circuit held that a locator must substantially comply with the applicable location statutes to be entitled to possession of mining claims on a group or area basis under *pedis possessio*. *Id.*

103. 347 F. Supp. at 584-85. See *Velasco v. Mallory*, 5 Ariz. App. 406, 414, 427 P.2d 540, 548 (1967).

104. See Fiske, *supra* note 39, at 211. See also Olson, *supra* note 8, at 377.

105. See Fiske, *supra* note 39, at 211; Olson, *supra* note 8, at 377.

106. See *Smaller v. Leach*, 136 Colo. 297, 306-07, 316 P.2d 1030, 1036-37 (1957). The court recognized the problem facing the uranium prospector who stakes an area and begins the expensive drilling process, knowing that his activity might attract other prospectors willing to hover nearby until a discovery is made. *Id.* at 306, 316 P.2d at 1030. These latecomers may rush in and stake the surrounding lands and can prevent the original prospector from reaping the fruits of his labor. *Id.*

Several commentators have suggested that the modern search for hard minerals at great depth is analogous to the early search for oil under association placer claims, which typically contained 80 acres, and were afforded more liberal *pedis possessio* protection. See 1 LINDLEY, MINES § 218, at 487-88 (3d ed. 1914); Fiske, *supra* note 39, at 188; Olson, *supra* note 8, at 378 n. 46. Fiske has suggested that the rationale for this more liberal view was that deep deposits were sought by the early oil explorationists, and the search required more sophisticated technology than used customarily for shallow deposits. Fiske, *supra* note 39, at 188. Such exploration also demanded a broader area. *Id.* Within this area, the prospector began to narrow his drilling to areas that seemed most promising. *Id.* This type of exploration can be contrasted with mining for minerals that normally occur in veins or lodes that are more limited in size. *Id.* A profitable mining operation could be conducted within the limits of a single well-placed claim or a handful of them. See *id.* The prospectors who were working the larger oil claims needed protection from subsequent entry for a larger area than did those who were working traditional lode claims. *Id.*

Geologic technology has changed, as have the types of mineral deposits being mined for fuel and strategic purposes. Such deposits are initially defined based on sophisticated aerial and ground reconnaissance and orebodies often exist in low grades spread over a substantial area. These deposits are far beneath the surface, thus the process of exploration for them can take as long as several years. In addition, much of the evaluation of core samples and exploratory data is done in laboratories that are a great distance from the drill site, thus the actual physical presence of the mining company on its claims is likely to vary depending upon the stage of the operation. For these and other reasons, the more liberal *pedis possessio* application recognized to protect oil explorationists should be extended to protect prospectors for hard minerals where analogous circumstances are present. See REPORT OF THE OFFICE OF TECHNOLOGY ASSESSMENT, MANAGEMENT OF FUEL AND NONFUEL MINERALS IN FEDERAL LAND 46 (1979). See also Leaming & Lacy, *Nonfuel Mineral Resources of the Public Lands* (Vol. V. of report for Public Land Law Review Commission, 1970).

Ltd. v. Lucky Mc Uranium Corp., holding that a prospector is entitled under *pedis possessio* to only those claims on which he is in actual, physical occupancy, is contrary to recent decisions which have confronted the issue and to the current practice of responsible mineral locators.

The *Geomet* court characterized the issue to be decided as requiring a choice between what it termed the "majority view," that actual occupancy is required for *pedis possessio* protection, and the doctrine of constructive possession. This characterization disguised the real issue facing the court, which was the meaning of "actual occupancy" in this context.

Furthermore, the *Geomet* holding ignored the realities of modern uranium mining and favored a rigid, traditional approach more suited to an earlier era. *Geomet* may discourage uranium exploration at a time when the firms with the technical and economic capability to conduct it in a reasonable, logical manner are already being deterred by the considerable expense and substantial risks.

The *Geomet* court's limitation of the *pedis possessio* doctrine is not needed for the protection of the public lands. Monopolization can be prevented by careful judicial application of the traditional requirements for *pedis possessio*, including a less rigid definition of "actual occupancy," and of the standards set forth in *MacGuire v. Sturgis*. Such an approach can be expected to encourage exploration for uranium and similar minerals which are currently in great demand, and to decrease the likelihood of physical confrontation among competing claimants on the public domain.

Jon Doak

XI. REAL ESTATE LAW

A. ENFORCEMENT OF DUE-ON-SALE CLAUSES IN SECURED REAL ESTATE TRANSACTIONS

Customarily, creditors include a due-on-sale provision in the mortgage or deed of trust when lending money for the purchase of residential buildings. This provision typically accelerates the debt upon the sale, conveyance, or further encumbrance of the property by the debtor, making the entire balance due and payable and the security subject to sale or foreclosure.¹ Recently, however, the enforceability of due-on-sale provisions has been successfully challenged.² While not invalid *per se*,³ the due-on-sale provision's questionable enforceability has become an issue of contemporary concern to secured creditors.⁴

In *Patton v. First Federal Savings & Loan Association*,⁵ the validity of a due-on-sale provision in a deed of trust was challenged for the first time in Arizona.⁶ In that case, the plaintiff, Mrs. Patton, had borrowed money in December of 1972 from First Federal Savings & Loan of Phoenix to purchase a home.⁷ The deed of trust contained a due-on-sale provision.⁸ Eighteen months later, Mrs. Patton entered into a sale agreement of the trust property with Mr. Toy.⁹ Under the terms of this agreement, Mrs. Patton received a small down payment from Mr. Toy,¹⁰ the balance to be received in installments.¹¹ The instrument recited that the loan from First Federal was to remain Mrs. Patton's obligation, and that she would pay off this obligation before Mr. Toy's final

1. J. HETLAND, CALIFORNIA REAL ESTATE SECURED TRANSACTIONS § 4.55, at 182-83 (1970).

2. The first successful challenge of a due-on-sale clause was in California. *Tucker v. Lassen Sav. and Loan Ass'n*, 12 Cal. 3d 629, 635, 526 P.2d 1169, 1172, 116 Cal. Rptr. 633, 639 (1974). Ironically, the first case upholding the validity of a due-on-sale clause in California was a decision only ten years earlier. *Coast Bank v. Minderhout*, 61 Cal. 2d 311, 317, 392 P.2d 265, 268, 38 Cal. Rptr. 505, 508 (1964).

3. H. TIFFANY, THE LAW OF REAL PROPERTY § 1351.1, at 78 (Supp. 1979); see *Bartke & Tagaropoulos, Michigan's Looking Glass World of Due-on-Sale Clauses*, 24 WAYNE L. REV. 971, 984-85 (1978).

4. See H. TIFFANY, *supra* note 3, § 1351.1, at 78.

5. 118 Ariz. 473, 578 P.2d 152 (1978).

6. See *id.* at 477, 578 P.2d at 156.

7. *Id.* at 475, 578 P.2d at 154.

8. *Id.* at 477, 578 P.2d at 156. The due-on-sale clause provided that any transfer of the property by the trustor would result in the debt becoming immediately due and payable at the option of the beneficiary, regardless of the due date of the debt or the solvency of the trustor. *Id.* The clause further provided that the beneficiary's consent to a transfer would be withheld in the event that the interest rate on the loan was lower than the current market rate. *Id.*

9. *Id.* at 475, 578 P.2d at 154.

10. *Id.* at 478, 578 P.2d at 157.

11. *Id.* at 475, 578 P.2d at 154.

installment was due.¹² Upon receipt of Mr. Toy's final installment, Mrs. Patton would transfer title to the property to Mr. Toy.¹³

When First Federal learned of the sale agreement, it threatened enforcement of the due-on-sale provision unless Mrs. Patton agreed to a \$181.33 transfer fee plus a one-half percent interest rate increase on her outstanding loan.¹⁴ Having received only a small downpayment from Mr. Toy on the installment land contract, Mrs. Patton would have been unable to pay off the entire balance of the debt if the provision were to be enforced.¹⁵ While refusing to pay the transfer fee and rate increase, Mrs. Patton continued to make her regular payments and was never in default on her loan.¹⁶ When First Federal refused to accept these payments¹⁷ and arranged for a trustee's sale of the property,¹⁸ Mrs. Patton instigated suit to avoid the sale, attacking the enforceability of the clause.¹⁹

In reversing the trial court's grant of summary judgment for First Federal, the Arizona Supreme Court held that the provision could not be enforced without a showing by First Federal that the conveyance had impaired its security interest in the encumbered property and that, absent such a showing, enforcement of the clause was an unlawful restraint on alienation.²⁰ Concomitant with its holding, the court concluded that First Federal could not arbitrarily condition its consent to the transfer in order to exact an interest rate increase from Mrs. Patton.²¹

Initially, this casenote will examine the conflicting interests of the

12. *Id.*

13. *Id.*

14. *Id.*

15. *See id.* at 478-79, 578 P.2d at 157-58.

16. *Id.* at 475-76, 578 P.2d at 154-55.

17. *Id.* Even though First Federal refused the tendered payments, Mrs. Patton put them in an escrow account available to First Federal. *Id.*

18. *Id.* at 476, 578 P.2d at 155.

19. *Id.* Mrs. Patton made three additional claims for relief. First, she claimed that First Federal's actions amounted to an intentional infliction of emotional distress. *Id.* The court rejected the contention, holding that First Federal's actions were within the realm of acceptable business practices. *Id.* Second, she claimed that First Service Corporation, as trustee of the encumbered property, breached its fiduciary duty to her by failing to file proper notice of the trustee's sale. *Id.* The court again upheld the trial court's grant of summary judgment, holding that she had not been damaged by the breach of fiduciary duty where the statutes on notice were violated, but the sale of the property had not occurred. *Id.* Mrs. Patton's third claim involved a \$2000 pledge that she had been required to make in order to obtain the loan from First Federal. *Id.* at 475, 578 P.2d at 154. According to the agreement, First Federal was to return the pledge to Mrs. Patton after two years, provided that Mrs. Patton had not defaulted on the loan. *Id.* Because First Federal claimed that Mrs. Patton was in default under the due-on-sale provision, it refused to return the pledge. *Id.* at 479, 578 P.2d at 158. Mrs. Patton claimed that the refusal amounted to a conversion of the funds. *Id.* at 475, 578 P.2d at 154. The court reversed the trial court's grant of summary judgment on this issue, holding that if upon remand Mrs. Patton was found not to be in default of the loan agreement, First Federal would be liable for the conversion of funds. *Id.* at 479, 578 P.2d at 158.

20. *Id.* at 478-79, 578 P.2d at 157-68.

21. *Id.* at 479, 578 P.2d at 158.

debtor and the creditor surrounding due-on-sale provisions. Because *Patton* represents a significant advance in debtor's rights, a focus on the merits of the court's reasoning, as well as the authority relied upon by the court in making its decision, will be presented. Finally, some conclusions will be drawn on the future effects of the *Patton* decision.

The Conflicting Interests of the Debtor and Creditor

Traditionally, an owner's ability to convey his property freely has been protected, for to do otherwise would result in economic stagnation.²² The secured creditor's use of the due-on-sale provision, however, operates as a restraint on alienation in two ways. First, the clause tends to discourage the debtor from selling his property because the creditor can demand payment in full upon conveyance.²³ If the debtor cannot pay the accelerated debt, the creditor may endeavor to obtain other advantages in lieu of acceleration.²⁴ Secondly, due-on-sale clauses hamper the use of the installment land contracts as a device for financing the conveyance between the debtor and his transferee. Unless the debtor has ready cash to pay off his debt, the installments to be received from the transferee will be of no use against the accelerated debt.²⁵ Thus, the due-on-sale clause aggravates the reduced marketability of land in times of rising interest rates, because it forces a purchaser to borrow money at the current rate.²⁶

In contrast to the policies in favor of free alienation are the policies in favor of freedom of contract.²⁷ Generally, parties should be able to agree on such terms as they see fit to facilitate their business and stimulate the flow of commerce.²⁸ Therefore, the common-law rule prohibiting any restraint on alienation has given way to a number of exceptions in which legitimate interests are protected without unreasonable consequences to the restrained party.²⁹

22. Bernhard, *The Minority Doctrine Concerning Direct Restraints on Alienation*, 57 MICH. L. REV. 1173, 1179-80 (1959); Volkmer, *The Application of the Restraints on Alienation Doctrine to Real Property Security Interests*, 58 IOWA L. REV. 747, 750-51 (1973).

23. See J. HETLAND, *supra* note 1, § 4.55, at 182.

24. See *Patton v. First Fed. Sav. & Loan Ass'n*, 118 Ariz. at 475, 578 P.2d at 154 (interest rate increase and transfer fee); Bonanno, *Due on Sale and Prepayment Clauses in Real Estate Financing in California in Times of Fluctuating Interest Rates — Legal Issues and Alternatives*, 6 U.S.F. L. REV. 269, 278 (1971) (satisfaction with the buyers' credit standing, express assumption of the loan by the buyers, payment of a waiver or assumption fee, an increase in the interest rate, a reduction of principle, or additional security pledges).

25. *Tucker v. Lassen Sav. & Loan Ass'n*, 12 Cal. 3d 629, 637, 526 P.2d 1169, 1174, 116 Cal. Rptr. 633, 638 (1974).

26. See Bonanno, *supra* note 24, at 284-85.

27. See J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* §§ 1-3 (1977).

28. See *Baltimore Life v. Harn*, 15 Ariz. App. 78, 80, 486 P.2d 190, 192 (1971), *appeal denied*, 108 Ariz. 192, 494 P.2d 1322 (1972).

29. Spendthrift trusts have been upheld, as have been restrictions on the alienation of leasehold interests, corporate stock, and interests in executory land contracts. See *Coast Bank v. Minderhout*, 61 Cal. 2d 311, 316-17, 392 P. 2d 265, 268, 38 Cal. Rptr. 505, 508 (1964).

The due-on-sale clause may serve to protect the legitimate interests of the lender in many ways. First, it can prevent the debtor from conveying the property to one who would waste or depreciate the security to the point where a foreclosure sale would be insufficient to extinguish the outstanding loan.³⁰ Secondly, the clause may serve to prevent the debtor from squandering the proceeds of the transfer.³¹ In these two examples, the lender is merely seeking to protect his security interest in the property. Accordingly, the restraint on alienation imposed by the due-on-sale clause is lawful when the lender can show an actual impairment of security.³²

Due-on-sale clauses are also used by lenders to insure that the money used for real estate purchases is being loaned out at the current interest rate.³³ Upon the transfer of encumbered property, the lender can enforce the clause, receive the balance of the outstanding loan, and then loan the cash back out at the current (higher) interest rate.³⁴ During times of increasing interest rates, the conflict between the debtor and the lender is particularly acute.³⁵ As the gap between the contract rate and the market rate of interest widens, the marketability of the property increases as does the pressure on the lender to reinvest its funds at a higher rate of return.³⁶ Accordingly, whether a lender might employ the due-on-sale clause to exact an interest rate increase was the basic issue in the *Patton* case.³⁷

Arizona's Treatment of "Due-On-Sale"

Prior to *Patton*, the only Arizona case ruling on the enforcement of a due-on-sale clause was *Baltimore Life v. Harn*.³⁸ In *Harn*, the due-on-sale provision was included in a mortgage and in a promissory note which evidenced the debt.³⁹ The successor in interest to the mortgagee filed suit to foreclose after an alleged transfer of the property by the mortgagor.⁴⁰ The issue before the *Harn* court was whether a conveyance of the mortgaged property coupled with the presence of a due-on-

30. *See Wellenkamp v. Bank of America*, 21 Cal. 3d 943, 951, 582 P.2d 970, 975, 148 Cal. Rptr. 379, 384 (1978).

31. *Tucker v. Lassen Sav. & Loan Ass'n*, 12 Cal. 3d 629, 639, 526 P.2d 1169, 1175, 116 Cal. Rptr. 633, 639 (1974).

32. *Patton v. First Fed. Sav. & Loan Ass'n*, 118 Ariz. at 479, 578 P.2d at 158; *Tucker v. Lassen Sav. & Loan Ass'n*, 12 Cal. 3d 629, 638-39, 526 P.2d 1169, 1175, 116 Cal. Rptr. 633, 639 (1974).

33. Volkmer, *supra* note 22, at 770.

34. *Id.*

35. *See Bonanno, supra* note 24, at 275.

36. *See* FED. RES. BULL., June 1979, at A40; Bonanno, *supra* note 24, at 275-78.

37. 118 Ariz. at 479, 578 P.2d at 158.

38. 15 Ariz. App. 78, 486 P.2d 190 (1971), *appeal denied*, 108 Ariz. 192, 494 P.2d 1322 (1972).

39. *Id.* at 79, 486 P.2d at 191.

40. *Id.*

sale clause, without more, stated a claim for relief.⁴¹

As a defense to the foreclosure action, the Harns alleged that the acceleration clauses were unlawful restraints on alienation, and therefore unenforceable.⁴² The court of appeals declined to adopt the position that due-on-sale clauses were invalid *per se* because the clauses did not restrict the mortgagor's rights of alienation absolutely.⁴³ Nevertheless, the court refused to enforce the clauses absent an allegation that the purpose of the clauses had been circumvented, or that the mortgagee's security had been impaired.⁴⁴ Where there was no showing that the mortgagee had suffered from the conveyance, the court held it inequitable to impose the harsh penalty of a forfeiture on the mortgagor.⁴⁵ Accordingly, the *Harn* decision placed the burden on the mortgagee to prove that invocation of the clause was reasonable under the circumstances.⁴⁶

In deciding *Patton*, the Arizona Supreme Court relied upon *Harn* and also upon the reasoning of the California Supreme Court in *Tucker v. Lassen Savings & Loan Association*.⁴⁷ The *Tucker* court adopted a test comparing the "quantum of restraint" that the particular due-on-sale clause has upon alienation with the justification offered for the enforcement of the provision.⁴⁸ In an installment land contract, the possibility of automatic enforcement of the provision, without a showing of security impairment, creates a high quantum of restraint.⁴⁹ Accordingly, the lender must show a high degree of justification to overcome his burden of proof.⁵⁰

41. *Id.* at 80, 486 P.2d at 192.

42. *Id.*

43. *Id.* at 81, 486 P.2d at 193.

44. *Id.*

45. *Id.* Since the mortgagee's complaint contained no allegation that it had been harmed by the conveyance, the court upheld the trial court's dismissal of the complaint. *Id.*

46. *Id.*

47. 12 Cal. 3d 629, 526 P.2d 1169, 116 Cal. Rptr. 633 (1974). The Tuckers had borrowed money from the Lassen Savings and Loan to purchase a dwelling that the lender knew at the time of the loan was intended to be held by the Tuckers for resale. *Id.* at 632-33, 526 P.2d at 1170-71, 116 Cal. Rptr. at 634-35. Nevertheless, Lassen sought to enforce the due-on-sale clause contained in the deed of trust when the Tuckers conveyed the property to the Nolls on an installment contract. *Id.* Because the Tuckers could not pay the accelerated debt, an agreement was worked out between the Nolls and the lender, whereby the Nolls assumed the debt subject to an interest rate increase. *Id.* The Tuckers filed suit, alleging that the due-on-sale provision was an unlawful restraint on alienation and claiming damages for profits lost on the transaction. *Id.* at 634, 526 P.2d at 1171, 116 Cal. Rptr. at 635.

48. *Id.* at 636, 526 P.2d at 1173, 116 Cal. Rptr. at 637.

49. *Id.* at 637, 526 P.2d at 1174, 116 Cal. Rptr. at 638.

50. *Id.* at 636, 526 P.2d at 1173, 116 Cal. Rptr. at 637. The *Tucker* quantum-of-restraint test, which places a varying burden of proof on the lender, has been adopted by other jurisdictions. *E.g.*, *Nichols v. Ann Arbor Fed. Sav. & Loan Ass'n*, 73 Mich. App. 163, 174, 250 N.W.2d 804, 809 (1977); *Bellingham First Fed. Sav. & Loan Ass'n v. Garrison*, 87 Wash. 2d 437, 439, 553 P.2d 1090, 1092 (1976). Other courts simply hold that due-on-sale clauses are valid restraints on alienation when they are reasonable under the circumstances. *See Sanders v. Hicks*, 317 So. 2d 61, 64 (Miss. 1975); *First Commercial Title v. Holmes*, 92 Nev. 363, 365, 550 P.2d 1271, 1272 (1976); *Crockett v. First Fed. Sav. & Loan Ass'n*, 289 N.C. 620, 630, 224 S.E.2d 580, 587 (1976).

In applying the quantum-of-restraint test to the facts in *Patton*, the court distinguished transactions involving a deed of trust from mortgages on the ground that a deed of trust affords the borrower less protection than does a mortgage.⁵¹ The court added, however, that mortgages and deeds of trust were sufficiently analogous so that mortgage law may be looked to for guidance when dealing with a deed of trust.⁵²

According to *Harn*, the lender must show that impairment of security results from the conveyance.⁵³ Furthermore, in accordance with the *Tucker* reasoning, when the quantum of restraint is high,⁵⁴ the lender carries the burden of proving a high degree of justification before the clause would be enforced.⁵⁵ That justification was found to be lacking in the *Patton* case because the court concluded that First Federal's security was actually improved by the transaction between Mrs. Patton and Mr. Toy.⁵⁶ As the court explained, at the time First Federal took action to enforce its rights under the deed of trust, it had two parties interested in making payments on the loan and maintaining the property instead of only one.⁵⁷ Arguably, its security interests were enhanced rather than impaired by Mrs. Patton's conveyance and, therefore, enforcement of the provision was unreasonable.⁵⁸

In addition to First Federal's failure to show sufficient justification for enforcement of the due-on-sale clause, the court also found that First Federal had violated provisions of the Deed of Trust Act.⁵⁹ The Act provides for an inexpensive and swift foreclosure proceeding,⁶⁰ but is also designed to protect borrowers.⁶¹ For example, section 806.01 limits the beneficiary's ability to increase the interest rate on the loan secured by the trust deed.⁶² An increase is allowed only in those trans-

51. 118 Ariz. at 477, 578 P.2d at 156.

52. *Id.*

53. *Baltimore Life v. Harn*, 15 Ariz. App. at 81, 486 P.2d at 193.

54. See text & notes 48-51 *supra*.

55. *Patton v. First Fed. Sav. & Loan Ass'n*, 118 Ariz. at 479-80, 578 P.2d at 158.

56. *Id.* Mrs. Patton did not ask to be relieved from liability on her obligation to First Federal. *Id.* According to the court, she therefore had a considerable interest in ensuring that the payments were made to First Federal because if Mr. Toy defaulted, the trustee could sell the property, thereby jeopardizing her security on Mr. Toy's obligation. *Id.* Mr. Toy also had a strong interest in maintaining the premises and seeing that the obligations were properly maintained because he occupied the property and would lose his equity if the obligations fell into default. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 478-79, 578 P.2d at 157-58. See ARIZ. REV. STAT. ANN. §§ 33-801 through -821 (1974).

60. ARIZ. REV. STAT. ANN. § 33-807 (1974); see *Andreola v. Arizona Bank*, 26 Ariz. App. 556, 559, 550 P.2d 110, 113 (1976) (citing Comment, *The Deed of Trust: Arizona's Alternative to the Real Property Mortgage*, 15 ARIZ. L. REV. 194, 195 (1973)).

61. See ARIZ. REV. STAT. ANN. § 33-806.01 (1974); Fry, *The Deed of Trust: A New Device in Arizona Real Estate Financing*, ARIZ. B. J., March 1972, at 5, 7.

62. ARIZ. REV. STAT. ANN. § 33-806.01 (C) (1974).

fers that totally release the trustor from his obligation.⁶³ Since Mrs. Patton remained liable on her obligation to First Federal, the court concluded that the lender's attempt to raise the interest rate violated the statute.⁶⁴ The same section also protects the trustor's right of conveyance and disallows an arbitrary withholding of consent to transfer.⁶⁵ Accordingly, the court in *Patton* found that since First Federal's actions were not based on an impairment of its security, the association withheld its consent arbitrarily in violation of the statute.⁶⁶

Without infringing upon the borrower's right to convey or violating the Deed of Trust Act, permissible actions of the lender to protect its security do exist. First Federal could have required Mr. Toy to provide information concerning his financial status, enabling the association to determine whether the transfer endangered its security.⁶⁷ If it were demonstrated that Mr. Toy was a financial risk, the lender could refuse consent to the transfer and enforce the due-on-sale clause, but it may not act arbitrarily, nor condition its consent upon exacting an interest rate increase.⁶⁸ Thus, the *Patton* decision did not invalidate due-on-sale clauses, but merely limited their enforcement to situations where security is reasonably impaired.

The Future of Due-on-sale Clauses in Arizona

By its terms, the *Patton* decision would seem to have a broad scope of application. That scope, however, may be severely limited by the appearance of certain federal regulations on federally chartered savings and loan associations. Under the authority granted to it by Congress,⁶⁹ the Federal Home Loan Bank Board has promulgated extensive regulations for the chartering and operation of federal savings and loan associations.⁷⁰ One such regulation specifically allows for the use of due-on-sale provisions in loan contracts made by these federal agencies.⁷¹ Hence, problems of federal preemption not present in the *Patton* case may appear in the future.⁷²

Section 545.6-11, subsection (f), of Title 12 of the Code of Federal Regulations, provides that federal savings and loan associations con-

63. *Id.*

64. 118 Ariz. at 478, 578 P.2d at 157.

65. ARIZ. REV. STAT. ANN. § 33-806.01 (A) (1974).

66. 118 Ariz. at 479, 578 P.2d at 158.

67. *Id.*

68. *Id.*

69. 12 U.S.C. § 1464(A) (1976).

70. 12 C.F.R. §§ 500 through 589 (1979).

71. *Id.* § 545.6-11(f), (g).

72. The deed of trust in the *Patton* decision was executed in 1972. *Patton v. First Fed. Sav. & Loan Ass'n*, 118 Ariz. at 475, 578 P.2d at 154. Therefore, it did not come within the provisions of 12 C.F.R. § 545.6-11(f), (g) (1979).

tinue to have the power to include due-on-sale acceleration clauses in their loan instruments.⁷³ Although subsection (g) limits the exercise of the due-on-sale clauses in certain situations,⁷⁴ and prohibits the imposition of a prepayment penalty in conjunction with debt acceleration under the due-on-sale clause,⁷⁵ the lender is allowed great latitude in the drafting and enforcement of the clause.⁷⁶ The question arises, then, whether state law may further restrict the use of these clauses without conflicting with the federal law.

In *Glendale Federal Savings & Loan Association v. Fox*,⁷⁷ due-on-sale clauses in federal savings and loan association contracts were upheld notwithstanding a California statute that prohibited their use.⁷⁸ The court concluded that the federal regulations governed exclusively, and completely preempted any state regulation on the matter in all federal savings and loan association contracts made on or after June 8, 1976.⁷⁹ Thus, it appears that the only restrictions that are applicable to due-on-sale clauses in federal savings and loan association contracts are those enumerated in the Code of Federal Regulations.⁸⁰

Accordingly, the rule of *Patton* will have little effect in future controversies between borrowers and federally chartered savings and loan associations. The decision still controls state chartered associations.

73. 12 C.F.R. § 545.6-11(f) (1979). Prior to the enactment of this regulation in its present form on May 3, 1976, the Federal Home Loan Bank Board had interpreted prior regulations to permit the use of due-on-sale clauses. See *Glendale Fed. Sav. & Loan Ass'n v. Fox*, 459 F. Supp. 903, 907 (C.D. Cal. 1978). There is also authority for the proposition that federal regulations in the area of federally chartered savings and loans are so extensive that the field is entirely preempted, and state laws are inapplicable to these associations despite the lack of a specific regulation on the matter. See *City Fed. Sav. & Loan Ass'n v. Crowley*, 393 F. Supp. 644, 655 (E.D. Wis. 1975); *Lyons Sav. & Loan Ass'n v. Federal Home Loan Bank Board*, 377 F. Supp. 11, 17 (N.D. Ill. 1974); *People v. Coast Fed. Sav. v. Loan Ass'n*, 98 F. Supp. 311, 316 (S.D. Cal. 1951). This issue, however, was not addressed in the *Patton* decision.

74. 12 C.F.R. § 545.6-11 (g)(1) (1979). The federal savings and loan association may not exercise the acceleration clauses in the following circumstances: (1) Creation of a junior encumbrance; (2) creation of a security interest in the property for the purchase money of a household appliance; (3) transfer by devise, descent, or by operation of law upon the death of a joint tenant; and (4) the grant of any leasehold interest of three years or less not containing an option to purchase. *Id.*

75. *Id.* § 545.6-11(g)(2).

76. See, e.g., *id.* § 545.6-11 (g)(3) (allowing the lender to increase the interest rate on the outstanding debt upon an agreement of novation between the borrower and his transferee); *id.* § 545.6-11 (f) (except as provided in subsection (g), enforcement of the clause shall be governed solely by the terms of the contract between the lender and the borrower).

77. 459 F. Supp. 903 (C.D. Cal. 1978).

78. *Id.* at 912. In *Glendale*, the California Real Estate Board refused to allow Glendale Federal Federal Savings & Loan to finance a large multi-family complex because the association's standard deed of trust contained due-on-sale clauses, prohibited under California law. *Id.* at 905-06. The association sued the board, alleging that its contracts were not subject to state regulation. *Id.* at 906. The court held that the California statute, CAL. CIV. CODE § 2924.6 (West 1979), was inapplicable to the contracts in question. 459 F. Supp. at 912.

79. 459 F. Supp. at 907. After an extensive survey of the congressional intent and the historical background regarding the regulation of federal savings and loan associations, the court determined that the intention of the Federal Home Loan Bank Board was to negate state attempts to control the use of due-on-sale clauses in federal loan contracts. *Id.* at 912.

80. See 12 C.F.R. § 545.6-11 (g) (1979); text and notes 74-76 *supra*.

Nevertheless, the *Patton* court did not declare due-on-sale clauses to be invalid *per se*,⁸¹ and thus the clause remains as a viable method by which the lender may protect its security interests.⁸² State chartered lending institutions, then, will simply have to employ other means for increasing interest rates on outstanding loans.⁸³

Conclusion

The *Patton* decision reflects a judicial balancing of the policies favoring freedom of contract and the policies favoring the free alienability of property. The decision allows creditors to protect their security interests through the use of due-on-sale clauses in the contract, but it also protects the debtor's rights of transfer as well. The applicability of the *Patton* court's reasoning, however, is significantly limited by federal preemption and may only be valid as against state chartered financial institutions.

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81. 118 Ariz. at 479, 578 P.2d at 158.

82. *Id.*

83. Two such means are the variable rate mortgage and the rollover mortgage. See Cowen & Foley, *New Trends in Residential Mortgage Finances*, 13 REAL PROP. PROB. & TR. J. 1075, 1080 (1978).

XII. TORTS

A. ARIZONA'S CONSUMER FRAUD ACT: A STANDARD OF CONDUCT

The Arizona Supreme Court in *Sellinger v. Freeway Mobile Homes Sales, Inc.*,¹ created a private cause of action under the Arizona Consumer Fraud Act.² This decision enlarged the number of remedies available to consumers victimized by fraud³ and placed Arizona in line with a growing number of states that provide a private right of action for consumer fraud.⁴

In a recent case, *Peery v. Hansen*,⁵ the Arizona Court of Appeals reaffirmed the vitality of *Sellinger*.⁶ *Peery* represents the first attempt by an Arizona court to identify the specific elements that must be proved to maintain a cause of action for statutory fraud under section 1522 of the Arizona Consumer Fraud Act.⁷

In *Peery*, Neal Hansen made a \$1000 down payment for the purchase of John Peery's retail business, Fair Wheel Bikes.⁸ The contract was executed by the parties, but two days after closing, Hansen and his wife abandoned the premises and repudiated the contract.⁹ Subsequently, Peery sold the property to a third party for less than the Hansens had agreed to pay.¹⁰ Peery brought suit seeking to recover the difference between the contract price and the resale price.¹¹

In response, the Hansens answered and counterclaimed, seeking

1. 110 Ariz. 573, 521 P.2d 1119 (1974).

2. ARIZ. REV. STAT. ANN. §§ 44-1521 to -1534 (1967).

3. See 1975 ARIZ. ST. L.J. 220, 220 [hereinafter Casenote].

4. See NATIONAL ASS'N OF ATTORNEYS GENERAL COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, STATE PROGRAMS FOR CONSUMER PROTECTION 43 (1973). This publication, compiled prior to *Sellinger*, contains a list of 39 states, including Arizona, that have created a private cause of action for consumer fraud. *Id.* See also Lovett, *Private Actions for Deceptive Trade Practices*, 23 ADMIN. L. REV. 271, 271 (1971) (discussing the need to develop private remedies to match the growth of governmental remedies for consumer fraud and the state and federal government's response to this need).

5. 120 Ariz. 266, 585 P.2d 574 (Ct. App. 1978).

6. *Id.* at 269, 585 P.2d at 577.

7. ARIZ. REV. STAT. ANN. § 44-1522(A) (1967) provides:

The act, use, or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived, or damaged thereby, is declared to be an unlawful practice.

8. 120 Ariz. at 264-68, 585 P.2d at 575-76.

9. *Id.* at 267, 585 P.2d at 575.

10. *Id.*

11. *Id.* Evidence at trial showed that the Hansens agreed to purchase the business for \$14,406.23. *Id.* Peery subsequently sold the business for \$9,000 and sought damages for the difference of \$5,406.23. *Id.*

rescission of the contract and damages for fraud.¹² They based their claim for fraud on Peery's newspaper ad for his business which stated: "Owner claims \$20,000 yr. gross over \$70,000 p/yr."¹³ The Hansens' counterclaim was based on two counts: (1) Violation of the Arizona Consumer Fraud Act;¹⁴ and (2) common law misrepresentation.¹⁵ The trial court found that the Hansens knew, or should have known after a reasonable investigation, that the statements in the advertisement were not true and rendered judgment for Peery on the counterclaim.¹⁶

On appeal, the Hansens asserted that the trial court erred in entering judgment for the appellee on their counterclaim for fraud under Arizona's Consumer Fraud Act.¹⁷ In reversing the trial court, the court of appeals recognized that a violation of the Act is more readily shown than a common-law fraud violation.¹⁸ Nevertheless, the court held that while a right to rely is not essential to a statutory fraud action, the claimants must demonstrate actual reliance on the misrepresentation.¹⁹ Since it was impossible to determine from the record whether the Hansens had, in fact, relied on Peery's alleged misrepresentation, the court remanded the case for proceeding consistent with the opinion.²⁰

This casenote will examine the elements necessary to maintain an action under the Arizona Consumer Fraud Act as enumerated by the court in *Peery*. The court's holding, in light of prior case law, will then be examined. Finally, a reconciliation of the court's holding in *Peery* with the reasoning and public policy considerations underlying the Arizona Supreme Court's decision in *Sellinger* will be discussed.

Requisite Elements of Fraud

In Arizona, a plaintiff must prove a concurrence of the following nine elements in order to maintain a common law fraud action: (1) A representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted by and in the manner contemplated; (6) the hearer's ignorance of the truth; (7) his reliance on the truth; (8) his right to rely thereon;

12. 120 Ariz. at 267, 585 P.2d at 575.

13. *Id.* The only evidence the trial court had before it as to the gross sales of the business, was a statement by Peery's accountant that sales for the two months he had owned the business were \$1200 for December, 1975 and \$4600 for January, 1976. *Id.*

14. ARIZ. REV. STAT. ANN. §§ 44-1521 to -1534 (1967).

15. 120 Ariz. at 269, 585 P.2d at 577.

16. *Id.* 268-70, 585 P.2d at 576-78.

17. *Id.*

18. *Id.* at 269, 585 P.2d at 577.

19. *Id.* at 270, 585 P.2d at 578.

20. *Id.* "The question in the instant case is thus whether appellants actually knew, before they purchased Fair Wheel Bikes, that the representations in the ad were false." *Id.* at 269, 585 P.2d at 577.

and (9) his consequent and proximate injury.²¹ A major stumbling block to the successful prosecution of common law fraud has been proving the plaintiff's right to rely on the defendant's representations.²²

In Arizona, the general rule is that one has a right to rely on a representation only if such representation relates to a present or pre-existing fact.²³ This rule precludes predication of fraud either on promises that are not subsequently kept or on statements as to future events.²⁴ The reason is that such representations cannot be shown to be true or false at the time they were made.²⁵ Thus, there is no legal right to rely on a representation of a fact not in existence.²⁶ An exception to the general rule is made, however, if the promise is made without a present intent to perform.²⁷ Hence, to pursue a fraud action predicated upon failure to fulfill a promise or statements as to future events, a plaintiff is relegated to the difficult task of proving an actual intent to deceive on the part of the defendant.²⁸

Accordingly, the Arizona Consumer Fraud Act was passed in 1967²⁹ to give the Attorney General a more effective means of controlling consumer fraud.³⁰ Prior to the *Sellinger* decision, it was thought that any legal action under the statute rested within the exclusive domain of the state's Attorney General.³¹ With the creation of a private cause of action in *Sellinger*, consumers are able to recover damages under the Act.³²

In order to maintain a private action under section 1522(A) of the Act a plaintiff must prove the following elements: (1) A misrepresentation made in connection with a sale, (2) the buyer's actual reliance on the misrepresentation, and (3) the buyer's consequent and proximate injury.³³ In implying a private cause of action under the Arizona Con-

21. 120 Ariz. at 269, 585 P.2d at 577. See *Nielson v. Flashberg*, 101 Ariz. 335, 338-39, 419 P.2d 514, 517-18 (1966).

22. See Note, *Private Remedies Under the Consumer Fraud Acts: The Judicial Approaches of Statutory Interpretation and Implication*, 67 Nw. U.L. REV. 413, 417 (1972). See also *Lininger v. Soneblich*, 23 Ariz. App. 266, 268-69, 532 P.2d 538, 540 (1975); *Denbo v. Badger*, 18 Ariz. App. 426, 428, 503 P.2d 384, 386 (1972) (demonstrating difficulties involved in proving a right to rely in a common law fraud action).

23. See *Denbo v. Badger*, 18 Ariz. App. 426, 428, 503 P.2d 384, 386 (1972).

24. See generally *Ahmed v. Collins*, 23 Ariz. App. 54, 530 P.2d 900 (1975); *Denbo v. Badger*, 18 Ariz. App. 426, 503 P.2d 384 (1972).

25. See *Ahmed v. Collins*, 23 Ariz. App. 54, 57, 530 P.2d 900, 903 (1975).

26. See *Denbo v. Badger*, 18 Ariz. App. 426, 428, 503 P.2d 384, 386 (1972).

27. See *Berry v. Robotka*, 9 Ariz. App. 461, 467, 453 P.2d 972, 978 (1969).

28. See *Youngren v. Rezzonico*, 25 Ariz. App. 304, 306, 543 P.2d 142, 144 (1975); *Friedenmaker v. Valley Nat'l Bank*, 23 Ariz. App. 565, 569, 534 P.2d 1064, 1068 (1975).

29. 1967 Ariz. Sess. Laws 314 (codified at ARIZ. REV. STAT. ANN. §§ 44-1521 to -1534 (1967)).

30. See *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 576, 521 P.2d 1119, 1122 (1974).

31. See Casenote, *supra* note 3, at 222.

32. 110 Ariz. at 576, 521 P.2d at 1122.

33. See *Parks v. Macro-Dynamics, Inc.*, 121 Ariz. 517, 520, 591 P.2d 1005, 1008 (Ct. App.

sumer Fraud Act, the Arizona Supreme Court recognized that consumers would be provided with a more effective means of redress than was available under a common law fraud action³⁴ because an action under the Act is easier to maintain.³⁵

Rationale of Peery

The *Peery* court also recognized this need to provide consumers with more effective remedies for fraud.³⁶ The court of appeals noted the failure of the trial court to distinguish between the two counts in rendering judgment.³⁷ In considering this distinction, the court reasoned that the elements of fraud under the Arizona Consumer Fraud Act and common law fraud were not identical.³⁸ The court concluded that the right to rely is not an element of a cause of action for statutory fraud.³⁹ Nevertheless, the court held that actual reliance by the claimants was a prerequisite to recovery under the Act.⁴⁰

The *Peery* court drew from several sources to support its view that the right to rely is not an essential element of fraud under the Arizona Consumer Fraud Act. The court specifically adopted the reasoning of the Oregon Supreme Court in *Wolverton v. Stanwood*⁴¹ which also recognized that violations of the Oregon Unlawful Trade Practices Act were designed to be much more readily proven.⁴² Support for the court's reasoning was also drawn from the public policy considerations established in *Sellinger*.⁴³ Underlying the decision in *Sellinger* was the apparent need to provide consumers with more effective remedies for fraud and deceptive trade practices.⁴⁴ The *Sellinger* court recognized

1979); *Peery v. Hansen*, 120 Ariz. 266, 269, 585 P.2d 574, 577 (Ct. App. 1978); *Sellinger v. Freeway Mobile Homes Sales, Inc.*, 110 Ariz. 573, 576, 521 P.2d 1119, 1122 (1974). While ARIZ. REV. STAT. ANN. § 44-1522(A) (1967), set forth at note 7 *supra*, seems not to require a showing of reliance, this language has been held to apply only to those civil actions brought by the Attorney General seeking injunctive relief. See *Peery v. Hansen*, 120 Ariz. at 269, 585 P.2d at 577. See text & notes 61-75 *infra*.

34. *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. at 576, 521 P.2d at 1122.

35. See *Peery v. Hansen*, 120 Ariz. at 269, 585 P.2d at 577.

36. *Id.*

37. See *id.* Compare ARIZ. REV. STAT. ANN. § 44-1522(A) (1967) with *Nielson v. Flashburg*, 101 Ariz. 335, 338-39, 419 P.2d 514, 517-18 (1966). It appears that there are only three elements of fraud under the Act while there are nine elements of common law fraud. *Id.* For a list of these nine elements, see text & note 21 *supra*.

38. 120 Ariz. at 270, 585 P.2d at 578.

39. *Id.*

40. *Id.*

41. 278 Or. 709, 565 P.2d 755 (1978). See *Peery v. Hansen*, 120 Ariz. at 269, 585 P.2d at 577. In *Wolverton* the Oregon Supreme Court stated that "[t]he elements of common law fraud are distinct and separate from the elements of a cause of action under the Unlawful Trade Practices Act." 278 Or. at 713, 565 P.2d at 757.

42. 278 Or. at 713, 565 P.2d at 757.

43. See 110 Ariz. at 576, 521 P.2d at 1122.

44. *Id.* See *Lovett*, *supra* note 4, at 271 (recognizing the need to develop more effective private remedies for consumer fraud). Indeed, it has been suggested that the plaintiffs in *Sellinger* brought their action under the Consumer Fraud Act rather than common-law fraud to avoid

that "without effective private remedies, the widespread economic losses that result from deceptive trade practices remain uncompensable and a private remedy is highly desirable in order to control fraud in the market place."⁴⁵ Thus, Arizona's Consumer Fraud Act was construed in a manner designed to redress these recognized grievances.⁴⁶ The *Peery* court, in holding that a plaintiff who brings an action under the Arizona Consumer Fraud Act need not prove his right to rely, alleviated one of the major difficulties in maintaining a common law fraud action.⁴⁷

The *Peery* court cited no direct authority to support its holding that actual reliance is necessary to sustain an action under the Act, but rather assumed such a requirement from *Sellinger*.⁴⁸ In support of this proposition, the *Peery* court looked to language found in *Sellinger* that seemed to require that a plaintiff be actually damaged in order to bring an action under the Arizona Consumer Fraud Act.⁴⁹

In *Sellinger*, the court held that section 1533⁵⁰ impliedly granted a private right of action: "Clearly the section . . . contemplates that a person who has been damaged by the practices declared to be unlawful may exert a claim by reason of such acts. . . ."⁵¹ The *Peery* court interpreted this language to mean that a plaintiff must show he was damaged by the illegal practice.⁵² In order to demonstrate such a causal connection, the plaintiff must prove reliance on the deceptive act.⁵³ While a showing of actual reliance appears to be contrary to the express language of section 1522(A), such a requirement follows prior case law.⁵⁴

Reconciliation of Peery and Sellinger

The *Peery* court's holding that actual reliance is a prerequisite for recovery under Arizona's Consumer Fraud Act⁵⁵ is consistent with the

problems anticipated in proving justifiable reliance on the vendor's representations. Casenote, *supra* note 3, at 220 n.7.

45. 110 Ariz. at 576, 521 P.2d at 1122.

46. *Id.*

47. See Casenote, *supra* note 3 at 223; Note, *supra* note 22, at 417.

48. See 120 Ariz. at 269, 585 P.2d at 577.

49. *Id.*

50. ARIZ. REV. STAT. ANN. § 44-1533 (1967) reads:

The provisions of this article shall not bar any claim against any person who has acquired any monies or property, real or personal, by means of any practice declared to be unlawful by the provisions of this article.

51. 110 Ariz. at 576, 521 P.2d at 1122.

52. 120 Ariz. at 269, 585 P.2d at 577.

53. *Id.* at 269, 585 P.2d at 578. *But see id.* at 271, 585 P.2d at 579 (Howard, J., concurring). While disagreeing with the holding of *Sellinger*, Judge Howard argued that a strict reading of ARIZ. REV. STAT. ANN. § 44-1522(A) leads to the conclusion that actual reliance is not an element of fraud under the Act. *Id.*

54. See text & note 62 *infra*.

55. 120 Ariz. at 270, 585 P.2d at 578.

creation of a private cause of action under the Act in *Sellinger*.⁵⁶ Underlying both of these decisions is the recognized need to provide consumers with more effective means of redress.⁵⁷

Both *Sellinger* and *Peery* follow the well established principle that the standard of conduct required of a reasonable man may be defined by legislative enactments.⁵⁸ Courts have long recognized that a standard of conduct prescribed by legislation may be used to imply tort liability if the purpose of the legislation is to protect the class of persons to which the plaintiff belongs from a particular type of injury the legislation is designed to prevent.⁵⁹ Indeed, *Sellinger* has been cited as authority for this proposition by an Arizona court.⁶⁰

Thus while requiring actual reliance to be demonstrated appears to be contrary to the express language of the Consumer Fraud Act,⁶¹ such a holding logically follows Arizona law relating to the violations of a standard of conduct defined by legislative enactment.⁶² Though a court may adopt a standard of conduct formulated by a legislative body,⁶³ in order for the violation of such a statute to be actionable, the violation must be the proximate cause of the injury alleged.⁶⁴ In other words, there must be a causal relationship between the violation and the injury.⁶⁵ In the absence of actual reliance, this causal relationship would not exist. Therefore, the *Peery* court correctly concluded that reliance is a necessary element in a section 1522(A) private action.

Nevertheless, as authority to support a private cause of action under the Act, the *Sellinger* court relied primarily on an Illinois appellate court decision, *Rice v. Snarlin*,⁶⁶ noting similarity between the Ari-

56. See 110 Ariz. at 576, 521 P.2d at 1122.

57. *Id.*; 120 Ariz. at 270, 585 P.2d at 578.

58. See *Shaffer v. Mountain States Tel. & Tel. Co.*, 335 F.2d 932, 935 (9th Cir. 1964); *Collier v. Stamatis*, 63 Ariz. 285, 287-88, 162 P.2d 125, 126 (1945). See also RESTATEMENT (SECOND) OF TORTS §§ 285-288 (1965).

59. See, e.g., *Shaffer v. Mountain States Tel. & Tel. Co.*, 335 F.2d 932, 935 (9th Cir. 1964); *Valley Transp. System v. Reinartz*, 67 Ariz. 380, 382, 197 P.2d 264, 270 (1948); *Collier v. Stamatis*, 63 Ariz. 284, 287-88, 162 P.2d 125, 126 (1945). See also RESTATEMENT (SECOND) OF TORTS § 286 (1965). This section provides that tort liability may be implied when the purpose of the legislation is: (a) To protect a class of persons which includes the one whose interest is invaded; (b) to protect the particular interest invaded; (c) to protect that interest against the kind of harm which has resulted; and (d) to protect that interest against the particular hazard from which the harm results.

60. *Scott v. Allstate Ins. Co.*, 27 Ariz. App. 236, 243 n.3, 553 P.2d 1221, 1227 n.3 (1978) ("violation of a penal statute may constitute a civil tort").

61. See ARIZ. REV. STAT. ANN. § 44-1522(A) (1967) (set forth at note 7 *supra*).

62. See *Valley Transp. Sys. v. Reinartz*, 67 Ariz. 380, 382, 197 P.2d 269, 270 (1948); *Collier v. Stamatis*, 63 Ariz. 285, 287-88, 162 P.2d 125, 126 (1945).

63. See *Valley Transp. Sys. v. Reinartz*, 67 Ariz. 380, 382, 197 P.2d 269, 270 (1948); *Collier v. Stamatis*, 63 Ariz. 285, 287-88, 162 P.2d 125, 126 (1945); *Beaty v. Jenkins*, 3 Ariz. App. 375, 376, 414 P.2d 763, 764 (1966).

64. See cases cited note 62 *supra*. See also *Shaffer v. Mountain States Tel. & Tel. Co.*, 335 F.2d 932, 935 (9th Cir. 1964).

65. See *Beaty v. Jenkins*, 3 Ariz. App. 375, 376, 414 P.2d 763, 764 (1966).

66. 131 Ill. App. 2d 434, 266 N.E.2d 183 (1970). In *Rice*, the court concluded that the Illinois Consumer Fraud Act clearly expanded the consumer's rights beyond that of the common law and

zona and Illinois Consumer Fraud Acts.⁶⁷ Recently, in *Brooks v. Midas-International Corp.*,⁶⁸ the same Illinois appellate court concluded that under the Illinois Act, reliance is not a necessary element of statutory fraud.⁶⁹ Basing its holding on the language found in the Illinois Consumer Fraud Act, the *Brooks* court viewed the intent of the defendant as determinative.⁷⁰

While the Arizona and Illinois Consumer Fraud Acts contain identical language which seems not to require a showing of reliance,⁷¹ the *Peery* court recognized that the explicit purpose of Arizona's Act was to permit the attorney general to use injunctive relief to combat fraud.⁷² Since the purpose of injunctive relief is to prevent the occurrence of a harmful act, requiring actual reliance for the purpose of obtaining such relief would in many cases be self-defeating.⁷³ In contrast, the principle remedy sought in private actions will be damages.⁷⁴ To impose damages for fraud without a showing of actual reliance by the plaintiff would, in effect, hold a defendant liable when in fact his actions might not have been the proximate cause of the plaintiff's injury. Not only is there no support for this proposition in the law of Arizona,⁷⁵ but it would be tantamount to imposing absolute liability for misrepresentation. That is, a seller would be liable to all buyers regardless of whether the buyers were, in fact, injured by the seller's misrepresentation.

Although actual reliance must be demonstrated, it appears that the standard required by the *Peery* court will not be difficult to prove. At the common law, reliance describes the causal connection between the

that by creating this liability, the legislature must have intended to invest the consumer with the right to enforce his claim. *Id.* at 441, 266 N.E.2d at 188.

67. 110 Ariz. at 576, 521 P.2d at 1122. Compare ARIZ. REV. STAT. ANN. §§ 44-1521 to -1534 (1967) with ILL. REV. STAT. ch. 121 1/2, § 262 (Supp. 1974). But see 120 Ariz. at 271, 585 P.2d at 579 (Howard, J., concurring) (Illinois and Arizona statute are substantially different).

68. 47 Ill. App. 3d 266, 361 N.E.2d 815 (1977). "[T]he language employed in the Consumer Fraud Act clearly indicates that it is the intent of the defendant in his conduct, not reliance or belief of the plaintiff which is the pivotal point upon which an action arises." *Id.* at 273, 361 N.E.2d at 819.

69. *Id.* at 273, 361 N.E.2d at 819.

70. *Id.*

71. Compare ARIZ. REV. STAT. ANN. § 44-1522(A) (1967) with ILL. REV. STAT. ch. 121 1/2, § 262 (Supp. 1974). Both statutes provide that the question of "whether or not any person has in fact been misled, deceived or damaged thereby" is not an element of an action brought under the Acts. *Id.*

72. 120 Ariz. at 264-270, 585 P.2d at 576-78.

73. See generally *Tagiguchi v. State*, 47 Ariz. 302, 55 P.2d 802 (1936); *Gainbury v. Dodge*, 143 Ark. 473, 101 S.W.2d 178 (1938). See also FED. R. CIV. P. 65.

74. See *Peery v. Hansen*, 120 Ariz. 266, 267, 585 P.2d 574, 575 (Ct. App. 1978); *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 572, 575, 521 P.2d 1119, 1122 (1974). But see *Brooks v. Midas-Int'l. Corp.*, 47 Ill. App. 3d 266, 268, 361 N.E.2d 815, 817 (1977) (wherein plaintiffs sought both injunctive relief and damages).

75. See cases cited note 58 *supra*.

wrongful misrepresentation and the resulting injury.⁷⁶ In its classic sense, this connection is cast in terms of inducing the plaintiff to act.⁷⁷ In addition, this inducement must play a substantial part in causing the plaintiff to act.⁷⁸ This traditional notion of reliance is in contrast with the seemingly lax standard proffered by the *Peery* court. The court appears to require only an absence of knowledge of the falseness of the representation.⁷⁹ This less rigorous definition of reliance compliments the *Peery* court's holding that a plaintiff need not prove a right to rely in order to bring a statutory fraud action. By merely requiring a plaintiff to prove lack of knowledge of falsity, the *Peery* court adhered to the principle that the Act should provide consumers with a more effective remedy for fraud than is available at common law.⁸⁰

Conclusion

In holding that proof of a right to rely is not necessary to successfully establish a cause of action under the Arizona Consumer Fraud Act, the *Peery* court assured consumers of an effective means of redress by alleviating one of the major stumbling blocks to a common law fraud action. While a requirement that actual reliance must be demonstrated appears to be contrary to the express language of the statute, such requirement is in concert with the Arizona cases relating to the use of a legislative enactment as establishing a standard of conduct. The requirement that the defendant's conduct be the proximate cause of the injury serves to make the statutory remedy available only to those persons who, in fact, have been damaged by a deceptive act. Nevertheless, the court has indicated that the plaintiff's burden of proving reliance will not be a strict one.

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B. CLARIFYING THE CAUSE OF ACTION IN BYSTANDER RECOVERY

Most jurisdictions recognize freedom from emotional distress as a

76. See W. PROSSER, LAW OF TORTS § 108, at 714-15 (1971).

77. *Id.* See also *Stewart v. Albuquerque Nat'l. Bank*, 3 Ariz. 293, 298, 30 P. 303, 304 (1891).

78. See *Sarwark Motor Sales, Inc. v. Husband*, 5 Ariz. App. 304, 309, 426 P.2d 404, 409 (1967); *Stewart v. Phoenix Nat'l Bank*, 49 Ariz. 34, 43, 64 P.2d 101, 105 (1937).

79. 120 Ariz. at 269, 585 P.2d at 577-78. The court does not indicate whether materiality will be required. Presumably the misrepresentation is material, however, if the buyer actually relied on it. See text and note 13 *supra*.

80. See 120 Ariz. at 269, 585 P.2d at 577.

protected interest.¹ Only a small number of states, however, allow bystanders to recover for mental distress manifested by physical symptoms² and caused solely by witnessing peril or harm to a third party.³ In *Keck v. Jackson*,⁴ the Arizona Supreme Court held that a cause of action does exist for emotional distress caused by witnessing a negligently inflicted injury to a third person.⁵ The court limited this cause of action, however, by requiring that the plaintiff be within the "zone of danger,"⁶ that the injury produce a physical manifestation in the plaintiff,⁷ and that the plaintiff and the victim have a close personal relationship.⁸

In *Keck v. Jackson*, Dorothy Keck alleged that she and her mother were parked in the emergency lane of an interstate highway in order to change a flat tire.⁹ According to the complaint, their car was hit from behind by the defendant, who was negligently driving her car in the emergency lane.¹⁰ The mother was gravely injured and died in a hospital three months later.¹¹ Dorothy Keck was also seriously hurt, but survived the accident.¹² In addition to her physical injuries, Mrs. Keck sought damages for her emotional distress, suffered from witnessing the injury to and prolonged suffering of her mother.¹³ The trial court dis-

1. *E.g.*, *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 337, 240 P.2d 282, 285 (1952); *Rodrigues v. State*, 52 Haw. 156, 170, 472 P.2d 509, 519 (1970); *Falzone v. Busch*, 45 N.J. 559, 568, 214 A.2d 12, 17 (1965); *Hinish v. Meier and Frank Co.*, 166 Or. 482, 506, 113 P.2d 438, 448 (1941).

Peace of mind was not always recognized as a legally protected interest. *See* W. PROSSER, *LAW OF TORTS* § 12, at 49-50 (4th ed. 1971); text & note 19 *infra*. Liability for negligent invasions of emotional tranquility is, even today, a controversial area of the law. *See* W. PROSSER, *supra*, § 54, at 327.

2. Only Hawaii has done away with the requirement of a physical manifestation of the emotional injury. *Sinn v. Burd*, — Pa. —, —, 404 A.2d 672, 689 (1979). In *Leong v. Takasaki*, 55 Haw. 398, 412-13, 520 P.2d 758, 767 (1974), the court noted that emotional distress may be painful even when it does not cause physical symptoms. Although the calculation of damages is easier when there are physical symptoms, their absence should not bar relief altogether. *Id.* at 413, 520 P.2d at 767.

3. The leading case allowing recovery in this situation is *Dillon v. Legg*, 68 Cal. 2d 728, 748, 441 P.2d 912, 925, 69 Cal. Rptr. 72, 85 (1968). It has been followed in only a few jurisdictions. *See* *D'Ambra v. United States*, 354 F. Supp. 810, 822 (D.R.I. 1973); *D'Amicol v. Alvarez Shipping Co.*, 31 Conn. Supp. 164, 169, 326 A.2d 129, 132 (Super. Ct. 1973); *Leong v. Takasaki*, 55 Haw. 398, 410, 520 P.2d 758, 765 (1974); *Dziokonski v. Babineau*, 380 N.E.2d 1295, 1302 (Mass. 1978); *Toms v. McConnell*, 45 Mich. App. 647, 657, 207 N.W.2d 140, 146 (1973); *Sinn v. Burd*, — Pa. —, —, 404 A.2d 672, 686 (1979). *But see, e.g.*, *Tobin v. Grossman*, 24 N.Y.2d 609, 611, 249 N.E.2d 419, 420, 301 N.Y.S.2d 554, 555 (1969); *Grimsby v. Sampson*, 85 Wash. 2d 52, 57, 530 P.2d 291, 294 (1975) (may be overruled by *Hunsley v. Giard*, 87 Wash. 2d 424, 436, 553 P.2d 1096, 1103 (1976)).

4. 122 Ariz. 114, 593 P.2d 668 (1979).

5. *Id.* at 115, 593 P.2d at 669.

6. *Id.* at 116, 593 P.2d at 670.

7. *Id.* at 115, 593 P.2d at 669.

8. *Id.* at 116, 593 P.2d at 670.

9. *Id.* at 114, 593 P.2d at 668.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

missed the emotional-distress count¹⁴ of the complaint. The court of appeals reversed.¹⁵ The Arizona Supreme Court vacated the court of appeals' decision.¹⁶

This casenote will briefly examine the history of the "zone of danger" concept, as an element of bystander recovery, and its renunciation by the California Supreme Court in *Dillon v. Legg*.¹⁷ The casenote will then analyze *Keck v. Jackson* in light of its potential impact on the right of bystanders to recover for emotional distress caused by witnessing injury to another person. Finally, it will be argued that the zone of danger requirement of *Keck v. Jackson* should be abandoned.

Historical Perspective on Recovery for Mental Distress

Legal redress for invasions of emotional tranquility has long been recognized where the infliction of mental distress was intentional.¹⁸ The earliest cases allowing recovery for negligently inflicted emotional distress were those in which the plaintiff also experienced a physical injury.¹⁹ This impact rule, however, often led to inequitable results.²⁰

14. *Id.*

15. *Keck v. Jackson*, 122 Ariz. 117, 123, 593 P.2d 671, 677 (Ct. App. 1978).

16. *Id.* at 116, 593 P.2d at 670.

17. 68 Cal. 2d 728, 748, 441 P.2d 912, 925, 69 Cal. Rptr. 72, 85 (1968).

18. *See, e.g.*, *Savage v. Boies*, 77 Ariz. 355, 358, 272 P.2d 349, 351 (1954); *Barnett v. Collection Serv. Co.*, 214 Iowa 1303, 1312, 242 N.W. 25, 28 (1932); *Johnson v. Sampson*, 167 Minn. 203, 207, 208 N.W. 814, 816 (1926); *Moore v. Jefferson Hosp., Inc.*, 208 Va. 438, 441, 158 S.E.2d 124, 127 (1967); RESTATEMENT (SECOND) OF TORTS § 46 (1965); F. HARPER & F. JAMES, *THE LAW OF TORTS* § 18.4, at 1033 (1956); W. PROSSER, *supra* note 1, § 12, at 52; McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1, 10 (1949).

19. *See, e.g.*, *Spade v. Lynn & Boston R.R.*, 168 Mass. 285, 290, 47 N.E. 88, 89 (1897) (overruled by *Dziokonski v. Babineau*, 380 N.E.2d 1295, 1296 (Mass. 1978)); *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 109, 45 N.E. 354, 355 (1896) (overruled by *Battalla v. State*, 10 N.Y.2d 237, 239, 176 N.E.2d 729, 730, 219 N.Y.S.2d 34, 35 (1961)); *Knaub v. Gottwald*, 422 Pa. 267, 270, 220 A.2d 646, 647 (1966) (overruled by *Niederman v. Brodsky*, 436 Pa. 401, 411, 261 A.2d 84, 89 (1970)). *See also* Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1243 (1971).

The requirement of a physical injury or impact has become the minority position due in part to the belief that modern psychiatric testimony can, in many cases, distinguish real emotional suffering from false claims of distress. *See* *Rodrigues v. State*, 52 Haw. 156, 172, 472 P.2d 509, 519-20 (1970); *Battalla v. State*, 10 N.Y.2d 237, 242, 176 N.E.2d 729, 730, 219 N.Y.S.2d 34, 38 (1961); F. HARPER & F. JAMES, *supra* note 18, § 18.4, at 1034.

The rationale behind requiring a physical injury is that some sort of physical invasion of the plaintiff's person guarantees the genuineness of the claim of emotional injury. Otherwise, there would be no guarantee that the mental injury was not feigned. *Herrick v. Evening Express Pub. Co.*, 120 Me. 138, 141, 113 A. 16, 17 (1921); *Spade v. Lynn & Boston R.R.*, 168 Mass. 285, 288, 47 N.E. 88, 89 (1897) (overruled by *Dziokonski v. Babineau*, 380 N.E.2d 1295, 1296 (Mass. 1978)); *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 110, 45 N.E. 354, 354-55 (1896) (overruled by *Battalla v. State*, 10 N.Y.2d 237, 239, 176 N.E.2d 729, 730, 219 N.Y.S.2d 34, 35 (1961)); *Miller v. Baltimore & O.S.W.R. Co.*, 78 Ohio St. 309, 321, 85 N.E. 499, 502-03 (1908).

20. Plaintiffs with trivial emotional injuries but who had experienced an "impact" could often recover while those with relatively severe emotional damage unaccompanied by a physical invasion could not. Many courts found the rule to be satisfied by the most trifling of contacts. *See, e.g.*, *Christy Bros. Circus v. Turnage*, 38 Ga. App. 581, 581-82, 144 S.E. 680, 681 (1928) (recovery granted where horse evacuated its bowels into plaintiff's lap); *Mitchell v. Rochester Ry.*, 155 N.Y. 107, 109, 45 N.E. 354, 354 (1896) (no recovery where plaintiff fainted and suffered a miscarriage from shock when trolley horses stopped suddenly on either side of her head but did not touch her);

Most courts have rejected the impact rule and adopted a "zone of danger" test.²¹ Under the zone of danger test, the defendant is liable for damages for the negligent infliction of emotional distress if the plaintiff's personal security was threatened.²² In some of the jurisdictions that have already adopted the zone of danger rule, recovery is permitted only if the emotional distress results from the plaintiff's fear for his or her own safety.²³ Other courts have awarded damages where the emotional distress could be traced at least in part to the plaintiff's fear for another.²⁴

Arizona had used the zone of danger test prior to *Keck v. Jackson in Valley National Bank v. Brown*.²⁵ In *Brown*, the plaintiffs sought recovery for the aggravation of an existing emotional disturbance, allegedly caused by the bank's wrongful garnishment of their account.²⁶ The court denied recovery and enunciated the general rule that there is no cause of action for mental distress in Arizona unless there has been a "physical invasion of a person or the person's security."²⁷

Morton v. Stack, 122 Ohio St. 115, 116, 170 N.E. 869, 869 (1930) (recovery granted where plaintiff inhaled smoke). See also F. HARPER & F. JAMES, *supra* note 18, § 18.4, at 1033-34.

21. *E.g.*, Orlo v. Connecticut, 128 Conn. 231, 239, 21 A.2d 402, 405 (1941); Resavage v. Davies, 199 Md. 479, 487, 86 A.2d 879, 883 (1952); Falzone v. Busch, 45 N.J. 559, 569, 214 A.2d 12, 17 (1965).

Another approach, slightly different from the impact rule, is to allow damages for mental distress where the plaintiff suffers a physical injury although no actual impact occurs. Thus, Florida allowed a cause of action where a plaintiff suffered a heart attack after a car crashed into her house, even though she was not hit by the car nor was within the "zone of danger." Stewart v. Gilliam, 271 So. 2d 466, 472 (Fla. 1972).

22. Hopper v. United States, 244 F. Supp. 314, 317 (D. Colo. 1965); Strazza v. McKittrick, 146 Conn. 714, 717, 156 A.2d 149, 151 (1959); Whetham v. Bismarck Hosp., 197 N.W.2d 678, 684 (N.D. 1972).

23. See Strazza v. McKittrick, 146 Conn. 714, 719, 156 A.2d 149, 152 (1959) (woman who was endangered but not hurt by a car striking her house could not recover because her nervous condition stemmed from the fear that her son might have been hurt).

24. See, *e.g.*, Lindley v. Knowlton, 179 Cal. 298, 301-02, 176 P. 440, 441 (1918) (plaintiff allowed to recover for the emotional distress caused by her combined fear for herself and for her children when she rescued them from an attacking chimpanzee); Dave Snelling Lincoln-Mercury v. Simon, 508 S.W.2d 923, 926 (Tex. Civ. App. 1974) (plaintiff recovered because the court considered it unrealistic to require a mother who was within the zone of danger to remember whether her fear at the time of the accident was for her own safety or that of her child).

Those jurisdictions employing the impact test also take varied approaches to the problem of whether a plaintiff who suffers a physical impact may recover for emotional distress caused by the plaintiff's fear for the safety of another person. In *Lessard v. Tarca*, 20 Conn. Supp. 295, 133 A.2d 625 (Super. Ct. 1957), a family was involved in an automobile accident. *Id.* at 296, 133 A.2d at 626. One daughter was pinned inside the car. The parents and other children watched her burn to death. *Id.* Their claims for damages for emotional distress were denied because the distress arose from their concern for the burning child and not for their own safety. *Id.* at 299, 133 A.2d at 628. A New Jersey court reached a different conclusion in *Greenberg v. Stanley*, 51 N.J. Super. 90, 143 A.2d 588 (1958). In *Greenberg*, a mother who was pushing her child across the street in a perambulator was struck by a car. *Id.* at 94, 143 A.2d at 590. The court found it impossible to trace a certain percentage of the mother's damages to her fear for herself, as distinct from her fear for her child's safety. *Id.* at 107-08, 143 A.2d at 598. The court said that the entire injury was caused by the accident and it would not attempt to apportion damages between fear for self and fear for another. *Id.* at 106, 143 A.2d at 597.

25. 110 Ariz. 260, 265, 517 P.2d 1256, 1261 (1974).

26. *Id.*

27. *Id.* *Brown* did not define the zone of danger test in detail. Because the case did not

Dillon v. Legg's Rejection of the Zone of Danger Rule

In other jurisdictions, several recent decisions have rejected the zone of danger test.²⁸ For example, in the landmark case *Dillon v. Legg*,²⁹ the California Supreme Court recognized a cause of action for emotional distress, manifested by physical symptoms, that is caused by witnessing peril or harm to a closely related person.³⁰ In *Dillon*, a mother and daughter both experienced shock and resulting mental distress when they witnessed the accidental death of another daughter.³¹ The surviving daughter was within the zone of danger, but the mother—standing a few yards away—was not.³² The *Dillon* court overruled *Amaya v. Home Ice, Fuel and Supply Co.*,³³ which would have required Mrs. Dillon's presence within the zone of danger before she could claim to have suffered a legally recognizable injury.³⁴

The *Dillon* court noted that "the only reason for the requirement of presence within the zone of danger lies in the fact that one within it will fear the danger of impact."³⁵ The court reasoned, therefore, that since California had previously rejected the impact rule, the zone of danger test must "inevitably collapse."³⁶ The court determined that a defendant should be held liable where it reasonably could be foreseen that the defendant's negligent act would cause emotional distress in a bystander-witness.³⁷ To aid the lower courts in finding whether the plaintiff's injury was foreseeable, the court noted that the following factors should be considered: (1) The plaintiff's physical proximity to the accident;³⁸ (2) whether the shock resulted from a "direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence;"³⁹ and (3) the closeness of the relationship

involve an accident (and thus no invasion of the plaintiffs' physical security), the court applied the zone of danger test negatively to deny liability. *Id.* at 265, 517 P.2d at 1261. There was no opportunity for the court to say more than it did about the zone of danger rationale.

28. See cases cited at note 3 *supra*.

29. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

30. *Id.* at 740, 441 P.2d at 925, 69 Cal. Rptr. at 85.

31. *Id.* at 731, 441 P.2d at 915, 69 Cal. Rptr. at 75.

32. *Id.* at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.

33. 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

34. See *id.* at 302, 379 P.2d at 515, 29 Cal. Rptr. at 35.

35. 68 Cal. 2d at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75 (emphasis in original).

36. *Id.* If the rule of *Amaya* were applied to the facts of *Dillon*, the surviving sister could have recovered damages for emotional distress caused by witnessing the death of her sister. Her recovery would have been based on her presence within the zone of danger. Recovery for the mother would have been precluded because her physical safety had not been threatened. See *id.* at 732-34, 441 P.2d at 915, 69 Cal. Rptr. at 75.

37. *Id.* at 740, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81. "When a child is endangered, it is not beyond contemplation that its mother will be somewhere in the vicinity, and will suffer serious shock." *Id.* (quoting W. PROSSER, *supra* note 1, § 54, at 334).

38. *Id.* at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

39. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

between the plaintiff and the victim.⁴⁰ Also, the court pointed out that the emotional injury must be manifested physically.⁴¹

Keck v. Jackson's Approach to Bystander Recovery

In reversing the trial court, the Arizona Court of Appeals in *Keck* relied heavily on the reasoning in *Dillon v. Legg*. It cited *Dillon* for the proposition that the zone of danger rule is an artificial device used to limit liability.⁴² The court of appeals quoted passages from *Dillon* to the effect that courts should apply general principles of tort law in a case of negligent infliction of emotional distress, rather than using artificial barriers—such as the zone of danger test—to limit liability.⁴³ Even though the court of appeals in *Keck* was “most persuaded”⁴⁴ by the reasoning in *Dillon*, it emphasized that its decision was “strictly predicated upon the existence of physical symptoms . . . and the fact that the plaintiff was actually involved in the impact.”⁴⁵

A year after the court of appeals grappled with *Keck v. Jackson*, the Arizona Supreme Court vacated the lower court's opinion.⁴⁶ The Supreme Court acknowledged Dorothy Keck's claim of emotional distress from witnessing the injury to her mother.⁴⁷ The opinion limited the cause of action to cases in which the plaintiff was within the zone of danger⁴⁸ and had a close personal relationship to the victim.⁴⁹ Stating

40. *Id.* In most of the reported cases, the plaintiff was related to the victim by blood or affinity. See, e.g., *Dillon v. Legg*, 68 Cal. 2d at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74 (1968) (a mother recovered damages for emotional distress caused by witnessing the death of her daughter); *Krouse v. Graham*, 19 Cal. 3d 59, 76, 562 P.2d 1022, 1030, 137 Cal. Rptr. 863, 872 (1977) (a husband recovered damages for emotional distress caused by witnessing the death of his wife). In *Keck*, the relationship may be close “by consanguinity or otherwise.” 122 Ariz. at 116, 593 P.2d at 670. See text & note 49 *infra*.

41. 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

42. 122 Ariz. 117, 120, 593 P.2d 671, 674 (Ct. App. 1978), vacated, 122 Ariz. 114, 593 P.2d 668 (1979).

43. *Id.* at 121, 593 P.2d at 675. According to the court of appeals:

Dillon emphasized that there is no reason why the general rules of tort law, including the concepts of negligence, foreseeability, and proximate cause, should not govern in a negligent infliction of emotional distress for a third person cause of action, as they have been applied to all other types of tort causes.

Id. For a general discussion of the relative merits of the “zone of danger” and “foreseeability” approaches to bystander recovery, see Comment, *Negligently Inflicted Emotional Shock from Witnessing the Death or Injury of Another*, 10 ARIZ. L. REV. 508, 508-22 (1968).

44. 122 Ariz. at 123, 593 P.2d at 677.

45. *Id.*

46. 122 Ariz. 114, 116, 593 P.2d 668, 670 (1979).

47. *Id.*

48. *Id.* The court, noting that it usually follows the *Restatement* position when there is no case law on point, quoted the *Restatement* rule with approval. *Id.* at 115, 593 P.2d at 669. The *Restatement* position is that the defendant should be liable to a bystander for emotional distress that causes physical symptoms only if the defendant has also created an unreasonable risk of bodily harm to the bystander. RESTATEMENT (SECOND) OF TORTS § 313 (1965).

49. 122 Ariz. at 116, 593 P.2d at 670. The relationship may be close “either by consanguinity or otherwise.” *Id.* In a footnote, the court cited favorably the holding of *Leong v. Takasaki*, 55 Haw. 398, 411, 520 P.2d 758, 766 (1974), which allowed a child to recover damages for emotional distress caused by witnessing the death of his step-grandmother. 122 Ariz. at 116 n.2, 593 P.2d at

that damages for emotional disturbance alone are "too speculative,"⁵⁰ the court further required that the mental distress be manifested physically.⁵¹ Finally, the holding provided a remedy for emotional harm experienced at "the time of the accident" but not afterward.⁵² Therefore, Mrs. Keck was not permitted to claim damages for the emotional distress she suffered from watching her mother's prolonged battle for life.⁵³

By requiring that the zone of danger test be met in bystander-recovery cases, the Arizona Supreme Court has refused to follow *Dillon v. Legg* and its progeny.⁵⁴ While the *Keck* holding is more liberal than those in some other jurisdictions,⁵⁵ it stops short of *Dillon's* watershed decision that replaced mechanical bars to bystander recovery with an analysis based upon general tort principles.⁵⁶ The supreme court in *Keck* insists, however, on limiting bystander recovery by using the zone of danger test.⁵⁷ This is an intellectually unsatisfying requirement, as the zone of danger rule does not test the genuineness of the emotional distress suffered by a plaintiff who has witnessed an injury to another person. As *Dillon v. Legg* pointed out, courts that employ the zone of danger test do so to ensure that the plaintiff feared for his or her own safety.⁵⁸ It purportedly gives some assurance that the plaintiff's emotional distress was not feigned.⁵⁹ The cause of action recognized in *Keck*, however, provides a remedy for plaintiffs who suffer shock because someone else has been injured.⁶⁰ Applying the zone of danger rule to bystander situations like *Keck* simply tests the wrong proposition—that the plaintiff's claim probably is valid because emotional distress naturally results from a fear of danger to oneself. Thus, the rule is

670 n.2. See also *Hunsley v. Giard*, 87 Wash. 2d 424, 436, 553 P.2d 1096, 1103 (1976). The *Hunsley* court "declin[e]d to draw an absolute boundary around the class of persons whose peril may stimulate the mental distress. This usually will be a jury question bearing on the reasonable reaction to the event unless the court can conclude as a matter of law that the reaction was unreasonable." *Id.* at 436, 553 P.2d at 1102-03.

50. 122 Ariz. at 115-16, 593 P.2d at 669-70.

51. *Id.* at 115, 593 P.2d at 669.

52. *Id.* at 116, 593 P.2d at 670. The court offered no reasoning for its holding that the emotional distress must be due to fright suffered at the time of the accident. The same limitation was advanced by the *Dillon* court, 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80, and was adopted by the Arizona Court of Appeals in *Keck*, 122 Ariz. at 120, 593 P.2d at 674. The rationale offered in *Dillon* was that the defendant would be more likely to foresee emotional injury to a nearby witness. 68 Cal. 2d at 741, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81.

53. 122 Ariz. at 116, 593 P.2d at 670.

54. See note 3 *supra*.

55. Many jurisdictions have totally denied recovery for emotional distress caused by witnessing injuries to another person. Foremost among these cases is *Tobin v. Grossman*, 24 N.Y. 2d 609, 619, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 562 (1969). See text & notes 56-60 *infra*.

56. 68 Cal. 2d at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.

57. 122 Ariz. at 116, 593 P.2d at 670.

58. 68 Cal. 2d at 732-33, 441 P.2d at 915, 69 Cal. Rptr. at 75.

59. *Id.* at 735, 441 P.2d at 917, 69 Cal. Rptr. at 77.

60. 122 Ariz. at 115, 593 P.2d at 669.

irrelevant in determining whether the plaintiff suffered emotional distress from witnessing injury to a third person.

The Arizona opinion falls somewhere between the two major approaches, as represented by *Dillon* and its antithesis, *Tobin v. Grossman*.⁶¹ In *Tobin*, the New York Court of Appeals refused to overrule its well established policy of refusing to award damages to a plaintiff who suffers emotional distress as a result of an injury inflicted on another.⁶² Questions of the relationship between the plaintiff and the third-party victim and whether the plaintiff was an eyewitness to the incident were of no importance to the court.⁶³ The crucial issue, a concern shared by many other courts,⁶⁴ was the need to limit the extent of the defendant's liability.⁶⁵ The *Tobin* court feared that liability would be potentially unlimited if recovery in bystander cases were based on the foreseeability of emotional harm.⁶⁶ *Tobin* explained, therefore, that its refusal to impose a duty to avoid negligently inflicting psychic injury on bystanders was based on policy considerations alone.⁶⁷

In *Keck*, the Arizona Supreme Court seems to have blended the various concerns of *Tobin* and *Dillon*. The result, however, does not clarify the issues in this area of the law. For example, *Tobin* denies recovery for bystanders' emotional distress because it would impose undue liability on the defendant.⁶⁸ *Keck*, however, states that a bystander should have a legal remedy for such distress.⁶⁹ Where *Dillon* denies the need for artificial barriers such as the zone of danger test,⁷⁰ *Keck* imposes it as a necessary limit on liability.⁷¹ This appears to be an effort by the Arizona court to find a compromise between the approaches of *Tobin* and *Dillon*: *Keck* recognizes both the need to pro-

61. 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

62. *Id.* at 611, 249 N.E.2d at 420, 301 N.Y.S.2d at 555.

63. *Id.*

64. See, e.g., *Garfield v. United States*, 297 F. Supp. 891, 901 (W.D. Wis. 1969); *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678, 680 (N.D. 1972); *Colla v. Mandella*, 1 Wis. 2d 594, 599, 85 N.W.2d 345, 348 (1957).

65. See, e.g., *Amaya v. Home Ice, Fuel and Supply Co.*, 59 Cal. 2d 295, 312-13, 379 P.2d 513, 523, 29 Cal. Rptr. 33, 43 (1963) (overruled by *Dillon v. Legg*, 68 Cal. 2d 728, 748, 441 P.2d 912, 925, 69 Cal. Rptr. 72, 85 (1968)); *Guilmette v. Alexander*, 128 Vt. 116, 120, 259 A.2d 12, 15 (1969).

66. 24 N.Y.2d at 615, 249 N.E.2d at 423, 301 N.Y.S.2d at 558. See also W. PROSSER, *supra* note 1, § 54, at 334. Dean Prosser stated:

It would be an entirely unreasonable burden on all human activity if the defendant who endangered one man were to be compelled to pay for the lacerated feelings of every person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as his friends.

Id. Although thus recognizing the need for circumscribing liability, Dean Prosser nevertheless recommended that courts provide a limited remedy for emotional distress caused by witnessing injury to another. *Id.* § 54, at 335.

67. 24 N.Y.2d at 617, 249 N.E.2d at 425, 301 N.Y.S.2d at 560.

68. See text & note 59 *supra*.

69. 122 Ariz. at 115, 593 P.2d at 669.

70. 68 Cal. 2d at 747, 441 P.2d at 925, 69 Cal. Rptr. at 85.

71. 122 Ariz. at 116, 593 P.2d at 670.

vide a remedy and the need to limit the defendant's liability. It is, in fact, a positive step in that it states clearly a plaintiff's right to recover for emotional distress caused by the shock of seeing another person injured. The *Keck* decision will avoid the unsettling result of an extreme case like *Lessard v. Tarca*,⁷² in which family members involved in an auto collision could not claim damages for emotional distress caused by watching a daughter burn to death.⁷³ The *Keck* decision, however, does not rectify the problem that was overcome by the California court in *Dillon*: the injustice of compensating a plaintiff who was within the zone of danger but denying recovery to a similarly affected person who was standing but a few feet further away from the accident.⁷⁴

Keck's Further Limits on Bystander Recovery

In addition to the zone of danger test, the *Keck* court imposed three further conditions that a plaintiff must satisfy in order to establish a cause of action for emotional distress caused by witnessing an injury to another person: (1) The shock must be manifested as a physical injury;⁷⁵ (2) the emotional distress must result from shock suffered at the time of the accident;⁷⁶ and (3) the plaintiff must have been closely related to the victim.⁷⁷ The latter two of these requirements are similar to the factors set forth in the *Dillon* opinion as aids to the lower courts in finding whether the bystander's emotional distress was reasonably foreseeable.⁷⁸ In effect, these requirements should supplant the zone of danger test as a way to "mark out the areas of liability, excluding the remote and unexpected."⁷⁹

The other additional condition to bystander recovery—that the emotional distress must be manifested by physical symptoms⁸⁰—reflects the widespread belief that emotional distress alone is too subjective an injury to be established accurately in court.⁸¹ While it is true that some mental injury may be difficult to tie to a specific cause,⁸² psychiatric testimony can establish with a degree of sophistication the

72. 20 Conn. Supp. 295, 133 A.2d 625 (Super. Ct. 1957). See text & note 24 *supra*.

73. 20 Conn. Supp. at 299, 133 A.2d at 628.

74. 68 Cal. 2d at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.

75. 122 Ariz. at 115, 593 P.2d at 669.

76. *Id.* at 116, 593 P.2d at 670.

77. *Id.*

78. 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80. See text & notes 39-40 *supra*.

79. 68 Cal. 2d at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.

80. See text & note 75 *supra*.

81. See *Daley v. LaCroix*, 384 Mich. 4, 9, 179 N.W.2d 390, 393 (1970); *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 110, 45 N.E. 354, 354-55 (1896) (overruled by *Battalla v. State*, 10 N.Y.2d 237, 239, 176 N.E.2d 729, 730, 219 N.Y.S.2d 34, 35 (1961)); W. PROSSER, *supra* note 1, § 12, at 50.

82. See *Leong v. Takasaki*, 55 Haw. 398, 412, 520 P.2d 758, 767 (1974).

existence of real emotional harm.⁸³ Since expert witnesses can now verify many claims of emotional distress, there is no longer any medical reason to bar such claims from the courts.⁸⁴ Injuries failing to produce physical symptoms, however, generally are more subjective, somewhat less serious and shorter lived than those that do cause physical damage.⁸⁵ This is not to say that emotional distress without physical consequences is not painful.⁸⁶ Rather, it would not seem unjust to preclude recovery for this class of emotional disturbance if it does, in fact, cause suffering that is relatively less severe than the suffering that is accompanied by physical symptoms. If the Arizona court is concerned with limiting liability in bystander-recovery cases, the physical-manifestation requirement is not an unreasonable place to draw the line.⁸⁷

Closely tied to this concern with problems of proof is the necessity of showing that the plaintiff's reaction to the emotional stimulus was not an exaggerated one.⁸⁸ One commentator has written that it might be too difficult to establish the reaction of a reasonable person who has no pre-existing vulnerability to psychic injury.⁸⁹ Implicit in *Keck v.*

83. See *id.* at 412, 520 P.2d at 767; *Battalla v. State*, 10 N.Y.2d 237, 242, 176 N.E.2d 729, 733, 219 N.Y.S.2d 34, 38 (1961). See also Comment, *supra* note 19, at 1253.

84. See *Falzone v. Busch*, 45 N.J. 559, 566-67, 214 A.2d 12, 15-16 (1965). *Falzone*, which replaced the impact rule with the zone of danger rule, noted that "the problem of tracing a causal connection from negligence to injury is not peculiar to cases without impact and occurs in all types of personal injury litigation In any event, difficulty of proof should not bar the plaintiff from the opportunity of attempting to convince the trier of fact of the truth of her claim." *Id.* at 566, 214 A.2d at 15-16. There was no indication in the *Falzone* decision that this statement might also apply to the zone of danger rule. The case, however, was decided three years before *Dillon v. Legg*, which was the first case to allow recovery to a plaintiff outside the zone of danger.

85. See *Leong v. Takasaki*, 55 Haw. 398, 411-13, 520 P.2d 758, 766-67 (1974); Adams, *Symposium on Trauma: Trauma and the Psychiatrist*, in *TRAUMA AND DISEASE* 71, 73 (A. Moritz & D. Helberg eds. 1959). The *Restatement* recommends denial of recovery where no physical symptoms result from the negligent infliction of emotional distress. *RESTATEMENT (SECOND) OF TORTS* § 476A (1965). Emotional distress that does not produce physical symptoms is so trivial and relatively harmless that "the task of compensating for it would unduly burden the courts and the defendants." *Id.*, Comment b.

86. Indeed, it can be more painful than purely physical injury. Laughlin, *Neuroses Following Trauma*, in 6 *TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY* 76, 77 (P.D. Cantor ed. 1962).

87. See text & note 75 *supra*. Dean Prosser recommended retention of the physical-symptom requirement as one of several admittedly arbitrary limitations on the cause of action, in order to protect the defendant against undue liability. W. PROSSER, *supra* note 1, § 54, at 334-45.

88. Where liability has already been established because of a physical injury to the plaintiff, the defendant is responsible for the full extent of the plaintiff's injuries, including "parasitic" damages, to compensate for emotional distress. Smith, *The Relation of Emotions to Injury and Disease*, 30 VA. L. REV. 187, 227 (1943). The defendant "must take his victim as he finds him." *Id.* at 260-61. Thus, even an excessive emotional reaction to the physical injury is compensated. *Flood v. Smith*, 126 Conn. 644, 647, 13 A.2d 677, 679 (1940). On the other hand, where emotional distress is the only injury alleged, the plaintiff must prove that he or she had no pre-existing susceptibility to develop the emotional injury and that the negligent act would have caused psychic injury in a normally constituted person. See Smith, *supra*, at 200, 252. See generally Smith & Solomon, *Traumatic Neuroses in Court*, 30 VA. L. REV. 87, 99-110 (1943).

89. See Comment, *supra* note 43, at 518. Most people do have a pre-existing disposition to develop emotional injury from a traumatic stimulus. See Laughlin, *supra* note 86, at 76, 79. The Hawaii Supreme Court has attempted to define the reaction of a reasonable person. In *Rodrigues*

Jackson, however, is the belief that these problems of proof are not insurmountable.⁹⁰ When the supreme court established a duty to refrain from causing psychic injury to bystanders, it also of necessity recognized the ability of the lower courts to determine the actual cause of the plaintiff's injuries. If the lower courts find themselves unable to cope with these problems of proving the "cause in fact" of bystanders' emotional distress, the cause of action will be greatly circumscribed.

Conclusion

In *Keck v. Jackson*, the Arizona Supreme Court recognized a cause of action for emotional injury caused solely by a plaintiff's fear for another, provided that the plaintiff was within the zone of danger. The cause of action was further limited in that the plaintiff must be closely related to the victim. Also, the plaintiff's emotional distress must arise from fright suffered at the time of the accident and it must produce physical symptoms. The court stated that the zone of danger requirement would place an adequate limit on the scope of the defendant's liability. The zone of danger rule, however, is an artificial means of limiting liability. At best it guarantees the genuineness of a claim of emotional distress caused by the plaintiff's apprehension of injury to himself or herself. The approach to bystander recovery taken in *Dillon v. Legg*—basing liability on the foreseeability of the injury—is a more desirable way of analyzing the issues in this type of case. It may not be advisable to provide a remedy in tort for every wrong, but there should be a right to present a claim for damages when one has experienced a genuine injury as the result of witnessing the death or injury of someone close, whether or not one had been in the so-called zone of danger. It is therefore suggested that Arizona abandon its reliance on the zone of danger rule and let the *Keck* cause of action stand without this limitation.

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v. State, 52 Haw. 156, 173, 472 P.2d 509, 520 (1971), the court held that "serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." Thus, the reasonable person standard that is usually applied to the defendant in negligence cases was applied to the plaintiff in *Rodrigues*. See Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between California and New York*, 51 ST. JOHN'S L. REV. 1, 7 (1976).

90. See 122 Ariz. at 115-116, 593 P.2d at 669-70.

C. DETERMINING LIABILITY FOR DESIGN DEFECTS: ARIZONA'S DICHOTOMIZED APPROACH

Products liability has become a major area of tort law.¹ One of the most unsettled areas of products liability concerns the treatment of design defects. Courts² and commentators³ have not been in agreement on their treatment of design defects. At the present time, the standards being applied to design defects range from negligence⁴ to strict liability.⁵ The Arizona Court of Appeals, in *Brady v. Melody Homes Manufacturer*,⁶ dichotomized the prevailing Arizona approach to design defects. The court held that some design defects are capable of determination under strict liability principles, while others should be determined under traditional negligence concepts.⁷

Plaintiff Bobby Joe Brady brought an action for the death of his son and for injuries sustained by his daughter resulting from a fire in a mobile home manufactured in 1964 by the defendant, Melody Homes Manufacturer.⁸ Plaintiff alleged that the mobile home was defectively designed due to the manufacturer's failure to include smoke alarms, escape hatches, pop-out windows, and more than one egress.⁹ The defendant moved for summary judgment supported by an affidavit containing testimony that smoke detectors and egress windows were not known to, or available for use in the mobile home construction industry in 1964.¹⁰ The trial court granted summary judgment in favor of the defendant.¹¹ The court of appeals reversed and remanded the

1. See Hoenig, *Products Liability Problems and Proposed Reforms*, 1977 INS. L.J. 213, 215 n.5. An estimated 1,000,000 product liability suits were filed in 1976. *Id.*

2. Compare *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 543 P.2d 209, 214 (Alaska 1975) (the product must be shown to be defective, but not unreasonably dangerous), *modified on rehearing*, 555 P.2d 42 (Alaska 1976) with *Seattle-First Nat'l Bank v. Tabert*, 86 Wash. 2d 145, 154, 542 P.2d 774, 779 (1975) (not requiring the product to be proven defective, but only unreasonably dangerous).

3. Compare Hoenig, *Product Designs and Strict Tort Liability: Is There a Better Approach?*, 8 Sw. U.L. REV. 109, 122 (1976) (proposing traditional negligence standards for the treatment of design defects) with Wade, *On The Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 834-35 (1973) (imputing knowledge of the risk of harm, then considering the feasibility of a safer design).

4. See *Krugh v. Miehle Co.*, 503 F.2d 121, 126 (6th Cir. 1974).

5. See *Lamon v. McDonnell Douglas Corp.*, 19 Wash. App. 515, 521, 576 P.2d 426, 430 (1978).

6. 121 Ariz. 253, 589 P.2d 896 (Ct. App. 1979).

7. *Id.* at 259-60, 589 P.2d at 902-03. Under prior Arizona law, strict liability was applied in any case involving a design defect. See *Byrns v. Riddell, Inc.*, 113 Ariz. 264, 266, 550 P.2d 1065, 1067-69 (1976).

8. 121 Ariz. at 255, 589 P.2d at 898.

9. *Id.*

10. *Id.* In opposition to the defendant's motion for summary judgment, plaintiff's affidavit stated that smoke detectors were the subject of standards adopted by the American Standards Institute in 1962, and that "push-out" windows were required for certain Interstate Commerce Commission motor carriers as early as 1952. *Id.*

11. *Id.*

case.¹² The court held that whether the lack of window egress from the sleeping quarters was a defect was a factual issue to be decided under strict liability principles, but whether the omission of smoke alarms was a defect was a factual issue to be decided under traditional negligence concepts.¹³

This casenote will discuss the various standards of liability that have been applied to defective products. A discussion of the importance of the unreasonably dangerous requirement for defects in product design will follow. Under a strict liability standard, two tests applied by the courts in determining if a product's design is defective and unreasonably dangerous are the consumer expectation test and the risk/benefit analysis. These tests will be examined to determine which of the two should be applied in a particular design-defect case. Particular discussion will be given to the *Brady* court's decision to use strict liability where the consumer expectation test is applicable, and to apply negligence concepts under risk/benefit analysis where the consumer expectation test is inapplicable. Finally, a brief discussion will follow comparing the court's decision with the effect of an Arizona product liability statute.

General Applications of Strict Liability

Until the adoption of strict liability in tort, liability for injuries caused by products was severely limited.¹⁴ Recovery was limited to negligence and warranty theories.¹⁵ Under a negligence theory, the plaintiff had the burden of proving that the manufacturer did not exercise reasonable care in designing and manufacturing the product.¹⁶ This was an impossible burden in many product liability cases.¹⁷ Under a contract warranty theory, the plaintiff was relieved of proving negligence, but was faced with problems of notice, disclaimer, and privity.¹⁸ Section 402A of the *Restatement (Second) of Torts* was drafted to alleviate the problems encountered under the negligence and warranty theories,¹⁹ providing for strict liability in tort for injuries caused by defective products.²⁰

12. *Id.* at 260, 589 P.2d at 903.

13. *Id.* at 259-60, 589 P.2d at 902-03.

14. See Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 800-01 (1966).

15. See Wade, *supra* note 3, at 825-29.

16. W. PROSSER, *THE HANDBOOK OF THE LAW OF TORTS* § 96, at 644 (4th ed. 1971).

17. See *id.* § 97, at 650. Some courts invoked the doctrine of *res ipsa loquitur* to infer negligence on the part of the manufacturer. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 363-64 (1965).

18. Prosser, *supra* note 14, at 791-801.

19. W. PROSSER, *supra* note 16, § 98, at 656-57.

20. RESTATEMENT (SECOND) OF TORTS § 402A (1965) states:

(1) One who sells any product in a defective condition unreasonably dangerous to the

Many courts imposing strict liability for injuries caused by products have adopted the unreasonably dangerous standard²¹ of section 402A.²² A small minority of courts have rejected the unreasonably dangerous requirement.²³ For example, the California Supreme Court rejected the requirement in *Cronin v. J.B.E. Olson Corp.*²⁴ The court in *Cronin* held that to determine liability only a finding that a defect caused an injury is necessary.²⁵ The court stated that the unreasonably dangerous requirement places upon the plaintiff a burden of proof that "rings of negligence," and that it would undermine the purpose of strict liability.²⁶ *Cronin* has been criticized both for its lack of a proper definitive standard for defective products,²⁷ and for its propensity to hold manufacturers liable for injuries caused by a product regardless of whether the product was actually dangerous to the consumer.²⁸ Arizona has rejected the *Cronin* approach.²⁹ In *Brady*, the Arizona Court

user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

At present, strict liability has been adopted in two-thirds of the states. W. PROSSER, *supra* note 16, § 98, at 657-58. Arizona has adopted strict liability. *O. S. Stapley Co. v. Miller*, 103 Ariz. 556, 559, 447 P.2d 248, 251 (1968).

21. *See, e.g., Bunn v. Caterpillar Tractor Co.*, 415 F. Supp. 286, 290-91 (W.D. Pa. 1976), *aff'd*, 556 F.2d 564 (3d Cir. 1977); *O. S. Stapley Co. v. Miller*, 103 Ariz. 556, 559, 447 P.2d 248, 251 (1968); *Union Supply Co. v. Pust*, 583 P.2d 276, 280 (Colo. 1978); *Kleve v. General Motors Corp.*, 210 N.W.2d 568, 570-71 (Iowa 1973); *Jagmin v. Simonds Abrasive Co.*, 61 Wis. 2d 60, 65, 211 N.W.2d 810, 813 (1973).

22. RESTATEMENT (SECOND) OF TORTS § 402A, Comment g (1965) defines defect as a "condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." Comment i defines unreasonably dangerous as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."

23. *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 543 P.2d 209, 214 (Alaska 1975); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 96-97, 337 A.2d 893, 900 (1975). The per curiam decision in *Berkebile* was not accorded precedential value in *Beron v. Kramer-Trenton Co.*, 402 F. Supp. 1268, 1277 (E.D. Pa. 1975), *aff'd*, 538 F.2d 318 (3d Cir. 1976).

24. 8 Cal. 3d 121, 133-34, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972).

25. *Id.*

26. *Id.* at 132, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

27. Donaher, Piehler, Twerski & Weinstein, *The Technological Expert in Products Liability Litigation*, 52 TEX. L. REV. 1303, 1306 (1974); Hoenig, *supra* note 3, at 116 n.29; Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 30-32 (1973).

28. Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 304 (1977). Twerski stated:

Since there is general agreement that the manufacturer is not the insurer of the product but is liable only when a product is defective, it becomes clear that some external standard must be used in order to give content to the defect concept in a design defect case. . . . [This] requires that a plaintiff establish that a product is "unreasonably dangerous."

Id. at 316.

29. *Byrns v. Riddell, Inc.*, 113 Ariz. 264, 266, 550 P.2d 1065, 1067 (1976).

of Appeals supported the *Restatement's* unreasonably dangerous requirement for all manufacturing defects,³⁰ as well as for those design defects that are to be determined under strict liability principles.³¹

Determining Liability for Design Defects

There is not much difficulty in applying the strict liability concept to injuries caused by defects in manufacture,³² because the product has a flaw that was not intended by the manufacturer and not expected by the consumer.³³ With defects in manufacture, strict liability can be imposed under section 402A, since the product is in a defective condition "not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."³⁴ With a design defect, however, the product does not have a flaw, but instead has been produced exactly as the manufacturer intended.³⁵ Consequently, a whole product line is affected.³⁶ Where it is alleged that the product is defectively designed, the majority of courts imposing strict liability require a finding that the design rendered the product unreasonably dangerous to the consumer.³⁷ Once that is determined, it is usually held that the product is both defective and unreasonably dangerous, triggering liability.³⁸

Utilizing risk/benefit analysis where the consumer expectation test is inappropriate. To establish liability under section 402A, the product must be in a condition not contemplated by the ordinary consumer and be dangerous to an extent beyond that contemplated by the ordinary consumer.³⁹ This consumer expectation test, however, is difficult to apply in many design defect cases.⁴⁰ An ordinary consumer might not be knowledgeable of specific design features, and "in many situations . . . the consumer would not know what to expect, because he would have no idea how safe the product could be made."⁴¹ This is most notably a

30. 121 Ariz. at 256, 589 P.2d at 899.

31. *Id.* at 257, 589 P.2d at 900. For those design defects that the court states will not be considered under strict liability principles, see text & notes 69-85 *infra*.

32. Twerski, *supra* note 28, at 302-03.

33. Bowman v. General Motors Corp., 427 F. Supp. 234, 241 (E.D. Pa. 1977).

34. RESTATEMENT (SECOND) OF TORTS § 402A, Comment g (1965). See Brady v. Melody Homes Mfr., 121 Ariz. at 256, 589 P.2d at 899.

35. Brady v. Melody Homes Mfr., 121 Ariz. at 256, 589 P.2d at 899.

36. *Id.*

37. See, e.g., cases cited note 21 *supra*.

38. See, e.g., Byrns v. Riddell, Inc., 113 Ariz. 264, 268, 550 P.2d 1065, 1069 (1976); Phillips v. Kimwood Mach. Co., 269 Or. 485, 494, 525 P.2d 1033, 1038-39 (1974). See also W. PROSSER, *supra* note 16, § 99, at 659 ("product is defective when it is properly made according to an unreasonably dangerous design").

39. Brady v. Melody Homes Mfr., 121 Ariz. at 256, 589 P.2d at 899; Kleve v. General Motors Corp., 210 N.W.2d 568, 571 (Iowa 1973).

40. Brady v. Melody Homes Mfr., 121 Ariz. at 257, 589 P.2d at 900.

41. *Id.* at 257, 589 P.2d at 900 (quoting Barker v. Lull Engineering Co., 20 Cal. 3d 413, 430, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 237 (1978) (quoting Wade, *supra* note 3, at 829)).

problem where the design is complex.⁴²

Thus, the consumer expectation test is not appropriate where technical issues must be resolved.⁴³ In these cases, a risk/benefit analysis has been proposed to determine the unreasonably dangerous characteristic of a product's design.⁴⁴ This analysis, when applied under strict liability, looks to the product rather than the manufacturer's conduct.⁴⁵ A substantial number of courts have adopted this risk/benefit analysis for use in determining whether a product as designed is unreasonably dangerous to the consumer.⁴⁶

The Arizona Supreme Court considered the risk/benefit analysis in *Byrns v. Riddell, Inc.*⁴⁷ In *Byrns*, the plaintiff was injured in a high school football game while wearing a helmet manufactured by the defendant.⁴⁸ One of the main issues was the effectiveness of the helmet design in preventing injuries upon impact.⁴⁹ While the court stated that no "all encompassing rule" could be applied to defects, it offered the risk/benefit analysis as one approach to determine if a design was unreasonably dangerous.⁵⁰ The *Brady* court cited *Byrns* as an example of a design defect issue that cannot adequately be resolved under the consumer expectation test of section 402A.⁵¹ The risk/benefit analysis does appear to be more appropriate where, as in *Byrns*, characteristics of the product's design are of a technical nature and not within the expectations of the ordinary consumer.⁵²

42. See Keeton, *supra* note 27, at 37.

43. *Id.*

44. Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 17 (1965). Dean Wade lists the following factors to consider in determining the unreasonably dangerous characteristics of a product:

(1) The usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

Id.

45. Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 564 (1969) (recognizing the distinction between negligence and strict liability in that strict liability looks to the product and eliminates the burden of proving lack of due care); Wade, *supra* note 3, at 834.

46. See, e.g., *Dorsey v. Yoder Co.*, 331 F. Supp. 753, 760 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3d Cir. 1973); *Barker v. Lull Eng'r Co.*, 20 Cal. 3d 413, 430-31, 573 P.2d 443, 454-55, 143 Cal. Rptr. 225, 236-37 (1978); *Back v. Wickes Corp.*, 378 N.E.2d 964, 970 (Mass. 1978); *Roach v. Kononen*, 269 Or. 457, 464-65, 525 P.2d 125, 128-29 (1974); *Lamon v. McDonnell Douglas Corp.*, 19 Wash. App. 515, 519, 576 P.2d 426, 430 (1978).

47. 113 Ariz. 264, 267, 550 P.2d 1065, 1068 (1976).

48. *Id.* at 265, 550 P.2d at 1066.

49. *Id.* at 265-66, 550 P.2d at 1066-67.

50. *Id.* at 267, 550 P.2d at 1068.

51. 121 Ariz. at 258, 589 P.2d at 901.

52. In *Byrns*, evidence was presented concerning the amount and distribution of energy absorption in the cushion system of a football helmet. *Byrns v. Riddell, Inc.*, 113 Ariz. at 265-66, 550 P.2d at 1066-67.

From a policy standpoint, utilizing the risk/benefit analysis has the advantage of preventing a manufacturer from being held absolutely liable in all design defect cases.⁵³ For example, a product having great utility that sells for \$50.00 might conceivably be made safer, but at a cost of \$500.00. In addition, if it is highly unlikely that the design will result in harm, and the harm that could result is not of a serious nature, it might be unfair to hold the manufacturer strictly liable.⁵⁴ An even clearer example would be where no safer alternative design is feasible.⁵⁵ In this case, although the design is unsafe, the product's utility and benefits may demand its use, with the consumer absorbing the risk.⁵⁶

In any event, where a design defect cannot be determined by consumer expectations,⁵⁷ the risk/benefit analysis is a useful aid in determining the unreasonably dangerous characteristics of a product's design.⁵⁸

Strict Liability Imposed Only Where the Consumer Expectation Test Can Be Applied

In *Brady*, the court of appeals stated that in order for a design defect case to be determined under strict liability, it must be capable of determination under the *Restatement's* consumer expectation test.⁵⁹ That is, a design is defective if it falls below the expectations of an ordinary consumer.⁶⁰ The court cited a recent California case, *Barker v. Lull Engineering Co.*,⁶¹ as a "springboard" for its analysis.⁶² In

53. See *Vineyard v. Empire Mach. Co.*, 119 Ariz. 502, 504, 581 P.2d 1152, 1154 (Ct. App. 1978) (strict liability is not synonymous with absolute liability). See also *Union Supply Co. v. Pust*, 583 P.2d 276, 292 n.5 (Colo. 1978) ("the 'unreasonably dangerous' portion of the definition serves the useful function of placing some limits on the liability of a manufacturer or seller").

54. See Phillips, *The Standard for Determining Defectiveness in Products Liability*, 46 U. CINN. L. REV. 101, 117 (1977). See generally Holford, *The Limits of Strict Liability for Product Design and Manufacture*, 52 TEX. L. REV. 81 (1973).

55. See *Huddell v. Levin*, 537 F.2d 726, 737 (3d Cir. 1976) (requiring proof of a safer alternative design before liability can be imposed); *Rourke v. Garza*, 530 S.W.2d 794, 799 (Tex. 1975) (same).

56. See Holford, *supra* note 54, at 93-95.

57. See text at notes 40-43 *supra*.

58. *Byrns v. Riddell, Inc.*, 113 Ariz. 264, 267, 550 P.2d 1065, 1068 (1976). See also Casenote, *The Unreasonably Dangerous Requirement in Arizona Products Liability Law*, 19 ARIZ. L. REV. 684, 695 (1977). It is unclear how the courts decide which test to apply. In *Brady*, for example, the court held that pop-out windows may have been within the expectations of the ordinary consumer, but smoke detectors were not. 121 Ariz. at 259-60, 589 P.2d at 902-03. It would appear that a court's view on how far strict liability should extend will determine the court's choice of which test to apply. That is, if a court concludes that manufacturers should bear the cost of harm caused by defectively designed products, the consumer expectation test would be applied. If, however, a court determines that liability for design defects should be limited in some manner, the risk/benefit analysis would be applied to afford such limitation. The problem with the *Brady* court's dichotomy is that it begs the question. The court obtained the result it wanted by choosing which test to apply.

59. 121 Ariz. at 257, 589 P.2d at 900.

60. *Id.*

61. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

62. 121 Ariz. at 257, 589 P.2d at 900.

Barker, the court held that the design of a product would be found defective if it could be shown that the product did not perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.⁶³ In *Brady*, the court stated that it would apply this consumer expectation test under strict liability since the "defect is ascertainable by an objective standard."⁶⁴ A similar approach has been taken by at least two other courts.⁶⁵

With this kind of design defect, determining liability is no more difficult than with a manufacturing defect.⁶⁶ For example, the location of the gas tank in a car would be an obvious design defect if low-speed rear-end collisions caused the gas tank to explode. The product would obviously fall below the expectations of the ordinary consumer. In this situation, as with manufacturing defects, strict liability can be imposed without resorting to a risk/benefit analysis of the product.

In *Brady*, the court held that since a factual issue existed as to whether a reasonable consumer would realize that the mobile home windows would not provide egress, summary judgment was precluded under strict liability.⁶⁷ In other words, if on remand it is determined that a reasonable consumer would expect windows to "pop-out," strict liability principles will apply. The court has thus provided an example of the type of design defect that can be resolved under the strict liability principles of section 402A.⁶⁸

Where the Consumer Expectation Test Is Not Appropriate, the Risk/Benefit Analysis Will Be Applied Under a Negligence Standard

Although the *Brady* court concluded that whether the windows were defectively designed might be determined utilizing the consumer expectation test, it noted that many design defects are not capable of determination under section 402A.⁶⁹ Citing *Barker*,⁷⁰ the court deter-

63. 20 Cal. 3d at 435, 573 P.2d at 457, 143 Cal. Rptr. at 239.

64. 121 Ariz. at 257, 589 P.2d at 900.

65. See *Welch v. Outboard Marine Corp.*, 481 F.2d 252, 254 (5th Cir. 1973); *Henderson v. Ford Motor Co.*, 519 S.W.2d 87, 92 (Tex. Civ. App. 1975).

66. For a discussion on determining liability for manufacturing defects, see text & notes 32-34 *supra*.

67. 121 Ariz. at 259-60, 589 P.2d at 902-03.

68. This does not appear to be in conflict with the risk/benefit analysis applied in *Byrns v. Riddell, Inc.*, 113 Ariz. 264, 267, 550 P.2d 1065, 1068 (1977), as the product design in that case was not within ordinary consumer expectations. See text & notes 47-52 *infra*.

69. 121 Ariz. at 257, 589 P.2d at 900.

70. [A] product is defective in design (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove, in light of the

mined that the risk/benefit analysis ought to be applied in such cases.⁷¹ This is the test being applied by a large number of courts for all design defects.⁷²

One of the factors in the risk/benefit analysis is the availability of other and safer products to fulfill the same need.⁷³ Upon considering this factor, the court in *Brady* is critical of the California approach, stating that *Barker* and some of the other courts utilizing the risk/benefit analysis are imputing knowledge and technology that may not have been present when the product was designed.⁷⁴ On this issue, courts and commentators are split.⁷⁵

A few courts consider feasibility factors as they exist at the time of the trial, including developments in technology and safer alternative designs that did not exist at the time the allegedly defective product was manufactured.⁷⁶ The argument in support of this approach is that an industry should not be allowed to set its own standards, since the industry will have little incentive to improve products when technological advances occur.⁷⁷ Other courts, although applying strict liability principles, have considered the state of the art and technology existing at the time of manufacture.⁷⁸ As the court in *Brady* warned, tort means wrong, and if the manufacturer is to be held liable for technology not existing when the product was manufactured, then the system becomes

relevant factors . . . , that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.

20 Cal. 3d at 435, 573 P.2d at 457-58, 143 Cal. Rptr. at 239-40.

71. 121 Ariz. at 258-59, 589 P.2d at 901-02.

72. *E.g.*, *Aetna Cas. & Sur. Co. v. Jeppesen & Co.*, 463 F. Supp. 94, 95 (D. Nev. 1978); *Everett v. Bucky Warren, Inc.*, — Mass. —, —, 380 N.E.2d 653, 660 (1978) (applying Rhode Island law); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 807, 395 A.2d 843, 846 (1978); *Rourke v. Garza*, 530 S.W.2d 794, 799 (Tex. 1975); *Seattle-First Nat'l Bank v. Tabert*, 86 Wash. 2d 145, 154, 542 P.2d 774, 779 (1975).

73. *Wade*, *supra* note 3, at 837.

74. 121 Ariz. at 258, 589 P.2d at 901. In *Barker*, the court stated that strict liability will be imposed if upon hindsight the design is found to be unsafe. *Barker v. Lull Eng'r Co.*, 20 Cal. 3d 413, 434, 573 P.2d 443, 457, 143 Cal. Rptr. 225, 239 (1978). According to another California Supreme Court decision, this "hindsight" determination allows consideration of changes in design or repairs made to the product occurring after the time of the injury. *Ault v. International Harvester Co.*, 13 Cal. 3d 113, 117-18, 528 P.2d 1148, 1150, 117 Cal. Rptr. 812, 814 (1975).

75. *Compare* *Fabian v. E. W. Bliss Co.*, 582 F.2d 1257, 1261 (10th Cir. 1978) (state of technology at time of manufacture is not a defense under strict liability) and *Wade*, *supra* note 3, at 834 (imputing the element of scienter) with *Bruce v. Martin-Marietta Corp.*, 544 F.2d 442, 447 (10th Cir. 1976) (supporting the defense for state of the art at the time of manufacture) and *Hoenig*, *supra* note 3, at 123 (rejecting the idea of imputing knowledge).

76. *See, e.g.*, *Fabian v. E. W. Bliss Co.*, 582 F.2d 1257, 1261 (10th Cir. 1978); *Rucker v. Norfolk & W. Ry. Co.*, 64 Ill. App. 3d 770, 781, 381 N.E.2d 715, 724 (1978).

77. *Northwest Airlines v. Glenn L. Martin Co.*, 224 F.2d 120, 129 (6th Cir. 1955) ("Customary practice is not ordinary care; it is but evidence of ordinary care."). *See also* *Johnson, Product Liability "Reform": A Hazard to Consumers*, 56 N.C. L. Rev. 677, 680-81 (1978) (criticizing the state-of-the-art defense as creating an absolute defense for manufacturers).

78. *E.g.*, *Bruce v. Martin-Marietta Corp.*, 544 F.2d 442, 447 (10th Cir. 1976) ("state-of-the-art evidence helps determine the expectation of the ordinary consumer"); *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076, 1088 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); *Jones v. Hittle Serv., Inc.*, 219 Kan. 627, 632, 549 P.2d 1383, 1390 (1976).

one of compensation rather than a system of tort.⁷⁹

Following this warning, the court stated that the risk/benefit analysis cannot be applied without considering the reasonableness of the manufacturer's conduct.⁸⁰ Since the manufacturer's conduct is at issue, the court determined that negligence is the proper standard to apply, rather than strict liability.⁸¹ This position is consistent with the view that design cases are basically being treated under negligence principles anyway,⁸² or that the only variation from negligence principles is the imputed element of scienter.⁸³

The *Brady* court held that the reasonable consumer would not have expected smoke detectors to be installed in mobile homes in 1964.⁸⁴ Therefore, the omission of the smoke detectors would be judged under traditional negligence standards considering the state of the art at the time of manufacture.⁸⁵

Statutory Provision for the State of the Art Defense

In addition to the judicially created state-of-the-art defense, legislation has been introduced in at least nine states that requires consideration of the industry standards at the time of manufacture.⁸⁶ Most of these statutes are recent, which may suggest a possible trend toward a limitation on manufacturer's liability.⁸⁷ A recent amendment to the Arizona Revised Statutes creates an absolute defense in all design defect cases where the product conforms with the state of the art at the time the product was first sold by the defendant.⁸⁸ While this amend-

79. 121 Ariz. at 258-59, 589 P.2d at 901-02. See also Epstein, *Product Liability: The Search for the Middle Ground*, 56 N.C. L. Rev. 643, 645 (1978).

80. 121 Ariz. at 259, 589 P.2d at 902.

81. *Id.* In contrast, the focus under a strict liability standard is on the product rather than the manufacturer's conduct. See text & note 45 *supra*.

82. *Jones v. Hutchinson Mfg.*, 502 S.W.2d 66, 69-70 (Ky. 1973); W. PROSSER, *supra* note 16, § 99, at 659 n.72.

83. Hoenig, *supra* note 3, at 123-25. One other variance among the courts is the burden of proof. California, for example, requires the defendant to prove under the risk/benefit analysis that the benefits outweigh the risk of danger in the design. See note 70 *supra*. In Arizona, traditional negligence concepts will require the plaintiff to prove under the risk/benefit analysis that the defendant acted unreasonably. See *Brady v. Melody Homes Mfr.*, 121 Ariz. at 259, 589 P.2d at 902 ("[l]iability only follows where a showing is made that the manufacturer was negligent").

84. 121 Ariz. at 260, 589 P.2d at 903.

85. *Id.*

86. ARIZ. REV. STAT. ANN. § 12-683 (Supp. 1979); COLO. REV. STAT. § 13-21-403(1)(a) (Supp. 1977); IND. CODE ANN. § 34-4-20A-4(4) (Burns Supp. 1979); KY. REV. STAT. § 411.310 (Supp. 1978); MICH. STAT. ANN. § 27A.2946 (Supp. 1980); 1978 Neb. Laws, LB665 § 4; N.H. REV. STAT. ANN. § 507-D:4 (Supp. 1979); TENN. CODE ANN. § 23-3705 (Supp. 1979); UTAH CODE ANN. § 78-15-6(3) (1977) (rebuttable presumption of no defect where the product conforms with government standards for the industry).

87. *Contra*, Phillips, *supra* note 54, at 115.

88. 1978 Ariz. Sess. Laws 42 (codified at ARIZ. REV. STAT. ANN. § 12-683 (Supp. 1979)). Section 12-686 provides that advances or changes in the industry subsequent to the time the product was first sold by the defendant, or evidence of changes in the product or similar products will not be admissible as direct evidence of a defect. ARIZ. REV. STAT. ANN. § 12-686 (Supp. 1979).

ment is not retroactive to *Brady*,⁸⁹ and the court stated that it would not consider the statute's application,⁹⁰ the court's decision is consistent with the effect of the statute.

The court's analysis shows an intention to achieve this result. The first step in the court's analysis was to state that certain design defects are not capable of determination by consumer expectations.⁹¹ This first step allowed the consumer expectation test to be replaced by the alternate risk/benefit analysis.⁹² One of the factors to be considered under the risk/benefit analysis is the availability of a safer design,⁹³ which leads into the second step of the court's analysis—whether to determine the availability of a safer design at the time of manufacture or at the time of injury.⁹⁴ Because the court decided that the risk/benefit analysis cannot be applied without considering the conduct of the manufacturer⁹⁵ and that standard principles of negligence should apply instead of strict liability,⁹⁶ the court concluded that the time of manufacture was appropriate.⁹⁷

Thus the Arizona Court of Appeals has provided for all design defect cases accruing before the effective date of the Arizona statute to be treated as if the statutory state-of-the-art defense was applicable.

Conclusion

Strict liability was originally imposed to relieve some of the heavy burdens that had been placed on the plaintiff. With certain design defects, however, imposing strict liability can be unfair to the defendant manufacturer. The *Brady* court concluded that a manufacturer should not be held strictly liable when it had utilized all available technology existing at the time the product was manufactured. The Arizona product liability statutes also reflect this position. In *Brady*, the court gave these design defects the same treatment as would have been afforded under the statute providing for the state-of-the-art defense, had it been applicable to this case.

The court might have been merely paying deference to the legislature. Nevertheless, the *Brady* court recognized that strict liability is an

89. The products liability section is only effective for causes of action accruing on or after September 3, 1978. 1978 Ariz. Sess. Laws 44.

90. 121 Ariz. at 260 n.4, 589 P.2d at 903 n.4.

91. *Id.* at 257, 589 P.2d at 900.

92. *Id.* at 258, 589 P.2d at 901.

93. *Id.* at 259, 589 P.2d at 902.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

inappropriate standard if it imposes liability on a defendant who has committed no wrong under traditional concepts of tort law.

Douglas J. Newman

