APPELLATE DECISIONS 1979-80
Part I

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I. CIVIL PROCEDURE

A. SERVICE OF PROCESS ON A CORPORATION'S OSTENSIBLE AGENT

A court may not render a valid judgment without acquiring jurisdiction over the defendant through proper service of process.[1] In *Koven v. Saberdyne Systems, Inc.*,[2] the Arizona Court of Appeals held that service of process on a corporation's ostensible agent[3] is sufficient to give an Arizona court jurisdiction over a corporation.[4]

In *Koven*, the plaintiff was injured in a Phoenix amusement park and brought suit against Saberdyne Systems, the owner of the park.[5] In attempting to determine the proper parties for service of process, the plaintiff examined records of Saberdyne that were on file with the Arizona Corporation Commission.[6] Although Arizona law requires that foreign and domestic corporations doing business in Arizona file an annual report with the Commission containing the name and address of the corporation's statutory agent for purposes of service of process,[7] Saberdyne had not filed a report for nearly two years.[8] Moreover, Saberdyne did not maintain business offices at the address listed in the most recent annual report or at any other address and had failed to appoint a statutory agent for service of process.[9] The plaintiff, therefore, served process on the only corporate officer listed in the two-year old report who was found to reside in Arizona.[10] Unknown to the

1. Schering Corp. v. Cotlow, 94 Ariz. 365, 367, 385 P.2d 234, 236 (1963); Air East, Inc. v. Wheatley, 14 Ariz. App. 290, 292, 482 P.2d 899, 901 (1971).

2. No. C-333040 (Ariz. Ct. App. March 27, 1980).

3. The *Koven* court uses the term "ostensible agent." The term "apparent agent" is also commonly used to describe this relationship, BLACK'S LAW DICTIONARY 59 (5th ed. 1979), but this casenote will follow the court's usage. For a definition of the term, see note 25 *infra*.

4. Slip op. at 11.

5. Plaintiff was nine years old when she suffered injuries at the Legend City Amusement Park in 1965. *Id.* Her complaint was timely filed when she reached the age of majority in 1976. *Id.* at 2. At the time of the injury the amusement park was owned and operated by Legend City, Inc., an Arizona corporation. *Id.* at 1. In 1970, Legend City merged with Saberdyne, Inc., a Nevada corporation, to form a new Arizona corporation, Saberdyne, Inc. *Id.* Saberdyne, Inc. apparently succeeded to all the rights, debts, and liabilities of its predecessors. *Id.* at 2. In 1971, Saberdyne, Inc. changed its name to Saberdyne Systems, Inc. *Id.* In her suit, plaintiff named Legend City Amusements, Inc., Legend City, Inc., Saberdyne, Inc., Continental Recreation, Inc., and other ficticiously named entities as defendants. *Id.*

6. *Id.* at 2.

7. ARIZ. REV. STAT. ANN. § 10-125 (1977) provides that every domestic and foreign corporation transacting business in Arizona must file an annual report which sets forth the corporation's business address, the names and addresses of its officers and directors, and the address of its Arizona statutory agent. *See* ARIZ. CONST. art. 14, § 8.

8. Slip op. at 2.

9. *Id.*

10. *Id.* The officer was listed as a Saberdyne vice president. *Id.*

plaintiff, the officer had resigned and severed all connections with Saberdyne two years earlier.[11] Nevertheless, he accepted service and failed to inform the process server of his resignation.[12]

The plaintiff subsequently entered into settlement negotiations with Saberdyne's insurer.[13] When negotiations broke down the plaintiff caused a default judgment to be entered against Saberdyne.[14] Saberdyne's insurer moved to set aside the judgment on Saberdyne's behalf.[15] In its motion the insurer argued that the default judgment was void because of lack of proper service and because Saberdyne's failure to answer was the result of mistake, inadvertence, or excusable neglect.[16] The trial court granted the motion and set aside the judgment as void for lack of proper service.[17] The court of appeals reversed, holding that the trial court erred as a matter of law in ruling that it was without jurisdiction to enter the default judgment.[18] The case was remanded for a determination of the issues of mistake, inadvertence, and excusable neglect.[19]

This casenote will first review the purposes of the rules regarding service of process. Corporate and agency law will then be discussed to determine corporate liability for actions of the corporation's ostensible agents. Finally, the *Koven* decision will be analyzed in terms of its treatment of service of process rules in situations where service is made on a corporation's ostensible agent—a matter of first impression in Arizona.

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11. *Id.*
12. *Id.*
13. *Id.* at 3.
14. *Id.* The insurer was not given notice of the default hearing, *id.*, but Arizona law requires such notice only if the defendant has appeared in the action. ARIZ. R. CIV. P. 55(b)(2) (Supp. 1980-81). *See* Phoenix Metals Corp. v. Roth, 79 Ariz. 106, 109, 284 P.2d 645, 647 (1955).
15. Slip op. at 4.
16. *Id.* ARIZ. R. CIV. P. 60(c)(1) (Supp. 1980-81) provides that a default judgment may be set aside because of a party's "mistake, inadvertence, surprise, or excusable neglect." Plaintiff argued that the insurer did not have standing to move to set the judgment aside because it had previously denied coverage and lacked sufficient personal interest to intervene. Slip op. at 4. The trial court, however, rejected this argument. *Id.* at 5. Generally, questions of "service of process are personal to the person upon whom service was made," *id.*, but the *Koven* court reasoned that the attorney hired by the insurer was acting on behalf of Saberdyne as its legal representative. *Id.*
17. Slip op. at 4.
18. *Id.* at 11. The *Koven* court ruled that since a default judgment could create a debt under the insurance contract, the insurance company had a right to move to set aside the default judgment. *Id.* at 5. *See* Camacho v. Gardner, 104 Ariz. 555, 558, 456 P.2d 925, 928 (1969); Sandoval v. Chenoweth, 102 Ariz. 241, 245, 428 P.2d 98, 102 (1967); Lawrence v. Burke, 6 Ariz. App. 228, 236, 431 P.2d 302, 310 (1967). *But cf.* Damron v. Sledge, 105 Ariz. 151, 155, 460 P.2d 997, 1001 (1969) (insurer has no right to move to set aside a default judgment when it wrongfully refuses to defend its insured). *See also* Casenote, *Damron Agreements and the Insurer's Duty to Defend*, 22 ARIZ. L. REV. 263, 266 (1980).
19. Slip op. at 11.

Service of Process

At a minimum, the due process clause of the fourteenth amendment requires "that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing. . . ."[20] Indeed, modern interpretations of the due process clause have resulted in exacting notice requirements.[21] In Arizona, for instance, there are specific requirements regarding the content of a summons, by whom it may be served, and upon whom it may be served.[22] According to the United States Supreme Court, the notice procedure utilized must be reasonably certain to result in actual notice of the pendency of the proceeding to interested persons or their representatives.[23]

Providing notice to a corporation is especially troublesome because a corporation is an artificial entity, and can act only through its formally appointed agents or those impliedly authorized to act on its behalf.[24] Because of the special problems inherent in serving process on a corporation, Arizona requires that service on a corporation be made on an officer, managing or general agent, or any other agent authorized by appointment or law to accept service.[25]

The primary purposes of service of process rules for corporations[26] are to provide the means for an aggrieved party to bring a corporation before the court and to protect corporations from surprise default judgments.[27] As with any other defendant, notice is a prerequisite to the assertion of jurisdiction over a corporation.[28]

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20. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). *See* ARIZ. CONST. art. 2, § 4; Huck v. Haralambie, 122 Ariz. 63, 65, 593 P.2d 286, 288 (1979); Safeway Stores, Inc. v. Ramirez, 99 Ariz. 372, 409 P.2d 292 (1965); McDonnell v. Southern Pacific Co., 79 Ariz. 10, 281 P.2d 792 (1955).

21. RESTATEMENT (SECOND) OF JUDGMENTS § 4, Comment a, at 19 (Tent. Draft No. 5, 1978). *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977); Mullane v. Central Bank & Trust Co., 339 U.S. 306 (1950).

22. ARIZ. R. CIV. P. 4.

23. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

24. Lois Grunow Memorial Clinic v. Davis, 49 Ariz. 277, 284, 66 P.2d 238, 241 (1937); Arizona Mut. Auto Ins. Co. v. Bisbee Auto Co., 22 Ariz. 376, 379, 197 P. 980, 981-82 (1921); O'Malley Inv. and Realty Co. v. Trimble, 5 Ariz. App. 10, 18, 422 P.2d 740, 748 (1967).

25. ARIZ. R. CIV. P. 4(d)(6); ARIZ. REV. STAT. ANN. § 10-014(B) (1977). "There are two main types of agency, one actual, and the other ostensible or apparent." Aetna Loan Co. v. Apache Trailer Sales, 1 Ariz. App. 322, 324, 402 P.2d 580, 582 (1965). Actual agency results from an express or implied authorization allowing the agent to act on behalf of the principal. Canyon State Canners v. Hooks, 74 Ariz. 70, 72, 243 P.2d 1023, 1024 (1952). For example, Arizona law provides that each corporation doing business in this state must appoint a statutory agent for service of process. ARIZ. REV. STAT. ANN. § 10-012(1) (1977). *See also* ARIZ. CONST. art. 14, § 8. "The ostensible agent is one where the principal has intentionally or inadvertently induced third persons to believe that such a person was its agent although no actual or express authority was conferred on him as agent." Canyon State Canners v. Hooks, 74 Ariz. 70, 73, 243 P.2d 1023, 1025 (1952).

26. ARIZ. R. CIV. P. 4; ARIZ. REV. STAT. ANN. § 10-014 (1977).

27. *See* Schering Corp. v. Cotlow, 94 Ariz. 365, 368, 385 P.2d 234, 237 (1963); Eclipse Fuel Eng'r Co. v. Superior Court, 148 Cal. App. 2d 736, 745, 307 P.2d 739, 745 (1957).

28. Marquez v. Rapid Harvest Co., 99 Ariz. 363, 365, 409 P.2d 285, 287 (1965). Since a corporation is an artificial entity, service on an officer or agent of the corporation is the only way

Arizona law provides several methods for serving notice on a corporation. In addition to service on a statutory agent,[29] process may be served on an officer, director, or managing agent of the corporation.[30] Rule 4(d)(6) of the Arizona Rules of Civil Procedure also permits service on an agent authorized by appointment or by law.[31]

Ostensible Agency

In *Koven*, the defendant's articles of incorporation provided that its officers would hold office until a successor had been elected.[32] Thus, the *Koven* plaintiff contended that because a successor had not been elected, service on Saberdyne's former vice president was valid, notwithstanding the fact that he had resigned two years earlier.[33]

In its analysis the *Koven* court looked to what it called the "general rule" that corporate officers are free to resign at any time, notwithstanding provisions in corporate bylaws or articles to the contrary.[34] Under this rule, courts are reluctant to invalidate the resignations of corporate officers because of the necessity of assigning liability for corporate or personal actions.[35] In *Koven*, the court of appeals adopted this general rule and held that the plaintiff could not rely on the articles of incorporation to effect service of process on an officer who had resigned.[36]

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to serve process on a corporation. *See* Arizona Mut. Auto Ins. Co. v. Bisbee Auto Co., 22 Ariz. 376, 379, 197 P. 980, 981-82 (1921). Service of process rules that provide for notice, see text and notes 21-23 *supra*, are generally construed strictly when other than personal service is involved. Miller v. Corning Glass Works, 102 Ariz. 326, 329, 429 P.2d 438, 441 (1967); Llamas v. Superior Court, 13 Ariz. App. 100, 101, 474 P.2d 459, 460 (1970). Where a defendant receives actual notice of an action brought against him, the service of process rules should not be strictly construed if the effect would be to preclude prosecution of the suit. Pasadena Medi-Center Assocs. v. Superior Court, 9 Cal. 3d 773, 779, 511 P.2d 1180, 1184, 108 Cal. Rptr. 828, 832 (1973).

29. ARIZ. R. CIV. P. 4(d)(6).

30. *Id.*; ARIZ. REV. STAT. ANN. § 10-014(B) (1977).

31. ARIZ. R. CIV. P. 4(d)(6). *See* Hess v. Pawloski, 274 U.S. 352, 356-57 (1927) (nonresident motorist statute).

32. Slip op. at 6.

33. *Id.*

34. *Id. See* Schuckman v. Rubenstein, 164 F.2d 952, 956-57 (6th Cir. 1947); Security Investors' Realty Co. v. Superior Court, 101 Cal. App. 450, 451, 281 P. 709, 709 (1929); Modern Heat & Power Co. v. Bishop Steamotor Corp., 239 Iowa 1267, 1273, 34 N.W.2d 581, 585 (1948). Curiously, while noting that there were "few decisions directly on point elsewhere," the court referred to the role described in the text as "the general and better reasoned" rule. Slip op. at 6.

35. *E.g.*, Halle & Stieglitz, Filor, Bullard Inc. v. Empress Int'l, Ltd., 442 F. Supp. 217, 225 (D. Del. 1977); Venner v. Denver Union Water Co., 40 Colo. 212, 226, 90 P. 623, 628 (1907); Westwood, *Resignation of Corporate Officers*, 22 VA. L. REV. 527, 529 (1936).

36. Slip op. at 7. For purposes of service of process, there is an exception to the general rule that corporate officers are free to resign at any time. Schuckman v. Rubenstein, 164 F.2d 952, 957 (6th Cir. 1947); Ross v. Western Land & Irrigation Co., 223 F. 680, 682 (S.D. Iowa 1915); Venner v. Denver Union Water Co., 40 Colo. 212, 226, 90 P. 623, 628 (1907). In situations involving possible liability of the corporation for the acts of its officers, a resignation should be considered effective against the corporation upon receipt. *Id.* at 226, 90 P. at 628. Insofar as the public is concerned, the resignation is not effective until a successor is appointed. Ross v. Western Land & Irrigation Co., 223 F. 682, 682 (S.D. Iowa 1915).

The *Koven* plaintiff further argued that Saberdyne was estopped from denying its retired officer's authority to accept service of process because of her reasonable reliance upon Saberdyne's last annual report.[37] Thus, the plaintiff argued for the existence of an ostensible agency, a "specific application of the more general doctrine of estoppel."[38] The issues before the court thus were whether the retired vice president was Saberdyne's ostensible agent, and whether service on an ostensible agent is sufficient to confer personal jurisdiction over the principal.[39]

Two requirements must be met before a person will be designated an ostensible agent: (1) the principal must knowingly or negligently permit the agent to exercise authority or hold him out as possessing that authority; and (2) the third party must reasonably rely on the agent's apparent authority to act for the principal.[40] A corporation might clothe a former corporate officer with ostensible authority by allowing him to continue his functions as an officer, by treating him as an officer after he has resigned,[41] or by indicating to a third party that he has authority to act on behalf of the corporation.[42] In *Koven*, there was nothing in the record to indicate that Saberdyne's vice president continued to perform corporate duties after his resignation. He was, however, listed as a corporate officer in the last annual report filed by the corporation with the Arizona Corporation Commission.[43] This was deemed sufficient to satisfy the first requirement of ostensible agency.[44]

The second requirement for establishing ostensible agency is that the third party must be reasonable in his reliance upon the apparent agency.[45] The *Koven* court held that under the circumstances, the plaintiff's reliance was reasonable because of the defendant's inaccurate annual report, the lack of more current information, and the fact that Saberdyne had no corporate offices at which plaintiff could inquire.[46]

Providing the public with access to information about a corporation is one of the purposes of the Arizona statute that requires corpora-

37. Slip op. at 7.
38. *Id. See* Pasadena Medi-Center Assocs. v. Superior Court, 9 Cal. 3d 773, 779, 511 P.2d 1180, 1184, 108 Cal. Rptr. 828, 832 (1973).
39. Slip op. at 7.
40. Lux Art Van Serv., Inc. v. Pollard, 344 F.2d 883, 887 (9th Cir. 1965); Hudlow v. American Estate Life Ins. Co., 22 Ariz. App. 246, 249, 526 P.2d 770, 773 (1974); Pasadena Medi-Center Assocs. v. Superior Court, 9 Cal. 3d 773, 780, 511 P.2d 1180, 1185, 108 Cal. Rptr. 828, 832 (1973).
41. *See* note 36 *supra*.
42. Hudlow v. American Estate Life Ins. Co., 22 Ariz. App. 246, 248, 526 P.2d 770, 772 (1972); *see* RESTATEMENT (SECOND) OF AGENCY §§ 8, 27, 49 (1957).
43. Slip op. at 9.
44. *Id.*
45. See text & note 40 *supra*.
46. Slip op. at 9-10.

tions to file annual reports with the Corporation Commission.[47] Since Saberdyne failed to list a statutory agent and had no known place of business in Arizona,[48] the erroneous annual report was the latest source of information regarding the corporation.[49] The *Koven* court found that the reports filed with the Corporation Commission were almost always reliable, and stated that it would be too expensive and time-consuming for plaintiffs to be required to make further inquiries.[50]

Because it failed to file annual reports that would have shown that its vice president had resigned, Saberdyne was estopped from asserting that its former vice president was without authority to accept service of process on its behalf.[51] If a corporation does not avail itself of statutory provisions designed to give it notice of impending suits,[52] and has actual notice of the action against it, as Saberdyne had in *Koven*,[53] it should not be permitted to take advantage of a technical error in service to escape liability for its actions.[54] It is a principle of equity that where one of two persons must suffer, the one that has misled the other should bear the burden.[55] The *Koven* court held that the service on Saberdyne's ostensible agent qualified as service upon an "agent authorized by law" to accept service under Rule 4(d)(6) of the Arizona Rules of Civil Procedure.[56] The court followed the rule that where actual notice has been received, service of process rules should be liberally construed to uphold the jurisdiction of the court, thus insuring the opportunity for a trial on the merits.[57]

Applying this liberal standard, the *Koven* court noted that Saberdyne's president had received actual notice of the proceeding against it and thus declined to invalidate service on Saberdyne's osten-

47. State v. Betts, 71 Ariz. 362, 367, 227 P.2d 749, 752 (1951). Regarding the information required in annual reports, see ARIZ. REV. STAT. ANN. § 10-125 (1977). The information required includes the corporation's name, address, character of business, directors and officers, number of shares issued, and stockholders. *Id.*

48. ARIZ. REV. STAT. ANN. § 10-012(1) (1977) requires a corporation to have a "known place of business" in Arizona.

49. Slip op. at 9.

50. *Id.*

51. Slip op. at 11.

52. *See* text & note 25 *supra*.

53. Slip op. at 9.

54. Eclipse Fuel Eng'r Co. v. Superior Court, 148 Cal. App. 2d 736, 745, 307 P.2d 739, 745 (1957); Oro Navigation Co. v. Superior Court, 82 Cal. App. 2d 884, 889, 187 P.2d 444, 447 (1947).

55. Capen v. Pacific Mut. Ins. Co., 25 N.J.L. 67, 71 (1885).

56. Slip op. at 7.

57. *Id. See generally* 9 UTAH L. REV. 192 (1964), for a discussion of possible problems created when actual notice is the criterion used to uphold service of process. The Judicial Council of California has recommended a liberal construction of service rules in order to "eliminate unnecessary, time-consuming and costly disputes over legal technicalities, without prejudicing the right of defendants to proper notice." P. LI, ATTORNEY'S GUIDE TO CALIFORNIA JURISDICTION AND PROCESS 57-58 (1970). In order to effectuate service and uphold the jurisdiction of the court, the Council recommended that, if there has been actual notice, the question of service be resolved by considering each situation from a practical standpoint.

sible agent.[58] The *Koven* court relied heavily on the California Supreme Court decision in *Pasadena Medi-Center Associates v. Superior Court*.[59] There, the defendant corporation filed certain information with the California Commission of Corporations in order to obtain a permit to issue stock.[60] The plaintiff served process on the secretary-treasurer listed in the corporation's application.[61] The defendant moved to quash service on the ground that the person listed as secretary-treasurer was not a corporate officer and therefore was not an agent authorized to accept process on behalf of the corporation.[62] The California Supreme Court, however, held that the erroneous report rendered the person listed as secretary-treasurer an ostensible agent of the corporation, and that service on the ostensible agent operated to give the court personal jurisdiction over the corporation.[63] The court reasoned that by preparing its own list of corporate officers, the defendant led all who read the list to rely on its accuracy.[64] Since the corporation had no general offices and had not filed a list of officers and agents authorized to accept service, the plaintiff's reliance on the three-year-old stock permit application was held to be reasonable.[65]

The important issue in *Pasadena Medi-Center* was whether service on an ostensible agent of a corporation was effective to establish jurisdiction over the corporation.[66] The primary factor in the decision seems to be that the corporation had actual notice of the pending action.[67] The California Supreme Court stated that when the principal has actual notice of the action against it, there is no reason not to recognize an ostensible agent's authority to accept service of process.[68] The court did not decide whether the result would be different where the corporation had no notice of the action. In that event, it appears that due process considerations would preclude bringing a default judgment against the corporation. Indeed, the Arizona Supreme Court has overturned a default judgment where the defendant had no legal notice of the action.[69]

In holding that service on an ostensible agent is adequate under

58. Slip op. at 9 n.6.
59. 9 Cal. 3d 773, 511 P.2d 1180, 108 Cal. Rptr. 828 (1973).
60. *Id.* at 775-76, 511 P.2d at 1182, 108 Cal. Rptr. at 830.
61. *Id.*
62. *Id.* at 777, 511 P.2d at 1183, 108 Cal. Rptr. at 831.
63. *Id.* The California Supreme Court described ostensible agency as nothing more than a specialized form of the doctrine of estoppel. *Id.* at 779, 511 P.2d at 1184, 108 Cal. Rptr. at 832.
64. *Id.* at 780, 511 P.2d at 1185, 108 Cal. Rptr. at 833.
65. *Id.* at 781, 511 P.2d at 1186, 108 Cal. Rptr. at 834.
66. *Id.*
67. *See id.*
68. *Id.* at 782, 511 P.2d at 1186, 108 Cal. Rptr. at 834.
69. National Metal Co. v. Green Consol. Copper Co., 11 Ariz. 108, 114-15, 89 P. 535, 537-38 (1907). *See* text & notes 20-23 *supra*.

the rule that allows for service upon a corporation by serving its "agent authorized by law,"[70] the Arizona Supreme Court closely followed *Pasadena Medi-Center*. The court's holding is an application of the general principle that an agent represents his principal for all purposes within the scope of his actual or ostensible agency.[71] Service upon Saberdyne's former vice president was upheld because Saberdyne in effect induced the plaintiff to believe that the former vice president had authority to accept service of process on behalf of Saberdyne.[72]

Under Arizona law, service of process on Saberdyne also could have been accomplished by serving the Corporation Commission.[73] The Commission acts as an agent for service of process whenever a corporation fails to maintain a statutory agent.[74] Saberdyne argued that this provision required the plaintiff to serve process on the Commission.[75] The *Koven* court rejected this argument and held that the statute authorizing service upon the Commission was not mandatory.[76]

Conclusion

The *Koven* decision validates a court's jurisdiction when process is served on a corporation's ostensible agent. The decision means that Arizona plaintiffs may rely upon information filed with the Arizona Corporation Commission to determine corporate officers upon whom process may be served. When a corporation fails to comply with Arizona's corporate disclosure statutes and has actual notice of an impending action, it will not be permitted to escape litigation because of

70. Slip op. at 7; *see* ARIZ. R. CIV. P. 4(d)(6) (allowing service on an agent authorized by law).

71. *See* Pasadena Medi-Center Assocs. v. Superior Court, 9 Cal. 3d at 781, 511 P.2d at 1186, 108 Cal. Rptr. at 834 (1973). California has codified the general rule that an agent within his ostensible authority represents his principal, whether it be in contract, fraud, or other contexts. CAL. CIV. CODE §§ 2315, 2330 (West 1954).

72. Slip op. at 9; *see* O.S. Stapley Co. v. Logan, 6 Ariz. App. 269, 273, 431 P.2d 910, 914 (1967).

73. Slip op. at 10. ARIZ. REV. STAT. ANN. § 10-014(B) (1977) states: "Whenever a corporation shall fail to appoint or maintain a statutory agent at the address shown on the records of the commission, the commission shall be an agent of such corporation upon whom any such process, notice or demand may be served."

74. *Id.*

75. Slip op. at 10.

76. *Id. See* Ariz. Mut. Auto Ins. Co. v. Bisbee Auto Co., 22 Ariz. 376, 382, 197 P. 980, 982 (1921). The wording of Arizona's statute regarding service on a nonresident insurance company is clearly mandatory: "Service of such process against a nonresident or alien insurer shall be made only by service of process upon the director." ARIZ. REV. STAT. ANN. § 20-221 (1977). If the legislative intent had been to require service on the Corporation Commission it would have been clearly stated, as in § 20-221. Phoenix of Hartford, Inc. v. Harmony Restaurants, Inc., 114 Ariz. 257, 259, 560 P.2d 441, 443 (Ct. App. 1977). The *Koven* court held that service on the Corporation Commission pursuant to ARIZ. REV. STAT. ANN. § 10-014(B) (1977) was an alternate method, not a mandatory one. Slip op. at 10-11.

technical service of process defects that are caused by the corporation's noncompliance with statutory requirements.

Kathryn Hormby

B. SERVICE OF PROCESS ON FOREIGN AND INCOMPETENT DEFENDANTS

It is a basic tenet of American civil procedure that a judgment rendered by a court without jurisdiction over a defendant is void.[1] One prerequisite to the valid assertion of personal jurisdiction in a civil case is that the defendant be given proper notice of the pending action.[2] Normally the notice requirement is met when the service of process satisfies state procedural requirements.[3] Where service of process is attempted in a foreign country, however, mere compliance with the appropriate state procedures may not suffice. A treaty between the United States and the foreign country may prohibit the method of service that state procedures prescribe. In that case, service by the prohibited method is not sufficient and does not confer jurisdiction over the foreign party. Treaty provisions are the "supreme Law of the Land"[4] and, as such, they supersede inconsistent state procedures and laws.[5] In cases where a guardian or guardian ad litem has been appointed, service is not sufficient and does not confer jurisdiction over a party if it is made only on the guardian or guardian ad litem and not on the defendant.[6]

In *Kadota v. Hosogai*,[7] the Arizona Court of Appeals considered two service of process issues: (1) the effect of United States treaty provisions relating to service of process on the sufficiency of the service;

1. Hanson v. Denckla, 357 U.S. 235, 250-51 (1958); Pennoyer v. Neff, 95 U.S. 714, 733 (1878).

2. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). The *Mullane* Court stated: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.*

3. *See, e.g.*, Marquez v. Rapid Harvest Co., 99 Ariz. 363, 365, 409 P.2d 285, 287 (1965); Shering Corp. v. Cotlow, 94 Ariz. 365, 367, 385 P.2d 234, 236 (1965); Hershey v. Banta, 55 Ariz. 93, 102, 99 P.2d 81, 85 (1940). *See generally* Hazard, *Requisites of a Valid Judgment*, PRAC. LAW., Apr. 15, 1978, at 35.

4. U.S. CONST. art. VI, cl. 2.

5. *Id.*; United States v. Pink, 315 U.S. 203, 230-31 (1942). The Court there held that "state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty [signed by the United States]." *Id. See* Nielsen v. Johnson, 279 U.S. 47, 52 (1928).

6. Ronan v. First Nat'l Bank of Ariz., 90 Ariz. 341, 346 & n.7, 367 P.2d 950, 953 & n.7 (1962).

7. 125 Ariz. 131, 608 P.2d 68 (Ct. App. 1980).

and (2) the effect of service of process on a guardian ad litem of an incompetent defendant.[8] The *Kadota* plaintiff used at least three different methods of service in an attempt to serve a Japanese resident;[9] the defendant challenged each method.[10] The defendant's motions were denied and the trial court upheld personal jurisdiction over the Japanese defendant.[11] The appellate court reversed the trial court, finding none of the methods of service to be adequate.[12] Accordingly, the court remanded the case for dismissal.[13]

This casenote will first discuss the methods of service attempted by the *Kadota* plaintiff. In the next section, the Convention on the Service Abroad of Judicial and Extrajudicial Documents—the treaty involved in the *Kadota* decision—will be examined. Attention will be given to the treaty's historical background, its provisions, and its application by the *Kadota* court. The final section will examine the problems of service of process on foreign defendants and on incompetent defendants in light of the *Kadota* decision.

Methods of Service

Kadota involved a negligence action based on an automobile accident that occurred in Arizona.[14] As a result of the accident, the plaintiff's husband was killed and the defendant suffered severe brain

8. *Id.* at 133, 608 P.2d at 70.

9. *Id.* In chronological order, the methods attempted by the plaintiff were: (1) service pursuant to the Arizona nonresident motorist statute (ARIZ. REV. STAT. ANN. §§ 28-502 to -503 (1976)) by service on the Arizona superintendent of motor vehicles on April 5, 1976, *id.*, and subsequent mailing of process to the defendant (date unknown), *id.* at 137, 608 P.2d at 74; (2) service pursuant to ARIZ. R. CIV. P. 4(e)(6)(iii) (long-arm service in a foreign country), 125 Ariz. at 133-36, 608 P.2d at 70-73, and pursuant to ARIZ. REV. STAT. ANN. § 28-503(a)(2) (1974), 125 Ariz. at 138, 608 P.2d at 75, by personal service on the defendant in Japan on April 25, 1976, with verification by an affidavit of service from a Japanese attorney filed on May 5, 1976, *id.* at 133, 608 P.2d at 70; and (3) service pursuant to ARIZ. R. CIV. P. 4(d)(1) by serving process on the defendant's guardian ad litem on July 7, 1976, 125 Ariz. at 133, 138, 608 P.2d at 70, 75.

10. 125 Ariz. at 133, 608 P.2d at 70.

11. *Id.* The plaintiff was subsequently awarded a verdict of $225,000. *Id.*

12. *Id.* at 140, 608 P.2d at 77. The court also dismissed plaintiff's contention that defendant submitted himself to the court's jurisdiction when his father requested that the trial court appoint a guardian ad litem. *Id.* at 139-40, 608 P.2d at 76-77.

13. *Id.* at 140, 608 P.2d at 77. The court reversed and remanded the case with directions to dismiss for lack of personal jurisdicton over the defendant. *Id.* In Arizona, once service is quashed, a party may still effect proper service if this can be done within the time allowed by statute. Stinson v. Johnson, 3 Ariz. App. 320, 323, 414 P.2d 169, 172 (1966). In the *Kadota* case, however, the automobile accident at issue occurred in 1975, Brief for Appellant at 4, and the limitations period is only two years, ARIZ. REV. STAT. ANN. § 12-542 (Supp. 1980-81). Consequently, the statute of limitations had run by the time of the court's decision.

Nor was *id.* § 12-501 (1956) available to the plaintiff. This section provides that the absence of a defendant from the state will toll the statute of limitations. Courts have interpreted this statute to mean that a defendant is "absent" only if service of process cannot be made to secure personal jurisdicton over that person. Selby v. Karman, 110 Ariz. 522, 524, 521 P.2d 609, 611 (1974); Engle Bros., Inc. v. Superior Court, 23 Ariz. App. 406, 408, 533 P.2d 714, 716 (1975). In *Kadota*, the defendant could have been reached by service of process while in Japan. *See* text & notes 90-94 *infra*. The statute of limitations, therefore, should not have been tolled.

14. 125 Ariz. at 133, 608 P.2d at 70.

damage.[15] The defendant was hospitalized in Arizona, but returned to Japan to live with his family before the suit was filed.[16]

After filing the suit, the plaintiff attempted to serve process on the defendant by various methods.[17] In one attempt, the plaintiff served the defendant under Arizona's long-arm rule,[18] which includes alternative methods for serving process in a foreign country.[19] One method authorized by the long-arm rule is personal delivery to the defendant of a copy of the summons and complaint[20] by any person who is not a party to the action and who is not less than eighteen years of age.[21]

In *Kadota*, the plaintiff had a Japanese attorney personally serve the defendant in an attempt to satisfy the requirements of Arizona's long-arm rule.[22] The Japanese attorney filed an affidavit stating that he was of requisite age, was not involved in the suit, and "that he had personally served a copy of the summons and complaint with a Japanese translation" on the defendant.[23] The appellate court found no procedural defect with this service but held that personal service in Japan was prohibited by a treaty.[24]

In a second attempt to serve the defendant, the plaintiff relied on provisions of Arizona's nonresident motorist statute.[25] That statute requires a plaintiff to first serve process on the state superintendent of

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15. *Id.*
16. *Id.*
17. *See* note 9 *supra*.
18. 125 Ariz. at 134, 608 P.2d at 71. In Arizona, long-arm jurisdicton is based upon ARIZ. R. CIV. P. 4(e)(2) which authorizes service of process on an out-of-state party who "has caused an event to occur in this state out of which the claim which is the subject of the complaint arose."
19. ARIZ. R. CIV. P. 4(e)(6), entitled "Alternative provisions for service in a foreign country," authorizes service:

> (i) in the manner prescribed by the law of the foreign country for service in that country . . .; or
> (ii) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or
> (iii) upon an individual, by delivery to him personally . . .; or
> (iv) by any form of mail, requiring a signed receipt . . .; or
> (v) as directed by order of the court.

Id. R. 4(e)(6)(a).
20. *Id.* R. 4(e)(6)(a)(iii).
21. *Id.* R. 4(e)(6)(a)(v).
22. 125 Ariz. at 134, 608 P.2d at 71.
23. *Id.* at 133, 608 P.2d at 70.
24. *Id.* at 136, 608 P.2d at 73. The Convention on the Service Abroad of Judicial and Extrajudicial Documents entered into force in the United States on February 10, 1969. 20 U.S.T. 361, T.I.A.S. No. 6638, 68 U.N.T.S. No. 9432, at 163.
25. 125 Ariz. at 133, 608 P.2d at 70. *See* ARIZ. REV. STAT. ANN. §§ 28-502 to -503 (1976). Service of process pursuant to nonresident motorist statutes is a method of asserting personal jurisdicton based on implied consent. The nonresident motorist impliedly consents, upon making use of the state roads, that a statutorily designated official such as the Assistant Director for the Motor Vehicle Division of the Arizona Department of Transportation may act as an agent for receiving service of process for any claims arising out of the operation of the vehicle in the state. *Id.* § 28-502(B). Assertion of personal jurisdiction by this means was upheld by the United States Supreme Court in Hess v. Pawloski, 272 U.S. 352, 356-57 (1927).

motor vehicles.[26] The superintendent acts as the nonresident motorist's agent for receiving process for any claims arising out of the nonresident's operation of a vehicle within the state.[27] The *Kadota* plaintiff did file an affidavit of compliance with this part of the statute but failed to meet an additional requirement of the statute.[28]

A plaintiff may complete service of process under the nonresident motorist statute in either of two ways. The first option requires the plaintiff to send the nonresident defendant, by registered mail, a copy of the complaint and summons along with notice of prior service on the superintendent.[29] In *Kadota*, the plaintiff could not prove service by registered mail.[30] The plaintiff alleged service by regular mail and argued that this constituted substantial compliance with the statute.[31] The court, however, relied on Arizona precedent and ruled that full statutory compliance was necessary.[32]

The second option for completing service allows for direct service on the defendant "by a duly constituted officer, qualified to serve like process in the state or jurisdiction where defendant is found."[33] The direct service must be followed by the filing of the serving officer's return to show that the statutory requirements have been fulfilled.[34] In *Kadota*, the plaintiff attempted to meet the requirements of this option through the use of the affidavit of the Japanese attorney.[35] The court, in ruling on the validity of the service under the long-arm rule, had held that personal service was invalid under a United States treaty,[36]

26. ARIZ. REV. STAT. ANN. § 28-503(A) (1976).
27. *Id.* §§ 28-502 to -503.
28. 125 Ariz. at 133, 608 P.2d at 70.
29. ARIZ. REV. STAT. ANN. § 28-503(A)(1) (1976).
30. 125 Ariz. at 137, 608 P.2d at 74. The plaintiff failed to file either a return receipt or an affidavit of compliance as required by the statute. *Id.*
31. *Id.* In Brief for Appellee at 13-17, the plaintiff argued extensively that substantial compliance with statutory requirements should be sufficient where the defendant has received actual notice. Regarding actual notice, the *Kadota* court said that "[t]he fact that the appellant may have had actual notice in this case does not excuse appellee's failure to comply with the applicable statutes." 125 Ariz. at 133, 608 P.2d at 74. Since the defendant's father had the court appoint a guardian ad litem to represent his son, *see* text at note 38 *infra*, it appears that the defendant's household received actual notice.
32. 125 Ariz. at 137-38, 608 P.2d at 74-75. One case cited was Stinson v. Johnson, 3 Ariz. App. 320, 414 P.2d 169 (1966). In *Stinson*, the court invalidated service because the plaintiff, like the *Kadota* plaintiff, failed to properly use registered mail. *Id.* at 321, 414 P.2d at 170. The other case cited was Nosal v. Collett, 8 Ariz. App. 571, 448 P.2d 415 (1968). *Nosal* illustrates the strict application of process service requirements. In the original hearing, 8 Ariz. App. 440, 446 P.2d 950 (1968), the court had upheld service because the defendant had received actual notice, constitutional standards had been met, and the court thought there should be a limit on strict enforcement of notice requirements. *Id.* at 442, 446 P.2d at 952. On rehearing, service was invalidated on the ground that Arizona law demanded strict adherence to service of process requirements. 8 Ariz. App. at 571, 448 P.2d at 415.
33. ARIZ. REV. STAT. ANN. § 28-503(A)(2) (1976).
34. *Id.*
35. 125 Ariz. at 133, 138, 608 P.2d at 70, 75.
36. *See* text & notes 20-24 *supra*. Convention on the Service Abroad of Judicial and Extrajudicial Documents, 20 U.S.T. 361, T.I.A.S. No. 6638, 68 U.N.T.S. No. 9432, at 163.

and apparently without hesitation applied this same ruling to service under the nonresident motorist statute.[37]

Following these attempts at service, the defendant's father requested that the court appoint his son's attorney as guardian ad litem.[38] The request was based on the son's brain damage and resulting incapacity.[39] The trial court made the appointment and the plaintiff subsequently served the guardian ad litem.[40] The plaintiff contended that such service was valid under Rule 4(d)(1) of the Arizona Rules of Civil Procedure,[41] which allows service to be made on "an agent authorized by appointment or by law to receive service of process."[42] The plaintiff maintained that the guardian ad litem qualified as an agent authorized to receive process and that service on the guardian ad litem alone was sufficient to confer jurisdiction over the defendant.[43]

In deciding whether this service was valid, the *Kadota* court first pointed out that "there is no rule which authorizes the guardian ad litem to accept service of process for the incompetent."[44] The court then looked at the requirements of Rule 4(d)(4) of the Arizona Rules of Civil Procedure which governs "service of process on a person who had been 'judicially declared to be insane or mentally incompetent.' "[45] The court pointed out that this rule requires service on both the incompetent and the appointed guardian.[46]

The *Kadota* court next looked to the disposition of a similar service of process issue in *Ronan v. First National Bank of Arizona*.[47] In *Ronan*, the Arizona Supreme Court discussed whether service was valid under Rule 4(d)(1) when made only upon an appointed guardian

37. 125 Ariz. at 138, 608 P.2d at 75. An issue the *Kadota* court did not discuss was whether this attempt at service met statutory requirements. Personal service under Arizona's nonresident motorist statute must be made by "a duly constituted officer qualified to serve like process in the state or jurisdiction where the defendant is found." ARIZ. REV. STAT. ANN. § 28-503(A)(2) (1976). In *Kadota*, the personal service by the Japanese attorney was not shown to meet these requirements. 125 Ariz. at 138, 608 P.2d at 75. Since personal service in Japan was held to be invalid under the treaty, *see* text & notes 20-24 *supra*, it was not necessary for the court to decide this issue. In comparison, ARIZ. R. CIV. P. 4(e)(6)(a)(v) carries more liberal qualification requirements for the process server: "[Service] may be made by *any person* who is not a party and is not less than 18 years of age *or* who is designated by order of the court or by the foreign court." *Id.* (emphasis added).

38. 125 Ariz. at 133, 608 P.2d at 70.

39. *Id.*

40. *Id.*

41. *Id.* at 138, 608 P.2d at 75.

42. ARIZ. R. CIV. P. 4(d)(1).

43. 125 Ariz. at 138, 608 P.2d at 75.

44. *Id.* The court specified that ARIZ. R. CIV. P. 17(g) does authorize a court to appoint a guardian ad litem to sue or defend for an incompetent person. *Id.*

45. *Id.* at 138, 608 P.2d at 75.

46. *Id.* The *Kadota* court also noted, however, that "this rule is not directly applicable because the appellant had never been judicially declared an incompetent." *Id.*

47. 90 Ariz. 341, 367 P.2d 950 (1962).

ad litem and not upon four minors.[48] The *Ronan* court held that there is no express authorization in the statutes for the guardian ad litem to serve as agent for service of process upon minors and that no such authorization is implied, since Rule 4(d)(2),[49] the general provision for service upon minors, requires service to be made on both the minor and upon an appropriate adult guardian.[50] The *Kadota* Court applied the reasoning used in *Ronan* and ruled that a guardian ad litem was not an agent for receiving service of process within the meaning of Rule 4(d)(1), and that this attempt at service was therefore insufficient to confer jurisdiction over the defendant.[51]

The Treaty Involved in Kadota: Background

Suits against foreign defendants have traditionally been a troublesome area for American attorneys.[52] One of the major areas of difficulty is the enforcement of judgments against defendants located in foreign countries.[53] When a judgment against a foreign defendant is not enforceable in the United States, plaintiffs are dependent upon the cooperation of foreign authorities.[54] Ideally the foreign authorities would enforce American judgements as a matter of comity.[55] Oftentimes, however, this is not the case.[56] Where an American plaintiff serves process by a method that is disfavored by the foreign authorities because the method is either seen as an attempt to infringe on that country's sovereignty or is inconsistent with the internal law of the for-

48. *Id.* at 346 & n.7, 367 P.2d at 953 & n.7.

49. ARIZ. R. CIV. P. 4(d)(2) provides for service of process:

> Upon a minor under the age of sixteen years, by service in the manner set forth in paragraph 1 of this subdivision upon the minor and upon his father, mother or guardian, within this state, or if none is found therein, then upon any person having the care or control of such minor, or with whom he resides.

50. 90 Ariz. at 346 & n.7, 367 P.2d at 953 & n.7.

51. 125 Ariz. at 138, 608 P.2d at 75. The *Kadota* court in dictum also stated that even if a guardian ad litem were authorized to receive process for an incompetent defendant, the service in *Kadota* would not be valid because the defendant's guardian ad litem was not validly appointed. *Id.* at 138-39, 608 P.2d at 75-76. The court, again citing *Ronan*, ruled that a court may not appoint a guardian ad litem unless there has first been proper service upon the incompetent defendant. *Id.* at 138-39, 608 P.2d at 75-76. *See* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1099, at 131 & n.32.2 (Supp. 1980). Wright and Miller recommend that, to avoid a possible anomaly in service of process requirements, provisions that require service upon a guardian, in addition to service upon an incompetent, should be applicable only where there has been a formal declaration of incompetent status. *Id.*

52. *See generally* Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515 (1953); Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031 (1961).

53. *See* 4 C. WRIGHT & A. MILLER, *supra* note 51, § 1133, at 555-56.

54. *See id.* at 555-57.

55. *Id.* "Comity of nations" is defined as the "recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws." BLACK'S LAW DICTIONARY 242 (5th ed. 1979).

56. *See* 4 C. WRIGHT & A. MILLER, *supra* note 51, § 1133, at 555-56 & n.14. *See also* Smit, *supra* note 52, at 1040-41.

eign country, comity is not likely to follow.[57] The plaintiff who must depend on the cooperation of foreign authorities to enforce a judgment is thus in a better position when the means of service used is in harmony with the laws and policies of that country.[58]

Prior to 1963, attorneys seeking to serve process on foreign defendants often had to rely on provisions that were replete with difficulties.[59] Former Rule 4 of the Federal Rules of Civil Procedure,[60] for example, was criticized on a number of grounds. Its provisions for foreign service of process were seen as difficult to construe, too dependent on unsatisfactory service of process provisions of federal statutes, and inadequate in allowing for possible objections of foreign sovereigns as to particular methods of service.[61] Thus, under these provisions, attorneys were restricted not only in their ability to meet jurisdictional requirements in serving process but also in their ability to satisfy foreign authorities and gain their cooperation.

In 1963, the Arizona Supreme Court, following the lead of the Federal Rules Committee, expanded those portions of Rule 4 of the Arizona Rules of Civil Procedure relating to service of process in a foreign country.[62] A central purpose behind this expansion was to allow greater flexibility in serving process on foreign defendants,[63] and thus give Arizona plaintiffs a better chance to effect proper service on foreign defendants and to gain the cooperation of foreign authorities in enforcing judgments.[64] The expansion of Rule 4, however, was not a complete solution to the difficulties involved in making foreign service of process. The difficulties in determining the requirements and policies relating to process service in a particular foreign country and the difficulties in carrying out the chosen method have remained significant problem areas.[65]

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57. Smit, *supra* note 52, at 1040-42; *see* 4 C. WRIGHT & A. MILLER, *supra* note 51, § 1133, at 557.

58. *See* 4 C. WRIGHT & A. MILLER, *supra* note 51, § 1133, at 557.

59. Smit, *supra* note 52, at 1032-43. Smit analyzes foreign service of process problems with federal procedures existent prior to the 1963 federal rules changes.

60. FED. R. CIV. P. 4, 308 U.S. 664-67 (1939), *amended in* 374 U.S. 877-78 (1963).

61. *See* Smit, *supra* note 52, at 1032.

62. *See* ARIZ. R. CIV. P. 4(e)(6). The State Bar Committee Note following this rule provides that the "additions to Rule 4 follow the changes by the Federal Committee. The purpose is to overcome objections of foreign governments to service of process issued out of alien courts. These changes take into account the difficulties encountered in making service abroad and conform the manner of service to local law."

63. State Bar Committee Note, set forth in note 62 *supra*. *See* 4 C. WRIGHT & A. MILLER, *supra* note 51, § 1133, at 558-59; Notes of Advisory Committee on Rules following FED. R. CIV. P. 4(i).

64. *See* ARIZ. R. CIV. P. 4(e)(6)(a)(i) which provides that service of process in a foreign country may be made "in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction. . . ."

65. 4 C. WRIGHT & A. MILLER, *supra* note 51, § 1133, at 558-59. *See* Note, *The Effect of the Hague Convention on Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commer-*

The Treaty Involved in Kadota

In 1969 the United States entered into a multilateral treaty, the Convention on the Service Abroad of Judicial and Extrajudicial Documents,[66] concerned with the international service of process among the signatory nations. The main goal of the treaty was to make international service of process more efficient so that the timeliness and certainty of legal notice might be improved.[67] By subscribing to the treaty, the United States helps to protect its citizens by implementing the treaty's restrictions on a foreign court's authority to render default judgments against Americans named as defendants in foreign actions.[68] The Treaty also aids United States citizens seeking to serve process on foreign defendants located in a signatory country.[69]

Pursuant to this latter goal the treaty first attempts to ensure a set of uniform guidelines for international service of process among the signatory nations by providing, in article 1, that the treaty "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad."[70] In addition to ensuring uniform guidelines, the treaty attempts to simplify and expedite foreign service of process by establishing a means for international cooperation.[71] A "central authority" is established in each member nation to facilitate requests for service of process.[72] By making the proper request, a plaintiff seeking to serve a foreign defendant in a signatory country can have that country's central authority com-

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cial Matters, 2 CORNELL INT'L L.J. 125, 132-33 (1969) (discussing the differences in European service of process laws).

66. 20 U.S.T. 361, T.I.A.S. No. 6638, 68 U.N.T.S. No. 9432, at 163. The complete treaty and a current list of the signatories, including their declarations, can be found in the notes following FED. R. CIV. P. 4, 28 U.S.C.A. (Supp. 1980). It is noteworthy that neither Canada nor Mexico are signatories of this Treaty. *Id.*

67. 20 U.S.T. at 362, T.I.A.S. No. 6638 at 2, 68 U.N.T.S. No. 9432 at 165. The Treaty preamble reads:

> The States signatory to the present Convention,
>
> Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,
>
> Desiring to improve the organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure,
>
> Have resolved to conclude a Convention to this effect and have agreed upon the following provisions. . . .

68. *Id.* *See* Note, *supra* note 65, at 129-30.

69. *See* note 67 *supra*.

70. 20 U.S.T. at 362, T.I.A.S. No. 6638 at 2, 68 U.N.T.S. No. 9432 at 165.

71. *See* note 67 *supra*.

72. 20 U.S.T. at 362-63, T.I.A.S. No. 6638 at 2-3, 68 U.N.T.S. No. 9432 at 165-67. Articles 1 through 6 of the treaty discuss the establishment and duties of each member's central authority. The central authority is also discussed throughout the body of the treaty. *Id.* at 361, T.I.A.S. No. 6638 at 1, 68 U.N.T.S. No. 9432 at 165. *See* Note, *supra* note 65, at 130, describing the benefits to the United States in having a central authority established by each treaty member: "The United States also gains from the institution of a governmental organ capable of effecting service of documents because such service is not open to the objections made by civil law countries to service abroad by private parties, that the home nation's sovereignty is encroached upon."

plete service of process.[73]

Due to the extensive treatment given to the "central authority" in the treaty, it appears that the drafters may have envisioned the use of this method as the primary means for international service of process.[74] The general intent of the treaty, however, was not to reduce the available methods of service;[75] in addition to service through central authorities, the treaty specifically provides for other methods of process service.[76]

Further, article 10 of the treaty conditionally qualifies the restrictive implications of article 1. Article 10 provides in part (a) that unless objected to by the nation of destination, the treaty shall not interfere with "the freedom to send judicial documents, by postal channels, directly to persons abroad."[77] It is not certain whether this provision was intended to legitimize service of process through the mailing of judicial documents.[78] The *Kadota* court refrained from deciding this question because it was not raised by either party.[79] If service by mail were allowed under article 10(a), then service by mail pursuant to state long-arm provisions[80] or pursuant to nonresident motorist statutes[81] would

73. 20 U.S.T. at 362-63, T.I.A.S. No. 6638 at 2-3, 68 U.N.T.S. No. 9432 at 165-67.

74. *See* text & notes 72-73 *supra*.

75. *See* Note, *supra* note 65, at 130 (describing the objectives of the drafters).

76. 20 U.S.T. at 362-65, T.I.A.S. No. 6638 at 2-5, 68 U.N.T.S. No. 9432 at 165-75. In *Kadota*, the court, without further elaboration, stated: "[T]he complete convention . . . appears to authorize all of the methods of service provided for in the Arizona Rules of Civil Procedure *plus some additional methods*." 125 Ariz. at 135-36, 608 P.2d at 72-73 (emphasis added). The *Kadota* court also implied that a method of service that was authorized by the treaty would be valid in an Arizona court, even if the method was not otherwise provided in Arizona rules or statutes. *Id.* at 136, 140, 608 P.2d at 73, 77. This language represents a different conclusion as to the effect of the United States Constitution's supremacy clause than discussed previously. *See* text & notes 3-7 *supra*. The *Kadota* court implied not that state procedures are invalid to the extent they conflict with treaty provisions, but that a treaty's provisions are constitutionally imposed on the states. 125 Ariz. at 136, 140, 608 P.2d at 73, 77. Thus, for example, the *Kadota* court implied that service through a central authority, though not authorized for effecting service under Arizona procedures, is nevertheless valid in Arizona because it is imposed on Arizona courts by an international treaty. *Id.* at 136, 608 P.2d at 73. A better approach might have been to hold that ARIZ. R. CIV. P. 4 contains provisions that can be interpreted to authorize all of the methods of service provided by the treaty. Service through a central authority, for example, reasonably comes under Rule 4(e)(6)(a)(i), *see* note 19 *supra*, since the rule allows for service as prescribed by the law of the foreign country. It is the responsibility of a central authority to see that service is carried out in accordance with the country's internal laws. 20 U.S.T. at 362-63, T.I.A.S. No. 6638 at 2-3, 68 U.N.T.S. No. 9432 at 167.

77. 20 U.S.T. at 363, T.I.A.S. No. 6638 at 3, 68 U.N.T.S. No. 9432 at 169-71.

78. Kadota v. Hosogai, 125 Ariz. at 137, 608 P.2d at 74. The question is not whether article 10(a) prescribes service by mail as a method provided by the treaty. See text at note 77 *supra*. The question is whether the treaty interferes with the freedom to effect proper service through the mail. Other jurisdictions have upheld service by mail under article 10(a) of the treaty, where that service met state requirements for mailing of service. *E.g.*, Isothermics, Inc. v. United States Energy Research and Development Agency, 434 F. Supp. 1155, 1158 (D.N.J. 1977); Shoei Kako Co. v. Superior Court, 33 Cal. App. 3d 808, 823, 109 Cal. Rptr. 402, 412 (1973).

79. 125 Ariz. at 137, 608 P.2d at 74.

80. ARIZ. R. CIV. P. 4(e)(6)(a)(iv) allows service on an out-of-state party "by any form of mail, requiring a signed receipt."

81. *E.g.*, ARIZ. REV. STAT. ANN. § 28-503(A)(1) (1976).

appear to be valid under the treaty. The remaining provisions in article 10, parts (b) and (c), basically provide that unless objected to by the nation of destination, the treaty shall not interfere with the freedom of judicial authorities or of interested parties "to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination."[82]

Under the above mentioned provisions, the *Kadota* plaintiff's attempt to personally serve the defendant in Japan apparently would have been authorized.[83] Thus, plaintiff's personal service under Rule 4(e)(6)(a)(iii) and under Arizona Revised Statutes section 28-503(A)(2) of the nonresident motorist provisions, apparently sufficient for state requirements,[84] would be allowed under article 10(c) of the treaty.[85]

The critical factor in *Kadota* was that Japan entered formal objections, upon signing the treaty, to parts (b) and (c) of article 10.[86] Because Japan properly objected to these provisions, and because the personal service made in Japan was not otherwise authorized by the treaty, the *Kadota* court properly held that personal service was not permitted by the treaty.[87] Since treaty agreements supersede conflicting state procedures for service of process,[88] the *Kadota* court invalidated the plaintiff's personal service by a Japanese attorney pursuant to Arizona's Rule 4(e)(6)(a)(iii) and Arizona's nonresident motorist statute.[89]

Service of Process in Light of Kadota

The *Kadota* court pointed out that under the treaty several methods of serving process in Japan are still available in the treaty despite that country's objections to personal service.[90] Included in the available methods are: (1) service through the country's central authority;[91] (2) service in a manner prescribed by the internal law of the foreign country (article 19);[92] (3) service accomplished through American dip-

82. 20 U.S.T. at 363, T.I.A.S. No. 6638 at 3, 68 U.N.T.S. No. 9432 at 169-71.
83. *See* note 76 *supra*.
84. See text & notes 25, 37 *supra*.
85. See text & note 76 *supra*.
86. 125 Ariz. at 136, 608 P.2d at 73.
87. *Id.*
88. *Id.*; text & note 5 *supra*.
89. 125 Ariz. at 138, 608 P.2d at 75. The *Kadota* court invalidated service under ARIZ. REV. STAT. ANN. § 28-503(A) and -503(A)(2) (1976) by merely noting: "[A]s discussed above (long-arm service), the Convention between Japan and the United States prohibits personal service from being an effective method of service on a defendant in Japan." *Id.* Under this ruling, an Arizona plaintiff may not be able to serve process on a Japanese defendant under the nonresident motorist statute. The personal service option is not available and it is uncertain whether service by mail is available. *See* text & note 78 *supra*.
90. 125 Ariz. at 136, 608 P.2d at 73. *See* text & note 66 *supra*.
91. 20 U.S.T. at 362-63, T.I.A.S. No. 6638 at 2-3, 68 U.N.T.S. No. 9432 at 165-69.
92. Id. at 365, T.I.A.S. No. 6638 at 5, 68 U.N.T.S. No. 9432 at 175.

lomatic channels (article 8);[93] and (4) service accomplished through letters rogatory (article 9).[94]

In selecting a method of service for use in a foreign country, several factors should be considered. For example, service in a manner prescribed by the internal law of the foreign country may involve significant problems in determining the foreign law and in carrying out the service.[95] Historically, service attempted through American diplomatic channels has been neither a readily available nor a reliable method.[96] Service attempted through use of letters rogatory has traditionally been "the most time consuming, cumbersome, and expensive method of service provided in [Federal] Rule 4(i)."[97] Service of process by mail has the desirable attributes of being both expeditious and inexpensive.[98] In light of the *Kadota* decision, however, it is not clear whether such a method is available to an Arizona plaintiff attempting to serve process in a country that has signed the *Kadota* treaty.[99]

Considering these factors it appears that service through a central authority generally offers the best method of making foreign service of process—at least when the defendant is located in a signatory country.[100] A party utilizing this method, however, should still become familiar with the internal law of the foreign country because such service, though carried out by a foreign authority, must still meet American due process requirements.[101] On the other hand, service through a central authority would seem to avoid many of the proof problems involved in Arizona's Rule 4 since article 5 of the treaty places the responsibility for meeting the foreign country's procedural requirements on that country's central authority.[102] Service through a central authority appears more reliable and more simple than service through American diplomatic channels or through letters rogatory. It also appears less risky than personal service (even when that method is not formally objected to by the foreign country) largely because personal service is often viewed as an infringement on the foreign nation's sovereignty.[103] Unlike service by mail, service through a central authority is clearly

93. Id. at 363, T.I.A.S. No. 6638 at 3, 68 U.N.T.S. No. 9432 at 169.
94. Id.
95. *See* text & note 65 *supra*.
96. *See* Jones, *supra* note 52, at 536.
97. 4 C. WRIGHT & A. MILLER, *supra* note 51, § 1134, at 562; *see* Smit, *supra* note 52, at 1040.
98. 4 C. WRIGHT & A. MILLER, *supra* note 51, § 1134, at 563-64.
99. *See* text & note 78 *supra*.
100. *See* text & notes 71-76 *supra*.
101. *See* text & note 2 *supra*. *See also* 4 C. WRIGHT & A. MILLER, *supra* note 51, § 1134, at 562-63; Note, *supra* note 65, at 141.
102. 20 U.S.T. at 362-63, T.I.A.S. No. 6638 at 2-3, 68 U.N.T.S. No. 9432 at 165.
103. *See* 4 C. WRIGHT & A. MILLER, *supra* note 51, § 1133, at 556-57.

provided for in the treaty.[104] Perhaps most important, service through the central authority of a foreign country appears to be the method most likely to generate cooperation from foreign authorities when needed to enforce a judgment. This method is clearly provided by the treaty and it is least offensive to the sovereignty of the country involved.[105]

In addition to deciding legal issues related to foreign service of process where a treaty is involved, *Kadota* helps clarify the problems inherent in the service of process on incompetent persons. Prior to *Kadota*, a plaintiff attempting to assert jurisdiction over an incompetent defendant had Rule 4(d)(4) of the Arizona Rules of Civil Procedure for guidance. Rule 4(d)(4) basically provides that if there has been a judicial declaration of incompetency, service of process must be made on both the incompetent defendant and the appointed guardian.[106] Thus, Rule 4(d)(4) does not provide for the situation where a defendant may be physically or mentally incompetent but has not yet been judicially declared an incompetent.[107] The *Kadota* court held that the appointment of a guardian ad litem to represent the incompetent defendant in such a situation does not give the guardian ad litem authority to receive process on behalf of the defendant incompetent.[108] In this situation, as in Rule 4(d)(4), a plaintiff seeking to assert jurisdiction over an incompetent defendant must still make proper service of process on the defendant.[109]

Conclusion

Kadota illustrates that service of process in a foreign country is not only difficult but hazardous as well. In *Kadota*, the application of a treaty intended to make service easier resulted in denying the plaintiff a substantial judgment. When contemplating foreign service of process, attorneys should realize that each case and each country is different. They should take the time to analyze fully the service of process problem in light of the factors herein discussed. Where the treaty in *Kadota* governs, service through the central authority appears to be the soundest method. It appears to have been the soundest method for the *Kadota* plaintiff. Nevertheless, when attempting both to satisfy the forum's service requirements and to gain the cooperation of foreign authorities, an attorney is well advised to rely on more than one form of

104. 125 Ariz. at 136, 608 P.2d at 73. *See* text & notes 72-73 *supra*.
105. *See* text & note 72 *supra*.
106. ARIZ. R. CIV. P. 4(d)(4).
107. 125 Ariz. at 138, 608 P.2d at 75.
108. *Id.*
109. *Id.*

service. Alternative forms of service should be attempted whenever the certainty of any one method is in doubt.

In the area of service of process on incompetent defendants, *Kadota* provides a narrow holding that may be given broader dimensions in future cases. The *Kadota* court held that the appointment of a guardian ad litem to represent an incompetent defendant does not in itself confer upon that guardian ad litem the authority to act as the incompetent's agent for receiving process. Plaintiffs attempting to assert jurisdiction over an incompetent defendant must still properly serve the incompetent. This is the narrow holding of *Kadota*. A broader proposition for which *Kadota* will likely be cited is that an incompetent's rights will be jealously guarded and a legislative intent to circumvent or diminish those individual rights through principles of agency or otherwise will not be lightly inferred.

Thomas J. Tanksley

II. CONSTITUTIONAL LAW

A. EQUAL PROTECTION AND STATUTORY RAPE LEGISLATION

In *United States v. Hicks*,[1] the Ninth Circuit Court of Appeals held unconstitutional two federal statutes proscribing carnal knowledge of a female under the age of sixteen.[2] The Arizona federal district court had dismissed the indictment of two defendants under 18 U.S.C. sections 1153 and 2032 because the provisions violated the due process clause of the fifth amendment.[3] The court of appeals affirmed.[4]

Both the district court and the court of appeals applied the "intermediate" standard of judicial review to the statutes,[5] requiring the government to demonstrate that the statutory gender-based classifications were based upon important governmental objectives and were "substantially related" to the achievement of those objectives.[6]

This casenote will first analyze the use of the intermediate scrutiny standard in equal protection claims. Attention will then be given to the application of intermediate scrutiny to statutory rape laws. Lastly, the arguments used by the government in *Hicks* to justify statutory rape legislation will be discussed.

Intermediate Scrutiny

The so-called "intermediate" tier of scrutiny first appeared formally in the United States Supreme Court's analysis of an Oklahoma

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1. 625 F.2d 216 (9th Cir. 1980).

2. *Id.* at 221. One of the statutes which was struck down, 18 U.S.C. § 1153 (1976), provides part:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely . . ., carnal knowledge of any female, not his wife, who has not attained the age of sixteen years . . . within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

The other statute, *id.* § 2032, provides in part:

> Whoever, within the special maritime and territorial jurisdiction of the United States, carnally knows any female, not his wife, who has not attained the age of sixteen years, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense, be imprisoned not more than thirty years.

3. 625 F.2d 216, 218 (1980).

4. *Id.* at 221.

5. *See Id.* at 127. There are three standards of review used in analyzing equal protection claims. For a discussion of the strict and minimal scrutiny standards, see text & notes 10-15 *infra*. The intermediate standard is stated in Craig v. Boren, 429 U.S. 190, 197 (1976), which is discussed at text & notes 8-10 *infra*. In *Hicks*, the government failed to meet its burden under the intermediate standard of review. *See* text & notes 86-92 *infra*. *See also* Vance v. Bradley, 440 U.S. 93, 94 n.1 (1979); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).

6. 625 F.2d at 218 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).

statute allowing eighteen year old women—but not men—to purchase beer.[7] In *Craig v. Boren*,[8] the Court invalidated the Oklahoma statute and propounded the test for gender-based classifications under the equal protection clauses: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[9]

Before *Craig*, only two types of scrutiny were regularly used to analyze equal protection claims.[10] In the first type—minimal scrutiny— the Court shows great deference to legislative decisions: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[11] Minimal scrutiny was usually applied to economic legislation and, prior to 1971, was the equal protection test used for classifications based on sex.[12] The second type—strict scrutiny—requires the state's interest to be "compelling" and the means used to reach that end to be "necessary."[13] The standard applies when a classification interferes with the exercise of a fundamental right[14] or when "suspect" criteria are used in creating the classification.[15]

In *Reed v. Reed*,[16] the Court purported to apply the minimal scrutiny, "rational relationship" standard.[17] Nevertheless, it implicitly developed the third, or intermediate, level of scrutiny because "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment. . . ."[18] The intermediate standard of review has been applied to several types of sex classifications including those that exhibit some characteristics of a sus-

7. OKLA. STAT. tit. 37, §§ 241, 245 (1971).

8. 429 U.S. 190 (1976).

9. *Id.* at 197.

10. *See generally* Stanton v. Stanton, 421 U.S. 7, 13 (1975).

11. McGowan v. Maryland, 366 U.S. 420, 426 (1961).

12. *See* Reed v. Reed, 404 U.S. 71 (1971). Note, however, that *Craig* seems to interpret *Reed* as applying the intermediate standard of review. Craig v. Boren, 429 U.S. at 197-98. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-24, 16-25, at 1060-63 (1978).

13. Korematsu v. United States, 323 U.S. 214, 216 (1944).

14. Dunn v. Blumstein, 405 U.S. 330, 339-40 (1972) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel); Loving v. Virginia, 388 U.S. 1, 12-13 (1967) (marriage).

15. Frontiero v. Richardson, 411 U.S. 677, 682 (1973). Suspect classifications are those based on race, alienage, national origin or similar characteristics. Anderson v. City of Detroit, 54 Mich. App. 496, 499 n.1, 221 N.W.2d 168, 169 n.1 (1974).

16. 404 U.S. 71 (1971).

17. *Id.* at 76.

18. *Id. See* L. TRIBE, *supra* note 12, § 16-25, at 1063. Intermediate scrutiny also arose from a recognition by the Supreme Court in *Reed* that a classification must be "reasonable, not arbitrary, and must rest upon some difference having a fair and substantial relation to the object of the legislation." 404 U.S. at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

pect class.[19] Typically, its application has resulted in striking down laws that rest on "archaic and overbroad generalizations"[20] or laws that interfere with nonconstitutional interests upon which "constitutionally guaranteed rights are dependent."[21]

The Supreme Court has upheld gender-based classifications where the classification actually worked to benefit the class and the true basis for the classification was an informed, purposeful attempt to rectify past discrimination.[22] In *Schlesinger v. Ballard*[23] for example, the Supreme Court upheld a Navy policy that allowed women thirteen years for advancement before automatic discharge but allowed men only eight years without promotion before summary discharge.[24] The Court upheld the policy because it found that male and female naval officers were not similarly situated: sea duty, often important for promotion, was regularly denied to female officers.[25] By contrast, in *Stanton v. Stanton*[26] and *Weinberger v. Wiesenfeld*,[27] the Court struck down statutes that tended to lock males and females into traditional roles.[28]

The broad language of the intermediate scrutiny test gives the Court the needed flexibility to decide important equal protection issues

19. *See* Craig v. Boren, 429 U.S. at 197-99 (drinking age law); Stanton v. Stanton, 421 U.S. 7, 13-15, 17 (1975) (child support payments); Frontiero v. Richardson, 411 U.S. 677, 682-86 (1973) (military dependency benefits).

20. Schlesinger v. Ballard, 419 U.S. 498, 508 (1975) (navy promotion regulation); *see* text & note 19 *supra*.

21. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 102 (1973) (Marshall, J., dissenting); *see* text & note 19 *supra*. The dissent in *San Antonio* asserts that the more closely constitutional rights and nonconstitutional interests are linked, the more "fundamental" the nonconstitutional interest becomes. The "degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly." 411 U.S. at 102-03.

22. *See* Califano v. Webster, 430 U.S. 313, 317-18 (1977); Kahn v. Shevin, 416 U.S. 351, 354-55 (1974). The Court noted in *Kahn* that "[g]ender has never been rejected as an impermissible classification in all instances. Congress has not so far drafted women into the armed forces." 416 U.S. at 356 n.10.

23. 419 U.S. 498 (1975).

24. *Id.* at 510.

25. *Id.* at 508.

26. 421 U.S. 7 (1975).

27. 420 U.S. 636 (1975).

28. Stanton v. Stanton, 421 U.S. at 14; Weinberger v. Wiesenfeld, 420 U.S. at 653. In *Stanton* the Court invalidated a Utah statute establishing different ages of majority for males and females: 21 years and 18 years respectively. On remand, the Utah Supreme Court again held the age of majority statute constitutional. In Stanton v. Stanton, 429 U.S. 501 (1977), the Supreme Court vacated the state court for the second time. *Id.* at 504. The Utah statute reinforced the traditional notion that young women should marry while young men should be supported until they graduate from college. *See* 421 U.S. at 14-15. In *Weinberger*, the Court declared unconstitutional a Social Security Administration regulation giving survivor's benefits to widows with dependent children but not to widowers with dependent children. 420 U.S. at 653. Two other cases involving similar statutory schemes are Califano v. Webster, 430 U.S. 313, 317-18 (1977) (Social Security Administration regulation giving preferential treatment to female wage earners to make up for past wage discrimination upheld) and Califano v. Goldfarb, 430 U.S. 199, 216-17 (1977) (statute struck down that paid survival benefits to females regardless of dependency but withheld them from males without proof of spousal dependency). *See* L. TRIBE, *supra* note 12, § 16-26, at 1068-69, which states that the Court will uphold "carefully tailored remedial provisions cast in terms of gender . . . but only if they were in fact adopted for remedial reasons rather than out of romantic paternalism,' and if they are in fact substantially fitted to their remedial roles." *Id.* (footnote omitted).

in types of cases in which the traditional levels of scrutiny are not normally applied.[29] When applying the intermediate standard of review, the Court looks to the actual legislative purpose of the statute.[30] It has stated that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."[31] A typical application of intermediate scrutiny involves a close analysis of the actual legislative history to discover the real object of the statute,[32] a determination of the reasonableness of the objective,[33] and finally a judgment as to whether the means used to realize the objective bear a substantial relation to the accomplishment of that objective.[34]

Statutory Rape Law: An Overview

Statutory rape law is based on the doctrine of *parens patriae*.[35] Protecting the "virtue" of a young girl is the historical justification for such laws, which are designed to punish the male perpetrator and protect the female victim.[36] In contemporary cases, the justifications for-

29. *See* Stanton v. Stanton, 421 U.S. at 13.

30. *See* text & note 32 *infra*.

31. Califano v. Webster, 430 U.S. 313, 317 (1977) (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975)).

32. The Court scrutinized the actual legislative history in Caban v. Mohammed, 442 U.S. 380, 389-91 & n.8 (1979); Orr v. Orr, 440 U.S. 268, 279-80 (1979); Vorchheimer v. School Dist., 532 F.2d 880, 883-85 (1976), *aff'd per curiam*, 430 U.S. 703 (1977). *See* Rundlett v. Oliver, 607 F.2d 495 (1st Cir. 1979); Michael M. v. Superior Court, 25 Cal. 3d 608, 601 P.2d 572, 159 Cal. Rptr. 340 (1979), *aff'd*, 49 U.S.L.W. 4273 (March 23, 1981), for criticism of courts' application of the legislative history test. In both cases, the dissents noted that the respective majorities purported to scrutinize the legislative history of the laws but instead looked only at the wording of the old statutes and inferred that prevention of pregnancy and injury were the objectives. Rundlett v. Oliver, 607 F.2d at 505; Michael M. v. Superior Court, 25 Cal. 3d at 617-20, 601 P.2d at 579-80, 159 Cal. Rptr. at 346-47.

33. Craig v. Boren, 429 U.S. 190, 199-200 (1976).

34. *Id.* at 201-04; text & note 31 *supra*.

35. *Parens Patriae* is defined as the "role of the state as sovereign and guardian of persons under legal disability." BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). Cases dealing with gender-related statutes written from a paternalistic point of view include Rundlett v. Oliver, 607 F.2d 495 (1st Cir. 1979); Meloon v. Helgemoe, 564 F.2d 602 (1st Cir. 1977), *cert. denied*, 436 U.S. 950 (1978); and State v. Gray, 122 Ariz. 445, 595 P.2d 990 (1979). A good summation of the *parens patriae* doctrine as it applies to statutory rape legislation is found in the *Model Penal Code*: "Special treatment of consensual intercourse with a child is warranted not only because the immature require protection and to prevent the outrage to parental and community feelings, but also because an adult male's proclivity with children is a recognized symptom of mental aberration, called pedophilia. . . ." MODEL PENAL CODE § 207.4, Comment 10 (1955).

It is clear from the above that girls under the age of consent are considered unable to comprehend the responsibilities attending sexual intercourse and are especially vulnerable to physical injury because of their youth. The age of consent varies from jurisdiction to jurisdiction, *e.g.*, 18 U.S.C. § 1153 (1976) (age 15); ME. REV. STAT. ANN. tit. 17-A § 252(1)(A) (1976) (age 15); N.H. REV. STAT. ANN. § 632-A:2(XI) (Supp. 1979) (age 13); MODEL PENAL CODE § 207.4, Comment 10 (1955) (age 10).

36. Hall v. State, 365 So. 2d 1249, 1252-53 (Ala. Crim. App. 1978), *cert. denied*, 365 So. 2d 1253 (Ala. 1979). As the court stated in *Hall*:

> The design and breadth of our carnal knowledge statutes are to protect young girls of tender years from falling victims to the wiles, schemes, debasedness, and depravity of over-sexed men who use arts of flattery and other inducements to persuade them to sur-

warded usually include the prevention of pregnancy and physical harm to young females.[37] Support for the modern justifications can be drawn from statistical studies demonstrating that physical injury to pre-menarche[38] females caused by intercourse is more common than such injury to post-menarche females.[39] Similarly, when comparing pregnant teenagers with older pregnant women, the younger women evidence (1) a higher rate of illegitimate births, (2) a higher rate of termination of pregnancy by abortion, (3) a higher physical risk, and (4) a lower rate of high school graduation.[40] Thus, the government's interest in protecting young women from injury, when properly raised, is seen by most courts as legitimate.[41]

Despite the preceding evidence, statutory rape laws are not always upheld. In *Meloon v. Helgemoe*,[42] for instance, the state failed to support its linking of pregnancy and injury prevention with the stated statutory objective of preventing sexual abuse of children by males.[43] The statute at issue mandated that "penetration, however slight, is all that is necessary for the crime and that emission is not required."[44] The *Meloon* court noted that if only the slightest penetration and no emission was necessary to complete the crime, it was unlikely that preg-

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render their most precious possession to the gratifications of men who have lost their moral values.

Id. at 1253 (quoting Powell v. State, 53 Ala. App. 30, 34-35, 297 So. 2d 163, 167 (1974)). *See* People v. Verdegreen, 106 Cal. 211, 214, 39 P. 607, 608 (1895) (purpose of statutory rape law is protection of society by protecting the "virtue" of young and unsophisticated girls).

37. *E.g.*, Rundlett v. Oliver, 607 F.2d 495, 497 (1st Cir. 1979); Meloon v. Helgemoe, 564 F.2d 602, 607 (1st Cir. 1977); Michael M. v. Superior Court, 25 Cal. 3d 608, 611, 601 P.2d 572, 574-75, 159 Cal. Rptr. 340, 342-43 (1979), *aff'd*, 49 U.S.L.W. 4273 (March 23, 1981).

38. Menarche is the "initiation of menstruation." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1409 (1965).

39. Woodling, Evans & Bardbury, *Sexual Assault: Rape & Molestation*, 20 CLINICAL OBSTETRICS & GYNECOLOGY 509, 516 (1977). Because physical injury is more likely to occur in forcible situations than in statutory rape situations—which are often consensual—the use of such studies as support for the proposition that statutory rape often results in injury should be closely examined.

40. See text & note 95 *infra*.

41. *See, e.g.*, State v. Gray, 122 Ariz. 445, 595 P.2d 990 (1979); Brooks v. State, 24 Md. App. 334, 330 A.2d 670 (1975); Olson v. State, 95 Nev. 1, 588 P.2d 1018 (1979).

42. 564 F.2d 602 (1st Cir. 1977), *cert. denied*, 436 U.S. 950 (1978).

43. *Id.* at 605-08. In its analysis the court asked: "Why . . . does the difference in sex between persons who have sexual intercourse with persons under 15 'warrant the distinction' in penalties imposed by state law[?]" *Id.* at 606 (quoting Stanton v. Stanton, 421 U.S. 7, 14 (1975)). The government's four unsupported assertions were: 1) vulnerable females form a larger class than vulnerable males; 2) adult males are more likely to commit the offense than adult females because of recognized metal disorder known as pedophilia; 3) female children are more likely to suffer physical injuries than are male children; and 4) only female victims may become pregnant.

44. N.H. REV. STAT. ANN. § 632:2(I)(c) (1974) (repealed 1975). The Arizona law is similar to the New Hampshire law. ARIZ. REV. STAT. ANN. § 13-1401(3) (1978) states in pertinent part: " 'Sexual intercourse' means penetration into the penis, vulva, or anus by any part of the body . . . ." *See* State v. Kidwell, 27 Ariz. App. 466, 467, 556 P.2d 20, 21 (1976) (critical element of rape is sexual penetration; slightest penetration of vulva is sufficient to complete the offense). In United States v. Red Bear, 250 F. Supp. 633 (D.S.D. 1966), the court noted that Congress left it to the states to define rape and intended the state's terminology to be exclusive. *Id.* at 636. Thus, under the *Red Bear* analysis, Arizona's definition of rape should be applied to the federal statute.

nancy prevention had anything to do with the statutory objective.[45] The justification advanced by the prosecution, taken from the *Model Penal Code*, also gave no support for the pregnancy prevention rationale.[46] The *Model Penal Code* advises that statutory rape laws should protect only those females under the age of ten years.[47] Since the *Meloon* court found that ten-year-olds are usually physically incapable of pregnancy, it was obvious to the court that the *Model Penal Code* and hence, the New Hampshire statute, did not rely upon pregnancy prevention as its justification.[48]

Looking to the injury contention, the court noted that the state offered no evidence to show that the physical injury to young females resulting from rape is more common or dangerous than the psychic trauma usually associated with adult sexual contact with children of either sex.[49] Finding the statute overbroad, the court suggested that "[t]here is little in the scenario of an adolescent love tryst of a sixteen year old boy and a fourteen year old girl (a clear violation of the statute) which invokes the likelihood of physical danger."[50] Additionally, a statute that punishes "penetration, however slight," seems unconcerned with the objective of preventing physical injury.[51] The *Meloon* court concluded that it was "hard put" to find a "fair and substantial" connection between a statutory scheme that penalizes one gender while protecting the other and the stated objectives of pregnancy and injury prevention.[52]

Justice Mosk of the California Supreme Court, dissenting in *Michael M. v. Superior Court*,[53] also raised the logical infirmity inherent in a law that defines rape as "penetration no matter how slight, emission irrelevant," and uses prevention of pregnancy as a justification.[54] Justice Mosk argued that the prevention of pregnancy rationale is overbroad because a substantial portion of the class of females under

45. 564 F.2d at 607 n.6.

46. *Id.* at 607. The justification is set out in note 35 *supra*.

47. MODEL PENAL CODE § 207.4(d), Comment 10 (1955).

48. 564 F.2d at 607 n.6.

49. *Id.* at 608.

50. *Id.* There is also little danger of pregnancy if the couple uses contraceptives. The court noted that the statute did not even allow use of contraceptives as a defense, despite the fact that this would serve the same purpose as that of the statutory rape statute. *Id.* at 607 n.6. The fact that a teenage girl can legally consent to an abortion but cannot legally consent to the sexual act that gives rise to the need for the abortion is certainly paradoxical. *See generally* Carey v. Population Serv. Int'l, 431 U.S. 678 (1977).

51. 564 F.2d at 608.

52. *Id.* This holding is carefully limited to New Hampshire's statute and thus the result might be different for another state's statutory scheme. *Id.* at 609.

53. 25 Cal. 3d 608, 616, 601 P.2d 572, 577, 159 Cal. Rptr. 340, 345 (1979) (Mosk, J., dissenting), *aff'd*, 49 U.S.L.W. 4273 (March 23, 1981).

54. *Id.* at 620, 601 P.2d at 580, 159 Cal. Rptr. at 348 (Mosk, J., dissenting) (construing CAL. PENAL CODE § 261.5 (West Supp. 1980)).

eighteen years of age, having not yet reached menarche, are biologically unfit to become pregnant.[55] Justice Mosk also noted that sexual intercourse is by definition an act "in which *both* male and female must participate."[56] Yet the California statute at issue ignored the question of consent, providing only that it was illegal to have sexual intercourse with a female under the age of eighteen.[57] Thus, although both parties may be responsible for the act, only the male is punished.[58] Accordingly, Justice Mosk would have found California's statutory rape law "impermissibly underinclusive."[59]

Intermediate Scrutiny and Statutory Rape Laws

In a plurality opinion attacked by vigorous dissents, the United States Supreme Court, in its first review of a constitutional challenge to a statutory rape law, affirmed the California Supreme Court's decision in *Michael M. v. Superior Court*.[60] The lack of consensus in that opin-

55. *Id.* According to one study cited in Rundlett v. Oliver, 607 F.2d 495, 502 (1979), the most common age of menarche is thirteen years old. Goldfarb, *Puberty and Menarche*, 20 CLINICAL OBSTETRICS & GYNECOLOGY 625, 630 (1977).

56. 25 Cal. 3d at 621, 601 P.2d at 580, 159 Cal. Rptr. at 348 (Mosk, J., dissenting) (emphasis in original).

57. CAL. PENAL CODE § 261.5 (West Supp. 1980). Thus, in California females under the age of 18 are legally incapable of consent. Consensual incapacity is a common legislative pronouncement. *See* note 33 *supra*.

58. 25 Cal. 3d at 601, 601 P.2d at 580, 159 Cal. Rptr. at 348 (Mosk, J., dissenting). Justice Mosk stated: "Although it is true that biologically only females can become pregnant, no compelling justification has been offered for holding the male but not the female criminally responsible for the same act. The statute is therefore impermissibly underinclusive." *Id.* The court further stated that "[a]s it presently reads, the California statutory rape law thus reflects the belief that the minor female is in need of special protection not only against the male, but also against herself, against her 'voluntary' but presumptively important decisions in matters of sex." *Id.* at 624, 601 P.2d at 582, 159 Cal. Rptr. at 350.

59. *Id.* at 621, 601 P.2d at 580, 159 Cal. Rptr. at 348. "Where, as here, the state's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender-classifies and therefore carries with it the baggage of sexual stereotypes, the state cannot be permitted to classify on the basis of sex." *Id.* at 625, 601 P.2d at 583, 159 Cal. Rptr. at 351 (quoting Orr v. Orr, 440 U.S. 268, 283 (1979)). A number of statutes with gender classifications have been held to be impermissibly underinclusive. *E.g.*, Lamb v. Brown, 456 F.2d 18, 20 (10th Cir. 1972) (OKLA. ST. ANN. tit. 10, § 1101(a) (West Supp. 1980), statute giving females less than 18 years old juvenile status in court proceedings but setting the male status cut-off point at 16); Commonwealth v. MacKenzie, 368 Mass. 613, 616, 334 N.E.2d 613, 615 (1975) (MASS. GEN. LAWS ANN. ch. 273, § 11 (repealed 1977), statute giving misdemeanor status to unmarried males but not unmarried females who beget a child); Tatro v. State, 372 So. 2d 283, 285 (Miss. 1979) (MISS. CODE ANN. § 97-5-23 (Supp. 1980), statute making it a felony for a male, but not a female, to sexually fondle a child under the age of fourteen).

60. 49 U.S.L.W. 4273 (March 23, 1981). The Supreme Court decided *Michael M.* as this Casenote went to press. A plurality consisting of Justices Rehnquist, Stewart, Powell, and Chief Justice Burger was "reluctantly" joined by Justice Blackmun in affirming a California statutory rape law. *Id.* at 4277-79. The California statute provided for the prosecution of males, and only males, who had intercourse with females under the age of eighteen. CAL. PENAL CODE § 261.5 (West Supp. 1980). The plurality's opinion, written by Justice Rehnquist, held that California's statute was neither impermissibly under- or overinclusive and that the punishment of males only roughly equalized the risks involved to the parties. 49 at 4275. Males risked imprisonment and females risked pregnancy. *Id.*

Further, the plurality played down the legislative history requirement of the intermediate scrutiny test and found that the justification for the legislation offered by the state should be given

ion[61] did little to settle the division in the lower federal courts that had faced this challenge.[62] State courts, on the other hand, have generally rebuffed equal protection challenges to their rape laws,[63] although some did so before the advent of the intermediate scrutiny standard.[64] In addition, some later cases have applied the test in either an incorrect or a haphazard manner.[65] Sound applications of the intermediate standard are found in *Meloon v. Helgemoe*[66] and *Rundlett v. Oliver*.[67]

The *Meloon* case involved a New Hampshire statute that made it a crime for a male to engage in consensual sex with a female under the age of fifteen.[68] The First Circuit Court of Appeals applied the intermediate standard of review in three basic steps. First, the court applied the standard with "special sensitivity" because a criminal statute was

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"great deference." *Id.* at 4274. See text & notes 30-32 *supra*. Finally, Justice Rehnquist stated that the statute reasonably reflected the fact that women bear the brunt of sexual contact. Justice Blackmun, in his concurring opinion, noted that the case was an unfortunate one to prosecute but reluctantly concurred because the facts here seemed to fit the crime. *Id.* at 4279. It can be argued that the plurality's decision rests not on a reasoned belief that the statute meets constitutional muster, but rather on feelings of paternalism. See text & notes 35-36 *supra*.

In dissent, Justices Brennan, White, Marshall, and Stevens uniformly criticized California's law for both over- and underinclusiveness. 49 U.S.L.W. at 4279-83. They also noted that the statute's classification scheme was not proven by the state to be substantially related to its objective. *Id.* Disagreeing with the plurality's contention that a gender-neutral law is not required if a gender's discriminatory classification *reasonably* accomplishes the statute's objective, the dissenters noted that at least thirty-seven states have manageable and effective gender-neutral statutory rape laws. *Id.* at 4280. The dissent correctly applied the intermediate scrutiny standard while the plurality seemed to prove that hard cases make bad law.

61. See note 60 *supra*.

62. *E.g.*, Meloon v. Helgemoe, 564 F.2d 602, 603 (1st Cir. 1977), *cert. denied*, 436 U.S. 950 (1978) (striking down a New Hampshire statute); Rundlett v. Oliver, 607 F.2d 495, 503 (1st Cir. 1979) (Maine statute upheld); Hall v. McKenzie, 537 F.2d 1232, 1235 (4th Cir. 1976) (West Virginia statute upheld).

The *Rundlett* court was supplied with substantial evidence to support the state's contention of an injury prevention rationale. 607 F.2d at 501-02. Still, *Rundlett* was split by a sharp dissent. *Id.* at 504 (Bownes, J., dissenting). In United States v. Hicks, 625 F.2d 216 (9th Cir. 1980), the Ninth Circuit overturned the statute because the government had not shown how the sex classification substantially furthered the purported legislative objectives of pregnancy and injury prevention. *Id.* at 220-21.

63. *E.g.*, Hall v. State, 365 So. 2d 1249, 1253 (Ala. Crim. App. 1978), *cert. denied*, 365 So. 2d 1253 (Ala. 1979); State v. Gray, 122 Ariz. 445, 447, 595 P.2d 990, 992 (1979); Michael M. v. Superior Court, 25 Cal. 3d 608, 614, 601 P.2d 572, 576, 159 Cal. Rptr. 340, 344 (1979), *aff'd*, 49 U.S.L.W. 4273 (March 23, 1981); State v. Rundlett, 391 A.2d 815, 822 (Me. 1978); Olson v. State, 95 Nev. 1, 2, 588 P.2d 1018, 1019 (1979).

64. *E.g.*, *In re* W.E.P., 318 A.2d 286, 289-90 (D.C. App. 1974); Finley v. State, 527 S.W.2d 553, 556-57 (Tex. Crim. App. 1975); State v. Ewald, 63 Wis. 2d 165, 172-74, 216 N.W.2d 213, 217-18 (1974).

65. *E.g.*, State v. Gray, 122 Ariz. 445, 447, 595 P.2d 990, 992 (1979). In *Gray*, there is no evidence that the court scrutinized the actual legislative history. The court concluded that prevention of pregnancy and injury met the intermediate scrutiny test, apparently with no showing of evidence. *Id.* In Hall v. State, 365 So.2d 1249, 1253 (Ala. Crim. App. 1978), *cert. denied*, 365 So. 2d 1253 (Ala. 1979), the Alabama court failed to scrutinize legislative history and did not attempt to find a substantial relation between the sexual classification and the achievement of the objective. *Id.*

66. 564 F.2d 602 (1st Cir. 1977), *cert. denied*, 436 U.S. 950 (1978).

67. 607 F.2d 495 (1st Cir. 1979).

68. N.H. REV. STAT. ANN. § 632:2(I)(c) (1974) (repealed 1975) provided in part: "A male who has sexual intercourse with a female not his wife is guilty of a Class A felony if . . . the female is . . . less than 15 years old."

involved.[69] Second, the court asked whether the difference in gender between people who have sexual intercourse with persons under the age of fifteen warrants a distinction in legal sanctions.[70] The state alleged that the purpose of the statute was to prevent sexual exploitation of children through sexual intercourse, but offered no evidence to support its contention that the prosecution of males only would substantially further the state goal; moreover, the state offered no evidence to explain why females under fifteen years of age needed special protection against males only, or any evidence that males under fifteen years of age did not require such protection.[71] Third, to meet the intermediate test, the court held that the state must show that concentrating enforcement on the class with more potential offenders—males—would achieve a greater measure of protection for children than would a gender-neutral law.[72] This was not shown, and the statute was ultimately struck down.[73]

In *Rundlett v. Oliver*,[74] a later First Circuit case also dealing with statutory rape, the State of Maine offered evidence to support its claim that young females—unlike young males—were often physically injured in statutory rape situations.[75] The age of consent in the Maine statute was fourteen years—one year less than the age in the law overturned in *Meloon*.[76] The age of menarche is generally near fourteen,[77] and injuries resulting from intercourse occur almost exclusively to premenarchal females, as opposed to post-menarchal females.[78] Thus, Maine's statute was not overbroad in the sense that it did not aim to protect young girls who in all probability could not be injured by such activity.[79] The New Hampshire statute at issue in *Meloon* made fifteen the age of consent.[80] It was declared overbroad in part because most females have reached menarche by that age and are no longer as susceptible to injury during consensual intercourse.[81]

In *United States v. Hicks*, the government indicted two defendants

69. 564 F.2d at 604. A criminal sanction typically involves imprisonment. Such a drastic measure requires special sensitivity. The *Hicks* court also interpreted the intermediate standard as applying stringently when criminal liability is possible. 625 F.2d at 220.

70. 564 F.2d at 606.

71. *Id.* at 606, 608.

72. *Id.* at 606.

73. *Id.* at 606-09.

74. 607 F.2d 495 (1st Cir. 1979).

75. *Id.* at 500.

76. ME. REV. STAT. ANN. tit. 17, § 3151 (1963) (repealed 1975) stated in pertinent part: "Whoever . . . unlawfully and carnally knows and abuses a female child who has not attained her 14th birthday" is subject to punishment by imprisonment.

77. *See* note 55 *supra*.

78. 607 F.2d at 502.

79. *Id.* at 502-03.

80. N.H. REV. STAT. ANN. § 632:2(I)(c)(1974)(repealed 1975). See text & note 67 *supra*.

81. *See* 564 F.2d at 608.

on one and two counts, respectively, of carnal knowledge of a female Indian under sixteen years of age.[82] The court noted that "[h]ad Hicks and Davis been female, they would not have been charged. . . ."[83] The government argued in the district court that two purposes were served by the statutory rape laws at issue: the prevention of unwanted pregnancy and the prevention of physical injury to young females.[84] The government introduced no evidence to support its arguments, however, and the trial court dismissed the indictment.[85]

On appeal, the government first contended that the defendants were required to show that the statute failed to meet the intermediate tier standard.[86] The court noted, however, that an earlier Ninth Circuit case, *Berkelman v. San Francisco Unified School District*,[87] held that the government must produce evidence and prove a "constitutionally-sufficient justification" for the statutory gender classification.[88] In light of *Berkelman* and two subsequent United States Supreme Court cases, the government's argument that the defendants were required to prove that the statutes were unconstitutional was erroneous.[89] Clearly, the government had the burden of proving the constitutionality of the statutes.[90]

In attempting to meet its burden, the government argued that the goals of preventing teenage pregnancy and injury were related to the statutory penalties because "only women can get pregnant" and there " 'seems to be evidence that women are far more likely to suffer physical damage' than are males of the same age."[91] The court held that those bare assertions were insufficient to meet the intermediate standard and that the two federal statutes were unconstitutional.[92] In its analysis, the court indicated that the intermediate-tier standard requires the government to produce actual evidence supporting a substantial relationship between the asserted objectives of preventing pregnancy and injury and the sex-based classification.[93] According to

82. 625 F.2d at 217.
83. *Id.*
84. *Id.* at 218-20.
85. *Id.* at 218.
86. *Id.*
87. 501 F.2d 1264 (9th Cir. 1974).
88. 625 F.2d at 219.
89. *Id.* at 218. The court's analysis in *Berkelman* was substantiated in two later United States Supreme Court cases: Caban v. Mohammed, 441 U.S. 380 (1979), and Craig v. Boren, 429 U.S. 190 (1976).
90. 625 F.2d at 218-19.
91. *Id.* at 220.
92. *Id.* at 221. The court held that all of 18 U.S.C. § 2032 (1976), and that part of *id.* § 1153 pertaining to carnal knowledge of a female under the age of 16, were violative of the fifth amendment. *Id.*
93. 625 F.2d at 220. See text & note 4 *supra*.

Michael M. v. Superior Court,[94] such evidence might include statistics showing that most teenage pregnancies are unwanted, dangerous, or of high social cost.[95] The court believed that such evidence, when buttressed with proof of the greater likelihood of physical trauma to premenarchal females, would make a good case for the requisite "important" governmental interest needed to justify the gender-based classification.[96] The *Hicks* court implied that a strong governmental case could be made by proving that men do or should bear more of the responsibility for causing sexual contact, that punishment of males is more likely to deter teenage pregnancies than punishment of females or of both, and that females are always the victims of the sexual contact or are more likely to suffer physical injury than males.[97]

In *Hicks*, the government offered no evidence to support its assertions that the statutes would prevent pregnancy and injury.[98] In any event, the government's prevention of pregnancy argument is dubious in light of the statutory language indicating that emission is irrelevant.[99]

The *Hicks* court noted that "[t]he absence of such evidence is particularly disturbing because the statute punishes males of any age, even in cases where the male is younger than the female."[100] Additionally, the court refused to accept the implication that "males of all ages are larger, stronger, more sexually aggressive, and less likely to suffer phys-

94. 25 Cal. 3d 608, 601 P.2d 572, 159 Cal. Rptr. 340 (1979), *aff'd*, 49 U.S.L.W. 4273 (March 23, 1981).

95. *Id.* at 611-12, 601 P.2d at 574-75, 159 Cal. Rptr. at 342-43. Evidence from California showed that between 1971 and 1976, 37.5% of teenage pregnancies were illegitimate compared to an overall illegitimacy rate of 15%; that in 1976, 48% of the pregnant teenagers terminated their pregnancies by induced abortion, accounting for 34.7% of all legal abortions; that teenage pregnancies are more dangerous to the mother than pregnancies of older women; and that 80% of women who became mothers at age 17 or younger never graduate from high school—twice the percentage of those women who wait until age 20 or older to have a child. *Id.*

96. *Id.* at 612, 601 P.2d at 575, 159 Cal. Rptr. at 343. As noted in Craig v. Boren, 429 U.S. 190 (1976), caution should be exercised when relying on statistical evidence. In *Craig*, the United States Supreme Court warned that "[i]t is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique," and "proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." *Id.* at 204. In *Craig*, statistics were used in an attempt to prove a "close fit" between the objective and the gender-based classification. *Cf.* Michael M. v. Superior Court, 25 Cal. 3d at 611-12, 601 P.2d at 574-75, 159 Cal. Rptr. at 342-43, where the prosecution used statistics showing the high social costs of teenage pregnancy to establish that the government's interest was important.

The use of statistics to prove an "important governmental interest" seems preferable to their use to prove a "substantial" connection between the interest and the gender-based classification because, according to *Craig v. Boren*, proof of a substantial relation should rest on more than the "dubious business" of the use of statistics, although the best possible proof of the importance of a governmental interest is often statistical. 429 U.S. at 204.

97. 625 F.2d at 220.

98. *Id.*

99. *See* text & notes 44, 55 *supra*.

100. 625 F.2d at 220.

ical injury from sexual contact than females."[101]

Conclusion

The use of the intermediate standard of scrutiny for equal protection challenges to gender-based legislative classifications is well settled. The *Hicks* court properly applied this level of scrutiny to invalidate 18 U.S.C. sections 1153 and 2032. The court found that the government failed to show a substantial relationship between the prevention of pregnancy and physical injury to females under sixteen years of age and the use of overt sex discrimination to meet those goals. The *Hicks* decision demonstrates that statutory rape legislation is subject to attack when the statute punishes only one person for an act that is by definition cooperative, uses pregnancy prevention as a justification while stating that emission is irrelevant, and intimates that males are always the sexual malefactors. For a statutory rape statute to survive intermediate-tier scrutiny, the government must show that the actual purpose of the statute is important and that the classification itself is substantially related to the achievement of that objective.

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101. *Id.* at 220. The court noted that the statutes are "a legislative judgment that young females are victims in any case of sexual contact, no matter what the age of the male partner." *Id.* n.7. The court refused to uphold that judgment.

III. CONTRACTS

A. REMEDIES IN ARIZONA FOR BREACH OF A CONSTRUCTION CONTRACT

In *American Continental Life Insurance Co. v. Ranier Construction Co.*,[1] the Arizona Supreme Court was asked to decide whether a construction contract should be strictly enforced.[2] The court held that the contract should be strictly enforced and that the owner-applicant did not waive the requirement calling for a "final certificate for payment" as a condition precedent to a final payment.[3] Since the contractor-appellee did not procure the certificate, it was not permitted to recover the final payment due under the contract.[4]

This casenote will first examine the decision in *American*. Specific attention will then be given to the contract theories of waiver, substantial performance, and anticipatory repudiation as they relate to the *American* case. Finally, this casenote will discuss the effect of *American* on Arizona contract law.

The Decision in American

In *American*, defendant American Continental Life Insurance Co. contracted with plaintiff Ranier Construction Co. for the construction of a building.[5] American Continental was required to make progress payments each month upon the issuance of a certificate for payment by the architect of the building.[6] American Continental made each progress payment but refused to make the final payment.[7] In addition, American Continental refused to approve the "punch list"[8]—a list of

1. 125 Ariz. 53, 607 P.2d 372 (1980).
2. *Id.* at 54-55, 607 P.2d at 373-74.
3. *Id.* at 55-56, 607 P.2d at 374-75.
4. *Id.* at 56, 607 P.2d at 375.
5. *Id.* at 54, 607 P.2d at 373.
6. *Id.* American Continental employed an architectural firm to prepare plans for the building and to supervise its construction. *Id.* at 57, 607 P.2d at 376 (Struckmeyer, C.J., dissenting). By the terms of the contract, the architect was the owner's agent. *Id.* Monthly progress payments were to represent 90% of the work done in that month. *Id.* at 54, 607 P.2d at 373.
7. *Id.* at 54, 607 P.2d at 373. The final payment consisted of the accumulated 10% retained each month and the amount due for work completed after the date of the last progress payment. *Id.*
8. *See* J. SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS § 23.05, at 433 (2d ed. 1977).

items to be corrected or completed before final payment—embodied in the architect's certificate of substantial completion.[9] American Continental refused to make the final contract payment on the grounds that Ranier had failed to construct the building in a workmanlike manner[10] and that Ranier did not meet the construction timetable in the contract.[11] Ranier instituted suit to recover funds retained under the contract, damages for delays, and lost profits.[12] American Continental counterclaimed on the grounds of breach of contract and negligence for faulty construction and delays.[13] At the trial, American Continental alleged that there was no basis for recovery because Ranier had failed to meet a condition precedent to the right to final payment.[14] It argued that Ranier had failed to procure a final certificiate for payment from the architect as required in the contract.[15] After a trial in which the jury viewed the building,[16] a verdict of $130,000 was returned in favor of Ranier, and a verdict of $10,000 was awarded to American Continental on its counterclaim.[17] The Court did not award attorney's fees.[18]

Both sides appealed. American Continental appealed the award to Ranier and Ranier appealed the trial court's refusal to award attorney's fees.[19] The Arizona Supreme Court reversed and remanded the case to the trial court.[20]

The Arizona Supreme Court treated the waiver issue as the paramount question in the case.[21] The court reasoned that no matter how lax the appellant and the appellee might have been in regard to the other clauses,[22] the parties did not waive any of the payment or re-

9. 125 Ariz. at 58, 607 P.2d at 377 (Struckmeyer, C.J., dissenting). American Continental made its own "punch list" of items that it would require to be completed before the building would be acceptable. *Id.*

10. *Id.* at 54, 607 P.2d at 373.

11. *Id.* at 57, 607 P.2d at 376 (Struckmeyer, C.J., dissenting). Every delay complained of by American Continental was established at trial as resulting from a change order issued by the architect. *Id.*

12. *Id.* at 54, 607 P.2d at 373.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 57, 607 P.2d at 376 (Struckmeyer, C.J., dissenting).

17. *Id.* at 54, 607 P.2d at 373.

18. *Id.* Ranier asked for attorney's fees under a provision of the contract that provided that if suit was brought on the contract the prevailing party was entitled to attorney's fees. *Id.* at 57, 607 P.2d at 376. The trial judge refused to award attorney's fees, apparently on the theory that neither side prevailed since the jury returned a verdict for each side. *Id.*

19. *Id.* at 54, 607 P.2d at 373.

20. *Id.* at 57, 607 P.2d at 376.

21. *Id.* at 55-56, 607 P.2d at 374-75.

22. *Id.* at 55, 607 P.2d at 374. Evidence showed that both parties had deviated from the formal requirements of the contract. *Id.* For example, the contract apparently required that change orders be in writing and signed by the appellant. *See id.* Despite this language, oral change orders were issued and followed and informal time extensions were granted. *Id.* These

quired performance clauses in the contract.[23] Moreover, the supreme court interpreted waiver much more narrowly than did the lower court.[24]

The court found that the certificate of final payment was a substantial, bargained-for right in the contract and not just "procedural chaff" to be waived with other minor procedural rights and guarantees.[25] It was the court's strong belief in the sanctity of the certificate of final payment, more than anything else, that compelled its finding that the condition precedent had not been waived.[26]

Chief Justice Struckmeyer wrote a strong dissent.[27] He implied that American Continental's acts constituted a waiver of the final certificate requirement.[28] He also found fault with the majority for not deciding the case on the grounds of substantial completion or anticipatory breach of contract.[29]

Contract Theories

The *American* court faced arguments involving three theories: waiver,[30] substantial performance,[31] and anticipatory repudiation.[32] The adoption of either of the latter two theories probably would have necessitated a ruling for Ranier.[33] Instead, the majority brushed aside the substantial performance and anticipatory repudiation arguments[34] and decided the case on waiver grounds.[35] The following sections will

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and other deviations prompted the trial court to submit to the jury the issue of waiver of strict compliance on the contract. *Id.*

23. *Id.* at 55-56, 607 P.2d at 374-75.

24. *Id.* The decision of the trial court shows a willingness to find an implied waiver. *Id.* at 55, 607 P.2d at 374. The Arizona Supreme Court refused to accept the trial court's findings. *Id.* The supreme court indicated an unwillingness to accept anything but an express waiver in this case. *See id.*

25. *Id.* at 56, 607 P.2d at 375.

26. *See id.* The supreme court decided the waiver question very narrowly, implying that waiver of peripheral conditions should not also imply a waiver of more important conditions, such as the final certificate. *Id.* at 55-56, 607 P.2d 374-75.

27. *Id.* at 57-60, 607 P.2d at 376-79 (Struckmeyer, C.J., dissenting).

28. *See id.* at 58, 607 P.2d at 377 (Struckmeyer, C.J., dissenting). Chief Justice Struckmeyer looked at the overall contract dealings to find evidence of an implied waiver. *Id.* at 57-58, 607 P.2d at 376-77.

29. *Id.* at 58-60, 607 P.2d at 377-79 (Struckmeyer, C.J., dissenting). Struckmeyer used an equity overview to note the availability of the doctrines of substantial performance and anticipatory repudiation and the desirability of applying them to the present case. *See id.*

30. *Id.* at 59, 607 P.2d at 378.

31. *Id.* at 56 & n.6, 607 P.2d at 375 & n.6.

32. *Id.*

33. Under either the theory of substantial performance or that of anticipatory repudiation, Ranier would have been awarded the contract price less an offset for the uncompleted work. *See* J. MURRAY, MURRAY ON CONTRACTS § 222, at 443-46 (2d ed. 1974). *See generally* cases cited at notes 64, 78 *infra*.

34. 125 Ariz. at 56 n.6, 607 P.2d at 375 n.6. The majority stated that it believed substantial performance and anticipatory repudiation were inapplicable in the present case. *Id.*

35. *Id.* at 55-56, 607 P.2d at 374-75.

analyze the Arizona Supreme Court's treatment of the above-mentioned theories.

Waiver

Waiver has been defined as "the voluntary and intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right."[36] In *American*, the majority found no intentional relinquishment of a right to payment.[37] Once the court held that American Continental did not expressly waive the necessity of a final certificate of payment, it turned to the question of whether American Continental's conduct warranted a finding of waiver.[38] In answering the question in the negative, the court found no indication that American Continental would have accepted anything less than specific performance in regard to the final certificate for payment.[39] Although the court noted other contractual provisions that had been waived by the parties,[40] it refused to characterize this conduct as waiving the requirement of the final certificate of payment.[41]

The *American* court viewed the issue of waiver very narrowly. The court ruled that the waiver of a substantial requirement, such as a payment requirement, should not be inferred from the waiver of the more peripheral conditions in the contract.[42] The court concluded that since there was no evidence before the trial court of the waiver of any payment conditions, the question should not have been submitted to the jury.[43]

Although the decision of the *American* court is well reasoned, the majority overlooked evidence of deviation in the payment requirement that was presented in the dispute over the certificate of substantial completion.[44] The certificate of substantial completion was the precursor to the certificate of final payment.[45] The certificate of substantial completion defined final work to be done[46] and set the date for final pay-

36. City of Tucson v. Koerber, 82 Ariz. 347, 356, 313 P.2d 411, 418 (1957). *See* Delta Construction, Inc. v. Dressler, 64 Ill. App. 3d 867, 874-75, 381 N.E.2d 1023, 1029 (1978); Steffek v. Wichers, 211 Kan. 342, 351-52, 507 P.2d 274, 280-81 (1973). The definition of waiver in *American* is almost identical to the language quoted from *Koerber*. 125 Ariz. at 55, 607 P.2d at 374.

37. 125 Ariz. at 55-56, 607 P.2d at 374-75.

38. *Id.* at 56, 607 P.2d at 375.

39. *Id.*

40. *See* note 22 *supra*.

41. 125 Ariz. at 56, 607 P.2d at 375.

42. *Id.* at 55-56, 607 P.2d at 374-75. The peripheral requirements in this case are discussed at note 22 *supra*.

43. 125 Ariz. at 56-57, 607 P.2d at 375-76.

44. *Id.* at 58, 607 P.2d at 377 (Struckmeyer, C.J., dissenting).

45. *Id.*

46. *Id.*

ment.[47] American Continental's conduct in refusing to honor the certificate of substantial completion and in deviating from the certificate's requirements could be seen as direct evidence of waiver of payment requirements.[48] Since there was such direct evidence of deviation from terms dealing with payment requirements, it is clear that the issue of the waiver of payment terms was properly before the jury.[49] Therefore, the jury decision should not have been overturned by the Supreme Court.

The conclusion of the *American* majority that American Continental's conduct in regard to payment terms, when taken alone, was insufficient to find a waiver is an arguable proposition. But even without the preceeding analysis, when American Continental's conduct regarding payment terms is coupled with its overall conduct,[50] the position of the *American* majority is even less defensible.

Throughout the term of the contract the parties paid only limited attention to its language and violated the express language on numerous occasions.[51] Thus, the court had evidence of conduct, some of it directly related to the issue in contention,[52] from which it could have found a waiver of the certificate of final payment.

In addition to the waiver analysis, there is also a doctrine of implied waiver that is peculiar to construction law. This doctrine applies to situations where the owner takes possession of a completed or substantially completed building.[53] The theory places special emphasis on the case where the building is constructed on the land of the con-

47. Contract between American Continental Life Insurance Co. and Ranier Construction Co., art. 9.7.1 (March 29, 1972).

48. 125 Ariz. at 58, 607 P.2d at 377 (Struckmeyer, C.J., dissenting). The certificate of substantial completion called for a "final punch list" to be issued by the architect containing a list of things required of the appellee before the building would be considered complete. *Id.* An impasse developed between the parties when American Continental refused to accept the architect's punch list and made his own punch list. *Id. See* text & notes 70-72 *infra*. American Continental's refusal to accept the architect's punch list and its refusal to sign the certificate of substantial completion constituted a deviation from the contract requirements and could be inferred as a waiver of a payment term.

49. 125 Ariz. at 58, 607 P.2d at 377 (Struckmeyer, C.J., dissenting).

50. *Id.* at 55, 607 P.2d at 374; *id.* at 58, 607 P.2d at 377 (Struckmeyer, C.J., dissenting); *see* text & notes 22, 48 *supra*.

51. 125 Ariz. at 57-58, 607 P.2d at 376-77. (Struckmeyer, C.J., dissenting). For instance, the contract provided for the architect to be the owner's representative until final payment. The contract also stated that all of the owner's instructions to the contractor were to be issued through the architect. *Id.* American Continental breached this contract clause by hiring a special supervisor as its personal representative on the job site. *Id.* Ranier also claimed that this special supervisor further breached the contract by issuing orders to workers and subcontractors. *Id.* at 58, 607 P.2d at 377 (Struckmeyer, C.J., dissenting).

52. *See* text & notes 44-51 *supra*.

53. Creith Lumber Co. v. Cummins, 163 Ohio St. 264, 267-68, 126 N.E.2d 323, 325 (1955). *See also* K. CUSHMAN, CONSTRUCTION CONTRACTS 1978; SUBSTANTIAL AND FINAL COMPLETION 279-88 (1978).

tractee/owner.[54]

Before Ranier initiated the suit, American Continental had moved into the building and was using it for its original purpose.[55] Nevertheless, the majority in the *American* court never addressed this issue. Since American Continental took possession of a building that was substantially complete, its action should be deemed a waiver of the condition precedent, and Ranier should receive the contract price minus any deductions for deficiencies.[56] Because of the special nature of a building contract involving construction on the land of the owner, once the contractee takes possession, some courts hold that it waives its objections and is liable for the fair market value of the building.[57]

This peculiar doctrine of construction law was apparently overlooked by the attorney for the appellee. Although the dissent pointed out the appellant's occupancy,[58] nothing further can be adduced. It appears that the appellee's attorney missed an important facet in the present case that, if noted, would have obviated the necessity of employing a waiver analysis.[59]

Substantial Performance

When a contract is substantially performed by one party, and the other party retains the benefits of the substantial performance, courts have held that there may be a recovery by the party giving substantial performance.[60] Because it is nearly impossible for a contractor to com-

54. *See* Steffek v. Wichers, 211 Kan. 342, 351-52, 507 P.2d 274, 280-81 (1973); Creith Lumber Co. v. Cummins, 163 Ohio St. 264, 267-68, 126 N.E. 2d 323, 325 (1955).

55. 125 Ariz. at 58, 607 P.2d at 377 (Struckmeyer, C.J., dissenting).

56. *See* Creith Lumber Co. v. Cummins, 163 Ohio St. 264, 267, 126 N.E.2d 323, 325 (1955). The *Creith* court stated:

> [W]here the owner of a building built for him under contract substantially performed accepts and takes possession of it, knowing or having reason to know that the construction is defective or incomplete, such acceptance will be deemed a waiver of such a condition precedent and the contractor will be entitled to recover the amount due under the contract less deductions for deficiencies.

Id. See also Kizziar v. Dollar, 268 F.2d 914, 916 (10th Cir. 1959); Martin v. Karsh, 142 Cal. 2d 468, 470, 298 P.2d 635, 636-37 (1956).

57. *E.g.*, Creith Lumber Co. v. Cummins, 163 Ohio St. 264, 267-68, 126 N.E.2d 323, 325 (1955). According to the *Creith* court:

> For obvious reasons the doctrine of waiver has especial significance and application in a building contract case where the building is constructed upon the premises of the contractee owner. The work on the building, under such circumstances, is such that, even if rejected, the owner necessarily receives the benefit of the contractor's materials supplied and of the services performed, which situation differs from a case where a chattel is constructed, since the chattel may be rejected or returned to the contractor or furnisher. Since, in the case of a building contract, the owner must receive the benefits of construction, in justice he must pay for what he receives, if he takes possession.

Id. at 268, 126 N.E.2d at 325. *See* Kizziar v. Dollar, 268 F.2d 914, 916 (10th Cir. 1959); Martin v. Karsh, 142 Cal. 2d 468, 470, 298 P.2d 635, 636-37 (1956).

58. 125 Ariz. at 58, 607 P.2d at 377 (Struckmeyer, C.J., dissenting).

59. In fairness to the Arizona Supreme Court, it should be recognized that the special construction doctrine was not raised by either party. Thus, the doctrine was not before the court.

60. *E.g.*, Delta Construction, Inc. v. Dressler, 64 Ill. App. 3d 867, 871-73, 381 N.E.2d 1023,

ply literally with all the minute specifications in a building contract, the doctrine of substantial performance is uniquely suited to the handling of disputed construction contracts.[61]

The jury may have found the building at issue in *American* to be ninety-eight percent complete,[62] and the Arizona Supreme Court did not consider that part of the jury verdict.[63] By this analysis, appellee's performance was well within the limits of substantial performance in Arizona.[64] Nevertheless, the *American* majority believed the doctrine of substantial performance was not applicable in this case.[65]

Anticipatory Repudiation

Anticipatory repudiation "occurs when one of the parties to a bilateral contract either expressly or impliedly repudiates the contract prior to the time for performance."[66] Anticipatory repudiation results when one party expresses a clear intention that it will not perform except on the satisfaction of a condition that is not authorized by the contract.[67] The evidence necessary to find an anticipatory breach of contract includes a positive and unequivocal manifestation that required performance will not be forthcoming when it is due.[68] As the

1027 (1978); Steffek v. Wichers, 211 Kan. 342, 351, 507 P.2d 274, 280 (1973); Creith Lumber Co. v. Cummins, 163 Ohio St. 264, 267-69, 126 N.E.2d 323, 325 (1955).

61. 125 Ariz. at 59, 607 P.2d at 378 (Struckmeyer, C.J., dissenting).

62. *See id.* at 54, 607 P.2d at 373. Although the *American* majority did not characterize the contract as substantially performed, the $10,000 awarded to appellee represented less than 2% of the contract price of $517,286.30. *Id.* If the $10,000 was awarded for unfinished or unsatisfactory work, then the jury considered the building to be 98% complete. Additionally, the fact that appellant moved into the building and was using it for its original purposes, *id.* at 58, 607 P.2d at 377 (Struckmeyer, C.J., dissenting), is support for the proposition that the contract was substantially performed.

63. *Id.* at 54 n.1, 607 P.2d at 373 n.1.

64. *See* Cracchiolo v. Carlucci, 62 Ariz. 284, 292, 157 P.2d 352, 355-56, (1945), where a construction contract was found to be approximately 92% complete and payment to the contractor was upheld on the theory of substantial performance. *Id.* The court stated: "Where a contract is partly performed by one party and the other has derived a substantial benefit therefrom, the latter cannot refuse to comply with its terms simply because the former fails to complete performance." *Id.* at 292, 157 P.2d at 355.

65. 125 Ariz. at 56 n.6, 607 P.2d at 375 n.6. The court pointed out: "To allow the doctrine of substantial performance to operate here would fly in the face of the original intent of the parties and would nullify the contract." *Id.*

66. Lovric v. Dunatov, 18 Wash. App. 274, 282, 567 P.2d 678, 682 (1977).

67. National Farmers Organization v. Bartlett & Co. Grain, 560 F.2d 1350, 1357 (8th Cir. 1977); Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co., 508 F.2d 283, 290 (7th Cir. 1974); Created Gemstones, Inc. v. Union Carbide Corp., 47 N.Y.2d 250, 255 n.5, 391 N.E.2d 987, 990 n.5 (1979).

68. Kammert Bros. Enterprises, Inc. v. Tanque Verde Plaza Co., 102 Ariz. 301, 306-07, 428 P.2d 678, 683-84 (1967). *See* U.C.C. § 2-610. ARIZ. REV. STAT. ANN. § 44-2373 (1967) can be analogized to the present case. Anticipatory repudiation is there defined:

> When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may:
> (1) For a commercially reasonable time await performance by the repudiating party; or
> (2) Resort to any remedy for breach (§ 44-2382 or § 44-2390), even though he has noti-

dissent in *American* argued, the doctrine of anticipatory repudiation was applicable in the *American* case.[69]

A dispute arose between the parties over the architect's "punch list"[70] and the certificate of substantial completion.[71] American Continental stated that it would not sign the certificate of substantial completion and also that it would not make the final payment as required under the contract.[72] Evidence showed that Ranier had complied with the architect's punch list.[73] Nevertheless, American Continental refused to accept Ranier's work as complying with the contract,[74] and instead made its own "punch list" of things it would require to be done.[75]

Ranier treated American Continental's "punch list" conduct and refusal to sign the certificate of substantial completion as an anticipatory repudiation.[76] Ranier's anticipatory repudiation argument is strengthened by the proposition that language that is not alone a repudiation may become a repudiation when accompanied by some nonperformance by the obligor.[77] Two acts of American Continental, when added to its statements about the certificate of substantial completion and final payment, could easily be found to constitute anticipatory repudiation: (1) its refusal to sign its architect's certificate of substantial completion; and (2) its refusal to perform its contractual duties until Ranier complied with American Continental's punch list.[78]

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fied the repudiating party that he would await the latter's performance and has urged retraction; and

(3) In either case suspend his own performance or proceed in accordance with the provisions of this article on the seller's right to identify the goods to the contract notwithstanding breach or to salvage unfinished goods (§ 44-2383).

Id.

69. 125 Ariz. at 58, 607 P.2d at 377 (Struckmeyer, C.J., dissenting). Chief Justice Struckmeyer argued that Ranier correctly treated American Continental's conduct, including its refusal to make the final payment, as an anticipatory breach. *Id.*

70. *Id.*; *see* text & note 8 *supra*.

71. 125 Ariz. at 58, 607 P.2d at 377 (Struckmeyer, C.J., dissenting).

72. *Id.* Appellant's statements are sufficient to bring it within "a performance not yet due the loss of which will substantially impair the value of the contract to the other. . . ." ARIZ. REV. STAT. ANN. § 44-2373 (1967).

73. 125 Ariz. at 58, 607 P.2d at 377 (Struckmeyer, C.J., dissenting).

74. *Id.*; *see* text & note 48 *supra*.

75. 125 Ariz. at 58, 607 P.2d at 377 (Struckmeyer, C.J., dissenting).

76. *Id.*

77. RESTATEMENT (SECOND) OF CONTRACTS § 274, Comment b (Tent. Draft No. 8, 1973).

78. 125 Ariz. at 58, 607 P.2d at 377 (Struckmeyer, C.J., dissenting). The majority stated that even if Ranier's assumption that American Continental would refuse to make the final payment when due was correct, Ranier was not relieved of its contractually imposed duty of acquiring the final certificate for payment. *Id.* at 56, 607 P.2d at 375. Contrary to the majority's contention, it is now generally recognized that the promisee may treat the repudiation as an excuse of conditions precedent to the promisor's duty, without thereby losing the right to sue for breach of contract when the time for performance arrives. *E.g*, Craddock v. Greenhut Constr. Co., 423 F.2d 111, 114-15 (5th Cir. 1970); Giarratano v. McIlwain, 215 A.D. 644, 646-47, 214 N.Y.S. 582, 584-86 (1926); Weinglass v. Gibson, 304 Pa. 203, 206, 155 A. 439, 440 (1931). This general proposition reflects a concern with minimizing waste whenever possible. Rockingham County v. Luten Bridge Co., 35 F.2d 301, 307-08 (4th Cir. 1929); Wigent v. Marrs, 130 Mich. 609, 611, 90 N.W.423, 423

It is clear that the repudiation by American Continental occurred before Ranier's duty to procure the certificate of final payment arose.[79] Therefore, application of the doctrine of anticipatory repudiation would be more in line with the facts as found by the trial court[80] than would a waiver analysis.

Conclusion

The value of *American* as precedent in future cases is questionable in light of the court's reasoning and treatment of the facts. The Arizona Supreme Court should not have reversed the trial court because: (1) the court could have found an implied waiver of the condition precedent; and (2) the doctrines of substantial performance and anticipatory repudiation are better suited to the present case and should have been applied. The ultimate concern with the *American* decision is that it will allow contractee owners to accept the fruits of a contractor's labor without paying for them. If the contractor neglects to follow contract payment procedures to the letter, the contractor may be unable to enforce the contract in the courts.

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(1902); Richards v. Manitowoc & N. Traction Co., 140 Wis. 85, 88, 121 N.W. 937, 938 (1909). When this rule is applied to the present case the result is both equitable and practical. Rainer is not forced to invest further labor where payment might not be forthcoming, and American Continental, the party interjecting doubt into the contract situation, is not allowed to profit from its actions.

79. 125 Ariz. at 58, 607 P.2d at 377 (Struckmeyer, C.J., dissenting).

80. By narrowing the issue to waiver, the majority removed any chance of recovery on the contract price that would have been available under the theories of substantial performance or anticipatory breach. See text & notes 60-68 *supra*. Thus, Ranier is left with recovery under quantum meruit, which will probably be less than the jury award on the contract under the doctrine of substantial performance. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 4.2, at 237-38 (1973).

IV. CRIMINAL LAW

A. PRE-SENTENCE JAIL CREDIT AND PROBATIONARY JAIL TIME

Under Arizona law, courts may suspend the imposition or execution of a sentence and place a convicted person on probation.[1] As a condition of probation the court may require that the convicted person be incarcerated in the county jail for up to one year.[2] Arizona law also provides that all time spent in custody pursuant to an offense shall be credited against any sentence imposed.[3] Such time spent in custody prior to sentencing is called pre-sentence jail time.[4]

In *State v. Brodie*,[5] the Arizona Court of Appeals considered whether pre-sentence jail time should be credited against jail time imposed as a condition of probation. Brodie was convicted of theft.[6] Because he was unable to post bond, Brodie spent fifty-one days in jail prior to sentencing.[7] The trial court suspended sentence and placed Brodie on probation for five years.[8] As a condition of probation the court imposed one year of incarceration in the county jail.[9] On appeal Brodie argued that he should receive credit against his jail term for the fifty-one days of pre-sentence jail time.[10] The *Brodie* court recognized that pre-sentence jail time must be credited against a sentence,[11] but

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1. ARIZ. REV. STAT. ANN. § 13-901(A) (Supp. 1980-81).

2. *Id.* § 13-901(F). Section 13-901(E) was redesignated as § 13-901(F) in 1980 Ariz. Sess. Laws ch. 229, § 11, at 727. This casenote will cite to § 13-901(F).

3. *Id.* § 13-709(B) provides: "All time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense shall be credited against the term of imprisonment otherwise provided for by this chapter."

4. In State v. Brodie, 127 Ariz. 150, 151, 618 P.2d 644, 645 (Ct. App. 1980), the court refers to incarceration between the time of arrest and the time of sentencing as "pre-sentence jail time."

5. 127 Ariz. 150, 618 P.2d 644 (Ct. App. 1980).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* The one-year term imposed by the trial court is the maximum probationary incarceration allowed under ARIZ. REV. STAT. ANN. § 13-901(F) (Supp. 1980-81).

10. 127 Ariz. at 150, 618 P.2d at 644. Brodie's rationale for allowing credit was that §§ 13-901(F) and 13-903(E) reflect a legislative intent to credit pre-sentence incarceration against all maximum terms of imprisonment. Section 13-901(F) provides that "the period actually spent in confinement [pursuant to probationary incarceration] shall not exceed one year. . . ." Section 13-903(E) provides that "time spent in custody under § 13-901, subsection E [now subsection F] shall be credited to any sentence of imprisonment imposed upon revocation of probation." See text & notes 14-29 *infra* for discussion and interpretation of these statutes.

11. *See* 127 Ariz. at 151, 618 P.2d at 645. This conclusion is implicit in the court's discussion of the distinction between probationary incarceration and a sentence. *See* text & notes 30-39 *infra*.

distinguished probationary jail time from a sentence.[12] Consequently, the court held that pre-sentence jail time need not be credited against jail time imposed as a condition of probation.[13]

This casenote will first examine the conclusions reached in the *Brodie* opinion. Secondly, issues not raised in *Brodie* but relevant to pre-sentence jail credit will be discussed.

Analysis of the Brodie Opinion

Prior to 1978, probationary jail time in Arizona was governed by section 13-1657 of the Arizona criminal code.[14] Section 13-1657 provided that the conditions of probation could include incarceration in the county jail for a period of up to one year.[15] In *State v. Long*,[16] section 13-1657 was interpreted as not providing credit for pre-sentence jail time against probationary jail time.[17]

The question raised by the defendant in *Brodie* was whether in enacting section 13-709(B) of the 1978 criminal code, which displaced section 13-1657, the state legislature intended to provide credit for pre-sentence jail time against probationary jail time.[18] In support of his position, Brodie cited two statutes to the court for interpretation.[19] One of the statutes, section 13-901(F) of the new criminal code,[20] authorizes the imposition of intervals of incarceration as a condition of probation "as long as the period actually spent in confinement does not exceed one year."[21] Brodie argued that the quoted language encompasses all

12. 127 Ariz. at 151, 618 P.2d at 645. The court stated that all recent Arizona case law interprets probationary incarceration as a condition of probation and not as a sentence. The court then concluded that probationary jail time can be used as a tool of probation apart from a sentence. *See id.* at 645. See text & notes 30-39 *infra*.

13. 127 Ariz. at 151, 618 P.2d at 645.

14. *See* ARIZ. REV. STAT. ANN. § 13-1657(A)(1) app., at 809 (1978) which provides in part:

> 1. The court may suspend the imposing of sentence in felony cases and may direct that the suspension continue for such period of time, not exceeding the maximum term of sentence which may be imposed, and upon such terms and conditions as the court determines, and shall place such person on probation, under the charge and supervision of the probation officer of the court during such suspension. *The conditions imposed may include incarceration in the county jail for a specified period not to exceed one year. . . .*

(emphasis added).

15. *Id.*

16. 119 Ariz. 327, 580 P.2d 1181 (1978).

17. *Id.* at 329, 580 P.2d at 1183. The *Long* court distinguished probationary jail time from a sentence imposed upon the revocation of probation and held that credit for pre-sentence jail time is required only against a sentence imposed upon the revocation of probation. *Id.*

18. 127 Ariz. at 150-51, 618 P.2d at 644-45.

19. ARIZ. REV. STAT. ANN. §§ 13-901(F) (Supp. 1980-81) and 13-903(E) (1978). Brief for appellant at 3.

20. ARIZ. REV. STAT. ANN. § 13-901(F) (Supp. 1980-81) provides:

> When granting probation the court may require that the defendant be imprisoned in the county jail at whatever time or intervals, consecutive or nonconsecutive, the court shall determine, within the period of probation, as long as the period actually spent in confinement does not exceed one year or the maximum period of imprisonment permitted under chapter 7 of this title, whichever is the shorter.

21. *Id.*

periods of confinement, whether as a condition of probation or as pre-sentence jail time.[22] Thus, when pre-sentence jail time and probationary jail time combined exceed one year, credit must be given for the pre-sentence jail time to the extent the one year limitation is exceeded. Faced only with the language of paragraph F of section 13-901, the court rejected the argument and concluded that a limitation is placed only on probationary jail time.[23] The paragraph refers to confinement "within the period of probation."[24] Brodie requested credit for time spent in jail prior to being placed on probation.[25] Consequently, the court's conclusion was reasonable.

Section 13-903(E)[26] was the other statute offered by Brodie as indicating an intent to credit pre-sentence jail time against probationary jail time. Section 13-903(E) requires only that probationary jail time be credited against a sentence imposed upon revocation of probation.[27] Pre-sentence jail time is not mentioned in the statute.[28] The court concluded the obvious when it summarily rejected Brodie's argument and stated: "We find nothing in the statute to require that pre-sentence jail time be offset against probationary jail time."[29]

Finally, the *Brodie* court reconsidered a prior Arizona case, *State v. Long*.[30] In that case, as previously mentioned, the same issue faced by the *Brodie* court arose under the former criminal code.[31] Long argued that since one year was the maximum incarceration that could be imposed as a condition of probation, credit for pre-sentence jail time should be granted when the pre-sentence jail time and probationary jail time would otherwise exceed one year.[32] The crucial distinction recognized by the *Long* court was between incarceration imposed as a "sentence" and incarceration imposed merely as a condition of probation.[33] While the court recognized that case law may require pre-sentence jail

22. 127 Ariz. at 151, 618 P.2d at 645.

23. *Id.* The court stated: "When the paragraph is read in its entirety, it is clear that the [relevant] language is placing an outer limit of one year as the time that a defendant may be incarcerated as a term of probation, regardless of the intervals in which the jail time is served." *Id.*

24. ARIZ. REV. STAT. ANN. § 13-901(F) (Supp. 1980-81).

25. 127 Ariz. at 150, 618 P.2d at 644. The court stated: "The sole issue on appeal is whether appellant should have been credited with 51 days of pre-sentence incarceration served as a result of appellant's inability to post bond *prior to his placement on probation*." *Id.* (emphasis added).

26. ARIZ. REV. STAT. ANN. § 13-903(E) (1978). See note 10 *supra*.

27. ARIZ. REV. STAT. ANN. § 13-903(E) (1978).

28. *Id.*

29. 127 Ariz. at 151, 618 P.2d at 645.

30. 119 Ariz. 327, 580 P.2d 1181 (1978).

31. *Id.* at 329, 580 P.2d at 1183. The court considered whether pre-sentence jail time must be credited against probationary jail time.

32. *Id.* One year was the maximum probationary jail time that could be imposed under the former criminal code, ARIZ. REV. STAT. ANN. § 13-1657(A)(1) app. at 809 (1978) (current version at ARIZ. REV. STAT. ANN. §§ 13-901 to -903 (1978 & Supp. 1980-81)).

33. 119 Ariz. at 329, 580 P.2d at 1183.

time to be credited against a sentence, the court held that such credit is not required against probationary jail time.[34]

The *Brodie* court concluded that the distinction between probationary jail time and a sentence still exists under current case law.[35] The current position is reflected in two cases. In *State v. Risher*,[36] the Arizona Supreme Court stated that section 13-1657 of the former criminal code made clear that "probation is not a sentence, but rather a feature of the suspension of imposition of sentence."[37] Citing this language as controlling, *Pickett v. Boykin*[38] held that "incarceration as a part of probation is not a sentence to confinement, but simply one of the conditions which is established at the time sentence is suspended."[39] As a consequence of this distinction and because the statutes presented to the *Brodie* court did not reflect a change in legislative intent, the *Brodie* court correctly reaffirmed *Long*.

Analysis of Other Issues

The *Brodie* decision is correct in the conclusions reached upon the issues addressed. The decision, however, should be viewed as a limited one. In his argument based on legislative intent, Brodie failed to raise section 13-709(B) of the new criminal code.[40] Section 13-709(B) is important because it contains broad language mandating that all time spent in custody pursuant to an offense be credited to any defendant who is "sentenced" to a "term of imprisonment".[41] The statute represents Arizona's first legislative mandate to credit pre-sentence jail time.[42] As such, section 13-709(B) indicates a legislative intent to liber-

34. *Id.* The *Long* court stated: "Credit for pre-sentence incarceration is required only against a sentence imposed after revocation of probation." *Id.* Consequently, the court stated: "We believe that appellant's claim that she is entitled to credit against her probationary jail time is without merit." *Id.*

35. 127 Ariz. at 151, 618 P.2d at 645. The court stated that since the enactment of statutory authority for incarceration as a condition of probation, "all Arizona case law has interpreted probationary jail time as a condition of probation and not part of the 'sentence'." *Id.*

36. 117 Ariz. 587, 574 P.2d 453 (1978).

37. *Id.* at 588, 574 P.2d at 454. The question in *Risher* was "whether a defendant found guilty of an 'open-end' offense (one which may be treated either as a misdemeanor or a felony depending upon the sentence imposed), may be placed on probation for a longer period of time than the maximum sentence for a misdemeanor and still have the offense designated as a misdemeanor upon successful completion of the probationary period." *Id.* The court held that the offense could be designated a misdemeanor. *Id.* at 589, 574 P.2d at 455.

38. 118 Ariz. 261, 576 P.2d 120 (1978).

39. *Id.* at 262, 576 P.2d at 121. The court held that upon violation of probation, a court may modify the probationary terms and require a defendant to be incarcerated for one full year. *Id.*

40. ARIZ. REV. STAT. ANN. § 13-709(B) (1978) provides: "All time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense shall be credited against the term of imprisonment otherwise provided for by this chapter."

41. *Id.*

42. Prior to the enactment of § 13-709(B), credit for pre-sentence jail time was required by case law when the pre-sentence jail time and the sentence imposed exceeded the maximum statutory sentence. *See* State v. Sutton, 21 Ariz. App. 550, 552, 521 P.2d 1008, 1010 (1974).

ally credit pre-sentence jail time against all periods of confinement.

An argument that this liberal intent operates to provide credit for pre-sentence jail time against probationary jail time is subject to two objections. The first objection concerns the location of section 13-709(B) within the new criminal code. Section 13-709(B) refers only to credit against terms of imprisonment authorized by chapter 7 of the criminal code.[43] Probationary jail time is a term of imprisonment authorized by chapter 9 of the criminal code.[44] Consequently, it may be argued that section 13-709(B) has no effect upon probationary jail time.

The second objection concerns the language of section 13-709(B). This section refers to defendants who are "sentenced" to imprisonment.[45] Case law decided under the prior criminal code determined that probationary jail time is not a "sentence."[46] Rather, probationary jail time is a condition of probation and is not subject to the limitations placed upon "sentences."[47] By using the word "sentenced," it may be argued that the legislature intended to incorporate this distinction into the new criminal code. As a result, the provisions of section 13-709(B) would not operate to provide credit against probationary jail time.

The invalidity of the first objection becomes apparent when section 13-709(B) is read in conjunction with section 13-901(F). Section 13-901(F) limits probationary jail time to one year or the maximum period of imprisonment permitted under chapter 7 of the criminal code, whichever is shorter.[48] Section 13-709(B) limits the maximum imprisonment permitted under chapter 7 by requiring that pre-sentence jail time be credited against imprisonment imposed under chapter 7.[49] If the credit requirements of section 13-709(B) do not operate against probationary jail time, then the maximum imprisonment permitted under chapter 7, contrary to the express requirements of section 13-901(F),[50] would be exceeded. Consequently, section 13-901(F) should be read as being subject to the requirements of section 13-709(B). Pre-sentence jail time would then be credited against any term of probationary jail time.

The second objection may be similarly rebutted. The argument that the legislature excluded the application of credit requirements to

43. ARIZ. REV. STAT. ANN. § 13-709(B) (1978).
44. *Id.* § 13-901(F) (Supp. 1980-81).
45. *Id.* § 13-709(B) (1978).
46. Pickett v. Boykin, 118 Ariz. at 262, 576 P.2d at 121. See text & note 39 *supra*.
47. In *State v. Long*, the Arizona Supreme Court held under the prior criminal code that, because probationary jail time is not a sentence, pre-sentence jail time need not be credited against probationary jail time. 119 Ariz. at 329, 580 P.2d at 1183.
48. ARIZ. REV. STAT. ANN. § 13-901(F) (Supp. 1980-81).
49. *Id.* § 13-709(B) (1978). This section provides that credit shall be given against "the term of imprisonment otherwise provided for by this Chapter."
50. *Id.* § 13-901(F) (Supp. 1980-81). See note 20 *supra*.

probationary jail time by using the word "sentenced" in section 13-709(B) presupposes that the legislature intended distinct meanings for the word "sentence" (or "sentenced") and "probationary jail time." However, section 13-901(G) states: "When granting *probation*, the court shall set forth at the time of *sentencing* and on the record the factual and legal reasons in support of each *sentence*."[51] The legislature used the words "sentence" and "probation" interchangeably. This belies any intent to exclude probationary jail time from the terms of section 13-709(B) by use of the word "sentence." As a result, the word "sentenced" in section 13-709(B) should not be viewed as proscribing the application of that section to probationary jail time.[52] Rather, the statute should be viewed as providing credit for pre-sentence jail time against any "term of imprisonment,"[53] including probationary jail time.

This conclusion is reinforced by the legislative history of section 13-901(F). This section was adapted from both the New York Penal Code[54] and the Model Penal Code.[55] Both of those works expressly state that a person may be "sentenced" to probationary jail time.[56]

The principle of equal protection also has bearing on the issue of credit against probationary jail time. Brodie received the maximum probationary jail time of one year.[57] Because of his inability to post bond he spent an additional fifty-one days in jail.[58] A defendant in the same position as Brodie, but with greater financial resources, would have had to spend only one year in confinement. That is, under the *Brodie* rule the financially disadvantaged are subject to greater confinement than the financially advantaged. In *Williams v. Illinois*,[59] the United States Supreme Court applied the equal protection clause of the fourteenth amendment to invalidate imprisonment that resulted from

51. ARIZ. REV. STAT. ANN. § 13-901(G) (1978) (emphasis added).

52. This legislative use of the word "sentence" to refer to terms of imprisonment pursuant to both the probation chapter and the imprisonment chapter should abrogate the distinction between probationary jail time and a sentence that was recognized by case law decided under the prior criminal code. *See* notes 46-47 *supra*.

53. ARIZ. REV. STAT. ANN. § 13-709(B) (1978) provides for credit against the "term of imprisonment" authorized by chapter 7 of the criminal code.

54. ARIZONA CRIMINAL CODE COMMISSION, ARIZONA REVISED CRIMINAL CODE (1975). The Commission stated that § 13-901(F) was adapted from N.Y. PENAL LAW §§ 65.00-.20 (McKinney 1975). *Id.* at 103.

55. *Id.* The Commission stated that § 13-901(F) was adapted from MODEL PENAL CODE art. 301 (Proposed Official Draft 1962).

56. N.Y. PENAL LAW § 65.00(1)(A) (McKinney 1975) states that a "court may sentence a person to a period of probation. . . ." Article 301 of the Model Penal Code also states that a court may sentence "a person who has been convicted of a felony or misdemeanor to be placed on probation. . . ." MODEL PENAL CODE § 301.1(3) (Proposed Official Draft 1962).

57. 127 Ariz. at 150, 618 P.2d at 644. The maximum probationary jail time of one year was imposed pursuant to ARIZ. REV. STAT. ANN. § 13-901(F) (Supp. 1980-81).

58. 127 Ariz. at 150, 618 P.2d at 644.

59. 399 U.S. 235 (1970).

the involuntary non-payment of a fine and exceeded the maximum imprisonment fixed by statute.[60] In a 1974 decision, *State v. Sutton*,[61] the Arizona Court of Appeals applied the rationale of *Williams* to pre-sentence jail time.[62] *Sutton* held that the United States Constitution requires credit for pre-sentence jail time resulting from the inability to post bond when the maximum statutory sentence is imposed.[63]

Two questions arise in the application of the *Sutton* rationale to the *Brodie* case. The first question concerns the length of confinement. Brodie was convicted of an offense for which he could have received a four year sentence.[64] Instead the court imposed the maximum probationary jail time of one year.[65] *Sutton*, and all the cases that have applied its holding, involved incarceration exceeding the maximum sentence allowable.[66] The rationale of *Sutton*, however, appears broader than its holding. The court stated: "Where the statutory scheme of sentencing places a greater burden on those who are unable to make bond, in bailable offenses, than those who are financially able is to deny the equal protection mandated by the 14th amendment. The added burden being, of course, pre-sentence incarceration."[67] That burden exists regardless of whether the one year maximum or four year maximum is imposed. Consequently, the principle should apply in *Brodie*.

A question also arises concerning the type of confinement imposed. The *Brodie* court imposed "probationary jail time."[68] *Sutton* considered only "sentences."[69] In considering whether pre-sentence jail time is punishment, however, *Sutton* rejected any distinction between confinement called "probationary jail time" and confinement called a "sentence." Rather, the court held: "[W]hile pre-sentence incarceration may not qualify as 'punishment' . . . , it amounts to an infringement of freedom and deprivation of liberty and when added to

60. *Id.* at 240-41.

61. 21 Ariz. App. 550, 521 P.2d 1008 (1974).

62. *Id.* at 552, 521 P.2d at 1010. The court stated that although *Williams* did not involve pre-sentence jail time, the opinion was applicable thereto.

63. *Id.*

64. 127 Ariz. at 150, 618 P.2d at 644. Brodie was convicted of a Class 4 felony. *Id.* The maximum sentence that may be imposed for a Class 4 felony is four years. ARIZ. REV. STAT. ANN. § 13-701(B)(3) (1978).

65. 127 Ariz. at 150, 618 P.2d at 644. One year is the maximum probationary jail time authorized by ARIZ. REV. STAT. ANN. § 13-901(F) (Supp. 1980-81).

66. 21 Ariz. App. at 552, 521 P.2d at 1010; Hook v. Arizona, 496 F.2d 1172, 1174 (9th Cir. 1974); State v. Warde, 116 Ariz. 598, 600, 570 P.2d 766, 768 (1977); State v. Salinas, 23 Ariz. App. 232, 234, 532 P.2d 174, 176 (1974). Each case held that a defendant must receive credit for pre-sentence jail time when such time, if added to the maximum sentence imposed, exceeds the maximum sentence for the crime of which the defendant is convicted.

67. 21 Ariz. App. at 551, 521 P.2d at 1009.

68. 127 Ariz. at 150, 618 P.2d at 644.

69. 21 Ariz. App. at 551, 521 P.2d at 1009. Sutton received the maximum sentence allowed by law. *See id.*

the maximum deprivation of liberty allowed by law results in a denial of equal protection guaranteed by the 14th amendment of the United States Constitution."[70]

Even without considering the legislative failure to distinguish between the two terms,[71] the rejection of the distinction between "probationary jail time" and "sentence" is reasonable when viewed in the context of the history of probation in Arizona. Initially, case law proscribed the imposition of incarceration in conjunction with probation.[72] At that time, probation and sentence were easily distinguished. A sentence involved confinement, probation did not. In 1970, however, the Arizona criminal code was amended to allow for the imposition of incarceration as a condition of probation.[73] This blurred the former distinction between sentence and probation.[74] Now, regardless of whether a court order is called "probation" or "sentence," in some circumstances the same degree of deprivation of liberty can result.[75] Courts, therefore, need to look to the effect of their decisions. If credit is granted according to the name assigned to the confinement imposed, defendants' liberty becomes contingent upon an arbitrary classification. If courts look to the effect of their decisions, it will become apparent that the reasons for applying credit in the case of a "sentence" are equally good reasons for applying credit in the case of "probationary jail time."

Conclusion

The *Brodie* opinion presents a correct, but limited, decision. The result of the opinion is that a defendant receives credit for pre-sentence jail time when a court imposes a "sentence," but not when "probationary jail time" is imposed. The decision should not be viewed as dispositive of the question whether pre-sentence jail time must be credited against probationary jail time for two reasons. First, section 13-709(B) of the criminal code indicates a legislative intent to provide credit

70. *Id.* at 552, 521 P.2d at 1010.

71. *See* text & notes 41-57 *supra*.

72. State v. Van Meter, 7 Ariz. App. 422, 428, 440 P.2d 58, 64 (1968). The court held that there was no statutory authority for imposing both probation and a jail sentence. *Id.*

73. ARIZ. REV. STAT. ANN. § 13-1657(A)(1) app., at 809 (1978) (current version at ARIZ. REV. STAT. ANN. § 13-901 to -903 (1978 & Supp. 1980-81)).

74. The creation of statutory authority for the imposition of imprisonment as a condition of probation has been recognized as blurring the distinction between sentence and probation in federal law. *See* Schaefer, *Criminal Sentencing: Misunderstandings and Misapplications*, FED. PROBATION, June, 1979, at 22-23.

75. The lesser of one year or the maximum sentence under chapter 7 of the criminal code may be imposed as probationary jail time. ARIZ. REV. STAT. ANN. § 13-901(F) (Supp. 1980-81). The maximum sentence that may be imposed for a Class 1 misdemeanor is 6 months. *Id.* § 13-707 (1978). Thus, regardless of whether a court order is called a "sentence" or "probationary jail time," a court may require that a convicted person spend the same amount of time in jail.

against any type of confinement imposed. Second, the equal protection rationale of *State v. Sutton* should apply whenever the burden of presentence incarceration is placed only upon those unable to post bond. For these reasons, the *Brodie* decision should not be a deterrent to arguing a similar case in Arizona in the future.

W. John Thomas

V. CRIMINAL PROCEDURE

A. A WITNESS' FIFTH AMENDMENT PRIVILEGE AT ODDS WITH A DEFENDANT'S SIXTH AMENDMENT RIGHT OF CONFRONTATION

The sixth amendment to the United States Constitution secures for any defendant in a criminal prosecution the right "to be confronted with the witnesses against him."[1] This right of confrontation has been held to include the right to cross-examine witnesses.[2] The fifth amendment, however, provides that no person "shall be compelled in any criminal case to be a witness against himself."[3] Under the fifth amendment, a witness in a criminal prosecution can refuse to answer questions that tend to incriminate that witness. A defendant's sixth amendment right to cross-examine a witness does not preempt that witness' fifth amendment privilege.[4]

In two recent cases, *State v. Dunlap*[5] and *State v. Robison*,[6] the Arizona Supreme Court dealt with the sixth amendment problems that arise when a defendant's cross-examination of a prosecution witness is limited by the witness' assertion of the fifth amendment privilege. Max Dunlap and James Robison were codefendants accused of conspiracy and first degree murder in connection with the 1976 bombing death of Phoenix newspaper reporter Don Bolles.[7] John Adamson, also charged with Bolles' murder, agreed to testify against Dunlap and Robison.[8] At their joint trial, Dunlap and Robison were convicted primarily on the

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1. U.S. CONST. amend. VI.

2. Douglas v. Alabama, 380 U.S. 415, 418 (1965); Pointer v. Texas, 380 U.S. 400, 404 (1965). The sixth amendment was incorporated into the fourteenth amendment and thereby made applicable to the states in *Pointer*. *Id.* at 403.

3. U.S. CONST. amend. V. Malloy v. Hogan, 378 U.S. 1 (1964), made the fifth amendment binding on the states through its incorporation into the fourteenth amendment. *Id.* at 8.

4. McCrary v. Illinois, 386 U.S. 300, 314 (1967). In *McCrary*, the Supreme Court held that a defendant's sixth amendment right to cross-examine a witness does not prevent that witness from asserting testimonial privileges, including the fifth amendment privilege against compelled self-incrimination. *Id.*

5. 125 Ariz. 104, 608 P.2d 41 (1980).

6. 125 Ariz. 107, 608 P.2d 44 (1980).

7. *Id.* at 108, 608 P.2d at 45.

8. *Id.* The State of Arizona agreed to allow Adamson to plead guilty to second degree murder in exchange for his testimony against Dunlap and Robison. Adamson v. Superior Court, 125 Ariz. 579, 580, 611 P.2d 932, 933 (1980). On direct examination Adamson testified as to the role that each of the three men played in the murder. State v. Dunlap, 125 Ariz. at 105, 608 P.2d at 42. Adamson testified that Dunlap had hired him to murder not only Don Bolles but also Al Lizantz and Bruce Babbitt, then Attorney General of Arizona. *Id.* All three men allegedly were causing trouble for Dunlap's friend Kemper Marley. *Id.* Adamson claimed that Robison detonated the bomb by remote control after Adamson had planted it under Bolles' car. *Id.*

strength of Adamson's testimony.[9] In separate appeals, both defendants alleged that numerous errors required reversal of their convictions.[10]

In separate opinions, the Arizona Supreme Court ruled that the cross-examination of Adamson had been unreasonably limited by repeated assertions of his fifth amendment privilege.[11] Consequently, the court held that the trial court should have granted the defendants' motions to strike Adamson's direct testimony.[12] Its failure to do so resulted in a denial of the appellants' sixth amendment right of confrontation and constituted reversible error.[13]

This casenote will analyze the *Dunlap* and *Robison* decisions, beginning with a determination of the standard to be applied when a defendant's cross-examination is limited by a witness' assertion of the fifth amendment privilege against self-incrimination. An analysis of the Arizona Supreme Court's application of that standard, first in the *Dunlap* case and then in the *Robison* case will follow. Finally, some implications of the *Dunlap* and *Robison* decisions will be discussed.

Determining When Cross-Examination has been Unreasonably Limited by a Witness' Invocation of the Fifth Amendment

The United States Supreme Court has not established a test to apply when proper cross-examination is limited by a witness' invocation of the fifth amendment privilege. The seminal lower court decision promulgating such a test is *United States v. Cardillo*.[14] *Cardillo* began

9. State v. Robison, 125 Ariz. at 108, 608 P.2d at 45. Both defendants were sentenced to death, State v. Dunlap, 125 Ariz. at 105, 608 P.2d at 42, followed by an automatic appeal to the Arizona Supreme Court. *Id.*; ARIZ. REV. STAT. ANN. § 13-4031 (1978); ARIZ. R. CRIM. P. 31.2(b).

10. State v. Dunlap, 125 Ariz. at 105, 608 P.2d at 42; State v. Robison, 125 Ariz. at 108, 608 P.2d at 45.

11. State v. Dunlap, 125 Ariz. at 106, 608 P.2d at 43; State v. Robison, 125 Ariz. at 110, 608 P.2d at 47. Adamson invoked the fifth amendment during cross-examination when asked about the source of supply of clothing he claimed to have had for sale, whether he had been in the business of receiving stolen goods, the source of some $2,000 of a total of $8,000 he had in his possession after the murder, and whether he had filed state and federal tax returns for 1976, the year of Bolles' murder. State v. Dunlap, 125 Ariz. at 106, 608 P.2d at 43.

12. *See* State v. Dunlap, 125 Ariz. at 106-07, 608 P.2d at 43-44; State v. Robison, 125 Ariz. at 110, 608 P.2d at 47.

13. State v. Dunlap, 125 Ariz. at 106-07, 608 P.2d at 43-44; State v. Robison, 125 Ariz. at 110, 608 P.2d at 47. The Arizona Supreme Court reversed the convictions and remanded the cases. State v. Dunlap 125 Ariz. at 107, 608 P.2d at 44; State v. Robison, 125 Ariz. at 111, 608 P.2d at 48. When the State of Arizona prepared to retry Dunlap and Robison, Adamson claimed that he no longer had a duty to testify as he had fulfilled his part of the plea agreement. Adamson v. Superior Court, 125 Ariz. 579, 580-82, 611 P.2d 932, 933-35 (1980); *see* text & note 8 *supra*. The Arizona Supreme Court, however, held that Adamson's refusal to testify violated the plea agreement, 125 Ariz. at 584, 611 P.2d at 937, and it allowed the state to refile an open murder charge against Adamson. *Id.* Adamson was then convicted of first degree murder. Arizona Daily Star, Oct. 18, 1980, at 1, col. 1.

14. 316 F.2d 606 (2d Cir.), *cert. denied*, 375 U.S. 822 (1963). When dealing with the issue, virtually every United States court of appeals and a number of state courts have applied the *Cardillo* test. *E.g.*, United States v. Garrett, 542 F.2d 23, 26 (6th Cir. 1976); United States v.

with a four-count indictment charging defendants Harris, Kaminsky, and four others with crimes involving the interstate transportation and sale of stolen furs.[15] The government's case rested almost entirely on the testimony of Max Friedman,[16] who was also involved in the crime.[17] Friedman testified that he had given Harris $5,000 to purchase the stolen furs and that later the same night he and Harris had sold the furs to Kaminsky.[18] When cross-examined by defense counsel about the source of the $5,000, Friedman replied that he had obtained it from a "friend."[19] Defense counsel continued to question him about the source of the money and Friedman asserted his fifth amendment privilege.[20] Kaminsky's counsel argued that the precluded line of inquiry would have destroyed Friedman's credibility as a witness.[21] Counsel for both Kaminsky and Harris moved to strike Friedman's direct testimony.[22] The trial court denied the motion, and the defendants were found guilty.[23] They appealed claiming, *inter alia*, that their sixth amendment rights of confrontation had been violated.[24]

On appeal, the Second Circuit stated that if a defendant's cross-examination of a witness is unreasonably limited, then it is reversible error not to strike that witness' direct testimony.[25] Not every limitation of proper cross-examination, however, requires the striking of direct testimony.[26] The court held that a witness' assertion of the fifth amendment privilege on cross-examination only compels striking the direct testimony if the defendant would otherwise be prejudiced.[27] Whether the defendant was prejudiced depends on the nature of the precluded line of inquiry as determined by an analysis of the purpose of the in-

Gould, 536 F.2d 216, 222 (8th Cir. 1976); United States v. Newman, 490 F.2d 139, 145-46 (3d Cir. 1974); Fountain v. United States, 384 F.2d 624, 628 (5th Cir. 1967), *cert. denied*, 390 U.S. 1005 (1968); United States v. Smith, 342 F.2d 525, 527 (4th Cir. 1956); People v. Coca, 39 Colo. App. 264, 268, 465 P.2d 431, 434 (1977); State v. Montanez, 215 Kan. 67, 70, 523 P.2d 410, 413 (1974).

15. 316 F.2d at 609. The furs, recovered in New York City, were stolen from a fur shop in Paterson, New Jersey. *Id.* The four-count indictment charged the defendants with: (1) transporting stolen goods in interstate commerce; (2) conspiring to transport stolen goods in interstate commerce; (3) receiving goods moving in interstate commerce knowing that they had been stolen; and (4) conspiring to receive goods moving in interstate commerce knowing that they had been stolen. *Id.*

16. *Id.* at 611.

17. *Id.* at 609.

18. *Id.* at 610.

19. *Id.* at 612.

20. *Id.*

21. *Id.*

22. *Id.* The *Cardillo* opinion gives no indication whether defense counsel intended the precluded inquiry as anything more than an attack on the general credibility of the witness.

23. *Id.* at 612. Kaminsky and Harris were convicted on the third and fourth counts of the indictment. *Id.* at 609. See note 15 *supra*.

24. 316 F.2d at 610.

25. *Id.* at 611.

26. *Id.*

27. *Id.*

quiry and the role that the answers might have played in the defense.[28] If the precluded line of inquiry relates to collateral matters that bear only on the witness' general credibility, then little danger of prejudice exists and the direct testimony need not be stricken.[29] If, however, the precluded inquiry concerns matters developed on direct examination, then there is a "substantial danger of prejudice because the defense is deprived of the right to test the truth of [the witness' direct testimony]."[30] In the latter situation, the direct testimony should be stricken.[31] The court recognized that in some instances a partial striking may be all that is required. Whether all or only part of the direct testimony must be stricken is left to the discretion of the trial court.[32]

Applying this test to the facts, the Second Circuit examined the role that the precluded inquiry might have played in the defense.[33] The court found that an inquiry into the source of the $5,000 might have been far more significant than a mere attack on the general credibility of the witness.[34] If Friedman had identified the source of the money, then the defense might have been able to call the lender as a witness and perhaps prove that no such loan had been made.[35] In this manner, the defendants might have been able to show that Friedman was lying about specific events of the crime.[36] Thus, proving Friedman's untruthfulness concerning specific events about which he had testified would have had a much greater impact on the trier of fact than a mere attack on his general credibility.[37] Therefore, the court found that the precluded line of inquiry was not collateral because it would have tested the truth of Friedman's direct testimony.[38] The court reversed the convictions of Harris and Kaminsky, indicating that the motion to strike Friedman's direct testimony should have been granted.[39]

The ultimate inquiry under *Cardillo* is whether a defendant has been prejudiced by being deprived of the right to test the truth of the witness' direct testimony.[40] The resolution of that inquiry generally depends on the outcome of a secondary inquiry—whether the precluded line of questioning involved collateral matters or matters about which

28. *Id.* at 612.
29. *Id.* at 611.
30. *Id.*
31. *Id.* at 613.
32. *Id.*; State v. Dunlap, 125 Ariz. at 106 n.1, 608 P.2d at 43 n.1.
33. 316 F.2d at 612.
34. *Id.* at 613.
35. *Id.* at 612.
36. *Id.* at 613.
37. *Id.* at 612-13.
38. *Id.* at 613.
39. *Id.*
40. *Id.* at 611.

the witness had testified on direct examination.[41] Cases following *Cardillo* have referred to this secondary inquiry as involving the question of whether the precluded line of questioning pertained to "collateral" matters as opposed to "direct" matters.[42] The term "direct," as used in these later cases, has been applied to areas of inquiry other than matters raised on direct examination. The areas of inquiry most often found to be direct involve not only matters elicited by the government on direct examination,[43] but also matters tending to establish the witness' untruthfulness with respect to specific events of the crime charged[44] and matters tending to establish bias on the part of the witness.[45]

This collateral/direct classification generally, but not necessarily,[46] determines the resolution of the ultimate inquiry. Thus, whether a precluded line of inquiry involves collateral or direct matters is of paramount importance. In *Cardillo*, the Second Circuit adopted a liberal position. The court specifically rejected the argument made by defense counsel to the trial court that the foreclosed inquiry was relevant only as an attack on the witness' general credibility.[47] Instead, the *Cardillo* court found that the precluded inquiry was not collateral because it concerned matters tending to establish untruthfulness with respect to specific events of the crime charged.[48] More specifically, the precluded inquiry might have led to evidence from which the trier of fact could have, but need not have,[49] concluded that the witness was lying about having made a payment to the defendant.[50]

The line between collateral and direct matters, however, is not clearly drawn, and courts may differ as to which of the two a particular

41. *Id.*

42. *E.g.*, United States v. Rogers, 475 F.2d 821, 827 (7th Cir. 1973); Fountain v. United States, 384 F.2d 624, 628 (5th Cir. 1967), *cert. denied*, 390 U.S. 1005 (1968); State v. Montanez, 215 Kan. 67, 70, 523 P.2d 410, 413 (1974).

43. *See* United States v. Gould, 536 F.2d 216, 222 (8th Cir. 1976); United States v. Cardillo, 316 F.2d 606, 611 (3d Cir. 1963).

44. *See* Dunbar v. Harris, 612 F.2d 690, 693 (2d Cir. 1979); United States v. La Riche, 549 F.2d 1088, 1097 (6th Cir. 1977).

45. *See* United States v. Garrett, 542 F.2d 23, 26 (6th Cir. 1976); State v. Montanez, 215 Kan. 67, 72, 523 P.2d 410, 415 (1974). *See also* Davis v. Alaska, 415 U.S. 308, 316 (1973); State v. Morales, 120 Ariz. 517, 520, 587 P.2d 236, 239 (1978).

46. *See* Dunbar v. Harris, 612 F.2d 690, 694 (2d Cir. 1979); text & note 99 *infra*.

47. 316 F.2d at 613.

48. *Id.*

49. The *Cardillo* court emphasized that a defendant need not demonstrate that questioning would necessarily have led to evidence discrediting a witness. *Id.* at 613 n.4. An unreasonable limitation of cross-examination is established upon a showing that questioning *may* have led to such evidence. *Id. See* State v. Dunlap, 125 Ariz. at 107 n.2, 608 P.2d at 44 n.2.

50. *Id.* at 612. The precluded inquiry would have uncovered the name of the lender, possibly leading to proof that the alleged lender had not made the loan. *Id.* This would have permitted the inference that the loan had not been made, which in turn would have permitted the inference that the witness did not have the money to make the payment to the defendant. *See id.* This would have permitted the conclusion that the witness was lying about having made the payment to the defendant. *See id.*

line of inquiry involves. The liberal position of the Second Circuit in *Cardillo* can be contrasted with the more conservative position taken by the Fifth Circuit in *Fountain v. United States*.[51] In *Fountain*, the defendant had attempted to cross-examine a government witness concerning the source of funds that he allegedly paid to the defendant for protection, but the witness asserted his fifth amendment privilege.[52] The defendants argued on appeal that if they had been able to pursue that line of inquiry, they may have been able to demonstrate that the witness did not have the money to make the alleged payment.[53] This is very similar to the claim upheld in *Cardillo*.[54] Nevertheless, the *Fountain* court found that the inquiry into the source of the money was of a collateral nature.[55] The court stated that "[t]he proposed inquiry was one which . . . could only have established the basis for the first of a long series of inferences necessary to reach a conclusion directly related to the issues in the case."[56] Thus, two courts applying the *Cardillo* test to similar sets of facts may reach different results depending on their view of the collateral/direct dichotomy.

The Arizona Supreme Court adopted the *Cardillo* test in *State v. Thompson*.[57] The *Thompson* court found that the precluded inquiry was intended to elicit evidence to impeach the witness, and that as such, it was cumulative in light of the considerable evidence of the witness' unsavory character already before the court.[58] Citing *Cardillo* for the proposition that direct testimony need not be stricken when the precluded inquiry involves collateral matters bearing only on the credibility of the witness, the court held that the trial judge had not erred in denying the motion to strike.[59]

Application of the Cardillo Test in the Dunlap and Robison Cases

In *Dunlap* and *Robison*, the Arizona Supreme Court considered a

51. 384 F.2d 624 (5th Cir. 1967), *cert. denied*, 390 U.S. 1005 (1968).
52. *Id.* at 627.
53. *Id.* at 628.
54. See text & notes 14-21 *supra*.
55. 384 F.2d at 629.
56. *Id.* The court elaborated on the series of inferences that would have been necessary to make the inquiry direct. If he had not been able to explain the source of the money in his bank account, it would have permitted the inference that there was no money in the account. *Id.* n.3. Lack of money in the account would have permitted the inference that he did not have the money to make the payment. *Id.* From this it could have been inferred that he could not have made the payment, thus permitting the conclusion that he had lied on direct examination. *Id.*
57. 108 Ariz. 500, 503, 502 P.2d 1319, 1322 (1972). In *Thompson*, a prosecution witness to the illegal sale of narcotics invoked the fifth amendment when she was cross-examined concerning her possible addiction to narcotics at the time of the trial. *Id.* at 501-02, 502 P.2d at 1320-21.
58. *Id.* at 502-03, 502 P.2d at 1321-22. The witness had already admitted on cross-examination to having been addicted to drugs at the time of the sale, to having been convicted of a felony, and to having worked as a prostitute in order to purchase drugs. *Id.* at 502, 502 P.2d at 1321.
59. *Id.* at 503, 502 P.2d at 1322.

situation similar to the one in *Cardillo*.[60] The state's key witness, John Adamson, testified on direct examination that his preliminary discussion with Dunlap concerning the murder plot took place as Adamson went to fit one Don Aldridge for clothing.[61] When questioned on cross-examination about the source of the clothing, Adamson asserted his fifth amendment privilege.[62] He also testified on direct examination that after the murder he had $8,000 available for legal fees and that $6,000 of this was given to him by Dunlap as payment for the killing.[63] When asked on cross-examination about the source of the remaining $2,000 and whether he had filed state and federal tax returns for 1976, Adamson again invoked the fifth amendment.[64]

The defendants argued that their cross-examination had been unreasonably limited.[65] According to *Cardillo*, the ultimate inquiry to be made when a defendant's cross-examination is limited by a witness' assertion of the fifth amendment privilege is whether the defendant was prejudiced by being denied the opportunity to test the truth of the witness' direct testimony.[66] This inquiry is generally resolved by determining whether the precluded line of questioning involved collateral matters or direct matters.[67]

In *Dunlap*, the Arizona Supreme Court framed its inquiry more narrowly than did the Second Circuit in *Cardillo*. The court stated that if cross-examination is limited only to collateral matters, then the direct examination testimony need not be stricken.[68] But if cross-examination is limited with respect to either information elicited by the state on direct examination or information tending to establish the witness' untruthfulness with respect to specific events of the crime charged, then the direct examination testimony must be stricken.[69] These two areas of inquiry are among those most often found by the courts to concern direct matters.[70] The court, however, did not address the issue of whether the defendant had been prejudiced by being denied the right to test the truth of the witness' direct testimony. Thus, in *Dunlap*, the

60. As in *Cardillo*, see text & notes 15-23 *supra*, appellants argued that cross-examination of the prosecution's key witness, admittedly involved in the crime, was unreasonably limited when that witness invoked the fifth amendment in response to questions concerning the source of money relevant to the case. State v. Dunlap, 125 Ariz. at 105, 608 P.2d at 42; State v. Robison, 125 Ariz. at 109, 608 P.2d at 46.

61. State v. Dunlap, 125 Ariz. at 106, 608 P.2d at 43.

62. *Id.*

63. *Id.* at 105-06, 608 P.2d at 42-43.

64. *Id.* at 106, 608 P.2d at 43.

65. *Id.* at 105, 608 P.2d at 42; State v. Robison, 125 Ariz. at 109, 608 P.2d at 46.

66. *See* text at notes 40-41 *supra*.

67. *See* text & notes 42-45 *supra*.

68. 125 Ariz. at 106, 608 P.2d at 43.

69. *Id.*

70. *See* text & notes 43-45 *supra*. The types of inquiry listed by the court in *Dunlap* were taken from the *Cardillo* opinion. State v. Dunlap, 125 Ariz. at 106, 608 P.2d at 43.

Arizona Supreme Court framed the issue in terms of the secondary inquiry rather than the broader issue central to the *Cardillo* case.[71] In many cases this difference will not be significant. In some cases, however, it could be.[72]

In resolving the collateral/direct issue, the court adopted the liberal position taken by the Second Circuit in *Cardillo*.[73] Analyzing the role that the precluded inquiry might have played in the defense, the *Dunlap* court concluded that the inquiries concerning the source of clothing and the $2,000 might have led to evidence from which the jury could have, but need not have, concluded that Adamsom had lied about Dunlap's involvement in the murder.[74] Therefore, the foreclosed inquiry was not merely collateral; rather, it tended to establish untruthfulness about specific events of the crime charged.[75] Because the precluded inquiry was not collateral, the court held that Adamson's direct testimony should have been stricken.[76]

Thus, in applying the *Cardillo* test to the *Dunlap* facts, the Arizona Supreme Court framed the issue in terms of the collateral/direct inquiry which was only secondary in the *Cardillo* opinion. By doing so, the court ignored the broader issue in *Cardillo* which is whether the defendant was prejudiced by being denied the opportunity to test the truth of the witness' direct testimony. In spite of this narrow reading of *Cardillo*, the court reached a similar result by adopting the *Cardillo* court's liberal position for classifying a particular line of inquiry as collateral or direct.[77]

Since Max Dunlap and James Robison were tried together in the Arizona Superior Court,[78] *Robison* involved essentially the same facts as *Dunlap*. Unlike *Dunlap*, however, the court framed the inquiry in

71. *See* text & notes 40-41 *supra*.

72. *See* text & notes 97-99 *infra*.

73. *See* text & notes 27-30 *supra*.

74. 125 Ariz. at 107, 608 P.2d at 44. The court reasoned that questioning concerning the source of the clothing may have demonstrated that Adamson had no source at the time he allegedly discussed the murder with Dunlap. *Id.* at 106, 608 P.2d at 43. This would have permitted the inference that he had no clothes to sell from which it could be inferred that Adamson never went to fit Don Aldridge for clothes. *Id.* These inferences would have permitted the conclusion that Adamson lied about the timing of discussions with Dunlap. *Id.* at 106-07, 608 P.2d at 43-44.

Questioning concerning the source of the $2,000 might have shown that Adamson was involved with, and had received money from, persons whom the defense claimed were responsible for the killing. *Id.* at 107, 608 P.2d at 44. This would have allowed the inference that, as Dunlap claimed, the $6,000 also came from these sources. *Id.* From this the jury could have concluded that Adamson lied on direct examination when he said that the money came from Dunlap. *Id.*

75. *Id.*

76. *Id.*

77. This holding is not at odds with the court's holding in State v. Thompson, 108 Ariz. 500, 502 P.2d 1319 (1972). In *Thompson*, the Arizona Supreme Court did not adopt any particular position for classifying a line of inquiry as either collateral or direct. It merely stated that cumulative matters bearing on the credibility of a witness are collateral. *Id.* at 502-03, 502 P.2d at 1321-22.

78. State v. Dunlap, 125 Ariz. at 105, 608 P.2d at 42.

Robison in terms of the broader issue enunciated in *Cardillo*. The *Robison* court held that when a witness invokes the fifth amendment on cross-examination, the direct testimony must be stricken if the defendant has been prejudiced by being deprived of the right to test the truth of the direct testimony.[79] The determination of whether the defendant has been deprived of this right requires distinguishing between invoking the privilege as to collateral matters and invoking it as to direct matters.[80]

In deciding whether the precluded inquiry involved collateral or direct matters, and thereby deciding the ultimate inquiry, the court maintained a liberal position. In analyzing the role that the precluded inquiry might have played in the defense, the court found two ways in which Robison was denied the right to test the truth of Adamson's direct testimony.[81] First, the inquiry into the source of the $2,000 might have led to evidence from which the jury could have, but need not have, concluded that Adamson had lied on direct examination when he identified Dunlap as the source of the $6,000.[82] Second, the precluded inquiry might have led to evidence that Adamson was involved in criminal activities that did not include Robison, thus permitting the inference that Adamson's testimony as to Robison's involvement in the murder was untrue.[83] The court concluded that the foreclosed inquiry was not collateral; hence, the direct testimony should have been stricken.[84]

In comparing the *Robison* opinion with *Cardillo*, it appears that the Arizona Supreme Court may have adopted even a more liberal position for determining whether a particular line of inquiry concerned collateral or direct matters. In *Cardillo*, the Second Circuit found that the precluded inquiry could have established that the witness had lied about events directly related to both defendants' participation in the crime.[85] In *Robison*, however, the Arizona Supreme Court found that the precluded inquiry might have established that Adamson had lied about events relating only to Dunlap's involvement in the crime.[86] Although the source of the money had nothing to do with Robison's al-

79. 125 Ariz. at 109, 608 P.2d at 46.
80. *Id.*
81. *Id.* at 109-10, 608 P.2d at 46-47.
82. *Id.* *See* note 74 *supra*.
83. 125 Ariz. at 110, 608 P.2d at 47.
84. *Id.*
85. 316 F.2d at 612-13. The witness Friedman testified that he had placed $5,000 in the hands of Harris, one of the defendants, in order to enable him to buy stolen furs from Kaminsky, another defendant. *Id.* at 610. He also testified that he was present at the subsequent purchase of the furs. *Id.* The court found that questioning the source of the $5,000 was not a collateral inquiry in that it directly related to Harris' and Kaminsky's participation in the crime. *Id.* at 612.
86. 125 Ariz. at 109-10, 608 P.2d at 46-47. *See* text & note 74 *supra*.

leged role in the conspiracy, the court held that it was not collateral.[87] Although the court indicated that it may be necessary to sever the two cases upon retrial,[88] there is no suggestion that the inquiry foreclosed in the original trial would have been collateral to Robison's case had the cases been tried separately.[89] Thus, while the *Cardillo* test seems to require that the precluded inquiry relate to testimony concerning the defendant's participation in the crime, the Arizona Supreme Court in *Robison* required only that it involve the crime in general.

In addition, the Arizona Supreme Court reasoned that the precluded inquiry might have uncovered evidence implicating Adamson in criminal activity not involving Robison, thus casting doubt on his testimony that Robison was involved in the Bolles murder.[90] Cross-examination, however, had already uncovered a considerable amount of evidence that Adamson was involved in criminal activities that did not involve Robison.[91] In light of this evidence, further inquiry into Adamson's participation in criminal activity should have been merely cumulative. Nevertheless, the court held that Adamson's direct testimony should have been stricken.[92] In finding that preclusion of further inquiry into the criminal activities of the witness was prejudicial rather than merely cumulative, the court read the facts of *Robison* in a light much more favorable to the defendant than it did in *State v. Thompson*.[93]

Some Implications of Dunlap and Robison

In analyzing the significance of the *Dunlap* and *Robison* opinions, one striking point is that the court applied the *Cardillo* test more narrowly in *Dunlap* that it did in *Robison*. *Dunlap* holds that a witness' direct testimony need not be stricken if the foreclosed inquiry involved collateral matters, but it must be stricken if the foreclosed inquiry involved either matters elicited on direct examination or matters tending to establish the witness' untruthfulness concerning specific events of the

87. 125 Ariz. at 109-10, 608 P.2d at 46-47.

88. *Id.* at 111, 608 P.2d at 48.

89. *See id.* at 109-10, 608 P.2d at 46-47. The court acknowledged that the precluded inquiry was more crucial to Dunlap's case than to Robison's. *Id.* at 109, 608 P.2d at 46. The finding of prejudice to Dunlap, however, does not appear to have been a factor relevant to the finding of prejudice to Robison. *Id.* at 109-10, 608 P.2d at 46-47.

90. *Id.* at 110, 608 P.2d at 47. See text & note 70 *supra*.

91. Brief for Appellee at 46, State v. Robison, 125 Ariz. 107, 608 P.2d 44 (1980). Cross-examination revealed that Adamson had been involved in the beating of a talent scout, the burning of a restaurant, the burning of a tavern, the burglary of a home, the defrauding of two innkeepers, the flooding of a home for insurance recovery, and the receipt of stolen property. *Id.*

92. State v. Robison, 125 Ariz. at 110, 608 P.2d at 47.

93. 108 Ariz. at 503, 502 P.2d at 1332. Applying the *Cardillo* test in that case, the Arizona Supreme Court held that striking of direct testimony was not required when the precluded inquiry involved cumulative matters bearing on the credibility of the witness. *Id.* See text & notes 57-59 *supra*.

crime charged.[94] The *Robison* decision, however, states that a witness' direct testimony must be stricken if the defendant has been prejudiced by being denied the right to test the truth of the direct testimony.[95] The resolution of this inquiry, however, involves drawing a distinction between collateral and direct matters.[96] Where the precluded inquiry concerns one of the two types of direct matters specifically delineated in *Dunlap*,[97] this difference may not be significant. Under either reading of *Cardillo*, the direct examination testimony would be stricken. But if the foreclosed inquiry deals with direct matters other than the two stated in *Dunlap*,[98] the difference may be significant. In such cases, a court applying *Dunlap* may find that the direct testimony need not be stricken because the precluded inquiry involves only collateral matters. The same court applying *Robison* may find that the testimony must be stricken because the precluded inquiry involves direct matters and thus denies the defendant the right to test the truth of the direct testimony.

This difference may also be significant where the precluded inquiry involves one of the two types of direct matters listed in *Dunlap* but does not deny the defendant the right to test the truth of the witness' direct testimony.[99] In such cases a court applying *Dunlap* may find that the direct testimony must be stricken because it falls into one of the enumerated categories. The same court applying *Robison* may

94. 125 Ariz. at 106, 608 P. 2d at 43. See text & notes 68-71 *supra*. These two categories are not clearly distinguishable. Indeed, in *Dunlap* the court did not say which category the precluded inquiry fell into. 125 Ariz. at 107, 608 P.2d at 44. Conceivably, a fine distinction can be made. A line of questioning may tend to establish untruthfulness with respect to specific events of the crime charged without directly addressing matters raised on direct examination. For example, in *Dunlap* Adamson did not testify on direct about his activity related to receiving stolen property but pursuit of that line of inquiry may have demonstrated untruthfulness with respect to his version of the murder plan.

95. 125 Ariz. at 109, 608 P.2d at 46. See text & notes 79-80 *supra*.

96. *Id.* See text at notes 79-80 *supra*.

97. See text & note 69 *supra*.

98. An example of such direct matters is evidence tending to show bias on the part of the witness. United States v. Garrett, 542 F.2d 23, 25-26 (6th Cir. 1976). In *Garrett*, the government witness was a suspended police officer. *Id.* at 24. He refused on fifth amendment grounds to answer questions concerning his use of drugs. *Id.* at 24-25. The court denied a defense motion to strike his direct testimony. *Id.* at 25. On appeal, the Sixth Circuit rejected the government's argument that the precluded inquiry was collateral and found that the inquiry could have shown bias on the part of the witness. *Id.* at 26. Limiting cross-examination and thereby preventing the defendant from showing bias or prejudice denied the sixth amendment right of confrontation. *Id.* at 25.

99. *See* Dunbar v. Harris, 612 F.2d 690 (2d. Cir. 1979). *Dunbar* involved three sales of cocaine by Dunbar to an undercover policeman. *Id.* at 691. A police informer named Burks was the only witness to corroborate the undercover policeman's identification of the defendant. *Id.* When cross-examined about previous drug dealings with the defendant, Burks invoked the fifth amendment privilege. *Id.* A subsequent defense motion to strike Burks' direct testimony was denied. *Id.* at 692. The defendant was convicted and on appeal he argued that the precluded inquiry involved direct matters in that it related to the issue of identification of the defendant as the seller of the cocaine. *Id.* The court acknowledged that the identification of the defendant was the very substance of Burks' testimony, *id.* at 694, but that the defendant had not been denied the right to test the truth of the witness' direct testimony as to identification because he could have done so by framing questions that did not require Burks to incriminate himself. *Id.* at 694 n.5.

find that the testimony need not be stricken because although the precluded inquiry involved direct matters, the defendant was not denied the right to test the truth of the direct testimony.

Although *Dunlap* represents a more narrow reading of *Cardillo* than *Robison*, the two are not irreconcilable.[100] *Robison* may be viewed as stating the general rule applicable in cases in which a defendant's cross-examination is limited by a witness' assertion of the fifth amendment. That rule requires the striking of direct testimony when the defendant is prejudiced by being deprived of the right to test the truth of the witness' direct testimony. The *Dunlap* opinion is best understood as identifying two, but not all, of the situations in which there is substantial danger of prejudice.

Another significant point concerns the position adopted by the Arizona Supreme Court in determining that the precluded inquiry involved direct matters in both *Dunlap* and *Robison*. The court's position in *Dunlap* is essentially the same liberal position adopted by the Second Circuit in *Cardillo*.[101] In both cases the foreclosed inquiry tended to establish untruthfulness with respect to the defendant's participation in the crime charged.[102] In *Robison*, however, the Arizona Supreme Court adopted a position more liberal than that adopted in *Cardillo* and *Dunlap*,[103] holding that the precluded inquiry was direct even though it did not involve the appealing defendant's participation in the crime.[104]

Viewing the broad ruling in *Robison* as controlling over the narrow ruling in *Dunlap*, it appears as if the court has interpreted the sixth amendment more broadly than *Cardillo* and its progeny. The effect of this broad reading of the sixth amendment, however, will be felt only when cross-examination is limited by a witness' assertion of the fifth amendment. Because of the wide latitude of cross-examination permitted in Arizona,[105] cases in which cross-examination is limited by the trial judge's discretion ought not be affected.

Conclusion

In *Dunlap* and *Robison*, the Arizona Supreme Court dealt with the

100. Justice Gordon wrote for a unanimous court in *Dunlap*, and Justice Holohan did so in *Robison*. State v. Dunlap, 125 Ariz. at 105, 608 P.2d at 42; State v. Robison, 125 Ariz. at 108, 608 P.2d at 45. Perhaps some degree of discrepancy is unavoidable when two cases involving identical facts are dealt with in separate opinions by different justices.

101. *See* text & notes 80-83 *supra*.

102. *See* text & notes 95-97 *supra*.

103. *Id.*

104. *Id.*

105. *See* ARIZ. R. EVID. 611(b) (witness may be cross-examined on any relevant matters); M. UDALL, ARIZONA LAW OF EVIDENCE § 45, at 68 (1960).

problems that arise when a defendant's cross-examination is limited by a witness' assertion of the fifth amendment privilege. The court followed the majority of the United States courts of appeals by adopting the rule of *United States v. Cardillo*. Reading that rule narrowly in *Dunlap*, the Arizona Supreme Court found that such cases call for the striking of a witness' direct testimony if the foreclosed inquiry involved matters elicited by the government on direct examination, or matters tending to establish the witness' untruthfulness with respect to specific events of the crime charged.

Reading the *Cardillo* rule more broadly in *Robison*, the court found that direct examination testimony must be stricken if the defendant has been deprived of the right to test the truth of the witness' direct testimony. This ultimate inquiry in turn requires a determination of whether the cross-examination was limited as to collateral matters, in which case striking is unnecessary, or as to direct matters, in which case the testimony must be stricken. In both Arizona decisions the court found that the precluded inquiry was not collateral and that the witness' direct testimony should have been stricken.

In *Dunlap*, the court adopted the Second Circuit's liberal position for determining whether a line of inquiry involves collateral or direct matters in reaching that result. Only by adopting a position more liberal than the Second Circuit's and by reading the facts of the case in a light more favorable to the defendant than it has previously was the court able to reach the same result in *Robison*. The seeming inconsistency resulting from the different readings of *Cardillo*, however, can be reconciled by treating the *Dunlap* opinion as merely identifying specific instances of the general rule announced in *Robison*. Finally, the effect of the broad reading given the sixth amendment will be limited to cases in which defendant's cross-examination of the witness is restricted by that witness' assertion of the fifth amendment.

John Curry

B. DWI Breath Sample Evidence: Prosecutorial Duty to Collect And Preserve

Production of evidence for use by defendants in intoxication cases has received considerable judicial attention during the last decade.[1]

1. *E.g.*, Lauderdale v. State, 548 P.2d 376 (Alaska 1976); Scales v. City Court, 122 Ariz. 231, 594 P.2d 97 (1979); Smith v. Ganske, 114 Ariz. 515, 562 P.2d 395 (Ct. App. 1977); People v. Hitch, 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974); People v. Miller, 52 Cal. App. 3d 666, 125 Cal. Rptr. 341 (1975).

The majority of decisions have dealt only with the issue of whether breathalyzer ampoules should be made available to the defense.[2] Recently, however, in *Baca v. Smith*,[3] Arizona joined Colorado in requiring that, under certain circumstances, samples of breath be both collected and preserved for the defendant's use.[4]

By requiring the preservation of breath samples, the Arizona Supreme Court augmented an earlier decision that compelled preservation of breathalyzer ampoules.[5] The *Baca* holding imposes an affirmative duty on investigating officers to gather evidence for the defense.[6] Prior to *Baca*, two other state supreme courts had faced the issue of preservation of breath samples in intoxication cases.[7] Arizona joins Colorado in requiring that an accused be provided breath samples.[8]

In *Baca*, the defendant was arrested and charged with driving while under the influence of intoxicating liquor.[9] He was administered a gas chromatograph intoximeter test to ascertain his blood alcohol level.[10] The particular type of detector used to test defendant Baca's breath destroys the sample of breath in the process of testing.[11] The intoximeter indicates alcohol concentration on a strip chart printout, and it is this record which is used by the prosecution as evidence of intoxication.[12]

Although the breath sample collected in the intoximeter is consumed by analysis, there also exists a "field collection unit" for captur-

2. *E.g.*, Lauderdale v. State, 548 P.2d 376, 381 (Alaska 1976); Scales v. City Court, 122 Ariz. 231, 234-35, 594 P.2d 97, 100-01 (1979); State v. Watson, 48 Ohio App. 2d 110, 112, 355 N.E.2d 883, 885 (1975); State v. Michener, 25 Or. App. 523, 532-33, 550 P.2d 449, 454 (1976).

3. 124 Ariz. 353, 604 P.2d 617 (1979).

4. *Id.* at 356, 604 P.2d at 620; Garcia v. District Court, 197 Colo. 38, 47, 589 P.2d 924, 930 (1979). *Garcia* held that in all cases where an accused submits to a breath test, the state must provide a breath sample to the accused for independent testing. *Id. Baca* followed *Garcia* by requiring that separate breath samples be taken for a defendant's use when the state's testing consumes the evidence. 124 Ariz. at 356, 604 P.2d at 620. The duty in Arizona is qualified, however, so that it only applies upon the written request of the defendant. *Id.*

5. Scales v. City Court, 122 Ariz. 231, 234, 594 P.2d 97, 100 (1979). *Scales* held that the destruction of breathalyzer ampoules is a violation of due process. *Id.* The court based its decision on a finding that the ampoules were material and their destruction was prejudicial to the defendant. *Id.*

6. 124 Ariz. at 356-57, 604 P.2d at 620-21.

7. People v. Miller, 52 Cal. App. 3d 666, 125 Cal. Rptr. 341 (1975); Garcia v. District Court, 197 Colo. 38, 589 P.2d 924 (1979).

8. Garcia v. District Court, 197 Colo. 38, 47, 589 P.2d 924, 930 (1979). *See* People v. Miller, 52 Cal. App. 3d 666, 670, 125 Cal. Rptr. 341, 343 (1975).

9. 124 Ariz. at 354, 604 P.2d at 618. Driving while intoxicated violates ARIZ. REV. STAT. ANN. § 28-692(A) (Supp. 1980-81).

10. 124 Ariz. at 354, 604 P.2d at 618.

11. *Id. See* Garcia v. District Court, 197 Colo. 38, 44, 589 P.2d 924, 928 (1979); R. ERWIN, DEFENSE OF DRUNK DRIVING CASES § 18.08, at 18-26 (3d ed. 1980).

12. 124 ARIZ. at 354, 604 P.2d at 618. *See* People v. Miller, 52 Cal. App. 3d 666, 668-70, 125 Cal. Rptr. 341, 342-43 (1975); Garcia v. District Court, 197 Colo. 38, 44, 589 P.2d 924, 928 (1979); AMA COMMITTEE ON MEDICOLEGAL PROBLEMS, BREATH/ALCOHOL TESTS 19-21 (1972) [hereinafter cited as AMA COMMITTEE].

ing and preserving breath samples for testing at a later time.[13] The Intoximeter Field Crimper-Indium Encapsulation Kit operates by passing the subject's breath through a short length of tubing containing the rare metal indium.[14] The indium is crimped into three compartments, and the tubing can then be taken to a laboratory for analysis by a gas chromatograph intoximeter.[15]

Baca contended that the unavailability of a separately encapsulated breath sample for his independent scientific analysis constituted a denial of due process.[16] Consequently, he requested the suppression of the printout results from the intoximeter test.[17] When the trial court denied Baca's motion to suppress,[18] he brought a special action in the Arizona Supreme Court challenging the denial.[19]

The Arizona Supreme Court ruled that when breath testing completely destroys the evidence, the police must, upon written request by the defendant, collect and preserve a separate breath sample for the later independent use of the accused.[20] The court specified that the accused must be informed of the right to have a separate breath sample taken and preserved by the police.[21] The accused must also be told that upon conviction, the cost of such collection and preservation may be assessed against him.[22] Finally, the *Baca* court held that its ruling would be prospective only, thereby denying Baca relief.[23]

This casenote will analyze the affirmative duty to collect evidence for the defense imposed by *Baca* upon the investigating and prosecuting authorities. Analogous decisions that mandate the collection of other types of evidence for use by defendants will be examined. A series of judicial rulings developing the prosecutorial duty to disclose in-

13. Samples of known blood alcohol concentration encapsulated in indium tubing and stored at room temperature have been tested fourteen days after collection with satisfactory results. R. ERWIN, *supra* note 11, § 5B.04C, at 5B-10.24(1). In a companion case to *Baca*, State *ex rel.* Baumert v. Municipal Court, 124 Ariz. 357, 604 P.2d 621 (1979), testimony by Lucien Haag, a licensed criminologist and blood analyst, indicated that a crimped breath sample could be reliably preserved for up to four days. Baca v. Smith, 124 Ariz. at 356-57, 604 P.2d at 620-21.

14. Baca v. Smith, 124 Ariz. at 354, 604 P.2d at 618.

15. *Id.*; R. ERWIN, *supra* note 11, § 5B.04C, at 5B-10.24 to 5B-10.24(1); AMA COMMITTEE, *supra* note 12, at 32-33.

16. 124 Ariz. at 354, 604 P.2d at 618.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 356, 604 P.2d at 620. The court noted that Baca had requested a blood test, but none was taken. *Id.* at 357 n.2, 604 P.2d at 621 n.2.

21. *Id.* at 356, 604 P.2d at 620. Failure to execute a form provided by the police informing the arrestee of the right to have a separate breath sample taken and preserved results in the waiver of that right. *Id.*

22. *Id.* If found not guilty, the defendant is not charged with the cost. *Id.*

23. *Id.* at 357, 604 P.2d at 621. The court did not indicate why on this particular issue it diverged from its otherwise close following of *Garcia* which applied retroactively. *See* Garcia v. District Court, 197 Colo. 38, 47, 589 P.2d 924, 930 (1979). *Cf.* Lauderdale v. State, 548 P.2d 376, 382-84 (Alaska 1976).

toxication evidence will then be discussed. The rationale of *Baca* itself will be assessed in light of prior statutory law and possible policy bases for the decision. Finally, the impact of the *Baca* rule on breathalyzer cases will be considered.

Development of the Prosecutorial Duty to Produce Evidence

The prosecutorial duty to produce evidence useful to the defense has evolved through a series of court decisions beginning with *Brady v. Maryland*.[24] In *Brady*, the United States Supreme Court established that it is a violation of due process for the prosecution to suppress requested evidence favorable to an accused and material to the issue of guilt or punishment.[25] The courts have progressively refined the *Brady* holding with the result that its due process formulation now applies to widely differing fact situations.[26]

The *Brady* rule applies most obviously to cases where the state

24. 373 U.S. 83 (1963). Brady and a companion were convicted in separate trials of first degree murder and sentenced to death. *Id.* at 84. Prior to trial, petitioner requested examination of statements made by his companion. *Id.* The prosecution withheld one statement in which Brady's companion admitted committing the homicide. *Id.* Petitioner did not become aware of the existence of this statement until after his conviction was affirmed. *Id.* His motion for post-conviction relief was denied by the trial court, but the court of appeals held that the suppression constituted a denial of due process, and the United States Supreme Court affirmed. *Id.* at 84-86, 91.

25. *Id.* at 87.

26. *See, e.g.*, State v. Schreiber, 115 Ariz. 555, 556, 566 P.2d 1031, 1032 (1977) (when the prosecuting attorney failed to disclose the existence of an official accident report which corroborated part of appellant's testimony, the court held that the failure to disclose the material report denied defendant due process). In State v. Fowler, 101 Ariz. 561, 422 P.2d 125 (1967), the court noted the post-*Brady* development of a broad duty to disclose, and held that it was a due process violation for the prosecution to conceal a victim's knife recovered from the scene of the crime and material to the assertion of self-defense. *Id.* at 563-64, 422 P.2d at 127-28. In addition, it was not necessary that the defense request the evidence because the prosecution has a duty to protect the rights of the innocent and to see that justice is done. *Id.* In Trimble v. State, 75 N.M. 183, 402 P.2d 162 (1965), the New Mexico Supreme Court followed *Brady* and determined that although this was not strictly a suppression case, the effect of police action in seizing tape recordings material to the defense and returning them with the conversations erased, was just as damaging as if the evidence had been known to the prosecution and not the defense. *Id.* at 186, 402 P.2d at 165.

The duty imposed by *Brady* has been expanded by courts' continued liberal interpretations of that decision. What constitutes "favorable" and "material" evidence necessitating the disclosure of evidence held by the state has been broadly defined since *Brady*. State v. Helmer, — S.D. —, —, 278 N.W.2d 808, 812 (1979) (favorable means exculpatory). *See generally* Casenote, *Unconstitutional Suppression of Evidence Through the Destruction of Breathalyzer Ampoules*, 22 ARIZ. L. REV. 237 (1980). Garcia v. District Court, 197 Colo. 38, 589 P.2d 924 (1979), notes that the mere possibility that the requested material might have been favorable to the accused is sufficient. *Id.* at 46, 589 P.2d at 929. *Contra*, United States v. Agurs, 427 U.S. 97, 109-10 (1976) ("[t]he mere possibility that an item of undisclosed information might have helped the defense . . . does not establish 'materiality' in the constitutional sense"). "Suppression of the evidence" has been liberally construed so that the *Brady* duty to disclose has been applied even where the prosecution has not consciously withheld evidence. Garcia v. District Court, 197 Colo. 38, 46, 589 P.2d 924, 929-30 (1979) ("[t]he failure of the state to collect and preserve evidence, when those acts can be accomplished as a mere incident to a procedure routinely performed by state agents, is tantamount to suppression of that evidence"); Trimble v. State, 75 N.M. 183, 186, 402 P.2d 162, 165 (1965) (effect of loss of evidence while in possession of police was just as damaging as if the evidence had been knowingly withheld). *Contra*, State v. Malone, 105 Ariz. 348, 351, 464 P.2d 793, 796, *cert. denied*, 400 U.S. 841 (1970) (in absence of reason to believe evidence would tend to

possesses nondisclosed evidence of exculpatory value to the defense.[27] Courts, however, have broadly interpreted *Brady* so that the ambit of the state's duty to disclose now encompasses more than just evidence actually possessed by the prosecution. The *Brady* rule has been applied to require the state to produce evidence not in the immediate or direct control of the prosecution,[28] evidence routinely destroyed and therefore no longer in the state's possession,[29] and evidence not yet collected and therefore never literally in the state's possession.[30]

Although *Baca* enhanced the scope of *Brady's* disclosure duty by formulating a duty of collection of evidence as well as preservation when the state's scientific analysis consumes the initial breath sample, the mandate to gather evidence of potential exculpatory value to the defense was earlier established in cases concerning the identity of prosecution witnesses.[31] In *Eleazer v. Superior Court*,[32] the California Supreme Court held that the prosecution must use reasonable efforts to locate and obtain information concerning the identity of informants.[33] This obligation expanded the long-recognized duty of the state to reveal all information actually in the prosecutor's possession.[34] Subse-

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exonerate the accused, officers who acted in good faith in discarding such evidence at the scene of the crime did not "suppress" the evidence).

In addition, "prosecution" has been interpreted to denote not only the prosecuting officials, but any government personnel participating in the investigation of the case. United States v. Bryant, 439 F.2d 642, 650 (D.C. Cir. 1971) ("prosecution" includes investigators); State v. Fowler, 101 Ariz. 861, 862, 422 P.2d 125, 127 (1967). "Both prosecutors and the police, as public officers acting on behalf of the state, are sworn to uphold the law and are duty bound to protect the rights of the innocent as well as to prosecute the guilty. Their primary duty is not to convict, but to see that justice is done." *Id. See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-103(B), ECs 7-13, 7-14 (1979); AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE 256 (1974) (hereinafter cited as ABA PROJECT).

27. *E.g.*, United States *ex rel.* Meers v. Wilkins, 326 F.2d 135, 136-37 (1964) (prosecution did not reveal the existence of witness' affidavits asserting that the defendant was not the individual seen robbing a store); State v. Schreiber, 115 Ariz. 555, 556-58, 566 P.2d 1031, 1032-34 (1977) (official accident report tending to corroborate defendant's testimony was withheld by the prosecutor); State v. Fowler, 101 Ariz. 561, 562-64, 422 P.2d 125, 127-28 (1967) (the state concealed the existence of victim's knife which supported defendant's theory of self-defense).

28. Engstrom v. Superior Court, 20 Cal. App. 3d 240, 243-44, 97 Cal. Rptr. 484, 486 (1971) (the prosecution is required to obtain and make available pertinent information in the possession of other government agencies that are part of the criminal justice system).

29. Scales v. City Court, 122 Ariz. 231, 234, 594 P.2d 97, 100 (1979) (ampoules used in breathalyzer test); People v. Hitch, 12 Cal. 3d 641, 652-53, 527 P.2d 361, 369, 117 Cal. Rptr. 9, 17 (1974) (ampoules in breathalyzer test); State v. Michener, 25 Or. App. 523, 526, 550 P.2d 449, 450 (1976) (ampoules in breathalyzer test).

30. Baca v. Smith, 124 Ariz. 353, 357, 604 P.2d 617, 620 (1979) (breath samples); Eleazer v. Superior Court, 1 Cal. 3d 847, 851-53, 464 P.2d 42, 44-45, 83 Cal. Rptr. 586, 588-89 (1970) (address of paid police informer/witness); *see* Garcia v. District Court, 197 Colo. 38, 46, 589 P.2d 924, 929-30 (1979) (breath sample). *Contra*, People v. Watson, 75 Cal. App. 3d 384, 400, 142 Cal. Rptr. 134, 143 (1978) (sample of defendant's blood).

31. People v. Goliday, 86 Cal. 3d 771, 774, 505 P.2d 537, 540, 106 Cal. Rptr. 113, 116 (1973); Eleazer v. Superior Court, 1 Cal. 3d 847, 852-53, 464 P.2d 42, 45, 83 Cal. Rptr. 586, 589 (1970); *see* People v. Hunt, 4 Cal. 3d 231, 239, 481 P.2d 205, 211, 93 Cal. Rptr. 197, 203 (1971).

32. 1 Cal. 3d 847, 464 P.2d 42, 83 Cal. Rptr. 586 (1970).

33. *Id.* at 851-53, 464 P.2d at 44-45, 83 Cal. Rptr. at 588-89.

34. *See id.* at 851-52, 464 P.2d at 45, 83 Cal. Rptr. at 589.

quently in *People v. Goliday*,[35] California rejected the notion that an investigating officer could avoid the *Eleazer* rule by deliberately not asking for the last names of informants.[36] Thus, *Goliday* further emphasized the prosecutor's responsibility to obtain evidence for use by the defense. As does *Baca, Goliday* established that the defendant must demonstrate only the possibility that the material evidence sought will be favorable to the defense before the prosecutorial duty to expend reasonable efforts to obtain this evidence arises.[37] Without this material evidence, the defendant would be deprived of evidence of potential exculpatory value, and consequently deprived of a fair trial.[38]

This affirmative duty to collect evidence has also been imposed on the prosecution in cases other than those in which the accused seeks to identify witnesses. In *Engstrom v. Superior Court*,[39] the California Court of Appeal established that when the records of a prosecution witness' past assault convictions were available to, although not actually in the possession of the prosecutor, the state must acquire and make available to the defense such information.[40] The *Engstrom* court balanced the state's interests and burdens against the benefits of access to evidence for the defendant and concluded that the state had no interest in denying the defendant access to all material evidence.[41] This balancing of defendant's need for evidence against the government's burden in having to produce such evidence is also utilized in breath-testing cases.[42]

The Prosecutorial Duty to Disclose Intoxication Evidence: Comparison of Baca and its Precursors

A number of jurisdictions have been faced with issues similar to those presented in *Baca*. In *People v. Hitch*,[43] the California Supreme Court concluded that the ampoules used in testing an accused's breath by the breathalyzer apparatus must be preserved and disclosed as evi-

35. 8 Cal. 3d 771, 505 P.2d 537, 106 Cal. Rptr. 113 (1973).

36. *Id.* at 781, 505 P.2d at 544-45, 106 Cal. Rptr. at 120-21.

37. *Id.* at 778-79, 505 P.2d at 542-43, 106 Cal. Rptr. at 118-19. *See* Baca v. Smith, 124 Ariz. 353, 356, 604 P.2d 617, 620 (1979). The "identity of witnesses" cases differ from *Baca*-type cases in that the latter entail lack of evidence due to consumption in the process of testing.

38. People v. Goliday, 8 Cal. 3d at 777, 505 P.2d at 542, 106 Cal. Rptr. at 118; *see* Baca v. Smith, 124 Ariz. 353, 356, 604 P.2d 617, 620 (1979); Garcia v. District Court, 197 Colo. 38, 47, 589 P.2d 924, 930 (1979).

39. 20 Cal. App. 3d 240, 97 Cal. Rptr. 484 (1971).

40. *Id.* at 243-45, 97 Cal. Rptr. at 486-87.

41. *Id.*

42. *E.g.*, Baca v. Smith, 124 Ariz. 353, 355-56, 604 P.2d 617, 619-20 (1979); Garcia v. District Court, 197 Colo. 38, 45-47, 589 P.2d 924, 928-30 (1979).

43. 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974). The breathalyzer ampoule had been destroyed in accordance with routine police procedure. *Id.* at 644-45, 527 P.2d at 363, 117 Cal. Rptr. at 11. The defendant's motion to suppress was granted and the state appealed. *Id.* at 645, 527 P.2d at 364, 117 Cal. Rptr. at 12.

dence.[44] Referring to the *Brady* requirement that evidence that is both favorable and material must be turned over to the defense, the *Hitch* court reasoned that by their very nature, breathalyzer results are material to the issue of guilt or innocence.[45] Since the evidence had been destroyed by the prosecution, the "favorability" prong of *Brady* could not be determined.[46] Nevertheless, the court concluded that the reasonable possibility that the ampoule would have been exculpatory sufficed to require disclosure of the evidence had it not been destroyed.[47] Significantly, *Hitch* stated that the disclosure duty attaches once the prosecution actually "possesses" the evidence.[48]

Scales v. City Court[49] brought Arizona within the rule set forth in *Hitch*. Like *Hitch, Scales* implemented the *Brady* due process standard and determined that the breathalyzer ampoule was material, and its destruction prejudicial.[50] The court therefore imposed a duty on the state to preserve the breathalyzer ampoule because it could be a "crucial source of evidence with which to attack the validity of the test reading and hence the [statutory] presumption [of intoxication]."[51]

The duty to collect evidence for use by the defendant was directly addressed in *People v. Miller*.[52] The California Court of Appeal addressed the issue of whether due process allows admission of test results produced by an intoxilyzer when such testing destroys the only breath sample.[53] The court held that even though the intoxilyzer does not preserve any sample that can be retained for retesting, it is not a denial of due process to admit in evidence the printout results of the test.[54] The *Miller* decision turned on the court's reasoning that breath expelled into an intoxilyzer was "gathered" but could not be "possessed" in the sense intended by *Hitch*.[55] Since there was no possession, there was no

44. *Id.* at 652, 527 P.2d at 369, 117 Cal. Rptr. at 17.
45. *Id.* at 647, 527 P.2d at 365, 117 Cal. Rptr. at 13.
46. *Id.* at 647-48, 527 P.2d at 366, 117 Cal. Rptr. at 14.
47. *Id.* at 649-50, 527 P.2d at 367, 117 Cal. Rptr. at 15.
48. *Id.* at 650, 527 P.2d at 367, 117 Cal. Rptr. at 15.
49. 122 Ariz. 231, 594 P.2d 97 (1979). Petitioners were arrested for driving while intoxicated and were administered a breathalyzer test. *Id.* at 232, 594 P.2d at 98. In response to motions for production of the ampoules, the city indicated that the requested evidence had been discarded in accordance with normal procedure. *Id.* Motions to suppress and to dismiss were denied, and special actions were then filed with the state supreme court. *Id.*
50. *Id.* at 234, 594 P.2d at 100.
51. *Id.*
52. 52 Cal. App. 3d 666, 125 Cal. Rptr. 341 (1975). Three petitioners were prosecuted for driving while under the influence of intoxicating liquor. *Id.* at 668, 125 Cal. Rptr. at 342. An intoxilyzer test was administered to all three. *Id.* They sought to extend the *Hitch* ruling in order to render the test results inadmissible. *Id.* In refusing to so extend *Hitch*, the court of appeal affirmed one conviction and reversed orders of dismissal in the other two cases. *Id.* at 670-71, 125 Cal. Rptr. at 343.
53. *Id.* at 668, 125 Cal. Rptr. at 342.
54. *Id.* at 669, 125 Cal. Rptr. at 342.
55. *Id.* at 669-70, 125 Cal. Rptr. at 343.

duty to disclose.[56]

In an opinion consistent with *Miller*, the Idaho Supreme Court in *State v. Reyna*[57] examined the parameters of the prosecutorial duty of disclosure. Appellant had made no request for a blood test and no chemical test for drunkenness was administered.[58] The court held that neither due process nor statute imposed an affirmative duty on the state to collect evidence that the defense believes would be probative and exculpatory but which the prosecution believes is unnecessary to its case.[59] The court's logic was that if the prosecution does not possess or control the evidence, it cannot be said to have concealed it; thus, if the prosecution declines to collect evidence it believes is unnecessary to its case, this evidence is not "suppressed."[60]

Garcia v. District Court[61] is the Colorado Supreme Court ruling that imposed an affirmative duty upon the state to collect breath samples for a defendant. *Garcia* consolidated a breathalyzer prosecution and an intoxilyzer case.[62] The gas chromatograph used in *Garcia* is similar to the intoximeter used in *Baca* in that both devices consume the breath sample in the process of testing.[63] The Colorado court held that an accused who submits to a breath test, the results of which will be used as evidence, must be provided a separate sample of breath usable for independent scientific analysis.[64] The court reasoned that a breath sample from each defendant could inexpensively and expediently be obtained, and that since such a breath sample was material and could possibly be favorable, failure to collect was "tantamount to suppression."[65]

Each of these precursors to *Baca* in some way delimits the meaning of "possession" relative to intoxication evidence. It is clear that the duty of disclosure attaches once the state is in possession of intoxication evidence upon which it relies in establishing its case and which satisfies

56. *Id.* The court declined to require that evidence be reduced to preservable form by any means possible. *Id.* at 670, 125 Cal. Rptr. at 343.

57. 92 Idaho 669, 448 P.2d 762 (1968). The defendant was found guilty of driving while under the influence of intoxicating liquor. *Id.* at 671, 448 P.2d at 764. He was convicted on the testimonial evidence of the arresting officer. *Id.* at 674, 448 P.2d at 767. On appeal, the defendant asserted that the failure to administer an intoxication test constituted a denial of due process in the form of suppression of probative and exculpatory evidence. *Id.* at 673, 448 P.2d at 766.

58. *Id.* at 674, 448 P.2d at 767.

59. *Id.* at 673-75, 448 P.2d at 766-68. The evidence that the defense sought to compel the state to collect included a blood test and names of witnesses. *Id.* at 673-74, 448 P.2d at 766-67.

60. *Id.* at 674, 448 P.2d at 767.

61. 197 Colo. 38, 589 P.2d 924 (1979).

62. *Id.* at 40-44, 589 P.2d at 925-28.

63. *See id.* at 44, 589 P.2d at 928; Baca v. Smith, 124 Ariz. at 355, 604 P.2d at 619.

64. 197 Colo. at 47, 589 P.2d at 930.

65. *Id.*

the two-pronged "materiality" and "favorability" *Brady* rule.[66] This ensures that the state cannot circumvent the *Brady* rule by destroying the evidence and then claiming it is not "in possession."[67] The more troublesome question arises with reference to evidence never collected.

Miller turned on the issue of whether or not the prosecution can "possess" a breath sample.[68] By phrasing the issue in this manner, the court became captive to classifying various types and conditions of evidence as either possessable or not. Because the *Miller* court determined that breath was not possessable, it concluded that no duty of disclosure arose with reference to the breath itself.[69] If no disclosure duty exists, it follows that the state could not be required to collect a breath sample for an accused.[70]

In contrast, *Garcia, Scales*, and *Baca* do not initiate their analyses with a literal interpretation of "possession." Rather, they focus on the more fundamental and significant issue of whether the defendant has a right of access to material and possibly favorable evidence, when such access is controlled by the state.[71] This analysis does not depend upon whether the particular case concerns breathalyzers and destruction of ampoule evidence[72] or intoxilyzers/intoximeters and consumption of the breath evidence during testing.[73]

The touchstone of the prosecutorial duty to disclose evidence is the state's obligation to ensure justice.[74] Generally, the state must disclose evidence sought by the intoxication case defendant when it is material and possibly favorable, and "where nondisclosure would deprive him of a fair trial."[75] Where destruction of breathalyzer ampoule evidence

66. United States v. Bryant, 439 F.2d 642, 651 (D.C. Cir. 1971); People v. Hitch, 12 Cal. 3d 641, 650, 527 P.2d 361, 367, 117 Cal. Rptr. 9, 15 (1974).

67. United States v. Bryant, 439 F.2d 642, 651 (D.C. Cir. 1971); People v. Hitch, 12 Cal. 3d 641, 651, 527 P.2d 361, 368, 117 Cal. Rptr. 9, 16 (1974).

68. 52 Cal. App. 3d at 670, 125 Cal. Rptr. at 343 (1975).

69. *Id.* at 669, 125 Cal. Rptr. at 342.

70. *Id.* at 670, 125 Cal. Rptr. at 343.

71. Baca v. Smith, 124 Ariz. at 356, 604 P.2d at 620; Scales v. City Court, 122 Ariz. at 234, 594 P.2d at 100 (1979); Garcia v. District Court, 197 Colo. at 45-46, 589 P.2d at 929-30 (1979). "Whether the evidence remains available to the state . . . or has been destroyed . . . is irrelevant to the question of whether the refusal to produce the evidence is violative of the state's duty to disclose." State v. Michener, 25 Or. App. 523, 532, 550 P.2d 449, 454 (1976).

72. *See* Garcia v. District Court, 197 Colo. at 45-47, 589 P.2d at 929-30; State v. Michener, 25 Or. App. 523, 532, 550 P.2d 449, 454 (1976).

73. *See* Baca v. Smith, 124 Ariz. at 355, 604 P.2d at 619; Garcia v. District Court, 197 Colo. at 45-47, 589 P.2d at 929-30. Note that a duty of *preservation* of ampoules arises in breathalyzer cases while a duty to *collect* breath has been imposed in intoxilyzer cases. *Baca*, however, may now impose a duty to collect a breath sample for defendant's use in breathalyzer cases. *See* text & notes 96-104 *infra*.

74. United States v. Bryant, 439 F.2d 642, 650 (D.C. Cir. 1971); *see* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-13 (1979); ABA PROJECT, *supra* note 26, at 92-93; ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 150 (1936).

75. People v. Hitch, 12 Cal. 3d 641, 648, 527 P.2d 361, 366, 117 Cal. Rptr. 9, 14 (1974) (quoting People v. Hunt, 4 Cal. 3d 231, 239, 481 P.2d 205, 210, 93 Cal. Rptr. 197, 203 (1971)). Note that the court in Lauderdale v. State, 548 P.2d 376 (Alaska 1976) seems to go even farther by stating

destroys the defendant's ability to demonstrate the favorability of obviously material evidence, the courts have found suppression and imposed a duty to preserve the ampoules.[76] The impossibility of a defendant establishing favorability is equally present when the state has destroyed the evidence in the process of testing by intoximeters and has not collected samples for independent testing. Thus, either nondisclosed evidence or uncollected evidence is "in a real sense 'lost' to the defendant, as effectively as if it had been destroyed."[77] In following the due process dictates of *Brady*, the *Garcia* and *Baca* courts concluded that "the failure of the state to collect and preserve evidence, when those acts can be accomplished as a mere incident to a procedure routinely performed by state agents, is tantamount to suppression of that evidence."[78]

Cases that require the state to collect and/or preserve intoxication evidence do, however, accord some weight to the state's administrative interests by limiting the extent of the disclosure duty. For example, *Hitch* established that sanctions for nonpreservation and nondisclosure of evidence would not be invoked if the government designed and in good faith attempted to follow "rigorous and systematic procedures designed to preserve the test ampoule."[79] Thus, in California, even when the state has destroyed the ampoule, if the established procedures have been fulfilled, the results of the breathalyzer test will be admitted into evidence.[80] The *Baca* court tempered the duty imposed on the state by minimizing the state's expenses. Unlike *Garcia*,[81] *Baca* does not require that a separate breath sample be taken in all cases where a defendant submits to a breath test.[82] The Arizona court limited the state's duty to collect to those cases where the defendant makes a written request, thereby avoiding unnecessary state expense which would otherwise result when defendants do not contest the charges.[83]

An Alternative to Baca v. Smith

Baca established the rule that when breath testing by the state completely destroys the evidence, the state must collect and preserve a

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that a denial of the right to retest an ampoule is reversible error without the need for showing prejudice to the defense. *Id.* at 381.

76. *E.g.*, Lauderdale v. State, 548 P.2d 376, 380-81 (Alaska 1976); Scales v. City Court, 122 Ariz. 231, 234, 594 P.2d 97, 100 (1979); People v. Hitch, 12 Cal. 3d 641, 649, 527 P.2d 361, 367, 117 Cal. Rptr. 9, 15 (1974).

77. People v. Hitch, 12 Cal. 3d at 648, 527 P.2d at 367, 117 Cal. Rptr. at 15.

78. Baca v. Smith, 124 Ariz. at 355, 604 P.2d at 619 (quoting Garcia v. District Court, 197 Colo. at 46, 589 P.2d at 929-30)).

79. 12 Cal. 3d at 652, 527 P.2d at 369, 117 Cal. Rptr. at 17.

80. *Id.* at 653, 527 P.2d at 369, 117 Cal. Rptr. at 17.

81. 197 Colo. at 46-47, 589 P.2d at 930.

82. 124 Ariz. at 356, 604 P.2d at 620.

83. *Id.*

separate sample of breath for the later independent use of the accused when he or she so requests.[84] Prior to *Baca*, section 28-692(F) of the Arizona Revised Statutes already provided that defendants who submit to the police-administered breath test are entitled to have additional intoxication tests performed by doctors of their choice.[85] This type of statute is designed to provide arrested individuals with scientific evidence with which to rebut the results of the state's police-administered test.[86] Considering the existence of Section 28-692(F), the court's reasoning in *Baca* that "the defense has little or no recourse to alternate scientific means of contesting the test results"[87] appears questionable.[88]

The *Baca* opinion relied almost exclusively on *Garcia* for authority. Unlike Arizona, however, Colorado has no statutory provision guaranteeing an accused the opportunity to obtain independent chemical analysis of his or her blood alcohol concentration.[89] Consequently, the *Garcia* court had to rely on a due process analysis to assure that the motorist had a reasonable opportunity to secure independent evidence of sobriety.[90]

It is possible that the *Baca* court concluded that the persuasiveness of tests conducted on breath, blood, or urine gathered at a time remote from arrest pursuant to the statute would not be as compelling as evidence gathered immediately following the arrest. It is well established

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84. *Id.* at 355-56, 604 P.2d at 619-20.

85. ARIZ. REV. STAT. ANN. § 28-692(F) (Supp. 1980-81) provides in part: "The person tested may have a physician or a qualified technician, chemist, registered nurse or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer."

86. *See* R. ERWIN, *supra* note 11, § 5B.04C, at 5B-10.24(4).

87. 124 Ariz. at 356, 604 P.2d at 620.

88. The Arizona Supreme Court apparently did not consider whether § 28-692(F) is a viable alternative to the requirement imposed by *Baca* that the state provide a separate breath sample upon demand by the defendant. Note that even before *Baca, Scales* cast doubt on the viability of the statute. Casenote, *supra* note 26, at 244 n.64. *Compare* State v. Superior Court, 107 Ariz. 332, 334, 487 P.2d 399, 401 (1971) (Arizona's statutory right to secure independent intoxication testing was sufficient for due process purposes) *with* Scales v. City Court, 122 Ariz. at 233-35, 594 P.2d at 99-101 (due process requires retention and preservation of breathalyzer ampoules).

The *Baca* court makes an oblique reference in a footnote to the fact that defendant Baca had requested a blood test but that none was given. 124 Ariz. at 357 n.2, 604 P.2d at 621 n.2. The court could have related these facts to an assessment of the defendant's ability to actually invoke the statutory right to have an independent blood test performed. If defendants are ignorant of this statutory right, are too inebriated to invoke it, or are routinely being denied it once invoked, then a *Baca*-type ruling may well be called for in order that the accused be able to secure evidence whose probative weight equals that of the state's evidence. Arizona previously has given added protection to the statutory right to have an independent chemical test performed by an expert of defendant's choice. Should the state fail to provide a suspect with every reasonable opportunity to secure such a test, or should unreasonable interference with an individual's efforts to gather such evidence occur, the case must be dismissed. Smith v. Ganske, 114 Ariz. 515, 516-17, 562 P.2d 395, 396-97 (1977); Smith v. Cada, 114 Ariz. 510, 514, 562 P.2d 390, 394 (1977).

89. *See generally* COLO. REV. STAT. § 42-4-1202 (1976); Comment, *Breathalyzers: Should the State Be Required to Preserve the Ampoules?*, 15 LAND & WATER L. REV. 299, 312 (1980).

90. Garcia v. District Court, 197 Colo. at 45, 589 P.2d at 929. *See* Comment, *supra*, note 89, at 311-12.

that blood alcohol evidence must be gathered promptly in order to accurately reflect the individual's state of inebriation at the time of arrest.[91] Comparison of results from tests conducted on samples of the same substance collected at the same time is likely to be of more probative weight than comparison of results from tests conducted on samples of different substances gathered at different times. Thus, the *Baca* decision affords a defendant access to evidence virtually identical to that possessed by the state. Rather than articulating any such reasoning, however, the *Baca* court relied on the logic of *Garcia*, which because of the differences between Colorado and Arizona statutory law, may not be directly analogous.

Since Arizona already provides for independent testing of blood alcohol concentration by an expert of the defendant's choosing,[92] and because the court is obviously concerned that defendants should have "scientific means of contesting the [state's] test results,"[93] a narrower decision reaching the same ends would have required the police simply to continue their practice of informing the accused of the right to have an independent test.[94] Only a well-informed individual will be aware of the right to independently secure evidence of potential exculpatory or impeachment value; consequently, a rule requiring that defendants be informed would ensure that they are accorded due process.[95]

The Impact of the Baca Rule of Breathalyzer Evidence

Because of the limited exposition of supporting reasoning and the language used in *Baca*, two antithetical interpretations of the meaning of the decision are possible.[96] One of the determinative factors leading

91. State v. Pandoli, 109 N.J. Super. 1, 4, 262 A.2d 41, 42 (Super. Ct. App. Div. 1970) notes the "rapidity with which the passage of time and the physiological processes tend to eliminate evidence of ingested alcohol in the system. . . ." *See* Smith v. Ganske, 114 Ariz. 515, 517, 562 P.2d 395, 397 (1977); R. ERWIN, *supra* note 11, § 30.06, at 30-14 to 30-15.

92. ARIZ. REV. STAT. ANN. § 28-692(F) (Supp. 1980-81).

93. Baca v. Smith, 124 Ariz. at 356, 604 P.2d at 620.

94. When investigators are not obligated to gather samples for the defendant's later analysis, the responsibility is on the defendant to request that independent tests be made. R. ERWIN, *supra* note 11, § 30.01(2), at 30-3.

95. Apparently recognizing that uninformed individuals may not request a separate breath sample, the *Baca* court required that the defendant be informed of the right to a sample. 124 Ariz. at 356, 604 P.2d at 620. Only then will the failure to request operate as a waiver of the right. *Id.*

96. Indeed, both the defense and the prosecution are relying on *Baca*—to different ends—in Tucson City Court DWI cases. The state's position is that the *Baca* ruling should be limited to similar fact situations, *i.e.*, intoximeter testing, and is not to be extended to breathalyzer cases. Opposition to Motion to Suppress at 5, State v. Smith, No. 2-16655 (Tucson J.P. Ct. 1980); Minute Entry at 2-3, State v. City Court, No. 189159 (Pima County Super. Ct. Oct. 21, 1980). In addition, city and county prosecutors maintain that *Baca* leaves undisturbed the *Scales* ruling which, according to the state, held that, "it is only necessary to preserve the ampoule" in a breathalyzer case. State's Response to Motion to Suppress at 2, State v. Rylance, No. 791483 (Tucson City Ct. 1980). *See* Opposition to Motion to Suppress at 4-5, State v. Smith, No. 2-16655 (Tucson J.P. Ct. 1980).

to *Baca's* mandate to collect breath samples is the fact that the breath is consumed or destroyed by analysis.[97] Consequently, exactly what constitutes "consumption" must be determined. The type of intoximeter used in *Baca* destroys the sample of breath which it tests, leaving no substance available for retesting.[98] The breathalyzer, on the other hand, contains an ampoule which holds chemicals altered by the passage of breath through a glass tube.[99] Although this ampoule cannot be retested, its physical properties and those of the breathalyzer apparatus can be analyzed for possible evidence with which to impeach the prosecution's breathalyzer test procedure.[100]

If the courts view the breathalyzer test as consuming the defendant's breath since in fact none remains for retesting, then in accordance with *Baca*, law enforcement officers will be required to collect and preserve a breath sample when administering a breathalyzer test.[101] This will impose a duty upon the state beyond the duty to preserve the breathalyzer ampoule as mandated by *Scales v. City Court*.[102] Despite *Scales'* delineation of the rebuttal information obtainable by a physical examination of the ampoule,[103] the *Baca* court may have reasoned that such evidence is of limited value and that tests conducted by the defense on actual breath samples would provide a better opportunity for possible defense against the state's breath tests. By examining the ampoule, the defendant can merely attack the reliability of a specific component of the breathalyzer instrument. If *Baca* applies to breathalyzer cases, however, the defendant has an even broader source of evidence with which to defend against the state's evidence—tests conducted on

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Defendants, on the other hand, assert that the ampoule is of little use since the breath sample is destroyed during the testing procedure. Motion to Suppress at 1-2, State v. Harrison, No. 809652 (Tucson City Ct. 1980). Defendants thus argue that *Baca's* requirement to collect and preserve a breath sample for the defendant's use when testing consumes the evidence applies regardless of whether a breathalyzer or intoximeter is used. *See id.*; note 101 *infra*.

97. 124 Ariz. at 354, 356, 604 P.2d at 618, 620.

98. *Id.* at 354, 604 P.2d at 618. Note, however, that at least one intoxilyzer model, the CMI Intoxilyzer, is capable of both testing a sample and preserving another sample. This device has been used since mid-November, 1980, by the Tucson Police Department to gather evidence for prosecutorial use, as well as to satisfy the dictate of *Baca* that the defendant be provided a separate sample for independent testing. Interview with Sgt. Robert J. Fund, *supra* note 22.

99. Scales v. City Court, 122 Ariz. at 233, 594 P.2d 97, 99 (1979).

100. *See id.* at 233-34, 594 P.2d at 99-100.

101. In a recent appeal to the superior court, the state contended that the *Baca* mandate pertained only to cases where the police use the intoximeter, and did not require collection and preservation of a separate breath sample in breathalyzer cases. Minute Entry at 2-3, State v. City Court, No. 189159 (Pima County Super. Ct. Oct. 21, 1980). The superior court rejected this reasoning and upheld the city court's suppression of the breathalyzer ampoule evidence. *Id.* at 3. The minute entry for the appeal notes: "The ampoule in no way preserves a portion of the breath which is the evidence that is analyzed and which is destroyed in the analysis. . . ." *Id.* at 2. *See generally* Tucson Citizen, Oct. 23, 1980, § D, at 6, col. 1.

102. 122 Ariz. at 234, 594 P.2d at 100.

103. *Id.* at 233, 594 P.2d at 99.

an unaltered sample of breath itself taken immediately after the state's own sample is collected.[104]

If, on the other hand, the breathalyzer is not perceived as destroying the defendants' breath, then there will be no duty to collect a separate breath sample in breathalyzer cases.[105] This interpretation of *Baca* would contradict *Garcia v. District Court*, however, since the Colorado court held that even when a defendant's breath is tested by the breathalyzer, a separate sample of breath must be collected and preserved for possible rebuttal use by the defense.[106] This potential for a contradiction of *Garcia* is especially significant since *Baca* explicitly accepted the principles of that case.[107]

Conclusion

Baca v. Smith is not unique in requiring prosecutors and investigators to gather evidence of potential exculpatory value for the defense. By mandating the collection as well as preservation of breath samples, *Baca* joins *Garcia* in going beyond any duty of disclosure previously established in breath testing cases. *Baca* applies the *Garcia* rationale with little elaboration, despite the fact that Arizona already has in existence a statute which guarantees a procedure for independent blood tests. Arguably, the goal that defendants must have fair access to independent evidence could have been achieved with less administrative burden by requiring arresting officers simply to continue the practice of informing the accused of the statutory right to secure separate intoxication testing at the accused's own expense. Since Colorado does not have a statute providing the defendant with a right to independent testing, the *Baca* court's total reliance upon *Garcia* may be misplaced. Also, since *Garcia* was broader than Arizona law in requiring that breath be preserved even if a breathalyzer is employed instead of an intoximeter, *Baca* may create troublesome issues in application.

Rather than explicitly setting forth its underlying rationale, *Baca* incorporates the language of *Garcia* with little explanation. Nevertheless, because breath is in essence "consumed" by breathalyzer testing just as in intoximeter testing, and because of the Arizona Supreme Court's concern that trials of criminal cases continue to be a "sober

104. In essence, such an interpretation of *Baca* would mean that preservation of breathalyzer ampoules as mandated by *Scales* is no longer sufficient to protect a defendant's right to a fair trial.

105. That is, preservation of the ampoule alone, according to the dictates of *Scales*, will be sufficient.

106. 197 Colo. at 46-47, 589 P.2d at 929-30.

107. 124 Ariz. at 355-56, 604 P.2d at 619-20.

search for truth," *Baca* should be read to mandate collection and preservation of breath samples for defendants' use in breathalyzer as well as intoximeter cases.

Jean C. Florman

VI. EVIDENCE

A. DISCLOSING GALLAGHER AGREEMENTS TO THE JURY

Gallagher agreements,[1] known in other states as Mary Carter agreements[2] or loan receipt agreements,[3] are partial settlement devices used in multiple-defendant litigation.[4] Such agreements are entered into between the plaintiff and one or more, but not all, of the defendants.[5] The defendant or defendants who have entered into such agreements remain in the suit.[6] Although their specific conditions may vary,[7] such agreements generally limit or extinguish the agreeing defendant's financial responsibility while guaranteeing the plaintiff a minimum recovery.[8] The agreeing defendant's maximum liability is

1. For examples of Gallagher agreements, see Mustang Equip., Inc. v. Welch, 115 Ariz. 206, 207-08, 564 P.2d 895, 896-97 (1977); City of Tucson v. Gallagher, 108 Ariz. 140, 142, 493 P.2d 1197, 1199 (1972); Hemet Dodge v. Gryder, 23 Ariz. App. 523, 529, 534 P.2d 454, 460 (1975).

2. Note, *Are Gallagher Agreements Unethical?: An Analysis Under the Code of Professional Responsibility*, 19 ARIZ. L. REV. 863, 865 (1977) [hereinafter cited as *Are Gallagher Agreements Unethical?*]; Note, *The Mary Carter Agreement—Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S. CAL. L. REV. 1393, 1396 n.25 (1974) [hereinafter cited as *Collusive Settlements*]. The term "Mary Carter" was coined in Maule Indus., Inc. v. Rountree, 264 So. 2d 445, 447 (Fla. Dist. Ct. App. 1972), *rev'd on other grounds*, 284 So. 2d 389 (Fla. 1973), from a prior Florida case, Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. Dist. Ct. App. 1967).

3. Loan receipt agreements are very similar to Gallagher and Mary Carter agreements in that they guarantee a minimum recovery to the plaintiff and limit the agreeing defendant's liability. Note, *Are Gallagher Agreements Unethical?, supra* note 2, at 867 n.38. In a loan receipt agreement, however, the agreed amount is paid in advance to the plaintiff who agrees to repay the loan or some portion thereof from any judgment obtained from the nonagreeing defendant. *Id.* Sequoia Mfg. Co. v. Halec Constr. Co., 117 Ariz. 11, 22-23, 570 P.2d 782, 793-94 (Ct. App. 1977), involved a loan receipt agreement as defined above. The court stated that the agreement was a Gallagher agreement and subject to all requirements of such agreements. Thus, loan receipt agreements can be said to fall within the class of Gallagher agreements in Arizona. For other examples of loan receipt agreements, see Reese v. Chicago, Burlington & Quincy R.R., 55 Ill. 2d 356, 358, 303 N.E.2d 382, 383-84 (1973); Northern Indiana Pub. Serv. Co. v. Otis, 145 Ind. App. 159, 170-71, 250 N.E.2d 378, 387 (1969). Because loan receipt agreements so closely resemble Gallagher and Mary Carter agreements, *see* Michael, *"Mary Carter" Agreements in Illinois*, 64 ILL. B.J. 514, 515 (1976), such partial settlement devices will be considered collectively and hereinafter will be referred to as Gallagher agreements.

4. Taylor v. DiRico, 124 Ariz. 513, 519, 606 P.2d 3, 9 (1980) (Gordon, J., concurring); Note, *Collusive Settlements, supra* note 2, at 1397.

5. Mustang Equip., Inc. v. Welch, 115 Ariz. 206, 208, 564 P.2d 895, 897 (1977); Maule Indus., Inc. v. Rountree, 264 So. 2d 445, 446 (Fla. Dist. Ct. App. 1972), *rev'd on other grounds*, 284 So. 2d 389 (Fla. 1973).

6. Taylor v. DiRico, 124 Ariz. 513, 519, 606 P.2d 3, 9 (1980) (Gordon, J., concurring); Cox v. Kelsey-Hayes Co., 594 P.2d 354, 358 (Okla. 1978); Note, *Collusive Settlements, supra* note 2, at 1396; Comment, *Mary Carter Agreements: Unfair and Unnecessary*, 32 Sw. L.J. 779, 784 (1978) [hereinafter cited as *Mary Carter Agreements*]; Comment, *Mary Carter Agreements: A Viable Means of Settlement?* 14 TULSA L.J. 744, 754 (1979) [hereinafter cited as *A Viable Means*].

7. *See* Maule Indus., Inc. v. Rountree, 264 So. 2d 445, 447 (Fla. Dist. Ct. App. 1972), *rev'd on other grounds*, 284 So. 2d 389 (Fla. 1973). "[T]he number of variations of the so-called 'Mary Carter Agreement' is limited only by the ingenuity of counsel and the willingness of the parties to sign. . . ."

8. *See* Ward v. Ochoa, 284 So. 2d 385, 387 (Fla. 1973); Burkett v. Crulo Trucking Co., 355

usually dependent on the final adjudication of liability[9] or the amount of the judgment.[10] The agreeing defendant's obligation is inversely related to that of the nonagreeing defendants.[11]

In *Taylor v. DiRico*,[12] Frances DiRico, the plaintiff, brought a wrongful death action against Doctors Roy Weinrach, Max Taylor, and John Cahill for negligently treating Mario DiRico, her husband.[13] Dr. Weinrach entered into a Gallagher agreement with the plaintiff, specifying that he was to pay $25,000 to the plaintiff.[14] Pursuant to the terms of the agreement, if the verdict was for the defendants or against Dr. Weinrach alone, Mrs. DiRico would keep the money; but if the verdict was against Dr. Taylor alone or against Dr. Taylor and Dr. Weinrach, plaintiff would repay the $25,000 but execute only against Dr. Taylor.[15] The plaintiff won a $200,000 judgment against Taylor and Weinrach.[16]

The agreement was disclosed to the court and to Dr. Taylor's attorney at the close of evidence.[17] Dr. Taylor's attorney then requested that the jury be informed of the agreement or, in the alternative, that Dr. Weinrach be excluded from further participation in the trial.[18] The trial court denied both requests and Dr. Taylor appealed.[19] The Arizona Supreme Court held that the trial court did not err in refusing to disclose the agreement to the jury.[20] Moreover, the court held that the trial court has considerable discretion in determining whether a Gal-

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N.E.2d 253, 258 (Ind. Ct. App. 1976); Note, *Collusive Settlements, supra* note 2, at 1396-97; Comment, *A Viable Means, supra* note 6, at 754.

In Mustang Equip., Inc. v. Welch, 115 Ariz. 206, 564 P.2d 895 (1977), the Arizona Supreme Court concluded that an agreement, whereby the agreeing defendant provided the plaintiff with the name of a third party and a report concerning that party in exchange for the plaintiff's promise to execute any joint judgment solely against the unnamed defendant, was a Gallagher agreement. *Id.* at 209, 564 P.2d at 898. Although the plaintiff was not guaranteed a minimum recovery, the court viewed the distinction between the agreement in *Mustang Equipment* and prior agreements as one of degree and not of substance since the probability of a verdict favorable to the plaintiff was increased. *Id.*

9. *See* Taylor v. DiRico, 124 Ariz. 513, 515, 606 P.2d 3, 5 (1980); Mustang Equip., Inc. v. Welch, 115 Ariz. 206, 209, 564 P.2d 895, 898 (1977); Note, *Collusive Settlements, supra* note 2, at 1396-97; Comment, *Mary Carter Agreements, supra* note 6, at 783.

10. *See* City of Tucson v. Gallagher, 108 Ariz. 140, 142, 493 P.2d 1197, 1199 (1972); General Motors Corp. v. Simmons, 558 S.W.2d 855, 857 (Tex. 1977); Note, *Collusive Settlements, supra* note 2, at 1397.

11. Maule Indus., Inc. v. Rountree, 264 So. 2d 445, 446 n.2 (Fla. Dist. Ct. App. 1972), *rev'd on other grounds*, 284 So. 2d 389 (Fla. 1973); Grillo v. Burke's Paint Co., 275 Or. 421, 425 n.1, 551 P.2d 449, 452 n.1 (1976); Note, *Collusive Settlements, supra* note 2, at 1396.

12. 124 Ariz. 513, 606 P.2d 3 (1980).

13. *Id.* at 514, 606 P.2d at 4. At the close of evidence, the trial court granted a directed verdict in favor of Dr. Cahill. *Id.* at 515, 606 P.2d at 5.

14. *Id.* at 515, 606 P.2d at 5.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 516, 606 P.2d at 6.

lagher agreement should be disclosed to the jury.[21] In making this determination, the trial court must observe the conduct and demeanor of all counsel, the overall atmosphere of the courtroom, and other factors which might bear on the integrity of the trial.[22]

This casenote will examine the policies for permitting Gallagher agreements and the effects of such agreements upon trials. The treatment of these agreements in Arizona and other states will then be examined. Finally, the *Taylor* decision will be evaluated.

The Policy Favoring Settlements

There exists a well recognized maxim that the law favors settlements.[23] This policy is justified by several arguments. The private resolution of conflicts eases court dockets.[24] In addition, an out-of-court compromise is more likely to protect the interests of the parties and to create a satisfactory solution for all involved in the settlement.[25] Finally, settlement in multiple-defendant cases simplifies complex litigation.[26]

This policy favoring settlements supports the use of Gallagher agreements.[27] In addition, many Gallagher agreements allow plaintiffs to enter into agreements from which they will be paid immediately, providing them with funds needed for litigation or living expenses.[28] Gallagher agreements also allow a concurrent tortfeasor, who for some reason cannot obtain indemnity, to limit or escape liability.[29] Finally,

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21. *Id.* The court failed to address Dr. Taylor's argument that Dr. Weinrach should be excluded from further participation in the trial. *See id.* at 515-16, 606 P.2d at 5-6; text & notes 100-08 *infra*.

22. *Id.* at 516, 606 P.2d at 6.

23. Mustang Equip., Inc. v. Welch, 115 Ariz. 206, 211, 564 P.2d 895, 900 (1977); Michael, *supra* note 3, at 525; Comment, *Settlements in Multiple Tortfeasor Controversies—Texas Law*, 10 ST. MARY'S L.J. 75, 75-76 (1978); Note, *Collusive Settlements, supra* note 2, at 1397.

24. Michael, *supra* note 3, at 525; Note, *Collusive Settlements, supra* note 2, at 1398.

25. Michael, *supra* note 3, at 525; Note, *Collusive Settlements, supra* note 2, at 1397.

26. Reese v. Chicago, Burlington & Quincy R.R., 55 Ill. 2d 356, 364, 303 N.E.2d 382, 386 (1973); Comment, *Mary Carter Agreements, supra* note 6, at 785-86.

27. Mustang Equip., Inc. v. Welch, 115 Ariz. 206, 211, 564 P.2d 895, 900 (1977); Reese v. Chicago, Burlington & Quincy R.R., 55 Ill. 2d 356, 364, 303 N.E.2d 382, 386 (1973); Comment, *Mary Carter Agreements, supra* note 6, at 785; Comment, *A Viable Means, supra* note 6, at 745.

28. Mustang Equip., Inc. v. Welch, 115 Ariz. 206, 207, 564 P.2d 895, 897 (1977); Reese v. Chicago, Burlington & Quincy R.R., 55 Ill. 356, 364, 303 N.E.2d 382, 386 (1973); Northern Indiana Pub. Serv. Co. v. Otis, 145 Ind. App. 159, 179, 250 N.E.2d 378, 392 (1969); Comment, *Mary Carter Agreement, supra* note 6, at 787.

29. Reese v. Chicago, Burlington & Quincy R.R., 55 Ill. 2d 356, 363, 303 N.E.2d 382, 386 (1973). The *Reese* court decided that the policy denying contribution between joint tortfeasors did not outweigh the policy favoring private settlement of lawsuits. *Id.*

By the doctrine of contribution, a jointly and severally liable defendant who has paid a judgment in full may collect from other joint tortfeasors whose negligence also contributed to the injury a proportionate share of the judgment. BLACK'S LAW DICTIONARY 297 (5th ed. 1979); Note, *Are Gallagher Agreements Unethical?, supra* note 2, at 865. Today, most states allow contribution either by statute or judicial decision. Taylor v. DiRico, 124 Ariz. at 521, 606 P.2d at 11 (Gordon, J., concurring). Neither Illinois nor Arizona, however, permit contribution. Therefore, Gallagher agreements in those states frequently force the nonagreeing defendant to pay the entire

such agreements allow the plaintiff to retain all defendants in the litigation.[30]

Gallagher agreements are only partial settlements, however, and have therefore been criticized as not promoting settlement at all.[31] The argument that Gallagher agreements ease court dockets fails because cases in which such agreements have been reached still go to trial.[32] Furthermore, such agreements do not simplify complex litigation because the agreeing defendants remain in the trial.[33] Most importantly, while providing a satisfactory solution for the parties to the agreement, such agreements ignore the interests and rights of the defendants not participating.[34]

The major criticism of Gallagher agreements has been that they allow the plaintiff and agreeing defendants to maintain artificially the position of adversaries,[35] thus weakening the adversarial process and controverting the policy favoring fairness and justice.[36] Although defendants in a suit are not required to be friendly or allied against the

judgment. *Id.* at 519-20, 606 P.2d at 9-10 (Gordon, J., concurring). The agreement in *Taylor* had this effect. *Id.* at 515, 606 P.2d at 5. In his concurring opinion, Justice Gordon argued that allowing contribution among joint tortfeasors would have a positive effect in multiple-defendant suits involving Gallagher agreements. *Id.* at 520, 606 P.2d at 10 (Gordon, J., concurring). The pressure on defendants to enter into Gallagher agreements would not be as great, and the inequity of forcing one defendant to pay for the negligence of all would be eliminated. *Id.* at 520-21, 606 P.2d at 10-11 (Gordon, J., concurring). Justice Gordon concluded that perhaps it is time for Arizona to join the majority of jurisdictions which allow contribution. *Id.* at 521, 606 P.2d at 11 (Gordon, J., concurring). This position is examined in Comment, *Denying Contribution Between Tortfeasors in Arizona: A Call for Change*, 1977 ARIZ. ST. L.J. 673, 683-96.

30. Retaining all defendants in the litigation is often desirable to the plaintiff to prove negligence and to increase the likelihood of a favorable verdict. For example, in City of Tucson v. Gallagher, 108 Ariz. 140, 493 P.2d 1197 (1972), the plaintiff sustained serious injuries when the car in which she was riding dropped into a washout that was not marked or barricaded. *Id.* at 142, 493 P.2d at 1199. She sued the city and the driver. Plaintiff and counsel for the driver entered into a Gallagher agreement and the driver continued in the suit. *Id.* Plaintiff did not want to proceed only against the city because in that event the city could have argued to the jury that the driver caused the accident and the plaintiff had sued the wrong party. *Id.* Note, *Collusive Settlements, supra* note 2, at 1396; Comment, *A Viable Means, supra* note 6, at 754.

31. Note, *Collusive Settlements, supra* note 2, at 1396; Comment, *Mary Carter Agreements, supra* note 6, at 785-86; Note, *Settlement in Joint Tort Cases*, 18 STAN. L. REV. 486, 488-89 (1966).

32. Reese v. Chicago, Burlington & Quincy R.R., 55 Ill. 2d 356, 367, 303 N.E.2d 382, 388 (1973); Comment, *Mary Carter Agreements, supra* note 6, at 785-86.

33. Comment, *Mary Carter Agreements, supra* note 6, at 785-86.

34. Michael, *supra* note 3, at 525. Some critics argue that Gallagher agreements often shift liability from a more culpable to a less culpable party. Note, *Settlements—Loan Agreements as Settlement Devices—Affirmative Duty to Disclose Loan Agreement to the Court and to the Remaining Defendants—Gatto v. Walgreen Drug Co.*, 25 DE PAUL L. REV. 792, 801 (1976). In Reese v. Chicago, Burlington & Quincy R.R., 55 Ill. 2d 356, 303 N.E.2d 382 (1973), the dissent stated that Gallagher agreements can effectively shift the entire loss to the less blameworthy party because the more blameworthy party is generally willing to offer more to escape liability entirely. *Id.* at 367, 303 N.E.2d at 388.

35. Taylor v. DiRico, 124 Ariz. at 520, 606 P.2d at 10 (Gordon, J., concurring); Cox v. Kelsey-Hayes Co., 594 P.2d 354, 358 (Okla. 1978); City of Houston v. Sam P. Wallace & Co., 585 S.W.2d 669, 672 (Tex. 1979); Comment, *Mary Carter Agreements, supra* note 6, at 792; Comment, *A Viable Means, supra* note 6, at 763.

36. Lum v. Stinnett, 87 Nev. 402, 410, 488 P.2d 347, 352 (1971); Trampe v. Wisconsin Tel. Co., 214 Wis. 210, 218, 252 N.W. 675, 678 (1934); Note, *Collusive Settlements, supra* note 2, at 1399.

plaintiff on the question of liability,[37] the agreeing defendant and plaintiff are in a position to act collusively when a Gallagher agreement is involved.[38] They can work together to insure a large verdict for the plaintiff and at the same time insure that the agreeing defendant will pay little or nothing.[39] The defendant involved in the agreement, even though sympathetic to the plaintiff, can change defenses and be called by the plaintiff as an adverse witness.[40] The plaintiff's attorney may lead and cross-examine such adverse witnesses, procedures which cannot be used with the plaintiff or another favorable witness.[41] Favorable statements made by a supposedly adverse party can affect the jury significantly by leading them to believe that the defendants are guilty and a large verdict should be returned.[42]

Although Gallagher agreements are heavily criticized as unethical and against public policy,[43] few states have held them invalid per se.[44] Some states, however, allow the use of such agreements but require that certain procedures or safeguards be followed.[45] For example, courts are nearly unanimous in holding that such agreements must not be kept

37. Northern Indiana Pub. Serv. Co. v. Otis, 145 Ind. App. 159, 182, 250 N.E.2d 378, 393 (1969); Comment, *Mary Carter Agreements, supra* note 6, at 789.

38. Taylor v. DiRico, 124 Ariz. at 520, 606 P.2d at 10 (1980) (Gordon, J., concurring); Mustang Equip., Inc. v. Welch, 115 Ariz. 206, 210-11, 564 P.2d 895, 899-900 (1977); Note, *Collusive Settlements, supra* note 2, at 1399-1400.

39. For example, in Lum v. Stinnett, 87 Nev. 402, 488 P.2d 347 (1971), two defendants accepted a Gallagher agreement whereby the defendants would pay any amount necessary to bring the plaintiff's recovery to $20,000, but that if the verdict exceeded $20,000, plaintiff would execute only against the nonagreeing defendant. *Id.* at 404, 488 P.2d at 348. The agreeing defendants accepted the agreement on condition that the plaintiff would not oppose a motion dismissing them at the close of plaintiff's case and would urge a jury verdict in excess of $20,000, thereby precluding any obligation by them to pay. *Id.* at 405, 488 P.2d at 348. The plaintiff made the nonagreeing defendant the target of his opening argument. *Id.* The plaintiff then called both agreeing defendants as "adverse witnesses" and was able to lead them and to object to the nonagreeing defendant's attempt to cross-examine. *Id.* at 405, 488 P.2d at 349. *See* text & notes 41-42 *infra*. The agreeing defendants were dismissed without objection, and during final argument, the plaintiff did not suggest that either of them was negligent. 87 Nev. at 407, 488 P.2d at 350. The jury returned a verdict against the nonagreeing defendant for $50,000. *Id. See* Note, *supra* note 34, at 799.

40. Note, *supra* note 34, at 799; Comment, *Mary Carter Agreements, supra* note 6, at 792.

41. *See* Lum v. Stinnett, 87 Nev. 402, 405-06, 488 P.2d 347, 349 (1971); ARIZ. R. EVID. 611(c); Note, *supra* note 34, at 799; *Collusive Settlements, supra* note 2, at 1401.

42. *See* Lum v. Stinnett, 87 Nev. 402, 412, 488 P.2d 347, 352-53 (1971) (effect of testimony by supposedly adverse witness); Degen v. Bayman & Outboard Marine, 86 S.D. 598, 607-08, 200 N.W.2d 134, 139 (1972) (admission of liability by adverse party during trial); Note, *supra* note 34, at 799.

43. Lum v. Stinnett, 87 Nev. 402, 409, 488 P.2d 347, 351 (1971); Note, *Are Gallagher Agreements Unethical?, supra* note 2, at 891-92 ("the Gallagher covenant embraces unethical behavior," and its use by an attorney violates the obligations of the Code of Professional Responsibility); Note, *supra* note 34, at 802.

44. Lum v. Stinnett, 87 Nev. 402, 409, 488 P.2d 347, 351 (1971) (Gallagher agreements generally void as against public policy); *see* Trampe v. Wisconsin Tel. Co., 214 Wis. 210, 218, 252 N.W. 675, 678 (1934) (Gallagher agreement in case at bar void as against public policy); Note, *Collusive Settlements, supra* note 2, at 1408.

45. *E.g.*, Mustang Equip., Inc. v. Welch, 115 Ariz. 206, 211, 564 P.2d 895, 900 (1977); Ward v. Ochoa, 284 So. 2d 385, 387 (Fla. 1973); Cox v. Kelsey-Hayes Co., 594 P.2d 354, 360 (Okla. 1978).

secret and should be disclosed to the court and all parties in the case.[46] In an effort to ameliorate the prejudicial effects that an agreement has upon a nonagreeing defendant, courts have also adopted other solutions: that evidence of the agreement be disclosed to the jury either through instruction or through cross-examination;[47] or that the agreeing defendant be dismissed from the trial.[48]

Disclosure to the Jury

A majority of courts, in deciding whether Gallagher agreements should be admissible as evidence and disclosed to the jury, have held them admissible.[49] Some courts have followed the rule set forth in *Ward v. Ochoa*.[50] In *Ward*, the Florida Supreme Court held that Gallagher agreements are discoverable.[51] Further, if such an agreement reduces the agreeing defendant's maximum liability by increasing the liability of any of the codefendants, the agreement is admissible into evidence upon the request of any of those affected codefendants.[52] The evidentiary use of such agreements has been limited, however, to impeachment purposes and to guide the jury in considerations of motive

46. *E.g.*, Mustang Equip., Inc. v. Welch, 115 Ariz. 206, 211, 564 P.2d 895, 900 (1977); Ward v. Ochoa, 284 So. 2d 385, 387 (Fla. 1973); Gatto v. Walgreen Drug Co., 61 Ill. 2d 513, 523, 337 N.E.2d 23, 29 (1975). Disclosure to the court and all parties does not mean that the jury will also be informed of the agreement. *See* text & notes 49-61 *infra*. Courts require disclosure to the judge and other parties to avoid misleading the judge, Ward v. Ochoa, 284 So. 2d 385, 387 (Fla. 1973), or litigating fictitious suits. Gatto v. Walgreen Drug Co., 61 Ill. 2d 513, 523, 337 N.E.2d 23, 29 (1975); Trampe v. Wisconsin Tel. Co., 214 Wis. 210, 218, 252 N.W. 675, 678 (1934).

47. Ward v. Ochoa, 284 So. 2d 385, 387 (Fla. 1973); Maule Indus., Inc. v. Rountree, 264 So. 2d 445, 448 (Fla. Dist. Ct. App. 1972), *rev'd on other grounds*, 284 So. 2d 389 (Fla. 1973); Reese v. Chicago, Burlington & Quincy R.R., 55 Ill. 2d 356, 364, 303 N.E.2d 385, 387 (1973); Grillo v. Burke's Paint Co., 275 Or. 421, 427, 551 P.2d 449, 453 (1976); Bristol-Meyers Co. v. Gonzales, 561 S.W.2d 801, 805 (Tex. 1978); General Motors Corp. v. Simmons, 558 S.W.2d 855, 858 (Tex. 1977). *Cf.* Bedford School Dist. v. Caron Constr. Co., 116 N.H. 800, 805, 367 A.2d 1051, 1055 (1976) (not a Gallagher agreement, but the court likened it to one because it was to a third party's advantage to promote plaintiff's case).

48. Burkett v. Crulo Trucking Co., 171 Ind. App. 166, 175-77, 355 N.E.2d 253, 259 (1976) (requiring a separate trial for nonagreeing defendant and plaintiff); Cox v. Kelsey-Hayes Co., 594 P.2d 354, 359 (Okla. 1978).

49. *E.g.*, General Motors Corp. v. Lahocki, 286 Md. 714, 728, 410 A.2d 1039, 1046 (1980); Cox v. Kelsey-Hayes Co., 594 P.2d 354, 359 (Okla. 1978); Grillo v. Burke's Paint Co., 275 Or. 421, 426, 551 P.2d 449, 452 (1976). There are three methods of disclosing an agreement to the jury: (1) disclosure of all terms of the agreement, including the amount; (2) disclosure of all terms except the amount; and (3) disclosure of only the existence of the agreement. Comment, *A Viable Means, supra* note 6, at 765-66. In General Motors Corp. v. Lahocki, 286 Md. 714, 410 A.2d 1039 (1980), the Maryland Court of Appeals held that the jury should be informed of the positions of the parties by presentation of the Gallagher agreement itself if it contained no self-serving declarations, or by a statement outlining the terms of the agreement. *Id.* at 730, 410 A.2d at 1047. Another possible solution is to disclose an edited version of the agreement to the jury. Note, *Collusive Settlements, supra* note 2, at 1413.

50. 284 So. 2d 385 (Fla. 1973).

51. *Id.* at 387.

52. *Id.* The *Ward* rule was adopted in Maule Indus., Inc. v. Rountree, 264 So. 2d 445 (Fla. Dist. Ct. App. 1972), *rev'd on other grounds*, 284 So. 2d 389 (Fla. 1973), and Kuhns v. Fenton, 288 So. 2d 253, 254 (Fla. 1973). Other courts have found the *Ward* rule persuasive in admitting such agreements into evidence. *E.g.*, Bedford School Dist. v. Caron Constr. Co., 116 N.H. 800, 804, 367 A.2d 1051, 1055 (1976); Grillo v. Burke's Paint Co., 275 Or. 421, 426-27, 551 P.2d 449, 453 (1976).

and credibility.[53] Settlement agreements are not admissible with regard to any substantive issues.[54]

Arguments both for and against disclosure to the jury have been advanced. Arguments for disclosure are based on the assumption that the nonagreeing defendant will be unfairly prejudiced by nondisclosure.[55] Furthermore, the jury is not adequately informed of the true positions of the parties and thus cannot fairly evaluate the testimony of the agreeing defendant if the agreement is not disclosed.[56] The nonagreeing defendant can, however, be harmed by complete disclosure of the agreement if it has been filled by the agreeing defendant with self-serving comments and untrue statements which would damage the former's case.[57] In addition, upon learning the substance of the agreement, the jury might feel that the nonagreeing defendant acted unreasonably in failing to settle or is reluctant to do so because that defendant is more at fault.[58] On the other hand, the jury might think the agreeing defendant settled because he was more at fault.[59] Further, it might take the view that since the plaintiff received one settlement, another one is not deserved.[60] Because prejudice can result to any party, it has been argued that disclosure, without more, is not an acceptable way to deal with Gallagher agreements.[61]

Dismissal of the Agreeing Defendant

In *Cox v. Kelsey-Hayes Co.*,[62] the Oklahoma Supreme Court adopted an alternative method for dealing with Gallagher agreements. It held that an agreeing defendant who will directly benefit from the judgment must be dismissed from the case; otherwise the agreement is

53. Courts reason that the basis for admitting evidence of the agreement is to allow the nonagreeing defendant to show bias or prejudice of an agreeing defendant—a witness who has a financial interest in the plaintiff's case—thus aiding the jury in evaluating that witness' testimony. Bedford School Dist. v. Caron Constr. Co., 116 N.H. 800, 805, 367 A.2d 1051, 1055 (1976); Cox v. Kelsey-Hayes Co., 594 P.2d 354, 359 (Okla. 1978); General Motors Corp. v. Simmons, 558 S.W.2d 855, 858 (Tex. 1977); ARIZ. R. EVID. 408; Note, *Collusive Settlements, supra* note 2, at 1411.

54. Reese v. Chicago, Burlington & Quincy R.R., 55 Ill. 2d 356, 365, 303 N.E.2d 382, 387 (1973); Bedford School Dist. v. Caron Constr. Co., 116 N.H. 800, 805, 367 A.2d 1051, 1055 (1976); ARIZ. R. EVID. 408; Comment, *supra* note 23, at 77.

55. Ward v. Ochoa, 284 So. 2d 385, 387 (Fla. 1973); Reese v. Chicago, Burlington & Quincy R.R., 55 Ill. 2d 356, 364, 303 N.E.2d 382, 387 (1973); Note, *Collusive Settlements, supra* note 2, at 1410.

56. Reese v. Chicago, Burlington & Quincy R.R., 55 Ill. 2d 356, 361, 303 N.E.2d 382, 387 (1973); General Motors Corp. v. Simmons, 558 S.W.2d 855, 858-59 (Tex. 1977); Comment, *A Viable Means, supra* note 6, at 764.

57. General Motors Corp. v. Lahocki, 286 Md. 714, 728, 410 A.2d 1039, 1047 (1980); Note, *Collusive Settlements, supra* note 2, at 1411. See note 49 *supra*.

58. Note, *supra* note 34, at 800.

59. *Id.*

60. *Id.*

61. Cox v. Kelsey-Hayes Co., 594 P.2d 354, 359 (Okla. 1978); Note, *Collusive Settlements, supra* note 2, at 1412; Comment, *Mary Carter Agreements, supra* note 6, at 796.

62. 594 P.2d 354 (Okla. 1978).

deemed void as against public policy.[63] Dismissal of the agreeing defendant has been justified on the grounds that there are no justiciable issues between the parties to the agreement[64] and that the trial is not truly an adversarial proceeding if the agreeing defendant remains in the suit.[65] On the other hand, dismissal has been criticized as discouraging settlement.[66] Furthermore, an agreeing defendant who is dismissed is less available as a witness.[67] The Alaska Supreme Court has dealt with these disadvantages in a unique manner. In *Breitkreutz v. Baker*,[68] the court affirmed a trial court's limitation of the role that a defendant who is a party to a Gallagher agreement could maintain while still a party to the suit.[69] The agreement in the case determined the agreeing defendant's pecuniary liability but required that he remain in the suit.[70] The trial court limited his voir dire of the jury and allowed him to put on witnesses only in a limited capacity.[71] In addition, the trial court informed the jury of the settlement agreement and explained that no instructions allowing a finding of liability against the agreeing defendant would be given.[72] In affirming these limitations, the court stated that since the agreeing defendant had determined his liability, he had no interest in the outcome of the case and the court did not err in limiting his role.[73]

Arizona Law and Taylor v. DiRico

In *Mustang Equipment, Inc. v. Welch*,[74] the Arizona Supreme Court held that as a matter of public policy, Gallagher agreements should be disclosed before trial to the judge and to all parties or at the "earliest possible opportunity" if entered into after trial has begun.[75] The *Mustang* court found that the agreement in issue was not prejudicial to the parties and did not upset the adversarial posture of the parties or infringe the trial's integrity.[76] Nevertheless, the court stated that

63. *Id.* at 360.
64. Gatto v. Walgreen Drug Co., 61 Ill. 2d 513, 523, 337 N.E.2d 23, 29 (1975); City of Houston v. Sam P. Wallace & Co., 585 S.W.2d 669, 672 (Tex. 1979); Comment, *Mary Carter Agreements, supra* note 6, at 800.
65. *See* text & notes 35-36 *supra*.
66. A plaintiff is less likely to settle if a defendant who is important in proving the plaintiff's case to the jury will be lost at trial. *See* text & notes 23-26, 30 *supra*.
67. Michael, *supra* note 3, at 523. After dismissal, such persons could be called as witnesses if their testimony is relevant, although they could no longer be called as adverse witnesses. *Id.* See text & note 39 *supra*.
68. 514 P.2d 17 (Alaska 1973).
69. *Id.* at 29.
70. *Id.* at 19.
71. *Id.* at 28.
72. *Id.*
73. *Id.* at 29.
74. 115 Ariz. 206, 564 P.2d 895 (1977). See discussion at note 8 *supra*.
75. 115 Ariz. at 211, 564 P.2d at 900.
76. *Id.* at 210-11, 564 P.2d at 899-900. The agreement is discussed at note 8 *supra*.

keeping the Gallagher agreement secret could frustrate the policy favoring settlements, encourage collusion and wrongdoing, and have a negative effect on the public's view of the adversary system.[77]

In *Sequoia Manufacturing Co. v. Halec Construction Co.*,[78] the Arizona Court of Appeals adopted the *Ward v. Ochoa* rule[79] with substantial modification.[80] In *Sequoia*, one defendant agreed to make a loan equal to the maximum policy amount under its insurance coverage in exchange for the plaintiff's agreement to limit its liability to that amount.[81] The court stated that if a Gallagher agreement operated to enable the agreeing defendant to improve his financial position by insuring a verdict equal to or greater than a fixed amount, the agreement could be admitted into evidence at the discretion of the trial court.[82] The court should consider the possibility of collusion between parties or prejudice to the nonagreeing defendant in deciding whether the agreement should be admitted.[83]

In *Taylor v. DiRico*,[84] the Arizona Supreme Court addressed the admissibility question. It considered initially the agreement's effect on the trial to determine whether there had been collusion between the agreeing parties, fraud practiced on the court, or a breakdown in the adversarial setting.[85] After examining the record, the court concluded that the agreement had not damaged the integrity of the trial because the agreeing defendant had presented his closing argument just as if no agreement had been made.[86] The *Taylor* court relied on *Sequoia* in noting that the trial court is vested with considerable discretion in admitting Gallagher agreements.[87] Since the *Taylor* agreement had been disclosed to the court after the close of evidence,[88] disclosure of the agreement to the jury would not have been useful for impeachment or

77. 115 Ariz. at 211, 564 P.2d at 900.
78. 117 Ariz. 11, 570 P.2d 782 (Ct. App. 1977).
79. See text & notes 50-52 *supra*.
80. 117 Ariz. at 23-24, 570 P.2d at 794-95.
81. *Id.* at 24, 570 P.2d at 795.
82. *Id.* at 23, 570 P.2d at 794. The court stated that it was "probably obligatory" that the agreement be admitted, but suggested that some agreements might be too prejudicial to the plaintiff and the agreeing defendant to be admitted. *See id. Cf.* ARIZ. R. EVID. 403. "[A]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." *Id.* In analyzing the case, the court seemed persuaded by the fact that the agreeing defendant's primary purpose was to limit its maximum liability. 117 Ariz. at 24, 570 P.2d at 795.
83. 117 Ariz. at 24, 570 P.2d at 795. The court, then, has discretion to refuse to admit an agreement that is within the *Ward* rule. *See* text & notes 50-52 *supra*.
84. 124 Ariz. 513, 606 P.2d 3 (1980).
85. *Id.* at 515-16, 606 P.2d at 5-6. See text & notes 35-36 *supra*.
86. 124 Ariz. at 516, 606 P.2d at 6.
87. *Id.*
88. The plaintiff stated that this was the earliest possible moment after the parties reached an agreement. *Id.* at 515, 606 A.2d at 5. See text & note 75 *supra*.

as an aid to the jury in considerations of motive or credibility.[89] Thus, the *Taylor* court held that the trial court correctly refused to admit the agreement.[90]

In *Taylor*, the court took the position that trial courts have great discretion to decide whether Gallagher agreements should be disclosed to the jury.[91] This holding differs from the stand taken by many states that the agreement be admitted under the *Ward* rationale.[92] The *Taylor* holding can be supported, however, by Arizona Rule of Evidence 403 which permits relevant evidence to be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.[93] As mentioned earlier, disclosure of Gallagher agreements to the jury has certain disadvantages; all of the parties may be prejudiced as a result.[94] By adopting a flexible rule, the *Taylor* court has permitted Arizona trial courts to evaluate the potential prejudicial effects of disclosure to the jury, the conduct of counsel, witnesses, and parties, and the overall atmosphere of the courtroom on a case-by-case basis.[95] The trial court can thus reach a solution which will best preserve the policies of settlement and fair trial.[96]

The appellant asked the *Taylor* court to consider the alternative procedures for dealing with Gallagher agreements discussed above:[97] disclosure to the jury, or dismissal of the defendant who entered the agreement.[98] Although it held that the trial court properly exercised its discretion in not disclosing the agreement to the jury,[99] the court did not address the dismissal alternative.[100] In *Taylor*, the plaintiff received from the agreeing defendant the amount stipulated in the agreement when the agreement was made at the close of evidence.[101] The only relevant issue remaining concerning the agreeing defendant was the jury's determination of the other defendant's liability. If the jury found the other defendant liable, the agreeing defendant was to receive, pursuant to the agreement, a full refund of the amount paid to the plaintiff.[102]

89. 124 Ariz. at 516, 606 P.2d at 6.
90. *Id.*
91. *Id.*
92. *See* text & notes 49-52 *supra*.
93. ARIZ. R. EVID. 403.
94. *See* text & notes 55-61 *supra*.
95. *See* Taylor v. DiRico, 124 Ariz. at 516, 606 P.2d at 6; Sequoia Mfg. Co. v. Halec Constr. Co., 117 Ariz. 11, 24, 570 P.2d 782, 795 (Ct. App. 1977).
96. *See* text & notes 23-46 *supra*.
97. See text & notes 49-73 *supra*.
98. 124 Ariz. at 515, 606 P.2d at 5.
99. *Id.* at 516, 606 P.2d at 6.
100. *See id.* at 515-16, 606 P.2d at 5-6; text & notes 62-73 *supra*.
101. 124 Ariz. at 515, 606 P.2d at 5.
102. *Id.*

Under the reasoning of *Cox v. Kelsey-Hayes Co.*,[103] the continued participation of the *Taylor* defendant who had already paid the plaintiff pursuant to the agreement would have been against public policy.[104] According to the *Cox* rule, when no judiciable issues remain between the plaintiff and the agreeing defendant, the latter should be dismissed to preserve the adversary character of the proceedings.[105] In *Taylor*, the agreement was disclosed to the judge and the codefendant's counsel at the close of evidence, after the agreeing defendant could have been used as a witness.[106] The *Taylor* court determined, however, that the agreeing defendant presented his closing argument just as if no agreement had been made, thus preserving the integrity of the trial.[107] Given the timing of the agreement and the conduct of the agreeing defendant, the court was correct in deferring to the trial court's decision to allow the agreeing defendant to continue.[108] The court's deference is also consistent with the position taken in *Taylor* that the trial court should have broad discretion in dealing with Gallagher agreements.[109]

Conclusion

The Arizona Supreme Court in *Taylor v. DiRico* considered whether a Gallagher agreement should be disclosed to the jury. In affirming the trial court, the Arizona Supreme Court recognized that trial courts have considerable discretion in determining the question. Although the holding does not follow the majority rule, it allows the trial court to evaluate when disclosure to the jury would be appropriate in order to assure fairness to all parties.

The nonagreeing defendant in *Taylor* also argued that the agreeing defendant should have been dismissed from the trial. Although this alternative was not addressed specifically, the court determined that the integrity of the trial had not been infringed by the agreeing defendant's continued participation. Its deference to the trial court's decision that the agreeing defendant remain is consistent with the position that the trial court should have considerable discretion in dealing with Gallagher agreements.

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103. 594 P.2d 354 (Okla. 1978).
104. *See id.* at 359.
105. *See* text & notes 63-65 *supra*.
106. 124 Ariz. at 515, 606 P.2d at 5. See text & note 67 *supra*.
107. 124 Ariz. at 516, 606 P.2d at 6. See text & notes 85-86 *supra*.
108. Had the agreement been made earlier than at the close of evidence, however, the *Cox* rule would be more compelling for dismissing the nonagreeing defendant. *See* text & notes 62-65 *supra*.
109. *See* text & notes 87, 91 *supra*.

VII. REAL ESTATE LAW

A. ESCROWEES' DUTY TO DISCLOSE FRAUD: AN EXPANSION OF THE LIMITED AGENCY DOCTRINE

Until recently, Arizona courts unanimously held that an escrow agreement effectively created a limited agency[1] giving rise to fiduciary duties consistent with general agency doctrine.[2] One exception, however, was that the duty of an escrow agent only encompassed instructions expressly or implicitly prescribed by the escrow contract.[3] Within this limitation, the escrow agent was required to perform its prescribed duties with "scrupulous honesty, skill, and diligence."[4] In *Berry v. McLeod*,[5] the Arizona Supreme Court reexamined the duty involved in the escrow relationship. The *Berry* court expanded the escrowee's duty by requiring disclosure of any knowledge of fraud that, if not revealed, would assist in perpetrating a fraud against a party to an escrow.[6] An escrowee who fails to disclose knowledge of fraudulent acts to the af-

1. *E.g.*, Brean v. North Campbell Professional Bldg., 26 Ariz. 381, 384, 548 P.2d 1193, 1196 (1976); Tucson Title Ins. Co. v. D'Ascoli, 94 Ariz. 230, 234, 383 P.2d 119, 121 (1963); Malta v. Phoenix Title & Trust Co., 76 Ariz. 116, 120, 259 P.2d 554, 557 (1953). Arizona courts actually refer to an escrow relationship as a trustee relationship rather than an agency relationship. *Id.* at 120, 259 P.2d at 557. This designation is a misnomer. The transfer of legal title to the trustee, which is a fundamental element of a valid trust, Chicago, Milwaukee & St. Paul Ry. Co. v. Des Moines Union Ry. Co., 254 U.S. 196, 208 (1920); RESTATEMENT (SECOND) OF TRUSTS § 2 (1959), is conspicuously absent from the "trustee" relationship in Arizona escrow agreements. In Tucson Title Ins. Co. v. D'Ascoli, 94 Ariz. 230, 234, 383 P.2d 119, 121 (1963), the court relied on a Fifth Circuit decision as authority for the Arizona "trustee" position. Tucker v. Dr. P. Phillips Co., 139 F.2d 601 (5th Cir. 1943). However, despite the *Tucker* court's contention that an escrowee is a trustee to an express trust, the court in the same opinion acknowledged that legal title does not pass to an escrowee. *Id.* at 602-03. It would perhaps be more appropriate to say that the duties of an escrowee are similar to a trustee's duties to its beneficiary. *See* Walter H. Leimert Co. v. Woodson, 125 Cal. App. 2d 186, 189, 270 P.2d 95, 97 (1954); Henderson v. Hassur, 225 Kan. 678, 687, 594 P.2d 650, 658 (1979). The Arizona escrow designation, as explicated in *Malta* and its progeny, is otherwise functionally similar to the California-type "dual agency" doctrine. *See* authorities cited at note 32 *infra*.

2. *See* text & notes 25-26 *infra*.

3. Shaheen v. American Title Ins. Co., 120 Ariz. 505, 508, 586 P.2d 1317, 1320 (Ct. App. 1978); Tucson Title Ins. Co. v. D'Ascoli, 94 Ariz. 230, 234, 383 P.2d 119, 121 (1963). In *D'Ascoli*, the Arizona Supreme Court stated that an escrowee's relationship to its principals is "one of trust and confidence" with the agent acting as trustee. *Id.* at 234, 383 P.2d at 121. The court limited this type of fiduciary relationship by holding that "[a]n escrow agent is held to strict compliance with the terms of the escrow agreement, and is liable for all damages resulting from any deviation." *Id.*

4. Tucson Title Ins. Co. v. D'Ascoli, 94 Ariz. 230, 234, 383 P.2d 119, 121-22 (1963).

5. 124 Ariz. 346, 604 P.2d 610 (1979).

6. *Id.* at 352, 604 P.2d at 616.

fected party will be liable for damages resulting from the fraud.[7]

In *Berry*, Richard McLeod contracted to sell two parcels of real property shortly before his death.[8] One of the transactions involved a 320 acre parcel that McLeod agreed to convey to W.R. Ranches for $160,000.[9] Unknown to McLeod, W.R. Ranches was a "dummy" corporation established by McLeod's real estate brokers for the purpose of reselling his property to another purchaser for $320,000.[10] The brokers attempted to create a single escrow with Stewart Title & Trust for both transactions.[11] Stewart Title's agent established simultaneous "back-to-back" escrows.[12] The first was for the sale between McLeod and W.R. Ranches, and the second was for the sale between W.R. Ranches and the third party, W.O. Stewart.[13] McLeod was completely unaware of the second transaction and the second escrow.[14] Thus, McLeod's brokers reaped an illegal secret profit, and the escrow agent was alleged to have known of the scheme.[15]

After his death, McLeod's personal representative brought an action against Stewart Title. The personal representative alleged that, through its agent, Stewart Title was negligent in the administration of the escrow for the 320-acre sale and violated its fiduciary duty by failing to disclose a known fraud.[16] The personal representative contended that an escrowee has a duty to inform the escrow parties of known fraud when the escrowee's silence would aid in accomplishing the fraud.[17]

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7. *See id.*

8. *Id.* at 348, 604 P.2d at 612. The court acknowledged that the facts were in serious dispute, but nevertheless assumed them for the purpose of its legal analysis. *Id.* at 352, 604 P.2d at 616.

9. *Id.* at 350, 604 P.2d at 614. A fraud action involving the other parcel of real property was also decided. The issues raised in that portion of the appeal involved the rights and liabilities of McLeod's real estate brokers, *id.* at 349, 604 P.2d at 613, and the McLeod estate's rights to certain unrelated financing costs. *Id.* Those issues are not addressed in this casenote.

10. *Id.* at 350-52, 604 P.2d at 614-16. *See* cases cited at note 15 *infra*.

11. 124 Ariz. at 350, 604 P.2d at 614.

12. *Id.* A "back-to-back" or "double" escrow is used "when a person is selling property which he does not own, but he has a right to purchase by virtue of a purchase agreement or option. . . . As long as the intermediary buyer-seller is not an agent of one of the parties, and as long as there is no other misrepresentation, the use of the 'double escrow' is a legitimate transaction." H. MILLER & M. STARR, CURRENT LAW OF CALIFORNIA REAL ESTATE § 12:83, at 395 (1977). The evidence used by the court indicates that in *Berry*, McLeod's brokers were using the "back-to-back" escrow illegally since they were also acting as McLeod's agents. *See* note 15 *infra*.

13. 124 Ariz. at 350, 604 P.2d at 614.

14. *Id.*

15. *Id.* at 352, 604 P.2d at 616. In Arizona, real estate brokers have been found liable for damages arising from reaping secret profits through hidden resale schemes. Christensen v. Pryor, 75 Ariz. 260, 267, 255 P.2d 195, 200 (1953). *See* Hassenpflug v. Jones, 84 Ariz. 33, 38, 323 P.2d 296, 299 (1958). This axiom is consistent with the general agency principle that an agent has a duty to act primarily for the benefit of its principal in matters connected with the agency relationship. *See* authorities cited at note 26 *infra*.

16. 124 Ariz. at 350, 604 P.2d at 614.

17. *Id.* at 352, 604 P.2d at 616.

After a jury trial in which all of the parties agreed that inconsistent verdicts were returned, the trial court granted a motion for a new trial on both the negligence and breach of fiduciary duty claims.[18] The Arizona Supreme Court subsequently ruled that Stewart Title should have received a directed verdict on the negligence issue but affirmed the order granting a new trial to determine whether Stewart Title breached its fiduciary duty.[19] The decision ultimately left to a jury's discretion the question of whether the escrowee actually knew McLeod's brokers were perpetrating a fraud.[20]

This casenote will first examine general agency law and the limited agency exception for escrowees. Next, the partial shift in the law governing escrowees from limited to general agency law as exemplified by the *Berry* rule will be discussed. Finally, the *Berry* decision will be examined in terms of decisions from other jurisdictions, hypothetical applications of the principles expounded by this decision, and Arizona's prior judicial decisions and legislative enactments.

Escrowees' Traditional Liabilities and Duties as Perceived and Modified in Berry

In Arizona, escrows are devices used by parties to a binding contractual agreement to carry out a conveyance.[21] An escrowee is a depositary for contractual instruments that are to be held until the prescribed contractual conditions are performed or enumerated events occur.[22] The escrowee is legally obligated to complete the conveyance only upon such performance or the happening of the prescribed conditions.[23]

Courts have defined the escrowee's relationship to its respective principals as a dual agency limited by the contractual instructions involved.[24] This is contrasted with the broader and more rigid relationship created by a general agency. A general agency creates a fiduciary relationship between a principal and an agent.[25] Through the forma-

18. *Id.* at 350, 604 P.2d at 614.
19. *Id.* at 352, 604 P.2d at 616.
20. *See id.*
21. Young v. Bishop, 88 Ariz. 140, 146, 353 P.2d 1017, 1021 (1960).
22. *Id.*
23. *Id.*
24. *E.g.*, Malta v. Phoenix Title & Trust Co., 76 Ariz. 116, 120, 259 P.2d 554, 557 (1953); Roberts v. Carter & Potruch, 140 Cal. App. 2d 370, 373, 295 P.2d 515, 516 (1956); Stark v. Chicago Title & Trust Co., 316 Ill. App. 353, 360, 45 N.E.2d 81, 84 (1942); Paul v. Kennedy, 376 Pa. 312, 315, 102 A.2d 158, 159 (1954).
25. Valley Nat'l Bank v. Milmoe, 74 Ariz. 290, 296, 248 P.2d 740, 744 (1952). The court, citing the *Restatement*, held that "[t]he agreement to act on behalf of the principal causes the agent to be a fiduciary, that is, a person having a duty, created by his undertaking to act primarily for the benefit of another in matters connected with his undertaking." *Id.* RESTATEMENT (SECOND) OF AGENCY § 13, Comment a (1957). Other jurisdictions have equated the type of fiduciary duty created by an agency to the duty a trustee owes its beneficiary. Walter H. Leimert Co. v. Wood-

tion of this relationship, the agent assumes a duty to act primarily for the benefit of its principal in matters connected with the undertaking.[26] The duty includes, *inter alia*, exercising good faith on behalf of the principal,[27] not competing with the principal in matters relating to the subject matter of the agency,[28] and disclosing information material to the principal's interests.[29]

In an escrow agreement, there are at least two principals—the vendor and the purchaser. The principals generally create the escrow out of a desire to have conflicting interests handled by a neutral party in such a manner that both parties are afforded protection.[30] Since an escrowee is an agent for both principals, it owes a fiduciary duty to both; hence, a potential conflict of interests exists.[31] Consequently, courts have classified escrow relationships as limited dual agencies.[32] The limited dual agency creates duties to both principals, though the duty to one principal is limited to the extent that performance does not conflict with any duties owed to the other principal.[33]

The limited dual agency concept limits an escrowee's duties to those required to fulfill the terms of the agreement.[34] Since the princi-

son, 125 Cal. App. 2d 186, 189, 270 P.2d 95, 97 (1954); Henderson v. Hassur, 225 Kan. 678, 687, 594 P.2d 650, 658 (1979). *But cf.* Moon v. Phipps, 67 Wash. 2d 948, 955, 411 P.2d 157, 161 (1966) (whether a fiduciary relationship emanates from an agency arrangement depends on the particular circumstances of each case).

26. Valley Nat'l Bank v. Milmoe, 74 Ariz. 290, 296, 248 P.2d 740, 744 (1952); RESTATEMENT (SECOND) OF AGENCY § 13 (1957).

27. Mallamo v. Hartman, 70 Ariz. 294, 298, 219 P.2d 1039, 1041 (1950); Starkweather v. Conner, 44 Ariz. 369, 376, 38 P.2d 311, 314 (1934).

28. *See* Valley Nat'l Bank v. Milmoe, 74 Ariz. 290, 296-97, 248 P.2d 740, 744 (1952); RESTATEMENT (SECOND) OF AGENCY § 13, Comment a (1957).

29. *E.g.*, Stewart v. Phoenix Nat'l Bank, 49 Ariz. 34, 44, 64 P.2d 101, 106 (1937); Menzel v. Salka, 179 Cal. App. 2d 612, 622, 4 Cal. Rptr. 78, 84 (1960); Village of Burnsville v. Westwood Co., 290 Minn. 159, 166, 189 N.W.2d 392, 397 (1971); Grundmeyer v. McFadin, 537 S.W.2d 764, 772 (Tex. Civ. App. 1976). *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 106, at 696-97 (4th ed. 1971).

30. Blackburn v. McCoy, 1 Cal. App. 2d 648, 654, 37 P.2d 153, 155 (1934).

31. *See* Valley Nat'l Bank v. Milmoe, 74 Ariz. 290, 297, 248 P.2d 740, 744 (1952). In *Milmoe*, the court delineated the rule governing a general agent's course of conduct when dealing with multiple principals. "A person will not be permitted to take on himself the character of an agent, where on account of his relationship to others he would be compelled to assume incompatible and inconsistent duties and obligations." *Id.*

32. *E.g.*, Gurley v. Bank of Huntsville, 349 So. 2d 43, 45 (Ala. 1977); Gordon v. D & G Escrow, 48 Cal. App. 3d 616, 622, 122 Cal. Rptr. 150, 154 (1975); Blackburn v. McCoy, 1 Cal. App. 2d 648, 654-55, 37 P.2d 153, 155 (1934). *See* Shaheen v. American Title Ins. Co., 120 Ariz. 505, 508, 586 P.2d 1317, 1320 (Ct. App. 1978) (escrowees' duties are limited to carrying out the implied and express escrow instructions).

33. Blackburn v. McCoy, 1 Cal. App. 2d 648, 654, 37 P.2d 153, 155 (1934); *see* Brean v. North Campbell Professional Bldg., 26 Ariz. App. 381, 384, 548 P.2d 1193, 1196 (1976) (an escrowee owes no lesser duty to the seller than the buyer, and is therefore equally liable to either for breach of fiduciary duty); Progressive Corp. v. Eastern Milling Co., 155 Me. 16, 19, 150 A.2d 760, 762 (1959) (attorney for purchaser may also act as the escrowee to the transaction until such time as his position as the purchaser's attorney, due to conflict of interest, becomes incompatible with his position as the escrow holder).

34. Miller v. Craig, 27 Ariz. App. 789, 792, 558 P.2d 984, 986 (1976); Arizona Title Ins. & Trust Co. v. Realty Inv. Co., 6 Ariz. App. 180, 182, 430 P.2d 934, 936 (1967).

pals determine the escrowee's instructions, escrowees who strictly comply with the instructions are generally not liable for breach of duty.[35] Prior to *Berry*, this was the position taken by Arizona courts. The courts consistently adhered to the principle that an escrow agency requires the escrowee's strict compliance with the agreement's terms.[36] These cases not only require strict compliance with the terms of the agreement, but make the escrowee liable for all damages resulting from any deviation thereform.[37]

In addition to requiring strict compliance with escrow instructions, Arizona courts historically required escrowees to conduct their principals' affairs with "scrupulous honesty, skill, and diligence."[38] But the *Berry* court found the "scrupulous honesty, skill, and diligence" rule inapposite to the issues presented, stressing that the rule does not alter the strict compliance principle with which the rule consistently appeared in prior cases.[39]

Cases from other jurisdictions involving escrowees who actively participated in the perpetration of fraud against their principals impose a duty upon the escrowee to disclose the fraud.[40] This duty is not based upon the legal sanctions against fraud generally but rather on the fiduciary relationship between the principal and the escrow agent.[41] Therefore, these cases expand an escrowee's duties beyond the limited dual agency/strict compliance doctrine and constructively include du-

35. *See* Blackburn v. McCoy, 1 Cal. App. 2d 648, 654-55, 37 P.2d 153, 155 (1934). *Cf.* Miller v. Craig, 27 Ariz. App. 789, 792, 558 P.2d 984, 987 (1977) (any deviation from the agreed-to escrow instructions is per se unreasonable).

36. *E.g.*, Tucson Title Ins. Co. v. D'Ascoli, 94 Ariz. 230, 234, 383 P.2d 119, 121 (1963); Malta v. Phoenix Title & Trust Co., 76 Ariz. 116, 120, 259 P.2d 554, 557 (1953); Brean v. North Campbell Professional Bldg., 26 Ariz. App. 381, 384, 548 P.2d 1193, 1196 (1976).

37. *See* cases cited at note 36 *supra*.

38. Tucson Title Ins. Co. v. D'Ascoli, 94 Ariz. 230, 234, 383 P.2d 119, 121-22 (1963). *See* Buffington v. Title Ins. Co. of Minn., 26 Ariz. App. 97, 99, 546 P.2d 366, 368 (1976); Arizona Title Ins. & Trust Co. v. Realty Inv. Co., 6 Ariz. App. 180, 182, 430 P.2d 934, 936 (1967); Higgins v. Kittleson, 1 Ariz. App. 244, 249, 401 P.2d 412, 417 (1965). Courts rarely describe what is meant by "scrupulous honesty, skill, and diligence" and are also vague in describing the rule. *See, e.g.*, Diaz v. United Cal. Bank, 71 Cal. App. 3d 161, 166, 139 Cal. Rptr. 314, 317 (1977) (the rule held applicable only in connection with an escrowee's failure to comply strictly with escrow instructions, and when the escrowee negligently fulfills its duties); Spaziani v. Millar, 215 Cal. App. 2d 667, 684, 30 Cal. Rptr. 658, 667 (1963) (the rule did not appear to require an escrowee to disclose information not called for in the agreement). In California, the term "scrupulous honesty" is conspicuously missing from the rule. Diaz v. United Cal. Bank, 71 Cal. App. 3d at 166, 139 Cal. Rptr. at 317; Spaziani v. Millar, 215 Cal. App. 2d at 684, 30 Cal. Rptr. at 667. This is consistent with the exceptionally weak relationship California escrowees' duties bear to general agency principles. *See* Lee v. Title Ins. & Trust Co., 264 Cal. App. 2d 160, 163, 70 Cal. Rptr. 378, 380 (1968).

39. 124 Ariz. at 351-52, 604 P.2d at 615-16.

40. *E.g.*, United Homes, Inc. v. Moss, 154 So. 2d 351, 354 (Fla. Dist. Ct. App. 1963); Bardach v. Chain Bakers, Inc., 265 A.D. 24, 27, 37 N.Y.S.2d 584, 587 (1942), *aff'd*, 290 N.Y. 818, 50 N.E.2d 233 (1943).

41. *See* Bardach v. Chain Bakers, Inc., 265 A.D. 24, 27, 37 N.Y.S.2d 584, 587 (1942), *aff'd*, 290 N.Y. 813, 50 N.E.2d 233 (1943). The court held the escrowee liable for harm to his principal because "[he] owed the [principal] the highest kind of loyalty. He was under a duty to disclose the situation which had come to his notice." *Id.*

ties imposed under general agency principles.[42] These principles resemble the "scrupulous honesty, skill, and diligence" standard applied by Arizona courts.[43] The courts retained vestiges of general agency doctrine in conjunction with the strict compliance rules imposed upon the escrow relationship.[44] Hence, despite the *Berry* court's expansion of the limited agency doctrine to include nonprescribed duties,[45] the court merely applied general fiduciary concepts embodied in the "scrupulous honesty, skill, and diligence" rule—concepts previously overshadowed by the strict compliance doctrine.[46] The *Berry* decision breathes new life into the fiduciary rhetoric associated with escrowee responsibilities by reasserting the connection between the escrow relationship and general agency duties.[47]

The Effects of Berry

Few jurisdictions have addressed the issue presented in *Berry*.[48] Those jurisdictions addressing the issue of an escrowee's duty when the escrowee knows of a fraud reject the expanded duty concept adopted by the *Berry* court.[49] The reasons for retaining a "strict compliance" approach to escrowees' liability is set out by the California Court of Appeal in *Lee v. Title Insurance & Trust Co.*[50] In *Lee*, as in *Berry*, the plaintiff attempted to establish that the escrowee's failure to report the

42. See text & notes 24-29 *supra*.

43. *See* Tucson Title Ins. Co. v. D'Ascoli, 94 Ariz. 230, 234, 383 P.2d 119, 121-22 (1963). The *D'Ascoli* court pointed out that the relationship between escrowee and principal is one of "trust and confidence. . . . In his fiduciary capacity the agent must conduct the affairs with which he is entrusted with scrupulous honesty, skill, and diligence." *Id.*

44. See notes 41, 43 *supra*.

45. 124 Ariz. at 352, 604 P.2d at 616.

46. *Id.* The court is effectively forcing escrowees to act more like general agents with a corresponding duty to protect the welfare of their principals rather than allowing them to blindly follow the instructions entrusted them. *See* First Nat'l Bank v. Sant, 161 Mont. 376, 382, 506 P.2d 835, 839 (1973). In this case, the appellant bank was found to be in a "special or limited" agency relationship with the appellee principal, for the sole purpose of disbursing designated funds to the principal's creditors. The Montana Supreme Court found that subsequent activities of the bank were violative of the fiduciary duty owed the principal:

> The fact that an agency relationship is of a limited or special nature does not extinguish the fiduciary duty, but rather that fiduciary duty is limited in scope and operation to the same degree as the agency to which it applies. Virtually any relationship between a principal and agent will have some limitation in the degree of authority and scope of purpose.

Id.

47. The duty to disclose information material to the principal's position is associated with general agency duties. *See* authorities cited at note 29 *supra*.

48. *See generally* Gurley v. Bank of Huntsville, 349 So. 2d 43 (Ala. 1977); Lee v. Title Ins. & Trust Co., 264 Cal. App. 2d 160, 70 Cal. Rptr. 378 (1968). *Berry* only involved a question of whether the escrowee knew of a fraud being perpetrated rather than if the escrowee actively participated in the fraud. 124 Ariz. at 352, 604 P.2d at 616.

49. Gurley v. Bank of Huntsville, 349 So. 2d 43, 45 (Ala. 1977); Lee v. Title Ins. & Trust Co., 264 Cal. App. 2d 160, 163, 70 Cal. Rptr. 378, 380 (1968). *See* Blackburn v. McCoy, 1 Cal. App. 2d 648, 655, 37 P.2d 153, 156 (1934).

50. 264 Cal. App. 2d 160, 70 Cal. Rptr. 378 (1968).

perpetration of a known fraud was a breach of fiduciary duty.[51] The plaintiff contended that this breach was in the nature of an actively perpetrated fraud.[52] The court rejected the plaintiff's arguments, however, and concluded that an implied duty to disclose fraud was contrary to the very nature and purpose of an escrow agreement.[53]

In reaching a legal conclusion different from that in *Berry*, the *Lee* decision explained the potential dangers in requiring disclosure by escrowees.[54] The *Lee* court stated that the escrowee would be placed in a dilemma when confronted with information concerning fraud against one of its principals.[55] If the escrowee withholds knowledge of fraud to the detriment of the defrauded principal, it would be liable for breach of duty.[56] Conversely, if the escrowee reveals knowledge that later proves inaccurate, liability could ensue for interference with the principals' contract.[57] The *Lee* court concluded that a duty to disclose known fraud would effectively discourage a reasonable and prudent person or company from acting as an escrowee and would ultimately defeat the purpose for which escrows originated.[58] The *Berry* court acknowledged the *Lee* arguments condemning any expansion of duty for escrowees but did not address them specifically in its opinion.[59]

Instead, the *Berry* court's approach to the problem solves the dilemma raised in *Lee*. The *Berry* court explicitly stated that a duty to disclose information not required by the escrow agreement exists only when the escrowee "*knows* that a fraud is being committed on a party to an escrow. . . ."[60] Moreover, the rule does not require the escrowee to look for fraud.[61] Thus, *Berry* is distinguishable from *Lee* because the *Berry* court dealt only with the situation where the agent acquires knowledge of an impending fraud.[62] Knowledge of fraud is implied

51. *Id.* at 161, 70 Cal. Rptr. at 379. Defendants had fraudulently purchased property from their client with the intent to reap a secret profit. *Id.*

52. *Id.*

53. *Id.* at 163, 70 Cal. Rptr. at 380; *accord*, Blackburn v. McCoy, 1 Cal. App. 2d 648, 654, 37 P.2d 153, 155 (1934). The rationale for the *Lee* holding is derived from the limited dual agency principle described in *Blackburn*. 264 Cal. App. 2d at 163-64, 70 Cal. Rptr. at 380.

54. 264 Cal. App. 2d at 163, 70 Cal. Rptr. at 380.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. 124 Ariz. at 351, 604 P.2d at 615.

60. *Id.* at 352, 604 P.2d at 616.

61. *Id.* The *Lee* court was much more ambiguous on the question of what type of information the escrowee was required to reveal: "[U]nder the proposed rule, once an escrow holder received information (from whatever source) he would be forced to decide independently whether to believe the information and disclose it or disbelieve it and conceal his knowledge." 264 Cal. App. 2d at 163, 70 Cal. Rptr. at 380.

62. The *Lee* court's analysis is based on a theory of nondisclosure prompted by uncertainty. 264 Cal. App. 2d at 163, 70 Cal. Rptr. at 379-80. The *Berry* decision, on the other hand, stresses that the escrowee must know fraud exists before any liability attaches. 124 Ariz. at 352, 604 P.2d at 616.

from notice of such facts and circumstances as would place an ordinary and prudent escrowee upon inquiry concerning the fraud.[63] Under the *Berry* decision, an escrowee would not be required to investigate all information it receives regarding impropriety. Only information which the reasonable escrowee perceives as evidence of fraud would require disclosure.[64] Consequently, an escrowee faces liability for remaining silent only in situations where it is substantially certain that fraud is being perpetrated.[65]

The second prong of the *Lee* dilemma concerns an escrowee's potential liability for tortious interference with the principals' contract by disclosing fraud when there is no fraud.[66] In Arizona, tortious interference with contract is established by satisfying a three-tier test: (1) an intentional interference with a contract; (2) an absence of justifiable purpose; and (3) actual damages from the interference.[67] Under a fact situation similar to that in *Berry*, proof of intent and actual damages are readily proven; the *Berry* decision, however, effectively provides the escrowee with the defense of justifiable purpose.[68] This defense specifically protects the agent in a fiduciary relationship from liability for tortious interference when it acts to protect its principal's welfare.[69] The *Berry* court's analysis of the general agency principles involved in an escrow relationship permits Arizona courts to apply this fiduciary privilege to escrow agents.[70] Thus, the *Lee* dilemma has no effect upon cases based on the *Berry* rationale.[71]

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63. *See* Rachofsky v. Rachofsky, 203 S.W. 1134, 1136 (Tex. Civ. App. 1918).

64. *See* 124 Ariz. at 352, 604 P.2d at 616.

65. *See* RESTATEMENT OF RESTITUTION § 10, Comment d (1936). "[O]ne who has knowledge of a fact has no substantial doubts as to its existence, whereas one may have suspicion although he realizes that there is a substantial chance of its non-existence." *Id.*

66. 264 Cal. App. 2d at 163, 70 Cal. Rptr. at 380. "If [the escrowee] discloses and the information is inaccurate, he may be sued by all parties to the escrow for interfering with their contract." *Id.*

67. Chanay v. Chittenden, 115 Ariz. 32, 36, 563 P.2d 287, 291 (1977). *See* Tipton v. Burson, 73 Ariz. 144, 148, 238 P.2d 1098, 1100 (1951); Meason v. Ralston Purina Co., 56 Ariz. 291, 299-300, 107 P.2d 224, 228 (1940).

68. For a discussion of justifiable purpose, *see* Carpenter, *Interference With Contract Relations*, 41 HARV. L. REV. 728, 745-62 (1928). *See also* Ulan v. Lucas, 18 Ariz. App. 129, 130, 500 P.2d 914, 915 (1972); D & S Farms v. Producers Cotton Oil Co., 16 Ariz. App. 180, 182, 492 P.2d 429, 431 (1972).

69. RESTATEMENT (SECOND) OF TORTS § 770.

> One who, charged with responsibility for the welfare of a third person, intentionally causes that person not to perform a contract . . ., does not interfere improperly with the other's relation if the actor (a) does not employ wrongful means and (b) acts to protect the welfare of the third person.
>
> . . . .
>
> Comment: b. The rule stated is frequently applicable to those who stand in a fiduciary relation toward another, as in the case of agents acting for the protection of their principals . . . .

Id. W. PROSSER, *supra* note 29, at 943 states: "[A]n agent protecting the interests of his principal" is protected from tortious interference with contract by privilege.

70. *See* text & notes 41-43 *supra*.

71. Nor would an escrowee's attempted avoidance of the disclosure duty through an exculpa-

The *Berry* rationale also seems to be supported by both the recommended ethical standards of the escrow industry and escrowees' regulation by the Arizona Legislature. The recommended standards of conduct of the escrow industry encourage escrowees to refuse escrow business that involves "dummy" corporations and secret profits as found in *Berry*.[72] The court, therefore, effectively raised an existing ethical standard to the level of a legal standard. The court's decision is also in accord with the Arizona Legislature's treatment of an escrowee's licensing requirements. The legislature has acted to require more than mere "strict compliance" to the escrow agreement by the escrowee.[73] An escrowee's license may be suspended or revoked if the escrowee "[h]as made any material misrepresentations or false statements to, or concealed any essential or material fact from, any person in the course of the escrow business."[74] Although these regulatory statutes do not apply directly to the tort liability created in *Berry*,[75] they do support the *Berry* conclusion because they indicate a legislative intent to require more from escrowees than mere "strict compliance."

Conclusion

The *Berry* court held that an escrowee's duties extend beyond the express or implied instructions in an escrow agreement. Escrowees must now warn their principals of any known fraud if failure to disclose will assist the perpetration of the fraud. The court imposed this duty by expanding escrowees' duties from the traditional limited agency doctrine to a position more closely related to general agency principles. Although the *Berry* decision expanded the legal duty escrowees owe their principals, it does not appear to impose any undue hardships upon escrow agents. The decision avoids the "dangers" inherent in the dilemma raised by the California court in *Lee*. Conse-

tory clause affect the outcome. *See* Mountain States Bolt, Nut & Screw Co. v. Best-Way Transportation, 116 Ariz. 123, 124, 568 P.2d 430, 431 (Ct. App. 1977). "[P]arties have the legal right to make such contracts as they desire to make, provided only that the contract shall not be for illegal purposes or against public policy." *Id. See also* Elson Dev. Co. v. Arizona Savings & Loan Ass'n., 99 Ariz. 217, 224, 407 P.2d 930, 935 (1965); S.H. Kress & Co. v. Evans, 21 Ariz. 442, 449, 189 P. 625, 627 (1920).

72. *See* A. BOWMAN, REAL ESTATE LAW IN CALIFORNIA 418 (3d ed. 1970). "[A]n escrow holder, regardless of the absence of legal liability, should decline to handle an escrow involving a secret profit by a person, such as a broker, standing in a fiduciary relationship to a principal to the escrow." *Id.* Although Arizona courts were silent on the nondisclosure issue until *Berry* (*but cf.* Shaheen v. American Title Ins. Co., 120 Ariz. 505, 508, 586 P.2d 1317, 1320 (Ct. App. 1978) (appeals court followed the *Lee* decision's characterization of escrowees' duties)), Arizona courts had already spoken on the impropriety of reaping secret profits from unsuspecting principals. *See* note 15 *supra*.

73. ARIZ. REV. STAT. ANN. §§ 6-801 to -837 (1974 & Supp. 1980-81).

74. *Id.* § 6-817(A)(5) (1974).

75. 124 Ariz. at 350-51, 604 P.2d at 614-15. The *Berry* court rejected the plaintiff's reliance on this statute because use of the statute still requires definition of the terms "material" and "essential." *Id.* at 351, 604 P.2d at 615.

quently, the *Berry* decision affords principals in escrow relationships more protection without placing an unreasonable burden upon reputable and honest escrow agents.

Tibor Nagy, Jr.

VIII. TORTS

A. *BARTLETT*'S PRICKLY PAIR (CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK): NEED PLAINTIFFS BE "STUCK" WITH BOTH?

At common law, assumption of risk acts as a complete defense to simple negligence.[1] The potency of this defense has been vitiated in most of the states that have changed from common law contributory negligence systems to comparative negligence systems,[2] although a few such jurisdictions retain assumption of risk as a bar to the plaintiff's recovery.[3] When the defendant's reckless conduct is involved, however, the impact of the assumption of risk defense varies from state to state, attributable in part to whether a state applies a comparative or contributory negligence system.[4] Some comparative negligence states have abolished assumption of risk in this context as well; but others have not.[5] Among contributory negligence jurisdictions, the efficacy of assumption of risk to a defendant in a gross negligence context depends on whether a state follows or rejects the *Restatement* position that assumption of risk is a complete defense to reckless conduct.[6] The Arizona Court of Appeals adopted the *Restatement* position in *Menendez v. Bartlett*[7] and denied recovery to the victim of a grossly negligent defendant.

In *Bartlett*, the plaintiff, defendant, and a third party drank together for two or three hours before deciding to have dinner at a restau-

1. Assumption of risk is not technically a defense; it is more precisely a plea in bar. *See* 1 J. DOOLEY, MODERN TORT LAW § 6.03, at 152 (1977); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 21.7, at 1189 (1956). The effect is the same as that of a successful contributory negligence defense in that the plaintiff is barred from recovery. *Id.* § 21.1, at 1162. But the defendant's successful pleading and proof of the elements of the assumption of risk doctrine negate the existence of duty on the part of the defendant. *See* Hildebrand v. Minyard, 16 Ariz. App. 583, 585-86, 494 P.2d 1328, 1330-31 (1972).

2. *See, e.g.*, McGrath v. American Cyanamid Co., 41 N.J. 272, 276, 196 A.2d 238, 240-41 (1963); Farley v. MM Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975); McConville v. State Farm Mut. Auto Ins. Co., 15 Wis. 2d 374, 378, 113 N.W.2d 14, 16 (1962).

3. *See, e.g.*, Capps v. McCarley & Co., 544 S.W.2d 850, 851 (Ark. 1976); Singleton v. Wiley, 372 So. 2d 272, 274-75 (Miss. 1979); Sandberg v. Hoogensen, 201 Neb. 190, 196, 266 N.W.2d 745, 749 (1978).

4. See cases cited in Blackburn v. Dorta, 348 So. 2d 287, 289 n.3 (Fla. 1977); Comment, *Assumption of Risk and the Automobile Guest: Time to Reevaluate their Relationship*, 13 CREIGHTON L. REV. 251, 258 n.68 (1978).

5. *See* note 31 *infra*.

6. *See* RESTATEMENT (SECOND) OF TORTS § 496A, Comment d (1965).

7. 125 Ariz. 48, 607 P.2d 31 (Ct. App. 1980).

rant.[8] The plaintiff rode with the defendant to the restaurant, though his own vehicle was available.[9] En route, the plaintiff asked the defendant whether she wanted him to drive—an offer the defendant declined.[10] Moments later, the defendant's car crashed.[11] The plaintiff alleged that his injuries were caused by the defendant's gross negligence in operating her vehicle under the influence of alcohol.[12] The defendant denied liability, interposing the defenses of contributory negligence and assumption of risk.[13]

The trial court granted the plaintiff's motion for a directed verdict on negligence, gross negligence, and contributory negligence, but not on the issue of assumption of risk.[14] It also denied the plaintiff's requested jury instruction that a finding of the defendant's gross negligence precluded consideration of the assumption of risk defense.[15] The jury returned a verdict for the defendant.[16]

On appeal, the plaintiff-appellant urged that since the doctrines of contributory negligence and assumption of risk both arise under the same article of the Arizona Constitution, they should be treated in the same fashion: where contributory negligence is precluded as a defense, assumption of risk should be precluded also.[17] This argument was bolstered by references to Prosser's statement that under some circumstances, a plaintiff's voluntary encounter with a known unreasonable risk is a form of contributory negligence.[18] The plaintiff's argument concluded that since his unreasonable conduct in assuming the risk in this case was identical to his unreasonable conduct constituting contrib-

8. Deposition of Moran Menendez, Phoenix, Ariz., Feb. 9, 1977, at 21; direct examination of Nancy S. Bartlett, Phoenix, Ariz., Dec. 6, 1977, at 15 (rptr.'s transcript).

9. Deposition of Moran Menendez, *supra* note 8, at 21; direct examination of Nancy Bartlett, *supra* note 8, at 54, 61.

10. Direct examination of Nancy Bartlett, *supra* note 8, at 63.

11. *Id.* at 65.

12. 125 Ariz. at 49, 607 P.2d at 32.

13. *Id.*

14. *Id.* The propriety of a trial court's directing a verdict on either contributory negligence or gross negligence in Arizona is questionable. ARIZ. CONST. art. 18, § 5 provides: "The defense of contributory negligence or assumption of risk shall, . . . at all times, be left to the jury." A directed verdict on contributory negligence therefore violates the constitutional provision, Heimke v. Munoz, 106 Ariz. 26, 30, 470 P.2d 107, 111 (1970), unless no evidence has been presented from which reasonable men could infer that contributory negligence existed. W.R. Skousen Contractor, Inc. v. Gray, 26 Ariz. App. 100, 102, 546 P.2d 369, 371 (1976).

As to the directed verdict on gross negligence, the Arizona Supreme Court recently ruled that intoxication plus negligent driving does not equal reckless or wanton conduct as a matter of law, and that the trial court should not remove the issue of wanton negligence from the jury's consideration unless the evidence is so meager as to be speculative. Smith v. Chapman, 115 Ariz. 211, 214, 564 P.2d 900, 903 (1977) (citing Nichols v. Baker, 101 Ariz. 151, 153, 416 P.2d 584, 586 (1966)). Instead, intoxication plus negligent driving amounts to negligence per se, establishing the defendant's duty toward the plaintiff, and the breach of that duty. *Id.* at 214, 564 P.2d at 903.

15. 125 Ariz. at 49, 607 P.2d at 32.

16. *Id.*

17. *Id.*

18. Brief for Appellant at 12-13 (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 67, at 441 (3d ed. 1964)).

utory negligence, a finding of gross negligence on defendant's part should preclude consideration of the defense of assumption of risk as it does the defense of contributory negligence.[19]

The court of appeals, unable to find Arizona precedent on the subject, declared the issue a matter of first impression and relied entirely on the *Restatement* position for its authority.[20] The court cited only Comment d to § 496A of the *Restatement* to reject the appellant's argument that by analogy to contributory negligence, assumption of risk should not be a viable defense when the defendant's gross negligence is established.[21]

This casenote will show how the Arizona court's decision corresponds to the positions of other contributory negligence states on the question of whether assumption of risk bars recovery in reckless conduct situations. The dissatisfying aspects both of the *Bartlett* opinion and the current stance of the Arizona courts concerning the differential treatment of the two doctrines will be discussed. This discussion will focus on the inherent weakness of Arizona's reliance on the consent versus conduct and subjective versus objective knowledge dichotomies in distinguishing assumption of risk from contributory negligence. Finally, the difficulties faced by Arizona juries laboring under the present doctrinal separation will be described, followed by a concluding prediction on how *Bartlett* will affect recoveries by plaintiff victims of gross negligence in Arizona.

The State of the Assumption of Risk Doctrine in Contributory Negligence Jurisdictions

Although courts continue to use the single expression "assumption of risk" to describe different kinds of behavior by the plaintiff,[22] periodic attempts by scholars to classify "types" or "senses" of assumption of risk have failed to result in agreement on a single approach to ana-

19. *Id.* at 22-23.

20. Where there is no Arizona precedent for a tort issue, the *Restatement* is followed. 125 Ariz. at 49, 607 P.2d at 32 (citing Southern Pac. Transp. Co. v. Lueck, 111 Ariz. 560, 574, 535 P.2d 599, 613 (1975)). The *Restatement's* status as primary legal authority in Arizona has been well documented, and the hazards of such binding authority discussed in Comment, *Reevaluation of the Restatement as a Source of Law in Arizona*, 15 ARIZ. L. REV. 1021 (1973).

21. *See* 125 Ariz. at 50, 607 P.2d at 33; RESTATEMENT (SECOND) OF TORTS § 496A, Comment d (1965). Comment d states that assumption of risk is a defense against reckless as well as negligent conduct, whereas contributory negligence does not operate against reckless conduct.

The appellant's other ground of appeal was that an instruction on assumption of risk stating that if the plaintiff assumed the risk and if that conduct was a cause of the injury the plaintiff "should" not recover was reversible error. *Id.* at 50, 607 P.2d at 33. This argument was rejected by the court. *Id.* at 51, 607 P.2d at 34.

22. *See* RESTATEMENT (SECOND) OF TORTS § 496A, Comment c (1965); 2 F. HARPER & F. JAMES, *supra* note 1, § 21.1, at 1162-63; Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 123-29 (1961); Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5, 14 (1961).

lyze the doctrine as it relates to simple negligence.[23] Arizona classifies assumption of risk as express or implied.[24] Express assumption of risk occurs when the plaintiff agrees in advance of the defendant's conduct that the defendant is not obligated to use reasonable care toward the plaintiff and that the defendant will not be held liable for the consequences of conduct that would otherwise be negligent.[25] Implied assumption of risk obtains when the plaintiff voluntarily enters into some relationship with the defendant knowing that the latter will not protect him or her against a risk.[26]

Assumption of risk is a defense disfavored by a growing number of courts,[27] and several commentators advocate abolishing the doctrine altogether.[28] Those favoring its abrogation argue that the doctrine's purposes presently are served by either the doctrine of contributory

23. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 68, at 439 (4th ed. 1971). The concept of negation of duty, otherwise known as primary assumption of risk, *see* 2 F. HARPER & F. JAMES, *supra* note 1, § 21.1, at 1162, is the only species of assumed risk identified in Arizona. Many authorities, however, recognize implied assumption of risk in another, secondary sense, where a plaintiff unreasonably undertakes to encounter a danger posed by a defendant's established breach of duty. *See, e.g.*, Blackburn v. Dorta, 348 So. 2d 287, 290 (Fla. 1977); Meistrich v. Casino Arena Attractions, 31 N.J. 44, 49, 155 A.2d 90, 93 (1959); 2 F. HARPER & F. JAMES, *supra* note 1, § 21.1, at 1162. In this secondary sense, implied assumption of risk is in fact a form of contributory negligence. *Id.*; W. PROSSER, *supra*, § 68, at 440-41. Secondary implied assumption of risk has been discussed by Arizona courts, *see* Tucson v. Holliday, 3 Ariz. App. 10, 13-16, 411 P.2d 183, 186-89 (1966), and was unsuccessfully raised on one occasion as an affirmative defense to the defendant's established negligence. *See* Lunsford v. Tucson Aviation Corp., 73 Ariz. 277, 280, 240 P.2d 545, 547 (1952). In Arizona, however, secondary assumption of risk is not recognized independently of primary assumption of risk; all assumed risks are perceived to negate the defendant's duty regardless of the defendant's course of conduct. *See* Hildebrand v. Minyard, 16 Ariz. App. 583, 586, 494 P.2d 1328, 1330 (1972). This position is anomalous in a situation where a defendant breaches a statutory duty. *See* note 14 *supra*.

24. Hildebrand v. Minyard, 16 Ariz. App. 583, 585-86, 494 P.2d 1328, 1330 (1972).

25. *Id.* at 585, 494 P.2d at 1330.

26. *Id.* The *Hildebrand* court cites such examples as where one rides in a car knowing that the brakes are defective, or where one enters an athletic field, chooses an unprotected seat, and thus exposes one's self to the risk of being struck by a ball. *Id.*

27. *See, e.g.*, Parker v. Redden, 421 S.W.2d 586, 592 (Ky. 1967); Meistrich v. Casino Arena Attractions, 31 N.J. 44, 50-51, 55, 155 A.2d 90, 93-94, 96 (1959); Williamson v. Smith, 83 N.M. 336, 341, 491 P.2d 1147, 1152 (1971). Two sources have collected authorities in which state courts and legislatures have abrogated or severely limited the assumpton of risk doctrine. *See* Blackburn v. Dorta, 348 So. 2d 287, 289 n.3 (Fla. 1977); Comment, *supra* note 4, at 258 n.68.

28. 1 J. DOOLEY, *supra* note 1, § 6.15, at 172-73 (except express assumption of risk); 2 F. HARPER & F. JAMES, *supra* note 1, § 21.8, at 1191 (same reservation); James, *Assumption of Risk*, 61 YALE L.J. 141, 169 (1952) (same reservation); Rice, *The Automobile Guest and the Rationale of Assumption of Risk*, 27 MINN. L. REV. 323, 439-40 (1943) (no exceptions in host-guest context).

Since the 1950's, the leading proponent of abolishing the doctrine, except in cases of express assumption, was Fleming James, Jr. In 1968, however, James stated:

> Where defendant's conduct is wilful or wanton, or entails strict liability, ordinary contributory negligence is not a defense, but the deliberate and voluntary assumption of an unreasonable risk may be. In such a situation there will be need to distinguish what may be called the unreasonable assumption of risk from ordinary contributory negligence.

James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185, 185 n.4 (1968) (citations omitted). The unreasonable/reasonable dichotomy in implied assumption of risk is also described in RESTATEMENT (SECOND) OF TORTS § 496C, Comment g (1965). Neither the *Restatement* nor Professor James explains how to distinguish contributory negligence from unreasonable conduct amounting to assumed risk.

negligence or the common law notion of absence of the defendant's duty.[29] They also argue that such doctrinal redundancy results in confusion which, in some cases, leads to an unjust denial of recovery.[30]

When assumption of risk is considered in the context of the defendant's reckless conduct, as opposed to simple negligence, there is similar disagreement as to the doctrine's effect on the plaintiff's case. The states that can be said to follow the common-law rule of contributory negligence[31] are divided sharply on whether assumption of risk applies where the defendant's breach of duty amounts to gross negligence or wilful or wanton behavior.[32] Of the fifteen contributory negligence states,[33] nearly half do not, or apparently would not,[34] allow assumption of risk to bar recovery when wilful or wanton behavior on the defendant's part is proven.[35] These seven jurisdictions that reject

29. *E.g.*, Blackburn v. Dorta, 348 So. 2d 287, 289 (Fla. 1977); Meistrich v. Casino Arena Attractions, 31 N.J. 44, 50-51, 55, 155 A.2d 90, 93-94, 96 (1959).

30. Blackburn v. Dorta, 348 So. 2d 287, 289 (Fla. 1977); *see* authorities cited at notes 28-29 *supra*. *But see* W. PROSSER, *supra* note 23, § 68, at 455-56, who argues that there are compelling procedural reasons, involving the shifting of the burden of proof from the defendant to the plaintiff, for retaining assumption of risk as an independent doctrine. Another of Dean Prosser's arguments for retaining assumption of risk as a defense distinct from contributory negligence is that assumption of risk may include reasonable conduct by the plaintiff, *see* RESTATEMENT (SECOND) OF TORTS § 496A, Comment c(3) (1965), whereas contributory negligence includes only unreasonable conduct. PROSSER, *supra* note 23, § 68, at 440. This argument has been rebutted in Meistrich v. Casino Arena Attractions, 31 N.J. 44, 50, 155 A.2d 90, 94 (1959); 2 F. HARPER & F. JAMES, *supra* note 1, § 21.1, at 108-09 (Supp. 1968); Note, *Contributory Negligence and Assumption of Risk—The Case for Their Merger*, 56 MINN. L. REV. 47, 53-57, 63 (1971).

31. It would not be enlightening to contrast Arizona's response to the *Restatement* position with the rules adopted by comparative negligence jurisdictions because many of these jurisdictions have abolished categorizing types or degrees of negligent conduct as useless in a fault-apportioning scheme. *See, e.g.*, Draney v. Bachman, 138 N.J. Super. 503, 510-11, 351 A.2d 409, 413 (1976); Bulski v. Schulze, 16 Wis. 2d 1, 14, 114 N.W.2d 105, 111-12 (1962); Danculovich v. Brown, 593 P.2d 187, 192 (Wyo. 1979). Even so, six comparative negligence states retain, by statute or judicial decision, implied assumption of risk as a complete bar to recovery. V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 9.3, at 161-62 (1974). *See, e.g.*, cases cited at note 3 *supra*.

32. Comparing the positions of these jurisdictions is complicated by the way in which contributory negligence jurisdictions define "gross negligence." In Arizona, the concepts of gross negligence, reckless conduct, and wilful or wanton misconduct are used interchangeably. *See, e.g.*, Cullison v. City of Peoria, 120 Ariz. 165, 169, 584 P.2d 1156, 1160 (1978); Southern Pac. Transp. Co. v. Lueck, 22 Ariz. App. 90, 95, 523 P.2d 1327, 1332 (1974); Kemp v. Pinal Co., 13 Ariz. App. 121, 124-25, 474 P.2d 840, 843-44 (1970). But other contributory negligence jurisdictions, see note 33 *infra*, do not employ these terms interchangeably. For the sake of consistency, comparison is limited to application of assumption of risk to defendant conduct different from ordinary negligence in quality, not degree.

33. Alabama, Arizona, Delaware, Illinois, Indiana, Iowa, Kentucky, Maryland, Missouri, New Mexico, North Carolina, Ohio, South Carolina, Tennessee, and Virginia. A classification of all jurisdictions by their liability-assessing schemes can be found in Wade, *Comparative Negligence—Its Development in the United States and its Present Status in Louisiana*, 40 LA. L. REV. 299, 304-06 (1980).

34. A few of these jurisdictions have taken this position by implication without issuing an express ruling to this effect. *See* note 38 *infra*.

35. Most representative of the viewpoint that assumption of risk has no validity as an independent defense where the defendant's conduct is reckless is the Kentucky Court of Appeals' opinion in Parker v. Redden, 421 S.W.2d 586 (Ky. 1967). The Kentucky court ruled that the distinctions between the two doctrines are not of sufficient significance to warrant retaining assumption of risk as a separate doctrine:

> The main distinction is that assumption of risk may operate as a bar to recovery in certain situations where in pure application contributory negligence would not effect a

assumption of risk as a defense to reckless conduct adopt one of three positions: (1) abolition of the defense altogether[36] or severe restriction of its applicability;[37] (2) merger of the doctrine with contributory negligence;[38] or (3) retention of the doctrine as a defense to simple negligence but not to reckless conduct.[39]

On the other hand, the eight states that accept the *Restatement* position that assumption of risk is a defense to the defendant's wilful and wanton or reckless conduct do so based on one of three views: (1) they regard assumption of risk and contributory negligence as clearly distinct defenses in theory and application;[40] (2) they recognize the over-

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bar. We think this problem can be handled simply by making minor adjustments in our contributory negligence doctrine. For example, if the defendant is guilty of gross negligence the plaintiff who is aware of such negligence and exposes himself to the resulting risk may be held to be barred from recovery on the ground that his contributory negligence is of equal (gross) rank with the negligence of the defendant.

Id. at 592. The court concludes that reasonableness of conduct should be the basic consideration in all negligence actions. *Id.* at 591-92. Where the plaintiff knows of the defendant's reckless conduct, and where there is a reasonably safe alternative open, the plaintiff's free choice of the more dangerous option is unreasonable and evidences a lack of due care for his own safety. This deviation from a reasonable, prudent person's standard of behavior amounts to both assumption of risk and contributory negligence. Gonzalez v. Garcia, 75 Cal. App. 3d 874, 881, 142 Cal. Rptr. 503, 507 (1977). Otherwise stated, the plantiff's conduct in assuming the risk in this type of situation is a form of contributory negligence. W. PROSSER, *supra* note 23, § 68, at 441.

36. *See* Parker v. Redden, 421 S.W.2d 586, 592 (Ky. 1967); Williamson v. Smith, 83 N.M. 336, 341, 491 P.2d 1147, 1152 (1971).

37. In Illinois, the defense is restricted to negligence actions involving a contractual or employment relationship, and to product liability actions where the plaintiff knows of a defect prior to use. *See* Court v. Grzelinski, 72 Ill. 2d 141, 149, 379 N.E.2d 281, 284 (1978); Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 426, 430, 261 N.E.2d 305, 309, 311 (1970). In North Carolina, assumption of risk is available as a defense only when the defendant is in a contractual relationship with the plaintiff. *See* McWilliams v. Parham, 269 N.C. 162, 166, 152 S.E.2d 117, 120 (1967).

38. In Delaware, assumption of risk is treated as contributory negligence. *See* Frelick v. Homeopathic Hosp. Ass'n of Detroit, 51 Del. 568, 571, 150 A.2d 17, 19 (Super. Ct. 1959). Maryland has held that a contributory negligence instruction lacking mention of assumption of risk nevertheless constitutes a sufficient coverage of the latter defense. *See* Bull S.S. Lines v. Fisher, 196 Md. 519, 527-29, 77 A.2d 142, 147-48 (1950). Maryland courts find that the same basic considerations apply to either doctrine, and that in both, the plaintiff's recklessness bars recovery. Baltimore Co. v. State, 232 Md. 350, 366, 193 A.2d 30, 38-39 (1963).

39. *See* Day v. Downey, 256 Ala. 587, 590, 56 So. 2d 656, 658 (1952).

40. *See* Chavez v. Pima Co., 107 Ariz. 358, 361, 488 P.2d 978, 980-81 (1971); Bohnsack v. Driftmier, 243 Iowa 383, 392-93, 52 N.W.2d 79, 84 (1952); Wever v. Hicks, 11 Ohio St. 2d 230, 234, 288 N.E.2d 315, 318 (1967); Turner v. Sinclair Ref. Co., 254 S.C. 36, 43, 173 S.E.2d 356, 359 (1970).

The conceptual differences between assumption of risk and contributory negligence that most commonly are cited to justify applying the former doctrine where the latter does not apply are the venturousness (consent) characteristic of assumption of risk as opposed to the carelessness of contributory negligence, and the subjective versus objective standards for determining the plaintiff's knowledge. As to the first distinction, it is said that assumption of risk bars recovery because the plaintiff consents to or intelligently acquiesces in the danger. By contrast, contributory negligence bars the plaintiff's recovery for failure to use the care of a reasonable person to avoid the danger regardless of his willingness to encounter it. *See* DeAmiches v. Popczun, 35 Ohio St. 2d 180, 185, 299 N.E.2d 265, 268 (1973).

As to the second distinction, it is said that assumption of risk tests the plaintiff's personal knowledge while contributory negligence tests the degree of care used in light of the knowledge of a reasonable person. *See, e.g.*, Chavez v. Pima Co., 107 Ariz. 358, 361, 488 P.2d 978, 980-81 (1971); Bohnsack v. Driftmier, 243 Iowa 383, 392-93, 52 N.W.2d 79, 83-84 (1952); Haarmeyer v. Roth, 113 Ohio App. 74, 80, 177 N.E.2d 507, 510-11 (1960). This distinction has been narrowed in Arizona, however, by the insertion into the assumption of risk doctrine of the concept of obvi-

lap between the doctrines in theory but distinguish the two in application as defenses to reckless conduct;[41] or (3) they view assumption of risk itself as wilful and wanton misconduct barring the plaintiff's recovery.[42]

By distinguishing the doctrines both in theory and application, Arizona falls into the first class of states.[43] Arizona courts prior to *Menendez v. Bartlett* differentiated assumption of risk and contributory negligence on two theoretical grounds.[44] The first ground for distinguishing the two defenses involves the basis of each doctrine. The basis of assumption of risk is the plaintiff's implied consent to the defendant's negligent acts;[45] the basis of contributory negligence is the plaintiff's failure to exercise due care, for example where the plaintiff fails to understand the danger faced or the consequences of the conduct undertaken.[46] Thus, while a plaintiff who assumes a risk may do so reasonably, a plaintiff who is contributorily negligent unreasonably participates in causing the injuries.[47]

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ousness under which the plaintiff may be found to have assumed a risk despite protests of ignorance if the jury determines that a reasonable person facing the same clear danger would have recognized it. *See* McGriff v. McGriff, 114 Ariz. 323, 325, 560 P.2d 1230, 1232 (1977). *See* text & notes 73-79 *infra*.

41. *See* Kroger Co. v. Haun, — Ind. App. —, —, 379 N.E.2d 1004, 1014 (1978); Stewart v. Farley, 364 Mo. 921, 926-27, 269 S.W.2d 896, 897-99 (1954); Monk v. Hess, 213 Va. 244, 245, 191 S.E.2d 229, 230 (1972). A Missouri court has indicated that the defenses should be handled with equal fairness and less confusion by confining the issues to negligence and contributory negligence, even where the contributory negligence consists of entering into a dangerous situation known to the plaintiff. *See* Turpin v. Shoemaker, 427 S.W.2d 485, 489 (Mo. 1968).

42. *See* Blair v. Jackson, 526 S.W.2d 120, 123 (Tenn. 1975). Tennessee's position on assumption of risk, as well as its contributory negligence system, is unique. Its courts have stated that voluntary assumption of risk is gross contributory negligence which, where found, bars a plaintiff's recovery even where the defendant has been grossly negligent. *See* Hood v. Waldrum, 58 Tenn. App. 512, 523, 528, 434 S.W.2d 94, 99, 101 (1968). Thus, at the same time that assumption of risk bars recovery, it is merged with negligence principles. Concerning negligence, Tennessee has a distinctive doctrine called "remote contributory negligence." It is based on a causation principle and serves to mitigate the defendant's damages instead of denying recovery to the plaintiff. *See* Wade, Crawford & Ryder, *Comparative Fault in Tennessee Tort Actions: Past, Present and Future*, 41 TENN. L. REV. 423, 430-44 (1974).

43. *See* text & note 40 *supra*. The leading Arizona cases establishing the distinctions, Chavez v. Pima Co., 107 Ariz. 358, 488 P.2d 978 (1971) and Hildebrand v. Minyard, 16 Ariz. App. 583, 494 P.2d 1328 (1972), were decided with reference to the defendant's simple negligence. The rules by which liability for gross negligence is determined, however, are identical to those by which liability for simple negligence is decided, with one exception: contributory neglience will not bar a plaintiff's recovery where the defendant's reckless conduct is established. De Elena v. Southern Pac. Co., 121 Ariz. 563, 567, 592 P.2d 759, 763 (1979).

44. The case law under review does not include those Arizona decisions construing the assumption of risk defense in situatons involving employees, in which the defense is limited by employer liability laws, or in express contractual agreements to assume a specified risk, which situation does not exist in *Bartlett*.

45. Hildebrand v. Minyard, 16 Ariz. App. 583, 585, 494 P.2d 1328, 1330 (1972); Moore v. Gray, 3 Ariz. App. 309, 312, 414 P.2d 158, 161 (1966). See note 40 *supra*.

46. *See* Chavez v. Pima Co., 107 Ariz. 358, 360-61, 488 P.2d 978, 980-81 (1971); Hildebrand v. Minyard, 16 Ariz. App. 583, 585-86, 494 P.2d 1328, 1330-31 (1972). See note 40 *supra*.

47. *See* note 30 *supra*. Arizona recognizes that a plaintiff who voluntarily undertakes an unreasonable risk may be found to be contributorily negligent and to have assumed the risk. Hildebrand v. Minyard, 16 Ariz. App. 583, 586, 494 P.2d 1328, 1330 (1972). The intersection does not disturb the courts which seem to agree that unreasonableness is not determinative of the plain-

The second ground for distinguishing the two defenses involves the different standards applied to the plaintiff's mental state. For assumption of risk, the standard is subjective, focusing on what the particular plaintiff in fact sees, knows, understands, and appreciates.[48] In contributory negligence, the standard applied is objective, requiring examination of what a reasonable, prudent person would know, understand, and appreciate.[49]

Infirmities in the Bartlett Affirmance of Arizona's Differential Treatment of the Contributory Negligence and Assumption of Risk Doctrines

The *Bartlett* opinion is noteworthy principally for its failure either to explain or to reexamine Arizona's treatment of the assumption of risk and contributory negligence defenses. The appeals court alluded to the conceptual distinctions between the doctrines previously acknowledged by Arizona's courts[50] in holding that unlike contributory negligence, the assumption of risk defense will bar a plaintiff's recovery even when a defendant's conduct is reckless.[51] But the *Bartlett* opinion does not explain why the doctrines should be treated differently in this context. For example, the court does not delineate any connection between the conceptual and operational distinctions separating the defenses.[52]

The court also declined to address the plaintiff's argument that his unreasonable conduct in assuming the risk is identical to the unreasonable conduct which describes contributory negligence, and that therefore the defenses should be applied identically to him.[53] The plaintiff argued that his conduct constituted secondary assumption of risk[54] which is acknowledged by commentators to be identical to contributory negligence[55] but is unrecognized in Arizona.[56]

Thus, an issue meriting the *Bartlett* court's consideration—whether Arizona should treat the defenses identically when, in the face of the defendant's reckless conduct, the plaintiff's conduct establishes

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tiff's right to recover. *Cf.* McGriff v. McGriff, 114 Ariz. 323, 326, 560 P.2d 1230, 1233 (1977) (plaintiff, knowing defendant driver was drowsy, was aware of danger inconsistent with his safety; the court's giving of jury instructions on both contributory negligence and assumption of risk, therefore, was appropriate).

48. Chavez v. Pima Co., 107 Ariz. 358, 361, 488 P.2d 978, 981 (1971); Hildebrand v. Minyard, 16 Ariz. App. 583, 586, 494 P.2d 1328, 1331 (1972). See note 36 *supra*.

49. Chavez v. Pima Co., 107 Ariz. 358, 361, 488 P.2d 978, 981 (1971). See note 40 *supra*.

50. See text & notes 44-49 *supra*.

51. 125 Ariz. at 50, 607 P.2d at 33.

52. The *Restatement* does not argue that the theoretical differences justify the difference in application. *See* RESTATEMENT (SECOND) OF TORTS § 496A, Comment d (1965). The *Bartlett* court itself failed to elaborate on the *Restatement* position.

53. See text & note 19 *supra*.

54. See note 23 *supra*.

55. *Id.*

56. *Id.*

assumption of the risk and contributory negligence but not gross contributory negligence—is unresolved.

The *Bartlett* court's ruling that the *Restatement* position on the differential application of the defenses is to be followed when the defendant is reckless concludes with citation to three Arizona cases[57] recapitulating the theoretical distinctions between the doctrines.[58] The *Bartlett* holding diverges from a clear trend in other states.[59] A growing number of jurisdictions recognize that the elements cited in the Arizona cases purporting to distinguish the two defenses on theoretical grounds are essentially insignificant, having more semantic than substantive utility.[60]

The Arizona cases hold that the basis of assumption of the risk is consent while the basis of contributory negligence is conduct.[61] Intelligent consent, however, is ultimately conduct;[62] in most instances, including *Bartlett*,[63] the plaintiff does not merely passively agree to encounter some danger.[64] The consent required for assumption of risk is usually inferred from conduct that demonstrates the plaintiff's failure to exercise due care.[65] This is the same conduct that shows contributory negligence.[66] It has been suggested by one critic that if the terms "consent" and "conduct" make no practical distinction between assumption of risk and contributory negligence, then these terms merely are labels for the same behavior.[67] Which term a court uses depends on which of the two doctrines it chooses to apply.[68]

The concept of consent is an attractive theoretical rationale for assumption of risk. It serves only to bar recovery when a plaintiff enters upon dangerous conditions with open eyes and knowledge of what will be encountered.[69] It is reasonable that the doctrine should operate in

57. McGriff v. McGriff, 114 Ariz. 323, 560 P.2d 1230 (1977); Chavez v. Pima Co., 107 Ariz. 358, 448 P.2d 978 (1971); Hildebrand v. Minyard, 16 Ariz. App. 583, 494 P.2d 1328 (1972).

58. 125 Ariz. at 50, 607 P.2d at 33.

59. *See* Blackburn v. Dorta, 348 So. 2d 287, 289 (Fla. 1977); Shaw, *Role of Assumption of Risk in Systems of Comparative Negligence*, 46 INS. COUNSEL J. 360, 381 (1979).

60. *See, e.g.*, Parker v. Redden, 421 S.W.2d 586, 591-92 (Ky. 1967); Meistrich v. Casino Arena Attractions, 31 N.J. 44, 51-55, 155 A.2d 90, 94-96 (1959); Williamson v. Smith, 83 N.M. 336, 340-41, 491 P.2d 1147, 1151-52 (1971). Nearly all of the arguments on both sides of the controversy concerning whether to retain or eliminate assumption of risk as a defense are addressed to the simple negligence paradigm rather than the gross negligence problem. See note 43 *supra*.

61. See text & notes 45-47 *supra*.

62. *See* Rice, *supra* note 28, at 341.

63. The plaintiff entered the automobile driven by the defendant (act), after which he failed to remove himself therefrom as soon as he knew of defendant's intoxication. *See* text & notes 9-10 *supra*.

64. Comment, *Distinction Between Assumption of Risk and Contributory Negligence in Wisconsin*, 1960 WIS. L. REV. 460, 467.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. Shaw, *supra* note 59, at 379.

this way in a democratic society emphasizing free will and accountability for one's choices and actions.[70] In practice, however, the concept of implied consent has been strained to bar plaintiffs who actually did not know of or fully appreciate the danger they encountered.[71] This is particularly true in cases involving "obvious" risk where knowledge of danger is imputed.[72]

The assumption of risk defense in Arizona requires that the danger actually be known to the plaintiff or else be "obvious" from the facts known.[73] Arizona and most jurisdictions retaining the assumption of risk defense permit the presentation of circumstantial evidence to rebut the plaintiff's claim of lack of actual knowledge or understanding of an obvious risk.[74] After consideration of evidence on the issue of plaintiff's constructive knowledge beyond the plaintiff's testimony,[75] the jury may infer such knowledge where under all the circumstances a person of normal intelligence would have appreciated the danger.[76] The law acknowledges a person's mental attitude as it manifests in that person's overt acts.[77] Hence, the purported determination of constructive knowledge by evaluation of the risk's obviousness involves the identical test used to ascertain whether the plaintiff was contributorily negligent, that is, the objective, reasonable prudent person standard.[78] Particularly in the context of obviousness, the contention that no genuine distinction exists betwen the standards of knowledge required by the two defenses seems meritorious.[79]

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70. *Id.*; Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 14 (1906).

71. Several authorities have addressed the impropriety of a liberal construction of implied consent. *See, e.g.*, McConville v. State Farm Mut. Auto Ins. Co., 15 Wis. 2d 374, 384-85, 113 N.W.2d 14, 19 (1962); Keeton, *supra* note 22, at 153; Shaw, *supra* note 59, at 379.

72. *See* Owens v. Union Pac. R.R., 319 U.S. 715, 723-24 (1943); Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368, 381 (Tex. 1963).

73. Bryant v. Thunderbird Academy, 103 Ariz. 247, 249-50, 439 P.2d 818, 820-21 (1968); Miller v. George Cook Constr. Co., 91 Ariz. 80, 83, 370 P.2d 53, 54 (1962); Lunsford v. Tucson Aviation Corp., 73 Ariz. 277, 280, 240 P.2d 545, 547 (1952). See note 40 *supra*.

74. Green v. Parisi, 478 F.2d 313, 316-17 (3d Cir. 1973) (decedent lit match near leaking gas; jury allowed to make inferences as to his knowledge of the risk where other household members expressed awareness of the danger of leaking gas); Bryant v. Thunderbird Academy, 103 Ariz. 247, 250, 439 P.2d 818, 821 (1968) (trial judge could properly conclude that where boy fell from broken tree branch of such a size that he ought not to have trusted it to sustain his weight, the risk of standing thereon was so obvious that it was taken to have been known and comprehended); *see* RESTATEMENT (SECOND) OF TORTS § 496D, Comment d (1965); W. PROSSER, *supra* note 23, § 68, at 448. *See also* Williams v. Brown, 45 Ill. 2d 418, 430-31, 261 N.E.2d 305, 312 (1970); Johnson v. Clark Equip. Co., 274 Or. 403, 411 n.8, 547 P.2d 132, 139 n.8 (1976).

75. *See, e.g.*, Green v. Parisi, 478 F.2d 313, 315 (3d Cir. 1973); Williams v. Brown, 45 Ill. 2d 418, 430-31, 261 N.E.2d 305, 312 (1970); Johnson v. Clark Equip. Co., 274 Or. 403, 411 n.8, 547 P.2d 132, 139 n.8 (1976).

76. *See* RESTATEMENT (SECOND) OF TORTS §§ 496D-496E; W. PROSSER, *supra* note 23, § 68, at 448.

77. Rice, *supra* note 28, at 377.

78. *Id.* at 375-76; Comment, *supra* note 64, at 466-67.

79. For a thorough treatment of the knowledge aspect of the two doctrines, *see* Shaw, *supra* note 59, at 365-67, 376-78.

Problems Encountered by the Arizona Jury in Evaluating the Contributory Negligence and Assumption of Risk Defenses to Gross Negligence

The compounded task of determining whether the plaintiff had actual or constructive knowledge[80] suggests the complexities faced by the jury in a contributory negligence jurisdiction where assumption of risk is retained as an independent defense to wilful, wanton, or reckless conduct. In Arizona, the burden of distinguishing assumption of risk from contributory negligence is ultimately on the jury.[81] The subtleties separating the two doctrines confound and divide legal practitioners,[82] yet the lay jury receives instructions on two discrete defenses which may seem substantively identical.[83] This is especially problematic when it is argued that the plaintiff unreasonably encountered a danger with knowledge and appreciation of the risk presented. When established, such conduct amounts not only to assumption of risk but also contributory negligence since it evidences a lack of due care for one's self.[84] By extension, a sufficiently unreasonable assumption of risk, when the danger is totally out of proportion to the benefit the plaintiff seeks, would closely resemble gross contributory negligence. Gross contributory negligence exists when the plaintiff's conduct creates an unreasonable risk of harm and a high degree of probability that such harm will result.[85]

Under such circumstances, the jury may perceive that the grossly negligent defendant has two separate defenses to the same conduct of the plaintiff.[86] Given the lack of substantial practical difference between the two doctrines when a risk has been assumed unreasonably, instructions on assumption of risk and contributory negligence place

80. *See id.* at 377.

81. ARIZ. CONST. art. 18, § 5 provides: "The defense of contributory neglience or assumption of risk shall, . . . at all times, be left to the jury."

82. See text & notes 23-42 *supra*.

83. *Compare* RAJI Negl. 2A, 5 (1974) (contributory negligence) *with id.* 5A, 6 (assumption of risk).

84. Kroger Company v. Haun, — Ind. App. —, —, 379 N.E.2d 1004, 1014 (1978); Budzinski v. Harris, 213 Va. 107, 110, 189 S.E.2d 372, 375 (1972); RESTATEMENT (SECOND) OF TORTS § 496A, Comment c (1965); F. HARPER & F. JAMES, *supra* note 1, § 21.1, at 1162; W. PROSSER, *supra* note 23, § 68, at 440-41.

85. Womack v. Preach, 63 Ariz. 390, 398, 163 P.2d 280, 283 (1945). *Cf.* W. PROSSER, *supra* note 23, § 68, at 440-41 (example of a man rushing into a burning building to save his hat as an unreasonably assumed risk).

86. Where the defendant's conduct is reckless, contributory negligence is no defense in Arizona, Southern Pac. Transp. Co. v. Lueck, 111 Ariz. 560, 562, 535 P.2d 599, 601 (1975); Southern Pac. R.R. v. Svendsen, 13 Ariz. 111, 117, 108 P. 262, 264-65 (1910), unless the plaintiff's contributory negligence also is gross in character, Southern Pac. Transp. Co. v. Lueck, 111 Ariz. at 574, 535 P.2d at 613; Coyner Crop Dusters v. Marsh, 90 Ariz. 157, 165, 367 P.2d 208, 213 (1961). See note 43 *supra*. Thus, whenever the defendant's gross negligence is at issue, and not established as a matter of law, *see* note 14 *supra*, it is necessary for the court to instruct the jury in some manner on contributory negligence if only to inform it that the defense will not apply unless it finds that the plaintiff's behavior is reckless in quality.

undue emphasis on the plaintiff's fault and increase the chances that the jury will deny him recovery.[87] Even when the jury finds that the plaintiff did not contribute to the injury to a sufficiently unreasonable degree to bar recovery under gross contributory negligence, the concurrent availability of assumption of risk as a separate defense allows the jury to conclude that the plaintiff unreasonably assumed the risk of the injury.[88] The conceptual labyrinth underlying this possibility and the potential for inequitable results arising from such a jury finding have led many states to rule that the function performed by assumption of risk in any context is adequately handled by contributory negligence, and that it is therefore unwise to continue to allow assumption of risk to exist as an independent defense.[89] Hence, if the plaintiff's contributory negligence is no defense to the defendant's gross negligence,[90] neither should the plaintiff's assumption of the risk be a defense.

Conclusion

In *Menendez v. Bartlett*, the court of appeals reaffirmed that in Arizona, assumption of risk is a doctrine distinct from contributory negligence. The court held that while a finding of defendant's gross negligence precludes consideration of contributory negligence as a defense, it does not preclude the defense of assumption of risk. This ruling places Arizona among the unstable majority of contributory negligence jurisdictions which permits assumption of risk to bar a plaintiff's recovery where the defendant's willful, wanton, or reckless conduct has been established. In reaching a decision on the functional distinction between the doctrines, the court relied exclusively on § 496A of the *Restatement* for authority.

After a directed verdict that the defendant was grossly negligent, the plaintiff's contributory negligence was not in issue. By then permitting the jury to find that the plaintiff assumed the risk, the *Bartlett* court reached a logically convoluted and fundamentally unfair conclusion. The result is that the plaintiff must bear the entire burden of his damages for which two parties are by hypothesis responsible. When a jury can receive apparently duplicative instructions on two independent defenses and is given the authority to find that the plaintiff should have known of the danger notwithstanding professed ignorance, the

87. *Cf.* Rosenau v. City of Estherville, 199 N.W.2d 125, 133 (Iowa 1972) (instructions should not give undue emphasis to any phase of the case favorable to either side).

88. *Cf. id.* at 132 (discussion in context of simple negligence).

89. *See, e.g.*, Parker v. Redden, 421 S.W.2d 586, 592 (Ky. 1967); Meistrich v. Casino Arena Attractions, 31 N.J. 44, 50-51, 55, 155 A.2d 90, 93-94, 96 (1959); Williamson v. Smith, 83 N.M. 336, 341, 491 P.2d 1147, 1152 (1971).

90. See note 43 *supra*.

potential for juror confusion is great, and the plaintiff's prospects for recovery as a victim of gross negligence in Arizona appear grim.

Inasmuch as the factors separating implied assumption of risk from either the absence of duty or contributory negligence are insubstantial, it is suggested that Arizona abrogate assumption of risk as an independent defense where the defendant's reckless conduct is established, at least where express assumptions or employment relationships are not involved.

Michael N. Widener

B. EMPLOYERS' LIABILITY FOR HIRING FELONS

In *McGuire v. Arizona Protection Agency*,[1] a felon, employed by the defendant alarm company, installed a burglar alarm in Patricia McGuire's home.[2] After completion of the work and after termination of his employment, the former employee returned to the plaintiff's home, disconnected the burglar alarm, and stole property worth $371,800.[3] The plaintiff brought an action against the burglar alarm company alleging that the company was negligent in employing a felon to install burglar alarm systems.[4] The trial court granted the defendant's motion to dismiss for failure to state a claim.[5]

The Arizona Court of Appeals reversed, holding that a burglar alarm company owes a duty to its customers to only employ as installers, to the extent reasonably determinable, responsible and trustworthy people.[6] Therefore, the court concluded that the plaintiff had not failed to state a claim.[7] The *McGuire* court relied on the *Restatement (Second) of Torts*,[8] Prosser's *Handbook of the Law of Torts*,[9] and *Central Alarm of Tucson v. Ganem*[10] in reaching its holding.[11] The court rea-

1. 125 Ariz. 380, 609 P.2d 1080 (Ct. App. 1980).
2. *Id.* at 381, 609 P.2d at 1081. The *McGuire* opinion does not indicate the nature of the felonies previously committed by the defendant's employee.
3. *Id.*
4. *Id.*
5. *Id.*; *see* ARIZ. R. CIV. P. 12(b)(6).
6. 125 Ariz. at 382, 609 P.2d at 1082.
7. *Id.* at 381, 609 P.2d at 1081.
8. RESTATEMENT (SECOND) OF TORTS § 302B (1965) provides: "An act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even if such conduct is criminal." A duty must be found before § 302B applies. *See* Fancil v. QSE Foods, Inc., 60 Ill. 2d 552, 556, 328 N.E.2d 538, 540 (1975); Cross v. Chicago Hous. Auth., 74 Ill. App. 3d 921, 924-25, 393 N.E.2d 580, 583 (1979); RESTATEMENT (SECOND) OF TORTS, § 302, Comment a (1965).
9. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 33, at 174 (4th ed. 1971).
10. 116 Ariz. 74, 567 P.2d 1203 (Ct. App. 1977). In *Ganem*, the defendant's negligence was

soned that the temptation and opportunity for a subsequent burglary associated with the installation of burglar alarms creates a duty to employ installers with no criminal proclivities.[12] If reasonable inquiry into the employee's background would have made the theft foreseeable, hiring the felon would be a breach of this duty.[13] Thus, the court of appeals remanded the case to the trial court to determine whether the defendant had breached its duty to make reasonable inquiry and whether the defendant's breach proximately caused the plaintiff's injury.[14]

This casenote will analyze the *McGuire* decision with particular emphasis on the court's imposition of a duty of care upon the burglar alarm company defendant. The concepts of duty arising from the existence of a special relationship, from the existence of an undertaking, and from the common-law principles of misfeasance will be discussed in conjunction with the *McGuire* facts. Finally, the policy considerations relevant to the imposition of a duty not to hire felons will be considered.

Existence Of A Duty

To establish liability for negligence, the plaintiff must prove that the defendant owed a duty to the plaintiff, that the duty was breached, and that the plaintiff was injured as a proximate result of the breach.[15] A duty arises when a legal obligation should be imposed on the defendant in order to protect the plaintiff's interests.[16] Such a legal obligation is imposed by courts only after analysis of a wide range of policy considerations.[17]

According to several commentators, the California trend is to ex-

assumed *arguendo*. *Id.* at 76, 567 P.2d at 1205. Judge Howard argued that *Ganem* was irrelevant to the *McGuire* decision because the issue in *McGuire* was the existence of a duty *vel non*, not the foreseeability of harm. 125 Ariz. at 383, 609 P.2d at 1083 (Howard, J., dissenting). *But see* text & note 21 *infra*.

11. 125 Ariz. at 381-82, 609 P.2d at 1081-82.

12. *Id.* at 382, 609 P.2d at 1082; *see* W. PROSSER, *supra* note 9, § 33, at 174.

13. *See* 125 Ariz. at 382, 609 P.2d at 1082; RESTATEMENT (SECOND) OF TORTS § 302B (1965).

14. 125 Ariz. at 382, 609 P.2d at 1082. Judge Howard dissented on the ground that the employer's duty ended when the employee was dismissed. *Id.* at 382-83, 609 P.2d at 1082-83. *But see* text & notes 59-60 *infra*. Judge Howard also asserted that the defendant was entitled to summary judgment because the plaintiff failed to show that evidence of the defendant's negligence was available. 125 Ariz. at 384, 609 P.2d at 1084. *But see* CK Security Sys., Inc. v. Hartford Accident & Indem. Co., 137 Ga. App. 159, 162-63, 233 S.E.2d 453, 456 (1956).

15. *See, e.g.*, Wisener v. State, 123 Ariz. 148, 149, 598 P.2d 511, 512 (1979); Rager v. Superior Coach Sales and Serv., 111 Ariz. 204, 210, 526 P.2d 1056, 1062 (1974); Shafer v. Monte Mansfield Motors, 91 Ariz. 331, 333, 372 P.2d 333, 334-35 (1962); W. PROSSER, *supra* note 9, § 30, at 143-44.

16. W. PROSSER, *supra* note 9, § 53, at 325.

17. *See* Weirum v. RKO General, Inc., 15 Cal. 3d 40, 46, 539 P.2d 36, 39, 123 Cal. Rptr. 468, 471 (1975); Brennan v. City of Eugene, 285 Or. 401, 406, 591 P.2d 719, 722 (1979); W. PROSSER, *supra* note 9, § 53, at 325-26.

pand the concept of duty by permitting the jury to decide the issue.[18] Nevertheless, in Arizona the duty issue is still treated as a question of law for the judge.[19] Liability cannot be imposed if the judge finds that the defendant owes no duty to the plaintiff.[20]

The existence of a defendant's duty to protect the plaintiff from injury is largely determined by the foreseeability of the risk created.[21] Additional factors to be considered include the likelihood of injury, the burden of guarding against it, and the effect of allocating that burden to the defendant.[22]

Duty Arising From Special Relationships. The duty concept always concerns the relationship between the plaintiff and the defendant.[23] As a general rule, a person owes a duty to others who will foreseeably be subjected to an unreasonable risk of harm caused by that person's conduct.[24] Courts have been reluctant, however, to find a duty to control the conduct of third persons unless the defendant has a special relationship with either the plaintiff or such third persons.[25]

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18. *See* Hodel, *The Modern Concept of Duty: Hoyem v. Manhattan Beach City School District and School District Liability for Injuries to Truants*, 30 HASTINGS L.J. 1893, 1904, 1919 (1979); Comment, *The Death of Palsgraf, A Comment on the Current Status of the Duty Concept in California*, 16 SAN DIEGO L. REV. 794, 802-03, 810 (1979).

19. Chavez v. Tolleson Elementary School Dist., 122 Ariz. 472, 477, 595 P.2d 1017, 1022 (Ct. App. 1979); Rodriguez v. Besser Co., 115 Ariz. 454, 459, 565 P.2d 1315, 1320 (Ct. App. 1977); Barnum v. Rural Fire Protection Agency, 24 Ariz. App. 233, 235, 537 P.2d 618, 620 (1975). *See* W. PROSSER, *supra* note 9, § 37, at 206; RESTATEMENT (SECOND) OF TORTS § 328B(b) & Comment e (1965).

20. *See, e.g.*, Shafer v. Monte Mansfield Motors, 91 Ariz. 331, 334, 372 P.2d 333, 335 (1962); Parish v. Truman, 124 Ariz. 228, 230, 603 P.2d 120, 122 (Ct. App. 1979); Chavez v. Tolleson Elem. School Dist., 122 Ariz. 472, 477-78, 595 P.2d 1017, 1022-23 (Ct.App. 1979).

21. *E.g.*, Rimondi v. Briggs, 124 Ariz. 561, 566, 606 P.2d 412, 417 (1980); Rager v. Superior Coach Sales & Serv., 111 Ariz. 204, 210, 526 P.2d 1056, 1062 (1974); City of Scottsdale v. Kokaska, 17 Ariz. App. 120, 124, 495 P.2d 1327, 1331 (1972). Whether a duty exists is, of course, a question distinct from the determination of the scope of the duty. *See* Shafer v. Monte Mansfield Motors, 91 Ariz. 331, 333-34, 372 P.2d 333, 334 (1962); Pulka v. Edelman, 40 N.Y.2d 781, 785, 358 N.E.2d 1019, 1022, 390 N.Y.S.2d 393, 396 (1976). The existence of a duty presupposes knowledge of the risk or the opportunity to acquire such knowledge. Alires v. Southern Pac. Co., 93 Ariz. 97, 106-07, 378 P.2d 913, 919 (1963). The scope of the duty is commensurate with the risk perceived in the situation. Bryan v. Southern Pac. Co., 79 Ariz. 253, 260, 286 P.2d 761, 765 (1955); Mountain States Tel. & Tel. Co. v. Kelton, 79 Ariz. 126, 133-34, 285 P.2d 168, 172-73 (1955); Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928).

22. *See* Campbell v. City of Tucson, 4 Ariz. App. 155, 157, 418 P.2d 401, 403 (1966); Rowland v. Christian, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968); Cross v. Chicago Hous. Auth., 74 Ill. App. 2d 921, 925, 393 N.E.2d 580, 583 (1979); W. PROSSER, *supra* note 9, § 39, at 327; RESTATEMENT (SECOND) OF TORTS § 302B, Comment f (1965); *Recent Developments*, 63 COLUM. L. REV. 766, 768 (1963). *Cf.* Rodriguez v. Besser Co., 115 Ariz. 454, 460, 565 P.2d 1315, 1321 (Ct. App. 1977) (failure to impose a duty means the burden of holding otherwise is too great).

23. W. PROSSER, *supra* note 9, § 53, at 325; Birnbaum & Rheingold, *Torts*, 29 SYRACUSE L. REV. 593, 593 (1978); Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 13 (1953).

24. Lewis v. Wolf, 122 Ariz. 567, 571, 596 P.2d 705, 709 (Ct. App. 1979); Tarasoff v. Board of Regents, 17 Cal. 3d 425, 434-35, 551 P.2d 334, 342, 131 Cal.Rptr. 14, 22 (1976); Seibel v. City and County of Honolulu, 61 Hawaii ___, ___, 602 P.2d 532, 536 (1979).

25. *See, e.g.*, Parish v. Truman, 124 Ariz. 228, 230, 603 P.2d 120, 122 (Ct. App. 1979); Tarasoff v. Board of Regents, 17 Cal. 3d 425, 435, 551 P.2d 334, 342-43, 131 Cal. Rptr. 14, 23

Special relationships between a plaintiff and defendant include common carrier/passenger,[26] innkeeper/guest,[27] possessor of land/invitee,[28] employer/employee,[29] and custodian/ward.[30] The law appears to be working slowly toward a recognition of the duty to protect in any relation of dependence.[31] Thus, the courts have increased the circumstances under which affirmative duties are imposed on the defendant by expanding this list of special relationships.[32]

(1976); Seibel v. City and County of Honolulu, 61 Hawaii __, __, 602 P.2d 532, 536-38 (1979). RESTATEMENT (SECOND) OF TORTS § 315 (1965) provides:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other the right to protection.

See also Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CAL. L. REV. 1025, 1027 n.12 (1974); Harper & Kime, *Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 887-88 (1934).

The need to prove the existence of a special relationship arose out of the common-law distinction between misfeasance and nonfeasance. W. PROSSER, *supra* note 9, § 56, at 339. Misfeasance is the improper performance of some act which a person may lawfully do. BLACK'S LAW DICTIONARY 902 (5th ed. 1979). Nonfeasance means the omission of an act which a person "ought" to do. *Id.* The difference is between active conduct working positive injury to another (misfeasance) and passive inaction where harm could have been prevented (nonfeasance).

The common law did not impose liability for nonfeasance (the failure to protect another from the conduct of a third person) unless the plaintiff could prove the existence of a special relationship. Mid-Cal Nat'l Bank v. Federal Reserve Bank, 590 F.2d 761, 763 (9th Cir. 1979); Mikilian v. City of Los Angeles, 79 Cal. App. 3d 150, 159, 144 Cal. Rptr. 794, 799 (1978); Mann v. State, 70 Cal. App. 3d 773, 777, 139 Cal. Rptr. 82, 86 (1977) (failure of officer to protect stranded motorist by placing flares or warning lights was nonfeasance requiring special relationship). A defendant was always liable for misfeasance (failure to protect another from the defendant's own affirmative conduct). W. PROSSER, *supra* note 9, § 56, at 338-39.

26. Borus v. Yellow Cab Co., 52 Ill. App. 3d 194, 200, 367 N.E.2d 277, 281 (1977); Lestos v. Chicago Transit Auth., 118 Ill. App. 2d 26, 30, 254 N.E.2d 645, 647 (1969); Harpell v. Public Serv. Coordinated Transp., 20 N.J. 309, 316-17, 120 A.2d 43, 46-47 (1956); Hines v. Garrett, 131 Va. 125, 140, 108 S.E. 690, 695 (1921); RESTATEMENT (SECOND) OF TORTS § 314A(1) (1965).

27. Fourtney v. Hotel Rancroft, Inc., 5 Ill. App. 2d 327, 331, 125 N.E.2d 544, 546 (1955); RESTATEMENT (SECOND) OF TORTS § 314A(2) (1965).

28. Berne v. Greyhound Parks, Inc., 104 Ariz. 38, 41, 448 P.2d 388, 391 (1968); First Nat'l. Bank of Ariz. v. Otis Elevator Co., 2 Ariz. App. 80, 86, 406 P.2d 430, 436 (1965); RESTATEMENT (SECOND) OF TORTS § 314A(3) (1965).

29. Circle K Corp. v. Rosenthal, 118 Ariz. 63, 68, 574 P.2d 856, 861 (Ct. App. 1977); RESTATEMENT (SECOND) OF TORTS § 314A, Comment a (1965).

30. Wallace v. Der-Ohanian, 199 Cal. App. 2d 141, 143-44, 18 Cal. Rptr. 892, 894 (1962) (children's camp/camper); Keeland v. Yankill County, 24 Or. App. 85, 89-90, 545 P.2d 137, 139 (1975) (county jail/prisoner); McLeod v. Grant County School Dist. No. 128, 42 Wash. 2d 316, 319-20, 255 P.2d 360, 362 (1953) (school/pupil); RESTATEMENT (SECOND) OF TORTS § 314A(4) (1965). *See also* Parish v. Truman, 124 Ariz. 228, 230, 603 P.2d 120, 122 (Ct. App. 1979); W. PROSSER, *supra* note 9, § 33, at 174-75, § 56, at 348; RESTATEMENT (SECOND) OF TORTS § 302B, Comment b (1965); Bazyler, *The Duty To Provide Adequate Protection: Landowners' Liability for Failure to Protect Patrons From Criminal Attack*, 21 ARIZ. L. REV. 727, 735-36 (1979).

31. *See* Mikilian v. City of Los Angeles, 79 Cal. App. 3d 150, 159, 144 Cal. Rptr. 794, 799 (1978); Mann v. State, 70 Cal. App. 3d 773, 779-80, 139 Cal. Rptr. 82, 86 (1977); RESTATEMENT (SECOND) OF TORTS § 314A, Comment b (1965).

32. *See* Harper & Kime, *supra* note 25, at 904-05; W. PROSSER, *supra* note 9, § 56, at 339-40. *Cf.* Duarte v. State, 151 Cal. Rptr. 727, 731 (1979) (exceptions may have swallowed the rule regarding the need for special relations). For additional circumstances under which the courts have found such special relationships between the plaintiff and defendant, *see* Kline v. 1500 Massachusetts Ave. Apt. Corp., 439 F.2d 477, 481, 483-85 (D.C. Cir. 1970) (landlord/tenant); Hutchinson v. Dickie, 162 F.2d 103, 106-07 (6th Cir.), *cert. denied*, 332 U.S. 830 (1947) (duty to invited

Special relationships between the defendant and third persons whose conduct must be controlled include parent/child,[33] master/servant,[34] possessor of land or chattels/licensee,[35] and custodian/person with dangerous propensities.[36]

The *McGuire* majority refers to a duty arising out of a temptation and opportunity for crime by the former employee brought about by the defendant and does not refer to any special relationship between the defendant and either the plaintiff or the former employee.[37] Although the court alluded to the sensitive nature of the defendant alarm company's work, it did not hold that the nature of the work gave rise to a special relationship between the plaintiff and the defendant.[38] Under the *Restatement* position,[39] the defendant employer had no special relationship with the former employee since during the burglary, the employee was not on premises that he was privileged to enter as a result of his employment.[40] The absence of a special relationship, however, does not preclude the imposition of a duty where the defendant has entered

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guest who fell off private yacht); Mann v. State, 70 Cal. App. 3d 773, 780, 139 Cal. Rptr. 82, 86 (1977) (police officer/stranded motorist); Farwell v. Keaton, 396 Mich. 281, 292, 240 N.W.2d 217, 222 (1976) (special relationship betwen social companions); Schuster v. City of New York, 5 N.Y.2d 75, 80-83, 154 N.E.2d 534, 537-38, 180 N.Y.S.2d 265, 269-71 (1958) (city's duty to guard witness in a criminal case); W. PROSSER, *supra* note 9, § 33, at 174, § 56, at 349; RESTATEMENT (SECOND) OF TORTS § 314A, Comment b (1965). *But cf.* Cross v. Chicago Hous. Auth., 74 Ill. App. 3d 921, 925, 393 N.E.2d 580, 584 (1979) (a landlord/tenant relationship does not create such a duty).

33. Parsons v. Smithey, 109 Ariz. 49, 52, 504 P.2d 1272, 1275 (1973); RESTATEMENT (SECOND) OF TORTS § 316 (1965).

34. RESTATEMENT (SECOND) OF TORTS § 317 (1965). Under the *Restatement* view, the special relation of master/servant imposes a duty on the master to control a servant only if the latter is upon premises that he or she is permitted to enter as a servant and the master knows of the need and has the ability to control the servant's conduct. *Id.*

35. *Id.* § 318.

36. *See* Grimm v. Arizona Bd.of Pardons & Paroles, 115 Ariz. 260, 267, 564 P.2d 1227, 1234 (1977) (parole board/prisoner); Tarasoff v. Board of Regents, 17 Cal. 3d 425, 435, 551 P.2d 334, 343, 131 Cal. Rptr. 14, 23 (1976) (therapist/patient); RESTATEMENT (SECOND) OF TORTS § 319 (1965).

37. 125 Ariz. at 382, 609 P.2d at 1082.

38. An argument could be made that there was a special relationship between the plaintiff and defendant arising out of the plaintiff's dependence on the defendant alarm company to protect her property. A special relation arises in circumstances where one party is dependent upon the other for protection. *See* Kline v. 1500 Massachusetts Ave. Apt. Corp., 439 F.2d 477, 482-83 (D.C. Cir. 1970); Powers, *Hospital Emergency Service and the Open Door*, 66 MICH. L. REV. 1455, 1462 (1968). See text & notes 31-32 *supra*. In *McGuire*, the plaintiff had employed the defendant alarm company to protect the property, and was clearly depending upon its expert services for that protection. This dependency may justify finding a special relationship between the plaintiff and defendant.

39. See note 34 *supra*.

40. *Compare* International Distrib. Corp. v. American Dist. Tel. Co., 569 F.2d 136, 139 (D.C. Cir. 1977) (duty to supervise employees authorized to enter premises of plaintiff) *with* Belmar, Inc. v. Dixie Bldg. Maintenance, Inc., 226 So. 2d 280, 281 (Fla. App. 1969) (no duty where janitors wrongfully entered plaintiff's portion of building). *See* RESTATEMENT (SECOND) OF TORTS § 317, Comment b (1965). Without relying on Restatement § 317, see note 34 *supra*, Judge Howard in *McGuire* argued that the termination of the employer/employee relationship ended the basis for the alarm company's duty to the plantiff. 425 Ariz. at 383, 609 P.2d at 1083 (Howard, J., dissenting). *But see* text & notes 59-60 *infra*.

into an undertaking[41] or where the defendant's affirmative acts have unreasonably increased the risk of harm to the plaintiff.[42]

Duty Arising Out Of An Undertaking. A defendant can voluntarily undertake a duty to protect the plaintiff against the acts of third persons as an express or implied term of a contract.[43] But a breach of contract is not a tort unless the law imposes a duty on the relationship created by the contract which exists apart from the contract.[44] Liability results, therefore, not from breach of the contract, but from breach of the common-law duty requiring performance of the contract with ordinary care.[45]

Although there was a contract for services in *McGuire*, the court did not discuss any of the defendant's contractual duties.[46] In addition, the court never reached the question of whether the burglar alarm company had a duty to perform the contract with ordinary care.

Duty Arising Out Of Misfeasance. Under the common law, there is a general duty to exercise due care when engaging in affirmative acts.[47] Liability is premised on the defendant's own conduct rather than the failure of the defendant to control another person.[48] When the defendant's conduct results in harm, liability may extend to any person to whom harm might reasonably have been anticipated as a result of such

41. *See* text & notes 43-46 *infra*.

42. *See* text & notes 47-62 *infra*.

43. *See* Forbes v. Romo, 123 Ariz. 548, 551, 601 P.2d 311, 314 (Ct. App. 1979); Duff v. Harrah's South Shore Corp., 52 Cal. App. 3d 803, 806, 125 Cal. Rptr. 259, 261 (1977); Nash v. Sears, Roebuck & Co., 383 Mich. 136, 142, 174 N.W.2d 818, 821 (1970).

44. *See* Aspel v. American Contract Bridge League of Memphis, 122 Ariz. 399, 402, 595 P.2d 191, 194 (Ct. App. 1979). Hence, the contract merely furnishes the relationship which creates a duty of care.

45. *See, e.g.*, Clark v. Dalman, 379 Mich. 251, 261, 150 N.W.2d 755, 760 (1967); Fireman's Mut. Ins. Co. v. High Point Sprinkler Co., 266 N.C. 134, 141, 146 S.E.2d 53, 60 (1966); Jackson v. Central Torpedo Co., 117 Okla. 245, 247-48, 246 P. 426, 428 (1926).

46. Presumably, the plaintiff did not want to sue on the contractual duty alone because of the near universal use of limitation of liability clauses in burglar alarm installation contracts. *See, e.g.*, Central Alarm of Tucson v. Ganem, 116 Ariz. 74, 77-78, 657 P.2d 1203, 1206-07 (1977); Better Food Markets v. American Dist. Tel. Co., 40 Cal. 2d 179, 188, 253 P.2d 10, 16 (1953); Singer v. I.A. Durbin, Inc., 348 So. 2d 370, 373 (Fla. App. 1977). Moreover, it is arguable that the defendant's contractual duties were discharged when installation of the burglar alarm was completed. *Cf.* Christian v. County of Ontario, 92 Misc. 2d 51, 53, 399 N.Y.S.2d 379, 381 (Sup. Ct. 1977) (recovery under contract presupposes that the rights accrued within the contract period).

47. *E.g.*, Suchomajcz v. Hummel Chem. Co., 524 F.2d 19, 24 (3d Cir. 1975); Lewis v. Wolf, 112 Ariz. 567, 571, 596 P.2d 705, 709 (Ct. App. 1979); Weirum v. RKO General, Inc., 115 Cal. 3d 40, 46, 539 P.2d 36, 39, 123 Cal. Rptr. 468, 471 (1975); RESTATEMENT (SECOND) OF TORTS § 302, Comment a, § 302B, Comment e (1965).

48. *See, e.g.*, Kendall v. Gore Properties, Inc., 236 F.2d 673, 678-80 (D.C. Cir. 1946); Bullis v. Security Pac. Nat'l Bank, 21 Cal. 3d 801, 813, 582 P.2d 109, 115, 148 Cal. Rptr. 22, 28 (1978); Sun 'n Sand, Inc. v. United Cal. Bank, 21 Cal. 3d 671, 693, 582 P.2d 920, 935, 148 Cal. Rptr. 329, 344 (1978). *But cf.* Hansen v. Cohen, 203 Or. 157, 165, 278 P.2d 898, 899 (1955) (failure to discharge an employee is passive negligence).

conduct.[49]

Prosser lists several ways the defendant's affirmative conduct may bring plaintiffs into contact with criminals in situations that create opportunities for crimes.[50] The defendant may, for example, hire a criminal under conditions in which an opportunity or temptation for crime is created,[51] or the defendant's conduct may facilitate criminal interference with the plaintiff's property.[52] The *Restatement (Second) of Torts* also recognizes that where the defendant's affirmative acts expose the plaintiff to an unreasonable risk of criminal misconduct, the defendant has a duty to prevent that misconduct.[53]

A number of courts have refused to extend liability for the criminal acts of third parties unless there is some special relationship between the parties, even if the plaintiff alleges affirmative acts by the defendant.[54] This view, however, blurs the common-law distinction between nonfeasance and misfeasance.[55] The better reasoned view is that affirmative acts provide a sufficient basis for imposing liability without such special relationships.[56]

In *McGuire*, a majority of the Arizona Court of Appeals held that a duty arose because the plaintiff was exposed to an increased risk of harm when the defendant placed its employee in a position of opportunity and temptation.[57] Judge Howard argued in dissent that the em-

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49. *See* W. PROSSER, *supra* note 9, § 56, at 339-40. *See also* Brennen v. City of Eugene, 285 Or. 401, 409, 591 P.2d 719, 723-24 (1979) (higher standard of care for affirmative acts).

50. W. PROSSER, *supra* note 9, § 33, at 175. *Cf.* Scheibel v. Hillis, 531 S.W.2d 285, 288 (Mo. 1976) (defendant brought plaintiff into contact with a dangerous third person by opening the front door). *But see* Parish v. Truman, 124 Ariz. 228, 229-30, 603 P.2d 120, 121-22 (Ct. App. 1979) (no liability on similar facts).

51. W. PROSSER, *supra* note 9, § 33, at 175; *see* McGuire v. Arizona Protection Agency, 125 Ariz. at 382, 609 P.2d at 1082.

52. W. PROSSER, *supra* note 9, § 33, at 175. *See, e.g.*, Southwestern Bell Tel. Co. v. Adams, 199 Ark. 254, 267-68, 133 S.W.2d 867, 873 (1939) (defendant-employer held liable for destruction of a building by fire where defendant's employee left building open and accessible to hobos after repossessing a telephone); Garceau v. Engle, 169 Minn. 62, 63-64, 210 N.W. 608, 608 (1926) (lessee who left keys in the door liable to lessor for loss from theft); Jesse French Piano & Organ v. Phelps, 47 Tex. Civ. App. 385, 388-89, 105 S.W. 225, 227 (1907) (defendant liable for goods stolen after its employee broke in to repossess a piano and left a door unlocked).

53. RESTATEMENT (SECOND) OF TORTS § 449, Comment a; § 302B, Comment e (1965). These *Restatement* sections have been applied in a wide variety of situations where the defendant creates an unreasonable risk of foreseeable injury due to criminal misconduct. *E.g.*, Nichols v. City of Phoenix, 68 Ariz. 124, 138, 202 P.2d 201, 210 (1949) (operation of bus); Parness v. City of Tempe, 123 Ariz. 460, 464, 600 P.2d 764, 768 (Ct. App. 1979) (maintenance of recreation area); Campbell v. City of Tucson, 4 Ariz. App. 155, 157-58, 418 P.2d 401, 403-04 (1966) (maintenance of stoplight).

54. *E.g.*, Mitchell v. Archibald & Kendall, Inc., 573 F.2d 429, 438 (7th Cir. 1978); Fancil v. QSE Foods, Inc., 60 Ill. 2d 552, 559-60, 328 N.E.2d 538, 542-43 (1975); Gulf Reston, Inc. v. Rogers, 215 Va. 155, 159, 207 S.E.2d 841, 844-45 (1974).

55. *See* note 25 *supra*.

56. *See* Mitchell v. Archibald & Kendall, Inc., 573 F.2d 429, 438 (7th Cir. 1978) (Fairchild, J., dissenting); Whalen v. Lang, 71 Ill. App. 3d 83, 86, 389 N.E.2d 10, 12 (1979); Christensen v. Epley, 287 Or. 539, __, 601 P.2d 1216, 1223-24 (1979) (Tongue, J., concurring); RESTATEMENT (SECOND) OF TORTS § 302B, Comment e; § 449, Comment a (1965).

57. 125 Ariz. at 382, 609 P.2d at 1082. This duty was based on W. PROSSER, *supra* note 9,

ployer was not liable for negligent hiring because the injury occurred after the employment relationship had been terminated.[58]

It would seem foreseeable that an employee exposed to opportunity and temptation while in a burglar alarm company's employ might later take advantage of them even after the employment is terminated.[59] For this reason, the defendant's obligation to protect the plaintiff from the type of harm that occurred in *McGuire* should be considered within the scope of the duty that the *McGuire* court imposed, and the employer should not be able to escape liability simply by firing the employee.[60]

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§ 33, at 174. See text & notes 49-51 *supra*. The *McGuire* court also relied on RESTATEMENT (SECOND) OF TORTS § 302B (1965). 125 Ariz. at 381-82, 609 P.2d at 1081-82. See note 8 *supra*.

58. 125 Ariz. at 383, 609 P.2d at 1083 (Howard, J., dissenting).

An employer generally has a duty to impose minimum standards in hiring, training, and supervising employees to insure that an employee is competent to perform his or her duties without an unreasonable risk of harm to those with whom the employee will come into contact. Fleming v. Bronfin, 80 A.2d 915, 917 (D.C. Mun. Ct. App. 1951); Lou-Con, Inc. v. Gulf Bldg. Serv., Inc., 287 So. 2d 192, 198 (La. App. 1977); Evans v. Morsell, 284 Md. 160, 166-67, 395 A.2d 480, 484 (1978); Weiss v. Furniture in the Raw, 62 Misc. 2d 283, 285, 306 N.Y.S.2d 253, 255 (Civ. Ct. N.Y. 1969). Prior to *McGuire*, no Arizona case had imposed liability where the plaintiff alleged negligent hiring. *See* Lewis v. Southern Pac. Co., 102 Ariz. 108, 109, 425 P.2d 840, 841 (1967); Olson v. Staggs-Bilt Homes, Inc., 23 Ariz. App. 574, 577-78, 534 P.2d 1073, 1076-77 (1975); Torrez v. Kennecott Copper Co., 15 Ariz. App. 272, 274, 488 P.2d 477, 478-79 (1971).

In Becken v. Manpower, Inc., 532 F.2d 56, 59 (7th Cir. 1976), the Seventh Circuit, applying Illinois law, held that an employment agency could be liable for a theft perpetrated by former employees for whom the defendant had found part-time employment. Two convicted felons, posing as unemployed window washers, helped the plaintiff relocate his jewelry store and later returned to steal plaintiff's inventory worth $25,509.36. *Id.* at 57. The court remanded the case for a determination of the remaining questions of fact, including whether the burglary was foreseeable and whether the burglary was planned during the thieves' employment. *Id.* at 59. *McGuire* is consistent with the *Becken* liability theory. *But cf.* Morse v. Jones, 223 La. 212, 217, 65 So. 2d 317, 320 (1953) (even if the thief actuated the plan to steal plaintiff's car during his employment, the employer is not liable in respondeat superior for a theft which occurred 1 1/2 hours after the employee quit for the day and after he had left the premises).

Becken is criticized in Note, *The Responsibility Of Employers For The Actions Of Their Employees: The Negligent Hiring Theory Of Liability*, 53 CHI.-KENT L. REV. 717, 728-30 (1971). This Note theorizes that the imposition of a duty in negligent hiring cases requires the simultaneous existence of three factors: (1) both the employee and the plaintiff had a right to be in the places they were in; (2) the plaintiff met the employee as a direct result of the employment; and (3) the employer was in a position to benefit if the employee acted properly. *Id.* at 724-26. In *Becken*, as in *McGuire*, the plaintiff came into contact with the third person through the third person's employment; but at the time of the injury, the employee was not in a place where he had a right to be, and the employer did not stand to benefit from the employee's conduct. Thus, only one of three elements "required" for the imposition of a duty was present. *See id.* at 729.

59. *See* McGuire v. Arizona Protection Agency, 125 Ariz. at 382, 609 P.2d at 1082.

60. *See id.* at 381-82, 609 P.2d at 1081-82; RESTATEMENT (SECOND) OF TORTS § 302B (1965). A defendant is liable for injuries within the scope of the risks created by the defendant's conduct. Central Alarm of Tucson v. Ganem, 116 Ariz. 74, 77, 567 P.2d 1203, 1206 (Ct. App. 1977); Barclay Kitchens, Inc. v. California Bank, 208 Cal. App. 2d 347, 355, 25 Cal. Rptr. 383, 388 (1962); De Lorena v. Slud, 95 N.Y.S.2d 163, 164-65 (Civ. Ct. N.Y. 1949).

In his dissent to the *McGuire* decision, Judge Howard would permit an employer to escape liability where the relationship with the employee/wrongdoer has been terminated. 125 Ariz. at 383, 609 P.2d at 1083 (Howard, J., dissenting). Judge Howard bases his argument on the proposition that mere foreseeability of harm does not give rise to a duty. *Id.* Judge Howard does not delineate the policy considerations which would preclude the imposition of a duty on the defendant. Elsewhere Judge Howard has argued that "the role of the common law judge is to start with the proposition that the law requires every man to act reasonably and not create undue risk for others by his conduct. If he fails to meet this standard and causes injury, he should then have to

It has been suggested that the court will find that a defendant owed a duty of care to a plaintiff where reasonable people would generally recognize such a duty.[61] The *McGuire* court apparently felt that reasonable people would expect an installer of burglar alarms to hire employees who do not have a propensity to steal.[62]

Policy Considerations. One policy consideration in deciding whether to impose a duty is the effect that imposition of such a duty would have on the defendant. Although alarm systems are intended to prevent or minimize losses, the installer should not be expected to insure against potential losses, and a customer who chooses to rely on a burglar alarm rather than more expensive insurance agreements should not expect indemnity for a loss.[63] The *McGuire* plaintiff, however, was not asking the court to make the defendant an insurer but only to place upon the defendant a duty to conduct its affairs with reasonable care to protect its customers.[64] A duty to exercise reasonable care in selecting employees has long been imposed without disastrous consequences on some businesses.[65] Especially in the burglar alarm installation business, it does not seem surprising that employee theft would occur if the employer failed to take proper care in hiring employees.[66] The alarm company would appear to be in the best position to prevent harm to the plaintiff and, therefore, may fairly be required to do so.[67]

There are other policy considerations also not addressed by the

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respond in damages, absent some strong contrary public policy." Lewis v. Wolf, 122 Ariz. 567, 571, 596 P.2d 705, 709 (Ct. App. 1979).

61. W. PROSSER, *supra* note 9, § 53, at 325.

62. *See* 125 Ariz. at 382, 609 P.2d at 1082.

63. *See* Central Alarm of Tucson v. Ganem, 116 Ariz. 74, 78, 567 P.2d 1203, 1207 (Ct. App. 1977); Bargaintown, Inc. v. Federal Engineering Co., 309 A.2d 56, 59 (D.C. 1973). *See also* F.T. Co. v. Woods, 92 N.M. 697, 701, 594 P.2d 745, 749 (1979).

64. *See* W. PROSSER, *supra* note 9, § 33, at 174; RESTATEMENT (SECOND) OF TORTS § 302B, Comment e (1965). *Cf.* O'Hara v. Western Seven Trees Corp. Intercoast, 75 Cal. App. 3d 798, 803, 142 Cal. Rptr. 487, 490 (1978) (imposing a duty of reasonable care does not make the landlord an insurer of his tenant's safety). *Accord*, Kline v. 1500 Massachusetts Ave. Apt. Corp., 439 F.2d 477, 484 (D.C. Cir. 1970).

65. *See, e.g.*, Fleming v. Bronfin, 80 A.2d 915, 917 (D.C. 1951) (apartment manager); F & F Embroidery v. Service Window Cleaning Co., 142 N.Y.S.2d 802, 803 (Sup. Ct. 1955) (messenger service); Wishone v. Yellow Cab Co., 20 Tenn. App. 229, 232, 97 S.W.2d 452, 453 (1936) (taxicab company). The duty not to hire felons is imposed by statute for businesses providing private investigative services, ARIZ. REV. STAT. ANN. § 32-2414(A)(4) (1976), and security guards, *id.* § 32-2622(A)(2) (Supp. 1979-80). *But see* Smith v. Fussenich, 440 F. Supp. 1077, 1080 (D. Conn. 1977) (exclusion of all felons from security service work is fatally overbroad).

66. *See* International Distrib. Corp. v. American Dist. Tel. Co., 569 F.2d 136, 138 (D.C. Cir. 1977); Rodgers v. Kemper Constr. Co., 50 Cal. App. 2d 608, 618, 124 Cal. Rptr. 143, 148 (1975); Hinman v. Westinghouse Elec. Co., 2 Cal. 2d 956, 959-60, 88 Cal. Rptr. 188, 190 (1970). *But see* Kuehn v. White, 24 Wash. App. 274, 279-80, 600 P.2d 679, 682-83 (1979).

67. *Cf.* Kline v. 1500 Massachusetts Ave. Apt. Corp., 439 F.2d 477, 484 (D.C. Cir. 1970) (landlord in best position to protect tenant); Kendall v. Gore Properties, 236 F.2d 673, 677-78 (D.C. Cir. 1956) (same); J.A. Meyers & Co. v. Los Angeles County Probation Dep't, 78 Cal. App. 3d 309, 315, 144 Cal. Rptr. 186, 189 (1978) (plaintiff/employer in best position to protect itself against parolee/employee by not hiring, promoting, or bonding him).

McGuire court. For example, an overly broad rule of liability will inhibit employers in hiring felons, even those who have been rehabilitated, for fear of negligence suits.[68] Furthermore, the felon's interest in not being unfairly denied employment as a consequence of the employer's potential liability cannot be ignored.[69] Balanced against these interests is the community's interest in protection from dangerous employees.[70] Innocent consumers may be injured because of an employer's negligent selection of an employee.[71] In balancing these interests, at least one court has held that the employer's liability must be determined by the jury.[72]

It has also been argued that the employer has a right to rely on the government's release of a prisoner as indicating readiness to become a law-abiding member of society.[73] The impact of the argument is diminished, however, by the recognition that liability may be limited by: (1) the sensitivity of the employment at issue; (2) the nature of the employee's past criminal conduct; and (3) the surrounding circumstances.[74] Therefore, the nature and extent of an employer's inquiry into a prospective employee's background should vary with the circumstances.[75] In many situations it would be unfair to impose upon an employer the burden of inquiring into a prospective employee's criminal record.[76] Given the *McGuire* court's recognition of the highly sensitive nature of the work performed by an alarm company's employees,[77] the imposition of a duty to inquire into their criminal

68. *See* Brown v. Vanity Fair Mills, Inc., 291 Ala. 80, 83, 277 So. 2d 893, 896 (1973) (dicta); Bennett v. T & F Distrib. Co., 117 N.J. Super. 439, 445, 285 A.2d 59, 62 (1971) (dicta); Note, *supra* note 58, at 729.

69. *See* authorities cited at note 68 *supra*.

70. Hersh v. Kentfield Builders, Inc., 385 Mich. 410, 415, 189 N.W.2d 286, 289 (1971); Bennett v. T & F Distrib. Co., 117 N.J. Super. 439, 445, 285 A.2d 59, 62 (1971).

71. *See* Brown v. Vanity Fair Mills, Inc., 291 Ala. 80, 83, 277 So. 2d 893, 896 (1973) (dicta); Bennett v. T & F Distrib. Co., 117 N.J. Super. 439, 445, 285 A.2d 59, 62 (1971).

72. Hersh v. Kentfield Builders, Inc., 385 Mich. 410, 415-16, 189 N.W.2d 286, 289 (1971). Since the *McGuire* court found a duty and remanded for trial, 125 Ariz. at 382, 609 P.2d at 1082, it thus left the determination of liability to the jury.

73. *See* Evans v. Morsell, 284 Md. 160, 167, 395 A.2d 480, 484 (1978).

74. *Id.* at 167 n.5, 395 A.2d at 484 n.5. *See* McGuire v. Arizona Protection Agency, 125 Ariz. at 382, 609 P.2d at 1082. The employee's prior crimes must be of such a nature that they would give a reasonable person an expectation that the employee will commit theft. *E.g.*, Argonne Apt. House Co. v. Garrison, 42 F.2d 605, 608 (D.C. Cir. 1930) (conviction for intoxication did not indicate dishonesty of apartment house maintenance man); Kane v. Hartford Accident & Indem., 98 Cal. App. 3d 350, 361, 159 Cal. Rptr. 446, 451 (1979) (rape victim could not recover from bonding company where window cleaner-rapist had committed only property-related crimes in the past); Lou-Con, Inc. v. Gulf Bldg. Serv., Inc., 287 So. 2d 192, 199 (La. Ct. App. 1973) (janitor convicted for stealing welfare checks five years earlier could not be expected to commit arson). The *McGuire* dissent argued that for this reason there must be a connection between the past conduct and the theft. 125 Ariz. at 384, 609 P.2d at 1084 (Howard, J., dissenting).

75. *See* Evans v. Morsell, 284 Md. 160, 167, 395 A.2d 480, 484 (1978).

76. *See* Abraham v. Onorato Garage, 50 Hawaii 628, 633, 446 P.2d 821, 825 (1968); LeBrane v. Lewis, 280 So. 2d 572, 579-80 (La. Ct. App. 1973); Evans v. Morsell, 484 Md. 160, 167, 395 A.2d 480, 484 (1978).

77. 125 Ariz. at 382, 609 P.2d at 1082. *Cf.* CK Security Sys., Inc. v. Hartford Accident &

records does not seem unreasonable.

The *McGuire* court failed to express the policies supporting the imposition of a duty on the defendant burglar alarm company. Since the imposition of a duty in particular circumstances turns in part on policy considerations,[78] a duty on one type of employer cannot be imposed on other types of employers unless the policy considerations in both situations are similar. Thus, the value of *McGuire* as precedent for imposing a duty of care in hiring employees or employers other than burglar alarm companies is limited because the court did not discuss the policies involved.

Conclusion

The Arizona Court of Appeals in *McGuire* held that a burglar alarm company has a duty not to hire installers with reasonably determinable criminal proclivities. The court premised this duty on the defendant's affirmative conduct which the court viewed as the defendant's creation of the temptation and opportunity for crime. Since the resulting theft was a foreseeable consequence of that conduct and since it appears that the burden of imposing a duty on the defendant alarm company did not outweigh the benefits of reducing the opportunities and temptations for crime, the court appears to have reached the proper result in imposing a duty and thereby potential liability. The *McGuire* court did not, however, clearly express the policy supporting the imposition of this duty. Therefore, the duty of care found in *McGuire* should not be extended to cases where the tortfeasor/employee is in a less sensitive position.

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Indem. Co., 137 Ga. App. 159, 161-62, 223 S.E.2d 453, 455 (1976) (hiring a security guard who has a propensity to steal may breach the employer's duty to exercise reasonable care); Lou-Con, Inc. v. Gulf Bldg. Serv., 287 So. 2d 192, 199 (La. Ct. App. 1973) (janitor is not a sensitive position).

78. *See* text & notes 21-22, 62 *supra*.

IX. ZONING LAW

A. CITY SIGN ORDINANCES NOT ENACTED IN ACCORDANCE WITH STATE STATUTORY REQUIREMENTS

A significant function of city government is the regulation of specific activities by ordinance.[1] The validity of such ordinances is frequently challenged when there is state legislation on the same subject.[2] In Arizona, a city ordinance is valid if the subject matter regulated is of purely local concern or if the city's charter expressly confers upon it the power to regulate the matter even though it is not one of purely local concern.[3] On the other hand, a city ordinance is invalid if the matter the ordinance purports to regulate is of statewide concern and the state legislature has evinced an intent to preempt the field by statute.[4]

Under the rule as set forth above, a home rule charter[5] gives a city

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1. Under the majority view a city does not have inherent powers. *E.g.*, Barnes v. District of Columbia, 91 U.S. 540, 544-45 (1876); Opinion of the Justices, 323 Mass. 759, 761, 79 N.E.2d 889, 891 (1948); Town of Lisbon v. Lisbon Village District, 104 N.H. 255, 259, 183 A.2d 250, 254 (1962). *See* Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1062, (1980). A city, viewed as a political subdivision of the state, possesses only those powers granted to it by the state constitution or statutes, or contained within its municipal charter. City of Scottsdale v. Superior Court, 103 Ariz. 204, 205, 439 P.2d 290, 291 (1968); State v. Jacobsen, 121 Ariz. 65, 68, 588 P.2d 358, 361 (Ct. App. 1978); City of Tempe v. Arizona Bd. of Regents, 11 Ariz. App. 24, 25, 461 P.2d 503, 504 (1969); 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.15, at 50 (1968); 1 C. ANTINEAU, MUNICIPAL CORPORATION LAW § 2.00, at 2-3 (1980). *See* Paddock v. Brisbois, 35 Ariz. 214, 220, 276 P. 325, 327 (1929). "A state Constitution . . . is a limitation of power, whereas a charter of a city, like the federal Constitution, is a grant of power." *Id.* Arizona cities derive their powers from two sources: enabling legislation adopted by the state legislature, and home rule charters adopted pursuant to ARIZ. CONST. art. 13, § 2. *See* Schroeder, *Public Regulation of Private Land Use in Arizona: An Analysis of its Scope and Potential*, 1973 L. & SOC. ORD. 747, 751. For a further discussion of home rule charters, see note 5 *infra*.

2. *See, e.g.*, City of Crawfordsville v. Jackson, 201 Ind. 619, 623, 170 N.E. 850, 851 (1930); Bower v. City of Louisville, 269 Ky. 350, 352, 107 S.W.2d 238, 239 (1937); Construction & Gen. Laborers Union Local 563 v. City of St. Paul, 270 Minn. 427, 429, 134 N.W.2d 26, 28 (1965).

3. *See* Levitz v. State, 126 Ariz. 203, 204, 613 P.2d 1259, 1260 (1980); Luhrs v. City of Phoenix, 52 Ariz. 438, 442, 83 P.2d 283, 285 (1938); Clayton v. State, 38 Ariz. 466, 468, 300 P. 1010, 1010 (1931).

4. In Clayton v. State, 38 Ariz. 466, 300 P. 1010 (1931), the Arizona Supreme Court in its denial of a rehearing set forth this rule as follows:

> Where the subject is one of local interest or concern, or where though not of local concern, the charter . . . confers on the city express power to legislate thereon, both jurisdictions may legislate on the same subject. Where, however, the subject is of state-wide concern, and the legislature has appropriated the field and declared the rule, its declaration is binding throughout the state.

Id. at 468, 300 P. at 1010. *Accord*, City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon, 67 Ariz. 330, 336, 195 P.2d 562, 565-66 (1948); City of Tucson v. Tucson Sunshine Climate Club, 64 Ariz. 1, 6, 164 P.2d 598, 601 (1945); Shaffer v. Allt, 25 Ariz. App. 565, 567, 545 P.2d 76, 78 (1976). *See* 1 C. ANTINEAU, *supra* note 1, § 3.08, at 3-18.

5. Historically, city charters were granted by the state legislature and most courts, in construing these grants, made the city completely dependent upon the legislature. *See* 1 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 1.40, at 49 (1971). To free cities of this legislative control, many states have enacted constitutional provisions which allow local communities to frame and

complete power to regulate matters of purely local concern.[6] To invalidate an ordinance promulgated under a home rule charter on the ground that state legislation regulates the same subject matter, a court must find both that the subject regulated is a matter of statewide concern and that the state legislature intended to appropriate the field.[7]

In *Levitz v. State*,[8] the Arizona Supreme Court applied a two-part state preemption test to the field of municipal sign regulation. The court determined first whether sign regulation is a matter of statewide concern and then whether Arizona's Urban Environment Management Act [UEMA][9] evidences a legislative intent to preempt inconsistent city law.[10] The court held that sign regulation is a matter of statewide concern which the state had preempted by enacting UEMA.[11]

This casenote will first discuss how Arizona courts determine whether a matter is of local or of statewide concern. Then the *Levitz* court's finding that sign regulation is a matter of statewide concern will be examined. Finally, the history and purposes of the Arizona Urban Environment Management Act will be examined to determine whether

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adopt their own municipal charters. Such charters have come to be known as "home rule" charters. Udall v. Severn, 52 Ariz. 65, 70, 79 P.2d 347, 349 (1938). BLACK'S LAW DICTIONARY 660 (5th ed. 1979) defines "home rule" as a "Constitutional provision . . . which results in providing local cities and towns with a measure of self government if such local government accepts terms of the state legislation." A charter enacted by a city pursuant to such a constitutional provision has the same force and effect as one granted by the legislature. City of Phoenix v. Arizona Sash, Door & Glass Co., 80 Ariz. 100, 104, 293 P.2d 438, 441 (1956); Buntman v. City of Phoenix, 32 Ariz. 18, 26, 255 P.2d 490, 492 (1927).

6. City of Tucson v. Walker, 60 Ariz. 232, 239, 135 P.2d 223, 226-27 (1943) (quoting Axberg v. City of Lincoln, 141 Neb. 55, 58, 2 N.W.2d 613, 614 (1942)); *see* Mayor & Common Council of City of Prescott v. Randall, 67 Ariz. 369, 371, 196 P.2d 477, 478 (1948); Note, *Conflicts Between State Statutes and Municipal Ordinances*, 72 HARV. L. REV. 737, 740 (1959). Thus, a constitutional provision permitting home rule charters can limit state supremacy and state interference in matters of purely local concern. Luhrs v. City of Phoenix, 52 Ariz. 438, 442, 83 P.2d 283, 285 (1938). Furthermore, local power may prevail over state control where the matter regulated is in fact primarily of local concern. 1 C. ANTINEAU, *supra* note 1, § 5.35, at 5-102.

7. The court in Phoenix Respirator & Ambulance Serv., Inc. v. McWilliams, 12 Ariz. App. 186, 468 P.2d 951 (1970) set forth the test as follows:

> [B]oth a city and state may legislate on the same subject when that subject is of local concern, . . . but where the subject is of statewide concern, and the legislature has appropriated the field by enacting a statute pertaining thereto, that statute governs throughout the state, and local ordinances contrary thereto are invalid.

Id. at 188, 468 P.2d at 953. *See* Strode v. Sullivan, 72 Ariz. 360, 365, 236 P.2d 48, 51 (1951); City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon, 67 Ariz. 330, 335, 195 P.2d 562, 565 (1948); ARIZ. REV. STAT. ANN. § 9-284(B) (1977); 1 C. ANTINEAU, *supra* note 1, § 3.03, at 3-10.

8. 126 Ariz. 203, 613 P.2d 1259 (1980).

9. 1973 Ariz. Sess. Laws ch. 178, § 2, at 1764-98 (codified at ARIZ. REV. STAT. ANN. §§ 9-461 to 9-464.01 (1977 & Supp. 1980-81)). The Act regulates municipal planning. Its provisions were derived from 1925 Ariz. Sess. Laws ch. 80, §§ 1-9, at 326-34, and were based substantially upon the Standard State Zoning Enabling Act which was drafted by the United States Department of Commerce and is reprinted in full in C. BERGER, LAND OWNERSHIP AND USE 612-17 (1968). *See* R. ANDERSON, *supra* note 1, §§ 2.21-.29, at 61-70, for an analysis and history of the Standard State Zoning Enabling Act.

10. 126 Ariz. at 205, 613 P.2d at 1261.

11. *Id.*

the Act evidences a legislative intent to preempt inconsistent city regulations.

The Levitz Municipal Ordinance Invalidity Doctrine

Between 1967 and 1977, the city of Phoenix gradually changed the manner in which its sign and billboard regulations were codified by transferring these regulations from the Phoenix general zoning ordinance to chapter 29 of the city code.[12] In making this change, the city failed to comply with the notice and hearing requirements of UEMA.[13] The Act sets forth comprehensive procedures which cities must follow in enacting zoning regulations.[14] The Act specifically authorizes cities to enact regulations relating to signs and billboards,[15] but requires them to comply with the notice and hearing requirements set forth therein.[16]

In 1977, the city of Phoenix filed criminal complaints against Gary R. Levitz and the M.D. Pruitt Furniture Company charging them with violation of several sections of chapter 29 of the city code which deal with portable ground signs.[17] In a subsequent action in the superior

12. Prior to December 27, 1967, the city had regulated signs and billboards through its zoning ordinance, PHOENIX, ARIZ., CITY CODE app. (1962). On that date, the city adopted ordinance G-831, which placed all sign regulations in chapter 29 of the city code. PHOENIX, ARIZ., CITY CODE ch. 29 (1969). On May 21, 1968, the city adopted ordinance G-864 which repealed all of the provisions of the general zoning ordinance relating to signs and billboards and left chapter 29 as the only source of such regulation. On November 18, 1975, the city enacted ordinance G-1508 which revised and readopted the sign regulations set forth in chapter 29. Levitz v. State, 126 Ariz. at 204, 613 P.2d at 1260.

13. ARIZ. REV. STAT. ANN. § 9-462.04 (Supp. 1980-81). The city of Phoenix admitted in *Levitz* that neither the 1967 recodification nor the 1975 amendments to chapter 29 were enacted in accordance with the statutory requirements. 126 Ariz. at 203, 613 P.2d at 1259.

14. ARIZ. REV. STAT. ANN. § 9-461.06 (1977) (procedure for adoption of a general plan for the development of a municipality); *id.* § 9-461.09 (procedure for adoption of specific plans); *id.* § 9-462.04 (procedure for adoption of city zoning ordinances).

15. *Id.* § 9-462.01(A)(2) (Supp. 1980-81) provides: "Pursuant to the provisions of this article, the legislative body of any municipality by ordinance may: . . . [r]egulate signs and billboards."

16. *Id.* § 9-462.04(A) provides:

> . . . Notice of the time and place of the hearing including a general explanation of the matter to be considered and including a general description of the area affected shall be given at least fifteen days before the hearing in the following manner:
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> 1. The notice shall be published at least once in a newspaper of general circulation, published or circulated in the municipality, or if there is none, it shall be posted on the affected property in such a manner as to be legible from the public right-of-way and in at least ten public places in the municipality. A posted notice shall be printed so that the following are visible from a distance of one hundred feet: the word 'zoning,' the present zoning district classification, the proposed zoning district classification, the date and time of the hearing.

17. The plaintiffs were charged with maintaining three portable ground signs in violation of PHOENIX, ARIZ., CITY CODE §§ 29-5(A)(3) and 29-53(D)(2) (1969). The plaintiffs violated these provisions by maintaining the signs less than three hundred feet apart on a major street and failing to remove or bring them into conformance within one year after they had become nonconforming. Brief for Appellant at 4-5. The Phoenix code defines "portable sign" as "any sign not permanently attached to the ground, a building, or other structure, and not including vehicle mounted signs." PHOENIX, ARIZ., CITY CODE § 29-10 (1969). A "ground sign" is defined as "any sign supported by a structure affixed to the ground and in no way supported by a building or part of a building." *Id.*

court, the two criminal defendants sought to have the city ordinance which established the sign and billboard regulations[18] declared invalid because the city failed to comply with the procedural requirements of UEMA.[19] The city argued that regulation of signs is a purely local matter and asserted that it was not required to comply with UEMA's hearing and notice requirements[20] because it had adopted its revised sign ordinance pursuant to its charter powers.[21]

The trial court enjoined the city from initiating or continuing criminal prosecution of the plaintiffs based upon the revised sign ordinance.[22] The Arizona Supreme Court affirmed, holding that the ordinance was void because the city had failed to comply with the procedural requirements of UEMA.[23]

Statewide versus Local Concern

The statewide versus local concern issue has been addressed many times by Arizona courts. These courts have found the following matters to be of statewide concern: regulation of traffic on public highways;[24] minimum wages and pensions of police and firemen;[25] the minimum wage paid by a city for manual and mechanical labor on public works;[26] taxes and tax liens;[27] operation of ambulances;[28] licensing of attorneys;[29] regulation of milk production as a health measure;[30] the issuance of liquor licenses;[31] rates charged by utilities;[32] regulation of motor vehicles for hire as common carriers;[33] and state budget law.[34] On the other hand, the following matters have been held to be of

18. Phoenix, Ariz., Ordinance G-1508 (Nov. 18, 1975).
19. 126 Ariz. at 204, 613 P.2d at 1260. See text & notes 12-13 *supra*.
20. 126 Ariz. at 204, 613 P.2d at 1260. See text & notes 12-13 *supra*.
21. *Id.* ARIZ. CONST. art. 13, § 2 provides in part: "Any city containing, now or hereafter, a population of more than three thousand five hundred may frame a charter for its own government consistent with, and subject to, the Constitution and laws of the State. . . ."
22. 126 Ariz. at 204, 613 P.2d at 1260.
23. *Id.* at 206, 613 P.2d at 1262.
24. Keller v. State, 46 Ariz. 106, 115, 47 P.2d 442, 446 (1935); Clayton v. State, 38 Ariz. 135, 146, 297 P. 1037, 1041, *rehearing denied*, 38 Ariz. 466, 300 P. 1010 (1931).
25. Luhrs v. City of Phoenix, 52 Ariz. 438, 448, 83 P.2d 283, 288 (1938).
26. City of Phoenix v. Drinkwater, 46 Ariz. 470, 473, 52 P.2d 1175, 1176 (1935); State v. Jaastad, 43 Ariz. 458, 465, 32 P.2d 799, 801 (1934).
27. Home Owners' Loan Corp. v. City of Phoenix, 51 Ariz. 455, 466, 77 P.2d 818, 822-23 (1938); Pacific Fruit Express Co. v. City of Yuma, 32 Ariz. 601, 604, 261 P. 49, 51 (1927).
28. Phoenix Respirator & Ambulance Serv., Inc. v. McWilliams, 12 Ariz. App. 186, 188, 468 P.2d 951, 953 (1970).
29. Russo v. City of Tucson, 20 Ariz. App. 401, 402-03, 513 P.2d 690, 691-92 (1973).
30. City of Flagstaff v. Associated Dairy Products Co., 75 Ariz. 254, 259-60, 255 P.2d 191, 194-95 (1953).
31. Mayor & Common Council of City of Prescott v. Randall, 67 Ariz. 369, 378, 196 P.2d 477, 483 (1948).
32. Yuma Gas, Light & Water Co. v. City of Yuma, 20 Ariz. 153, 157, 178 P. 26, 28 (1919).
33. Northeast Rapid Transit Co. v. City of Phoenix, 41 Ariz. 71, 81, 15 P.2d 951, 955 (1932).
34. American-La France and Foamite Corp. v. City of Phoenix, 47 Ariz. 133, 144-45, 54 P.2d 258, 263 (1936).

purely local concern: the manner and method of sale of real estate owned by a city;[35] a municipal advertising budget;[36] a municipal tax on attorneys for the privilege of practicing law;[37] generation of municipal revenue;[38] municipal elections;[39] city fire protection;[40] and the sale of liquor at municipal recreation facilities.[41]

Consideration of this line of decisions leads to the conclusion that the Arizona courts are likely to find a given subject a matter of purely local concern only when the subject regulated concerns "the administrative and procedural aspects of the local government" and has "no effect on citizens of the state living outside the municipality."[42] All of the cases set forth above fit this two-pronged test. For example, the generation of municipal revenue and the manner in which municipal elections are held are matters integral to municipal government and have little or no effect on citizens living outside the municipality.[43] Therefore, Arizona courts have found these subjects to be purely local matters.[44] By comparison, matters such as the licensing of attorneys and the fixing of utility rates have little to do with the operation of municipal government, but have a significant effect on citizens throughout the state. Thus, holdings that these are subjects of statewide concern are consistent with the two-pronged test.[45]

In *Levitz*, the city of Phoenix relied on *State v. Jacobsen*[46] for the proposition that a city could regulate signs under its charter powers.[47] The city argued that sign regulation is a purely local matter because of a municipality's interest in maintaining an attractive community.[48] Therefore, the city asserted that it was empowered to enact sign regulations pursuant to its charter[49] and need not comply with the procedural

35. City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon, 67 Ariz. 330, 336, 195 P.2d 562, 566 (1948).

36. City of Tucson v. Tucson Sunshine Climate Club, 64 Ariz. 1, 7, 164 P.2d 598, 601-02 (1945).

37. Russo v. City of Tucson, 20 Ariz. App. 401, 402-03, 513 P.2d 690, 691-92 (1973).

38. City of Phoenix v. Arizona Sash, Door & Glass Co., 80 Ariz. 100, 105, 293 P.2d 438, 441 (1956); Barrett v. State, 44 Ariz. 270, 273, 36 P.2d 260, 261 (1934).

39. Strode v. Sullivan, 72 Ariz. 360, 368, 236 P.2d 48, 54 (1951).

40. Gamewell v. City of Phoenix, 216 F.2d 928, 933 (9th Cir. 1954).

41. Shaffer v. Allt, 25 Ariz. App. 565, 570, 545 P.2d 76, 81 (1976).

42. Note, *supra* note 6, at 741.

43. *See* text & notes 38-39 *supra*.

44. *Id.*

45. *See* text & notes 29, 32 *supra*.

46. 121 Ariz. 65, 68, 588 P.2d 358, 361 (Ct. App. 1978). "[T]he power of the city of Phoenix to regulate signs is . . . conferred by ch. 4, § 2(17) of the city charter." *Id.*

47. Brief for Appellant at 6-7. The city found such powers in PHOENIX, ARIZ., CITY CHARTER ch. 4, § 2, ¶ 17 which reads as follows: "[T]he City, and the council acting for and in its behalf, shall have the further powers hereinafter enumerated and set forth, to-wit: Billboards and signs. To regulate, license or prohibit the construction and use of billboards and signs." Brief for Appellant at 6-7.

48. Brief for Appellant at 8-9.

49. See text & notes 5-6 *supra* for a discussion of municipal powers under a home rule char-

requirements of UEMA.[50] For the foregoing reasons, the city concluded that the fact that the sign regulations at issue had not been enacted in compliance with the notice and hearing requirements of the Act did not make them invalid.[51]

The *Levitz* court rejected this argument and overruled *Jacobsen*.[52] The court did not explicitly state that sign ordinances are, in and of themselves, a matter of statewide concern. Instead, the court, citing *City of Scottsdale v. Scottsdale Associated Merchants, Inc.*,[53] based its holding upon the proposition that zoning is a matter of statewide concern.[54] The *Levitz* court emphasized that the legislature's inclusion of sign regulation as a part of zoning in UEMA[55] is an indication that a municipality should regulate signs under the state zoning statutes.[56]

Levitz can be read for the proposition that regulation of signs is a form of zoning and therefore a matter of statewide concern.[57] Thus, the *Levitz* decision fits perfectly within the generalization that courts are not likely to find a given subject a matter of purely local concern unless it has to do with the administrative or procedural aspects of municipal government.[58] Furthermore, sign regulations have little to do with the manner of municipal operation. Therefore, the *Levitz* court's finding that sign regulation is a matter of statewide concern seems consistent with prior Arizona decisions.[59] The finding by a court that a subject is of statewide concern does not, however, automatically make a city ordinance regulating that subject invalid. The court must also find that the state legislature intended to preempt the field when it passed legislation covering the matter.[60]

Preemption

The Arizona courts have never explicitly stated a test to be used in determining preemption, but such tests have been formulated in other jurisdictions.[61] In applying these tests, the courts have generally found

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ter. *See also* Strode v. Sullivan, 72 Ariz. 360, 362, 236 P.2d 48, 50 (1951). "Phoenix has a 'freeholders' or 'home rule' charter in effect since 1914." *Id.*

50. Brief for Appellant at 8-9.

51. *Id.* See text & notes 4-6 *supra*.

52. 126 Ariz. at 205, 613 P.2d at 1261.

53. 120 Ariz. 4, 583 P.2d 891 (1978).

54. *See* 126 Ariz. at 204, 613 P.2d at 1260.

55. ARIZ. REV. STAT. ANN. § 9-462.01(A)(2) (Supp. 1980-81).

56. 126 Ariz. at 205-06, 613 P.2d at 1261-62. *See* Gamewell v. City of Phoenix, 216 F.2d 928, 932 (9th Cir. 1954); City of Scottsdale v. Superior Court, 103 Ariz. 204, 207, 439 P.2d 290, 293 (1968).

57. *See* 126 Ariz. at 505-06, 613 P.2d at 1261-62.

58. *See* text & notes 42-45 *supra*.

59. *See* text & notes 24-41 *supra*.

60. *See* text & notes 6-7 *supra*.

61. *E.g.*, Galvan v. Superior Court, 70 Cal. 2d 851, 859-60, 452 P.2d 930, 935-36, 76 Cal. Rptr. 642, 647-48 (1969); Bloom v. City of Worcester, 363 Mass. 136, 155-56, 293 N.E.2d 268, 280

a preemptive intent on the part of state legislatures where: state regulation of the subject matter is comprehensive and detailed; the state regulations specifically prescribe the limits of municipal power in a given area; and the subject matter seems to require uniform treatment throughout the state.[62]

Arizona courts have held that the legislature intended, by enacting zoning legislation, to preempt inconsistent municipal zoning ordinances,[63] but they have not explicitly set forth the rationale for this conclusion. In the next section, the UEMA will be examined under the three-prong test for preemptive intent used in other jurisdictions.

Analyis of UEMA

It is clear that UEMA comprehensively covers the field of zoning.[64] The Act prescribes, for example, the creation, financing, powers, and duties of municipal planning agencies;[65] the scope, procedure for adoption, and administration of municipal zoning plans;[66] the types of zoning regulations a municipality may enact;[67] the procedures a municipality must follow in enacting such regulations;[68] the manner in which a municipality may regulate subdivisions;[69] and the manner in which a municipality may conserve open space.[70] Therefore, the Act meets the comprehensiveness requirement of the preemption test as applied in other jurisdictions.[71]

Furthermore, where the Act authorizes municipal regulation, its terms specify exactly how such municipal regulation is to be exercised.[72] The Act's provision specifying the procedure whereby a city

(1973); Mangold Midwest Co. v. Village of Richfield, 274 Minn. 347, 358, 143 N.W.2d 813, 820 (1966); Fair Lawn Educ. Ass'n v. Fair Lawn Bd. of Educ., 79 N.J. 574, 586, 401 A.2d 681, 686-87 (1979).

62. *See* cases cited at note 61 *supra*. "Legislation, which deals with a subject comprehensively . . . may reasonably be inferred as intended to preclude the exercise of any local power . . . because otherwise the legislative purpose of the statute would be frustrated." Bloom v. City of Worcester, 363 Mass. 136, 155-56, 293 N.E.2d 268, 280 (1973). In Chavez v. Sargent, 52 Cal. 2d 162, 339 P.2d 801 (1959), the California Supreme Court stated that detailed state regulations on a subject may indicate an intent to preclude local regulation and that a determination of whether the subject requires uniform treatment throughout the state is also an important factor. *Id.* at 177, 339 P.2d at 810. *See* Overlook Terrace Management Corp. v. Rent Control Bd. of the Town of West New York, 71 N.J. 451, 461-62, 366 A.2d 321, 326 (1976).

63. *E.g.*, Wood v. Town of Avondale, 72 Ariz. 217, 219-20, 232 P.2d 963, 964 (1951); Committee for Neighborhood Preservation v. Graham, 14 Ariz. App. 457, 458, 484 P.2d 226, 227 (1971); Manning v. Reilly, 2 Ariz. App. 310, 313, 408 P.2d 414, 417 (1965).

64. *See* text & note 9 *supra*.

65. ARIZ. REV. STAT. ANN. §§ 9-461.01 to -461.04 (1977 & Supp. 1980-81).

66. *Id.* §§ 9-461.05 to -461.10.

67. *Id.* § 9-462.01.

68. *Id.* § 9-462.04.

69. *Id.* §§ 9-463.01 to -463.04.

70. *Id.* §§ 9-464 to -464.01.

71. *See* text & notes 61-62 *supra*.

72. ARIZ. REV. STAT. ANN. §§ 9-461 to -464.01 (1977 & Supp. 1980-81).

may enact a zoning ordinance is the most striking example of this statutory direction of municipal action.[73] The Act specifies that a city must hold a public hearing prior to enacting a zoning ordinance and must give prior notice of the time and place of this hearing.[74] The Act also specifies the method of notice which will be considered sufficient.[75] Therefore, the Act meets the second requirement of the preemptive intent test—that the state legislation specify exactly what the municipality can and cannot do.[76]

Finally, the third requirement of the preemptive intent test—that the subject regulated requires uniform treatment throughout the state[77]—must be applied. The *Levitz* court emphasized that one purpose served by UEMA, that of prescribing a specific method to be followed in enacting a zoning ordinance,[78] is particularly important in view of the seriousness of the legal restraints on the use of property resulting from the enactment of zoning ordinances.[79] In *Hart v. Bayless Investment & Trading Co.*,[80] the Arizona Supreme Court explained that zoning ordinances are enacted by local governments pursuant to their legislative powers[81] and that, since such ordinances affect property interests, due process requires that all interested parties be allowed to present their views prior to the enactment of such ordinances.[82] The notice and hearing provisions of the state zoning enabling act were intended to satisfy these due process requirements.[83] Therefore, a municipal government must comply with these procedures to avoid having its zoning ordinances declared invalid on due process grounds.[84]

Because of the due process considerations outlined above, the procedure whereby local governments enact zoning ordinances requires a uniform rule throughout the state. Therefore, the third part of the preemptive intent test is met.[85] The state legislature has attempted to provide such a uniform rule by specifying, in the Act, a single procedure

73. *Id.* § 9-462.04.
74. *Id.* § 9-462.04(A), (C).
75. *Id.* § 9-462.04(A). This subsection requires either publication notice or posted notice if no newspaper of general circulation exists in the municipality and specifies the manner in which these notices must be given and the information which they must contain. *Id.*
76. *See* text & note 62 *supra*.
77. *Id.*
78. ARIZ. REV. STAT. ANN. § 9-462.04(A) (Supp. 1980-81). *See* note 75 *supra*.
79. 126 Ariz. at 206, 613 P.2d at 1262.
80. 86 Ariz. 379, 346 P.2d 1101 (1959).
81. *Id.* at 389, 346 P.2d at 1108.
82. *Id.* The *Hart* court stated: "It should be borne in mind that there is a fundamental distinction, as regards due process of law, between a legislative hearing and an adversary proceeding. In a hearing of the former type, due process requires only that all interested parties be allowed to present their views and arguments." *Id.*
83. *Id.*
84. *Id.* at 391, 346 P.2d at 1110 (quoting Hurst v. City of Burlingame, 207 Cal. 134, 141, 277 P.2d 308, 311 (1929)).
85. See text & note 62 *supra*.

for the enactment of zoning ordinances.[86]

UEMA satisfies all three parts of the test used in other jurisdictions to discern preemptive intent.[87] For this reason, it is easy to understand why Arizona courts have consistently found that the legislature has preempted the field of zoning.[88] Where a statutory scheme specifies exactly how a local government may act in a particular area, it can hardly be argued that the legislature did not intend to promulgate a statewide policy in that area. The Act serves a statewide policy by providing a standard procedure to protect the due process rights of persons whose property interests may be adversely affected by a given zoning ordinance.[89] This policy would be frustrated if local governments were permitted to ignore the procedures specified in the Act.[90] Therefore, as the Arizona courts have found, the legislature must have intended to prescribe the exclusive procedure for the adoption of zoning ordinances and, thus, to occupy the field of zoning.[91]

Conclusion

Arizona adheres to the rule that a city ordinance which is inconsistent with state legislation on a given subject will not be judicially invalidated unless the matter regulated by the ordinance is of statewide concern and the court finds a legislative intent to appropriate the field. The Arizona courts have never, however, explicitly set forth a test to be used in determining which subjects are of statewide concern, nor have they set forth a test to determine whether the legislature has preempted a given field. Therefore, the rule has often been hard to apply. Nevertheless, such tests can be discerned from the factual patterns of Arizona cases or adopted from courts outside of Arizona. The result in *Levitz* is fully consistent with the result which would have been reached using these tests. Finally, the adoption of such tests by the Arizona courts could go far toward alleviating the uncertainty inherent in applying the two-pronged Arizona municipal ordinance voidability rule.

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86. *See* ARIZ. REV. STAT. ANN. § 9-462.04 (Supp. 1980-81).
87. *See* text & notes 61-62 *supra*.
88. *See* text & note 63 *supra*.
89. *See* text & notes 73-77 *supra*.
90. *See id.*
91. *See* text & note 63 *supra*.