Preparatory, Homicide, and Assault Crimes of Arizona's New Criminal Code: Some Potential Issues

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The 1977 Arizona Legislature enacted a thorough criminal code revision,[1] the first since 1913.[2] As expected, the new code modernizes the outdated territorial law.[3] For example, the crimes of dueling[4] and robbery of birds' nests[5] have been abolished. Also, the thirty-some mens rea concepts found in the old code have been replaced by four culpable mental states: negligence, recklessness, knowledge, and intent.[6]

Unlike the piecemeal legislation of the former code, the new code is neatly organized for easy reference. The first nine chapters focus on preliminary matters such as the purposes and definitions of the code,[7] the principles of criminal liability,[8] justification[9] and responsibility,[10] the classification of offenses,[11] and sentencing.[12] The remaining chapters of the code delineate the major substantive crimes.[13] Generally, the criminal statutes are consolidated under a generic title. For example, chapter 12, entitled *Assault and Related Offenses*, includes the crimes of endangerment,[14] threatening or intimidating,[15] assault,[16] ag-

1. ARIZ. REV. STAT. ANN. §§ 13-101 to 4147 (Supp. 1978) [hereinafter cited as new ARIZ. REV. STAT. ANN. § — (Supp. 1978)].
2. *See* DeGraw, Twist, & Gerber, *The New Arizona Criminal Code*, 13 ARIZ. B.J. August, 1977, at 14.
3. *Id.*
4. *See* ARIZ. REV. STAT. ANN. §§ 13-381 to -385 (1956) (repealed by Laws 1977, Ch. 142, § 12, effective October 1, 1978).
5. *See id.* § 13-510 (repealed by Laws 1977, Ch. 142, § 17, effective October 1, 1978).
6. *See* Gerber, *Sentencing Policies in the New Criminal Code*, 13 ARIZ. B.J. December, 1977, at 32, 36 n.21. *See also* new ARIZ. REV. STAT. ANN. § 13-105(5) (Supp. 1978).
7. *See* new ARIZ. REV. STAT. ANN. §§ 13-101, 13-105 (Supp. 1978).
8. *See id.* §§ 13-201 to 204.
9. *See id.* §§ 13-401 to 412.
10. *See id.* §§ 13-501 to 502.
11. *See id.* §§ 13-601 to 606.
12. *See id.* §§ 13-701 to 709.
13. *See id.* §§ 13-1001 to 3106.
14. *Id.* § 13-1201.
15. *Id.* § 13-1202.
16. *Id.* § 13-1203.

gravated assault,[17] and unlawfully administering intoxicating substances.[18] Overall, the new code promulgates precisely defined crimes and inflexible sentencing procedures.[19]

Like any collection of criminal statutes, the new code is bound to generate litigation. The purpose of this Note is to define and analyze some of the issues that may arise under the new code, specifically with regard to preparatory offenses, homicide, and assault. These particular crimes were chosen for analysis because of their tendency to generate appealable issues.[20] Although some of the issues discussed herein have universal relevance to the criminal law,[21] their appearance in this Note is justified because the new code will have a particular bearing on their resolution. This Note by no means purports to exhaustively discuss all litigable issues related to preparatory offenses, homicide, and assault; it only attempts to isolate a few issues which reasonably may be expected to arise in the future.

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I. PREPARATORY OFFENSES

Chapter ten of the new criminal code defines the inchoate offenses of attempt, solicitation, conspiracy, and facilitation.[22] The aim of the

17. *Id.* § 13-1204.
18. *Id.* § 13-1205.
19. *See* Gerber, *supra* note 6, at 28, 34.
20. A cursory glance at the criminal codes of most states will reveal that the annotations accompanying preparatory, homocide and assault statutes generally outnumber those of other criminal statutes.
21. *See, e.g.*, text & notes 176-214 *infra*.
22. New ARIZ. REV. STAT. ANN. §§ 13-1001 to 1004 (Supp. 1978). Section 13-1001 proscribes three variations of attempt: (1) conduct which would constitute the object offense if the attendant

chapter is to allow law enforcement agencies to intercept criminal conduct before the intended act has been committed.[23] Punishment of inchoate offenses has little deterrent effect.[24] Nonetheless, punishment is justified on the basis of a demonstrated disposition toward criminality.[25] Prosecution and conviction are based upon a criminal mental state and an act or omission prior to the completion of the object crime.[26]

A. *The Actus Reus of Attempt*

A question common to all attempt statutes is the definitional problem concerning what conduct constitutes an attempt.[27] Generally, something more than mere preparation[28] and less than the last proxi-

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circumstances were as the actor believed them to be; (2) action which is "any step in the course of conduct planned to culminate in commission of an offense"; and (3) conduct intended to aid another in the commission of an offense, provided the defendant fits the definition of an accomplice under chapter 3.

Conspiracy, § 13-1003, requires less preparatory conduct than attempt. The gist of conspiracy is an agreement coupled with an overt act. New ARIZ. REV. STAT. ANN. § 13-1003(A) (Supp. 1978). However, an overt act is not required when the object of the conspiracy is a felony upon the person of another, first degree burglary, or arson of an occupied structure. *Id.*

Solicitation and facilitation, §§ 13-1002 and 13-1004 respectively, are new to Arizona. Of all the preparatory offenses, they criminalize conduct the farthest removed from the object offense. New ARIZ. REV. STAT. ANN. §§ 13-1002(B) & 13-1004(B) (Supp. 1978). *See* TEX. PEN. CODE ANN. tit. 4, § 15.03, Practice Commentary, 538 (Vernon 1973). The solicitation statute proscribes commanding, encouraging, requesting, or soliciting another to engage in a crime. New ARIZ. REV. STAT. ANN. § 13-1002 (Supp. 1978). The facilitation statute penalizes the knowing assistance of another who is committing or intends to commit an offense. New ARIZ. REV. STAT. ANN. § 13-1004(A) (Supp. 1978).

23. *See* TEX. PEN. CODE ANN. tit. 4 § 15.01, Practice Commentary, 514 (Vernon 1973); MODEL PENAL CODE Art. 5, Introduction, 24-25 (Tent. Draft No. 10, 1960).

24. Since the defendant charged with an inchoate offense ignores the sanctions of the object offense, it is unlikely that the lesser penalties for preparatory acts deter conduct aimed at the commission of a higher offense. *See* TEX. PEN. CODE ANN. tit. 4, § 15.01, Practice Commentary, 514 (Vernon 1973); MODEL PENAL CODE Art. 5, Introduction, 24-25 (Tent. Draft No. 10, 1960).

25. *See* TEX. PEN. CODE ANN. tit. 4, § 15.01, Practice Commentary, 514 (Vernon 1973); MODEL PENAL CODE Art. 5, Introduction, 24-25 (Tent. Draft No. 10, 1960).

26. *See* ARIZ. REV. STAT. ANN. §§ 13-1001 to 1004 (Supp. 1978); Gerber, *Arizona's New Criminal Code: An Overview and a Critique*, 1977 ARIZ. ST. L.J. 483, 500. Under the new code, conviction for attempt, solicitation, and conspiracy requires intentional conduct. New ARIZ. REV. STAT. ANN. §§ 13-1001 to 1003 (Supp. 1978). *See also id.* at § 13-105(a). Knowing conduct is required for facilitation. *Id.* § 13-1004. *See also id* § 13-105(5)(b). If the object offense is completed, then the facilitation can result in prosecution for complicity. *Id.* §§ 13-303, -1002, -1004. In addition, under the new attempt statute, there is no longer the required element that the attempt fail due to some intervening cause. *Compare id.* § 13-1001 *with* ARIZ. REV. STAT. ANN. § 13-108 (1956) (repealed by Laws 1977, Ch. 142, § 1, effective October 1, 1978). Thus, in view of the provision allowing double punishment, *see* new ARIZ. REV. STAT. ANN. § 13-116 (Supp. 1978), there are conceivable instances where an act or omission could be prosecuted both as facilitation and complicity, or attempt and the object offense of the attempt.

27. *See generally* Garton, *The Actus Reus in Criminal Attempts*, 2 QUEEN L.J. 183 (1974). Punishing bad thoughts alone is not the object of criminal law. Generally, there must be an act, or failure to act where there is a duty to act, before the sanctions of society are invoked. W. LAFAVE & A. SCOTT, CRIMINAL LAW 178, 431 (1972). The offense of attempt is no exception. New ARIZ. REV. STAT. ANN. § 13-1001 (Supp. 1978) describes three types of conduct which may constitute attempt, see discussion note 22 *supra*.

28. *See, e.g.*, Whiddon v. State, 53 Ala. App. 280, 284, 299 So. 2d 326, 329-30 (1973); State v. Thomas, 438 S.W.2d 441, 446 (Mo. 1969); State v. Goddard, 74 Wash. 2d 848, 851, 447 P.2d 180,

mate act prior to the completion of the offense[29] is required.[30] Under the new code, attempt is committed when an intentional act is shown to be "any step in a course of conduct planned to culminate in commission of an offense."[31] Under prior law,[32] the Arizona courts defined the actus reus of attempt as some step or overt act toward the commission of the crime.[33] The language of the new title 13, section 1001(A)(2) of the ARIZONA REVISED STATUTES is noticeably similar to the courts' interpretation of the prior attempt statute.[34] However, Arizona's new attempt statute also closely resembles the one recommended by the American Law Institute in the Model Penal Code,[35] which purports to broaden liability for attempt.[36] Because of the resemblance to the lan-

183 (1968). Courts often cite the following statement to distinguish acts of preparation from acts of attempt: "Preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made." State v. Davis, 108 N.H. 158, 161, 229 A.2d 842, 844-45 (1967); State v. Martinez, 88 S.D. 369, 372, 220 N.W.2d 530, 531 (1974). *See also* State v. Stewart, 537 S.W.2d 579, 581 (Mo. Ct. App. 1976).

29. The last proximate act, of course, would be sufficient to constitute attempt, but no American jurisdiction requires it. MODEL PENAL CODE § 5.01(1)(b), Comment, 38-39 (Tent. Draft No. 10, 1960); W. LAFAVE & A. SCOTT, *supra* note 27, at 433.

30. Courts have often stated that no rigid formula can resolve the distinction between acts of preparation and acts of attempt; each case must rest upon its own facts and circumstances. *See, e.g.*, People v. Bean, 121 Ill. App. 2d 290, 295, 257 N.E.2d 558, 560 (1970), *cert. denied*, 402 U.S. 1009 (1971); People v. Bowen, 10 Mich. App. 1, 15, 158 N.W.2d 794, 801 (1968); State v. Lewis, 69 Wash. 2d 120, 125, 417 P.2d 618, 621 (1966). Nonetheless, several approaches have been devised to aid in the determination of whether a particular act is sufficient to constitute attempt. *See generally* MODEL PENAL CODE § 5.01(1)(c), Comment, 39-47 (Tent. Draft No. 10, 1960); W. LAFAVE & A. SCOTT, *supra* note 27, at 432-36. *See also* text & note 36 *infra*.

31. New ARIZ. REV. STAT. ANN. § 13-1001(a)(2) (Supp. 1978).

32. The previous statute described the actus reus of attempt as "an act immediately and directly tending to the commission of the crime . . . ." ARIZ. REV. STAT. ANN. § 13-108 (1956) (repealed by Laws 1977, ch. 142, § 1, effective October 1, 1978).

33. *See, e.g.*, State v. Wallen, 114 Ariz. 355, 358, 560 P.2d 1262, 1265 (1977); State v. Harvill, 106 Ariz. 386, 388, 476 P.2d 841, 843 (1970); State v. McCullough, 94 Ariz. 209, 210, 382 P.2d 682, 683 (1963); State v. Vitale, 23 Ariz. App. 37, 44, 530 P.2d 394, 399 (1975). The Arizona Supreme Court in State v. Mandel, 78 Ariz. 226, 228, 278 P.2d 413, 415-16 (1954), clarified the actus reus standard for attempt by requiring that the step or overt act must manifest an intention to commit the crime. *Id.* Where a criminal intent or purpose is clearly shown, even slight acts in furtherance of that intent will constitute attempt. *Id.* (citing Stokes v. State, 92 Miss. 415, 428, 46 So. 627, 629 (1908)). This approach most nearly approximates what the American Law Institute characterizes as a liberalized res ipsa loquitur test. MODEL PENAL CODE § 5.01, Comment, 46 (Tent. Draft No. 10, 1960) (citing Stokes v. State, 92 Miss. 415, 428, 46 So. 627, 629 (1908)). *See also* text & note 36 *infra*.

34. A cursory reading of the new code and the courts' opinions reveals no significant differences. *Compare* new ARIZ. REV. STAT. ANN. § 13-1001(a)(2) (Supp. 1978), ("any step in course of conduct planned to culminate in the commission of an offense"), *with* State v. Harvill, 106 Ariz. 386, 388, 476 P.2d 841, 843 (1970). ("some step . . . toward the commission of the crime"). It appears that the legislature has substituted the words "in a course of conduct planned to culminate" for the word "toward," and the word "any" for the word "some."

35. *See* MODEL PENAL CODE § 5.01 (Tent. Draft No. 10, 1960). Section 13-1001(A)(2) of the new code differs from MODEL PENAL CODE § 5.01(1)(c) only in that in the Arizona statute the word "any" has been substituted for the word "substantial" prior to the word "step." However, the American Law Institute's formulation of attempt also includes a definition of substantial step as conduct strongly corroborative of criminal purpose. *Id.* at § 5.01(2). There is no similar provision in the new Arizona attempt statute.

36. *See* MODEL PENAL CODE § 5.01(1)(c), Comment, 39-47 (Tent. Draft No. 10, 1960). The Institute discusses in detail some of the approaches that have evolved as a result of the effort to distinguish acts of attempt from preparation. Several approaches can be lumped under the head-

guage of both Arizona case law and the Model Penal Code, a question may arise under the new criminal code as to the appropriate standard for distinguishing acts of preparation from acts constituting attempt.

The new code defines the actus reus of attempt as "*any* step" toward an offense.[37] Read literally, this definition could result in a conviction for attempt upon less than a settled course of criminal conduct.[38] However, courts which have encountered similar definitions have not adopted such a strict interpretation of attempt statutes.[39] If a conviction for attempt is allowed to rest upon any preparatory conduct done for the purpose of committing crime, almost any act would suffice as the actus reus of attempt, and a substantial risk of convicting innocent persons would be created.[40] Such a reading of the new title 13, section 1001(A)(2) is not only undesirable, but unrealistic as well. A reasonable alternative would be the adoption of either the standard developed under the old attempt statute or the Model Penal Code approach.[41]

Under the prior law, the Arizona Supreme Court in *State v. Mandel*[42] adopted what has been denominated the res ipsa loquitur test[43] for distinguishing acts of preparation from acts of attempt. The *Mandel* court required that the actus reus of attempt be found in the

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ing of proximity tests. *See id.* at 39-43. Under these tests, the actor's nearness or proximity to completion of the crime is evaluated to determine if attempt has been committed. *See id.* Accordingly, the nearer the act is to a completed crime, the more likely it will be held sufficient to constitute attempt. The emphasis of the proximity tests is on what remains to be done. *Id.* at 47.

Another approach is the res ipsa loquitur test. *See id.* at 43. Under this test, acts of attempt are those that, in relation to the surrounding circumstances, manifest an intent to commit a crime. *See id.* at 44. The purpose of the res ipsa approach is to determine whether the actor is *unequivocally* guided by a criminal purpose. *Id.*

The Model Penal Code approach requires that the act be a "*substantial* step in a course of conduct" planned to result in crime, and be "strongly corroborative" of criminal intent or purpose. *Id.* at 47 (emphasis in original). Unlike the proximity tests, the Model Penal Code approach focuses on what acts have already occurred, rather than on what acts are left to be done. *See id.* Although major steps still remain before completion of the crime, "substantial" steps may already have been taken. *See id.* Similarly, no showing is required that the actor had reached a point where desistance from the effort to commit crime was improbable. *See id.* Finally, as compared to the res ipsa loquitur test, the Model Penal Code approach dispenses with the necessity of showing unequivocal behavior and, instead, assures the existence of the actor's resolute criminal purpose by requiring a substantial step which is strongly corroborative of that purpose. *See id.* at 47-49. Thus, in the foregoing manner, the Institute purports to broaden attempt liability. *See id.* at 48.

37. New ARIZ. REV. STAT. ANN. § 13-1001(A)(2) (Supp. 1978) (emphasis added).

38. *See* Gerber, *supra* note 26 at 500.

39. *See* State v. Gobin, 216 Kan. 278, 280-82, 531 P.2d 16, 19 (1975) ("any overt act" under KAN. STAT. § 21-3301[1] (Supp. 1973) interpreted as "sufficiently near to consummation of the offense"); State v. Martinez, 88 S.D. 369, 372, 220 N.W.2d 530, 531 (1974) ("any act" interpreted as "any *unequivocal* act") (emphasis in original); State v. Judge, 81 S.D. 128, 133, 131 N.W.2d 573, 575-76 (1964) (same).

40. See MODEL PENAL CODE § 4.01(1)(c), Comment, 44 (Tent. Draft No. 10, 1960).

41. *See* text & notes 32-37 *supra*.

42. 78 Ariz. 226, 228-29, 278 P.2d 413, 415-16 (1954).

43. *See* MODEL PENAL CODE § 5.01(1)(c), Comment, 45 & n.102 (Tent. Draft No. 10, 1960).

unequivocal conduct of the defendant directed at the commission of an offense.[44] Thus, the design of the res ipsa loquitur test is to attach attempt liability only to conduct that unequivocally shows the defendant is guided by criminal intent.[45]

Alternatively, the Model Penal Code approach distinguishes preparation from attempt by requiring the actus reus of attempt to be "a substantial step in a course of conduct" aimed at accomplishing a crime and "strongly corroborative" of criminal purposes.[46] Like the res ipsa loquitur test, this approach assures the existence of a firm criminal purpose before attempt liability will attach.[47] However, any argument advocating the broader Model Penal Code approach under the new code is deficient in two important respects. First, the word "substantial" has been deleted prior to the word "step" in the new statute.[48] Second, there is no requirement that the step be strongly corroborative of criminal purpose.[49] These Model Penal Code requirements purport to better serve the needs fulfilled by the res ipsa loquitur test.[50] Title 13, section 1001 of the new code, lacking the specific refinements necessary to permit courts to expand liability for attempt, will probably lead to constructions similar to those of the old statute. Thus, the guidelines set forth by *State v. Mandel*[51] are most likely to be perpetuated as a matter of necessity.

B. *Acquittal Defense in Conspiracy*

Title 13, section 1006 of the new Arizona Revised Statutes negates defenses based upon legal incapacity, immunity, insufficient mens rea, and lack of criminal responsibility on the part of the person who shared in the defendant's solicitation, conspiracy, or facilitation. Thus, the guilt or innocence of an individual involved in a preparatory offense is determined unilaterally, that is, irrespective of the legal status of other participants.[52] In addition, where title 13, section 303 of the new code imposes criminal liability based upon the conduct of another, acquittal of the other person is not a defense.[53] Conspicuously absent is a statu-

44. State v. Mandel, 78 Ariz. 226, 229, 278 P.2d 413, 416 (1954). The court also noted, however, that where the defendant's criminal intent or purpose is clearly shown, slight acts in furtherance of that intent or purpose may constitute attempt. *Id.* at 229, 278 P.2d at 415.

45. *Id*; MODEL PENAL CODE § 5.01(1)(c), Comment, 44 (Tent. Draft No. 10, 1960).

46. MODEL PENAL CODE § 5.01(1) (Tent. Draft No. 10, 1960).

47. *Id.* § 5.01(1)(c), Comment, 47-9.

48. *See* new ARIZ. REV. STAT. ANN. § 13-1001(A)(2) (Supp. 1978). The legislature deleted the word "substantial" from the criminal code commission's proposal. *See* Gerber, *supra* note 26, at 500.

49. *See* new ARIZ. REV. STAT. ANN. § 1310-01 (Supp 1978).

50. *See* text & note 36 *supra*.

51. 78 Ariz. 226, 228-29, 278 P.2d 413, 415-16 (1954).

52. New ARIZ. REV. STAT. ANN. § 13-1006(A) (Supp. 1978). *But see* text & notes 56-75 *infra*.

53. New ARIZ. REV. STAT. ANN. § 13-304(1) (Supp. 1978). A person can be held criminally

tory provision abolishing a defense to conspiracy based upon acquittal of all co-conspirators but one.[54] The issue of whether such a defense to conspiracy is operative under the new code thus emerges.

Since a conspiratorial agreement necessitates two or more individuals, acquittal of all except one generally requires the acquittal of that remaining one.[55] In *Eyman v. Deutsch*,[56] the Arizona Supreme Court voiced its approval of this view.[57] However, the general unilateral character of the new code's chapter on preparatory offenses may militate against such a defense.[58] For example, the crime of facilitation requires a finding that the defendant provided another person with the means or opportunity to commit a crime which *in fact aided* that person in the commission of the crime.[59] However, acquittal of the person committing the crime does not affect the liability of the defendant.[60] Thus, to acknowledge an acquittal defense to conspiracy would be inconsistent with the unilateral nature of the new code.

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liable for the conduct of another by the express language of a statute defining an offense (for example, *id.* §§ 13-1002, -1004), by acting as an accomplice, or by causing another to commit a crime. *Id.* § 13-303(A). Soliciting or commanding another to cause a result which is an element of an offense is also proscribed. *Id.* at § 13-303(B)(1). Similarly, agreeing to aid, attempting to aid, or aiding another in planning or engaging in conduct which constitutes an element of an offense are prohibited. *Id.* at § 13-303(B)(2).

54. New ARIZ. REV. STAT. ANN. § 13-1006 (Supp. 1978) does not mention acquittal. Section 13-1006(A)(3) bars a defense based upon the insufficient mens rea on the part of another person, which, of course, could have resulted in that person's acquittal. Section 13-304 bars an acquittal defense where criminal liability is based upon the conduct of another under § 13-303. Section 13-303 applies to conspiracy only in that it proscribes an agreement to aid another person in planning or causing a result which is an element of an offense. *See* new ARIZ. REV. STAT. ANN. § 13-303(B)(2) (Supp. 1978). Thus, the revised code contains no express bar to an acquittal defense for conspiracy.

55. *See, e.g.*, United States v. Goodwin, 492 F.2d 1141, 1144 (5th Cir. 1974); Davis v. United States, 425 F. Supp. 952, 952 (D. Conn. 1976); Commonwealth v. Hunter, 240 Pa. Super. Ct. 23,—,360 A.2d 702, 706 (1976).

56. 92 Ariz. 82, 373 P.2d 716 (1962).

57. *Id.* at 85, 373 P.2d at 718.

58. *See* text & note 52 *supra*. The Model Penal Code conspiracy statute also reflects a unilateral outlook, and it too fails to expressly negate the acquittal defense. *See* MODEL PENAL CODE §§ 5.03-.04 (Tent. Draft No. 10, 1960). The American Law Institute, however, perceives the statute as permitting prosecution and conviction of the only co-conspirator in cases where all other co-conspirators are acquitted in *different* trials. *See id.* § 5.03, Comment, 105-06 (Tent. Draft No. 10, 1960). Conceivably, an argument can be made that if the co-conspirator(s) have been acquitted and jeopardy has attached, then the co-conspirator(s) have "an immunity to prosecution or conviction." New ARIZ. REV. STAT. ANN. § 13-1006(A)(2) (Supp. 1978). Nevertheless, the Institute refrained from taking a position on the Model Penal Code's effect on the validity of inconsistent verdicts in a joint trial or the admissibility of a verdict in a subsequent trial against a co-conspirator. *See* MODEL PENAL CODE § 5.03, Comment, 106 (Tent. Draft No. 10, 1960).

59. New ARIZ. REV. STAT. ANN. § 13-1004(A) (Supp. 1978).

60. *Id.* § 13-304(1). Although an acquittal only indicates that the state failed to meet its burden of proof, *see* United States v. Fox, 130 F.2d 56, 58 (3d Cir. 1942). the unqualified wording of new ARIZ. REV. STAT. ANN. § 13-304(1) (Supp. 1978) conceivably includes those cases where the other person did not, in fact, commit the object offense. Despite the patent inconsistency, the rationale underlying the unilateral approach is that the reality of trials involves different juries, problems with availability of witnesses, and varying ability of attorneys which can give rise to inconsistent results. *See* ILL. ANN. STAT. ch. 38, § 8-2, Committee Comments at 459 (Smith-Hurd 1961). The reasoning is that so long as the defendant gets a fair and full trial, the result of another trial against another defendant is immaterial to the disposition of the instant defendant. *See id.*

Despite its unilateral character, there are compelling arguments for interpreting the code as permitting an acquittal defense to conspiracy. Title 13, section 1006 of the new code explicitly bars defenses based upon immunity, irresponsibility, or incapacity. Thus, under the maxim *expressio unius est exclusio alterius*[61] (the expression of one thing is the exclusion of another), the implication is that the availability of the acquittal defense is not intended to be precluded.[62] An even stronger inference of this intent can be found by comparing title 13, section 1006 with section 304. Both sections negate certain defenses to criminal liability, but only section 304 negates a defense based upon acquittal of one's partner in crime.

Construing section 1006 as not affecting the acquittal defense to conspiracy would be consistent with the vast weight of authority which holds that acquittal, or similar disposition, of all but one co-conspirator, mandates the acquittal of the remaining one.[63] This rule comports with "the community sense of a just outcome."[64] The acquittal defense should be no great bane to prosecutors; the rule has been tightly circumscribed by its limited application. The acquittal defense is not available in all cases where the defendant is the only remaining party.[65] If there are alleged, but unnamed or unknown co-conspirators, acquittal of all but one named co-conspirator is not a defense.[66] If the

61. Under the rule of *expressio unius est exclusio alterius*, a statute which enumerates the subjects or things on which it is to operate is construed as excluding from its operation all those things or subjects not expressly mentioned. *See* Pine Bluffs v. State Bd. of Equalization, 79 Wyo. 262,—, 333 P.2d 700, 708 (1958).

62. This conclusion becomes more compelling in view of the fact that some state legislatures have expressly barred the acquittal defense to conspiracy. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 8-2(b)(2) (Smith-Hurd 1961); MONT. REV. CODES ANN. § 94-4-102 (1974); N.D. CENT. CODE § 12-1-06-04(4) (1976); ORE. REV. STAT. § 161.475(1)(C) (1977).

63. *See, e.g.*, United States v. Goodwin, 492 F.2d 1141, 1144 (5th Cir. 1974); United States v. Peterson, 488 F.2d 645, 651 (5th Cir.), *cert. denied*, 419 U.S. 828 (1974); United States v. Musgrave, 483 F.2d 327, 333 (5th Cir.), *cert. denied*, 414 U.S. 1023 (1973); Davis v. United States, 425 F. Supp. 952, 952 (D. Conn. 1976); United States v. Whitfield, 378 F. Supp. 184, 192 (E.D. Pa. 1974), *aff'd*, 515 F.2d 506 (1975); United States v. Bruno, 333 F. Supp. 570, 577 (E.D. Pa. 1971); Cravero v. State, 334 So. 2d 152, 154 (Fla. Dist. Ct. App. 1976); Pearce v. State, 330 So. 2d 783, 784 (Fla. Dist. Ct. App. 1976); People v. Alexander, 35 Mich. App. 281, 282-83, 192 N.W.2d 371, 372 (1971); State v. Robinson, 15 N.C. App. 362, 365, 190 S.E.2d 271, 272 (1972); Commonwealth v. Hunter, 240 Pa. Super. Ct. 23,—, 360 A.2d 702, 706 (1976); State v. Fontaine, 113 R.I. 557, 558-59, 323 A.2d 571, 572 (1974). Even in one state where the acquittal defense was expressly abolished by statute, ILL. ANN. STAT. ch. 38, § 8-2(b)(2) (Smith-Hurd 1961), the majority rule was nonetheless applied. People v. Wurbs, 38 Ill. App. 3d 360, 365, 347 N.E.2d 879, 884 (1976).

64. *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 974 (1959). The rule assures consistent verdicts. *See* W. LAFAVE & A. SCOTT, *supra* note 27, at 488. *See also* text & note 62 *supra*. One might also share the view of Judge Learned Hand that conspiracy is "that darling of the modern prosecutor's nursery." Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925). The acquittal defense thus offsets the inherent prosecutorial advantages. *See* W. LAFAVE & A. SCOTT, *supra* note 27, at 455.

65. *See* United States v. Shipp, 359 F.2d 185, 189 (6th Cir. 1966).

66. *See* United States v. Rivera Diaz, 538 F.2d 461, 465 (1st Cir. 1976); Cross v. United States, 392 F.2d 360, 362 (8th Cir. 1968); People v. Cohen, 12 Cal. App. 3d 298, 326-27, 90 Cal. Rptr. 612, 631 (1970).

charges have been dismissed or *nolle prosequi*[67] entered against all but one co-conspirator, there is no bar to prosecution or conviction.[68] A guilty plea rather than a conviction may also present a bar to raising the acquittal defense.[69] California has adopted the view that acquittal should not be a bar to prosecution or conviction where the defendants are tried severally.[70]

In further support of an acquittal defense is the public policy towards limiting conspiracy crimes.[71] This policy is rooted in the concern that the conspiracy charge unduly burdens the defendant. Because of the elastic and pervasive nature of conspiracy as a legal concept, the defendant often must defend against a conspiracy charge which is ambiguously defined.[72] Compounding this disadvantage is the fact that a conspiracy charge poses special procedural and evidentiary difficulties to the defendant.[73] Adherence to the public policy of limiting conspiracy offenses would favor the acceptance of possible defenses, including the acquittal defense.

Arizona should retain an acquittal defense to conspiracy. Authority, equity, and public policy tip the balance in its favor.[74] Its susceptibility to circumscription ensures its just and reasonable application.[75] Moreover, the absence of a specific provision abolishing the defense, in light of the legislature's treatment of the same defense in new title 13, section 304(1), is strong evidence of a legislative intent to maintain the status quo.

C. *Governmental Commission of the Overt Act of Conspiracy*

The conspiracy statute raises another question. Conspiracy is committed if two persons agree that one of them will commit a crime

67. *Nolle prosequi* is a formal entry upon the record made by the prosecutor, declaring that there will be no further prosecution. BLACK'S LAW DICTIONARY 1198 (4th rev. ed. 1968).

68. *See* United States v. Klein, 560 F.2d 1236, 1242 (5th Cir. 1977); People v. Prince, 268 Cal. App. 2d 398, 416, 74 Cal. Rptr. 197, 209 (1968); LaFortez v. State, 11 Md. App. 598, 606, 275 A.3d 526, 531 (1971); Regle v. State, 9 Md. App. 346, 356, 264 A.2d 119, 123 (1970).

69. *See* United States v. Coronado, 554 F.2d 166, 171-72 n.7 (5th Cir. 1977); Rosecrans v. United States, 378 F.2d 561, 567 (5th Cir. 1967). *But see* Eyman v. Deutsch, 92 Ariz. 82, 85, 373 P.2d 716, 718 (1962) (the defendant's conviction was set aside on the basis of the acquittal of his alleged co-conspirator despite his entering a guilty plea *after* his alleged co-conspirator was found not guilty).

70. People v. Superior Court, 44 Cal. App. 3d 494, 498-99, 118 Cal. Rptr. 702, 704-05 (1975); People v. Holzer, 25 Cal. App. 3d 456, 459-60, 102 Cal. Rptr. 11, 12-13 (1972).

71. Grunewald v. United States, 353 U.S. 391, 404 (1957).

72. *See* Krulewitch v. United States, 336 U.S. 440, 446-49 (Jackson, J., concurring); W. LAFAVE & A. SCOTT, *supra* note 27, at 455-56.

73. For example, venue in a conspiracy offense may either be where the agreement took place or where the overt act occurred. Also, the co-conspirator hearsay exception is often liberally interpreted so as to allow into evidence a wide range of inculpatory statements predicated upon the assumption that a conspiracy exists. *See* Krulewitch v. United States, 336 U.S. 440, 452-53 (Jackson, J., concurring); W. LAFAVE & A. SCOTT, *supra* note 27, at 456-57.

74. *See* text & notes 71, 63-64.

75. *See* text & notes 65-70.

and one of them commits an overt act in the furtherance of the crime.[76] It is not a defense to conspiracy that one of the co-conspirators does not have the state of mind sufficient for the commission of the crime in question.[77] As a result, in cases where the party with whom the defendant conspired with is a peace officer, the defendant may still be held criminally liable.[78] Thus, from the new code emerges the prospect of a peace officer, as a second party to a conspiracy, committing the overt act upon which conspiracy liability is predicated.[79] This prospect raises the question of whether the defendant has a defense based upon the government supplying the overt act of conspiracy. Extensive governmental involvement in crime may give rise to two defenses—entrapment and violation of due process.[80]

The United States Supreme Court extensively discussed the entrapment defense in *Sorrells v. United States*,[81] and in *Sherman v. United States*.[82] The majority of the *Sorrells* Court took the view that in deciding whether the defendant had been entrapped "the controlling question [is] whether the defendant is a person otherwise innocent

76. New ARIZ. REV. STAT. ANN. § 13-1003(A)(Supp. 1978). The elements of conspiracy were not defined in the former conspiracy statute. *See* ARIZ. REV. STAT. ANN. § 13-331 (Supp. 1957-77)(repealed by Laws 1977, ch. 142, § 10, effective October 1, 1978).

77. *See id.* § 13-1006(A)(3). Conviction for conspiracy does require that the defendant intended to promote or aid the commission of an offense. *See id.* § 13-1003(A).

78. *Compare* People v. Cardosanto, 84 Misc. 2d 275, 276-77, 375 N.Y.S.2d 834, 836 (App. Div. 1975) *with* People v. Teeter, 86 Misc. 2d 532, 535-36, 382 N.Y.S.2d 938, 940 (App. Div. 1976). N.Y. PENAL LAW § 105.30 (McKinney 1975) provides: "It is no defense to a prosecution for conspiracy that, owing to . . . factors precluding the mental state required for the commission of conspiracy or the object crime, one or more of the defendant's co-conspirators could not be guilty of conspiracy or the object crime." The *Cardosanto* court took the view that because of the language of § 105.30, the fact that the party sharing in the defendant's conspiracy is a police officer who is merely simulating an intent to commit the object crime does not vitiate the conspiracy. 84 Misc. 2d at 276-77, 375 N.Y.S.2d at 836. However, the *Teeter* court disagreed with that interpretation of § 105.30, interpreting the section as limited to those situations where a person's lack of a culpable mental state is due to mental incapacity or unawareness. 86 Misc. 2d at 535-36, 382 N.Y.S.2d at 940. As compared to § 105.30, new ARIZ. REV. STAT. ANN. § 13-1006(A)(3) (Supp. 1978) is much more open-ended and negates a defense to prosecution for conspiracy based on the fact that the person with whom the defendant conspired "does not have the state of mind sufficient for the commission of the offense in question." *Id.* Arguably, the view expressed by the *Cardosanto* court would be acceptable under the less restrictive language of the new code.

79. Admittedly, such police conduct is a possibility under any conspiracy statute. However, in comparison to the former conspiracy statute, *see* ARIZ. REV. STAT. ANN. § 13-331 (Supp. 1957-77) (repealed by Laws 1977, ch. 142, § 10, effective October 1, 1978), the provisions of the new conspiracy statute seem to encourage extensive police involvement in conspiracy by expressly negating a defense based upon an insufficient mental state of one of the co-conspirators. New ARIZ. REV. STAT. ANN. § 13-1007(A)(3) (Supp. 1978).

80. Denial of due process is, of course, a defense of constitutional dimensions, whereas entrapment is not. United States v. Russell, 411 U.S. 423, 433 (1973). However, that distinction is often difficult to maintain, *see* United States v. Doe, 487 F.2d 892, 893 (5th Cir. 1973), and at least one court has found entrapment to be "indistinguishable from other law enforcement practices which violate due process." United States v. Chisum, 312 F. Supp. 1307, 1312 (C.D. Cal. 1970). However, in the plurality opinion in Hampton v. United States, 425 U.S. 484 (1976) Justices Rehnquist and White and Chief Justice Burger expressed the view that the remedy for the over-involvement of police in a crime lies, "not in freeing the equally culpable defendant, but in prosecuting the police . . . ." *Id.* at 489-91.

81. 287 U.S. 435 (1932).

82. 356 U.S. 369 (1958).

whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials."[83] This approach to entrapment has often been characterized as the subjective test.[84] It requires that the defendant must not have been predisposed to committing the crime.[85] The majority's view of entrapment was based on the legal theory that the legislature impliedly excepted from the sanctions of criminal statutes those persons induced to commit crime by government officials.[86] An alternative theory of the legal basis of entrapment was offered by the minority justices in *Sorrells*[87] and *Sherman*.[88] The minority viewed the defense of entrapment as a vehicle to serve the public policy of deterring unlawful police activity, thereby protecting the integrity of the criminal justice system.[89] Under this view an objective test is implemented to ascertain whether the methods of inducement employed by the government would cause persons to commit crimes who normally would not so act.[90]

Both the *Sorrells* and *Sherman* courts were remiss in not providing adequate guidelines for application of the entrapment defense,[91] and, as a result, confusion has prevailed in lower courts.[92] The Arizona courts have stated that a successful entrapment defense requires that the intent to commit the crime must not arise in the mind of the accused.[93] Government agents must have created the crime and induced the defendant to engage in it.[94] The mere fact that government agents provided the opportunity for the defendant to commit the crime does not constitute entrapment.[95] Where the accused stood ready to commit the crime if the opportunity was presented, entrapment is not a good

83. 287 U.S. at 451.

84. *See* Tanford, *Entrapment: Guidelines for Counsel and the Courts*, 13 CRIM. L. BULL. 5, 7 (1977); Comment, *The Viability of the Entrapment Defense in the Constitutional Context*, 59 IOWA L. REV. 655, 656 (1974).

85. Sorrells v. United States, 287 U.S. 435, 451-52 (1932).

86. *Id. See also* Sherman v. United States, 356 U.S. 369, 372-73 (1958).

87. 287 U.S. at 455 (Roberts, J., concurring).

88. 356 U.S. at 380 (Frankfurter, J., concurring).

89. Sorrells v. United States, 287 U.S. 435, 459 (1932) (Roberts, J., concurring); Sherman v. United States, 356 U.S. 369, 384 (1958) (Frankfurter, J., concurring). *See also* MODEL PENAL CODE § 2.10, Comment, 14 (Tent. Draft No. 9, 1959).

90. Sherman v. United States, 356 U.S. 369, 384 (1958) (Frankfurter, J., concurring).

91. *Id.* at 378-79 (Frankfurter, J., concurring). *See* Tanford, *supra* note 84, at 7.

92. *See* Tanford, *supra* note 84, at 12-13; Comment, *Entrapment in Arizona*, 1974 ARIZ. ST. L.J. 389, 397-401.

93. *See, e.g.*, State v. Mendoza, 109 Ariz. 445, 448, 511 P.2d 627, 630 (1973); State v. McKinney, 108 Ariz. 436, 439, 501 P.2d 378, 381 (1972); State v. Thurston, 100 Ariz. 297, 300-01, 413 P.2d 764, 766 (1966); State v. Ross, 25 Ariz. App. 23, 25, 540 P.2d 754, 756 (1975).

94. *See* State v. Rabon, 100 Ariz. 344, 345, 414 P.2d 726, 727 (1966); State v. Hernandez, 96 Ariz. 28, 31, 391 P.2d 586, 587-88 (1964).

95. *See, e.g.*, State v. Masengill, 110 Ariz. 310, 311, 518 P.2d 560, 561 (1974); State v. Duplain, 102 Ariz. 100, 101, 425 P.2d 570, 571 (1967); State v. Thurston, 100 Ariz. 297, 300-01, 413 P.2d 764, 766 (1966); State v. Ross, 25 Ariz. App. 23, 25, 540 P.2d 754, 756 (1975).

defense.[96] The defendant's mental state must be shown to be such that the crime would not have been contemplated, nor otherwise committed, had it not been for the government's activity.[97]

Nonetheless, some Arizona decisions have stressed the pertinence of governmental involvement as well as the defendant's mental state.[98] Where the government, in essence, supplies the *sine qua non*[99] of the offense, there may be entrapment.[100] In this light, an entrapment defense based upon the commission of the overt act of a conspiracy by a government agent is most likely to succeed. Without an overt act in furtherance of the crime there is no conspiracy.[101] Thus, if a government agent performs the overt act, the government has supplied the *sine qua non* of the offense and, arguably, the defendant should be able to claim entrapment. However, the Arizona court of appeals in *Kiser v. State*[102] recently rejected the argument that the government's conduct rather than the accused's intent is the controlling question with regard to an entrapment defense.[103] The *Kiser* court considered analysis of police conduct in prior Arizona cases merely as a means of evaluating whether the defendant was induced to commit the crime contrary to his or her natural inclination.[104] As confirmed by two recent Burger Court decisions, the crucial factor will continue to be whether the intent to engage in the crime originated with the accused or the government agent.[105]

96. *See* Bloch v. United States, 226 F.2d 185, 188 (9th Cir. 1955); State v. Hernandez, 96 Ariz. 28, 31, 391 P.2d 586, 588 (1964).

97. *See, e.g.*, State v. Mendoza, 109 Ariz. 445, 448, 511 P.2d 627, 630 (1973); State v. Gortarez, 98 Ariz. 160, 167, 402 P.2d 992, 996 (1965); State v. Ross, 25 Ariz. App. 23, 25, 540 P.2d 754, 756 (1975); State v. Sumter, 24 Ariz. App. 131, 134, 536 P.2d 252, 255 (1975). The focus by Arizona courts on the subjective predisposition of the accused is in accordance with the majority view promulgated by the United States Supreme Court in *Sorrells* and *Sherman*. *See* text & notes 80-86 *supra*.

98. *See* State v. Petralia, 110 Ariz. 530, 536-37, 521 P.2d 617, 623-24 (1974); State v. McKinney, 108 Ariz. 436, 439-40, 501 P.2d 378, 381-82 (1972); State v. Boccelli, 105 Ariz. 495, 496-97, 465 P.2d 740, 741-42 (1970). The extent and method of governmental involvement should be a concern only for those courts following the minority views of *Sorrels* and *Sherman*. *See* United States v. Esquer-Gamez, 550 F.2d 1231, 1233 (9th Cir. 1977); text & notes 87-88 *supra*. Yet the Arizona decisions involving analysis of the extent of involvement by law enforcement officers also contain an acknowledgment of the importance of subjective intent. *See* State v. Petralia, 110 Ariz. 530, 536, 521 P.2d 617, 623 (1974); State v. McKinney, 108 Ariz. 436, 439, 501 P.2d 378, 381 (1972); State v. Boccelli, 105 Ariz. 495, 497, 467 P.2d 740, 742 (1970).

99. *Sine qua non* refers to an indispensable condition without which the result (i.e., the crime) would not occur. BLACK'S LAW DICTIONARY 1556 (Rev. 4th ed. 1968).

100. *See* State v. Boccelli, 105 Ariz. 495, 497, 467 P.2d 740, 742 (1970) (quoting People v. Strong, 21 Ill. 2d 320, 325, 172 N.E.2d 765, 768 (1961)). *See also* United States v. Dillet, 265 F. Supp. 980, 986 (S.D.N.Y. 1966). *But see* United States v. Russell, 411 U.S. 423, 431 (1976) (rejecting defendant's argument that government's provision of an essential ingredient for the manufacture of an illegal drug constitutes entrapment).

101. *See* new ARIZ. REV. STAT. ANN. § 13-1003(A) (Supp. 1978).

102. 26 Ariz. App. 106, 546 P.2d 831 (1976).

103. *Id.* at 110, 546 P.2d at 535.

104. *Id.* at 110-11, 546 P.2d at 535-36.

105. *See* Hampton v. United States, 425 U.S. 484, 488-89 (1976); United States v. Russell, 411 U.S. 423, 433-34 (1973). However, governmental involvement will still have some significance to

Although the predisposition of the defendant may render the entrapment defense unavailable, due process requirements of fundamental fairness may bar conviction.[106] Where the conduct of the police is "outrageous,"[107] "egregious,"[108] or displays an "arrogant disregard for the sanctity of the . . . judicial and police processes,"[109] neither the courts nor the Constitution can condone the government invoking the judicial processes to seek a conviction, regardless of the defendant's predisposition.[110] At minimum, then, the governmental involvement must be of such proportions that it offends notions of fundamental fairness, thereby justifying the exercise of extraordinary judicial power to curb it.[111]

Since notions of due process are not easily translated into fixed standards,[112] the question of whether a police officer, acting as a co-conspirator, may commit the overt act of conspiracy without violating principles of due process escapes a set answer. However, the commission of the overt act by a government agent will certainly be an important factor in any such determination. Some jurisdictions have found that the government supplying narcotics which serve as a basis for a possession charge constitutes entrapment as a matter of law, despite the predisposition of the defendant.[113] Similarly, the government, by com-

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the entrapment inquiry. As indicated in *Kiser*, it can be a factor in determining whether the accused was induced to commit crime against his natural inclinations. *See* State v. Kiser, 26 Ariz. App. 106, 110-11, 546 P.2d 831, 835-36 (1976).

106. *See* Hampton v. United States, 425 U.S. 484, 495 n.7, 497 (per the concurring and dissenting opinions, a total of five justices); United States v. Russell, 411 U.S. 423, 431-32 (1973). The three justice plurality opinion of *Hampton* asserted that due process would never bar a conviction if the defendant was predisposed to committing the crime. 425 U.S. at 490. However, the remaining five justices rejected that view. *Id.* at 492-93 (Powell, J., concurring), and at 497 (Brennan, J., dissenting).

107. United States v. Russell, 411 U.S. 423, 431 (1973).

108. Hampton v. United States, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring).

109. United States v. Archer, 486 F.2d 670, 677 (2d Cir. 1973).

110. *See* cases cited notes 107-09 *supra*. *See also* Greene v. United States, 454 F.2d 783, 787 (9th Cir. 1971).

111. *See* United States v. Leja, 563 F.2d 244, 246 (6th Cir. 1977); Tanford, *supra* note 84 at 23. Stated another, although equally nebulous, way, due process forbids police conduct which "shocks the conscience," Rochin v. California, 342 U.S. 165, 172 (1952), or is "shocking to our sense of justice." United States v. McGrath, 468 F.2d 1027, 1030 (7th Cir. 1972) *remanded* 412 U.S. 936 (1973). Not surprisingly, courts are reluctant to infringe upon the powers of the other branches of government by exercising "a 'chancellor's foot' veto over law enforcement practices of which [they do] not approve." United States v. Russell, 411 U.S. 423, 435 (1973). *See also* United States v. Leja, 563 F.2d 244, 247 (6th Cir. 1977) *cert. denied*, —U.S.—,98 S.Ct. 1263 (1978).

112. *See, e.g.*, United States v. Russell, 411 U.S. 423, 431 (1973); Rochin v. California, 342 U.S. 165, 169 (1952); United States v. Leja, 563 F.2d 244, 248 (6th Cir. 1977) (Rubin, J., dissenting).

113. *See, e.g.*, United States v. West, 511 F.2d 1083, 1086-87 (3d Cir. 1975); United States v. Johnson, 495 F.2d 242, 244 & n.2. (10th Cir. 1974); United States v. Bueno, 447 F.2d 903, 906 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973); Dunbar v. United States, 342 F.2d 979, 981-82 (9th Cir. 1965). Whether this approach is really a due process analysis under the guise of entrapment is open to question. Entrapment as a matter of law and the due process defense are not always distinguishable. *See* United States v. Russell, 411 U.S. 423, 431-32 (1973); State v. Romero, 86 N.M. 99, 103, 519 P.2d 1180, 1184 (1974). Although the *Hampton* Court affirmed the conviction of a defendant who had been supplied heroin by a government informer, it did so without men-

mitting the overt act of conspiracy, supplies the *sine qua non* of the offense.[114] The purpose of requiring an overt act as an essential element of conspiracy is that such an act manifests more than simply a subjective intent to commit a crime.[115] Allowing the government to supply the overt act requirement of conspiracy would certainly nullify the purpose of the requirement. Thus, the commission of the overt act of conspiracy by a police officer should bar conviction as a matter of law.[116]

II. HOMICIDE

Criminal homicide under the new code is divided into the categories of negligent homicide,[117] manslaughter,[118] and second[119] or first degree murder.[120] The category of homicide in a particular case is conditioned upon which of the mental states of negligence, recklessness, knowledge, or intent is present.[121] If death results from criminal negligence, the crime is negligent homicide.[122] A conviction for manslaughter may be warranted if the defendant recklessly causes another person's death,[123] commits second degree murder, but is adequately provoked,[124] or is acting under duress,[125] or intentionally aids a suicide.[126] If the defendant intentionally, knowingly or, under circumstances revealing extreme indifference to human life, recklessly causes the death of another person, the defendant is guilty of second degree murder.[127] First degree murder is committed either when a person

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tioning the decisions of those courts which found such conduct to be entrapment as a matter of law. 425 U.S. at 488-91. Thus, the question of whether the supplying of narcotics by the government constitutes entrapment as a matter of law is still subject to dispute. *See* Tanford, *supra* note 84, at 21-22.

114. *See* text & notes 99-101 supra.

115. *See* United States v. Small, 472 F.2d 818, 819 (3rd Cir. 1972); United States v. Armones, 363 F.2d 385, 400 (2d Cir. 1966).

116. *Cf.* text & notes 99-101 (the government's supplying of the *sine qua non* of the offense—narcotics—barred conviction as a matter of law).

117. See New ARIZ. REV. STAT. ANN. § 13-1102 (Supp. 1978).

118. *Id.* § 13-1103. The tripartite distinction between voluntary, involuntary, and vehicular manslaughter has been abandoned. *Compare id. with* ARIZ. REV. STAT. ANN. § 13-456 (Supp. 1957-77) (repealed by Laws 1977, ch. 142, § 15, effective October 1, 1978).

119. New ARIZ. REV. STAT. ANN. § 13-1104 (Supp. 1978).

120. *Id.* § 13-1105.

121. *See id.* §§ 1102(A), 1103(A), 1104(A), 1105(A). *See also id.* § 13-105(5). The nebulous concepts of malice aforethought, abandoned and malignant heart, express and implied malice, and due caution and circumspection are no longer applicable. *See* Gerber *supra* note 26, at 506-07.

122. New ARIZ. REV. STAT. ANN. § 13-1102 (Supp. 1978). *See also id.* § 13-105(5)(d).

123. *Id.* § 13-1103(A)(1). *See also id.* § 13-105(5)(c).

124. *Id.* § 13-1103(2). Adequate provocation is defined as "conduct or circumstances sufficient to deprive a reasonable person of self-control." *Id.* § 13-1101(4).

125. *Id.* § 13-1103(4). Duress in this context means being coerced by the use, or threatened imminent use, of such an unlawful physical force that a reasonable person would be unable to resist. *Id.*

126. *Id.* § 13-1103(3).

127. *Id.* § 13-1004(A).

knowingly, and with premeditation, causes the death of a particular individual,[128] or the death of *any* person results from the commission, attempted commission, or flight from the commission of certain designated felonies.[129] Discussion of homicide will be limited to the potential issues emanating from the first degree murder statute.[130]

A. *The Premeditation Formula*

Under the new code premeditation requires "a length of time to permit reflection."[131] How Arizona courts will interpret that requirement, as distinguished from the wording of the old statute,[132] provokes analysis.

Although courts have used a variety of verbal forms to describe the reflection necessary to constitute premeditation,[133] they have been uniform in holding that no fixed length of time can be prescribed for ascertaining its existence.[134] Premeditation is to be found in the defendant's words, acts, and the circumstances surrounding the killing.[135] However, two distinct premeditation formulas have evolved.[136] One view is that premeditation may emerge as instantaneously as successive thoughts.[137] No preconceived design or plan to kill on the defendant's part need be shown;[138] all that is required is a showing that the defend-

128. *Id.* § 13-1105(A)(1). Premeditation is acting with the intention or knowledge that a human being will be killed or seriously injured, "when such intention or knowledge precedes the killing by *a length of time to permit reflection.*" *Id.* § 13-1101(1) (emphasis added). If the act is the "instant effect of a sudden quarrel or heat of passion," it is not premeditated. *Id. See also* text & notes 133-52 *infra*.

129. See new ARIZ. REV. STAT. ANN. § 13-1105(2) (Supp. 1978).

130. *See id.* § 13-1105

131. *Id.* § 13-1101(1).

132. Under ARIZ. REV. STAT. ANN. § 13-452 (Supp. 1957-77) (repealed by Laws 1977, Ch. 142, § 12), "[a] murder which [was] perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premediated killing . . ." was murder of the first degree.

133. *See*, People v. Smith, 33 Cal. App. 3d 51, 64, 108 Cal. Rptr. 698, 707 (1973) (pre-existing reflection, forethought, careful thought, weighing of consideration); Henderson v. State, 264 Ind. 334, 337-38, 343 N.E.2d 776, 778 (1976) (mulled over prior to acting); Owens v. State, 263 Ind. 487, 506, 333 N.E.2d 745, 755 (1975) (deliberating on a contemplated act).

134. *See, e.g.*, State v. Fryer, 226 N.W.2d 36, 41 (Iowa 1975); James v. State, 31 Md. App. 666, 672, 358 A.2d 595, 599 (1976); Commonwealth v. Caine, 366 Mass. 366, 374, 318 N.E.2d 901, 908 (1974); State v. Girouard, 135 Vt. 123,—,373 A.2d 836, 846 (1977); Harston v. Commonwealth, 217 Va. 429,—,230 S.E.2d 626, 628 (1976).

135. *See, e.g.*, James v. State, 31 Md. App. 666, 672, 358 A.2d 595, 599 (1976); State v. Stewart, 292 N.C. 219, 224, 232 S.E.2d 443, 447 (1977); Commonwealth v. Carroll, 412 Pa. 525, 532, 194 A.2d 911, 916 (1963).

136. *Compare* Commonwealth v. Carroll, 412 Pa. 525, 532-34, 194 A.2d 911, 916 (1963) *with* People v. Anderson, 70 Cal. 2d 15, 26-27, 447 P.2d 942, 948-49, 73 Cal. Rptr. 550, 556-57 (1968).

137. *See, e.g.*, Strickland v. State, 265 Ind. 664, 668, 359 N.E.2d 244, 248 (1977); State v. Bautista, 193 Neb. 476, 480, 227 N.W.2d 835, 839 (1975); Miller v. State, 523 P.2d 1118, 1122 (Okla. Crim. App. 1974); State v. Howell, 543 S.W.2d 836, 841 (Mo. 1976). This approach has been criticized because speaking of premeditation as "instantaneous" destroys the distinction between first and second degree murder. *See* Bullock v. United States, 122 F.2d 213, 213-14 (D.C. Cir. 1941).

138. *See* Commonwealth v. Carroll, 412 Pa. 525, 534, 194 A.2d 911, 916 (1963). The *Carroll* court rejected the argument that the lack of planning negated premediation. *Id.*

ant thought about the killing prior to engaging in the homicidal conduct.[139] The other view is that premeditation must be inferred from events before and at the time of the killing.[140] Evidence important to sustain a finding of premeditation falls into three categories:[141] (1) facts showing defendant's planning activity prior to the killing;[142] (2) facts concerning the defendant's prior dealing with the victim that show motive;[143] and (3) facts about the manner of the killing which show a preconceived design.[144]

Under the old homicide statute[145] Arizona adopted the view that premeditation could arise as instantaneously as consecutive thoughts of the actor.[146] No appreciable time between the intention to kill and the act of killing was required.[147] The language of the new homicide statute is not likely to prompt Arizona courts to change that view. Premed-

139. *See, e.g.*, State v. Fryer, 226 N.W.2d 36, 41 (Iowa 1975); State v. Henson, 221 Kan. 635, 645, 562 P.2d 51, 61 (1977); James v. State, 31 Md. App. 666, 672, 358 A.2d 595, 599 (1976).

140. *See* People v. Anderson, 70 Cal. 2d 15, 26-27, 447 P.2d 942, 949, 73 Cal. Rptr. 550, 557 (1968); People v. Oster, 67 Mich. App. 490, 497, 241 N.W.2d 260, 263 (1976). A "rash impulse hastily executed is rejected, according to this view, as a basis for premeditation. People v. Anderson, 70 Cal. 2d 15, 27, 447 P.2d 942, 949, 73 Cal. Rptr. 550, 557 (1968); People v. Thomas, 25 Cal. 2d 880, 898, 900, 901, 156 P.2d 7, 14 (1945). *See also* People v. Orabuena, 56 Cal. App. 3d 540, 545-46; 128 Cal. Rptr. 474, 477 (1976).

141. People v. Anderson, 70 Cal. 2d 15, 26, 447 P.2d 942, 949, 73 Cal. Rptr. 550, 557 (1968).

142. *See, e.g.*, Belton v. United States, 382 F.2d 150, 152 (D.C. Cir. 1967) (defendant carrying a deadly weapon); People v. Hillery, 62 Cal. 2d 692, 704, 401 P.2d 382, 389, 44 Cal. Rptr. 30, 37 (1965), *cert. denied*, 386 U.S. 938 (1967) (tying up a victim and taking her to a place where others are unlikely to intrude). People v. Kempt, 55 Cal. 2d 458, 472, 359 P.2d 913, 920, 11 Cal. Rptr. 361, 368 (1961) (surreptitious entry through victim's window).

143. *See, e.g.*, People v. Cartier, 54 Cal. 2d 300, 306, 353 P.2d 53, 57, 5 Cal. Rptr. 573, 579 (1960) (defendant angered by his wife talking to a sailor, killed her); People v. Cole, 47 Cal. 2d 99, 107, 301 P.2d 854, 859 (1956) (defendant killed his wife so he could marry another woman); People v. Slaughter, 29 Ill. 2d 384, 390, 194 N.E.2d 193, 196 (1963), *rev'd on other grounds*, 39 Ill. 2d 278, 235 N.E.2d 566 (1968), *aff'd on rehearing*, 46 Ill. 2d 114, 262 N.E.2d 904 (1970) (defendant had previously threatened victim).

144. *See, e.g.*, People v. Hillery, 62 Cal. 2d 692, 704, 401 P.2d 382, 389, 44 Cal. Rptr. 30, 37 (1965), *cert. denied*, 386 U.S. 938 (1967) (sewing shears were plunged deep into victim's chest); People v. Cartier, 54 Cal. 2d 300, 308-09, 353 P.2d 53, 59, 5 Cal. Rptr. 573, 579 (1960) (the victim's chest was opened and her heart removed); People v. Stroble, 36 Cal. 2d 615, 619, 226 P.2d 330, 333 (1951) (the victim suffered two hammer blows on the temple, two stab wounds in the chest, one stab wound in the back, another in the back of the neck, and six skull fractures).

If all three types of evidence are not presented, premeditation may still be found with strong evidence of the first category, or evidence of the second coupled with facts falling in either of the other two categories. People v. Anderson, 70 Cal. 2d 15, 27, 447 P.2d 942, 949, 73 Cal. Rptr. 550, 557 (1968); People v. Orafuena, 56 Cal. App. 3d 540, 545-46, 128 Cal. Rptr. 474, 477 (1976). The emphasis on the first type of evidence indicates that although no set time is required to form premeditation, instantaneous thoughts, absent planning, are not likely to constitute premeditation.

145. ARIZ. REV. STAT. ANN. § 13-452 (Supp. 1957-77) (repealed by Laws 1977, Ch. 142, § 15 effective October 1, 1978) provided in part: "A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing, . . . is murder of the first degree."

146. *See* State v. Magby, 113 Ariz. 345, 352, 554 P.2d 1272, 1279 (1976); State v. Sisk, 112 Ariz. 484, 486, 543 P.2d 1113, 1115, (1976); State v. Duke, 110 Ariz. 320, 325, 518 P.2d 570, 575 (1974); State v. McGee, 91 Ariz. 101, 110, 370 P.2d 261, 267, *cert. denied*, 371 U.S. 844 (1962); Macias v. State, 36 Ariz. 140, 149-50, 283 P. 711, 715 (1929).

147. *See* State v. Magby, 113 Ariz. 345, 352, 554 P.2d 1272, 1279 (1976); State v. McGee, 91 Ariz. 101, 110, 370 P.2d 261, 267, *cert. denied*, 371 U.S. 844 (1962); State v. Macias, 36 Ariz. 140, 149-50, 283 P. 711, 715 (1929).

itation requires only a finding of "a length of time to permit reflection."[148] The word "reflection" adds little substance to the new statute since it is synonymous with premeditation in the context of the statute.[149] The new statute also indicates that acts which are the instant effect of a sudden quarrel or heat of passion do not constitute premeditation.[150] However, an act done on impluse is not likely to militate against a finding of premeditation since the legislature rejected the standard of premeditation which excluded acts done on impulse.[151] Thus, under the new statute it appears that if the defendant merely thought about killing before performing the act he has committed first degree murder.[152]

B. *Narcotic Dealers and the New Felony-Murder Rule*

A conviction for first degree murder may also be the result of the operation of the felony-murder rule. The felony-murder rule allows the prosecution to charge a defendant with first degree murder for homicide occurring during the *res gestae*[153] of certain designated felo-

148. New ARIZ. REV. STAT. ANN. § 13-1101(1) (Supp. 1978). As proposed to the legislature the statute read "an *appreciable* length of time." H.B. 2054, 33rd Legis., 1st Reg. Sess. (1977) (as proposed) (emphasis added). If the word "appreciable" had been retained it could have been argued that the legislative intent was to amend the judicial standard which allows a finding of premeditation when no appreciable time had elapsed. *See* text & note 147 *supra*. However, even if the legislature had adopted the statute as proposed, the word "appreciable" would not necessarily effect a change in view by the courts. In Gladden v. State, 273 Md. 383, 330 A.2d 176 (1974), the court acknowledged that for murder to be premeditated, "the design to kill must have preceded the killing by an appreciable length of time . . . ." *Id.* at 387, 330 A.2d at 178. However, the *Gladden* court also recognized that murder is premeditated if it stems from "a choice made as a result of thought, however short the struggle between the intention and the act . . . ." *Accord* James v. State, 31 Md. App. 666, 672, 358 A.2d 595, 599 (1976). Thus, the mere statutory requirement of an appreciable length of time is not, by itself, irreconcilable with the view that premeditation may emerge as instantaneously as successive thoughts.

149. "Reflection" means contemplation or consideration of a subject matter or idea. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1908 (1961). "Premeditation" means the act or instance of meditating beforehand. *Id.* at 1789. "Meditate" means to consider or contemplate. *Id.* at 1403. Thus, reflection and premeditation both involve consideration and contemplation.

150. New ARIZ. REV. STAT. ANN. § 13-1101(1) (Supp. 1978). However, this language implies only that the defendant must act deliberately. *See* State v. Bowser, 214 N.C. 249, 253, 199 S.E. 31, 34 (1938) ("Deliberation means that the act is done in a cool state of the blood.").

151. As proposed to the legislature the statute read: "An act is done with [premeditation] if it is the instant effect of impulse." H.B. 2054, 33rd Legis. 1st Reg. Sess. (1977) (as proposed). If the statute had passed as proposed, such language would substantiate the argument that the legislature intended to undermine the approach taken by the Pennsylvania Supreme Court in Commonwealth v. Carroll, 412 Pa. 525, 532-34, 194 A.2d 911, 916 (1963). See text & note 138 *supra*. Since the legislature explicitly rejected a change, presumably it intended to maintain the existing standard.

152. *See* text & notes 137-39, 146-47 *supra*.

153. As most commonly used, "*res gestae*" relates to the spontaneous declaration exception to the hearsay rule. In the present context, the term is broadened to refer to action so related to the transaction as to be evoked or prompted by it. *See* BALLENTINE LAW DICTIONARY 1102 (3d ed. 1969). As described in one case: "The *res gestae* of the crime begins at the point where an indictable attempt is reached and ends where the chain of events between the attempted crime or completed felony is broken . . . ." Payne v. State, 81 Nev. 503, 507, 406 P.2d 922, 924 (1965). Under the new code a death is within the *res gestae* of the designated felony if it occurs in the course of

nies.[154] The prosecution is relieved of the burden of having to establish the elements of premeditation to obtain a conviction for first degree murder.[155] The harsh effect of the rule has precipitated a noticeable trend by the courts to limit its scope.[156] For example, in 1973 the Arizona Supreme Court was asked to impose felony-murder liability, in the form of second degree murder, upon a heroin seller where death of the buyer resulted from the voluntary and self-administered use of the purchased drug.[157] The court declined to do so, taking the view that any broadening of the felony-murder rule "should be done by the legislature . . . ."[158]

In the new criminal code the legislature has broadened the felony-murder rule to include the offense of selling narcotics as an underlying felony.[159] The question again arises: may the seller of heroin be held liable for felony-murder where death results from the voluntary and self-administered use of that heroin.[160] Since the issue is no longer

and in furtherance of the felony or in immediate flight from the felony. New ARIZ. REV. STAT. ANN. § 13-1105(A)(2) (Supp. 1978).

154. For example, new ARIZ. REV. STAT. ANN. § 13-1105(a)(2) (Supp. 1978) enumerates sexual assault, kidnapping, burglary, arson of an occupied structure, and robbery, amongst other crimes, as underlying felonies for the imposition of felony-murder liability. *See also* Bizup v. People, 150 Colo. 214, 217, 371 P.2d 786, 788, *cert. denied*, 371 U.S. 873 (1962); State v. Glenn, 429 S.W.2d 225, 231 (Mo. 1968), *habeus corpus denied*, 341 F. Supp. 1055 (E.D. Mo. 1972); Payne v. States, 81 Nev. 503, 505, 406 P.2d 922, 924 (1965), *cert. denied*, 391 U.S. 927 (1968); State v. Artis, 57 N.J. 24, 31, 269 A.2d 1, 5 (1970).

155. *See, e.g.*, State v. Cookus, 115 Ariz. 99, 105, 563 P.2d 898, 904 (1977); State v. Goodseal, 220 Kan. 487, 491-92, 553 P.2d 279, 284 (1976); Wiggins v. State, 8 Md. App. 598, 603, 261 A.2d 503, 506 (1970). The culpable mental state need not be an intent to kill, but only the mental state required to commit the underlying felony. New ARIZ. REV. STAT. ANN. § 13-1105(B) (Supp. 1978). *See also* Commonwealth v. Scott, 469 Pa. 258, 272 & n.11, 365 A.2d 140, 147 & n.11 (1976); Rodriguez v. State, 548 S.W.2d 26, 28-29 (Tex. Crim. App. 1977); Richmond v. State, 554 P.2d 1217, 1232 (Wyo. 1976).

156. *See* W. LAFAVE & A. SCOTT, *supra* note 27, at 547-59. The rule has been limited, for example, by requiring that the defendant's conduct be the proximate or legal cause of the victim's death and/or that the underlying felony be inherently dangerous to human life. *Id.* at 546-47. Further limitation upon the rule can be found in the requirements that the felony be independent of the homicide and/or that the death occur within a narrow interpretation of *res gestae*. *Id.*

157. State v. Dixon, 109 Ariz. 441, 442, 511 P.2d 623, 624 (1973). *See also* "The Status of Second-Degree Felony Murder in Arizona," 16 ARIZ. L. REV. 489, 591 (1974). Under ARIZ. REV. STAT. ANN. § 13-452 (Supp. 1957-77), (repealed by Laws 1977, ch. 142, § 15, effective October 1, 1978), the sale of heroin was not an enumerated felony for the purpose of imposing liability for first degree murder. However, since this statute also provided that all other kinds of murder, not designated first degree, were second degree murder, the state in *Dixon* argued that the sale of heroin was an inherently dangerous felony, caused the death of the victim, and should therefore be punished as second degree murder. 109 Ariz. at 442, 511 P.2d at 624-25.

158. State v. Dixon, 109 Ariz. 441, 443, 511 P.2d 623, 625 (1973).

159. *See* ARIZ. REV. STATE. ANN. § 13-1105(a)(2) (Supp. 1978). This section specifically enumerates the offenses of: importing, transporting, selling, or trafficking in narcotic drugs under ARIZ. REV. STAT. ANN. § 36-1002.02 (Supp. 1977-78); inducing minors to violate narcotic drug laws under *id.* § 36-1002.03; and minors inducing minors to violate drug laws under *id.* § 36-1002.04.

160. As pointed out in one case, the resolution of the question as to heroin necessarily resolves the question as to narcotics generally. State v. Mauldin, 215 Kan. 956, 958, 529 P.2d 124, 126 (1974). Thus, the word "narcotics" may be inserted for the word "heroin." However, it is important to distinguish the question in its present form from one which involves a defendant who injected or assisted in injecting the dosage of heroin into the deceased. In such instances criminal liability other than felony-murder may be imposed on the basis of the defendant's culpable mental

whether the sale of the drug is an underlying felony the question becomes whether death from the use of purchased heroin is within the *res gestae* of this felony.

In felony-murder prosecutions, defendants often contend that the homicide occurred after the felony was completed.[161] However, technical completion of the crime does not necessarily foreclose felony-murder liability.[162] If the homicide is within the *res geatae* of the felony—closely connected in terms of time, place and causal relation[163]—murder liability will attach.[164] However, the mere presence of proximity of time and place between the act and the death, without the presence of a causal connection, is insufficient to impute liability.[165] Hence, a decision regarding the heroin seller's felony-murder liability must focus primarily on the issue of causation.

The new criminal code has a two prong test defining the causal relationship between conduct and result. The conduct must be the *sine qua non*[166] of the result in question,[167] and the relationship between the two must satisfy any additional causal requirements imposed by the statute proscribing such conduct.[168] Thus, an initial showing must be made that the sale of heroin directly caused the death of the user.[169] However, even assuming that the sale of heroin is the direct cause of death resulting from the use of that heroin, there is an additional requirement that must be met. Death must result in the course of and in

state. *See* People v. Meyer, 46 Mich. App. 357, 366-67, 208 N.W.2d 230, 235 (1973) (manslaughter); People v. Cruciani, 44 App. Div. 2d 684, 685, 353 N.Y.S.2d 811, 813 (1974) (manslaughter).

161. *See, e.g.*, People v. Salas, 7 Cal. 3d 812, 820, 500 P.2d 7, 12-13, 103 Cal. Rptr. 431, 436-37 (1972), *cert. denied*, 410 U.S. 939 (1973); People v. Sirignano, 42 Cal. App. 3d 794, 801, 117 Cal. Rptr. 131, 136 (1974); State v. Beal, 470 S.W.2d 509, 512 (Mo. 1971).

162. *See, e.g.*, United States v. Naples, 192 F. Supp. 23, 33-34 (D.D.C. 1961), *rev'd on other grounds*, 307 F.2d 618 (1962); Jones v. State, 220 Ga. 899, 902, 142 S.E.2d 801, 803 (1965); Commonwealth v. Dellelo, 349 Mass. 525, 529, 209 N.E.2d 303, 306 (1965); State v. Artis, 57 N.J. 24, 31-33, 269 A.2d 1, 5 (1970).

163. Clark v. State, 558 P.2d 674, 678 (Okla. Crim. App. 1977).

164. *See* cases cited note 161 *supra*.

165. "Something more than a mere coincidence of time and place between the wrongful act and the death is necessary. It must appear that there was . . . actual legal relation between the killing and the crime committed or attempted. . . ." State v. McKinnon,—Mont.—,—, 556 P.2d 906, 910 (1976); 1 WHARTON'S CRIMINAL LAW AND PROCEDURE § 252, at 543 (Anderson ed. 1957). The real question is whether the killing was committed within the *res gestae* of the felony, so as to be said to be caused by the commission or attempted commission of the felony. *See* text & notes 167-71 *infra*.

166. *Sine qua non* refers to the "but for" cause, an indispensable condition without which the result would not occur. BLACK'S LAW DICTIONARY 1556. (Rev. 4th ed. 1968).

167. New Ariz. Rev. Stat. Ann. § 13-203(a)(1) (Supp. 1978).

168. *Id.* § 13-203(A)(2).

169. *See* People v. Stamp, 2 Cal. App. 3d 203, 210, 82 Cal. Rptr. 598, 603 (1969), *cert. denied*, 400 U.S. 819 (1970). Because of the way the *Dixon* court disposed of the case before it, the decision expressed no opinion on this issue. State v. Dixon, 109 Ariz. 441, 443, 511 P.2d 623, 625 (1973). *But see*, Comment, *Prospective Homicidal Responsibility for the Heroin Dealer in Arizona*, 1975 ARIZ. ST. L.J. 97, 106-09 (exploring some of the approaches to the issue of causation where death ensues subsequent to the sale of heroin).

the furtherance of or in immediate flight from the sale of heroin.[170] The underlying felony is the sale of heroin, and that felony is completed for the purpose of determining *res gestae* and causation upon consummation of the sale.[171] Under the new felony-murder rule, death which results from the voluntary and self-administered use of purchased heroin should not result in the imposition of murder liability upon the seller.

III. ASSAULT AND RELATED OFFENSES

The crimes of endangerment, threatening or intimidating, simple and aggravated assault, and unlawful administration of a drug are punishable under the heading of Assault and Related Offenses.[172] Reckless conduct which creates a substantial risk of death or injury to another person constitutes endangerment.[173] The offense of "threatening or intimidating" is committed if the defendant performs such acts with the intent to cause physical injury, property damage, or serious public inconvenience.[174] Assault is committed if one recklessly causes physical injury to another, intentionally places another in reasonable apprehension of imminent physical injury, or knowingly touches another with the intent to injure, insult, or provoke that person.[175] Assault becomes aggravated, and is thus felonious, if it results in serious physical injury, or is committed with a deadly weapon or dangerous instrument, or if the victim is within one of the enumerated privileged classes of persons or places.[176] Finally, administering intoxicants or narcotics to another without that person's consent is also classified as a felony under this chapter.[177]

170. *See* new ARIZ. REV. STAT. ANN. § 13-1005(a)(2) (Supp. 1978). The statutory delineation of the *res gestae*, in essence, amounts to an "additional causal requirement" under new ARIZ. REV. STAT. ANN. § 13-203(A)(2) (Supp. 1978). This added requirement comports with the general rule that the tort concept of proximate cause is insufficient; a more direct causal relationship between the criminal conduct and the homicide is required. *See, e.g.*, People v. Morris, 1 Ill. App. 3d 566, 570, 274 N.E.2d 898, 901 (1971); People v. Scott, 29 Mich. App. 549, 556, 185 N.W.2d 576, 579-81 (1971); Sheriff v. Hicks, 89 Nev. 78, 82, 506 P.2d 766, 768 (1973).

171. State v. Mauldin, 215 Kan. 956, 958, 529 P.2d 124, 126 (1974). The *Mauldin* court noted that case law mandated a stricter causal relationship than proximate cause in that the conduct causing death must arise in the commission of, or in the furtherance of, a design to commit the felony. *Id.* at 958, 529 P.2d at 126. New ARIZ. REV. STAT. ANN. § 13-1105(A)(2) (Supp. 1978) codifies that case law. *See* discussion and cases in note 170 *supra*. Thus, with consummation of the sale of heroin felony-murder liability under new ARIZ. REV. STAT. ANN. § 13-1105(A)(2) (Supp. 1978) ends as well.

172. *See* new ARIZ. REV. STAT. ANN. §§ 13-1201 to 1205 (Supp. 1978). Endangerment, threatening or intimidating, and unlawful administering of a drug are new crimes to Arizona.

173. *Id.* § 13-1201.

174. *Id.* § 13-1202.

175. *Id.* § 13-1203.

176. *Id.* § 13-1204. The enumerated classes of privileged persons and places include private residences, children fifteen years of age and younger, peace officers, school teachers, and employees of the department of corrections. *Id.*

177. *Id.* § 13-1205.

A. *Consent as a Defense to Assault*

Conspicuously absent in chapter 12 of the new code is a provision providing a defense to assault where the victim has consented to the assault.[178] Read literally, the absence of a consent defense in the assault statutes could lead to preposterous results. A physician performing authorized surgery[179] or an athlete participating in a lawful contact sport in accordance with the rules would be vulnerable to charges of violating the statute. Although such results are not likely to occur,[180] their potential supports an inference that there is an implied defense of consent in the statute.[181] Some of the conduct which should appropriately fall within this implied exception must be identified.

Although it is generally stated that consent is a defense to the crime of assault,[182] consent is not an absolute defense.[183] In fact, the defense has been given a very limited application.[184] If the assault

178. *Compare id.* §§ 13-1203 *and* 1204 *with* § 13-1205(A). Some states have provided by statute that consent is a defense to assault. *See* N.D. CENT. CODE § 12.1-17-08 (1976); WIS. STAT. ANN. § 940.20 (West Supp. 1978-79).

179. New ARIZ. REV. STAT. ANN. § 13-403(5)(a) justifies lawful medical treatment when the patient has consented, but only in emergency circumstances. However, it is generally recognized in Arizona that valid consent in the course of medical treatment will defeat a civil action for battery. *See* Hales v. Pittman, 118 Ariz. 305, 311-12, 576 P.2d 493, 499-500 (1978); Fiske v. Soland, 8 Ariz. App. 585, 587-88, 448 P.2d 429, 431-32 (1968); Shetter v. Rochelle, 2 Ariz. App. 358, 370, 409 P.2d 74, 86 (1965), *modified*, 2 Ariz. App. 607, 411 P.2d 45 (1966).

180. For one thing, most states recognize that consent in such situations bars the application of the statute. *See* cases cited in note 182 *infra*. Moreover, the presence of consent may prompt the decision on the part of the police not to arrest, the prosecutor not to charge, or the judge or jury not to convict. *See* W. LAFAVE & A. SCOTT, *supra* note 27, at 412-13.

181. Consent of the victim was first recognized as a defense to assault at common law. *See* R. PERKINS, CRIMINAL LAW 109 (2d ed. 1969); Comment, *The Consent Defense: Sports, Violence, and the Criminal Law*, 13 AM. CRIM. L. REV. 235, 236 (1975).

182. *See, e.g.*, Guarro v. United States, 237 F.2d 578, 581 (D.C. Cir. 1956); People v. Lenti, 44 Misc. 2d 118, 123, 253 N.Y.S.2d 9, 15 (Nassau County Ct. 1964); Banovitch v. Commonwealth, 196 Va. 210, 219, 83 S.E.2d 369, 375 (1954). For a collection of cases, see Annot., 58 A.L.R.3d 662, 664 (1974).

183. Unlike crimes which are defined in terms of lack of consent, such as sexual assault, new ARIZ. REV. STAT. ANN. § 13-1406 (Supp. 1978), the existence of consent poses no necessary bar to convictions. *See* W. LAFAVE & A. SCOTT, *supra* note 27, at 408. However, in one case, King v. State, 36 Md. App. 124, 134, 373 A.2d 292, 298 (1977), the court baldly stated that consent is an absolute defense to the crime of battery. *King* relied on Avery v. State, 15 Md. App. 520, 292 A.2d 728 (1972) for support, though the latter did not address the issue of whether the victim's consent was a defense to the charge of assault and battery. *See id.* at 548-49, 292 A.2d at 747.

184. Even in situations where consent is recognized as a viable defense, the consent itself must be valid. Consent obtained through fraud, duress, or from one without the capacity to consent will not be an effective defense. *See* People v. Samuels, 250 Cal. App. 2d 501, 513, 58 Cal. Rptr. 439, 447 (1967), *cert. denied*, 390 U.S. 1024 (1968); People v. Steinberg, 190 Misc. 413, 417, 73 N.Y.S.2d 475, 478-79 (Felony Ct. 1947); W. CLARK & W. MARSHALL, CRIMES 352 (7th Ed. 1967). Moreover, if the defendant's conduct exceeds the scope of the consent, the defense is ineffective. *See* Avery v. State, 15 Md. App., 520, 548, 292 A.2d 728, 747 (1972), *cert. dismissed*, 410 U.S. 977 (1973) (victim consented to injection of hypodermic needle in her arm by defendant-physician, but not to the subsequent indecent liberties taken by the defendant while she was unconscious); People v. Freer, 86 Misc. 2d 280, 284, 381 N.Y.S.2d 976, 977 (Suffolk County Ct. 1976) (defendant hit an opponent in the eye with his fist during a football game); People v. Lenti, 44 N.Y.S.2d 9, 11 (Nassau County Ct. 1964) (victim severely beaten in course of fraternity initiation).

causes serious physical injury[185] or amounts to a breach of the peace,[186] a consent defense is not effective. Severe bodily harm and breach of the peace are said to be an injury to the community, and a victim cannot consent on the behalf of the community for such injury.[187]

However, in instances involving breach of the peace rather than serious physical injury, arguably consent should be recognized as a defense. If serious injuries result from an assault, the state has no recourse but to indict for assault; whereas, if the state incurs a breach of the peace, it has a specific remedy in the new code's disorderly conduct statute.[188] Thus, in cases where the victim has consented to assault, and that assault results merely in a breach of the peace, the offense charged should be disorderly conduct, not assault.[189]

Recognizing consent as a defense in instances involving solely a breach of the peace would have significant ramifications under the new code.[190] For example, where aggravated assault is charged simply because the victim is within the ambit of one of the enumerated privileged classes of persons or places, such as private residences, peace officers or school teachers,[191] recognition of the consent defense would permit a significant reduction of the seriousness of the offense charged.[192] Such a reduction is particularly appropriate here since the purpose of the statute is to afford special protection for privileged per-

185. *See, e.g.*, People v. Alfaro, 61 Cal. App. 3d 414, 419, 429, 132 Cal. Rptr. 356, 358, 365 (1976) (victim was repeatedly kicked and beaten); People v. Samuels, 250 Cal. App. 2d 501, 513-14, 58 Cal. Rptr. 439, 447 (1967), *cert. denied*, 390 U.S. 1024 (1968) (severe beating); State v. Fransua, 85 N.M. 173, 174, 510 P.2d 106, 107 (1973) (serious gunshot wound to the head).

186. *See, e.g.*, Taylor v. State, 214 Md. 156, 159, 133 A.2d 414, 415 (1957) (engaging in public act of sex with minor); State v. Brown, 143 N.J. Sup. 571, 573-74, 364 A.2d 27, 30 (1976) (boxing and sparring in public cited as examples). *See also* Banovitch v. Commonwealth, 196 Va. 210, 219, 83 S.E.2d 369, 375 (1954).

187. *See* State v. Brown, 143 N.J. Super. 571, 573-75, 364 A.2d 27, 28-29 (1976), *aff'd*, 154 N.J. Super. 511, 381 A.2d 1231 (1977); Comment, *supra* note 181, at 237. As expressed in *Brown* the reasoning for this rule is that the community is injured because the public has an interest in both the personal safety of its citizens and the health and good order of the community in general. 143 N.J. Super. at 573-75, 364 A.2d at 28-29.

188. *See* new ARIZ. REV. STAT. ANN. § 13-2904 (Supp. 1978) which reads in part: "A person commits disorderly conduct if, with the intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, such person: 1. Engages in fighting, violent or seriously disruptive behavior. . . ."

189. *See* W. CLARK & W. MARSHALL, *supra* note 184, at 356; Note, *Consent in Criminal Law: Violence in Sports*, 75 MICH. L. REV. 148, 164 & n.54 (1976). However, in the only Arizona case on point, the Arizona Supreme Court held that consent was not a defense to assault and battery arising from mutual combat which constituted a breach of peace, and that both parties may be prosecuted criminally. State v. Mace, 86 Ariz. 85, 88, 340 P.2d 994, 996 (1959).

190. Although it would make little difference in terms of sentencing if simple assault is charged, since both simple assault and disorderly conduct are Class 1 misdemeanors, new ARIZ. REV. STAT. ANN. §§ 13-1203(B), 13-2904(B) (Supp. 1978), the mens rea element may differ between the two. Disorderly conduct requires intentional or knowing disturbance of the peace, *id.* § 13-2904(A), whereas assault can be committed recklessly in some instances, *id.* § 13-1202(A)(2).

191. See note 176 *supra*.

192. Aggravated assault under such circumstances is a class 6 felony, new ARIZ. REV. STAT. ANN. § 13-1204(B) (Supp. 1978), whereas, disorderly conduct is a Class 1 misdemeanor. *Id.* § 13-2904(B).

sons and places.[193] Consent by the privileged person can accordingly be viewed as a waiver of the special protection.[194] The charge, therefore, ought to be lowered to the misdemeanor of disorderly conduct—a statutory offense designed to protect the peace of the community.[195]

B. *Provocation as a Defense*

In addition to the absence of a provision for a consent defense, the assault statutes also fail to provide a reduction in the charge when there is present adequate provocation[196] by the victim.[197] Under the new code, second degree murder is reduced to mansalughter where it occurs in heat of passion resulting from adequate provocation.[198] From the defendant's point of view, provocation plays a no less significant role in many assault cases than in cases of homicide. There ought to be no magic affecting the defendant's liability in the fact that the victim died.[199] The question, then, is whether it would be appropriate to recognize adequate provocation by the victim as a defense to assault.[200]

Generally, in the absence of a statute to the contrary, provocation will not justify an assault.[201] The rule is grounded on the public policy which forbids individuals from righting their own wrongs.[202] The reasoning behind the policy is that excusing assaults emanating solely from provocation would encourage aggressive conduct and "lead to the law of the jungle."[203] Thus, mere words or threats, no matter how of-

193. *See* Gerber, *supra* note 26, at 511.

194. A waiver is generally regarded as a voluntary relinquishment of a known right or privilege. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Brown v. Pittsburg, 409 Pa. 357, 360, 186 A.2d 399, 401 (1962). *See also* BLACK'S LAW DICTIONARY 377 (4th ed. 1968); 8A WORDS AND PHRASES 206 (1967).

195. New ARIZ. REV. STAT. ANN. § 13-2904 (Supp. 1978). If the consent defense is not recognized, and the defendant is found guilty of assault despite a showing of consent by the victim, the practitioner should keep in mind that the existence of consent may mitigate the presumptive sentence. *See* Note, *supra* note 189, at 163 & n.49. Mitigating circumstances for the purpose of sentencing are enumerated in new ARIZ. REV. STAT. ANN. § 13-702(E)(1) to (4) (Supp. 1978). Though consent by the victim is not listed, "[a]ny other factors which the court may deem appropriate to the ends of justice" may also be considered. *Id.* § 13-702(E)(5). Arguably, the consent by an assault victim may be construed as such a factor.

196. "Adequate provocation' means conduct or circumstances sufficient to deprive a reasonable person of self-control." New ARIZ. REV. STAT. ANN. § 13-1101(4) (Supp. 1978).

197. *Compare id.* §§ 13-1203 *and* 1204 *with id.* § 13-1103. Some states have statutorily provided that adequate provocation can mitigate assault. *See* KY. REV. STAT. § 508.040 (1975); OHIO REV. CODE ANN. § 2903.12(a) (Anderson 1975).

198. New ARIZ. REV. STAT. ANN. § 13-1103(A)(2) (Supp. 1978).

199. *See* Howard, *Australian Letter—Provocation in Assault*, 1966 CRIM. L. REV. 435, 439.

200. The Arizona courts have apparently never addressed this issue.

201. *See, e.g.*, United States v. Ramirez, 460 F.2d 1322, 1323 (10th Cir. 1972); People v. Mayes, 262 Cal. App. 2d 195, 197, 68 Cal. Rptr. 476, 478-79 (1968); State v. Frommett, 159 N.W.2d 532, 535 (Iowa 1968).

202. *See* Tisdale v. State, 199 Ind. 1, 4, 154 N.E. 801, 802 (1927); State v. Frommet, 159 N.W.2d 532, 535 (Iowa 1968); Hodges v. Schuerman Bldg. & Realty Co., 174 S.W.2d 909, 913 (Mo. App. 1943).

203. People v. Mayes, 262 Cal. App. 2d 195, 197, 68 Cal. Rptr. 476, 478 (1968).

204. *See, e.g.*, People v. Martinez, 3 Cal. App. 3d 886, 889, 83 Cal. Rptr. 914, 915 (1970); People v. Mueller, 147 Cal. App. 2d 233, 239, 305 P.2d 178, 183 (1957); People v. Winn, 540 P.2d

fensive or provocative, do not justify an assault.[204] Only where the threats or words are accompanied by conduct which itself amounts to assault or in circumstances calling for self-defense will retaliatory assault be justified.[205]

Neither authority[206] nor the new code[207] supports the contention that adequate provocation constitutes a complete defense to a charge of assault. The code delineates circumstances justifying the use of force, but adequate provocation is not listed.[208] Nevertheless, although provocation does not constitute a legal excuse for assault, it has been considered a mitigating circumstance for the levying of both civil damages[209] and criminal penalties.[210] The analogy has already been drawn from the manslaughter statute,[211] where the effect of the mitigation is to reduce second degree murder to manslaughter.[212] With no statutory provision allowing for a similar reduction of assault, adequate provocation by the victim can most likely be considered a mitigating circumstance only for the purpose of sentencing.[213]

CONCLUSION

Only a few of the potential issues that might arise from the Arizona legislature's treatment of preparatory, homicide, and assault offenses in the new criminal code have been discussed in this Note. Whether these issues will reach the courts and how they will be resolved remains to be seen. Whatever the outcome, only a few words are necessary to place the issues discussed in this Note, or any others that might arise under the new code, in a larger perspective. "Criminal justice is inextricably interwoven with, and largely derivative from, a

1114, 1117 (Colo. Ct. App. 1975); State v. Bogie, 125 Vt. 414, 417, 217 A.2d 51, 55 (1966).

205. *See, e.g.*, People v. Mayes, 262 Cal. App. 2d 195, 197, 68 Cal. Rptr. 476, 478 (1968) (self-defense is the only legal justification of battery); People v. Mueller, 147 Cal. App. 2d 233, 239, 305 P.2d 178, 183 (1957) (the words must be accompanied by a threat of bodily harm, assault upon person, or trespass upon property); People v. Winn, 540 P.2d 1114, 1117 (Colo. Ct. App. 1975) (jury instruction that provocation be "with intent to cause physical injury or death" upheld); Smith v. State, 848 P.2d 1313, 1314 (Okla. Crim. App. 1971) (the threat must be coupled with an overt act evincing an intent to execute the threat).

206. *See* text & notes 201-05 *supra*.

207. *See* new ARIZ. REV. STAT. ANN. §§ 13-403, -404, -1203, -1204 (Supp. 1978).

208. *See id.* §§ 13-403 to 411.

209. *See* Morneau v. American Oil Co., 272 So. 2d 313, 315 (La. 1973); Hodges v. Schuerman Bldg. & Realty Co., 174 S.W.2d 909, 913 (Mo. App. 1943).

210. Hodges v. Schuerman Bldg. & Realty Co., 174 S.W.2d 909, 913 (Mo. App. 1943); State v. Kaiser, 78 Mo. App. 575, 577 (1899); Moore, v. State, 142 Tex Crim. 99, 101, 151 S.W.2d 595, 597 (1941).

211. *See* text & notes 98-99 *supra*.

212. *See* new ARIZ. REV. STAT. ANN. § 13-1103(A)(4) (Supp. 1978).

213. *See id.* § 13-702(E)(5). Although not specifically enumerated as a mitigating circumstance for sentencing, adequate provocation seems to be an appropriate factor to be considered in serving the "ends of justice." *Id.*

broader social justice. The construction of a just system of criminal justice in an unjust society is a contradiction in terms."[214] Thus, more important than the discussion of possible legal issues is a consideration of the social framework in which they arise.

214. *Struggle for Justice*, compiled by American Friends Service Committee, *as quoted in* 12 CRIM. L. BULL. 778, 778 (1976).