ARIZONA APPELLATE DECISIONS 1977-78: Part I

For the eleventh consecutive year, the *Arizona Law Review* presents the "Arizona Note" issue, a review of recent Arizona appellate decisions and a Ninth Circuit case. This issue represents a change in form, however, since the casenotes will be divided between this issue and the next issue of the *Review*. The purpose of the "Arizona Note" issue is twofold: to develop the research, writing, and analytical skills of the first year candidates, and to provide the legal community with in-depth analyses of selected recent cases. The casenotes represent a joint effort on the part of the candidates and the editorial board, with candidates engaging in rigorous research and writing and the editors working closely with the candidates at every stage of the process. The result, we trust, is a quality overview of recent developments of Arizona law.

CONTENTS

I. CIVIL PROCEDURE

A. INTERFERENCE WITH PEREMPTORY CHALLENGE IS REVERSIBLE ERROR

The peremptory challenge is a right granted only by statute.[1] Nonetheless, it is a substantial right as opposed to a procedural one,[2] its purpose being to secure a fair and impartial jury.[3] In Arizona, each side in a civil trial is allowed four peremptory challenges.[4] The trial court has the discretion to allow more, but each side must have an equal number.[5] A peremptory challenge, unlike the challenge for cause,[6] can be exercised without showing any justification for dismissing the prospective juror.[7]

The peremptory challenge is a right of such magnitude[8] that its impairment means the jury is unlawfully constituted.[9] In *Wasko v. Frankel*,[10] a negligence case, the issue of impairment of the peremptory challenge arose during voir dire.

Mary Wasko and her husband brought suit against Mark Frankel, M.D., for negligence in performing disc surgery upon Mrs. Wasko.[11] During the voir dire, a potential juror expressed definite opinions on malpractice problems and asserted that if "a person undergoes that type of thing [disc surgery] and ends up being able to be on their feet, it seems kind of hard to be suing someone for malpractice."[12] The juror did not answer affirmatively the question of whether he could disregard his opinions and be fair, and he "continually indicated it would be difficult" to do so.[13] When the trial court refused to dismiss the juror for cause, plaintiffs' counsel peremptorily challenged him, thus being

1. ARIZ. R. CIV. P. 47(e). There is no constitutional provision providing for peremptory challenges, but there may be a "natural" law backing. See text & note 52 *infra*.
2. State v. Thompson, 68 Ariz. 386, 390, 206 P.2d 1037, 1039 (1949). For a discussion of the significance of procedural versus substantive rights, see note 15 *infra*.
3. Wilson v. Wiggins, 54 Ariz. 240, 241-42, 94 P.2d 870, 871 (1939).
4. ARIZ. R. CIV. P. 47(e).
5. *Id.*
6. ARIZ. R. CIV. P. 47(c) lists five grounds for challenging jurors for cause: Lack of qualification, relationship to one of the parties, involvement in previous trial with the same parties, the formation of an opinion on the merits, and bias.
7. State v. Thompson, 68 Ariz. 386, 390, 206 P.2d 1037, 1039 (1949).
8. In Swain v. Alabama, 380 U.S. 202 (1965), the Court stated that the peremptory challenge is "one of the most important rights secured to the accused." *Id.* at 219.
9. Moran v. Jones, 75 Ariz. 175, 181, 253 P.2d 891, 895 (1953).
10. 116 Ariz. 288, 569 P.2d 230 (1977).
11. *Id.* at 289, 569 P.2d at 231.
12. *Id.* at 290, 569 P.2d at 232.
13. *Id.*

forced to use one of the four peremptories available.[14]

On appeal, the Arizona Supreme Court held that the trial court abused its discretion in not granting the challenge for cause and, by forcing the plaintiff to use a peremptory challenge to strike a juror who otherwise should have been stricken for cause, denied the litigant a substantial right.[15]

Initially, this casenote will briefly look at the history of the peremptory challenge. Next, two contrasting theories relating to its forced use will be examined. A summary of the Arizona case law preceding *Wasko* will then be presented. Finally, the *Wasko* decision and its potential impact upon the determination of prejudicial error and trial court discretion in relation to peremptory challenges will be discussed.

History and Theory of the Peremptory Challenge

The peremptory challenge first appeared in jury trials in thirteenth century England.[16] Although the right of the Crown to an unlimited number of peremptory challenges was repealed by statute in 1305,[17] the right to use peremptory challenges was later granted for use in felony trials to both the defendant and the prosecution.[18] The first Congress of the United States made mention of the right of challenge when adopting the Bill of Rights,[19] and by the late 1800's almost all of the states had statutes governing the challenge of jurors.[20]

14. *Id.*

15. *Id.* In Arizona, the peremptory challenge was first called a substantial right in State v. Thompson, 68 Ariz. 386, 390, 206 P.2d 1037, 1039 (1949). The *Thompson* court used the word substantial, as opposed to procedural, to emphasize the importance of the peremptory challenge and to circumvent art. 6, § 22 (currently art. 6, § 27, amended 1960) of the Arizona Constitution which precludes reversal of trial court decisions for mere procedural error when substantial justice had been done. See text & notes 46-52 *infra.*

16. A. GINGER, JURY SELECTION IN CRIMINAL TRIALS, NEW TECHNIQUES AND CONCEPTS § 12.1, at 510 (Biennial Supp. 1977).

17. Before 1305 the accused was allowed 35 peremptory challenges and the Crown had an unlimited number. Swain v. Alabama, 380 U.S. 202, 212 (1964). This unlimited number, however, was not a common law right but a perogative of the King. A. GINGER, *supra* note 16, at 510. Because of the delays in choosing a jury, this unlimited right of peremptory challenge was repealed in the fourteenth century. In requiring a reason for a challenge the statute provided in part: "[If] they that sue for the King will challenge any . . . Jurors, they shall assign . . . a Cause certain." An Ordinance for Inquests, 1305, 33 Edw. I, c. 4. *See* Swain v. Alabama, 380 U.S. 202, 213 (1964).

18. ABA APPROVED DRAFT ON STANDARDS RELATING TO TRIAL BY JURY § 2.6, at 70-71 (1968) [hereinafter ABA APPROVED DRAFT]. In England today, although it is seldom used, the peremptory challenge is still considered an important right. Swain v. Alabama, 380 U.S. 202, 213 n.12 (1964).

19. A. GINGER, *supra* note 16, at 510. One of the proposed Bill of Rights amendments read, in part:

> The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger) shall be by an impartial jury of the vicinage, with the requisite of unanimity for conviction, the right of challenge and other accustomed requisites . . . .

Id. (quoting Journal of the First Session of the Senate of the United States (Aug. 25, 1789)).

20. ABA APPROVED DRAFT, *supra* note 18, at 71. See Swain v. Alabama, 380 U.S. 202, 214-

With the rising importance of the peremptory challenge,[21] problems began to emerge when its exercise was impaired. As a result, two contrasting theories concerning the forced use of a peremptory challenge developed.

The Two Theories: Appearance of Justice vs. Actual Prejudice

The purpose of the peremptory challenge is to provide a method of securing a jury that is fair and impartial in fact and in the minds of both parties.[22] The United States Supreme Court in *Swain v. Alabama*[23] stated that this appearance of justice is as important as the factual impartiality that peremptory challenges provide.[24]

Most jurisdictions, however, do not take the position that the appearance of justice is important enough to justify granting a new trial when a challenge for cause is incorrectly denied and the appellant is forced to peremptorily challenge the questionable juror.[25] This position is supported by the argument that there is no prejudicial error under such circumstances because the jury was, in fact, fair and impartial.[26] However, some courts in these jurisdictions implicitly apply the appearance argument in some cases. For example, some courts have held that if the appellant was forced, over his objection, to take a juror he did not want because he had no more peremptory challenges—having used his last one on a juror whom the court should have stricken for cause—there may be reversible error.[27] In these cases

17 (1964), for a summary of the development of the peremptory challenge in both the federal and state systems in the United States.

21. *See, e.g.*, Pointer v. United States, 151 U.S. 396, 408 (1894) (peremptory challenge an important right of the accused); Hayes v. Missouri, 120 U.S. 68, 70 (1867) (peremptory challenge an important right of the prosecution).

22. Swain v. Alabama, 380 U.S. 202, 212 (1964). There has been a great deal of discussion on the use of peremptory challenge by the prosecution, and whether the prosecution is using the peremptory challenge to crumble the foundation of the "fair and impartial jury" and the "jury of one's peers" by striking minorities who may be sympathetic to the defendant. *See generally* Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 ST. LOUIS U.L.J. 662 (1974); Comment, *The Prosecutor's Exercise of the Peremptory Challenge to Exclude Non-White Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause*, 46 U. CIN. L. REV. 554 (1977); 41 ALBANY L. REV. 623 (1977). The California Supreme Court recently held that peremptory challenges may not be used to exclude minorities. People v. Wheeler, 22 Cal. 3d 258, 283, 583 P.2d 748, 766, 148 Cal. Rptr. 890, 907 (1978).

23. 380 U.S. 202 (1964).

24. The Court said: "In this way the peremptory satisfies the rule that 'to perform its high function in the best way justice must satisfy the appearance of justice.' " *Id.* at 219.

25. *See, e.g.*, Arkansas State Highway Comm'n v. Dalrymple, 252 Ark. 771, 771-72, 480 S.W.2d 955, 956 (1972); Hicks v. State, 138 So. 2d 101, 103 (Fla. Ct. App. 1962); Grasham v. Southern Ry., 111 Ga. App. 158, 160, 141 S.E.2d 189, 191 (1965); Wilson v. Ex-Cell-O Corp., 12 Mich. App. 637, 641-42, 163 N.W.2d 492, 495 (1968) (dicta); Harding v. Harding, 185 So. 2d 452, 456 (Miss. 1966); Los Angeles & S.L.R. v. Umbaugh, 61 Nev. 214, 231, 123 P.2d 224, 232 (1942); Cox v. Sarkeys, 304 P.2d 979, 984-85 (Okla. 1956).

26. *See, e.g.*, Williams v. Hendrickson, 189 Kan. 673, 676, 371 P.2d 188, 191 (1962) (dicta); Wilson v. Ex-Cell-O Corp., 12 Mich. App. 637, 641-42, 163 N.W.2d 492, 495 (1968) (dicta).

27. *See* Arkansas State Highway Comm'n v. Dalrymple, 252 Ark. 771, 772, 480 S.W.2d 955,

the appearance of justice is only important if the appellant objected at the trial level. If the appellant had no objection at that time, the jury must have appeared fair and impartial to him.

Other jurisdictions, however, adhere to the view expressed in *Swain* and followed in *Wasko* that the peremptory challenge is a substantial right[28] and provide that forcing a party to use his peremptory challenges to strike jurors who should have been stricken for cause is reversible error.[29] According to this view, the fact that the challenged juror did not ultimately sit on the jury and prejudice the appellant is of no consequence—the real issue is whether the appellant had the unrestricted use of his full complement of peremptory challenges.[30]

Although the *Swain* view has inherently appealing aspects, it should not require automatic reversal in every case. Parties do not always use their full array of peremptory challenges and thus are not prejudiced if forced to use one in lieu of a challenge for cause.[31] In addition, even though a party has been "forced" to use a peremptory challenge, he may be satisfied with the jury after he has used his remaining peremptory challenges. Unless he raises an objection at the trial level, a party should not be able to later complain of the lost use of a peremptory challenge just because he lost the case. The cases that require an objection to be raised at the trial level along with a specific request for an additional peremptory seem to follow the more logical point of view.[32] If no objection is made at the trial, factual impartiality and the appearance of justice have been obtained and no appeal should be granted.

If an objection to a denied challenge for cause is raised, along with a request for another peremptory challenge, the appellate court can determine whether the challenge for cause was incorrectly denied.[33] If the court finds the appellant was forced to "waste" a peremptory challenge and desired an additional one, there should be a reversal.

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956 (1972); Los Angeles & S.L.R. Co. v. Umbaugh, 61 Nev. 214, 231, 123 P.2d 224, 232 (1942); Cox v. Sarkeys, 304 P.2d 979, 984-85 (Okla. 1956). Older Arizona case law used to follow this view. *See* Territory v. Chartz, 4 Ariz. 4, 7, 32 P. 166, 167 (1893). For a full discussion of this case, see text & notes 38-40 *infra*.

28. See text & notes 2, 22-24 *supra*.

29. United States v. Allsup, 566 F.2d 68, 71 (9th Cir. 1977); United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976); Liebman v. Curtis, 138 Cal. App. 2d 222, 226-27, 291 P.2d 542, 544-45 (1956); State v. Holliman, 529 S.W.2d 932, 941 (Mo. Ct. App. 1975); Preston v. Ohio Oil Co., 121 S.W.2d 1039, 1043 (Tex. Civ. App. 1938); Crawford v. Manning, 542 P.2d 1091, 1093 (Utah 1975). *Wasko* relied heavily on *Crawford*. *See* 116 Ariz. at 290, 569 P.2d at 232.

30. *See* United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976); State v. Holliman, 529 S.W.2d 932, 942 (Mo. Ct. App. 1975).

31. *See* Hicks v. State, 138 So. 2d 101, 103 (Fla. Ct. App. 1962) (incorrect denial of challenge for cause was not prejudicial because the defendant did not exhaust his full quota of peremptory challenges).

32. See cases cited note 27 *supra*.

33. This may raise problems and interfere with judicial discretion. See text & notes 72-76 *infra*.

Unfortunately *Wasko* and *Swain*, and the cases following their point of view,[34] do not require the appellant to have previously requested an additional peremptory challenge at the trial and will serve as support for reversal of a decision where the peremptory challenge was interfered with.[35] In fact, some jurisdictions that formerly required an objection at trial level now do not.[36] This includes Arizona.[37]

Forced Use of the Peremptory Challenge in Arizona

Although the *Wasko* court made no reference to *Territory v. Chartz*,[38] that case decided the issue of forced use of a peremptory challenge over eighty years ago. The Arizona Territorial Supreme Court followed the then prevailing view[39] and held that when the appellant peremptorily challenged a juror who should have been stricken for cause, there was no basis for reversal unless the record disclosed that the appellant exhausted all peremptory challenges and was afterwards forced, over objection, to take an unacceptable juror.[40] Thirty years later in *Encinas v. State*,[41] the Arizona Supreme Court, relying heavily on California case law,[42] held that "[e]ven though the court may have erred in disallowing the . . . challenges . . . such disallowances 'did not amount to prejudicial error, and would not warrant a reversal.' "[43]

In 1939 the court shifted from this position and held that it *was*

34. See cases cited note 29 *supra*.

35. Swain v. Alabama, 380 U.S. 202, 219 (1965) (denial or impairment of the peremptory challenge is reversible error without a showing of prejudice); *see* Wasko v. Frankel, 116 Ariz. 288, 290, 569 P.2d 230, 232 (1977) (rejecting a claim of no prejudice).

36. The United States Supreme Court in Stroud v. United States, 251 U.S. 15 (1919), *petition for rehearing denied*, 251 U.S. 380 (1920) (jury point discussed further) stated that the complaining party had to express dissatisfaction with being forced to use a peremptory challenge and object or request additional challenges. *Id.* at 380-82. But later in Swain v. Alabama, 380 U.S. 202 (1965), the Court stated "[t]he denial or impairment of the right is reversible error *without* a showing of prejudice." *Id.* at 219 (emphasis added).

The Utah Supreme Court in Van Wagoner v. Union Pac. Ry., 186 P.2d 293 (Utah 1947), held that the court would not find prejudice when the trial court made an error in ruling on a challenge for cause, and a peremptory challenge was used, if the parties denied the challenge for cause did not inform the trial judge that they desired an additional peremptory challenge. *Id.* at 296-97. But in Crawford v. Manning, 542 P.2d 1091 (Utah 1975), the court stated that a party "should not be compelled to waste one [peremptory challenge] in order to accomplish that which the trial judge should have done." No mention was made of asking the trial judge for an additional peremptory. *Id.* at 1093.

37. *Compare* Territory v. Chartz, 4 Ariz. 4, 7, 32 P. 166, 167 (1893) *with* Wasko v. Frankel, 116 Ariz. 288, 290, 569 P.2d 230, 232 (1977).

38. 4 Ariz. 4, 32 P. 166 (1893).

39. *See, e.g.*, Territory v. Shankland, 3 Ariz. 403, 411, 77 P. 492, 494 (1892); People v. McGingill, 41 Cal. 429, 430 (1871); State v. Raymond, 11 Nev. 98, 108 (1876); Johnson v. State, 27 Tex. 758, 764-65 (1865).

40. 4 Ariz. at 7, 32 P. at 167.

41. 26 Ariz. 24, 221 P. 232 (1923).

42. The California cases cited were People v. Kramphold, 172 Cal. 512, 157 P. 599 (1916); People v. Schafer, 161 Cal. 573, 119 P. 920 (1911); and People v. Johnson, 57 Cal. App. 391, 207 P. 281 (1922).

43. 26 Ariz. at 29, 221 P. at 233.

error to force a party to use a peremptory challenge but the "substantial justice" provision of the Arizona Constitution[44] prevented reversal.[45] Ten years later the court in the landmark decision of *State v. Thompson*[46] overruled previous case law[47] relating to this notion of "substantial justice" and stated there had been a failure to "differentiate between a fair and impartial jury on the one hand and the deprivation of a substantial statutory right of the defendant on the other."[48] The *Thompson* court held that the "substantial justice" provision of the Arizona Constitution,[49] used in previous cases to prevent reversal when a party was wrongly forced to use a peremptory challenge, is applicable only to a procedural right and the peremptory challenge is more than a mere procedural right.[50] Analogizing the substantial right of the defendant to have peremptory challenges to the substantial right of the defendant to have a lawfully constituted, fair and impartial jury,[51] the court gave the statutory right to peremptory challenges a natural law backing.[52]

Thompson had a wide-ranging effect in determining the importance of peremptory challenges and was cited favorably by numerous courts,[53] including the United States Supreme Court.[54] Although the fact situation was different in *Wasko*,[55] it is apparent that *Thompson* was a strong influence on the *Wasko* court.[56]

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44. ARIZ. CONST. art. 6, § 22 (currently art. 6, § 27, amended 1960) reads in part: "No cause shall be reversed for technical error in pleading or proceedings when upon the whole case it shall appear that substantial justice has been done."

45. Connor v. State, 54 Ariz. 68, 72, 75, 92 P.2d 524, 526, 527 (1939).

46. 68 Ariz. 386, 206 P.2d 1037 (1949).

47. Specifically, the *Thompson* Court overruled Braugh v. Arizona, 55 Ariz. 276, 279-83, 101 P.2d 196, 197-98 (1940), which had relied completely on Connor v. State, 54 Ariz. 68, 92 P.2d 524 (1939). State v. Thompson, 68 Ariz. 386, 391, 206 P.2d 1037, 1040 (1937).

48. 68 Ariz. at 391, 206 P.2d at 1040.

49. See text & note 44 *supra*.

50. 68 Ariz. at 391, 206 P.2d at 1040.

51. The court stated that the right to a lawfully constituted jury was "a most substantial right, the birthright of every free man." *Id.* at 389, 206 P.2d at 1039.

52. St. Thomas Aquinas used the term "natural law" to describe laws that were transcendent to man-made laws—a divine sanction. P. KAUPER, THE HIGHER LAW AND THE RIGHTS OF MAN IN A REVOLUTIONARY SOCIETY 2 (1974). This higher natural law gave rise to natural rights, rights that were not created by law but were recognized and sanctioned by it. They were antecedent to positive law, and the law's function was to preserve and protect them. *Id.* at 3. Thus, by calling a jury trial "the birthright of every free man," and then equating this right with the right to peremptory challenges, *Thompson* is giving a divine sanction to peremptory challenges.

53. *See, e.g.*, Weems v. United States, 361 F. Supp. 922, 927 (D. Md. 1973); People v. Diaz, 105 Cal. App. 2d 690, 699, 234 P.2d 300, 306 (1951); Washington v. Salinas, 87 Wash. 2d 112, 115, 549 P.2d 712, 714 (1976).

54. Swain v. Alabama, 380 U.S. 202 (1965), cited *Thompson* for the proposition that "[t]he essential nature of the peremptory challenge is that it is exercised without a reason stated, without inquiry and without being subject to the court's control." *Id.* at 220.

55. In *Thompson*, three jurors who were peremptorily challenged actually served on the jury because of a mistake by the bailiff, 68 Ariz. at 388, 206 P.2d at 1038, whereas, in *Wasko*, the plaintiff was merely deprived of the unrestricted use of one peremptory challenge when the trial court incorrectly denied a challenge for cause, 116 Ariz. at 289, 569 P.2d at 232.

56. The holding in *Wasko* was entirely based on *Thompson's* proposition that the peremptory challenge is a substantial right which cannot be deprived. 116 Ariz. at 290, 569 P.2d at 232.

Wasko and Its Impact

In *Wasko* the court agreed with the appellants' contention that "it is prejudicial error to compel a party to waste one of its peremptory challenges to accomplish that which the trial judge should have done."[57] However, in its holding, the court did not actually mention the word prejudicial,[58] never specifically answering the question of whether forcing the appellant to use a peremptory challenge has to be proved prejudicial or is prejudicial as a matter of law. If it is the former, then the test is the one generally applied to questions of trial court error, whether there is a reasonable probability that a different verdict might have been rendered had the error not been committed.[59] This test reflects the notion of "substantial justice" regarding peremptory challenges that was rejected in *Thompson*[60] and is probably not the test the *Wasko* court intended to adopt.[61] Although some Arizona courts still use the words "prejudicial error" in connection with questions involving peremptory challenges,[62] what *Wasko* and the other courts probably mean by those words is that interference with peremptory challenges is prejudicial as a matter of law. The Arizona Supreme Court used these words over twenty-five years ago in the case of *Moran v. Jones*,[63] holding that since *State v. Thompson* decided that the peremptory challenge was a substantial right,[64] interference with the peremptory challenge "was prejudicial as a matter of law, the plaintiff having been denied a substantial right."[65] Thus, interference with a substantial right, such as the right to peremptory challenges, is "prejudicial error without a showing of actual prejudice."[66]

Since it is now clear from the holding in *Wasko* that incorrectly denying a challenge for cause and forcing a party to use a peremptory challenge is reversible error whether the challenged juror sits on the jury or not, there will be greater pressure on trial court judges to cor-

57. *Id.*

58. The court merely said that "forcing a party to use his peremptory challenges to strike jurors who should have been stricken for cause denies the litigant a substantial right." *Id.*

59. *See* State v. Brady, 105 Ariz. 190, 196, 461 P.2d 488, 494 (1969), and cases cited therein.

60. See text & notes 46-52 *supra.*

61. One of the more recent decisions concerning peremptory challenges rejected the use of the word prejudice. Penaskovic v. F.W. Woolworth Co., 20 Ariz. App. 403, 405, 513 P.2d 692, 694 (1973) (where defendants were allowed more peremptory challenges than plaintiff, plaintiff was deprived of a substantial right and need not show prejudice).

62. *See* State v. Lopez, 105 Ariz. 84, 85, 459 P.2d 517, 518 (1969) (it was "prejudical error" to allow the defendant only six peremptory challenges when he was statutorily entitled to ten); Moran v. Jones, 75 Ariz. 175, 181, 253 P.2d 891, 895 (1953) (where co-defendants were allowed four peremptory challenges each and the plaintiff was only allowed four, "plaintiff, to his prejudice, was denied a substantial right").

63. 75 Ariz. 175, 181, 253 P.2d 891, 894 (1953).

64. See text & notes 2, 46-52 *supra.*

65. 75 Ariz. at 181, 253 P.2d at 894.

66. United States v. Allsup, 566 F.2d 68, 71 (9th Cir. 1977). *See also* Swain v. Alabama, 380 U.S. 202, 219 (1965).

rectly decide issues of challenge for cause because their decisions will be more strictly scrutinized by appellate courts.[67] This stricter scrutiny may cause appellate courts to invade areas of judicial discretion normally left to trial courts.

Granting a challenge for cause has always been in the sound discretion of the trial court,[68] and its decision has not been disturbed in the absence of abuse.[69] Prior to *State v. Thompson*,[70] the trial court had this broad discretion in deciding whether to grant a challenge for cause. Unless the prospective juror in question later sat on the jury at the trial, the defendant was not prejudiced and the appellate court would not have to question the trial court's decision.[71] Now, however, under *Wasko*, the trial court's decision on the challenge for cause is much more important. If the trial court was "wrong," and the appellant was forced to use a peremptory challenge, the appellant's substantial right of peremptory challenge was interfered with and the appellate court must reverse. The problem is in deciding whether the trial court was "wrong."

Generally, in deciding whether potential jurors are qualified or not, the trial judge looks at the evidence[72] and applies the standards set out for jury qualification.[73] These standards are both subjective and objective.[74] Since the appellate court cannot observe the subjective factors, the trial court is in a much better position to decide on a potential juror, especially where the subjective factors were the determining element.[75] Because of the importance given to the peremptory challenge by *Wasko*, appellate courts will necessarily have to more closely scrutinize the juror unsuccessfully challenged for cause. This will narrow the

67. See discussion text & notes 72-76 *infra*.

68. Wasko v. Frankel, 116 Ariz. 288, 289, 569 P.2d 230, 231 (1977); Riley v. State, 50 Ariz. 442, 448, 73 P.2d 96, 99 (1937).

69. Wasko v. Frankel, 116 Ariz. 288, 289, 569 P.2d 230, 231 (1977); J & B Motors, Inc. v. Margolis, 75 Ariz. 392, 395, 257 P.2d 588, 590 (1953).

70. 68 Ariz. 386, 206 P.2d 1037 (1949).

71. See text & notes 38-43 *supra*.

72. State v. Moraga, 98 Ariz. 195, 200, 403 P.2d 289, 293 (1965).

73. State v. Narten, 99 Ariz. 116, 122, 407 P.2d 81, 85 (1965).

74. An example of objective standards is illustrated by the statutory grounds listed for challenging a juror for cause in ARIZ. R. CIV. P. 47(c). See note 6 *supra*. An example of a subjective standard is determining "whether a juror's opinion is fixed and will influence his decision. The determination depends, in large part, upon an observation of the prospective juror's demeanor and the tenor of his answers." State v. Narten, 99 Ariz. 116, 122, 407 P.2d 81, 85 (1965).

75. The Arizona Supreme Court long ago attempted to set forth this idea in Leigh v. Territory, 10 Ariz. 129, 85 P. 948 (1906), when it said:

> The question is, can the juror act fairly and impartially, irrespective of the opinion that he holds, or is it such an opinion, by reason of its strength on the grounds upon which it is based, as has produced in the juror a state of mind prejudiced to the substantial rights of the party. This is a question which must be left largely to the wise discretion of the trial court; and the determination of the trial court in that regard will not be disturbed on appeal, unless it appears to be clearly erroneous.

Id. at 133, 85 P. at 950.

broad discretion formerly given to the trial courts. Hopefully, however, Arizona appellate courts will not tread on subjective areas better left to trial court decisionmaking.[76]

Conclusion

The peremptory challenge, once a mere procedural right in Arizona, has been steadily gaining importance over the last seventy years to the point where it is now regarded as a substantive right. Interference with this right by denying a valid challenge for cause and forcing a party to use a peremptory challenge now constitutes reversible error. Rigid application of the rule may result in frivolous appeals if a party is denied a challenge for cause during voir dire and then loses the case on the merits. The former Arizona rule, in which a request had to be made for an additional peremptory challenge, seems the better reasoned point of view and would eliminate such frivolous appeals. However, even that may degenerate into a mere formality by parties asking for an additional peremptory at the trial level any time a challenge for cause is denied. Although peremptory challenges do not normally require any reason to be exercised, this problem of frivolous appeals could partially be solved by not only having the party request an additional peremptory challenge, but by having him state why he needs it. Another problem is in the appellate courts' attempt to determine if the trial judge abused his discretion in denying a challenge for cause. These problems must be weighed against the possibility that *Wasko* will result in fairer trials. Even if it does not, the words of the United States Supreme Court must be given consideration: "[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.' "[77]

76. In Utah, the jurisdiction from which *Wasko* borrowed its support, 116 Ariz. at 290, 569 P.2d at 232, the problem may already be arising. In Utah v. Brooks, 563 P.2d 799 (Utah 1977), two jurors who were friends of prospective witnesses said they could set aside those relationships and decide the case without prejudice. The court held that a "just inference" could be drawn that the jurors could not be impartial. *Id.* at 802. But Judge Crockett in dissent stated:

> The rule is so elementary as to be universally recognized: that it is the prerogative of the trial judge to examine and pass on the qualifications of jurors; and that this includes their credibility in answering questions as to their qualifications . . . . [I]t seems to me that it is a diametric departure from the rule above stated for this court to now decide that those jurors swore falsely and that the trial court was stupid or foolish to believe them . . . . I prefer to follow what I regard as the correct presumptions to the contrary: that the jurors told the truth; that the trial court believed them and that the jurors were thus properly qualified.

Id. at 806. *But see* United States v. Sutton, 446 F.2d 916 (9th Cir. 1971). In *Sutton*, a juror stated that if the defendant was connected with a rock festival she might be prejudiced, but subsequently she stated she could be fair. The court stated: "[The] trial judge has great discretion in determining competency of jurors . . . . In view of the statements of [the juror] that she could be fair, we conclude that the trial court judge did not abuse its discretion in failing to excuse this juror." *Id.* at 923 (citations omitted).

77. *In re* Murchison, 349 U.S. 133, 136 (1954) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)).

B. Recovery of Damages for Wrongful Injunction

Ordinarily, a plaintiff who wishes to apply for a temporary restraining order [TRO] must post a bond to cover the defendant's damages in case the TRO is wrongfully issued.[1] This requirement is embodied in Rule 65(c) of the Federal Rules of Civil Procedure,[2] and Rule 65(e) of the Arizona Rules of Civil Procedure.[3] The federal courts, as well as an overwhelming majority of state courts, hold that recovery of damages for wrongful injunction is limited to the amount of the bond unless malicious prosecution is shown.[4] The reasons behind limiting defendants' recovery of damages to the amount of the bond include an unwillingness to deter persons from applying to the courts to settle disputes,[5] and the notion that an error in granting an injunction is an error of the court.[6]

In *Smith v. Coronado Foothills Estates Homeowners Association*,[7] the Arizona Supreme Court departed from the majority rule. The court interpreted Rule 65(e) of the Arizona Rules of Civil Procedure to allow recovery of damages for wrongful injunction in an amount exceeding the bond posted to secure a temporary restraining order.[8] The court in *Smith* recognized that only five other jurisdictions allowed such recoveries,[9] but preferred this minority rule for its better reasoning in the context of the facts before the court.[10]

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1. 11 C. Wright & A. Miller, Federal Practice and Procedure § 2954, at 523 (1973).
2. Fed. R. Civ. P. 65(c).
3. Ariz. R. Civ. P. 65(e); *quoted* note 15 *infra*.
4. *See* Buddy Systems, Inc. v. Exer-Genie, Inc., 545 F.2d 1164, 1168 (9th Cir. 1976); First Citizen's Bank & Trust Co. v. Camp, 432 F.2d 481, 484 (4th Cir. 1970); Sanko S.S. Co., v. Newfoundland Ref. Co., 437 F. Supp. 947, 949 (S.D.N.Y. 1977); Jamaica Lodge 2188 v. Railway Express Agency, Inc., 200 F. Supp. 253, 254-55 (E.D.N.Y. 1961); Asevado v. Orr, 100 Cal. 293, 298, 34 P. 777, 782 (1893); United Mail Order Local 20 v. Montgomery Ward & Co., 9 Ill. 2d 101, 110, 137 N.E.2d 47, 52 (1956); Alder v. City of Florence, 194 Kan. 104, 110, 397 P.2d 375, 381 (1964); Strong v. Duff, 228 Ky. 615, 622-23, 15 S.W.2d 517, 521 (1929); Gratt v. Epstein, 238 Mich. 227, 230, 213 N.W. 190, 193 (1927); Weber v. Johnson Fuel Liners, Inc., 540 P.2d 535, 538 (Wyo. 1975). *See generally* 7 J. Moore & J. Lucas, Moore's Federal Practice, pt. 2, ¶ 65.10[1] (2d ed. 1978); Annot., 45 A.L.R. 1517 (1927).
5. Note, *Interlocutory Injunctions and the Injunction Bond*, 73 Harv. L. Rev. 333, 333-34 (1959).
6. United Motor Serv., Inc. v. Tropic Aire, Inc., 57 F.2d 479, 483 (8th Cir. 1932).
7. 117 Ariz. 171, 571 P.2d 668 (1977).
8. *Id.* at 172, 571 P.2d at 669.
9. *Id.* The cases cited by the court as support for the rule allowing recovery in excess of the bond are: Kohlsaat v. Crate, 114 Ill. 14, 32 N.E. 481 (1892); Howard D. Johnson Co. v. Parkside Dev. Corp., — Ind. App. —, 348 N.E.2d 656 (1976); Davis v. Poitevant & Favre Lumber Co., 15 La. App. 657, 132 So. 790 (1931); Johnson v. McMahan, 40 S.W.2d 920 (Tex. Civ. App. 1931); Miller Surfacing Co. v. Bridgers, 269 S.W. 838 (Tex. Civ. App. 1924); Houghton v. Grimes, 103 Vt. 54, 151 A. 642 (1930).
10. Smith v. Coronado Foothills Estates Homeowners Ass'n, 117 Ariz. 171, 173, 571 P.2d 668, 670 (1977). The court emphasized that the majority rule ignores the procedures usually involved in obtaining a temporary retraining order at the commencement of a lawsuit. Such procedures are usually ex parte and therefore give the TRO applicant the opportunity to limit his damages by a one-sided presentation of the facts. In the court's view, there would be no injustice in allowing a recovery against the party who asked for and obtained the wrongful issuance of the injunction. *Id.*

Smith involved a dispute between neighboring landowners over the propriety of building a two-story white stucco house on top of a prominent hill where the house would be seen by all the homeowners in the area.[11] The Coronado Foothills Homeowners Association alleged that Mrs. Smith violated deed restrictions in the construction of the house. The association filed a complaint seeking a permanent injunction and, on the same day, obtained a temporary restraining order prohibiting Mrs. Smith from further construction of her residence.[12] A nominal bond of ten dollars was set by the court. The temporary restraining order was later dissolved, and it was determined that a preliminary injunction would not issue.[13] Mrs. Smith then filed an answer and counterclaim to the complaint to recover damages for wrongful injunction.

The trial court, in accordance with the majority rule,[14] determined that Mrs. Smith's recovery should be limited to the ten dollars cash bond posted pursuant to rule 65(e).[15] The court of appeals affirmed,[16] but the Arizona Supreme Court reversed, stating that ten dollars was "patently insufficient to provide the security for 'payment of such costs and damages as may be incurred or suffered by any party who is found to be wrongfully enjoined or restrained.' "[17] The court held that in the "circumstances of this case, . . . the Association is liable for damages

11. Brief for Appellant at 11-12, Smith v. Coronado Foothills Estates Homeowners Ass'n, 117 Ariz. 171, 571 P.2d 668 (1977).

12. 117 Ariz. at 172, 571 P.2d at 669.

13. *Id.* "There are three stages in litigation where injunctive remedies are requested. First is the temporary restraining order issued ex parte at the commencement of the litigation." *Id.* Rule 65(d) of the Arizona Rules of Civil Procedure provides for automatic expiration of the TRO after ten days. ARIZ. R. CIV. P. 65(d). "Second is the preliminary injunction issued after an initial hearing usually as the result of an order to show cause, but before a final determination of the matter." 117 Ariz. at 172, 571 P.2d at 669; *see* ARIZ. R. CIV. P. 65(g); Note, *supra* note 5, at 334.

14. *See* Northwest Airlines, Inc. v. World Airways, Inc., 262 F. Supp. 316, 319 (D. Mass. 1966): "Under federal law a party enjoined can recover damages from an injunction solely upon and to the extent of any injunction bond unless he can prove malicious prosecution." *Id.; accord,* First Citizen's Bank & Trust Co. v. Camp, 432 F.2d 481, 484 (4th Cir. 1970); Greenwood County v. Duke Power Co., 107 F.2d 484, 487 (4th Cir. 1939); Jamaica Lodge 2188 v. Railway Express Agency, Inc., 200 F. Supp. 253, 254-55 (E.D.N.Y. 1961). *See* cases cited note 4 *supra.*

15. Rule 65(e) provides:

> Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to be wrongfully enjoined or restrained. No such security shall be required of the state or of an officer or agency thereof.

ARIZ. R. CIV. P. 65(e).

16. Smith v. Coronado Foothills Estates Homeowners Ass'n, 117 Ariz. 184, 186, 571 P.2d 681, 683 (Ct. App. 1977).

17. 117 Ariz. at 173, 571 P.2d at 670. The court emphasized that the injunctive remedy was too potentially damaging to be entrusted to an ex parte procedure. Nevertheless, since there are few substitutes for a TRO when a plaintiff stands to suffer immediate irreparable injury, the court recognized that at least in some circumstances ex parte issuance of a TRO should continue to be allowed. It remains unclear which circumstances are required to trigger liability beyond the amount posted for bond, although some of the language used by the court suggests that TROs will not issue unless the plaintiff assumes the entire risk of defendant's injury. *See* text & notes 81-85 *infra.*

incurred or suffered as the result of the wrongful temporary restraining order."[18]

This casenote will analyze the position taken by the Arizona Supreme Court on the issue of whether recovery of damages for wrongful issuance of a temporary restraining order should be limited to the amount of the bond. An examination will be made of the competing policies behind limiting the amount of damages to the bond or extending liability to damages actually suffered by the enjoined party. The safeguards surrounding the issuance of temporary restraining orders will be discussed to determine whether they are adequate in light of the criticism raised by *Smith*. The theoretical difficulties with liability beyond the amount of the bond will be discussed, and the probable interpretation and effect of the holding in *Smith* will be examined.

Competing Policies Behind the Majority and Minority Rules: The Proper Balance

The apparent purpose of the court's decision in *Smith* is to allow defendants wrongfully enjoined to recover their actual damages and to deter ex parte abuse of the injunctive remedy.[19] The rationale of the court's decision is that because the party who applies for a TRO has both initiated action that may be injurious to the defendant and independently controls judicial access to the information that influences the amount of the bond, that party should bear the consequences of a wrongful injunction.[20] Under this view, the purpose of the bond posted by the plaintiff is not to create or measure liability for damages, but to secure the payment of such damages up to the amount of the penalty of the bond.[21] The focus of the court was not upon the possibility of de-

18. 117 Ariz. at 173, 571 P.2d at 670.

19. *Id.* The court's holding in *Smith* will adequately protect defendants, but one of the primary effects of the decision may be the creation of a barrier to honest resort to the judicial process. *See* Note, *supra* note 5, at 333-34:

> While statutory indemnity irrespective of the plaintiff's motives would seem consistent with the British practice with respect to costs, . . . it is a departure from the general reluctance of the American courts to impose liability for the expenses of litigation on an unsuccessful litigant who has acted in good faith. Hesitancy to deter honest resort to the judicial process has with few exceptions prevailed over solicitude for a vindicated defendant who, although injured, is left without remedy unless he can show that the plaintiff acted maliciously and without probable cause.

Id. (citations omitted).

20. 117 Ariz. at 173, 571 P.2d at 670.

21. Kohlsaat v. Crate, 144 Ill. 14, 19, 32 N.E. 481, 482 (1892). The theoretical purpose of requiring a bond in connection with the issuance of a TRO is a fundamental difference between the minority and majority points of view. The majority rule rests on a contract analogy, whereby plaintiff's liability is created and measured by his commitment to pay. The minority rule emphasizes the tort analogy, whereby plaintiff is responsible for all the damage caused and the bond is merely a device to ensure the payment of at least part of that damage. *See* text & notes 68-75 *infra*. *See generally* Note, *Recovery of Damages on Injunction Bonds*, 32 COLUM. L. REV. 869, 871 (1932).

terring persons from applying to the courts for injunctive relief, but solely upon compensating the defendant for injuries caused by an improperly granted TRO obtained ex parte.[22]

Protection for the defendant is most critical in an ex parte TRO procedure, since the defendant is unable to present his case and opportunity for abuse is great. Rule 65 of the Arizona and Federal Rules of Civil Procedure, therefore, contains myriad safeguards protecting the defendant.[23] Federal courts have stated that Rule 65(b) of the Federal Rules should be scrupulously honored in order to insure that the rights of all concerned are protected.[24] If Rule 65(d) of the Arizona Rules,

22. Smith v. Coronado Foothills Estates Homeowners Ass'n, 117 Ariz. at 173, 571 P.2d at 670.

> The amount of the bond in such cases is usually little more than an estimate by the court based upon matters of opinion or ex parte statements, and, where it proves inadequate to cover the injured party's actual damages, we see no good reason why the party causing such damage should not be held responsible for it.

Id. (quoting Miller Surfacing Co. v. Bridgers, 269 S.W. 838, 840 (Tex. Civ. App. 1924)).

23. FED. R. CIV. P. 65(b), (c); ARIZ. R. CIV. P. 65(d), (e). The respective Arizona and Federal Rules are identical, and in relevant part provide:

> A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice or the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

ARIZ. R. CIV. P. 65(d). See note 15 *supra*; C. SMITH, ARIZONA CIVIL TRIAL MANUAL 138-39 (1977). *But see* Dobbs, *Should Security Be Required As A Pre-Condition to Provisional Injunctive Relief?*, 52 N. C. L. REV. 1091, 1165-72 (1974), for a proposed revision of Federal Rule 65(c) in order to more adequately protect the defendant from wrongfully issued temporary restraining orders.

24. "[A] district court should scrupulously observe the requirements of Rule 65 in the delicate business of granting temporary restraining orders." Austin v. Altman, 332 F.2d 273, 275 (2d Cir. 1964); *accord*, Leslie v. Penn Central R.R., 410 F.2d 750, 751 (6th Cir. 1969); Arvida Corp. v. Sugarman, 259 F.2d 428, 429 (2d Cir. 1958). The court in *Smith* did not fault the trial court for failing to observe the stringent safeguards of rule 65(d), but instead recognized that many courts will issue TROs without full compliance with that rule: "The majority view ignores the procedures usually involved in obtaining a temporary restraining order at the commencement of a lawsuit. The application is *usually* made ex parte and the court has no opportunity to hear from the person being enjoined or restrained." 117 Ariz. at 173, 571 P.2d at 670 (emphasis added).

which is identical to Rule 65(b) of the Federal Rules,[25] were scrupulously honored, there would be only a limited number of situations where the issuance of an ex parte TRO would be improper.[26] According to judicial interpretations of Federal Rule 65(b), in order to dispense with notice, an applicant must clearly show by affidavit or verified complaint that immediate and irreparable harm will result before the adverse party or his attorney can be heard in opposition.[27] However, where the defendants are available for notice and only slight delay would be caused, notice is required.[28] The Advisory Committee's Note to the 1966 Amendment to Federal Rule 65(b),[29] which Arizona has adopted,[30] indicates concern that the opposition be heard, if feasible, before the order is granted, and that informal notice is to be preferred to no notice at all. If informal notice cannot be given to the adverse party or his attorney, the applicant's attorney must certify to the court in writing the efforts that have been made to give notice and the reasons supporting his claim that notice should not be required.[31]

Under both the Federal and Arizona Rules of Civil Procedure, a TRO may issue only for a limited duration and is subject to dissolution or modification on motion of the party restrained.[32] Rule 65(d) of the Arizona Rules provides that every TRO granted without notice shall expire by its terms within ten days, unless within that time the court extends the order for good cause shown, or unless the party against whom the order is directed consents that it may be extended for a longer period.[33] The rule also provides that a defendant may appear and move for the dissolution or modification of a TRO on two days' notice to the plaintiff or on such shorter notice as the court may pre-

25. *Compare* FED. R. CIV. P. 65(b) *with* ARIZ. R. CIV. P. 65(d).

26. In addition to the specific restrictions upon the issuance of a TRO contained in Federal Rule 65(b) and Arizona Rule 65(d), see note 23 *supra*, federal courts have identified several other factors that may be considered by a trial judge in determining whether to grant or deny a TRO. These include whether the plaintiff has a reasonable probability of prevailing on the merits, and whether the harm that might be suffered by the defendant if the order were issued exceeds the injury that would result to plaintiff if the application for the restraining order were denied. *See* Division 580 Amalgamated Transit Union v. Central N.Y. Regional Transp. Auth., 556 F.2d 659, 662 (2d Cir. 1977); Ortega v. Usery, 441 F. Supp. 100, 103 (D. Conn. 1977); Paschall v. Kansas City Star Co., 441 F. Supp. 349, 356-57 (D. Mo. 1977); 11 C. WRIGHT & A. MILLER, *supra* note 1, § 2951, at 507-09.

27. Bullock v. United States, 265 F.2d 683, 690 (6th Cir.), *cert. denied*, 360 U.S. 909 (1959). Where applicants fail to show relevant facts demonstrating that irreparable injury would be caused by the failure to grant a TRO, the order should not be granted. Arvida Corp. v. Sugarman, 259 F.2d 428, 429 (2d Cir. 1958).

28. Arvida Corp. v. Sugarman, 259 F.2d 428, 429 (2d Cir. 1958); FED. R. CIV. P. 65(b).

29. The Advisory Committee's Note to the 1966 Amendment is set out in the Appendix to the volumes on the Civil Rules and is reprinted at 39 F.R.D. 124, 125 (1966).

30. The State Bar Committee's Note to the 1966 Amendment is set out in the Appendix to ARIZ. R. CIV. P. 65(d).

31. FED. R. CIV. P. 65(b); ARIZ. R. CIV. P. 65(d).

32. *See* note 23 *supra*; 11 C. WRIGHT & A. MILLER, *supra* note 1, § 2952, at 517-19, 522-23.

33. ARIZ. R. CIV. P. 65(d).

scribe.[34] Thus, if the party against whom a TRO is granted feels that he should not be enjoined, or has any basis for requesting a modification of the order, such as to increase the amount of the bond,[35] he need not wait until the expiration of the full ten day period but may obtain a hearing with two days' notice to the adverse party.

The requirement of security for the issuance of a TRO is another provision of rule 65 designed to protect defendants from the effects of a wrongfully issued injunction.[36] In Arizona, if no bond is posted for a TRO the order is void.[37] Under Federal Rule 65(c), although a judge will usually fix security in an amount that covers the potential incidental and consequential costs the enjoined party might suffer during the period of the injunction,[38] the court may exercise its discretion in setting the amount of the bond.[39] In situations where the plaintiff is financially unable to post security in any sigificant amount, the courts have exercised their equitable discretion to set the amount of the bond at a level that is likely to be below the actual costs and damages that the enjoined party may suffer.[40] For example, in *Bass v. Richardson*,[41] the plaintiffs moved for a preliminary injunction to restrain cut-backs in benefits under New York's Medicaid program. In granting the motion, the court refused to require security from the applicants, declaring that indigents should not ordinarily be required to post bond under rule 65(c).[42] Similarly, where the requirement of security sufficient to cover

34. *Id.* In addition, the court is required to hear and determine the motion as expeditiously as the ends of justice require. *Id.*

35. *See* Puerto Rico v. Price Comm'n, 342 F. Supp. 1308, 1310 (D.P.R. 1972).

36. 11 C. WRIGHT & A. MILLER, *supra* note 1, § 2954, at 523. The purpose of the requirement is to "secure indemnification for the costs, usually not including attorney's fees, and pecuniary injury that may accrue during the period in which a wrongfully issued equitable order remains in effect." *Id.*

37. State v. Nettz, 114 Ariz. 296, 299, 560 P.2d 814, 817 (Ct. App. 1977). Federal courts have interpreted Federal Rule 65(c) as a mandatory requirement of security for the issuance of interlocutory injunctions. *See, e.g.*, Telex Corp. v. IBM, 464 F.2d 1025, 1025 (8th Cir. 1972), where a preliminary injunction was dissolved because, *inter alia*, the trial court failed to require the giving of security by the applicant. *See* Bohn Alum. & Brass Co. v. Barker, 20 Ill. App. 3d 20, 21, 312 N.E.2d 722, 723 (1974); Diamond v. City of Kingston, 32 App. Div. 2d 587, 587, 299 N.Y.S.2d 94, 94 (1969); Rosenweig v. Factor, 457 Pa. 492, 495, 327 A.2d 36, 38 (1974).

38. 11 C. WRIGHT & A. MILLER, *supra* note 1, § 2954, at 525. It is difficult for the trial judge, in some cases, to fix security at any given amount because of the imprecise measure of some of the elements of damage and the varying ability of defendants, if a hearing is held, to establish their contemplated injuries. *See id.* at 525-26.

39. Randolph v. Missouri-Kansas Texas R. Co., 68 F. Supp. 1007, 1013 (W.D. Mo. 1946): "Quite clearly an applicant for an injunctive order is required to give bond. But the amount of the bond is within the sound discretion of the court." *Id.*; *see* Continental Oil v. Frontier Ref. Co., 338 F.2d 780, 782 (10th Cir. 1964); Ferguson v. Tabab, 288 F.2d 665, 675 (2d Cir. 1961).

40. *See, e.g.*, Bass v. Richardson, 338 F. Supp. 478, 490-91 (S.D.N.Y. 1971); *In re* Giblin, 304 Minn. 510, 524-25, 232 N.W.2d 214, 233 (1975); Babuschkin v. Royal Standard Corp., 305 So. 2d 253, 254 (Fla. Ct. App. 1974). *See generally* Dobbs, *supra* note 23, at 1112-21, 1161-62.

41. 338 F. Supp. 478 (S.D.N.Y. 1971).

42. *Id.* at 490 (quoting Denny v. Health & Social Serv. Bd., 285 F. Supp. 526, 527 (W.D. Wisc. 1969)). The court in *Bass* also refused to require a bond on the ground that the balance of hardships favored the plaintiffs: they could suffer a more grievous injury if the temporary re-

the defendant's actual damages would stifle litigation that is in the public interest, courts have allowed the posting of a nominal bond.[43]

Thus, a crucial difference between the rule in *Smith* and the majority rule is the emphasis the latter puts on the need for judicial discretion in setting the amount of a bond given as security for a TRO. In *Smith*, the court narrowed the scope of judicial discretion by holding that in cases where the bond is patently insufficient to provide for payment of the defendant's damages, liability of the plaintiff may exceed the amount of the bond.[44] Under the majority rule, the defendant is protected by the provisions of rule 65, but ultimately the trial court has the discretion to balance the equities and determine the extent of plaintiff's liability.[45] Presumably, under the rule in *Smith*, the plaintiffs in *Bass v. Richardson*[46] would be liable beyond the amount posted for bond notwithstanding the decision of the trial court not to require one.

Under the majority rule, a final protection for the defendant from damages resulting from the wrongful issuance of a temporary restraining order stems from the common law rule that damages shall not be limited to the amount of the bond in cases of malicious prosecution.[47] Unlike the restrictions placed upon the discretion of the trial court by rule 65,[48] the rule allowing damages to exceed the bond in cases of malicious prosecution focuses on the intent of the applicant[49] and seeks to prevent use of the TRO for purposes other than preserving the status quo prior to a determination of the rights of the parties.[50]

straining order were erroneously denied than the defendant could suffer if the order were erroneously granted. *Id.* at 489. See note 26 *supra.*

43. 11 C. WRIGHT & A. MILLER, *supra* note 1, § 2954, at 530.

44. 117 Ariz. at 173, 571 P.2d at 670. See text at notes 17-18 *supra.*

45. *See* cases cited note 39 *supra.*

46. 338 F. Supp. 478 (S.D.N.Y. 1971).

47. In Northeast Airlines, Inc. v. World Airways, Inc., 262 F. Supp. 316 (D. Mass. 1966), the court noted: "Under federal law a party enjoined may recover damages from an injunction improvidently granted solely upon and to the extent of any injunction bond unless he can prove malicious prosecution." *Id.* at 319; *accord,* Adolph Coors Co. v. A & S Wholesalers, Inc., 561 F.2d 807, 813 (10th Cir. 1977); First Citizens Bank & Trust Co. v. Camp, 432 F.2d 481, 484 (4th Cir. 1970); *see* Annot., 70 A.L.R.3d 536, 543-46 (1976).

48. *See* note 23 *supra.*

49. Ackerman v. Kaufman, 41 Ariz. 110, 15 P.2d 966 (1932). The gist of a malicious prosecution action is that the prior action was brought not for the purpose of securing justice and not with a reasonable expectation of winning the lawsuit but solely to vex and harass the plaintiff. *Id.* at 115, 15 P.2d at 967-68.

50. A temporary restraining order is designed to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction. 11 C. WRIGHT & A. MILLER, *supra* note 1, § 2951, at 498.

> The ex parte temporary restraining order is indispensable to the commencement of an action when it is the sole method of preserving a state of affairs in which the court can provide effective final relief. . . . Immediate action is vital when imminent destruction of the disputed property, its removal beyond the confines of the state, or its sale to an innocent party is threatened.

Developments in the Law—Injunctions, 78 HARV. L. REV. 995, 1060 (1965); *see* Tanner Motor

Concededly, the elements of a malicious prosecution action are often difficult to prove,[51] but this fact accords with the historic disfavor with which courts have always viewed any claim that seeks to hold a person liable for resorting to their aid.[52] The gist of a cause of action for malicious prosecution lies in the necessary elements of malice and want of probable cause in connection with the wrongful issuance of an injunction.[53] Blameworthy conduct on the part of an applicant for an ex parte injunction has been considered so important to recovery that, in its absence, at least a few cases have denied relief on the bond.[54] In effect, liability of the plaintiff on a malicious prosecution theory beyond the amount of the bond protects a defendant from illegitimate mo-

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Livery, Ltd. v. Avis, Inc., 316 F.2d 804, 808 (9th Cir. 1963); Rendleman, *Toward Due Process in Injunction Procedure*, 1973 U. ILL. L.F. 221, 235.

51. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 119, at 841 (4th ed. 1971). *See* text at note 52 *infra*. In order to sustain a cause of action for malicious prosecution in Arizona, the plaintiff is required to show that civil or criminal proceedings were instituted by the defendant against him, that the suit terminated in his favor, that it was commenced without probable cause, and that it was motivated by malice. Joseph v. Markovitz, 27 Ariz. App. 122, 124, 551 P.2d 571, 573 (1976); *accord*, Meadows v. Grant, 15 Ariz. App. 104, 108, 486 P.2d 216, 220 (1971); Tate v. Connel, 3 Ariz. App. 534, 536, 416 P.2d 213, 215 (1966).

52. *See* W. PROSSER, J. WADE, & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 1089 (6th ed. 1976). *See also* Gore v. Condon, 87 Md. 368, 39 A. 1042 (1898): "Actions for malicious prosecution are not encouraged because the law recognizes the right of everyone to sue for that which he honestly believes to be his own, and the payment of costs incident to the failure to bring suit is ordinarily considered a sufficient penalty." *Id.* at 375, 39 A. at 1044. "It is frequently said that actions for malicious prosecutions have never been favored in law." Griswold v. Horne, 19 Ariz. 56, 59, 165 P. 318, 319 (1917). *See also* Tate v. Connel, 3 Ariz. App. 534, 416 P.2d 213 (1966).

> The latitude allowed to defendant in a malicious prosecution action to establish probable cause and good faith in bringing the prosecution is permitted because there is a public policy involved in the prompt punishment of those who offend against the laws of the state, and hence public policy favors protection for those who honestly and in good faith cause criminal prosecutions to be commenced.

Id. at 538, 416 P.2d at 217.

53. *See* Gogue v. MacDonald, 35 Cal. 2d 482, 484, 218 P.2d 542, 543 (1950); Konas v. Red Owl Stores, Inc., 158 Colo. 29, 30, 404 P.2d 546, 547 (1965); Stohr v. Donahue, 215 Kan. 528, 530, 547 P.2d 983, 985 (1974). In Arizona, malice is defined as a wrongful act done intentionally without just cause or excuse. Griswold v. Horne, 19 Ariz. 56, 69, 165 P. 318, 323 (1917). Also, the failure to establish the other party's lack of probable cause in bringing the original suit precludes such a prosecution. Carroll v. Kalar, 112 Ariz. 595, 596, 545 P.2d 411, 412 (1976).

54. *See* Page Commun. Eng'rs, Inc. v. Froelke, 475 F.2d 994, 996-97 (D.C. Cir. 1973). In *Page*, the district court issued a preliminary injunction and required Page to post a $100,000 bond to cover all damages suffered or sustained by reason of wrongfully and inequitably suing out the injunction. *Id.* at 995. The court noted:

> Although Rule 65(c) required a bond here, it does not follow that the District Court was found to award damages on the bond, without considering the equities of the case. The Rule did not make judgment on the bond automatic, upon a showing of damages. On the contrary, the court in considering the matter of damages was exercising its equity powers, and was bound to effect justice between the parties. . . . Thus, we hold that the court had discretion to refuse to award damages, in the interest of equity and justice. This conclusion is consistent with the provision of the Rule which gives the court the discretion to set bond in a nominal amount; clearly the rule does not contemplate that a defendant who is wrongfully enjoined *will always be made whole by recovery of damages.*

Id. at 997 (emphasis added). *Accord*, Greenwood County v. Duke Power Co., 107 F.2d 484, 489 (4th Cir. 1939), *cert. denied*, 309 U.S. 667 (1940); Wissmann v. Boucher, 150 Tex. 326, 332, 240 S.W.2d 278, 281 (1951). *See also* Note, *Discretion of the Court in Allowing Recovery on the Injunction Bond*, 30 TEX. L. REV. 254 (1951).

tives[55] of the party seeking a TRO without discouraging plaintiffs who bring claims in good faith.

As pointed out by the court in *Smith*:

> The injunction bond appears to be the result of the interaction of two major competing considerations. On the one hand is the traditional reluctance to penalize a plaintiff for resorting to the judicial process or to make him pay a price for his remedy. On the other is the extreme caution which often permeates judicial proceedings and is reflected in their elaborate safeguards—the apprehension of a rash result or a judgment rendered after inadequate deliberation.[56]

The court's holding in *Smith*, by giving a defendant wrongfully enjoined an additional remedy beyond those available under the majority rule, weights the judicial process in favor of more cautious use of the TRO. The salient issue of the case, then, is whether the court's new interpretation of rule 65(e) achieves the proper balance between the competing policy considerations. Arizona's rules of civil procedure contain a multitude of provisions designed to guard against erroneous use of the TRO.[57] Only if these provisions are inadequate in practical use is the court's new rule a wise addition to a defendant's remedies for wrongful injunction.

Difficulties with Liability Beyond the Amount of the Bond

To justify extending plaintiff's liability beyond the amount of the bond, the *Smith* court emphasized the ex parte nature of the procedure for obtaining TROs and the justice of allowing a recovery against the party who obtained the wrongful issuance of the injunction.[58] Authorities agree, however, that although there are due process objections to any use of a device that deprives a defendant of freedom without considering his objections,[59] ex parte injunctive remedies are necessary in

55. "The gravamen of the action [for malicious prosecution] is that the prior proceedings instituted by the defendant were for an improper purpose and not to secure justice." Lantay v. McLean, 2 Ariz. App. 22, 23, 406 P.2d 224, 225 (1965). *See* discussion note 50 *supra*.

56. Smith v. Coronado Foothills Estates Homeowners Ass'n, 117 Ariz. 171, 172, 571 P.2d 668, 669 (1978) (quoting Note, *supra* note 5, at 336).

57. *See* note 23 *supra*.

58. 117 Ariz. at 173, 571 P.2d at 670. The court suggests that if liability is limited to the amount of the bond, the ex parte procedure for obtaining a TRO would allow a plaintiff, in some cases, to limit the amount of damages that may be recovered against him. *Id.* See note 22 *supra*.

59. The United States Supreme Court has rendered a number of decisions emphasizing the importance of satisfying the procedural requirements of notice and a hearing before a person may be deprived of the use of his property. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 96 (1972); Boddie v. Connecticut, 401 U.S. 371, 397-98 (1971); Sniadach v. Family Fin. Corp., 395 U.S. 337, 343 (1969). These cases seem to cast doubt on the validity of the rule 65(b) procedure because it enables a party to procure an ex parte temporary restraining order that may well inhibit defendant's use of his property on the basis of an affidavit instead of a hearing. 11 C. WRIGHT & A. MILLER, *supra* note 1, § 2951, at 505. *See* Dobbs, *supra* note 23, at 1114-20.

Sniadach involved a prejudgment garnishment of wages statute allowing plaintiff 10 days to serve the summons and complaint on the defendant after service on the garnishee. 395 U.S. at 338. The Court held that absent notice and a prior hearing, the prejudgment garnishment proce-

limited circumstances to preserve the plaintiff's rights until a hearing can be scheduled.[60] The decision in *Smith* puts a much heavier burden on the plaintiff who feels his situation warrants the use of an immediate, ex parte, equitable remedy. Instead of knowing with certainty the risk he is taking in applying for a TRO, a plaintiff in Arizona must now either choose to wait until a preliminary hearing can be scheduled or subject himself to an indeterminate amount of liability by invoking the court's power to preserve the status quo.

The *Smith* court rejected the idea that an error in granting an ex parte injunction is an "error of the court, for which there is no recovery in damages unless the same is sufficiently intentional as to be the basis of a suit for malicious prosecution . . . ."[61] The notion that it is the court, not the plaintiff, who has the ultimate responsibility for the issuance of a TRO undoubtedly has its origin in the discretionary nature of the injunctive remedy.[62] The court's decision in *Smith*, however, puts the onus for the wrongful issuance of a TRO on the plaintiff's shoulders.[63] In shifting this burden from judge to plaintiff, the court evidences a mistrust of equitable discretion over bond amounts,[64] whereas the majority rule readily accepts such discretion.[65]

A problem with the *Smith* decision is that the court makes no mention in its opinion of the legal theory supporting the plaintiff's liability beyond the amount of the bond. The court cites favorably cases[66]

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dure violated fundamental principles of due process. *Id.* at 342. Similarly, in *Fuentes*, the Court held that the Florida and Pennsylvania replevin provisions were invalid under the fourteenth amendment since they work a deprivation of property without due process of law by denying the right to a prior opportunity to be heard before chattels are taken from the possessor. 407 U.S. at 96. *See generally* Rendleman, *supra* note 50.

In Thorton v. Carson, 111 Ariz. 490, 492, 533 P.2d 657, 659 (1975), the Arizona Supreme Court invalidated Arizona's replevin statutes because there was no independent judicial determination interposed between the creditor's application and the issuance of an order for the taking of the property.

60. *See* authorities cited at note 50 *supra*.

61. 117 Ariz. at 173, 271 P.2d at 670 (quoting United Motor Serv., Inc. v. Tropic Aire, Inc., 57 F.2d 479, 483 (8th Cir. 1932)).

62. *See* Jimenez v. Barber, 252 F.2d 550 (9th Cir.), *stay denied*, 355 U.S. 943 (1958). *Jimenez* stands for the proposition that the grant or denial of a temporary restraining order is within the sound discretion of the court, and appellate review is limited to whether that discretion was abused. *Id.* at 554. "The prayer for a temporary restraining order is addressed to the equitable judgment of the court." Gerber v. Seamans, 332 F. Supp. 1187, 1190 (S.D.N.Y. 1971).

63. The court quoted favorably from a Texas case:

> The amount of the bond in such cases is usually little more than an estimate by the court based upon matters of opinion or ex parte statements, and, where it proves to be wholly inadequate to cover the injured party's actual damages, we see no good reason why the party causing the damage should not be held responsible for it.

117 Ariz. at 173, 571 P.2d at 670 (quoting Miller Surfacing Co. v. Bridgers, 269 S.W. 838, 840 (Tex. Civ. App. 1924)).

64. *See* Smith v. Coronado Foothills Estates Homeowners Ass'n, 117 Ariz. at 172-73, 571 P.2d at 669-70. The Arizona Supreme Court did not agree with the court of appeals that the trial court, in granting the temporary restraining order at a nominal bond, did not exceed its jurisdiction nor abuse its discretion. *Id.* at 172, 571 P.2d at 669.

65. *See* text & note 38 *supra*.

66. 117 Ariz. at 173, 571 P.2d at 670, *citing* Kohlsaat v. Crate, 144 Ill. 14, 19, 32 N.E. 481, 482

that have been viewed as creating tort liability for the plaintiff regardless of malice.[67] In *Kohlsaat v. Crate*,[68] for example, the defendant in the injunction suit was permitted to recover his actual damages even though they exceeded the amount of the bond.[69] The court said that "the liability of the party wrongfully suing out the injunction . . . is not created by nor is it dependent on the bond which may be given. His liability grows out of his wrongful act in suing out the writ and the injurious consequence which thereby results to the other party."[70] The problem with this view is that in many cases there may be no wrongful act to which tort liability can attach if the plaintiff brought the action in good faith and with sufficient probable cause to believe his rights were in jeopardy.[71] If negligence is the wrongful act of the plaintiff that creates liability beyond the bond, then the courts should analyze the plaintiff's act in terms of duty, breach, proximate cause, and damages.[72] Such an analysis is reasonably necessary to enable plaintiff's counsel to choose an appropriate course of action when deciding whether to apply for a TRO.

Under the majority rule the bond has been analogized to a contract liability.[73] Plaintiff agrees to indemnify the defendant against damages for a "consideration," the injunction, moving from a third party, the court. The contract analogy has the virtue of striking a mid-

(1892); Davis v. Poitevant & Favre Lumber Co., 15 La. App. 657, 660, 132 So. 790, 792 (1931); Johnson v. McMahan, 40 S.W.2d 920, 922 (Tex. Civ. App. 1931); Houghton v. Grimes, 103 Vt. 54, 67-68, 151 A. 642, 648-49, (1930).

67. *See* Note, *supra* note 21, at 871; Note, *supra* note 5, at 343.

There is reason to doubt the forcefulness of the cases cited by the court as support for its position. Only one of the cases, Houghton v. Grimes, 103 Vt. 54, 59, 151 A. 642, 645 (1930), involved a defendant damaged by the wrongful issuance of a temporary restraining order as opposed to a preliminary injunction. See discussion note 13 *supra*. The nature and purpose of the two injunctive orders are different enough to warrant a strong argument that a precedent determining the measure of damages for a preliminary injunction should not be used in a case involving a TRO. Under the Arizona rules, a TRO may issue ex parte and only for periods of less than 10 days. ARIZ. R. CIV. P. 65(d). A TRO purports to protect a plaintiff's rights pending litigation in situations where time is of the essence. *See* 11 C. WRIGHT & A. MILLER, *supra* note 1, § 2951, at 498. To extend a plaintiff's liability beyond the amount of the bond posted for issuance of a TRO, on authority of cases involving injunctive procedures with risk of greater damages for defendant, violates the ingenuity of the statutory scheme.

68. 144 Ill. 14, 32 N.E. 481 (1892).

69. *Id.* at 20, 32 N.E. at 482.

70. *Id.* at 19, 32 N.E. at 482.

71. "[A]llowing recovery regardless of the absence of a bond or beyond the limits specified in one, . . . is tantamount to permitting a malicious prosecution action against a plaintiff without permitting him the usual common law shields of good faith and probable cause." *See* Note, *supra* note 5, at 343-44. In Arizona, lack of good faith and lack of probable cause are essential elements in an action for malicious prosecution. *See* discussion at note 51 *supra*; text at note 52 *supra*.

72. W. PROSSER, *supra* note 51, § 30, at 143. The usual elements of a cause of action for negligence are: (1) a duty, recognized by the law, requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks; (2) a breach of that duty; (3) a reasonably close connection between the conduct and the resulting injury; and (4) actual loss or damage resulting to the interests of another. *Id.*

73. *See* Note, *supra* note 5, at 344-45; Note, *supra* note 21, at 871. See Dobbs, *supra* note 23, at 1125-31, for a discussion of the measure of damages on injunction bonds applying both contract and tort analogies.

dle ground between allowing damages on the bond only if plaintiff is liable for malicious prosecution, and creating tort liability for the plaintiff regardless of any malice.[74]

Interpretation and Effects of the Decision

The court defined the scope of its decision in *Smith* by emphasizing the important circumstances that led it to extend a plaintiff's liability for wrongful injunction beyond the amount of the bond.[75] First, the court pointed out the distinctions between the three different types of injunctions and stressed that it was dealing only with temporary restraining orders obtained ex parte.[76] Since TROs may be obtained through a procedure of notice and hearing in much the same way as with preliminary injunctions,[77] the court's decision expressly does not extend to issuance of injunctions with full adversarial proceedings.[78] Whether the plaintiff's liability can be limited to the bond when informal notice is given, as suggested by the language of rule 65,[79] remains in doubt. The decision implies that in order for liability to be limited to the bond, the defendant must have some opportunity to prepare evidence on the probable amount of his damages if enjoined.[80]

Moreover, the court stressed the "patent insufficiency" of the bond as an important factor in its decision to allow a recovery for actual damages.[81] Since *Smith* involved a TRO issued on a nominal bond of

74. *See* Note, *supra* note 21, at 871.

> The nature of the recovery under the bond may be analyzed in three ways. (1) The bond may be regarded as merely security for damage resulting from a malicious suing out of the writ, *i.e.*, the obligor would not be held to answer for damage caused by a writ secured in good faith. (2) The bond may be considered a contract liability, the petitioner and his sureties agree to indemnify the defendant against damage for a "consideration" (the injunction) moving from a third party, the court. (3) The statute may be viewed as creating a tort liability on the plaintiff regardless of malice, the surety being liable for damage up to the amount of his agreement (the penalty) and the plaintiff, as the statute requires, for "all damages."

Id.

75. The court specifically framed its holding in terms of the facts in the *Smith* case. 117 Ariz. at 173, 571 P.2d at 670.

76. *Id.* at 172, 571 P.2d at 669.

77. *Compare* ARIZ. R. CIV. P. 65(a) *with* ARIZ. R. CIV. P. 65(d); *see* 11 C. WRIGHT & A. MILLER, *supra* note 1, § 2951, at 499.

78. 117 Ariz. at 172, 571 P.2d at 669.

79. FED. R. CIV. P. 65(b); ARIZ. R. CIV. P. 65(d); 11 C. WRIGHT & A. MILLER, *supra* note 1, § 2951, at 505-06.

80. If the attorney for the plaintiff believes, as he usually does, that his cause is just and there are few or no equities on the side of the person being sued, he can feel justified in suggesting to the court that only a nominal bond is necessary. To give a party what, in actual practice, amounts to the right to limit the amount of damages that may be recovered against him is too great a temptation even to the most fair minded.

117 Ariz. at 173, 571 P.2d at 670. The emphasis the court places on the possibility that ex parte procedure may allow a plaintiff to limit the amount of damages that may be recovered against him suggests disapproval of any substitute for prior notice and hearing as insufficient to protect the defendant's interest.

81. *Id.*

ten dollars, it is likely that the plaintiff's liability will extend to actual damages on any nominal bond. The real question, however, is whether the "patently insufficient" nature of the bond given to secure a TRO is determined with reference to the time it was issued or to the time that defendant brings suit for wrongful injunction. If the former, then the plaintiff's liability for wrongful injunction extends beyond the amount of the bond when the trial judge sets the amount far below what a reasonable person would expect the defendant's damage to be. If the latter, then anytime the defendant's damages in fact far exceed the amount of the bond, he will have a cause of action for the recovery of the difference. The former interpretation is supported by the use of the word "may" in Arizona Rule of Civil Procedure 65(e),[82] part of which the court incorporated into its holding.[83] The word "may" in the court's holding suggests the focus is on the determination of damages at the time of the ex parte hearing. On the other hand, the language in both of the Texas cases the court quoted to support its opinion[84] speaks in terms of the defendant's "actual damages," implying that the focus is on the disparity between the amount of the bond and the damages in fact.[85] By this view, if the defendant has no chance to influence the amount of the injunction bond or to go on the record with his own estimations of his probable damages, then the plaintiff's liability may not be limited to the bond if the amount is "patently insufficient" to pay actual damages.

The *Smith* decision may discourage trial judges from using their equitable authority to set bonds at nominal amounts. Although this may not be important in most cases, since rule 65(e) urges the court to set the bond at an amount proper "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained,"[86] in at least some cases the court's willingness to set the amount of security below what may likely be the defendant's actual costs and damages should not be curbed.[87]

82. *See* note 15 *supra.*

83. *See* 117 Ariz. at 173, 571 P.2d at 670.

84. *See id.* (quoting Johnson v. McMahan, 40 S.W.2d 920, 922 (Tex. Civ. App. 1931), and Miller Surfacing Co. v. Bridgers, 269 S.W. 838, 840 (Tex. Civ. App. 1924)).

85. *See* 117 Ariz. at 173, 571 P.2d at 670. The court quoted from a Texas case:

> The amount of the bond in such cases is usually little more than an estimate by the court based upon matters of opinion or ex parte statements, and *where it proves to be wholly inadequate to cover the injured party's actual damages*, we see no good reason why the party causing the damage should not be held responsible for it . . . .

Id. (quoting Miller Surfacing Co. v. Bridgers, 269 S.W. 838, 840 (Tex. Civ. App. 1924)) (emphasis added).

86. ARIZ. R. CIV. P. 65(e).

87. 11 C. WRIGHT & A. MILLER, *supra* note 1, § 2954, at 528-32; *see* cases cited note 40 *supra.*

More importantly, although the holding in *Smith* may ultimately prove to be a very narrow one, the court's decision threatens to deter good faith plaintiffs who are faced with immediate, irreparable injury from seeking an injunctive remedy if the defendant is unavailable for a hearing. By deterring plaintiffs from seeking what may well be the only effective means of preserving their rights, the new rule cuts against the well-established policy of not penalizing a litigant for resorting to the judicial process.[88] If the rationale behind the *Smith* decision was to give defendants a full measure of protection in TRO procedure, the price of this policy may well be a greater number of persons alienated from the judicial process because of its costs and risks.

Conclusion

The court in *Smith v. Coronado Foothills Estate Homeowners Association* has altered the balance of risk of liability assumed by the respective parties in an ex parte issuance of a TRO, but has done so in a way that rejects traditional solicitude for the plaintiff's interest. In addition, the court shifts responsibility for the issuance of TROs to the plaintiff's shoulders, although the exercise of equitable remedies has historically been within the sound discretion of the court. Liability beyond the amount of the bond is theoretically troublesome, for if the plaintiff's liability is predicated on a tort analogy, the plaintiff should not be liable unless he is at fault. The new rule may have the effect of deterring good faith plaintiffs from seeking TROs for fear of subjecting themselves to indeterminate liability. Insofar as the court's rule fosters an attitude of care on the part of both the applicants for temporary restraining orders and trial judges, it may have the beneficial effect of deterring issuance of TROs on a "patently insufficient" bond. Because of the danger of limiting plaintiffs' access to the courts, however, the *Smith* decision should be narrowly construed, and any further departure from the majority rule should be approached with caution.

88. *See generally* Griswold v. Horne, 19 Ariz. 56, 59, 165 P. 318, 319 (1917); W. PROSSER, J. WADE, & V. SCHWARTZ, *supra* note 52, at 1089; Note, *supra* note 5, at 333-34.

mortgage loans.[6]

This casenote will focus on Arizona's adaptation of one of these exceptions, the Arizona installment loan law,[7] and the initial interpretation of this statute by the Arizona Supreme Court in *Browne v. Nowlin*.[8] Critical analysis will center on two issues: permissible charges in addition to the maximum legal rate of interest, and the accrual of interest on authorized charges.

The controversy in *Browne* stemmed from a loan of $2305.94 made by the Nowlins to Browne in exchange for his promissory note of $2781.00.[9] The difference of $475.06 represented three years of add-on

6. Benfield, *supra* note 1, at 843, 851-57.

7. ARIZ. REV. STAT. ANN. § 44-1205 (Supp. 1977-78). This statute provides in part:

A. It is lawful to make installment loans of the following classes:

1. In a principal amount not to exceed five thousand dollars if the total payment for interest or discount is not in excess of eight dollars per one hundred dollars per year on the first one thousand dollars and six dollars per one hundred dollars per year on the amount of the loan in excess of one thousand dollars, in each event to be calculated from the date of the indebtedness to the date the last installment becomes due, to be added to the principal amount of the loan and payable in installments, provided the lender shall be entitled to a minimum charge of ten dollars for the loan. Subject to the right of the lender to retain the minimum charge, if the loan is prepaid in full before maturity by cash, renewal or refinancing the borrower shall be refunded or credited a rebate of interest or discount computed pursuant to the rule of "78". The borrower's right of rebate shall not impair the obligation of the borrower to pay any reasonable collection costs and fees incurred by the lender in the event of deliquency. Where the amount of refund or credit would be less than one dollar no rebate need be made.

. . . .

B. The lender shall not charge or receive any sum in addition to the interest, discount or finance charge authorized by subsection A for preparing a loan application, for investigating the credit of an applicant or his guarantor, for appraising any property offered as security, for examining public records of liens or encumbrances or otherwise for services, expenses, brokerage or fines, whether a loan is granted or not, except the lawful fees actually and necessarily paid out by the lender to a public officer for filing or recording in a public office, for acknowledging the instrument securing the loan, and for costs of obtaining a preliminary title report or title insurance policy. If greater aggregate charges are collected or received on a loan than the maximum charges authorized by this section the loan shall be usurious.

Installment loan legislation like Arizona's was devised to fill a gap left by previously developed exceptions to the general usury statutes. Other exceptions permitted small loan lenders, industrial banks, savings and loan associations, and credit unions to engage in consumer lending at favorable interest rates. Commercial banks, however, were conspicuously absent from this group and were obliged to operate at a serious competitive disadvantage. Installment loan acts remedied this situation, providing more liberal rate restrictions for commercial banks and other groups as well. B. CURRAN, *supra* note 2, at 68.

When *Browne* was decided the maximum allowable interest rate under the general usury statutes was 10%. ARIZ. REV. STAT. ANN. §§ 44-1201 to 1204 (Supp. 1977-78). ARIZ. REV. STAT. ANN. § 44-1205 (1977-78) authorizes rates of return in excess of this 10% maximum by permitting lenders to charge specified interest rates on the original principal amount of the loan until the final installment becomes due. No recognition is given to the declining principal balance over the course of repayment. As an example, if $2000 were loaned for one year at the maximum permissible rate of interest (eight dollars per one hundred dollars on the first $1000 and six dollars per one hundred dollars on the amount of the loan in excess of $1000) with repayment to be made in twelve equal monthly installments, monthly payments would be $178.33 ($2000 principal plus $140 interest, divided into twelve equal installments) and the borrower would pay an annual interest rate of approximately 13.2%.

8. 117 Ariz. 73, 570 P.2d 1246 (1977).

9. *Id.* at 74, 570 P.2d at 1247.

II. COMMERCIAL LAW

A. THE ARIZONA INSTALLMENT LOAN ACT—AN INITIAL INTERPRETATION*

Potential participants in the consumer credit market in the early part of the twentieth century were confronted with a major stumbling block—allowable interest rates under general usury statutes[1] were too low to provide adequate return for small loans.[2] Permissible rates of return were usually generous enough to cover the cost associated with larger commercial loans, but small consumer loans, with proportionately greater fixed costs in providing credit and in processing periodic payments,[3] were unduly restricted.[4] In response to this situation, a number of exceptions to the general usury statutes were developed, including small loan, industrial loan, installment loan, and other special consumer lending laws.[5] These statutory exceptions, not the general usury laws, now control nearly all consumer borrowing except home

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* Editor's note: Subsequent to the completion of this casenote, the Arizona legislature enacted ARIZ. REV. STAT. ANN. § 44-1207 (Supp. 1978-79). Under this new statute a lender may add to the principal of a loan any lawful fees or charges he pays on behalf of his borrower; interest as provided by law may then be charged on the entire amount. *Browne* is the only recent Arizona case involving the accrual of interest on incidental loan expenses, and § 44-1207 is clearly the legislature's response to that decision.

1. For a general discussion of usury laws, see Benfield, *Money, Mortgages, and the Migraine—The Usury Headache*, 19 CASE W. RES. L. REV. 819 (1968); Lowell, *A Current Analysis of the Usury Laws: A National View*, 8 SAN DIEGO L. REV. 193 (1971); Oeltjen, *Usury: Utilitarian or Useless*, 3 FLA. ST. U.L. REV. 167 (1975).

The wisdom of usury laws has been assailed in a number of recent articles. *See generally* Friedman, *In Defense of Usury*, NEWSWEEK, Apr. 6, 1970, at 79; Prather, *Economics, Morality and The Real-Estate Loan*, 8 B.C. IND. & COM. L. REV. 475, 476 (1967); Shanks, *Practical Problems in the Application of Archaic Usury Statutes*, 53 VA. L. REV. 327 (1967); Comment, *Ohio's Usury Laws and Their Effect Upon the Home Mortgage Market: Economic and Constitutional Inequalities*, 8 AKRON L. REV. 125, 216 (1974).

2. B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 2, 52 (1965); Benfield, *supra* note 1, at 838; Jordan & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387, 389 (1968); *see* J. GLENN, L. BRANDT & F. ANDREWS, RUSSELL SAGE FOUNDATION 1907-1946, 136-51, 336-50 (1947).

3. Johnson, *The New Law of Finance Charges: Disclosure, Freedom of Entry, and Rate Ceilings*, in CONSUMER CREDIT REFORM 33, 46 (C. Havighurst ed. 1970); *see* Benfield, *supra* note 1, at 826-30.

4. B. CURRAN, *supra* note 2, at 2.

5. *Id.* at 15-82; Benfield, *supra* note 1, at 835-52. The development of small loan laws is reviewed in R. BARRETT, COMPILATION OF CONSUMER FINANCE LAWS (1952) (cited in B. CURRAN, *supra* note 2, at 16 n.17). The development of industrial banks as participants in the consumer credit market is set forth in SAULNIER, INDUSTRIAL BANKING COMPANIES AND THEIR CREDIT PRACTICES (1940) (cited in B. CURRAN, *supra* note 2, at 52 n.382). For a discussion of the growth of commercial banks in the consumer credit market, see AMERICAN BANKERS ASSOCIATION, THE COMMERCIAL BANKING INDUSTRY 162-89 (1962).

interest[10] computed at the maximum allowable rate[11] under title 6, section 254 of the Arizona Revised Statutes.[12] Charges for escrow service,

10. Add-on interest is interest calculated in accordance with the applicable statute and "added on" to the loan principal. The total amount is then repaid in installments.

11. 117 Ariz. at 77, 570 P.2d at 1250.

12. (Supp. 1969) (current version at ARIZ. REV. STAT. ANN. § 44-1205 (Supp. 1977-78)). As indicated in the *Browne* decision, 117 Ariz. at 76 n.1, 570 P.2d at 1249 n.1, the loan contract was formed in 1972 under the provisions of ARIZ. REV. STAT. ANN. § 6-254. The following year this statute was combined with ARIZ. REV. STAT. ANN. § 6-255 and incorporated into a new section, ARIZ. REV. STAT. ANN. § 44-1205 (Supp. 1972-73). The application of § 44-1205 in *Browne* in lieu of §§ 6-254 and 6-255 is, at the least, highly questionable since the contract was formed while these latter two sections were still effective. *See* Ch. 116, § 1, 1973 Ariz. Sess. Laws 658 (repealing §§ 6-254, 6-255 effective Aug. 8, 1973).

Differences between § 44-1205 and §§ 6-254, -255 can be summarized as follows: (1) Subsection 44-1205(B) sandwiches the list of impermissible expenses, including the catchall "shall not charge . . . otherwise for services, expense, brokerage or fines," between a summary of charges authorized under subsection A and an enumeration of additional acceptable expenses. This arrangement produces a stronger impression that the statute provides a classification of all possible loan-related expenses than the arrangement found in § 6-255. As a result, of the two statutes, § 44-1205 is more amenable to a strict interpretation like the one it received in *Browne*. (2) Section 44-1205 does not restrict the class of potential installment lenders. Section 6-254 did, although the restriction was a loose one. (3) Section 6-255 allowed banks and savings and loan associations to recover "disbursements actually and necessarily made to meet the requirements of law prescribed to qualify such loans as a lawful investment of such institution." Section 44-1205 is silent in this regard and presumably recovery of these expenses is prohibited. (4) Section 6-254 was much more detailed with respect to the computation of a borrower's credit for repayment than is § 44-1205. (5) Finally, there is some difference in the titles. Section 44-1205 is entitled "Installment loans, additional charges," while §§ 6-254, -255 were entitled "Installment loans" and "Additional charges for making loans." *See* ARIZ. REV. STAT. ANN. § 44-1205 (Supp. 1977-78), *quoted* note 7 *supra*; ch. 79, § 1, 1969 Ariz. Sess. Laws 177 (codified as § 6-254); ch. 86, § 1, 1965 Ariz. Sess. Laws 157 (codified as § 6-255). With regard to the possible significance of these differences, the Arizona Supreme Court has adopted the following definition: "Every Statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." Tower Plaza Invs. Ltd v. DeWitt, 109 Ariz. 248, 250, 508 P.2d 324, 326 (1973). The above listed differences would appear to be serious enough to make an after the fact application of § 44-1205 retrospective.

Generally, retrospective laws are not favored. State v. Williams, 111 Ariz. 222, 224, 526 P.2d 1244, 1246 (1974); State v. Martin, 59 Ariz. 438, 445, 130 P.2d 48, 51 (1942); Ledbetter v. Savittieri, 10 Ariz. App. 65, 68, 455 P.2d 1015, 1018 (1969). ARIZ. REV. STAT. ANN. § 1-244 (1974) provides: "No statute is retroactive unless expressly declared therein." A statute will be construed as having prospective operation only, unless it plainly indicates an intent that it shall operate retrospectively. Stanley v. Stanley, 112 Ariz. 282, 283, 541 P.2d 382, 383 (1975); State v. Stone, 104 Ariz. 339, 343, 452 P.2d 513, 517 (1969); Headley v. Headley, 101 Ariz. 331, 333, 419 P.2d 510, 512 (1966). Section 44-1205 makes no mention of retroactivity.

Arizona does not have a general rule that "remedial" or "curative" statutes are retroactive. Ledbetter v. Savittieri, 10 Ariz. App. 65, 68, 455 P.2d 1015, 1018 (1969). Purely procedural enactments, however, can be applied retroactively. Allen v. Fisher, 118 Ariz. 95, 96, 574 P.2d 1314, 1315 (1977); Ledbetter v. Savittieri, 10 Ariz. App. 65, 68, 455 P.2d 1015, 1018 (1969). A procedural law describes the method of enforcing rights or obtaining redress; a substantive law creates, defines, and regulates rights. Allen v. Fisher, 118 Ariz. 95, 96, 574 P.2d 1314, 1315 (1977). Applying this distinction, it is clear that the above listed differences between § 44-1205 and §§ 6-254, -255 relate to substance rather than procedure.

In addition to this general rule against retroactivity, there is in this case a specific constitutional objection to the retroactive application of § 44-1205. As a result of constitutional protections against the impairment of contracts, a statute invalidating contracts for the loan of money at interest greater than a specified rate cannot be applied retroactively. Yaffee v. International Co., 80 So. 2d 910, 912 (Fla. 1955); Sohmer Factors Corp. v. 278 Corp., 13 Misc. 2d 142, 150, 172 N.Y.S.2d 886, 894 (Sup. Ct. 1958); Security Bank & Trust Co. v. Barnett, 169 Okla. 298, 305, 36 P.2d 874, 881 (1934); Frank v. State Bank & Trust Co., 263 S.W. 255, 258 (Tex. Ct. App. 1924); RESTATEMENT OF CONTRACTS § 608, Comment d, Illustration 2 (1932). *See generally* U.S. CONST. art. I, § 10, cl. 1; ARIZ. CONST. art. 2, § 25. For an annotation, see 16A C.J.S. *Constitutional Law* § 358 (1956).

title insurance, recording, and broker's and attorney's fees were deducted from the loan principal during escrow, reducing the amount actually received by Browne to $2041.89.[13] Following a sporadic series of payments, the Nowlins brought suit to accelerate the debt and foreclose the mortgage, alleging that both monthly payments and taxes were in arrears.[14] The Nowlins' motion for partial summary judgment on these issues was granted and Browne appealed.[15] The appeal raised the issue, *inter alia*, of whether the loan was usurious.[16]

Permissible Charges

Because interest was calculated at the maximum authorized rate,[17] any additional return on the loan was impermissible.[18] Assuming the other elements of usury were present,[19] if the five charges made during escrow were charges for the loan itself, then the loan was rendered usurious.[20] Thus, the court's characterization of these charges as for the use of the loan *vel non* was of primary importance.

Two of these charges were obviously repayments of incidental expenses rather than additional unlawful return on the loan.[21] Title 44,

13. Browne v. Nowlin, 117 Ariz. 73, 76, 570 P.2d 1246, 1249 (1977).

14. *Id.* at 74, 570 P.2d at 1247.

15. *Id.*

16. *Id.* Two other issues on appeal were: (1) whether the note was subject to acceleration for default in the payment of principal and interest or real estate taxes; and (2) if acceleration was proper, whether the appellees waived their right to foreclose. Addressing the first of these, the court determined that Browne's failure to pay real estate taxes provided a basis for acceleration under provisions of the note. *Id.* at 76, 570 P.2d at 1249. With respect to the second issue, the Nowlins' acceptance of delinquent payment of interest and principal did not constitute a waiver of their rights arising from a tax deliquency due to Browne's failure to pay real estate taxes. *Id.* at 75, 570 P.2d at 1248.

17. *Id.* at 77, 570 P.2d at 1250.

18. *Id.*; *see* Modern Pioneers Ins. Co. v. Nandin, 103 Ariz. 125, 130, 437 P.2d 658, 663 (1968).

19. In addition to an exaction for the use of the loan of something in excess of what the law allows, the other four elements of usury are an unlawful intent, an understanding that the loan is absolutely repayable, a loan or forebearance, and a subject matter of money or money's equivalent. Small v. Ellis, 90 Ariz. 194, 199, 367 P.2d 234, 237 (1962); Britz v. Kinsvater, 87 Ariz. 385, 390, 351 P.2d 986, 989 (1960). In *Browne*, the last two of these elements were well established. Browne v. Nowlin, 117 Ariz. 73, 74, 570 P.2d 1246, 1247 (1977). With regard to the requirement of an absolute right of repayment, as a general rule it appears that an ordinary secured loan with interest at a definite rate will always be absolutely repayable within the meaning of this requirement. Britz v. Kinsvater, 87 Ariz. 385, 393, 351 P.2d 986, 991 (1960). As to the intent requirement, consciousness of the illegality of the transaction is not required. *Id.* It is sufficient that the loan contract unequivocally calls for an excessive rate of return on the indebtedness; intent to exact usury is presumed. *Id.* Therefore, once the Arizona Supreme Court found that the principal amount of the loan was less than the amount used by the Nowlins to calculate interest, the intent requirement was met. At that point the contract called for excessive return since it required the payment of the maximum lawful interest on a principal sum greater than the principal of the Nowlins' loan.

20. All five elements of usury would have been met. See note 19 *supra*.

21. 117 Ariz. at 76, 570 P.2d at 1249. The escrow agreement delineated the five charges against the "amount borrowed" as follows:

Amount received by mortgagor	$2041.89
Expenses paid by mortgagor	
Escrow fee	$ 48.00
Title insurance	50.00

section 1205 of the Arizona Revised Statutes[22] explicitly authorizes passing on to the borrower the cost of title insurance and recording.[23] Thus the question of whether the loan was usurious revolved around the broker's, attorney's, and escrow fees.[24]

As an initial step toward resolving this question, the court concluded that in specifying permissible charges section 44-1205 merely codified the general principle stated in *Grady v. Price*;[25] that is, in addition to the maximum legal rate of interest, a lender may charge for expenses actually incurred provided there is no charge for the ordinary overhead expenses of business or attempt to exact additional interest or profit.[26] Upon careful inspection, however, this conclusion does not comport with recent Arizona decisions in which *Grady* has been cited in support of the broad principle that "fees charged for services rendered are not interest if they are reasonable."[27] These decisions have authorized passing on attorney's fees, travel expenses, closing costs,[28] fees for the supervision provided by a construction lender, commitment fees,[29] and charges for appraisal, preliminary title search, and credit reports.[30] In contrast with both this broad principle of *Grady* and the nature of the expenses authorized by these recent decisions, section 44-1205 expressly forbids charging for services, expenses, brokerage, or fines in other than a few specified situations.[31] Moreover, the *Browne* court's own reading of this statute fails to support its conclusion that this legislation merely codified *Grady*. The court noted that it had "interpreted A.R.S. § 44-1205 rather strictly, limiting additional charges to those clearly set forth in the statute."[32]

The court concluded that all three of the charges at issue were im-

Recording fee	2.00	
Lawyer fee re: instruments paid to A. Goldenkoff	25.00	
Brokerage fee to Fred Warren	139.00	
		264.05
		$2305.94

Id.

22. (Supp. 1977-78).
23. *See* ARIZ. REV. STAT. ANN. § 44-1205(B) (Supp. 1977-78), *quoted* note 7 *supra*.
24. 117 Ariz. at 76, 570 P.2d at 1249.
25. 94 Ariz. 252, 383 P.2d 173 (1963).
26. Browne v. Nowlin, 117 Ariz. 73, 76, 570 P.2d 1246, 1249 (1977) (citing Grady v. Price, 94 Ariz. 252, 256, 383 P.2d 173, 176 (1963)).
27. Altherr v. Wilshire Mortgage Corp., 104 Ariz. 59, 63, 448 P.2d 859, 863 (1968); Modern Pioneers Ins. Co. v. Nandin, 103 Ariz. 125, 131, 437 P.2d 658, 664 (1968); Gangadean v. Leumi Fin. Corp., 13 Ariz. App. 534, 537, 478 P.2d 532, 535 (1970).
28. Gangadean v. Leumi Fin. Corp., 13 Ariz. App. 534, 537, 478 P.2d 532, 535 (1970).
29. Altherr v. Wilshire Mortgage Corp., 104 Ariz. 59, 62, 448 P.2d 859, 862 (1968).
30. Modern Pioneers Ins. Co. v. Nandin, 103 Ariz. 125, 132, 437 P.2d 658, 665 (1968).
31. ARIZ. REV. STAT. ANN. § 44-1205(B) (Supp. 1977-78), *quoted* note 7 *supra*.
32. 117 Ariz. at 78, 570 P.2d at 1251.

permissible.[33] With regard to brokerage fees, generally a lender cannot be charged with usury as a result of any commission or bonus the borrower pays his own agent, or an independent third party, for negotiating or procuring the loan.[34] If, on the other hand, the lender's agent exacts a commission from the borrower, the transaction is usually rendered usurious if the exaction is known to and authorized or ratified by the lender.[35] Even in this latter situation, however, some courts have held that a transaction is not usurious unless the charge is unreasonable.[36]

In *Browne*, the only pertinent evidence in the record concerning the brokerage fee was an affidavit by the broker in which he stated that in assisting in the creation of the note and mortgage he acted on behalf of the Nowlins.[37] Two previous Arizona decisions examined the effect of a borrower's payment of a commission or a bonus to the lender's broker. *Modern Pioneers Insurance Co. v. Nandin*[38] and *Kamrath v. Great Southwestern Trust Corp.*[39] adopted the minority rule that a loan is usurious only when the lender's broker exacts an unreasonable fee.[40]

Section 44-1205 fashioned a special rule regarding installment loans. Shifting of brokerage fees is expressly forbidden.[41] Any charge the lender makes for brokerage must be added to the interest charged on the loan. If the total exceeds the maximum permitted under subsection A of the statute, the loan is usurious.[42] Although this result seems

33. *Id.* at 77, 570 P.2d at 1250.

34. *See, e.g.*, Forte v. Nolfi, 25 Cal. App. 3d 656, 682, 102 Cal. Rptr. 445, 472 (1972); United Mortgage Co. v. Hildreth, 93 Nev. 79, 81, 559 P.2d 1186, 1187 (1977); Argo Air, Inc. v. Scott, 18 N.C. App. 506, 511, 197 S.E.2d 256, 259 (1973); Home Savings Ass'n v. Crow, 514 S.W.2d 160, 165 (Tex. Ct. App. 1974), *aff'd*, 522 S.W.2d 457 (Tex. 1975).

35. *See, e.g.*, Forte v. Nolfi, 25 Cal. App. 3d 656, 681, 102 Cal. Rptr. 455, 472 (1972); Feemster, v. Schurkman, 291 So. 2d 622, 627 (Fla. Ct. App. 1974); Mills v. State Nat'l Bank, 28 Ill. App. 3d 830, 834, 329 N.E.2d 255, 258 (1975); Morris v. Miglicco, 468 S.W.2d 517, 519 (Tex. Ct. App. 1971); Annot., 52 A.L.R.2d 703, 748 (1957).

36. Modern Pioneers Ins. Co. v. Nandin, 103 Ariz. 125, 131, 437 P.2d 658, 664 (1968); Kamrath v. Great Southwestern Trust Corp., 27 Ariz. App. 102, 104, 551 P.2d 92, 94 (1976); Avery v. Creigh, 35 Minn. 456, 457, 29 N.W. 154 (1886); Allen v. Grenada Bank, 160 Miss. 419, 423, 133 So. 648, 649 (1931); Landis v. Saxton, 89 Mo. 375, 380, 1 S.W. 359 (1886); American Mortgage Co. v. Woodward, 83 S.C. 521, 528, 65 S.E. 739, 742 (1909). The Arizona decisions appear to provide the only recent authority for this principle.

37. 117 Ariz. at 77, 570 P.2d at 1250.

38. 103 Ariz. 125, 437 P.2d 658 (1968).

39. 27 Ariz. App. 102, 551 P.2d 92 (1976).

40. Modern Pioneers Ins. Co. v. Nandin, 103 Ariz. 125, 131, 437 P.2d 658, 664 (1968); Kamrath v. Great Southwestern Trust Corp., 27 Ariz. App. 102, 104, 551 P.2d 92, 94 (1976). These decisions each involved a corporate lender acting in concert with a subsidiary to charge both interest and brokerage fees. The loan in each case bore interest at the maximum legal rate under the general usury statutes. *Nandin* was decided under ARIZ. REV. STAT. ANN. § 44-1202 (1967) (amended 1969), and *Kamrath* involved an application of ARIZ. REV. STAT. ANN. § 44-1202 (1977-78). In both instances the question of usury turned on the reasonableness of the brokerage charge. Modern Pioneers Ins. Co. v. Nandin, 103 Ariz. at 131, 437 P.2d at 664; Kamrath v. Great Southwestern Trust Corp., 27 Ariz. App. at 104, 551 P.2d at 94.

41. ARIZ. REV. STAT. ANN. § 44-1205(B) (Supp. 1977-78), *quoted* note 7 *supra*.

42. *Id.* For a transaction to be usurious it is essential that the sum of charges exacted from the borrower for loan-related expenses and the interest charged for the loan exceed the legal maxi-

anomalous in light of *Nandin* and *Kamrath*, it is consistent with the customary treatment of brokerage fees in the majority of jurisdictions.[43]

Section 44-1205, however, does not specifically prohibit a lender from transferring attorney's and escrow fees. By the weight of authority such charges can be shifted to the borrower if they are reasonable and the lender acts in good faith.[44] Although contrary to this majority approach, the Arizona Supreme Court's decision to disallow the passing on of attorney's and escrow fees[45] seems consistent with the intent of the statute.[46] Apparently the legislature exacted a quid pro quo for the higher interest rates authorized under subsection A. Expenses which would otherwise have been transferable were disallowed.[47] However, if the effect of this statute is examined in a variety of loan situations, the wisdom of this legislative action is called into question.

As an aid in this regard, a table indicating the rates of return on selected installment loans is set forth in the footnote below.[48] En-

mum interest. Fowler v. Equitable Trust Co., 141 U.S. 411, 413 (1891); *In re* Oakes, 267 F.2d 516, 519 (7th Cir. 1959); Pattavina v. Pignotti, 177 Neb. 217, 219, 128 N.W.2d 817, 818 (1964).

43. *See* text & note 35 *supra.*

44. *See, e.g.*, Forte v. Nolfi, 25 Cal. App. 3d 656, 681, 102 Cal. Rptr. 455, 472 (1972); State *ex rel.* Turner v. Younker Bros., Inc., 210 N.W.2d 550, 560 (Iowa 1973); Morris v. Miglicco, 468 S.W.2d 517, 519 (Tex. Ct. App. 1971); Sparkman & McLean Income Fund v. Wald, 10 Wash. App. 765, 768, 520 P.2d 173, 176 (1974); 45 AM. JUR. 2d *Interest and Usury* § 204 (1969).

45. Browne v. Nowlin, 117 Ariz. 73, 77, 570 P.2d 1246, 1250 (1977). The dissimilar attention afforded attorney's and escrow fees in *Browne* is somewhat puzzling. Both are given the same general treatment under § 44-1205, yet the court summarily rejected the transfer of escrow fees, citing the absence of this expense from the list of authorized charges, while it gave attorney's fees a more thoroughgoing examination applying tests suggested in *Grady*. 117 Ariz. at 77, 570 P.2d at 1250. After considering the legal documents utilized in the transaction the court concluded that, viewing the evidence most favorably to appellant Browne, a transfer of attorney's fees could only be considered an attempt to defray the lender's ordinary overhead expense. *Id.* This analysis suggests that in another case involving more complicated legal drafting and a borrower not aided by favorable evidentiary construction, a shifting of legal expenses might be accepted. This possibility seems doubtful, however, given the court's conclusion that additional charges were limited to those expressly authorized. *Id.* at 78, 570 P.2d at 1251.

46. "The lender shall not charge or receive any sum . . . [except as authorized] . . . for services, expenses, brokerage or fines . . . ." ARIZ REV. STAT. ANN. § 44-1205(B) (Supp. 1977-78), *quoted* note 7 *supra. See also* Opinion No. 41-L, 1962 OP. ARIZ. ATT'Y GEN. 127 (construing ARIZ. REV. STAT. ANN. § 6-255, later incorporated into ARIZ. REV. STAT. ANN. § 44-1205 (Supp. 1977-78)).

47. See text accompanying notes 26-30 *supra.*

48.

(1) Duration of Loan in Years	(2) Principal Amount of Loan	(3)[a] Monthly Payments	(4)[b] Nominal Annual Interest Rate	(5)[c] Expenses for Brokerage, Attorneys' and Escrow Fees	(6)[d] Corrected Loan Principal (column 2 + column 5)	(7) Corrected Nominal Annual Interest Rate	(8)[e] Corrected Loan Principal (column 2 + $100)	(9)[e] Decrease in Loan Yield Resulting from $100 Unrecoverable Expense
1	$1000	$ 90.00	14.45	$188	$1188	negative	1100	<14.45
2	1000	48.33	14.68	188	1188	negative	1100	9.53
3	1000	34.44	14.55	188	1188	2.80	1100	6.60
1	3000	266.67	12.09	397	3397	negative	3100	6.19
2	3000	141.67	12.32	397	3397	<1	3100	3.29
3	3000	100.00	12.25	397	3397	3.81	3100	2.27

hanced interest rates recoverable under section 44-1205 are depicted in column four. Column five represents a conservatively estimated set of costs comparable to those in question in *Browne*, costs which would be recoverable under the general usury statute.[49] Column seven provides a clear demonstration of the impact of prohibiting the recovery of these expenses. The return on every one of the sample loans is far below even the ten percent general usury rate in effect at the time of the *Browne* decision.[50] Needless to say, no rational lender would make installment loans of this variety. Columns eight and nine are based on sample loans with the same types of unrecoverable expenses limited to a total of $100. An inability to recover even this small amount can seriously reduce the rate of return on an installment loan, oftentimes decreasing the yield below that authorized under the general usury statutes. Under these circumstances the small loan lender still must contend with the proportionately greater fixed costs associated with lending in small increments, yet legislative aid has been withdrawn. It is doubtful that this result was contemplated when this legislation was drafted. As one consequence of the legislature's attempt to prevent unconscionable rates of return, mortgage-supported installment lending has been constrained.[51] This result seems particularly unfortunate, for

5	3000	66.67	11.96	397	3397	6.63	3100	1.69
1	5000	443.33	11.61	605	5605	negative	5100	3.96
2	5000	235.00	11.84	605	5605	<1	5100	1.98
3	5000	165.55	11.78	605	5605	4.03	5100	1.37
5	5000	110.00	11.51	605	5605	6.63	5100	.86
7	5000	86.19	11.22	605	5605	7.58	5100	.64

a. Interest was calculated at the maximum rate allowable under § 44-1205. Monthly payments were derived by adding the principal amount of the loan to the add-on interest and dividing by the duration of the loan in months.

b. Columns 4, 7, and 9 are based on present-value-of-annuity calculations and linear interpolation. *See generally* FINANCIAL PUBLISHING COMPANY, FINANCIAL COMPOUND INTEREST AND ANNUITY TABLES 1-469 (5th ed. 1970).

c. Expenses were established as follows:

(1) A brokerage fee of 10% of the principal amount of the loan, for loans of $5000 or less, represents the lowest figure quoted in a telephone survey of Tucson area mortgage brokers conducted during August 1978.

(2) Attorney's fees were set at $50.00. This is a conservative estimate of the normal charge for filling out a form mortgage, escrow documents, promissory note, and the federally required disclosure statement accompanying the note.

(3) Escrow fees are regulated in Arizona. *See* ARIZ. REV. STAT. ANN. § 20-342 (Supp. 1977-78). Used here were the charges consistently quoted by Tucson area escrow firms ($1000 principal, $38; $3000 principal $47; $5000 principal, $55) in an August 1978 telephone survey.

d. The amount loaned can be considered the "cost" of the borrower's repayment stream. Aside from normal overhead expenses, which are not recoverable under either the general usury statutes, ARIZ. REV. STAT. ANN. §§ 44-1201 to 1204 (Supp. 1978-79) or § 44-1205, installment lenders bear an additional "cost" of the same general type as the amount loaned. This is the cost of brokerage and attorney's and escrow fees recoverable under the general usury laws but not under § 44-1205. Consequently, this latter cost must be added to the loan principal to establish a basis for the calculation of the rate of return of an installment loan. This correction allows installment loan interest rates to be compared directly with those on loans made under the general usury statutes.

e. Expenses recoverable under the general usury statutes but not under § 44-1205 are assumed to total $100. Columns 8 and 9 demonstrate the serious impact on the rate of return stemming from an inability to recover even a small loan related expense.

49. *See* text accompanying notes 40, 44-47 *supra*.

50. *See* ARIZ. REV. STAT. ANN. § 44-1201 (Supp. 1977-78).

51. While this seems to be the logical result, some factors suggest that the adverse consequences may be limited. First, beginning September 3, 1978, the maximum allowable rate of interest under the general usury statutes was raised from 10% to 12%. *See* ARIZ. REV. STAT. ANN. §§ 44-1201 to 1204 (Supp. 1978-79). The installment loan rates did not receive a comparable upward revision, *id.* § 44-1205, and the result will no doubt be a reduction in the importance of § 44-1205. As column six demonstrates, see table note 48 *supra*, large installment loans and loans of an intermediate size with a long duration yield a rate of return lower than the new maximum. The tendency will be to move away from installment lending to take advantage of the higher rates allowed on other types of loans. Section 44-1205 applies only to installment lending and will not

borrowers who must rely on small secured loans are presumably one group the statute was specifically intended to aid.[52]

Accrual of Interest on Permissible Charges

The most surprising aspect of *Browne* is the court's rejection of interest calculations based on the sum of the loan principal received by the borrower and authorized expenses under subsection 44-1205(B).[53] On numerous occasions the court has asserted that it is substance and not form that will govern its decisionmaking in usury cases,[54] but in rendering this holding the court failed to abide by its own principle.

Subsection 44-1205(A) provides that the calculation of interest shall be based on the principal amount of the loan.[55] The installment

impede this change. Second, in reaction to *Browne* some installment lenders have begun to contract separately for services and expenses incidental to loan transactions. Telephone interview with Grady Silverthorn, Valley National Bank Consumer Lending Headquarters, Phoenix, Arizona (Jan. 21, 1979). However, given the court's policy of looking beyond the form of loan transactions to their substance, *see* text & note 54 *infra*, it seems doubtful that such plans will survive a court challenge.

52. The plight of the small necessitous borrower has prompted the development of many of the major exceptions to general usury statutes, including installment loan acts. B. CURRAN, *supra* note 2, at 15-83.

53. 117 Ariz. at 77, 570 P.2d at 1250.

54. *Id.* at 77, 570 P.2d at 1250; Modern Pioneers Ins. Co. v. Nandin, 103 Ariz. 125, 130, 437 P.2d 658, 663 (1968); Sulger v. Marlin, 90 Ariz. 70, 73, 365 P.2d 1113, 1115 (1961); Britz v. Kinsvater, 87 Ariz. 385, 390, 351 P.2d 986, 989 (1960); Dewulf v. Bissell, 83 Ariz. 68, 71, 316 P.2d 492, 494 (1957); Blaisdell v. Steinfeld, 15 Ariz. 155, 186, 137 P. 555, 568 (1914).

55. ARIZ. REV. STAT. ANN. § 44-1205(A) (Supp. 1977-78), *quoted* note 7 *supra*. In *Browne*, the court cited BLACK'S LAW DICTIONARY 1355-56 (4th ed. 1951) for the following definition of principal: "[t]he capital sum of a debt or obligation, as distinguished from interest or other additions to it." 117 Ariz. at 78, 570 P.2d at 1251. The source of this definition is Christian v. Superior Court, 122 Cal. 117, 119, 54 P. 518, 519 (1898). BLACK'S LAW DICTIONARY, *supra* at 1356. *Christian* addressed the issue of whether accrued interest is transformed into principal if it serves as the basis for the compounding of interest. 122 Cal. at 119, 54 P. at 519. The conclusion was that interest is not transformed, *id.*, and in the above definition of the phrase "or other additions to it" refers to this conclusion. It ensures that if interest is compounded, and hence additions are made to interest, for purposes of the definition of principal, interest serving as the basis for compound interest will not be regarded as principal. This phrase was not directed toward lawful charges incidental to a loan, *id.*, and should have been given no effect in *Browne*. *See* 117 Ariz. at 78, 570 P.2d at 1251.

Considering the remaining operative section of the above definition "the capital sum of a debt or obligation," the relevant definition of capital is "money invested at interest." BLACK'S LAW DICTIONARY, *supra* at 262. Investment, on the other hand, is "the placing of capital or laying out of money in a way intended to secure income or profit from its employment." *Id.* at 960. *See* Securities & Exch. Comm'n v. Wickham, 12 F. Supp. 245, 247 (D. Minn. 1935); State v. Gopher Tire & Rubber Co., 146 Minn. 52, 56, 177 N.W. 937, 938 (1920). Therefore, the principal of a loan in basic terms is "that portion of a loan placed or laid out in a way intended to secure interest." *See* Needles v. Kansas City, 371 S.W.2d 300, 305 (Mo. 1963) (principal is a capital sum placed at interest; it is the amount originally invested in something); Girard Trust Bank v. Remick, 215 Pa. Super. Ct. 375, 378, 258 A.2d 882, 884 (1969) (the principal amount of a loan is what the parties agree the borrower is to receive); Klitgaard v. Gaines, 479 S.W.2d 765, 770 (Tex. Ct. App. 1972) (principal is generally defined as a capital sum placed at interest as distinguished from interest or profit). Since it is the lender who places or lays out the loan, presumably his intent must govern. When the Nowlins loaned Browne $2305.94 they undoubtedly intended that that amount would bear interest. After all, their interest calculations were based on that amount. Browne v. Nowlin, 117 Ariz. 73, 76, 570 P.2d 1246, 1249 (1977). Even assuming that the borrower's intent is relevant, the conclusion that $2305.94 was the loan principal remains inescapable. There is no indication that when the loan was consummated Browne objected to paying interest

borrower receives from escrow the entire loan principal less authorized charges;[56] an equivalent expression in mathematical terms is: The amount the borrower receives added to the sum of authorized expenses equals the principal amount of the loan. Thus if a lender computes interest on the sum of the amount actually paid to the borrower and the amount disbursed from escrow for permissible expenses, in substance the interest calculation has been based on the loan principal and is in total compliance with the requirements of subsection A.[57]

However, the *Browne* court rejected the Nowlins' attempt to utilize exactly this type of calculation.[58] In support of its decision the court cited the absence of statutory language specifically authorizing the accrual of interest on costs permissible under subsection 44-1205(B).[59] But as is clear from the previous paragraph, an accrual of interest of this type is authorized. Subsection A provides that interest will be based on the loan principal.[60] As a necessary corollary, the calculation of interest on the sum of permissible charges and loan proceeds actually paid to the borrower must be authorized because it results in exactly the same amount of interest as a calculation based directly on the loan principal. The only difference is one of form.

Section 44-1205 manifests no legislative preference with respect to the borrower's use of the proceeds of his loan and imposes no restrictions in this area.[61] While subsection B authorizes a shift from lenders to borrowers of specified loan-related costs,[62] there is no indication that as a result of being transferred these expenses become less worthy of payment.[63] Nonetheless, a clear implication of the court's holding is that transferred expenses are less meritorious than others. For example, if during escrow fifty-two dollars were charged against a loan for title insurance and recording fees paid by the lender, the interest bearing principal of the loan would be reduced by an equal amount.[64] In other words, that portion of the loan earmarked for loan-related expenses owed to the lender suffers from a peculiar malady; it will not support the collection of interest. If the borrower were to use fifty-two

on that full amount. *Id.* at 74, 570 P.2d at 1247. His promissory note and mortgage were based on the sum of $2305.94 and add-on interest. *Id.* at 76, 570 P.2d at 1249. Moreover, a borrower's normal expectation is that interest will be paid on the full amount borrowed.

56. See note 21 *supra*. The only two authorized charges were for title insurance and recording fees, totalling $52. The amount borrowed (*i.e.*, the loan principal, $2305.94) should have been divided in escrow as follows: $52 to the Nowlins as payment for permissible charges, $2253.94 to Browne.

57. *See* ARIZ. REV. STAT. ANN. § 44-1205(A) (Supp. 1977-78), *quoted* note 7 *supra*.

58. 117 Ariz. at 77, 570 P.2d at 1250.

59. *Id.* at 78, 570 P.2d at 1251.

60. ARIZ. REV. STAT. ANN. § 44-1205(A) (Supp. 1977-78), *quoted* note 7 *supra*.

61. *See id.* § 44-1205.

62. *Id.* § 44-1205(B).

63. *See id.*

64. This was the situation in *Browne*, 117 Ariz. at 77, 570 P.2d at 1249-50.

dollars of his net from escrow to pay a second lender for an identical set of expenses stemming from a second loan, the interest bearing principal of the first loan would remain unaffected. This distinction is without justification. The principal amount of a loan, the proper basis for the calculation of interest under subsection A,[65] is not a function of the disposition of loan proceeds. Had the *Browne* court looked beyond the form of the interest calculation and allowed accrual of interest on permissible charges, this anomalous result would have been avoided.

Conclusion

In *Browne* the Arizona Supreme Court limited additional loan charges to those expressly authorized under section 44-1205. While this appears to be consistent with the intent of the statute, it seems doubtful that the legislature contemplated the full range of consequences stemming from this restriction. Mortgage-supported installment lending has been constrained even though the installment loan law was presumably enacted to ease the plight of small necessitous borrowers including those dependent on small secured loans. The court's decision to disallow an accrual of interest on permissible charges was based on the form of the interest calculation and is substantively unjustifiable. This holding prohibits installment lenders from receiving the full interest which they are due under subsection 44-1205(A).

B. FUTURE ACCOUNTS RECEIVABLE FINANCING: ABROGATION OF THE COMMON LAW PROHIBITION

The Uniform Commercial Code [U.C.C.] was created to bring some order to the confusing irregularities of commercial law.[1] The common law's varying treatment of future accounts receivable financing presented problems which have been dealt with in a number of provisions in article nine of the U.C.C.[2] In *Valley National Bank v.*

65. *See* ARIZ. REV. STAT. ANN. 44-1205(A) (Supp. 1977-78), *quoted* note 7 *supra.*

1. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 3 (1972). Admittedly, uniform acts on various aspects of commercial law existed prior to the U.C.C., but not all states had enacted them and the courts of some states had created many nonuniform judicial amendments. Also, new commercial practices developed which were either not covered or covered only inadequately by the pre-Code acts. *Id.* at 2-3. *See* Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367, 367-70 (1957) (commenting on the pre-Code state of commercial law).

2. Some of the U.C.C. provisions which apply to future accounts receivable financing are: § 9-105 (ARIZ. REV. STAT. ANN. § 44-3105 (Supp. 1978-79)), §§ 9-204, -205 (ARIZ. REV. STAT.

Flagstaff Dairy,[3] the Arizona Court of Appeals interpreted several of these provisions which bear directly upon the validity of security interests in future accounts receivable.[4]

In 1971, to finance the production of milk at his dairy, Larry Brown granted the Valley National Bank a security interest in payments due him from his customers.[5] The appropriate financing statement was duly filed and recorded.[6] Two years later, Brown executed another agreement granting the bank the right to collect "all monies due or to become due debtor [Brown] from the sale of milk."[7] Shortly thereafter, Brown notified Flagstaff Dairy to make the payments which were due him directly to the bank.[8] In compliance with the notice, the dairy paid the bank all monies then owed Brown.[9] However, monies due Brown from Flagstaff Dairy for subsequent sales were paid to Brown or his other designees.[10] At the time of his financial collapse, Brown owed the bank over $43,000.[11] Significantly, the dairy had paid more than that amount to Brown and his other creditors after receiving the notice to pay Valley Bank.[12]

The bank brought suit on the theory that it had a valid assignment of Brown's accounts and that the dairy, after notification, had wrongfully paid these accounts to Brown and other parties.[13] The dairy con-

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ANN. §§ 44-3117,-3118 (Supp. 1978-79)); § 9-318 (ARIZ. REV. STAT. ANN. § 44-3139 (SUPP. 1978-79)); and § 9-402 (ARIZ. REV. STAT. ANN. § 44-3141 (Supp. 1978-79)).

3. 116 Ariz. 513, 570 P.2d 200 (1977).

4. The laws interpreted in this case were derived from the 1962 version of the U.C.C. as enacted in Arizona by ch. 3, § 5, 1967 Ariz. Sess. Laws 28. Several of these provisions were later amended to conform with the 1972 changes in the U.C.C. Ch. 65, 1975 Ariz. Sess. Laws 245. Unless the two versions are substantially different, this casenote will refer to the versions as amended in 1975. The U.C.C. provisions interpreted are § 9-204 (ARIZ. REV. STAT. ANN. § 44-3117 (Supp. 1978-79)), *discussed in* 116 Ariz. at 516-18, 570 P.2d at 203-05; § 9-303 (ARIZ. REV. STAT. ANN. § 44-3124 (Supp. 1978-79)), *discussed in* 116 Ariz. at 518, 570 P.2d at 205; and § 9-318 (ARIZ. REV. STAT. ANN. § 44-3139 (Supp. 1978-79)), *discussed in* 116 Ariz. at 518-19, 570 P.2d at 205-06. For a discussion of some of the various changes found in the 1972 revisions of the U.C.C., see Coogan, *The New U.C.C. Article 9*, 86 HARV. L. REV. 477 (1973); Headrick, *The New Article Nine of the Uniform Commercial Code: An Introduction and Critique*, 34 MONT. L. REV. 28 (1973).

5. 116 Ariz. at 515, 570 P.2d at 202.

6. *Id.* Generally, a financing statement is signed by the debtor and the secured party, gives an address for each, and describes the collateral. U.C.C. § 9-402 (ARIZ. REV. STAT. ANN. § 44-3141 (Supp. 1978-79)). The filing of a financing statement is one of the prerequisites for perfection of a security interest. U.C.C. § 9-302 (ARIZ. REV. STAT. ANN. § 44-3123 (Supp. 1978-79)).

7. 116 Ariz. at 515, 570 P.2d at 202. However, there were no contractual arrangements between Brown and Flagstaff Dairy which required Brown to sell his milk to the dairy. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* The principle that upon notification, the account debtor becomes liable to pay the assignee is clearly recognized in Arizona. Bank of Yuma v. Arrow Constr. Co., 106 Ariz. 582, 584, 480 P.2d 338, 340 (1971); Greene v. Reed, 15 Ariz. App. 110, 112, 486 P.2d 222, 224 (1971); Van Waters & Rogers, Inc. v. Interchange Resources, Inc., 14 Ariz. App. 414, 417, 484 P.2d 26, 29 (1971); United Bank of Arizona v. Romanoski Glass & Mirror Co., 14 Ariz. App. 90, 92, 480 P.2d 1007, 1009 (1971). Flagstaff Dairy did not contest this principle. 116 Ariz. at 516, 570 P.2d at 202.

tended that the bank's security agreement could not create a security interest in Brown's future accounts receivable that would impose any obligation upon the dairy.[14] The trial court entered summary judgment in favor of the dairy, holding that no valid security interest could be created in future accounts receivable.[15] In reversing the trial court's decision, the appellate court held that a valid security interest could be created in future accounts receivable.[16]

This casenote will primarily discuss the validity of security interests in future accounts receivable. The practical aspects of the attachment and perfection of such interests will also be considered. Finally, brief attention will be given to the question of whether new notice to the account debtor is necessary as each payment becomes due.

In reaching its decision on the validity of the bank's interest, the court initially reviewed the pre-Code common and statutory law.[17] At common law an assignment of a debt not yet due, but based upon an existing contract, was valid.[18] However, if one attempted to assign the right to receive future accounts which were not based upon an existing contract, such an assignment would clearly have been ineffective.[19]

The policy behind the common law rule of nonassignability arose from the metaphysical difficulties of the assignment of something that did not exist.[20] More practically, however, the policy reflected the fear that a commercial borrower, if allowed to encumber all future assets, might place himself in a position of severe financial distress and thus deprive all other creditors of a cushion of free assets.[21]

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14. 116 Ariz. at 516, 570 P.2d at 203.

15. *Id.* at 519, 570 P.2d at 206.

16. *Id.*

17. *Id.* at 516, 570 P.2d at 203.

18. *Id.* Commercial Life Ins. Co. v. Wright, 64 Ariz. 129, 141, 166 P.2d 943, 955 (1946). *See* Valley Nat'l Bank of Arizona v. Byrne, 101 Ariz. 363, 365, 419 P.2d 720, 722 (1966). *See generally* 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 228-30 (1965), which discusses the early common law prohibition against the assignment of future intangibles. The restriction was based upon the rule "*Qui non habet, ille non dat*," that is, "he who does not having something, cannot give it away," and is at least 400 years old. *Id.* at 229. Theoretically, however, all choses in action were clearly unassignable at early common law. 7 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 531 (1922). Several explanations exist for the development of this doctrine including both the concept of privity and public policy considerations. *See* Holdsworth, *The Treatment of Choses in Action by the Common Law*, 33 HARV. L. REV. 997, 997-1016 (1920); Note, *The Assignment of Choses in Action: Rights of Bona Fide Purchaser*, 20 VA. L. REV. 621, 635-40 (1934).

19. 116 Ariz. at 516, 570 P.2d at 203; RESTATEMENT OF CONTRACTS § 154 (1932). *See* Taylor v. Barton Child Co., 228 Mass. 126, 129-30, 117 N.E. 43, 43 (1917) (book accounts to come into existence in the future in connection with an established business would not be enforced against a trustee in bankruptcy); First Nat'l Bank v. Campbell, 193 S.W. 197, 198-99 (Tex. Civ. App. 1917) (pledges of future contracts as security void due to their potential lack of existence); O'Neil v. Wm. B.H. Keer Co., 124 Wis. 234, 236-37, 102 N.W. 573, 574 (1905) (assignment of future accounts not arising out of a contract was not a legal transfer). *But see* Field v. New York, 6 N.Y. 179, 186-87 (1852) (courts of equity would support assignments of contingent interests provided that they were fairly entered into and not against public policy).

20. *See* G. GILMORE, *supra* note 18, at 229.

21. *See* U.C.C. § 9-204, Official Comment 2 (1972 version).

Arizona's relevant pre-Code statute, the Assignment of Accounts Receivable Act,[22] provided no clear answer to the question of the validity of secured interests in future accounts receivable.[23] Furthermore, Arizona case law provided no pertinent interpretations of the ambiguous portions of the Act.[24] Thus, whether or not the Act was intended to abrogate the common law prohibition against the assignment of future accounts not arising out of a presently existing contract is purely speculative.[25]

However, in applying U.C.C. section 9-204,[26] the court in the *Flagstaff Dairy* case[27] held that a valid security interest could be created in future accounts receivable.[28] Section 9-204 states that "a security agreement may provide that collateral, whenever acquired, shall secure all obligations covered by the security agreement."[29] Furthermore, the comments to the section, while acknowledging the fears expressed by the old common law prohibition, expressly validate the practice of future accounts receivable financing.[30] The comments note the changed economic situation and that the past restrictions on such financing were easily circumvented.[31]

Even though the U.C.C. clearly provides for such interests, the dairy's argument was based upon an interpretation of the Code which would make the dairy liable only for accounts existing at the time of notice.[32] The dairy relied upon the present tense definitions of account, account debtor, and contract right found in U.C.C. sections 9-105 and 9-106.[33] From these definitions the dairy made the argument that sec-

22. ARIZ. REV. STAT. ANN. §§ 44-801 to 808 (1967). These provisions were repealed by the adoption of the U.C.C. in 1967. Ch. 3, § 6, 1967 Ariz. Sess. Laws 229.

23. 116 Ariz. at 516, 570 P.2d at 203. *See also* Comment, *Multistate Accounts Receivable Financing: Conflicts in Context*, 67 YALE L.J. 402 *passim* (1958) (comparing the relevant provision of many states, including Arizona).

24. 116 Ariz. at 516, 570 P.2d at 203.

25. *See id.*

26. U.C.C. § 9-204 (ARIZ. REV. STAT. ANN. § 44-3117 (Supp. 1978-79)).

27. 116 Ariz. 513, 570 P.2d 200.

28. *Id.* at 519, 570 P.2d at 206.

29. U.C.C. § 9-204 (1972 version) (ARIZ. REV. STAT. ANN. § 44-3117 (Supp. 1978-79)).

30. *See* U.C.C. § 9-204, Official Comment 2 (1972 version).

31. *See* Grain Merchants v. Union Bank & Saving Co., 408 F.2d 209, 212 (7th Cir. 1969) (§ 9-204 obviously permitted a security agreement creating a lien in after-acquired accounts receivable); *In re* Penn Housing Corp., 367 F. Supp. 661, 665 (D.C. Pa. 1973) (accepting without authority the validity of a security interest in future accounts receivable); Central State Bank v. State, 73 Misc. 2d 128, 131, 341 N.Y.S.2d 322, 325 (Ct. Cl. 1953) (citing U.C.C. § 9-204 for the proposition that an interest assigned in an account not in existence will mature when the account comes into existence); U.C.C. § 9-204, Official Comments 2, 3 (1972 version); 2 P. COOGAN, W. HOGAN, & D. VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 15.08(2), at 1600-02 (1965); Coogan, *Article 9—An Agenda for the Next Decade*, 87 YALE L.J. 1012, 1016 (1978) (the U.C.C. "dramatically expanded the parties' freedom to create security interests in all kinds of after-acquired collateral, regardless of the ultimate nature of the collateral.").

32. 116 Ariz. at 518-19, 570 P.2d at 205-06.

33. U.C.C. § 9-105 (ARIZ. REV. STAT. ANN. § 44-3105(A)(1) (Supp. 1978-79)) reads: " 'Account debtor' means the person who is obligated on an account, chattel paper or general intangible." U.C.C. § 9-106 (ARIZ. REV. STAT. ANN. § 44-3106 (Supp. 1978-79)) reads:

tion 9-318[34] provides that until an account, a present right to payment, comes into existence and the account debtor, a person currently obligated on a particular account, subsequently receives notice, the account debtor can continue to pay the assignor.[35] Thus, the dairy reasoned that it could not be notified prematurely, but rather the notice had to be given as each account arose.[36] Therefore, the dairy contended that because it had received no new notice as each account arose, it could continue to pay Brown with impunity.[37]

The court rejected the dairy's argument, deeming it strained.[38] Initially, the court noted that the dairy's interpretation was completely at odds with the intent of the U.C.C. provisions on after-acquired property.[39] Furthermore, the court refused to accept the dairy's view that section 9-318 limits the collateral that might be validly assigned.[40] Instead the court adopted the view of other courts which interpret the provisions as merely clarifying the right of the account debtor to continue to make future payments directly to the assignee.[41] Finally, noting the commercial importance of accounts receivable financing and the protection afforded the confused account debtor by section 9-318,[42]

" 'Account' means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper whether or not it has been earned by performance." U.C.C. § 9-106 (ARIZ. REV. STAT. ANN. § 44-3106 (amended 1975)) formerly read: " 'Contract right' means any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper."

34. U.C.C. § 9-318 (ARIZ. REV. STAT. ANN. § 44-3139(C) (Supp. 1978-79)) reads: "The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee."

35. 116 Ariz. at 518-19, 570 P.2d at 205-06.

36. *Id.* at 519, 570 P.2d at 205.

37. *Id.*

38. *Id.* at 518-19, 570 P.2d at 205-06.

39. *Id.* at 518, 570 P.2d at 205. Pursuant to the U.C.C. provisions on after-acquired property, the validity of an after-acquired property clause of a security agreement was initially established in Arizona in General Elec. Credit Corp. v. Tidwell Indus., Inc., 115 Ariz. 362, 364-65, 565 P.2d 868, 870-71 (1977), and reaffirmed in General Elec. Credit Corp. v. Town & Country Mobile Homes, Inc., 117 Ariz. 562, 564-65, 574 P.2d 50, 52-53 (Ct. App. 1977).

40. 116 Ariz. at 518-19, 570 P.2d at 205-06.

41. *Id.* at 519, 570 P.2d at 206. *See, e.g.*, Tractortechnic Gebrueder Kulenkempft & Co. v. Bousman, 301 F. Supp. 153, 156 (D.C. Wis. 1969) (not citing § 9-318 but applying its rule); Commercial Sav. Bank v. G & J Wood Prod. Co., 46 Mich. App. 133, 136, 207 N.W.2d 401, 403 (1973) (account debtor is authorized to pay the assignor until notified otherwise, citing U.C.C. § 9-318); *In re* Chase Manhattan Bank, 48 App. Div. 2d 11, 14, 367 N.Y.S.2d 580, 583 (1975) (purpose of U.C.C. § 9-318 is to protect the rights of an account debtor as against the assignee).

42. ARIZ. REV. STAT. ANN. § 44-3139C (Supp. 1978-79). For discussion of the increased use of accounts receivable financing and some of the consequent problems, especially those involved in the multistate filing of financing statements, see Coogan & Gordon, *The Effect of the U.C.C. Upon Receivables Financing—Some Answers and Some Unresolved Problems*, 76 HARV. L. REV. 1529, 1567-68 (1963); Scult, *Accounts Receivable Financing: Operational Patterns Under the Uniform Commercial Code*, 11 ARIZ. L. REV. 1, 29 (1969). U.C.C. § 9-318 offers protection to the confused account debtor by allowing him to continue to pay the assignor until adequately notified otherwise. Furthermore, upon the request of the account debtor, the assignee must furnish proof that the assignment has been made, and until he does so the account debtor can continue to pay the assignor. *See* 116 Ariz. at 519, 570 P.2d at 206 (citing Comment to U.C.C. § 9-318 (1962 version)). *See generally* cases cited note 41 *supra*.

the court refused to require new notices each time new sums become due.[43] The court said that such notices "would impose a substantial burden and expense on accounts receivable financing."[44]

The court also considered the practical aspects of the attachment and perfection of security interests in future accounts receivable.[45] Attachment, the point at which the assignee's interest becomes enforceable against the account debtor, occurs upon the completion of several statutory prerequisites.[46] Therefore the court noted that until Brown executed a security agreement,[47] received value from the creditor,[48] and acquired rights in the collateral,[49] no security interest could attach.[50] Perfection, which maintains the assignee's priority of enforcement

43. 116 Ariz. at 519, 570 P.2d at 206.

44. *Id.* Repeated notices would be impractical because the assignor would have to inform the assignee of the new account's existence, and then the assignee would have to draft a notice and deliver it to the account debtor before the account debtor had paid the account. In some businesses, this process might have to be repeated many times each day.

45. 116 Ariz. at 518, 570 P.2d at 205.

46. *See* General Elec. Credit Corp. v. Tidwell Indus., Inc., 115 Ariz. 362, 364, 565 P.2d 868, 870 (1977); General Elec. Credit Corp. v. Town & Country Mobile Homes, Inc., 117 Ariz. 562, 565, 574 P.2d 50, 53 (Ct. App. 1977); U.C.C. § 9-203 (ARIZ. REV. STAT. ANN. § 44-3116 (Supp. 1978-79)).

47. 116 Ariz. at 519, 570 P.2d at 205; U.C.C. § 9-203 (ARIZ. REV. STAT. ANN. § 44-3116A (Supp. 1978-79)). *See* Anderson v. First Jacksonville Bank, 243 Ark. 977, 979, 423 S.W.2d 273, 274 (1967); Kruse, Kruse & Miklosko, Inc. v. Beedy, 165 Ind. App. —, —, 353 N.E.2d 514, 535 (1976) (security agreement, a writing which describes the collateral and is signed by the debtor, is necessary for attachment). *See generally* Wiseman, *Third-Party Influence on the Security Agreement: The Primary Source Doctrine*, 10 U.C.C.L.J. 53, 53 (1977), stating that the function of the agreement is to evidence the intentions of the secured party and the debtor and suggesting that its sufficiency is tested in the light of its ability "to prevent disputes as to specific items of the secured interest and to serve as a statute of frauds to prevent enforcement of claims based on wholly oral representations." *Id.* This article also suggests that a new criteria, the agreement's capacity to satisfy potential third-party creditor inquiries as to the status of specific collateral, has also been used by some courts. *Id. See also* Beard, *The Description of Collateral in Security Agreements and Financing Statements*, 28 MERCER L. REV. 611 *passim* (1977) which hypothesizes exactly what the U.C.C. demands for an adequate description of collateral.

48. 116 Ariz. at 518, 570 P.2d at 205. *See* U.C.C. § 9-203 (ARIZ. REV. STAT. ANN. § 44-3116A (Supp. 1978-79)); Kruse, Kruse, & Miklosko, Inc. v. Beedy, 165 Ind. App. —, —, 353 N.E.2d 514, 536 (1976) (citing value as one prerequisite for attachment and describing it as a consideration that is sufficient to support a simple contract); Honea v. Laco Auto Leasing, Inc., 80 N.M. 300, 303, 454 P.2d 782, 785 (1969) (citing U.C.C. § 1-201(44), and stating that a binding commitment to extend credit is a consideration sufficient to support a simple contract). *See also* Comment, *The Value of "Value" in a Purchase Money Security Interest*, 28 BAYLOR L.J. 667 *passim* (1976) (discussing the general concept of value in secured transactions governed by the U.C.C.).

49. 116 Ariz. at 518, 570 P.2d at 205. *See* Lonoke Prod. Credit Ass'n v. Bohannon, 238 Ark. 206, 208, 379 S.W.2d 17, 19 (1964) (the requisite debtor's rights in collateral is some ownership in the collateral which he can encumber); Kruse, Kruse & Miklosko, Inc. v. Beedy, 165 Ind. App. —, —, 353 N.E.2d 514, 536 (1976) (rights are acquired when a debtor obtains a beneficial interest in shares of stock); U.C.C. § 9-203 (ARIZ. REV. STAT. ANN. § 44-3116A (Supp. 1978-79)); Anzivino, *When Does a Debtor Have Rights in the Collateral Under Article 9 of the Uniform Commercial Code?*, 61 MARQ. L. REV. 23 *passim* (1977). All of the requirements for attachment mentioned in text at notes 47-49 must be met. *See* Branch v. Steph, 389 F.2d 233, 236 (10th Cir. 1968); *In re* Pelletier, 5 UCC REP. SERV. 327, 332 (D. Me. 1968); Peninsula State Bank v. Beneficial Fin. Co., 15 UCC REP. SERV. 503, 505 (N.Y. Sup. Ct. 1974). However, the order in which the requirements are fulfilled does not matter. *In re* United Thrift Stores, Inc., 363 F.2d 11, 14 (3d Cir. 1966); *In re* Laue, 8 UCC REP. SERV. 420, 422 (D.R.I. 1970).

50. 116 Ariz. at 518, 570 P.2d at 205. *See* U.C.C. § 9-203 (ARIZ. REV. STAT. ANN. § 44-3116A (Supp. 1978-79)).

against other creditors subsequently secured by the same property, or against unsecured creditors, is also statutorily regulated.[51] The court noted that the steps necessary for perfection may be undertaken prior to attachment, with the result that the security interest is perfected at the time the collateral comes into existence and the debtor acquires rights in it.[52] Thus, the bank's security interest was perfected at the time Brown's accounts with the dairy arose and he acquired rights in them.[53]

Conclusion

The Arizona Court of Appeals in *Valley National Bank of Arizona v. Flagstaff Dairy* expressly abrogated the common law prohibition against security interests in future accounts receivable. In so doing, the court followed the clear mandate of the Uniform Commercial Code. The court also noted, again in accord with the Code, that a security interest could become perfected at the time the interest attached if the steps necessary for perfection were undertaken prior to the fulfillment of all the conditions necessary for attachment. Finally, the court held that new notice to the account debtor as each account arises is unnecessary, so long as the initial requirements of notice of assignment are met.

David G. Gourley III

51. *See* U.C.C. §§ 9-302,-303 (ARIZ. REV. STAT. ANN. §§ 44-3123, -3125, -3126 (Supp. 1978-79)).

52. 116 Ariz. at 518, 570 P.2d at 205 (relying on U.C.C. § 9-303 (ARIZ. REV. STAT. ANN. § 44-3124 (1967))). *See* Enterprises NOW, Inc. v. Citizens & S. Dev. Corp., 135 Ga. App. 602, 603, 218 S.E.2d 309, 310 (1975); Index Store Fixture Co. v. Farmer's Trust Co., 536 S.W.2d 902, 904-05 (Mo. Ct. App. 1976). According to U.C.C. § 9-302 (ARIZ. REV. STAT. ANN. § 44-3123 (Supp. 1978-79)), except in certain circumstances, in order to perfect a security interest in accounts receivable the secured party must file a financing statement as defined in U.C.C. § 9-402 (ARIZ. REV. STAT. ANN. § 44-3141 (Supp. 1978-79)). As an alternative, if the security agreement meets the minimum standards of a financing statement prescribed by U.C.C. § 9-402 (ARIZ. REV. STAT. ANN. § 44-3141 (Supp. 1978-79)), then that section authorizes it to be filed in lieu of a financing statement. *See* Beard, *supra* note 47, at 611; Scult, *supra* note 42, at 11. *Compare* General Elec. Credit Corp. v. Tidwell Indus., Inc., 115 Ariz. 362, 364 (1977), where the security interest of G.E.C.C. in 16 mobile homes was perfected against Tidwell, an unpaid cash seller, by filing a financing statement with the Secretary of State pursuant to ARIZ. REV. STAT. ANN. §§ 44-3123(A), -3140 (Supp. 1978-79), *with* General Elec. Credit Corp. v. Town & Country Mobile Homes, Inc., 117 Ariz. 562, 565, 574 P.2d 50, 53 (Ct. App. 1977), where, arising out of the same factual situation, G.E.C.C. having previously complied with the filing requirements of article 9, its security interest in 10 mobile homes became perfected against Town & Country Mobile Homes, Inc., the cosignor-manufacturer, when the security interest attached to the mobile homes at the time the dealer-cosignee obtained possession, pursuant to ARIZ. REV. STAT. ANN. § 44-3124(A) (Supp. 1978-79).

53. 116 Ariz. at 518, 570 P.2d at 203.

III. CRIMINAL PROCEDURE

A. INTELLIGENT AND VOLUNTARY PLEA OF GUILTY: INFORMING A DEFENDANT OF POSSIBLE PUNISHMENT

The guilty plea has become a major element of the American criminal justice system.[1] Over ninety percent of criminal convictions each year are gained by way of the guilty plea.[2] Recognizing the increasing importance of the guilty plea, the United States Supreme Court in *Boykin v. Alabama*[3] held that a defendant cannot knowingly and intelligently enter a plea of guilty unless he is informed of the consequences of his plea.[4] This decision was followed by the adoption, in 1973, of rule 17.2 of the Arizona Rules of Criminal Procedure relating to the *Boykin* requirement that a defendant be informed of the consequences of his guilty plea.[5]

In two recent cases, *State v. Soloman*[6] and *State v. Ellis*,[7] the Arizona Supreme Court interpreted this provision of the Arizona Rules of Criminal Procedure. The issues in both cases concerned the particular consequences of which a defendant must be informed prior to the entry of a guilty plea and the effect of a trial court's failure to comply with the requirements of the rule.[8]

In *Ellis*, the defendant was charged with armed robbery and with committing burglary while armed with a gun.[9] He pled guilty to one count of each offense and received concurrent sentences of not less than 75 years nor more than 125 years for each count.[10]

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1. *See* Note, *The Supreme Court's Changed View of the Guilty Plea*, 4 MEM. ST. L. REV. 79, 79 (1973); Note, *Criminal Procedure - New Standards and Procedures for Accepting Guilty Pleas*, 22 WAYNE L. REV. 1463, 1466 (1976).

2. Note, *Criminal Procedure - New Standards and Procedures for Accepting Guilty Pleas*, 22 WAYNE L. REV. 1463, 1466 (1976); "Acceptance of Guilty Pleas," 14 ARIZ. L. REV. 543, 543 (1972).

3. 395 U.S. 238 (1969).

4. *Id.* at 243-44. In McCarthy v. United States, 394 U.S. 459 (1969), the Court explained the relationship between the acceptance of a guilty plea and the requirements of the Constitution:

> A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.

394 U.S. at 466 (footnotes omitted).

5. ARIZ. R. CRIM. P. 17.2.

6. 117 Ariz. 228, 571 P.2d 1024 (1977).

7. 117 Ariz. 329, 572 P.2d 791 (1977).

8. *Id.* at 332, 572 P.2d at 794; State v. Soloman, 117 Ariz. 228, 230, 571 P.2d 1024, 1026 (1977).

9. 117 Ariz. at 330, 572 P.2d at 792.

10. *Id.*

The defendant in *Soloman* was charged with armed burglary and armed rape.[11] Pursuant to a plea agreement, he pled guilty to the charge of armed rape, first degree, and was sentenced to serve from thirty years to life in prison.[12]

This casenote will analyze three major areas in light of the *Soloman* and *Ellis* decisions. First, the constitutionally required elements of a disclosure, as expounded by the Supreme Court in *Boykin v. Alabama*, will be examined. Emphasis will be placed upon an analysis of the cases handed down in Arizona after *Boykin* but prior to the adoption of the Arizona Rules of Criminal Procedure in 1973. Second, the Arizona rules pertaining to the consequences of a guilty plea will be outlined and a comparison of the rules and the constitutional requirements of *Boykin* will be undertaken. Finally, an analysis of how Arizona appellate courts deal with a failure by the trial court to comply with the letter or spirit of the Arizona rules will be made, and the requirements for "reversible error" with regard to this issue will be discussed.

Constitutional Requirements

The United States Supreme Court in *Boykin v. Alabama*[13] did not specify precisely what information would have to be imparted to a defendant prior to the acceptance of his guilty plea. The Court did indicate that a defendant had to be informed of the consequences of his plea.[14] The *Boykin* Court implied that the defendant should at least be informed of the maximum possible punishment.[15]

At the time of the *Boykin* decision, the federal court system had been operating under the edict of rule 11 of the Federal Rules of Criminal Procedure,[16] which essentially required that a defendant be informed of the consequences of a guilty plea prior to its entry.[17] Although the language of rule 11 was altered subsequent to the *Boykin* decision,[18] the Supreme Court in *Boykin* indicated that the rule as then

11. 117 Ariz. at 229, 571 P.2d at 1025.
12. *Id.*
13. 395 U.S. 238 (1969).
14. *Id.* at 243-44. The Supreme Court established this requirement with the following language: "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Id.*
15. *Id.* at 244. A Pennsylvania case, Commonwealth *ex rel.* West v. Rundle, 428 Pa. 102, 237 A.2d 196 (1969), was cited in a footnote to *Boykin*. The *Rundle* court indicated: "The trial court is best advised to conduct an on the record examination of the defendant which should include, inter alia, an attempt to satisfy itself that the defendant understands . . . the permissible range of sentences." *Id.* at 106, 237 A.2d at 198 (footnotes omitted).
16. Fed. R. Crim. P. 11 (1966).
17. The 1966 version of rule 11 required that the guilty plea be made with "understanding of the nature of the charge and the consequences of the plea." *Id.*
18. Current Federal Rule of Criminal Procedure 11(c)(1) states:

in force satisfied constitutional due process requirements.[19]

Although the Arizona Supreme Court had expressed the view that *Boykin* extended the requirements of rule 11 to the state courts,[20] the court later indicated that *Boykin* did not require state courts to adhere strictly to rule 11, but merely that courts comply with the "spirit" of the rule.[21] Since the *Boykin* decision, Arizona courts have required adherence to the constitutional guidelines provided by the Supreme Court in that case.[22] Prior to the adoption of the Arizona Rules of Criminal Procedure in 1973, the language of *Boykin* served as the guide to Arizona courts in accepting guilty pleas.[23]

During the period from 1969 to 1973, the Arizona courts facing the issue clearly indicated that under *Boykin* the United States Constitution required that a defendant be informed of the maximum punishment to which he could be subjected.[24] However, *Boykin* was interpreted by the Arizona Supreme Court as not requiring that a de-

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Advice to defendant: Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands the following:

1) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law . . . .

FED. R. CRIM. P. 11(c)(1). The Advisory Committee on Rules (1974 amendments) explained the purpose of the change in the language of rule 11: "The amendment identifies more specifically what must be explained to the defendant and also codifies, in the rule, the requirements of Boykin v. Alabama, 395 U.S. 238 (1969)." FED. R. CRIM. P. 11(c)(1), Notes of Advisory Committee on Rules (1974 amendment), at 21.

19. *See* 395 U.S. at 242-43.

20. State v. Laurino, 106 Ariz. 586, 588, 480 P.2d 342, 344 (1971).

21. State v. Williker, 107 Ariz. 611, 614, 491 P.2d 465, 468 (1971). In *Williker*, the trial judge did not personally participate in the interrogation wherein the defendant was asked whether he understood which constitutional rights he was waiving in pleading guilty; counsel for the defendant conducted the examination. *Id.* This procedure appeared to conflict with the specific language of federal rule 11 which requires that the judge address the defendant personally and inform him of the rule provisions. FED. R. CRIM. P. 11(c)(1). In upholding the guilty plea, the Arizona Supreme Court stated:

> It is, of course, clear from *Boykin* . . . that if the plea of guilty satisfies Federal Rule 11 then the requirements of *Boykin* . . . have also been met. This does not mean, however, that the State courts are required to follow the letter of Federal Rule 11. It is adherence to the spirit of Federal Rule 11 and not necessarily the literal observance of its provisions that is required by the mandate of *Boykin v. Alabama* . . . .

107 Ariz. at 614, 491 P.2d at 468.

22. *See, e.g.*, State v. Church, 109 Ariz. 39, 41, 504 P.2d 940, 942 (1973); State v. Hooper, 107 Ariz. 327, 329-30, 487 P.2d 394, 396-97 (1971); State v. Jackson, 17 Ariz. App. 533, 534-35, 499 P.2d 111, 112-13 (1972).

23. *See, e.g.*, State v. Carr, 108 Ariz. 203, 207, 495 P.2d 134, 138 (1972); State v. Hooper, 107 Ariz. 327, 329-30, 487 P.2d 394, 396-97 (1971); State v. Jackson, 17 Ariz. App. 533, 534-35, 499 P.2d 111, 112-13 (1972).

24. State v. Church, 109 Ariz. 39, 41, 504 P.2d 940, 942 (1973); State v. Carr, 108 Ariz. 203, 207, 495 P.2d 134, 138 (1972); State v. Hooper, 107 Ariz. 327, 329-30, 487 P.2d 394, 396-97 (1971); State v. Jackson, 17 Ariz. App. 533, 534-35, 499 P.2d 111, 112-13 (1972).

In *State v. Hooper*, 107 Ariz. 327, 487 P.2d 394 (1971), the Arizona Supreme Court relied on the federal interpretation of the *Boykin* decision, noting that "in at least 8 of the 11 federal circuits the words 'consequences of the plea' have been held to mean that a defendant is required to have been advised of the highest range of the possible sentence before pleading." *Id.* at 329, 487 P.2d at 396.

fendant be informed of parole eligibility[25] or of special conditions such as mandatory minimum sentences.[26]

The federal courts' interpretation of *Boykin* is, for the most part, in accordance with that of the Arizona appellate courts.[27] Thus, federal appellate courts have held that a defendant must be informed of the maximum possible punishment before entering a plea of guilty.[28] Federal courts also require that a defendant be informed of a mandatory special parole term,[29] on the grounds that it is an integral part of the maximum punishment to be imposed.[30] There is a lack of consensus among the federal courts as to whether a defendant must be informed that his guilty plea will result in parole ineligibility.[31] Such disclosure is not specifically required by the current version of federal rule 11.[32]

25. State v. Ross, 108 Ariz. 245, 247, 495 P.2d 841, 843 (1972). The Arizona Supreme Court in *Ross* suggested that it would be better practice for trial judges to ensure that the record affirmatively show that the defendant was informed of any restriction on parole. *Id.* at 247, 495 P.2d at 843. However, the court acknowledged that this was not part of the constitutional mandate of *Boykin*: "[N]othing in *Boykin* suggests any duty upon the court to advise a defendant regarding the prospects for parole . . . ." *Id.*

26. *See* State v. Rios, 114 Ariz. 505, 507, 562 P.2d 385, 387 (Ct. App. 1977). The guilty plea in *Rios* was accepted in 1972, prior to the adoption of the Arizona Rules of Criminal Procedure. The court in *Rios* noted that prior to the adoption of the rules, there was no requirement that convictions on guilty pleas be invalidated due to the failure of the trial court to inform a defendant of any special minimum sentence provisions. *Id.*

27. *Compare* State v. Church, 109 Ariz. 39, 41, 504 P.2d 940, 942 (1973), *and* State v. Carr, 108 Ariz. 203, 207, 495 P.2d 134, 138 (1972), *with* Keel v. United States, 572 F.2d 1135, 1135-36 (5th Cir. 1978), *and* Schriever v. United States, 553 F.2d 1152, 1154 (8th Cir. 1977).

28. *See* Keel v. United States, 572 F.2d 1135, 1135-36 (5th Cir. 1978); Schriever v. United States, 553 F.2d 1152, 1154 (8th Cir. 1977); United States v. Davis, 544 F.2d 1056, 1058 (10th Cir. 1976). In *Keel v. United States*, the trial judge erroneously informed the defendant that the maximum possible punishment was 45 years; in fact, the maximum possible was 25 years. Despite the fact that the 12-year sentence actually imposed was the sentence for which the defendant had bargained, and despite the absence of prejudice to the defendant, the court vacated the guilty plea. 572 F.2d at 1135. The court stated that "the 5th circuit now requires strict compliance with the terms of new rule 11." *Id.* at 1137. *Accord*, State v. Howell, 109 Ariz. 165, 166-67, 506 P.2d 1059, 1060-61 (1973); State v. Church, 109 Ariz. 39, 41, 504 P.2d 940, 942 (1973); State v. Carr, 108 Ariz. 203, 207, 495 P.2d 134, 138 (1972).

29. *See* United States v. Del Prete, 567 F.2d 928, 929 (9th Cir. 1978); United States v. Hamilton, 553 F.2d 63, 65 (10th Cir. 1977); United States v. Watson, 548 F.2d 1058, 1061 (D.C. Cir. 1977); United States v. Kattou, 548 F.2d 760, 761 (8th Cir. 1977).

In *United States v. Watson*, 548 F.2d 1058 (D.C. Cir. 1977), the court made clear that the 1975 amendment to rule 11 did not affect the requirement that a defendant be informed of the mandatory special parole term: "we regard its [rule 11] mandate that a defendant be informed of the 'maximum possible sentence' as continuing to require that he be informed of the mandatory special parole term." *Id.* at 1061. *But see* United States v. Adams, 566 F.2d 962, 969 (5th Cir. 1978) (holding that explanation of mandatory special parole term was not required under the language of newly amended rule 11). *See* note 18 *supra*.

For a general discussion of the effect upon guilty plea procedures caused by the changes in rule 11, see Hoffman, *Pleas of Guilty in the Federal Courts*, PRAC. LAW., Sept. 1, 1976, at 11; Note, *Revised Federal Rule 11: Tighter Guidelines for Pleas in Criminal Cases*, 44 FORDHAM L. REV. 1010 (1976).

30. *See* Yothers v. United States, 572 F.2d 1326, 1328 (9th Cir. 1978); United States v. Watson, 548 F.2d 1058, 1061 (D.C. Cir. 1977); Ferguson v. United States, 513 F.2d 1011, 1011-12 (2d Cir. 1975).

31. For the view that such information must be imparted to the defendant, see Del Vecchio v. United States, 556 F.2d 106, 108 (2d Cir. 1977); Durant v. United States, 410 F.2d 689, 693 (1st Cir. 1969). *Contra*, Herrera v. United States, 507 F.2d 143, 144 (5th Cir. 1975).

32. FED. R. CRIM. P. 11. See note 18 *supra*.

The rule does, however, explicitly require that a defendant be informed of any mandatory minimum sentencing provisions.[33]

Finally, there is no express constitutional requirement that the trial judge personally impart the required information to the defendant at the guilty plea proceeding.[34] Courts have interpreted *Boykin* as requiring only that the "accused be in fact aware of these matters regardless of the source from where the information comes. No specific formula need be followed, as long as he knows of the consequences of his guilty plea."[35]

Requirements of the Arizona Rules of Criminal Procedure

Arizona rule 17.2 requires that the trial court address the defendant personally and inform him of and determine that he understands "the nature and range of possible sentence for the offense to which the plea is offered, including any special conditions regarding sentence, parole or commutation imposed by statute . . . ."[36]

Several cases have required the courts to interpret the provisions of rule 17.2. The Arizona Supreme Court in *State v. Ellis*[37] dealt with a situation in which the trial court had failed to inform the defendant, prior to the acceptance of his guilty plea, of the special conditions of the Arizona robbery statute which provides that a defendant shall not be eligible for probation, pardon, or parole until he has served the minimum sentence imposed.[38] The *Ellis* court found the trial court's action to be a violation of rule 17.2.[39]

A similar sentencing provision, which denies the possibility of parole until a defendant has served the minimum sentence imposed under the rape statute,[40] was at issue in *State v. Soloman*.[41] The *Soloman* court found a clear violation of rule 17.2 because the trial court failed to inform the defendant of the special mandatory minimum sentencing

33. *Id.*

34. *See* Boykin v. Alabama, 395 U.S. 238, 244 (1969). The Court in *Boykin* did indicate that a trial judge has an obligation to ensure that a defendant has a complete understanding of the consequences of his plea, but the Court did not indicate that the Constitution required that the trial judge be the sole source of that information. *Id.*

35. State v. Stevens, 98 Idaho 131, 132, 559 P.2d 310, 311 (1977); Cox v. State, 205 Kan. 867, 875, 473 P.2d 106, 114 (1970); Lutton v. Smith, 8 Wash. App. 822, 823-24, 509 P.2d 58, 59-60 (1973). The Idaho Supreme Court in *Stevens* observed that "post-*Boykin* cases appear to require only that a defendant be advised of his rights and the consequences of his plea by some source, not necessarily the court." 98 Idaho at 132, 559 P.2d at 311.

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

37. 117 Ariz. 329, 572 P.2d 791 (1977).

38. *Id.* at 332, 572 P.2d at 794. The robbery statute at issue in *Ellis* was ARIZ. REV. STAT. ANN. § 13-643(B) (1973).

39. 117 Ariz. at 332, 572 P.2d at 794.

40. ARIZ. REV. STAT. ANN. § 13-614(c) (1973).

41. 117 Ariz. 228, 571 P.2d 1024 (1977).

provision.[42] Arizona decisions have consistently held that a defendant must be informed of these special conditions in order to render an intelligent and voluntary guilty plea in compliance with rule 17.2.[43]

In their interpretation of rule 17.2(b), the Arizona courts have made clear that the provision requires that a defendant be informed of any mandatory minimum sentencing provisions[44] and of ineligibility for parole.[45] In addition, a defendant must be informed of other special sentencing provisions, such as the unavailability of good behavior deductions,[46] and of minimum periods of confinement imposed where the pleading defendant is placed on probation.[47]

Given the interpretation of the *Boykin* decision by the Arizona courts during the period from 1969 to 1973,[48] certain provisions of rule 17.2 appear to exceed the requirements of the Constitution. Prior to the adoption of the Arizona Rules of Criminal Procedure, Arizona courts did not interpret *Boykin* as requiring that defendants be informed of parole ineligibility.[49] Yet both the language of rule 17.2[50] and subsequent Arizona decisions confirm that this information must now be imparted to the defendant.[51] The Arizona Court of Appeals has ruled that advice as to parole ineligibility is not required by *Boykin*[52] but is required by rule 17.2(b), explicitly overruling prior Arizona law.[53]

42. *Id.* at 230-31, 571 P.2d at 1026-27.

43. The trial court in State v. Davis, 115 Ariz. 153, 564 P.2d 104 (Ct. App. 1977), erroneously informed the defendant that he could receive probation. The judge also failed to inform the defendant that he would have to serve, as a mandatory minimum, the sentence actually imposed before he would be eligible for parole. The court of appeals found the error reversible and indicated that *vacatur* of the guilty plea and reversal, rather than remand for a hearing, was the appropriate remedy where the record affirmatively demonstrated that the trial court misinformed the defendant as to the range of possible sentences. *Id.* at 155, 564 P.2d at 106. *See* State v. Holbert, 114 Ariz. 244, 245, 560 P.2d 428, 429 (1977); State v. Johnson, 116 Ariz. 221, 223-24, 568 P.2d 1119, 1121-22 (Ct. App. 1977).

44. The trial court in State v. Hill, 118 Ariz. 157, 575 P.2d 356 (Ct. App. 1978), advised the defendant that he could receive probation as a minimum sentence, or a maximum term of life imprisonment, but he was not advised that if the court determined that he should be imprisoned, the mandatory minimum sentence was five years. *Id.* Because the defendant received a sentence substantially over the mandatory minimum prison term (nine and a half years), the appeals court found the trial court's noncompliance with rule 17.2(b) to be reversible error. *Id.* at 160, 575 P.2d at 359.

In State v. Gil, 27 Ariz. App. 190, 552 P.2d 1205 (1976), a case factually similar to *State v. Soloman*, the defendant was informed by the trial court that the minimum possible sentence was probation, when in actuality the mandatory minimum was five years. The court held that the trial court's actions constituted a violation of rule 17.2. *Id.* at 191, 552 P.2d at 1206. *See also* State v. Morones, 112 Ariz. 369, 370, 542 P.2d 28, 29 (1975).

45. State v. Rios, 113 Ariz. 30, 32, 545 P.28 954, 956 (1976), *overruled in* State v. Rogel, 116 Ariz. 114, 568 P.28 421 (1977); State v. Esquer, 26 Ariz. App. 124, 125, 546 P.2d 849, 850 (1976); State v. Riley, 24 Ariz. App. 412, 413-14, 539 P.2d 526, 527-28 (1975).

46. State v. Cuthbertson, 117 Ariz. 62, 63-64, 570 P.2d 1075, 1076-77 (1977).

47. State v. Lopez, 27 Ariz. App. 626, 628, 557 P.2d 558, 560 (1976).

48. See text & notes 24-26 *supra.*

49. State v. Ross, 108 Ariz. 245, 247, 495 P.2d 841, 843 (1972). See text & note 25 *supra.*

50. ARIZ. R. CRIM. P. 17.2.

51. *See* cases cited note 45 *supra.*

52. State v. Riley, 24 Ariz. App. 412, 413-14, 539 P.2d 526, 527-28 (1975).

53. *Id.* at 414, 539 P.2d at 528. In *Riley*, the court noted the Arizona Supreme Court's deci-

Similarly, Arizona courts did not interpret *Boykin* as requiring that a defendant be made aware of any mandatory minimum sentencing provisions.[54] However, a decision subsequent to the adoption of rule 17.2 has established that such information must now be conveyed to the defendant,[55] and an Arizona court recently acknowledged that this provision of rule 17.2 exceeds constitutional commands.[56]

The Arizona Supreme Court in *State v. Cuthbertson*[57] acknowledged that the provision of rule 17.2, which requires that a pleading defendant be informed of any "special conditions regarding sentence,"[58] exceeds constitutional requirements.[59] The court indicated that the *Boykin* requirements were of constitutional dimension and must be complied with,[60] but that the special sentencing conditions found in the Arizona statutes need not be imparted to the defendant in order to adhere to the Constitution.[61] Thus, the court acknowledged that a failure by the trial court to impart specific information to a defendant, which would not constitute error under the constitutional *Boykin* standard, could constitute error under rule 17.2(b).[62]

In addition to determining what information must be disclosed to a defendant, Arizona courts have been required to determine the appropriate remedy when noncompliance with the established standard occurs.

Noncompliance with Rules: Standards for Reversible Error

Several recent Arizona Supreme Court decisions have involved determination of the appropriate remedy when a trial court fails to comply with the provisions of rule 17.2.[63] In 1975, *State v. Morones*[64] held that if a defendant is not prejudiced by the trial judge's failure to inform him of a special sentencing provision, the error is merely "tech-

sion in State v. Ross, 108 Ariz. 245, 247, 495 P.2d 841, 843 (1972) (holding that *Boykin* did not require that defendant be informed of parole eligibility) was overruled by Arizona Rule of Criminal Procedure 17.2(b). 24 Ariz. App. at 414, 539 P.2d at 528.

54. *See* State v. Morones, 112 Ariz. 369, 370, 542 P.2d 28, 29 (1975); State v. Ross, 108 Ariz. 245, 247, 495 P.2d 841, 843 (1972); State v. Rios, 114 Ariz. 505, 507, 562 P.2d 385, 387 (Ct. App. 1977).

55. *See* State v. Soloman, 117 Ariz. 228, 230-31, 571 P.2d 1024, 1026-27 (1977).

56. State v. Hill, 118 Ariz. 157, 160, 575 P.2d 356, 359 (Ct. App. 1978).

57. 117 Ariz. 62, 570 P.2d 1075 (1977).

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

59. 117 Ariz. at 64, 570 P.2d at 1077.

60. *Id.*

61. *Id.*

62. *Id. See also* State v. Hill, 118 Ariz. 157, 160, 575 P.2d 356, 359 (Ct. App. 1978).

63. State v. Ellis, 117 Ariz. 329, 333, 572 P.2d 791, 795 (1977); State v. Cuthbertson, 117 Ariz. 62, 64, 570 P.2d 1075, 1077 (1977); State v. Rogel, 116 Ariz. 114, 116, 568 P.2d 421, 423, (1977); State v. Rios, 113 Ariz. 30, 32-33, 545 P.2d 954, 956-57 (1976); State v. Morones, 112 Ariz. 369, 370, 542 P.2d 28, 29 (1975).

64. 112 Ariz. 369, 542 P.2d 28 (1975).

nical" and does not constitute grounds for reversal.[65] In *State v. Rios*,[66] the Arizona Supreme Court explicitly rejected the "no prejudice" standard that it had articulated in *Morones* and held that "[a] plea cannot be considered 'intelligently' made where . . . there is no evidence that the defendant was at any stage of the prosecution provided information required to be disclosed to him under rule 17.2."[67]

The changing attitude of the court regarding this issue is exemplified by two post-*Rios* cases, *State v. Rogel*[68] and *State v. Cuthbertson*,[69] in which the court refused to vacate guilty pleas on grounds of technical violations of rule 17.2.[70] The court did not explicitly overrule the *Rios* decision in either case.[71] Finally, in *State v. Ellis*,[72] the court conceded that *Rios* had been implicitly rejected in prior decisions.[73] The court returned to a "no prejudice" standard, similar to that adopted in *Morones*.[74] The *Ellis* court indicated that violations of rule 17.2 do not necessarily require *vacatur* of a guilty plea.[75] In each case, the appellate court must examine the sentence actually imposed to determine if the defendant has been prejudiced by the trial judge's noncompliance with rule 17.2.[76] The court articulated the new standard in this man-

65. *Id.* at 370, 542 P.2d at 29. In *Morones*, the trial court did not advise the defendant of a special sentencing provision whereby he was required to serve a minimum five years in jail. However, under the sentence actually imposed by the trial court, the defendant would not have been eligible for parole within five years anyway; thus, the court found the error to be nonprejudicial. *Id.*

66. 113 Ariz. 30, 545 P.2d 954 (1976), *overruled in* State v. Rogel, 116 Ariz. 114, 568 P.2d 421 (1977).

67. *Id.* at 32, 545 P.2d at 956.

68. 116 Ariz. 114, 568 P.2d 421 (1977).

69. 117 Ariz. 62, 570 P.2d 1075 (1977).

70. In *Rogel*, the trial court failed to advise the defendant of the possibility of a $200 fine that could have been imposed in addition to any prison term. The fine was not actually imposed. The court refused to vacate the guilty pleas because of the technical noncompliance. 116 Ariz. at 116, 568 P.2d at 423.

In *Cuthbertson*, the trial court failed to inform the defendant that he would not be eligible for parole until he had served the minimum sentence actually imposed. Although the court held this failure to be reversible error, the court focused on a "prejudice" standard and indicated that mere technical violations would not provide sufficient basis for *vacatur* of a guilty plea. 117 Ariz. at 64, 568 P.2d at 1077.

71. State v. Rogel, 116 Ariz. 114, 116, 568 P.2d 421, 423 (1977). In *Rogel*, the court attempted to distinguish the case at hand from *Rios* by suggesting that while the imposition of the fine may have been a "technical possibility," it was not an "operative element" of the sentence actually imposed. *Id.* However, the *Rios* court had established an absolute "prejudice" rule and did not indicate that the effect on the sentence actually imposed was to be the dispositive factor. 113 Ariz. 30, 32, 545 P.2d 954, 956 (1976). Thus, the *Rogel* court actually overruled the *Rios* standard, as the court in *State v. Ellis* later conceded. 117 Ariz. 329, 333, 572 P.2d 791, 795 (1977).

The court in *Cuthbertson* did not expressly attempt to distinguish *Rios*. However, the court did focus on the prejudice to the defendant and the relationship of the error to the sentence actually imposed; thus, the opinion followed the *Rogel* standard. 117 Ariz. 62, 64, 570 P.2d 1075, 1077 (1977).

72. 117 Ariz. 329, 572 P.2d 791 (1977).

73. *See id.* at 333, 572 P.2d at 795.

74. *Id.*

75. *Id.*

76. *Id.*

ner:

> If the sentence contains any provision that the defendant was not aware of, that affects the manner in which the sentence or date of parole is computed, either the guilty plea should be vacated or the case remanded to determine if the defendant was actually aware of the provision absent from the record.[77]

In *Ellis*, the record of the trial proceedings did not indicate that the defendant was ever informed of a special sentencing condition whereby he was not eligible for parole until he had served the minimum sentence imposed.[78] Applying the standard enunciated, the court remanded the case for an evidentiary hearing to determine if the defendant was actually aware of the sentencing provision.[79] Thus, the *Ellis* standard requires a showing of prejudice by the defendant in that any alleged error must affect the manner in which a sentence is imposed.[80]

A comparison of the Arizona and federal standards reveals a divergence in the respective rules of criminal procedure as to the remedy for noncompliance. The approach that federal appellate courts take when a trial court fails to comply strictly with the provisions of federal rule 11 depends on whether a conviction is being attacked directly or collaterally.[81]

In a case involving a direct appeal, the United States Supreme Court in *McCarthy v. United States*[82] held that "a defendant is entitled to plead anew if a United States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11."[83] The Court made clear that its construction of the rule was based on its supervisory power over the lower federal courts and not constitutional authority.[84] Thus, federal courts have required that guilty pleas be vacated even where there has been nonprejudicial technical noncompliance with the strictures of rule 11 when the issue was raised on direct appeal.[85]

The Supreme Court in *Davis v. United States*[86] established a differ-

77. *Id.*
78. *Id.* at 332, 572 P.2d at 794.
79. *Id.* at 333, 572 P.2d at 795.
80. *Id.*
81. *See* Keel v. United States, 572 F.2d 1135, 1137 (5th Cir. 1978); Del Vecchio v. United States, 556 F.2d 106, 109 (2d Cir. 1977); Schriever v. United States, 553 F.2d 1152, 1154 (8th Cir. 1977); text & notes 83-91 *infra*.
82. 394 U.S. 459 (1969).
83. *Id.* at 463-64.
84. *Id.* at 464.
85. *See* Keel v. United States, 572 F.2d 1135, 1137 (5th Cir. 1978); United States v. Hart, 566 F.2d 977, 978 (5th Cir. 1978); United States v. Watson, 548 F.28 1058, 1062 (D.C. Cir. 1977); United States v. Journet, 544 F.2d 633, 634 (2d Cir. 1976).
86. 417 U.S. 333 (1974).

ent standard for examining noncompliance with rule 11 where a guilty plea conviction is being attacked collaterally. The Court stated that "collateral relief is not available when all that is shown is a failure to comply with the formal requirements of a rule of criminal procedure" unless the defendant is prejudiced by the noncompliance.[87]

In establishing a per se rule in *McCarthy*,[88] the Supreme Court emphasized the purposes of federal rule 11. The Court suggested that strict compliance is not only essential in order to assist the district court judge in determining that a defendant's plea is voluntary,[89] but also to produce a complete record of "the factors relevant to [the] voluntariness determination."[90] Thus the Court noted that "the more meticulously the Rule is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas."[91]

The standard for reviewing noncompliance with Arizona rule 17.2, articluated by the Arizona Supreme Court in *Ellis*, requires that any alleged error affect the manner in which the sentence actually imposed was computed.[92] This requirement that prejudice be shown is similar to that imposed by federal courts in cases in which the defendant seeks collateral relief.[93]

The policy reasons for refusing to overturn a conviction upon collateral attack absent a showing of prejudice are that strict enforcement of the rule years after the plea has been taken "erodes the principle of finality in criminal cases and may allow an obviously guilty defendant to go free because it is impossible, as a practical matter, to retry him."[94] These policy justifications do not apply to the direct appeal.[95] When a

87. *Id.* at 346. Since the *Davis* decision, federal courts have generally been reluctant to allow withdrawal of guilty pleas where the guilty plea is being attacked collaterally. Del Vecchio v. United States, 556 F.2d 106, 109 (2d Cir. 1977); Schriever v. United States, 553 F.2d 1152, 1154 (8th Cir. 1977); United States v. Hamilton, 553 F.2d 63, 65 (10th Cir. 1977); Bachner v. United States, 517 F.2d 589, 597 (7th Cir. 1975).

Collateral relief from a guilty plea is commonly sought by way of a 28 U.S.C. § 2255 habeas corpus petition. Del Vecchio v. United States, 556 F.2d 106, 107 (1977).

The defendant in *Del Vecchio* sought *vacatur* of a guilty plea by way of petition under 28 U.S.C. § 2255. The defendant had pled guilty to several violations of the federal narcotics laws. Almost two and one-half years later, Del Vecchio sought to withdraw his guilty plea and filed a petition under § 2255. 556 F.2d at 108. The court of appeals denied collateral relief on the ground that the trial court's noncompliance with Federal Rule of Criminal Procedure 11 had not been prejudicial to the defendant. *Id.* at 112-13.

88. 394 U.S. 459 (1969).

89. *Id.* at 465.

90. *Id.*

91. *Id.* (footnotes omitted).

92. 117 Ariz. 329, 333, 572 P.2d 791, 795 (1977).

93. *See* Del Vecchio v. United States, 556 F.2d 106, 109 (2d Cir. 1977); text & notes 86-87 *supra*.

94. *Id.* at 109.

95. *Id.*

plea is vacated upon direct appeal, witnesses will normally still be available.[96] Thus the per se rule articulated by the *McCarthy* Court for cases of direct appeal should be utilized by Arizona courts when examining instances of noncompliance upon direct appeal. For direct appeal cases, this standard is more appropriate than the *Ellis* standard. As a federal court of appeals stated with reference to the direct appeal, "the price of a short delay is a modest one to pay to correct the error of a government official . . . ."[97] The Arizona Rules of Criminal Procedure ensure that when a guilty plea is vacated by an Arizona appellate court upon direct appeal, no more than a short delay will result.[98] Thus the policies that support the federal per se rule also apply in Arizona.

Conclusion

The United States Constitution and the Arizona Rules of Criminal Procedure require that a defendant be informed of specific information relating to punishment before his guilty plea can be accepted. In view of the constitutional requirements imposed by the Supreme Court in *Boykin v. Alabama*, the provisions of the Arizona Rules of Criminal Procedure appear to exceed constitutional commands.

Arizona appellate courts now require that prejudice be shown by a pleading defendant before the court will vacate a guilty plea due to noncompliance by the trial court with rule 17.2(b). However, policy considerations indicate that in cases of direct appeal Arizona should follow the United States Supreme Court's holding requiring per se reversal for noncompliance with that rule.

96. *Id.*

97. *Id.*

98. ARIZ. R. CRIM. P. 8.2(d); Interview with Alan Minker, Office of the Public Defender, Pima County, Arizona, in Tucson, (Jan. 5, 1979). Rule 8.2(d) provides that "a trial ordered after a mistrial, upon a motion for a new trial, or upon the reversal of a judgment by an Appellate Court shall commence within 60 days of the entry of the order of the court or service of the mandate of the Appellate Court." ARIZ. R. CRIM. P. 8.2(d). This 60-day period for retrial after *vacatur* of a guilty plea upon direct appeal in Arizona should be contrasted with the time allowed by federal statute for the seeking of collateral relief from a guilty plea. 28 U.S.C. § 2255 (1976) provides that a habeas corpus petition under that section seeking *vacatur* of a guilty plea "may be made at any time." Lengthy delays have occurred under this statute. *See* Del Vecchio v. United States, 556 F.2d 106, 107-08 (1977) (delay of two and one-half years from entry of guilty plea to filing of habeas corpus petition); Schriever v. United States, 553 F.2d 1152, 1153 (1977) (delay of one year from entry of guilty plea to filing of habeas corpus petition); United States v. Watson, 548 F.2d 1058, 1059-60 (1977) (delay of one and one-half years from entry of guilty plea to filing of habeas corpus petition); McRae v. United States, 540 F.2d 943, 944 (1977) (delay of one year from entry of guilty plea to filing of habeas corpus petition).

IV. EVIDENCE

A. ADMISSIBILITY OF EVIDENCE OF PRIOR BAD ACTS IN CRIMINAL PROSECUTIONS

The general rule against admissibility of evidence of prior bad acts in a criminal prosecution[1] is subject to specific exceptions including the "emotional propensity" exception.[2] In *State v. Treadaway*,[3] the Arizona Supreme Court applied the general rule and held that admission of evidence of a prior act of child molesting constitutes reversible error where the defendant is charged with sodomy "unless and until there is reliable expert testimony that such an act three years prior shows a continuing emotional propensity to commit the act charged."[4] In reversing the trial court's decision admitting the evidence of prior bad acts, the court distinguished the *Treadaway* facts from those in *State v. McFarlin*,[5] where the "emotional propensity exception" was formally recognized by the court.[6]

The *Treadaway* case began when a mother found her six-year-old son dead in his waterbed. An autopsy revealed that the boy had died of asphyxia and had been sodomized.[7] Jonathan Charles Treadaway was charged with sodomy and first degree murder on the basis of circumstantial evidence. Two palm prints found on the exterior of the boy's bedroom window and some pubic hairs recovered from the body of the victim linked Treadaway to the crime.[8] At trial the state also offered as evidence of emotional propensity the fact that three years prior the defendant had taken a thirteen-year-old boy, undressed him, and committed fellatio and anilingus on him.[9] Treadaway was con-

1. *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 190, at 447 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK]; M. UDALL, ARIZONA LAW OF EVIDENCE § 114, at 218 (1st ed. 1960); 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 192-194, at 641-52 (3d ed. 1940).

2. The exceptions have in themselves become a rule recognized by both the common and statutory laws. *See* People v. Molineaux, 168 N.Y. 264, 291-92, 61 N.E. 286, 293-94 (1901); FED. R. EVID. 404(b) (permitting evidence of other crimes as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident).

3. 116 Ariz. 163, 568 P.2d 1061 (1977).

4. *Id.* at 167, 568 P.2d at 1065. See text & note 65 *infra*.

5. 110 Ariz. 225, 517 P.2d 87 (1973).

6. *Id.* at 228, 517 P.2d at 90.

7. 116 Ariz. 163, 164, 568 P.2d 1061, 1062.

8. *Id.* at 164-65, 568 P.2d at 1062-63.

9. *Id.* at 165, 568 P.2d at 1063. Although the trial court admitted evidence of the prior sex offense, it refused to admit the testimony of a psychiatrist, called by the defense, that the defendant was incapable of inflicting harm on anyone. The trial court sustained the prosecutor's objections that the testimony was irrelevant, immaterial, incompetent, hearsay, and without proper foundation. *Id.* at 168, 568 P.2d at 1066.

victed and sentenced to death,[10] but the Arizona Supreme Court reversed and remanded the case to the trial court with instructions.[11]

This casenote will first review the general rule excluding evidence of prior bad acts and consider its established exceptions as well as its potential for abuse. The *McFarlin* test for the emotional propensity exception will be discussed as a prelude to an analysis of the *Treadaway* addition to the exception. This discussion will be followed by an analysis of whether the emotional propensity exception continues to be tenable under the newly enacted Arizona Rules of Evidence.

Exclusion of Evidence of Prior Bad Acts

The principle is well established that the prosecutor cannot introduce evidence of a defendant's other criminal acts unless the evidence is relevant for some purpose other than to show the defendant's disposition to commit the act charged.[12] Frequently, it is admitted as rele-

10. Treadaway was sentenced to death for the first degree murder charge and to a term of not less than 20 years nor more than life for the sodomy conviction. *Id.* at 165, 568 P.2d at 1063.

11. The court stated that upon remand the trial court should give consideration to ARIZ. R. EVID. 405 which permits opinion evidence such as that offered by the defense psychiatrist as proof of character. 116 Ariz. at 168, 568 P.2d at 1066. Rule 405 is a substantial departure from the common law where opinion testimony was inadmissible as proof of character. The explicit allowance of inquiry into specific acts of conduct on cross-examination contemplates that testimony of such conduct is not usually permissible on the direct examination of an opinion witness to character. ARIZ. R. EVID. 405 provides:

> (a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

This rule raises an interesting question which Justice Holohan raised in his dissent. "On cross-examination can the state inquire of Dr. Tuchler whether he considered the sexual attack on the 13-year-old boy in forming his opinion of the peaceful nature of the defendant?" 116 Ariz. at 171, 568 P.2d at 1069. Rule 405(a) would permit the prosecution to inquire into specific instances of conduct on cross-examination provided that the defendant first offered opinion testimony as to proof of his good character. ARIZ. R. EVID. 405(a).

12. *See* Lovely v. United States, 169 F.2d 386, 389 (4th Cir. 1948); United States v. Rees, 193 F. Supp. 849, 856 (D. Md. 1961); State v. Mitchell, 112 Ariz. 592, 594, 545 P.2d 49, 51 (1976); State v. Lapage, 57 N.H. 245, 289, 295, 299, 303 (1876). FED. R. EVID. 404 codifies the exclusionary rule:

> (a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
>
> (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (3) Character of witness. Evidence of the character of witness, as provided in rules 607, 608, and 609.
>
> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of mo-

vant for such purposes as proving motive, intent, the absence of mistake or accident, a common scheme or plan embracing the commission of two or more crimes, and identity of the accused.[13] In the absence of a recognized exception, introduction of evidence of the bad character of the accused is forbidden unless and until the accused offers evidence of good character.[14] The rationale behind this doctrine is that the prejudicial effect of the evidence tends to outweigh its probative value.[15]

Evidence of prior bad acts is so potentially damaging to the accused that notwithstanding its relevancy, admission is not automatic even when it fits within an exception.[16] The trial judge is obliged to determine whether the probative value is substantially outweighed by the risk and danger of unfair prejudice and, if so, to exclude it.[17] This determination is not to be confused with the issue of whether evidence of other crimes is relevant. Character evidence is excluded not because

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tive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Arizona has adopted Federal Rule 404. *See* ARIZ. R. EVID. 404.

This basic tenet of law is recognized by every major commentator. *See generally* MCCORMICK, *supra* note 1, §§ 55-57, at 449-56; §§ 192-94, at 641-52; M. UDALL, *supra* note 1, §§ 114-15, at 217-39; 1 J. WIGMORE, *supra* note 1, § 57, at 454-55. *See also* MODEL CODE OF EVIDENCE rule 311 (1942) which states that:

> evidence that a person committed a crime or civil wrong on a specified occasion is inadmissible as tending to prove that he committed a crime or civil wrong on another occasion if, but only if, the evidence is relevant solely as tending to prove his dispositfon to commit such a crime or civil wrong or to commit crimes or civil wrongs generally.

But see United States v. Rocha, 553 F.2d 615, 616 (9th Cir. 1977) (evidence of other crimes excluded *only* where tending to prove criminal character); D. LOUISELL & C. MUELLER, 2 FEDERAL EVIDENCE § 140, at 114 (1978) [hereinafter cited as LOUISELL] which states: "So frequent is the use of prior crimes evidence to prove these matters that it might aid clarity if the basic rule excluding evidence of character to prove conduct were recast, at least in this particular context, as a basic rule of admissibility."

13. People v. Molineux, 168 N.Y. 264, 291-92, 61 N.E. 286, 293-94 (1901); *accord,* Lovely v. United States, 169 F.2d 386, 388 (4th Cir. 1948) (evidence of similar offenses close in time and place may be relevant on matters of identity, guilty knowledge, motive, or intent, where these are in issue, or to establish a plan or design); State v. Kelly, 111 Ariz. 181, 185, 526 P.2d 720, 724 (1974). *See* ARIZ. R. EVID. 404(b) (evidence to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident is admissible).

Another vehicle by which the prosecution can make the jury aware of the prior criminal acts of the accused is by inquiring of the defendant's character witnesses on cross-examination whether they have heard that the accused had been convicted of certain specified crimes. *See* Michelson v. United States, 335 U.S. 469, 479 (1948); FED. R. EVID. 405(a), set out at note 11 *supra* (enunciating the rule that when opinion or reputation testimony is offered by the accused, the prosecution may inquire on cross-examination into relevant instances of conduct). *See* discussion note 11 *supra.*

14. Michelson v. United States, 335 U.S. 469, 479 (1948). *See, e.g.,* United States v. Masino, 275 F.2d 129, 133 (2d Cir. 1960); State v. Von Reeden, 104 Ariz. 404, 406-07, 454 P.2d 149, 151-52 (1969); People v. Westek, 31 Cal. 2d 469, 479-81, 190 P.2d 9, 15-16 (1948). *See generally* MCCORMICK, *supra* note 1, § 190, at 447.

15. *See* LOUISELL, *supra* note 12, § 140, at 113; MCCORMICK, *supra* note 1, § 190, at 447; 1 J. WIGMORE, *supra* note 1, § 194, at 650.

16. *See, e.g.,* United States v. Phillips, 401 F.2d 301, 305-06 (7th Cir. 1968); United States v. Bradwell, 388 F.2d 619, 622 (2d Cir.), *cert. denied,* 393 U.S. 867 (1968); State v. Sicks, 33 Or. App. 441, —, 576 P.2d 834, 836 (1978).

17. *See, e.g.,* United States v. Huff, 442 F.2d 885, 889 (D.C. Cir. 1971); United States v. Rees, 193 F. Supp. 849, 857 (D. Md. 1961); State v. Sicks, 33 Or. App. 441, —, 576 P.2d 834, 836 (1978); FED. R. EVID. 403. *See generally* MCCORMICK, *supra* note 1, § 190, at 453-54.

it is irrelevant but because it is so unduly prejudicial as to prevent the defendant from obtaining a fair trial.[18] The reasons behind this policy are several. Admission of such evidence may confuse the jury as to the issues, unfairly surprise the accused so that he or she must defend against crimes other than the one charged, or create a general atmosphere of prejudice and passion which may unduly influence the jury's decision.[19]

The trend has been to pigeonhole such evidence into one of the accepted purposes for which character evidence may be introduced.[20] The more cautious approach, however, considers such factors as the need for the evidence in light of that available to the prosecution,[21] the strength of the evidence of the prior crime,[22] the actual probative worth of the evidence, and the tendency of the evidence to increase jury hostility.[23]

In spite of the risks and dangers which adhere to the established exceptions, the exclusionary rule has been further relaxed in cases where the defendant is charged with a sexual offense and evidence is offered regarding other sexual offenses.[24] While it appears that the

18. *See* Michelson v. United States, 335 U.S. 469 (1948):

> It may almost be said that it is because of this indubitable Relevancy of such evidence that it is excluded. It is objectionable not because it has no appreciable probative value, but because it has too much. The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of the crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of the present charge.

Id. at 476 (quoting 1 J. WIGMORE, *supra* note 1, § 194, at 646). One jurist has remarked that "every experienced lawyer knows that a conviction is near certainty if the jury but conclude that the accused is a bad man." State v. Finley, 85 Ariz. 327, 336, 338 P.2d 790, 797 (1959) (Struckmeyer, J., dissenting).

19. *See* 1 J. WIGMORE, *supra* note 1, § 194, at 650.

20. Automatically shoehorning the evidence into one or more of the established exceptions is dangerous because highly prejudicial evidence offered under the rubric of one of the exceptions would be admissible, while evidence which might be highly probative and necessary might be excluded for want of a particular classification. *See* Comment, *Defining Standards for Determining the Admissibility of Evidence of Other Sex Offenses*, 25 U.C.L.A. L. REV. 261, 278 (1977). *See generally* MCCORMICK, *supra* note 1, § 190, at 453.

21. *See* Advisory Committee's Note to FED. R. EVID. 403 stating: "The availability of other means of proof may also be an appropriate factor."

22. *See* United States v. McMillan, 535 F.2d 1035, 1038 (8th Cir. 1976) (evidence of other crimes admissible if clear and convincing); United States v. San Martin, 505 F.2d 918, 921-22 (5th Cir. 1974) (prior crimes evidence was not "plain, clear and convincing" even though there was a conviction, "because only the fact of the offenses and not their circumstances was introduced").

23. *See* FED. R. EVID. 403 which states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *See generally* MCCORMICK, *supra* note 1, § 190, at 453.

24. State v. McDaniel, 80 Ariz. 381, 388, 298 P.2d 798, 802 (1956); Elliot v. State, 87 Ga. App. 456, 458, 74 S.E.2d 366, 368 (1953); Slough, *Relevancy Unraveled*, 6 KAN. L. REV. 38 (1957).

> [C]ourts have lost all feeling for tradition and the consequences of prejudice, when applying rules of exclusion in prosecutions for sex offenses. A strong and stubborn line of contemporary authority holds that evidence of other crimes is admissible for the purpose of showing a degenerate disposition, a lustful disposition or an inclination to commit sexual offenses.

Id. at 51. See Comment, *Admitting Evidence of Prior Sex Offenses—A New Trend*, 58 Nw. U.L.

danger of prejudicial impact is even greater when a sexual offense is being tried,[25] often no adequate measures are taken to insure that the defendant will receive the fundamental evidentiary safeguards that the exclusionary rule provides.[26] Analysis of the cases indicates that the standards applied have been inconsistent.[27] The issue of relevancy is often mechanically handled by shoehorning the evidence into one of the established exceptions.[28] The result is that evidence is admitted solely for the purpose of showing the defendant's inclination to commit the crime charged.[29] Despite this tendency to undermine the general exclusionary rule,[30] few attempts have been made to explain the rationale for such a radical departure from the general rule.[31]

REV. 108, 110 & n.11 (1963). *Compare* 2 J. WIGMORE, *supra* note 1, § 357, at 267-69 (proposing that in some cases courts ought to be more liberal in admitting propensity-linked evidence of acts with others) *with* MCCORMICK, *supra* note 1, § 190, at 449 (arguing that similar sexual crimes with others do not show propensity).

25. *See* Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses*, 6 ARIZ. L. REV. 212, 235 (1965); 37 MINN. L. REV. 608, 614 (1953).

26. See text & notes 45-50 *infra*.

27. *Compare* State v. Godsoe, 107 Ariz. 367, 370, 489 P.2d 4, 7 (1971) (no error in jury instructions which stated that evidence of other similar acts demonstrating a propensity towards sexual abnormality might be considered by the jury along with all other evidence bearing on defendant's guilt) *with* State v. Goldsmith, 104 Ariz. 226, 230, 450 P.2d 684, 688 (1969) (the emotional propensity rule must be coupled with a "system, plan or scheme embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other").

28. *See* MCCORMICK, *supra* note 1, § 190, at 450 n.41; Comment, *supra* note 20, at 278-79. See discussion text & note 20 *supra*.

29. *See* Gregg, *supra* note 25, at 214-15; 40 MINN. L. REV. 694, 698 (1956). The tendency to distort an exception so that prior sex offenses come within its domain is evident in State v. Finley, 85 Ariz. 327, 334, 338 P.2d 790, 795-96 (1959), where the Arizona Supreme Court approved admission of evidence of a prior rape allegedly committed by the accused five days earlier and 500 miles away to prove a plan or design to commit the crime. The dissenting opinion concluded that the similarities between the two crimes were not relevant to the preconceived plan notion. *Id.* at 338, 338 P.2d at 798 (Struckmeyer, J., dissenting). For an interesting discussion on evidence admitted under the rubric of the design, scheme, or plan exception which otherwise would be barred under the exclusionary rule as tending to show propensity and criminal character, see Comment, *supra* note 20, at 280-84 & nn. 89-108.

Other courts have abused the exceptions to the exclusionary rule by admitting prior sex offenses to show motive and intent when in fact the evidence is only probative of the defendant's lustful character and depraved disposition. *See* State v. Schlak, 253 Iowa 113, 116-17, 111 N.W.2d 289, 291 (1961) (evidence offered to show lewd disposition was admitted as a form of motive or desire to satisfy a lustful inclination). *But see* Parris v. State, 43 Ala. App. 351, 353, 190 So. 2d 564, 565 (1966) (excluding evidence of other sex offenses with third persons as not probative of identity); Davis v. State, 115 Ga. App. 338, 340-41, 154 S.E.2d 462, 464 (1967) (evidence that defendant had committed peeping Tom offenses two years previously in the same general area was inadmissible as it did not show intent); People v. Oaks, 24 Mich. App. 7, 9, 179 N.W.2d 688, 689 (1970) (motive, intent, or scheme irrelevant in offenses of sodomy, gross indecency, and sexual intercourse with a minor).

30. See discussion text & notes 25-29 *supra*.

31. *See* Hodge v. United States, 126 F.2d 849, 849, (D.C. Cir. 1942), which states the rationale as follows:

> In prosecutions for sex offenses, however, there is a well established exception, the theory of which is that as the mental disposition of the defendant at the time of the act charged is relevant, evidence that at some prior time he was similarly disposed is also relevant. Evidence of prior acts between the same parties is admissible, therefore, as showing a disposition to commit the act charged, the probabilities being that the emotional predisposition or passion will continue.

In State v. Finley, 85 Ariz. 327, 334, 338 P.2d 790, 795 (1959), the Arizona Supreme Court concluded:

The admissibility of evidence in sexual crimes cases is treated differently than in nonsexual ones.[32] A special exception which the courts label as emotional propensity, lewd disposition, continuing inclination, or depraved sexual instinct has widely and unjustifiably expanded the exceptions to exclusion to the point where they overshadow the rule.[33] The majority of courts permit the prosecution to present evidence of similar prior sexual offenses involving the same prosecutrix in a prosecution for a sexual offense.[34] Such evidence is used to show a disposition to commit the act charged, apparently in the belief that the emotional predisposition or passion will continue.[35]

In determining admissibility under the emotional propensity exception, the courts consider such factors as the type of sexual crime committed,[36] the similarity between the crimes,[37] and the closeness in

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The rationale underlying the admissibility of evidence of prior acts of rape is partially for the purpose of showing the defendant's criminal desires and lustful propensity to commit such a crime. The courts appear to be more liberal in admitting, as proof of his guilt, evidence of similar sex offenses than when one is charged with non-sex offenses.

32. *See* text & note 24 *supra.*

33. *See* text accompanying notes 42-45 *infra. See also* LOUISELL, *supra* note 12, § 140, at 114 (proposing that the exceptions themselves have become the rule).

34. *E.g.*, Hodge v. United States, 126 F.2d 849, 849 (1942); Woods v. State, 250 Ind. 132, 144, 235 N.E.2d 479, 486 (1968); State v. Schut, 71 Wash. 2d 400, 402, 429 P.2d 126, 128 (1967); *see* MCCORMICK, *supra* note 1, § 190, at 449-50; 2 J. WIGMORE, *supra* note 1, §§ 398-99, at 355-68. *See generally* Comment, *Admissibility in Criminal Cases of Evidence of Other Sex Offenses*, 17 WASH. & LEE L. REV. 83, 86 (1960).

35. *See, e.g.*, United States v. Huff, 442 F.2d 885, 888 (D.C. Cir. 1971) (evidence of prior rape of same victim admitted as tending to show a predisposition of the accused to gratify his sexual desires with the victim); Bracey v. United States, 142 F.2d 85, 88 (D.C. Cir.), *cert. denied*, 322 U.S. 762 (1944) (evidence of prior acts between same parties admissible to show a disposition to commit the act charged); Hodge v. United States, 126 F.2d 849, 849 (D.C. Cir. 1942) (the mental disposition of the defendant at the time of the act charged is relevant, thus evidence that at some prior time he was similarly disposed is also relevant); State v. Garner, 116 Ariz. 443, 447, 569 P.2d 1341, 1345 (1977) (evidence of prior offenses with prosecuting witness admissible to show lewd disposition or intent towards witness); State v. McFarlin, 110 Ariz. 225, 228, 517 P.2d 87, 90 (1973) (similar acts near in time to the offense charged admitted as evidence of accused's propensity to commit such perverted acts); Gilman v. State, 258 Ind. 556, 557-58, 282 N.E.2d 816, 817 (1972) (evidence of prior similar crimes admissible to show a depraved sexual instinct); McMichael v. State, — Nev. —, —, 577 P.2d 398, 401-02 (1978) (similar crimes against same prosecutrix committed within a period immediately preceding and following the crime charged admissible to show an emotional propensity for sexual aberration); State v. Minns, 80 N.M. 269, 272, 454 P.2d 355, 358 (Ct. App. 1969) (evidence of similar sex offenses committed by defendant on prosecuting witness admissible to show a lewd and lascivious disposition). *But see* People v. Mooney, 363 Mich. 454, 457-58, 109 N.W.2d 845, 847 (1961) (admission for purpose of showing propensity of prior "lewd, homosexual parties," in trial for gross indecency held reversible error); State v. Gammons, 258 N.C. 522, 523, 128 S.E.2d 860, 862 (1963) (evidence of other offenses inadmissible where the only relevancy is to show the character of the accused or his disposition to commit the offense charged).

36. *See* Lovely v. United States, 169 F.2d 386, 390 (4th Cir. 1948); State v. McFarlin, 110 Ariz. 225, 228, 517 P.2d 87, 90 (1973) (the crime must constitute an abnormal sex act).

37. *See* State v. McFarlin, 110 Ariz. 225, 228, 517 P.2d 87, 90 (1973) (emotional propensity exception is limited to cases involving sexual aberration); State v. Gibson, 103 Ariz. 428, 430, 443 P.2d 424, 426 (1968) (no relevant connection between an act of a "peeping Tom" and one of a violent rape may be shown to establish criminal propensity); State v. Wright, 203 N.W.2d 247, 251 (Iowa 1972) (generally, on a charge of statutory rape, evidence of lascivious conduct with others is inadmissible).

time of the past offense to the offense charged.[38]

The rationale most frequently expounded by the courts for this exception is that evidence of other acts between the same parties is probative of their true relationship[39] and is properly admitted for corroborative purposes.[40] Because the relationship between the victim and the accused is central to the crime charged, this evidence is particularly relevant. The accused is not likely to be surprised by its introduction and the jury is less apt to be confused because it pertains to the parties at trial. Nevertheless, if the prejudicial impact outweighs the probative value, the evidence cannot be admitted.[41]

This exception has been extended beyond the reasoning that supports it.[42] The proposition that evidence of other sexual offenses against the same victim is admissible to show a lustful propensity or inclination towards the victim has been broadened to include evidence of crimes with others.[43] A somewhat haphazard application of the for-

38. State v. McFarlin, 110 Ariz. 225, 228, 517 P.2d 87, 90 (similar acts committed within a period shortly before and after the offense charged were admissible to show emotional propensity); People v. Adams, 14 Cal. 2d 154, 158, 93 P.2d 146, 148-49 (1939) (conduct which occurred two years prior to the time of trial inadmissible as too remote); State v. Nicks, 134 Mont. 341, 342-43, 332 P.2d 904, 904-05 (1958) (other acts of lewd conduct allegedly committed three years prior to those charged too remote). *But see* Findley v. State, — Nev. —, —, 577 P.2d 867, 868 (1978) (evidence of sexual misconduct occurring nine years earlier admissible to prove intent in prosecution for crime of lewdness with a minor).

39. Thus, this type of evidence may be admitted as probative of the familiarity existing between the defendant and the victim. While not all states have adopted this position, the majority is in accord. *See, e.g.*, People v. O'Moore, 83 Cal. App. 2d 586, 603-04, 189 P.2d 554, 565 (1948); People v. Whitham, 406 Ill. 593, 594-95, 94 N.E.2d 506, 507 (1950); Woody v. State, 95 Okla. Crim. 21, —, 238 P.2d 367, 370 (1951). *But see* State v. Franklin, 194 Neb. 630, 643, 234 N.W.2d 610, 617-18 (1975).

40. Apparently the majority of courts have accepted the proposition that the complainant may offer evidence of other sexual offenses to corroborate her testimony. This rule emerged from the continuing need for corroboration in consensual crimes, where convictions were often dependent upon the jury's belief in the prosecutrix' story. Evidence of one incident often is not as convincing as a series of instances which bolsters the prosecutrix' credibility and makes the crime charged seem more probable. *See, e.g.*, United States v. Kelly, 119 F. Supp. 217, 220 (D.D.C. 1954); State v. McDaniel, 80 Ariz. 381, 388-89, 298 P.2d 798, 803 (1956); State v. Ferrand, 210 La. 394, 400, 27 So. 2d 174, 176 (1946); State v. Minns, 80 N.M. 269, 272, 454 P.2d 355, 358; (Ct. App. 1969); State v. Austin, 20 N.C. App. 539, 542, 202 S.E.2d 293, 295, *rev'd on other grounds*, 285 N.E. 364, 204 S.E.2d 675 (1974). *But see* State v. Wright, 203 N.W.2d 247, 250 (Iowa 1972).

41. See text & note 17 *supra*.

42. *See* Gregg, *supra* note 25, at 215; Comment, *supra* note 24, at 109-10.

43. *See* State v. Bisagno, 121 Kan. 186, 188, 246 P. 1001, 1002 (1926). For examples of where evidence of other acts of sodomy, child molesting, or lewdness against others was admitted, see State v. Miller, 115 Ariz. 279, 282, 564 P.2d 1246, 1249 (Ct. App. 1977) (evidence admissible to show propensity to commit perverted acts); State v. McDaniel, 80 Ariz. 381, 387-88, 298 P.2d 798, 802 (1956) (prior acts of sodomy against others admitted to show common scheme and modus operandi); Kerlin v. State, 255 Ind. 420, 424, 265 N.E.2d 22, 25 (1970) (prior act of sodomy against other than prosecutrix admissible to show a depraved sexual instinct); State v. Schlak, 253 Iowa 113, 116, 111 N.W.2d 289, 291 (1961) (prior acts of lewdness against others admissible to show motive and identity). *But see* Agee v. Wyrick, 546 F.2d 1324, 1327 (8th Cir. 1976) (evidence of previous sexual misconduct with someone other than victim inadmissible); State v. Wright, 203 N.W.2d 247, 250 (Iowa 1972) (evidence of similar sex crimes committed against similar victims inadmissible for corroborative purposes); State v. Sicks, 33 Or. App. 441, —, 576 P.2d 834, 836 (1978) (evidence of similar acts with others inadmissible to show intent, identity, and scheme or plan). *See generally* 2 J. WIGMORE, *supra* note 1, § 357, at 267-69.

merly narrow "propensity" exception has caused the phrase "towards the prosecutrix" to be omitted.[44] As a result, a broad exception for sexual crimes evidence has now developed.[45] This departure from, and blatant contradiction of, the general exclusionary rule has not been rigorously scrutinized.[46] Failure to discriminate between different types of sexual perversion increases the probability that prior conduct which is not probative of the crime charged will be admitted.[47] However, judicial notice has been taken of the difference between a rape prosecution and one for sodomy, lewd and lascivious conduct, or child molestation;[48] the latter acts are more stringently evaluated and categorized as sexual aberrations, or depraved or perverted sexual instincts. This attitude appears to be a dominating force behind the expansion of the "propensity" exception in cases involving depraved or perverted offenses.[49] As a result, few if any safeguards remain available to protect a defendant classified as a sex pervert from unduly prejudicial evidence.[50]

McFarlin Test of Admissibility

Arizona's treatment of the admissibility of prior sexual offenses has been inconsistent.[51] However, the Arizona Supreme Court, in *State*

44. *See* Gregg, *supra* note 25, at 215.

45. *See* State v. Bisagno, 121 Kan. 186, 246 P. 1001 (1926). In *Bisagno*, the court said, "[i]n offenses of this class, proof of other acts of intercourse may be received to show the lustful disposition of the defendant." *Id.* at 188, 246 P. at 1002. At that time Kansas applied the narrow exception admitting only evidence of other crimes with the prosecutrix, but the court, without attempting to distinguish between prior crimes against the same victim and those involving other persons, simply borrowed the language of the broader exception. *See id.* at 188, 246 P. at 1002. *See also* Gregg, *supra* note 25, at 219-21.

46. *See* Gregg, *supra* note 25, at 215, 217, 219.

47. *See* Commonwealth v. Kline, 361 Pa. 434, 443-44, 65 A.2d 348, 352 (1948) (in prosecution for statutory rape, the court treated the defendant's conduct like incest and admitted evidence of prior exhibitionism as part of a general scheme or plan to commit sexual acts). *See* Gregg, *supra* note 25, at 231-36.

48. Lovely v. United States, 169 F.2d, 386 (4th Cir. 1948), was a rape prosecution where intercourse was admitted by the defendant and the only issue was that of consent. The court held evidence of the prior rape of another woman inadmissible. The court limited the inadmissibility of evidence of prior acts to rape cases while suggesting that a contrary result would occur in prosecutions for assault with intent to rape and for crimes involving a depraved sexual instinct. *Id.* at 390.

49. *See* note 24 *supra.*

50. "In crimes in which the prejudices against defendants are likely to be greatest and the danger of false witnessing considerable, an exception is being applied that leaves the accused extremely limited protection against admission of prior or subsequent offenses." Gregg, *supra* note 25, at 236. Perhaps this is more illustrative of the courts' emotional response and moral attitude toward the sexual offender than anything else, the sexual pervert being the most "despicable" of criminal types.

51. State v. McFarlin, 110 Ariz. 225, 228, 517 P.2d 87, 90 (1973). In the past, Arizona has allowed evidence of the prior bad act to be admitted for the purpose of proving a plan or scheme. *See* Taylor v. State, 55 Ariz. 13, 19, 97 P.2d 543, 545 (1940). However, the court also recognized that a specific emotional propensity for sexual aberration was probative of the accused's guilt. *See, e.g.*, State v. Finley, 85 Ariz. 327, 335, 338 P.2d 790, 796 (1959); State v. McDaniel, 80 Ariz. 381, 388, 298 P.2d 798, 802-03 (1956). *Cf.* State v. Parker, 106 Ariz. 54, 56-57, 470 P.2d 461, 463-64 (1970) (in child molesting cases, the emotional propensity exception alone is insufficient unless

v. McFarlin,[52] held that in cases where the offense charged "involves the element of abnormal sex acts such as sodomy, child molesting, and lewd and lascivious, etc., there is sufficient basis to accept proof of similar acts near in time to the offense charged as evidence of the accused's propensity to commit such perverted acts."[53]

The *McFarlin* test of relevancy—sexual aberration, similarity, and nearness in time—was designed to ensure that only evidence of prior acts which is probative of the crimes charged will be admitted.[54] Since the court admitted that the " 'emotional propensity' exception has been extended to questionable lengths,"[55] the vagueness of this test in its treatment of several key issues is particularly troublesome. There is no mention in *McFarlin* of what degree of similarity and nearness in time is necessary to fulfill these requirements.[56] In addition, the court neither adequately defined "abnormal sex acts"[57] nor indicated who may testify as to the other sexual offenses.[58] These questions should not be cursorily dismissed, especially in light of the highly prejudicial nature of the evidence. The need to question the relevancy of other similar sex crimes is crucial to the defendant's rights if the emotional propensity exception is to have continued application.[59] Notwithstanding these uncertainties, the emotional propensity exception has been applied in subsequent Arizona cases involving abnormal sexual offenses.[60]

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it is coupled with the scheme or plan exception); State v. Goldsmith, 104 Ariz. 226, 230, 450 P.2d 684, 688 (1969) (emotional propensity rule alone insufficient to justify admission of prior crimes evidence). *But see* State v. Godsoe, 107 Ariz. 367, 370, 489 P.2d 4, 7 (1971), where the court, without reference to either *Goldsmith* or *Parker*, admitted evidence of prior sexual offenses to indicate a propensity for sexual molestation or aberration.

52. 110 Ariz. 225, 517 P.2d 87 (1973).

53. *Id.* at 228, 517 P.2d at 90.

54. *Id.*

55. *Id.*

56. In *McFarlin*, the other incidents of molesting which were admitted occurred within a period of three months prior to and one day after the offense for which the defendant was charged. *Id.* at 226, 517 P.2d at 88.

57. The court mentioned "acts such as sodomy, child molesting, lewd and lascivious, etc.," without further addressing the matter. *Id.* at 228, 517 P.2d at 90. Is the list conclusive or did the court intentionally use "etc." as a catchall for any other sex acts it may define as abnormal in the future?

58. The court does not address the issue of whether the exception applies to cases where persons other than the prosecuting witness testify. The language in the case is unclear as to whether the testimony of the other acts came from the victim of the crime or other children. *Id.* at 226, 517 P.2d at 88.

59. The problem is heightened in the *Treadaway* decision where the court, in examining the statistical evidence pertaining to the low rate of recidivism among sex offenders, concluded that evidence of prior sex offenses may even be less probative for sex crimes than for other crimes. *See* 116 Ariz. at 167, 568 P.2d at 1065.

60. *See, e.g.*, State v. Garner, 116 Ariz. 443, 447, 569 P.2d 1341, 1345 (1977); State v. Miller, 115 Ariz. 279, 281, 564 P.2d 1246, 1248 (1977); State v. Williams, 111 Ariz. 511, 514-15, 533 P.2d 1146, 1149-50 (1975); State v. Gates, 25 Ariz. App. 241, 244, 542 P.2d 822, 825 (1975).

The Treadaway Case

The *Treadaway* decision is factually distinguishable from *McFarlin*. In *Treadaway*, remoteness in time[61] and dissimilarity of the crime charged[62] posed questions of relevancy which did not exist in *McFarlin*.[63] The distinction between *McFarlin* and *Treadaway* was recognized in *State ex rel. LaSota v. Corcoran*.[64] In *Corcoran*, the court specifically limited *Treadaway* as controlling only where "the prior act is either not similar to the crime charged or not near in time. Reliable expert testimony is not always required before a prior act may be admitted pursuant to the emotional propensity exception."[65]

The court's treatment of the emotional propensity exception in *Treadaway*, as clarified in *Corcoran*, suggests that it has adopted a two-tier analysis, the use of which is dependent upon the existence of a particular factual setting. In crimes of sexual aberrations, when the prior sexual offense is similar and near in time to the act charged, the evidence may be admitted.[66] However, if these requirements are not met, the court requires expert medical or psychological testimony for a determination of whether the evidence is relevant.[67]

Reliance on expert testimony appears a cautious measure, but in fact it may allow the admission of prejudicial evidence that the *McFarlin* test would have excluded. In cases where the prior incident is remote in time or factually dissimilar, varying psychological testimony may be introduced as to whether the evidence is relevant to the defendant's emotional propensity to commit the crime charged. The principal flaw in this type of relevancy analysis is that it presumes that the sex offender's emotional propensity can actually be demonstrated by evidence of prior acts.[68] Assuming that it can and that psychiatrists and doctors are equipped to make this determination, the inevitable result will be a contest between the many competing expert witnesses

61. The prior crime was committed three years before the present crime charged. 116 Ariz. at 165, 568 P.2d at 1063.

62. Evidence of prior acts of fellatio and anilingus with different person was introduced in prosecution for sodomy and murder. *Id.* at 164-65, 167, 568 P.2d at 1062-63, 1065.

63. State v. Treadaway, 116 Ariz. 163, 166-67, 568 P.2d 1061, 1064-65 (1978).

64. 119 Ariz. 573, 583 P.2d 229 (1978). *Corcoran* arose when, prior to Treadaway's retrial, the state filed a special action to contest the trial court's rulings on numerous motions submitted by Treadaway's counsel. *Id.* at 577, 583 P.2d at 233.

65. *Id.* at 577, 583 P.2d at 233. The court concluded that "as the [prior] incident is both similar and near in time to the crimes for which Treadaway is now accused, its admissibility is governed by *State v. McFarlin*, rather than *State v. Treadaway*." *Id.*

66. State v. Treadaway, 116 Ariz. 163, 166, 568 P.2d 1061, 1064 (1978); State v. McFarlin, 110 Ariz. 225, 228, 517 P.2d 87, 90 (1973).

67. "The admissibility of the prior act depends initially upon its relevancy, which involves complicated questions of sexual deviancy in a sophisticated area of medical and scientific knowledge. This Court is not prepared to resolve such questions in the absence of such expert knowledge." State v. Treadaway, 116 Ariz. 163, 167, 568 P.2d 1061, 1065 (1978).

68. See discussion text & note 82 *infra*.

and theories.[69]

In these instances, admissibility will be determined by which expert witness the trial judge believes.[70] Reliance on expert opinion in the judicial process may well lead to unpredictable and unfair decisions.[71]

The Emotional Propensity Exception and the Arizona Rules of Evidence

Discussing another issue in *Treadaway*, the Arizona Supreme Court indicated that upon remand the trial court should consider the rules of evidence in the event the case was retried before they became effective.[72] However, no further mention was made of the rules in the court's subsequent ruling in *State ex rel. LaSota v. Corcoran*[73] which occurred after their enactment. The court simply ignored the rules and relied upon the common law emotional propensity exception established in *McFarlin*.[74] Thus the question of whether the emotional propensity exception is still viable under the new rules of evidence remains unanswered.

Rule 404,[75] governing the admissibility of character evidence, is essentially a codification of the common law exclusionary rule.[76] Its purpose is to prevent introduction of evidence of character to show that the accused acted in conformity with that character.[77] While it does not specifically provide for the emotional propensity exception, Rule 404(b) lists special exceptions under which evidence of other crimes, acts, or wrongs may be admitted as relevant for purposes other than

69. *See, e.g.*, Hand, *Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 53 (1901); Molinari, *The Role of the Expert Witness*, 9 FORUM 789, 789-91 (1974); 30 DICK. L. REV. 10, 15-16 (1925). *See generally* 2 WIGMORE, *supra* note 1, § 536, at 645-46 n.2.

70. In his dissenting opinion, Justice Holohan criticizes the majority for this very reason. He states:

> The majority finds the decisions from other jurisdictions which support admissibility to be "summary and cursory," but the majority leaves the law of evidence on this issue in chaos. Will the admissibility of this evidence depend upon which expert the trial judge believes? In this very case there was a potential difference between experts on the defendant's emotional propensities.

116 Ariz. at 170, 568 P.2d at 1068.

71. A leading critic, Thomas Szasz, states:

> Not only is the use of psychiatric opinion in criminal cases unregulated by strict rules of law, but also the interpretation of opinion permits so much latitude that the very possibilities of consistency and predictability are negated. The judicial process is thus allowed to drift from impartial and predictable enforcement of rules toward an unpredictable decision of each case on what is thought to be its own merits.

T. SZASZ, LAW, LIBERTY AND PSYCHIATRY 205 (1963).

72. 116 Ariz. at 168, 568 P.2d at 1066.

73. 119 Ariz. 573, 583 P.2d 229 (1978).

74. *Id.* at 577, 583 P.2d at 233 (citing State v. McFarlin, 110 Ariz. 225, 228, 517 P.2d 87, 90 (1973)).

75. ARIZ. R. EVID. 404, *quoted* note 12 *supra*.

76. See discussion notes 12, 13 *supra*.

77. *Id.*

proving the defendant's character.[78] There is authority for the proposition that the list in 404(b) is neither conclusive nor complete.[79] In *McFarlin*, the court expressly added emotional propensity to the list of exceptions to the exclusionary rule.[80] Moreover, the treatment of the prior sex offenses in *Treadaway* and *Corcoran* may indicate that the court is silently incorporating the emotional propensity exception into Rule 404(b) as another purpose for which evidence of other crimes may be admitted.[81] However, it is questionable whether the emotional propensity exception can be considered relevant for any purpose other than proving the defendant's past criminal character.[82] The majority of studies have established that one who has committed one or more sex

78. ARIZ. R. EVID. 404(b).

79. The language in 404(b) stating that "It may, however, be admissible for other purposes, *such as* . . . ." indicates that the list is not complete. ARIZ. R. EVID. 404(b) (emphasis added). The Advisory Committee's Note to FED. R. EVID. 404(b) confirms this interpretation:

> However, the evidence may be offered for other purposes, such as proof of motive, opportunity, *and so on* . . . . No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403.

(Emphasis added). *See* United States v. Woods, 484 F.2d 127, 134 (4th Cir. 1973) (citing with approval McCormick's caveat in listing instances where evidence of prior acts is admissible that the "list is not complete"). *See also* Comment, *supra* note 20, at 285-91 & nn. 109-31 (proposing that a separate standard for corroboration evidence in sex crimes should be given recognition by the courts and the legislature).

80. 110 Ariz. 225, 228, 517 P.2d 87, 90 (1973).

> The 'emotional propensity' exception is limited to those cases involving sexual aberration, but this is not to say that the other usual exceptions to the exclusionary rule cannot be used. It simply means that in addition to the usual exceptions there is in cases involving the charge of sexual aberration the additional exception of emotional propensity.

Id.

81. The court's reliance upon the emotional propensity exception in *State ex rel. LaSota v. Corcoran* which was decided after the enactment of the new rules supports this conclusion. The court took considerable pains to define when the *McFarlin* test was applicable in light of the newly established relevancy test in *Treadaway*. Both tests, however, presume the validity of the emotional propensity exception. 119 Ariz. 573, 576-77, 583 P.2d 229, 232-33. There is no indication that the court even considered the effect that the new rules would have on the exception. The court may well view the status of the emotional propensity exception, as established in *McFarlin*, as a settled principle of law.

82. Psychological and sociological studies have presented a substantial statistical basis for this conclusion. Apparently the legal concept of the sex offender has no real counterpart in the psychological, psychiatric, or medical worlds. S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 351 (1971). The absence of a clearly defined character type is partially responsible for the psychiatrists' reluctance to categorize. *Id.* at 350-51. "In general, recent literature does little more than to make glaringly apparent the present confused state of psychiatric, psychological and sociological theory in the sex deviation field. The constant refrain is for more and better research." REPORT OF THE GOVERNOR'S STUDY COMMISSION ON THE DEVIATED CRIMINAL SEX OFFENDER 38-39 (1951), *cited in* S. BRAKEL & R. ROCK, *supra* at 350. This confusion is clearly demonstrated by the sexual psychopathic statutes where the proscribed conduct that categorizes the sex offender varies from state to state. Only a few of the 28 jurisdictions which have enacted these statutes use identical descriptions. *See, e.g.*, COLO. REV. STAT. § 16-13-202 (1973) (defining sex offender); D.C. CODE § 22-3503(1) (1973) (defining sexual psychopath); FLA. STAT. ANN. § 917.13 (West Supp. 1979) (defining mentally disordered sex offender).

The research literature in no way supports the thesis that sex offenders as a group have readily identifiable characteristics which distinguish them from the general population. *See* MINNESOTA DEP'T OF CORRECTIONS, THE SEX OFFENDER IN MINNESOTA 1 (1964) (hereinafter cited as THE SEX OFFENDER IN MINNESOTA) (citing M. CLINARD, SOCIOLOGY AND DEVIANT BEHAVIOR (1957); Fitch, *Men Convicted of Sexual Offenses Against Children—A Descriptive Follow-Up*, 2

crimes previously does not have an emotional propensity or predisposition to commit sex crimes in the future.[83] Thus, in most sex offenses, the fact that the defendant committed a prior sex offense is not probative of his present innocence or guilt. If it is relevant only in so far as it is probative of the defendant's past character, then admissibility of prior sex crimes is clearly repugnant to Rule 404(b).

Conclusion

The new Rules of Evidence function as evidentiary guidelines. Their purpose is to establish uniformity in the judicial process by replacing common law confusion with statutory consistency. The *Treadaway* and *Corcoran* opinions create the type of ambiguity the rules were enacted to eliminate. In treating the propensity exception as it has, the court has amended rule 404(b), *sub silencio*. The court may use discretion in interpreting the rules but if the result is an alteration or expansion of the rules, it should specifically address the change.

BRIT. J. CRIM. 18-37 (1962); B. Glueck, Research Project for the Study and Treatment of Persons Convicted of Crimes Involving Sexual Aberrations (1952-55)).

There is no indication that sex offenders progress from less serious to more serious crimes. *Id.* The assumption that the sex deviate is more dangerous than other criminals and requires greater restraint to protect society is simply unsubstantiated. *See* REPORT OF THE COMMISSION ON SEX OFFENDERS TO THE 68TH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS (1953), *cited in* S. BRAKEL & R. ROCK, *supra* at 348 (concluding that not more than about five percent of convicted sex offenders are dangerous).

The most significant fact that has emerged from these studies is that sexual recidivists tend to have a higher proportion of previous nonsexual convictions as compared to first time sexual offenders. REPORT OF THE MAYOR'S COMMITTEE FOR THE STUDY OF SEX OFFENSES 94 (N.Y. 1941) [hereinafter cited as MAYOR'S COMMITTEE]. This fact suggests that persistence may not necessarily spring from an emotional propensity to commit perverted sexual acts but rather a general proclivity towards criminal conduct. In one study, 80% of the sexual recidivists had at least as many previous convictions for nonsexual offenses as for sexual offenses. MAYOR'S COMMITTEE, *supra* at 95 (concluding that: "In substance, then, the average sex offender's criminal career seldom is prolonged. Even less seldom is it continuously sexual. When persistent at all, the design is usually criminal, not sexual.").

83. *See, e.g.*, CALIFORNIA DEP'T OF MENTAL HYGIENE, CALIFORNIA SEXUAL DEVIATE RESEARCH 21 (1951) (finding only 7.2% of the sex offenders had been previously imprisoned two or more times as compared to 16% of the general prison population); P. GEBHARD, J. GAGNON, W. POMEROY & C. CHRISTENSEN, SEX OFFENDERS 710 (1965) (citing PENNSYLVANIA BOARD OF PAROLE, A COMPARISON OF RELEASES AND RECIDIVISTS, FROM JUNE 1, 1946 TO MAY 31, 1961, at 1-2 (1961)) (showing sexual offenders less likely to either commit a crime again or repeat the same offense than offenders in six other categories over a 15-year survey in Pennsylvania); MAYOR'S COMMITTEE, *supra* note 82, at 89-93 (sex crime is not habitual behavior for the majority of sex offenders; only 7% or 40 out of 558 convicted sex offenders in 1930 were later arrested on charges of sex crimes between 1930 and 1941); 9 SEXUAL OFFENSES 156-77 (L. Radzinowicz ed. 1968) (Study of 1,985 sex offenders concluded that less than one in five had one or more previous sexual convictions. Only 344 or 17% had committed one or more prior sexual offenses, and of this group the most frequent to repeat their crimes were exhibitionists.); 2 THE SEX OFFENDER IN MINNESOTA, *supra* note 82, at 23 (concluding that of the 149 sex offenders, over 80% had no previous sex offense history). The rationale for maintaining a special emotional propensity exception is considerably weakened by the fact that sexual offenders have lower rates of prior convictions than other types of criminals. As a noted author concluded: "Our sex offenders are among the least recidivous of all types of criminals. They do not characteristically repeat as do our burglars, arsonists and thugs." Tappan, *Sentences for Sex Criminals*, 42 J. CRIM. L.C. & P.S. 332, 336 (1951), *cited in* S. BRAKEL & R. ROCK, *supra* note 82, at 349.

Knowledge of the court's disposition would then permit uniformity and consistency in their application and provide adequate notice for practitioners relying on the rules as they presently exist.

V. FAMILY LAW

A. ANNULMENT: EFFECT ON PRIOR SPOUSAL SUPPORT AND MAINTENANCE OBLIGATIONS

In a divorce decree, provisions are often made for the support and maintenance of the dependent spouse.[1] In Arizona, unless otherwise provided by the parties in writing or by the decree, the support obligation will terminate if either party dies or if the dependent party remarries.[2] Generally, such events are easily identifiable and present no complications because deaths are certifiable and most marriage ceremonies are sufficient to create valid marriages. However, the annulment of a subsequent remarriage presents a special complication. By the traditional view, an annulment denies the very existence of the marriage.[3] Therefore, the question arises whether an annulment revives the support obligation of the former spouse.

In *Hodges v. Hodges*,[4] the Arizona Court of Appeals was presented with precisely this question. In that case, the sixteen-year marriage of Vernard and Mary Hodges ended in divorce in April of 1976. The divorce decree provided that Vernard would pay maintenance and support to Mary.[5] Vernard complied with the order. In August 1976, Mary married John Pfrimmer and Vernard then ceased the support payments. Shortly thereafter, Mary requested and was granted

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1. ARIZ. REV. STAT. ANN. § 25-317(A) (1976) provides that the parties to a divorce may enter into a written separation agreement that provides for the maintenance and support of either of them.

ARIZ. REV. STAT. ANN. § 25-319 (1976) provides that the court may grant a maintenance order for either spouse only upon a finding that the spouse seeking maintenance lacks sufficient property to reasonably provide for his or her needs and is unable to support himself or herself through appropriate employment. The statute further provides that the amount and duration of the maintenance order will be determined without regard to marital misconduct. Among the factors considered are the relative financial resources and earning capabilities of the parties, the standard of living enjoyed during the marriage, and the duration of the marriage.

2. ARIZ. REV. STAT. ANN. § 25-327(A)-(B) (Supp. 1978) provides:

A. Except as otherwise provided in Subsection F of § 25-317, the provisions of any decree respecting maintenance or support may be modified only as to installments accruing subsequent to the motion for modification and only upon a showing of changed circumstances which are substantial and continuing. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

B. Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance.

3. *See generally* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 120 (1974); C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 174 (1966); 7 STAN. L. REV. 529, 531 (1955).

4. 118 Ariz. 572, 578 P.2d 1001 (Ct. App. 1978).

5. *Id.* at 573, 578 P.2d at 1002.

an annulment of her marriage to Pfrimmer and then sought to have the support payments from Vernard reinstated.[6] The trial court held that Mary was entitled to all payments due since the divorce decree.[7]

The Arizona Court of Appeals reversed,[8] holding that the statutory use of the word "remarriage"[9] contemplated only the performance of a marriage ceremony valid on its face[10] and that Vernard Hodges' support obligations had been terminated despite Mary's subsequent annulment. The court held that the termination was automatic upon remarriage and that the matter was forever removed from the jurisdiction of the courts.[11]

This casenote will study the court's analysis in *Hodges* and examine Arizona's statutory scheme dealing with divorce and annulment. More specifically, this casenote will examine the holding in *Hodges* that remarriage, whether void or voidable, automatically and finally terminates a former spouse's support obligations. The *Hodges* decision will also be discussed as it relates to current trends in family law, and an attempt will be made to assess its future impact.

The Relation Back Doctrine and the Void-Voidable Distinction

Traditionally, annulment is said to "relate back," restoring the parties to the status and position of each prior to the marriage ceremony.[12] Strictly applied, the relation back doctrine divests the annulled marriage, a remarriage in *Hodges*, of any legal force.[13] It does not allow for any reconciliation between the conduct of the parties and the legal fiction. Consequently, the children of an annulled marriage would be considered illegitimate.[14] Furthermore, the court may have

6. *Id.*

7. *Id.* This included those payments due and unpaid during the two months she was married to Pfrimmer. The trial court based its decision on Vernard's failure to show sufficient change in Mary's circumstances to warrant the termination of his support obligation to her. *Id.*

The trial court referred to the language in ARIZ. REV. STAT. ANN. § 25-327(A) (Supp. 1978) that requires a "showing of changed circumstances which are substantial and continuing" to justify a modification of an award for maintenance and support. The court interpreted "remarriage" in that statute to present merely a "change of circumstance" that must also be "substantial and continuing." The court concluded that Mrs. Hodges' annulled remarriage did not meet this test. 118 Ariz. at 573, 578 P.2d at 1002.

8. 118 Ariz. at 577, 578 P.2d at 1006.

9. ARIZ. REV. STAT. ANN. § 25-327(B) (Supp. 1978), *quoted* note 2 *supra*.

10. Hodges v. Hodges, 118 Ariz. 572, 576, 578 P.2d 1001, 1005 (Ct. App. 1978). Had Mrs. Hodges' remarriage not been terminated by an annulment, but had ended instead in divorce or the death of her new spouse, the remarriage would have effectively terminated the prior spouse's support obligation. *Id. See* Flaxman v. Flaxman, 57 N.J. 458, 463, 273 A.2d 567, 569 (1971); 24 WASH. & LEE L. REV. 326, 332 (1967).

11. 118 Ariz. 572, 576, 578 P.2d 1001, 1005 (Ct. App. 1978).

12. H. CLARK, *supra* note 3, at 139.

13. *See id.* at 131-37.

14. *See* Warrenburger v. Folsom, 140 F. Supp. 610, 613 (M.D. Pa.), *aff'd*, 239 F.2d 846 (3d Cir. 1956); *In re* Montcrief's Will, 235 N.Y. 390, 394, 139 N.E. 550, 551 (1923); H. CLARK, *supra* note 3, at 132.

no jurisdiction to equitably divide property acquired during the marriage, and ownership would simply rest in the party active in the purchase regardless of the origin of the purchase funds.[15]

Chief Judge Cardozo, while a judge on the New York Court of Appeals, recognized that although the relation back doctrine was adopted by the courts for the purpose of justice, it becomes an instrument of injustice when used to adversely affect the status of innocent third parties.[16] To better serve justice and soften the harsh consequences of the relation back doctrine where it is recognized, the relation back doctrine is not applied without exception.[17] Most jurisdictions have been willing to afford an annulled marriage sufficient legal validity to protect innocent parties such as children born to the annulled marriage.[18]

In many states the relation back of an annulment and the consequent revival of support payments are dependent upon whether the annulled marriage is labeled void[19] or voidable.[20] Although there is no

15. *See* DeFrance v. Johnson, 26 F. 891, 895 (D. Minn. 1886); Schmit v. Schneider, 109 Ga. 628, 631, 35 S.E. 145, 146-47 (1900); H. CLARK, *supra* note 3, at 136. However, some courts recognize the property rights of the spouse who contributes to the joint acquisition of property during a putative marriage which was entered into in good faith. *See, e.g.*, Fung Dai Kim Ah Leong v. Lau Ah Leong, 27 F.2d 582, 585-86 (9th Cir. 1928); Coats v. Coats, 160 Cal. 671, 676, 118 P. 441, 443-44 (1911); Buckley v. Buckley, 50 Wash. 213, 216, 96 P. 1079, 1082 (1908). However, no community property or curtesy or dower rights arise from an annulled marriage. *See* Coats v. Coats, 160 Cal. 671, 676, 118 P. 441, 443-44 (1911) (community property, curtesy, and dower); Price v. Price, 124 N.Y. 589, 598 (1891) (curtesy and dower); *In re* Sloan's Estate, 50 Wash. 86, 90, 96 P. 684, 685 (1908) (community property).

16. Sleicher v. Sleicher, 251 N.Y. 366, 367, 167 N.E. 501, 502 (1929).

17. Robbins v. Robbins, 343 Mass. 247, 251, 178 N.E.2d 281, 283 (1961). The court held that the wife's annulled remarriage did not constitute a significant change in circumstances and did not terminate the prior husband's alimony obligation. However, relation back was not strictly applied. The alimony obligation revived as of the date of the annulment not as of the date of the remarriage. The court recognized the annulled remarriage to have sufficient legal effect to suspend the alimony obligation for its duration.

18. *See* Taylor v. Taylor, 249 Ala. 419, 421, 31 So. 2d 579, 580-81 (1947); *In re* Ruff's Estate, 159 Fla. 777, 782-83, 32 So. 2d 840, 843 (1947); Sirois v. Sirois, 94 N.H. 215, 217, 50 A.2d 88, 89 (1946); 7 STAN. L. REV. 529, 532 (1955). Generally, the common law has been slow to make this adaptation. The legislatures of several states have attempted to mitigate the effects of annulled marriages on the children they produce. For example, in Arizona, ARIZ. REV. STAT. ANN. § 14-2109(2)(a) (1975) recognizes the child of an annulled marriage as the legitimate child of both parents. Other statutes include CAL. CIV. CODE § 4453 (West 1970); ILL. ANN. STAT. ch. 89, § 17(a) (Smith-Hurd 1966); OHIO REV. CODE ANN. § 2105.18(Page 1978). For a general discussion of these statutory remedies, see H. CLARK, *supra* note 3, at 132.

19. A void marriage is a legal nullity. The law cannot recognize or ratify such marriages. Bigamous and incestuous marriages are examples of void marriages. *See, e.g.*, Sutton v. Leib, 199 F.2d 163, 164 (7th Cir. 1952); Minder v. Minder, 83 N.J. Super. 159, 163, 199 A.2d 69, 71 (1964); Whitney v. Whitney, 192 Okla. 174, 176, 134 P.2d 357, 360 (1942). In some states, void marriages are considered so unconscionable that no decree is necessary to deprive the marriage of legal impact. *See* Minder v. Minder, 83 N.J. Super. 159, 164, 199 A.2d 69, 72 (1964). In other states, annulment proceedings are required. *See* ARIZ. REV. STAT. ANN. § 25-301 (1976) which provides that the superior court "may dissolve a marriage, and may adjudge a marriage to be null and void when the cause alleged constitutes an impediment rendering the marriage void."

20. A voidable marriage is legally valid until its nullity is pronounced by an annulment proceeding. H. CLARK, *supra* note 3, at 81; Note, *The Annulment Controversy: Revival of Prior Alimony Payments*, 13 TULSA L.J. 127, 131 (1977). The parties have the option to annul, but if they do not exercise the option the marriage is binding. C. FOOTE, R. LEVY & F. SANDER, *supra* note

consensus as to how the void-voidable distinction applies to the relation back doctrine,[21] an annulled void marriage has often been held to revive the support obligation.[22] It is reasoned that because a void marriage cannot be ratified by law, it should be given no legal validity for any purpose.[23] A voidable marriage, on the other hand, rarely revives the support obligation.[24] Because most states consider a voidable marriage valid until it is declared otherwise,[25] the annulled marriage has legal validity sufficient to terminate the prior support obligation. Thus, a voidable marriage usually limits or destroys the relation back effect of

3, at 175. The grounds denoting a voidable marriage vary from state to state. Some examples are fraud, nonage, incapacity, and duress. *See, e.g.*, Robbins v. Robbins, 343 Mass. 247, 251, 178 N.E.2d 281, 283 (1961); Bridges v. Bridges, 217 So. 2d 281, 283 (Miss. 1968); Chavez v. Chavez, 82 N.M. 624, 625, 485 P.2d 735, 736 (1971); "False Representation of Pregnancy Held Ground for Annulment," 9 ARIZ. L. REV. 481, 481, 483-84 (1968). For a general discussion of the void-voidable distinction, see C. FOOTE, R. LEVY & F. SANDER, *supra* note 3, at 173-79; Note, *supra* at 130-34; 7 STAN. L. REV. 529, 530-36 (1955); 24 WASH. & LEE L. REV. 326, 328-33 (1967); Annot., 45 A.L.R.3d 1033 (1973).

21. *See, e.g.*, Robbins v. Robbins, 343 Mass. 247, 252-53, 178 N.E.2d 281, 282-83 (1961) (alimony obligation revived by voidable remarriage); Boiteau v. Boiteau, 227 Minn. 26, 28-29, 33 N.W.2d 703, 705 (1948) (alimony obligation revived by void remarriage); Flaxman v. Flaxman, 57 N.J. 458, 461-66, 273 A.2d 567, 568-72 (1971) (alimony obligation not revived by voidable remarraige); Denberg v. Frischman, 24 App. Div. 2d 100, 103, 264 N.Y.S.2d 114, 115 (1965) (alimony obligation not revived by void remarriage).

22. *See, e.g.*, Reese v. Reese, 192 So. 2d 1, 2 (Fla. 1966); DeWall v. Rhoderick, 258 Iowa 433, 440, 138 N.W.2d 124, 128 (1965); Boiteau v. Boiteau, 227 Minn. 26, 29, 33 N.W.2d 703, 705 (1948); Minder v. Minder, 83 N.J. Super, 159, 164, 199 A.2d 69, 71-72 (1964).

However, a minority of jurisdictions has abandoned the void-voidable distinction altogether. *See, e.g.*, Hodges v. Hodges, 118 Ariz. 572, 576, 578 P.2d 1001, 1005 (1978); Berkely v. Berkely, 269 Cal. App. 2d 872, 875, 75 Cal. Rptr. 294, 296 (1969).

23. In DeWall v. Rhoderick, 258 Iowa 433, 138 N.W.2d 124 (1965), a divorced wife who was receiving support from her first husband remarried. The support ceased, but the remarriage was subsequently annulled because her second husband was still married to another woman. The first husband's support obligation was revived. *Id.* at 435, 138 N.W.2d at 125. In Minder v. Minder, 83 N.J. Super. 159, 199 A.2d 69 (1964), the divorced wife was receiving alimony from her first husband. The wife remarried, but the remarriage was later annulled because the wife was incompetent. Her remarriage was held to be void, and the annulment revived the first husband's support obligation. *Id.* at 162-64, 199 A.2d at 70-72. In Sutton v. Leib, 199 F.2d 163 (7th Cir. 1952), the divorced wife was receiving alimony from her first husband. Her subsequent remarriage to a bigamist was annulled after only one month. The remarriage was void and the first husband's alimony obligation was revived. *Id.* at 164.

24. *See, e.g.*, Hodges v. Hodges, 118 Ariz. 572, 575, 578 P.2d 1001, 1004 (Ct. App. 1978); Bridges v. Bridges, 217 So. 2d 281, 281 (Miss. 1968) (a remarriage annulled as fraudulent was held to be merely voidable, and the annulment of the remarriage did not revive the prior alimony obligation); Flaxman v. Flaxman, 57 N.J. 458, 460, 273 A.2d 567, 568 (1971) (the court held that a remarriage annulled on grounds of fraud was merely voidable and did not revive the first husband's alimony obligation).

The majority of jurisdictions in the United States employ variations of the void-voidable distinction when determining the extent to which annulment will "relate back." *See, e.g.*, Evans v. Evans, 212 So. 2d 107, 108 (Fla. Ct. App. 1968); Boiteau v. Boiteau, 227 Minn. 26, 28, 33 N.W.2d 703, 705 (1948); Flaxman v. Flaxman, 57 N.J. 458, 460, 273 A.2d 567, 568 (1971). *See* Annot., 45 A.L.R.3d 1033 (1973). Yet what the void-voidable distinction means as a legal concept varies from state to state. Similar fact situations presented in different jurisdictions often produce contrary results. As an example, a marriage held voidable on grounds of fraud will revive the alimony obligation in Massachusetts but not in New Jersey. *Compare* Robbins v. Robbins, 343 Mass. 247, 252, 178 N.E.2d 281, 284 (1961), *with* Flaxman v. Flaxman, 57 N.J. 458, 467, 273 A.2d 567, 572 (1971).

25. *See* McDonald v. McDonald, 6 Cal. 2d 457, 461, 58 P.2d 163, 165 (1936); Sirois v. Sirois, 94 N.H. 215, 217, 50 A.2d 88, 89 (1946); White v. McGee, 149 Okla. 65, 67, 299 P. 222, 224 (1931); C. FOOTE, R. LEVY & F. SANDER, *supra* note 3, at 175.

annulment[26] thereby allowing the court sufficient flexibility to deal equitably with the consequences annulment may have.[27]

However, a substantial minority of courts have abandoned the void-voidable distinction when dealing with the revival effect of an annulment upon a prior support obligation.[28] The Arizona Court of Appeals in *Hodges* aligned itself with these courts for various reasons. Arizona, like most of the minority states, has a statute that provides for the termination of the spousal support obligation upon the remarriage of the dependent spouse,[29] and major policies of equity will not support differing results based upon whether the annulled marriage was void or merely voidable.[30] Also, Arizona family law has undergone significant changes so that divorce and annulment are now treated as essentially the same.[31]

The appeals court in *Hodges* stated that Arizona is among the few states that provide as a matter of statutory law for the automatic termination of the spousal support obligations.[32] In most states, any termination of the obligation is dependent upon the terms of a private agreement or the judicial finding of changed circumstances that renders the continuation of the obligation inequitable.[33] California, Colorado, and Louisiana, like Arizona, provide by statute that if either party to the prior marriage dies or if the dependent spouse remarries, the support obligation ceases.[34] The courts of these other jurisdictions have interpreted "remarriage," as it is used in these statutes, to mean a mar-

26. *See* Torgan v. Torgan, 159 Colo. 93, 96, 410 P.2d 167, 170 (1966); Evans v. Evans, 212 So. 2d 107, 108-09 (Fla. Ct. App. 1968); Bridges v. Bridges, 217 So. 2d 281, 284 (Miss. 1968); H. CLARK, *supra* note 3, at 139.

27. *See* Note, *supra* note 20, at 132-34; 7 STAN. L. REV. 529, 532 (1955); text & notes 13-18 *supra*.

28. *See, e.g.*, Fry v. Fry, 5 Cal. App. 3d 169, 172, 85 Cal. Rptr. 126, 128 (1970); Berkely v. Berkely, 269 Cal. App. 2d 872, 875, 75 Cal. Rptr. 294, 296 (1969); Torgan v. Torgan, 159 Colo. 93, 96, 410 P.2d 167, 170 (1966); Keeney v. Keeney, 211 La. 586, 594, 30 So. 2d 549, 551 (1947).

29. Hodges v. Hodges, 118 Ariz. 572, 575, 578 P.2d 1001, 1004 (Ct. App. 1978); ARIZ. REV. STAT. ANN. § 25-327(B) (1978). See discussion note 2 *supra*.

30. Hodges v. Hodges, 118 Ariz. 572, 576, 578 P.2d 1001, 1005 (Ct. App. 1978).

31. See text accompanying notes 46-50 *infra*.

32. Hodges v. Hodges, 118 Ariz. 572, 575, 578 P.2d 1001, 1004 (Ct. App. 1978). For example, CAL. CIV. CODE § 4801(b) (West 1970) provides that "[e]xcept as otherwise agreed by the parties in writing, the obligation of any party in any order or judgment for the support and maintenance of the other party shall terminate upon the death of the obligor or upon the remarriage of the other party." COLO. REV. STAT. § 14-10-122(2) (1963) provides that "[u]nless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance." LA. CIV. CODE ANN. art. 160 (West 1964) provides: "This alimony shall be revoked if it becomes unnecessary, and terminates if the wife remarries." *See* ARIZ. REV. STAT. ANN. § 25-327(B) (Supp. 1978), *quoted* note 2 *supra*.

33. *See* Hodges v. Hodges, 118 Ariz. 572, 575, 578 P.2d 1001, 1004 (1978); Berkely v. Berkely, 269 Cal. App. 2d 872, 874, 75 Cal. Rptr. 294, 296 (1969); IOWA CODE ANN. § 598.21 (West 1978); MASS. ANN. LAWS ch. 208, § 37 (Michie/Law. Co-op 1978); N.M. STAT. ANN. § 40-4-7(C) (1978); OHIO REV. CODE ANN. § 3105.18(C) (Page 1979).

34. *See* note 32 *supra*.

riage ceremony valid on its face.[35] Exceptions are not made for marriages later proved void or voidable.[36]

In *Hodges*, the appellate court agreed with a number of policy reasons supporting this interpretation of remarriage.[37] A voidable marriage may or may not be annulled at the option of the parties.[38] To allow the annulment of such a marriage to revive a prior support obligation is unjust to the supporting spouse because such a revival ignores his or her reliance upon the apparent change in marital status of the dependent spouse.[39] Second, in Arizona there are a number of grounds that will support either a divorce or an annulment.[40] If both a divorce and an annulment carry a right to support, the dependent spouse may be able to choose his or her source of support merely by choosing the method of dissolving a subsequent marriage.[41] Finally, if this revival of the support is carried to extremes, the dependent spouse may be given a legal right to support from the first spouse for the period he or she lived with the second spouse.[42] Such a result was held to be against "public policy and good morals."[43] The *Hodges* decision is consistent with current statutes and policy regarding annulment. The void-voidable distinction has been held irrelevant in the analysis of annulment in Arizona.[44] The *Hodges* court stated that there is no difference between annulment and divorce for the purpose of deciding whether to reinstate a prior support obligation.[45] In line with this view are the statutory enactments that have vested substantial legal validity in the annulled marriage. There is now a statutory provision granting legitimacy to the children born before or after their parents marry even if that marriage is subsequently declared void.[46] The obligation to support children is the same regardless of whether the marriage ends in divorce or annulment.[47] Furthermore, in annulment proceedings, the court is now au-

35. *See, e.g.*, Fry v. Fry, 5 Cal. App. 3d 169, 172, 85 Cal. Rptr. 126, 128 (1970); Berkely v. Berkely, 269 Cal. App. 2d 872, 875, 75 Cal. Rptr. 294, 296 (1969); Torgan v. Torgan, 159 Colo. 93, 99, 410 P.2d 167, 170 (1966); Keeney v. Keeney, 211 La. 586, 594, 30 So. 2d 549, 551 (1947).

36. *See* cases cited note 35 *supra*.

37. 118 Ariz. at 576, 578 P.2d at 1005.

38. *See* text & notes 24-27 *supra*.

39. Hodges v. Hodges, 118 Ariz. at 576, 578 P.2d at 1005. See text & notes 75-79 *infra*.

40. Means v. Industrial Comm'n, 110 Ariz. 72, 75, 515 P.2d 29, 32 (1973). In *Means*, for example, impotence was judged to be grounds for both divorce and annulment.

41. Hodges v. Hodges, 118 Ariz. at 576, 578 P.2d at 1005. *See* text & notes 80-81 *infra*.

42. 118 Ariz. at 576, 578 P.2d at 1005.

43. *Id. See* text & notes 72-74 *infra*.

44. In Means v. Industrial Comm'n, 110 Ariz. 72, 75, 515 P.2d 29, 32 (1973), the court held that for the purpose of annulment, void and voidable were indistinguishable.

45. 118 Ariz. at 576, 578 P.2d at 1005; *see* Flaxman v. Flaxman, 57 N.J. 458, 463, 273 A.2d 567, 570 (1971).

46. ARIZ. REV. STAT. ANN. § 14-2109 (1975) provides that a person born out of wedlock is a child of the mother and the father if the natural parents participate in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void.

47. ARIZ. REV. STAT. ANN. § 25-302(B) (Supp. 1978).

thorized to divide the property acquired during the marriage's existence.[48]

Since the statutes afford an annulled marriage essentially the same status as a legally valid marriage, it is reasonable that annulment and divorce would be treated similarly. Many of the grounds sufficient to support an annulment will also support a divorce.[49] Whether the annulled marriage was void or voidable is of no consequence in any of the statutory provisions. The one remaining major distinction between annulment and divorce in Arizona is that there is no statutory authority to grant support and maintenance in an annulment decree as there is in a divorce.[50] In keeping with the statutory trends, an annulment should have the same effect on prior support obligations as a divorce.

The Meaning of Remarriage: A Comparison to Workmen's Compensation

Mrs. Hodges argued that the Arizona spousal maintenance statute[51] intended "remarriage" to mean a legally valid marriage, not one that was void or voidable.[52] She referred the court to the interpretation of "remarriage" as it is used in the workmen's compensation statute, which provides for the termination of spousal benefits if the surviving spouse remarries.[53] In *Southern Pacific Co. v. Industrial Commission*,[54] the Arizona Supreme Court held that "remarriage," within the meaning of that statute, contemplates a valid and subsisting marriage, not one that is void or voidable.[55] Therefore, a subsequently annulled marriage cannot qualify as a "remarriage" within the statute[56] because the annulment decree erases the legal validity of the remarriage and re-

48. *Id.*

49. *See* Means v. Industrial Comm'n, 110 Ariz. 72, 75, 515 P.2d 29, 32 (1973).

50. ARIZ. REV. STAT. ANN. § 25-319 (1976), discussed note 1 *supra*.

51. ARIZ. REV. STAT. ANN. § 25-327(B) (Supp. 1978), *quoted* note 2 *supra*.

52. 118 Ariz. at 574, 578 P.2d at 1003. Mrs. Hodges did not present any Arizona case law interpreting "remarriage" as it is used in ARIZ. REV. STAT. ANN. § 25-327(B) (Supp. 1978). Instead, she relied on the definition of marriage given in the context of an Indiana workmen's compensation statute. 118 Ariz. at 574, 578 P.2d at 1003.

53. ARIZ. REV. STAT. ANN. § 23-1046(A)(2) (Supp. 1977-78) provides that in the case of an industrial injury causing death, compensation known as a death benefit will be made to the surviving spouse if there are no children. The benefit will be equal to 35% of the deceased's average wage and will continue until the surviving spouse's death or remarriage. Upon remarriage, the surviving spouse receives two year's compensation in one lump sum.

54. 54 Ariz. 1, 3, 91 P.2d 700, 701 (1939).

55. *Id.* at 6, 91 P.2d at 702 (quoting Eureka Block Coal Co. v. Wells, 83 Ind. App. 181, 184, 147 N.E. 811, 812 (1925)). In this case the widow of an employee had been receiving death benefits under ARIZ. REV. STAT. ANN. § 23-1046(A)(2). She remarried, benefits ceased, and she received a lump sum settlement. Her second marriage was annulled. Subsequently, she sought to return the lump sum settlement and have reinstated the spousal benefits that had been terminated when she remarried. 54 Ariz. at 6, 91 P.2d at 702. *See also In Re* Duncan's Estate, 83 Idaho 254, 262, 360 P.2d 987, 992 (1961).

56. *See generally* Means v. Industrial Comm'n, 110 Ariz. 72, 75, 515 P.2d 29, 32 (1973).

vives the spouse's right to receive death benefits.[57]

Mrs. Hodges urged analogous application of "remarriage" as defined in the workmen's compensation statute[58] to her situation. However, the court of appeals rejected the comparison as improper,[59] citing fundamental differences in the relationships governed by the respective statutes.[60]

The general purpose of workmen's compensation law is to shift the burden of work-related accidental injury and death from the injured employee and his dependents to the industry.[61] Workmen's compensation statutes must be liberally construed in order to effectuate this purpose.[62] Moreover, the right to receive death benefits derives not from actual need, but rather from the beneficiary's status as the surviving spouse of a wage earner.[63] Once the right to benefits has been established, it cannot be terminated by a change in the recipient's financial position.[64] If the surviving spouse gets a job or receives an inheritance, the right to receive benefits continues uninterrupted.[65] Financial need is irrelevant.[66]

An award of support and maintenance in a divorce decree, on the other hand, is founded upon a prior marital obligation. Each situation is individually evaluated by the court in terms of financial need and ability to procure employment. Because the statute does not automatically place the burden of maintenance on either the husband or the wife,[67] there is no justification for interpreting it more liberally in favor of one of the parties as in workmen's compensation cases. The right to

57. *See* Southern Pac. Co. v. Industrial Comm'n, 54 Ariz. 1, 6, 91 P.2d 700, 702 (1939). It should be noted that although the court held that annulment revived her benefits, the widow did not receive them. The annulment was held invalid because it had been granted upon improper grounds. She remained the wife of the second husband. *Id.*

58. ARIZ. REV. STAT. ANN. § 23-1046(A)(2) (Supp. 1977-78). See discussion note 53 *supra.*

59. 118 Ariz. at 575, 578 P.2d at 1004.

60. *Id. But cf.* Gamez v. Industrial Comm'n, 114 Ariz. 179, 559 P.2d 1094 (Ct. App. 1976), where the Arizona Court of Appeals held that "[t]he concept of marriage under workmen's compensation statutes is not special, but follows the ordinary domestic relations law of this state." *Id.* at 181, 559 P.2d at 1196. This case can be distinguished from *Hodges* in that *Gamez* deals with establishing the validity of a first marriage, not a second marriage. Furthermore, the *Gamez* court held that workmen's compensation law "follows" domestic relations law rather than establishes a precedent for domestic relations law as Mrs. Hodges contended. *Id.*

61. Kay v. Hillside, 54 Ariz. 36, 42, 91 P.2d 867, 869 (1939). *See generally* 1 SCHNEIDER'S WORKMEN'S COMPENSATION § 3, at 3-11 (3d ed. 1941).

62. *See* Coca-Cola Bottling Co. v. Industrial Comm'n, 23 Ariz. App. 496, 498, 534 P.2d 304, 306 (1975); Pottinger v. Industrial Comm'n, 22 Ariz. App. 389, 393, 527 P.2d 1232, 1236 (1974); Bonnin v. Industrial Comm'n, 6 Ariz. App. 317, 322, 432 P.2d 283, 286 (1967).

63. A. LARSON, 2 LARSON'S WORKMEN'S COMPENSATION LAW § 64.40, at 11-131 to 11-136 (1976).

64. *Id.*

65. *Id.*

66. *See* United States Fidelity & Guar. Co. v. Industrial Comm'n, 25 Ariz. App. 244, 246, 542 P.2d 825, 827 (1975).

67. *See* ARIZ. REV. STAT. ANN. §§ 25-317 to 319 (1976). See discussion note 1 *supra.*

receive maintenance from an ex-spouse derives from financial need.[68] The award of maintenance is determined by considering a variety of factors, such as the need of the dependent spouse and the financial capability of the supporting spouse.[69] If financial need does not exist at the time of dissolution, an award will not be made. If an award is made and the dependent spouse later becomes self-supporting, the supporting spouse is entitled to a termination or modification of the support obligation.[70]

While recognizing that no Arizona precedent governed the interpretation of "remarriage" in the spousal maintenance statute,[71] the Arizona Court of Appeals in *Hodges* approved the analysis of the California Supreme Court in *Sefton v. Sefton*.[72] In that case, it is stated that whether a former husband's support payments will be revived following an annulment of the wife's subsequent marriage depends upon "sound policy and justice."[73] The *Hodges* court concluded that the most equitable interpretation of remarriage is that it contemplates only a marriage ceremony valid on its face and that it would be manifestly unjust to reinstate support payments following annulment.[74]

Policies for Non-Reinstatement of Support Payments

A number of policy considerations support the *Hodges* definition of remarriage. If the statutory use of remarriage contemplates merely the ceremony, the supporting spouse has a definable event terminating his obligation. In the alternative, if termination is dependent upon the

68. ARIZ. REV. STAT. ANN. § 25-319 (1976). See discussion note 1 *supra*.

69. *Id.*

70. ARIZ. REV. STAT. ANN. § 25-327(A) (Supp. 1977-78). See discussion note 2 *supra*. There is an additional difference between workmen's compensation and spousal maintenance that supports the appellate court's rejection of the attempted analogy, though it was not discussed at great length in *Hodges*. There is a manifest difference in the relative expectations of the alimony-paying divorced spouse as opposed to the workmen's compensation fund. If the remarriage of a workman's beneficiary is annulled and the beneficiary's right to receive benefits revives, the workmen's compensation fund cannot be prejudiced by reliance on the remarried status. Any payments made to the fund on behalf of the deceased wage earner were completed at his death and will not be decreased under any circumstances, including remarriage. *See* Ison v. Western Vegetable Dist., 48 Ariz. 104, 120, 59 P.2d 649, 656 (1936); ARIZ. REV. STAT. ANN. § 23-983 (1971).

The automatic revival of the obligation to pay death benefits is a burden that is justifiable in the workmen's compensation context. However, revival of support payments represents an intolerable burden on the private resources of a supporting spouse. The supporting spouse would be forever subject to the dormant claims of the dependent spouse which may be reactivated if the remarriage is annulled. Hodges v. Hodges, 118 Ariz. 572, 576, 578 P.2d 1001, 1005 (Ct. App. 1978). Conversely, the dependent spouse would be forever assured a source of support irrespective of the reasonable expectations of the supporting spouse. *Id. See generally* Folsom v. Pearsall, 138 F. Supp. 939, 944 (N.D. Cal. 1956), *aff'd*, 245 F.2d 562, 565 (9th Cir. 1957). *See also* Clark v. City of Los Angeles, 187 Cal. App. 2d 792, 798, 9 Cal. Rptr. 913, 918 (1960); *In Re* Duncan's Estate, 83 Idaho 245, 263, 360 P.2d 987, 992 (1961).

71. ARIZ. REV. STAT. ANN. § 25-327(B) (Supp. 1977-78), *quoted* note 2 *supra*.

72. 45 Cal. 2d 872, 291 P.2d 439 (1955).

73. *Id.* at 874, 291 P.2d at 441.

74. 118 Ariz. at 576, 578 P.2d at 1005.

formation of a valid marriage, the supporting spouse may never be able to ascertain when the obligation will end.[75] The facts that render a marriage void or voidable are not readily apparent to those outside the marriage.[76] Additionally, because a voidable marriage is not infirm at its inception, it does not have to be annulled;[77] it can be ratified by time or by acquiescence of the parties.[78] There is no way for the supporting spouse to know if the marriage will eventually be annulled, resulting in a revival of his or her obligations, and it is unfair to leave with the remarried spouse the choice of ratifying a voidable marriage or obtaining an annulment at the expense of the former spouse.[79]

Moreover, under Arizona law, a divorce or an annulment can be granted on the same grounds.[80] Therefore, the dependent spouse often has the choice between divorce and annulment. If annulment revives a prior support obligation, the dependent spouse is able to choose the source of support. Under annulment, the former spouse could be ordered to resume support; by divorce, the subsequent spouse can be obligated to provide support.[81] In some cases, the dependent spouse may receive support from both prior and present spouses for the period of the annulled marriage. In fact, the trial court awarded Mrs. Hodges support payments from Mr. Hodges for the two months she lived with John Pfrimmer as his wife and was entitled to his support.[82] The Arizona Court of Appeals stated that this was "repugnant to public policy and good morals"[83] and that Mrs. Hodges was entitled to support from only one husband at a time.[84] By defining remarriage as the marriage ceremony and not the creation of a valid marriage, the court avoided this unconscionable overlap of support.

Finally, by participating in a marriage ceremony the dependent spouse acts affirmatively to represent a new status, and the prior sup-

75. Sefton v. Sefton, 45 Cal. 2d 872, 876, 291 P.2d 439, 442 (1955); Flaxman v. Flaxman, 57 N.J. 458, 463, 273 A.2d 567, 570 (1971).

76. For example, to discern fraud one is required to have some knowledge of the terms of the marriage agreement. To discover bigamy or mental incompetence also requires an intimate knowledge of the parties not likely to be possessed by an uninvolved third party such as an ex-spouse.

77. *See* C. FORTE, R. LEVY & F. SANDER, *supra* note 3, at 175. *See* discussion note 20 *supra*; text & notes 24-27 *supra*.

78. *See* C. FOOTE, R. LEVY & F. SANDER, *supra* note 3, at 175.

79. *See* Sefton v. Sefton, 45 Cal. 2d 872, 876, 291 P.2d 439, 442 (1955); Flaxman v. Flaxman, 57 N.J. 458, 463, 273 A.2d 567, 570 (1971).

80. Means v. Industrial Comm'n, 110 Ariz. 72, 75, 515 P.2d 29, 32 (1973) (impotence judged to be grounds for both divorce and annulment).

81. Hodges v. Hodges, 118 Ariz. at 576, 578 P.2d at 1005.

82. *Id.*

83. *Id.* (quoting Keeney v. Keeney, 211 La. 586, 594, 30 So. 2d 549, 551 (1947)).

84. *Id.* at 577, 578 P.2d at 1006. This ruling may depart from prior court declarations that the purpose of support and maintenance is to provide the dependent spouse with a private source of support as long as it is required. *See* Linton v. Linton, 17 Ariz. App. 560, 563, 499 P.2d 174, 177 (1972). When viewed in conjunction with *Linton, Hodges* should be interpreted as an additional limitation on the dependent spouses "right" to support.

porting spouse has a right to rely on the apparent validity of the remarriage and its effect to end the support obligation.[85] It would be unfair to require the supporting spouse to remain ready to resume support should the remarriage be annulled in the indefinite future. The ex-spouse's "affairs should not be left in limbo subject to the conduct of parties to a relationship of which he has no part."[86]

If remarriage is interpreted to require only a ceremony, the dependent spouse will not be treated unfairly. This approach assumes all parties to be responsible and capable of bearing the consequences of their actions. The reasonable expectations of the dependent and supporting spouse when the remarriage took place are given force, rather than dated concepts of absolute legality.

Conclusion

In *Hodges*, the Arizona Court of Appeals departed from the traditional view regarding the retroactive effect of annulment. The distinction between void and voidable marriages was discarded as irrelevant in the analysis of the revival effect of annulment on a prior support obligation. Once a remarriage, valid on its face, has occurred, the support obligation is automatically terminated. No court may exercise jurisdiction over the matter.

This decision is in keeping with the current trend in Arizona treating annulment and divorce similarly. The decision is also supported by a number of policy decisions. Consequently, in the future, the effects of the *Hodges* decision may be avoided only if the parties to a divorce specifically provide for the termination of the support obligations under circumstances different than those provided by statute.

85. However, if the supporting spouse had reason to know about the defect in the dependent spouse's remarriage, there might be a different result. For example, suppose the supporting spouse knows that the dependent spouse is legally incompetent. The supporting spouse would have no justification for relying on the validity of any marriage the dependent spouse might attempt to contract unless it is ratified by his guardian. *See generally* Minder v. Minder, 83 N.J. Super. 159, 167-68, 199 A.2d 69, 73 (1964); Cecil v. Cecil, 11 Utah 2d 155, 157, 356 P.2d 279, 279-80 (1960). Otherwise, "it accords with the policy of the law to look less favorably upon the more active of two innocent parties when by reason of such activity a loss is sustained as a result of the misconduct of a stranger." Sefton v. Sefton, 45 Cal. 2d 872, 877, 291 P.2d 439, 442 (1955).

86. Flaxman v. Flaxman, 57 N.J. 458, 463, 273 A.2d 567, 570 (1971).

VI. INDIAN LAW

A. THE APPLICATION OF FULL FAITH AND CREDIT TO INDIAN NATIONS

The full faith and credit clause of the United States Constitution[1] requires each state to give effect to the public acts, records, and judicial proceedings of every other state.[2] The enabling legislation for this clause has extended such recognition to territories and possessions of the United States.[3] Whether this language should be read to include the Navajo Nation was raised by two similar cases recently decided in the courts of Arizona[4] and New Mexico.[5] The Arizona Court of Appeals in *Brown v. Babbitt Ford, Inc.*[6] answered this question in the negative.[7] The *Brown* court's determination that the Navajo Nation was not a "territory" within the meaning of the full faith and credit statute[8]

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1. U.S. CONST. art. IV, § 1.

2. The clause provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." The extent of recognition required by the full faith and credit clause to be given foreign state statutes is an issue of considerable controversy. *See* Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 11-34 (1945); Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 MICH. L. REV. 33, 71-86 (1957). Generally, a state is required to give effect to a foreign statute unless it conflicts with the public policy of the forum state. *Compare* Hughes v. Fetter, 341 U.S. 609, 611 (1951) *and* Broderick v. Rosner, 294 U.S. 629, 643 (1935) *with* Carroll v. Lanza, 349 U.S. 408, 411-14 (1955) *and* Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 544 (1935).

3. 28 U.S.C. § 1738 (1976) provides in part:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory, or Possession thereto.
>
> . . . .
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

4. Brown v. Babbitt Ford, Inc., 117 Ariz. 192, 571 P.2d 689 (Ct. App. 1977). The Arizona Supreme Court in Begay v. Miller, 70 Ariz. 380, 386, 222 P.2d 624, 628 (1950), previously determined that the Navajo Nation was not a state for purposes of article IV, § 1 of the United States Constitution. However, the court did recognize the validity of a divorce decree entered by a Navajo court and declared a subsequent decree by an Arizona court to be a nullity. *Id.* at 388, 222 P.2d at 629.

5. Jim v. C.I.T. Fin. Serv. Corp., 87 N.M. 362, 533 P.2d 751 (1975).

6. 117 Ariz. 192, 571 P.2d 689 (Ct. App. 1977).

7. *Id.* at 197, 571 P.2d at 694. However, the court recognized that the principles of comity should be extended to legislative enactments of the Navajo Tribal Council. *Id.* at 198, 571 P.2d at 695. Comity is the recognition given to the governmental acts of one sovereign jurisdiction by another sovereign jurisdiction out of deference and mutual respect. Hilton v. Guyot, 159 U.S. 113, 212-14 (1895); Brown v. Babbitt Ford, Inc., 117 Ariz. 192, 198, 571 P.2d 689, 695 (Ct. App. 1977).

8. 117 Ariz. at 195-97, 571 P.2d at 692-94.

was directly contrary to the holding of the New Mexico Supreme Court in *Jim v. C.I.T. Financial Services Corp.*[9]

The two cases involved similar actions brought in the state courts seeking relief based on title 7, sections 607 and 609 of the Navajo Tribal Code.[10] These acts create civil liability for repossession of personal property[11] from lands subject to the jurisdiction of the Navajo Nation where such repossession takes place without the written consent of the purchaser or, in the absence of written consent, by order of a Navajo Tribal Court.[12]

In *Brown*, the appellant, a member of the Navajo tribe, purchased a pickup truck from Babbitt Ford in Flagstaff, Arizona, which is located outside the boundaries of the Navajo Nation. Payment of the purchase price was to be made pursuant to an installment sales security agreement with the truck serving as collateral for the agreement. Brown subsequently defaulted on the payments, and agents of Babbitt Ford repossessed the truck from land within the jurisdictional limits of the Navajo Nation. Babbitt Ford neither secured the written consent of Brown nor obtained an order of the Navajo Tribal Council prior to the

9. 87 N.M. 362, 363, 533 P.2d 751, 752 (1975). The Washington Supreme Court has accepted the New Mexico interpretation of § 1738 without discussion. *See In re* Adoption of Buehl, 87 Wash. 2d 649, 663, 555 P.2d 1334, 1342 (1976).

10. NAVAJO TRIBAL CODE tit. 7, § 607 (1977) provides:

> The personal property of Navajo Indians shall not be taken from land subject to the jurisdiction of the Navajo Tribe under the procedures of repossession except in strict compliance with the following:
>
> (1) Written consent to remove the property from land subject to the jurisdiction of the Navajo Tribe shall be secured from the purchaser at the time repossession is sought. The written consent shall be retained by the creditor and exhibited to the Navajo Tribe upon proper demand.
>
> (2) Where the Navajo refuses to sign said written consent to permit removal of the property from the land subject to the jurisdiction of the Navajo Tribe, the property shall be removed only by order of a Tribal Court of the Navajo Tribe in an appropriate legal proceeding.

NAVAJO TRIBAL CODE tit. 7, § 609 (1977) provides in part:

> Any person who violates section 607 of this title and any business whose employee violates such section is deemed to have breached the peace of the lands under the jurisdiction of the Navajo Tribe, and shall be civilly liable to the purchaser for any loss caused by the failure to comply with sections 607-609 of this title.

The 1969 Navajo Tribal Code in effect at the time of the *Brown* decision listed these two sections as §§ 307 and 309 respectively.

11. *See* NAVAJO TRIBAL CODE tit. 7, §§ 607, 609 (1977). In both *Brown* and *Jim*, pickup trucks owned by Navajo Indians were repossessed from the Navajo Reservation allegedly in compliance with the "self help" provisions of the states' Uniform Commercial Codes. These provisions provide that upon default a secured party may take possession of the collateral without judicial process, if it can be done without breach of the peace. ARIZ. REV. STAT. ANN. § 44-3149 (1967); N.M. STAT. ANN. § 55-9-503 (1978).

A second claim was asserted by the plaintiff in *Brown*, that failure to comply with the Navajo repossession statute constituted a breach of the peace according to NAVAJO TRIBAL CODE tit. 7, § 609 and therefore the repossession was illegal under ARIZ. REV. STAT. ANN. § 44-3149 (1967). Abstract of Record at 137-38, Brown v. Babbitt Ford, Inc., 117 Ariz. 192, 571 P.2d 689 (1977). This claim, however, would also require state court acceptance of Navajo law.

12. NAVAJO TRIBAL CODE tit. 7, § 607 (1977).

repossession as required by the Tribal Code.[13] Contending that acts of the Navajo Nation are entitled to full faith and credit in state courts, Brown commenced an action for damages in the Arizona superior court based on title 7, sections 607 and 609 of the Navajo Tribal Code. The trial court dismissed this action for failure to state a claim, and the court of appeals affirmed.[14]

This casenote will examine the Arizona Court of Appeals' determination that acts of the Navajo Tribal Council are not entitled to full faith and credit. Discussion will center upon the meaning of the term "territory" as used in 28 U.S.C. § 1738 and whether the relationship of the Navajo Nation to the United States comes within that definition so as to require recognition of Navajo tribal authority.[15] Relevant precedents will be considered along with the historical development of both full faith and credit legislation and federal Indian legislation. Finally, the relevance of federal Indian policy in interpreting the full faith and credit statute will be discussed. The conclusion of this casenote is that full faith and credit should be given to Indian tribal authority.

Defining "Territory" in the Context of Full Faith and Credit

In concluding that the enactment of the Navajo Tribal Council was not entitled to full faith and credit, the Arizona court relied on a narrow interpretation of "territory"[16] which included only organized territories.[17] This definition was derived from two cases involving interpretation of the federal extradition statute.[18]

The first case is *Ex parte Morgan*,[19] where a federal district court held that the Cherokee Nation was not a territory and could not re-

13. 117 Ariz. at 194, 571 P.2d at 691; see NAVAJO TRIBAL CODE tit. 7, § 607 (1977); text & note 11 *supra*.

14. 117 Ariz. at 198, 571 P.2d at 695. The court of appeals affirmed the dismissal of the plaintiff's claim on the ground that the parties had chosen Arizona law by the terms of their contract. *Id.* at 199, 571 P.2d at 696.

15. Although this casenote deals specifically with full faith and credit in relation to the Navajo Nation, much of the discussion is applicable to Indians tribes in general.

16. [A territory is a] portion of the country not included within the limits of any State, and not yet admitted as a State into the Union, but organized under the laws of Congress with a separate legislature, under a territorial governor and other officers appointed by the President and Senate of the United States.

117 Ariz. at 196, 571 P.2d at 693 (quoting Kopel v. Bingham, 211 U.S. 468, 475 (1909)).

17. "An 'organized' Territory is one in which a civil government has been established by an Organic Act of Congress." United States v. Standard Oil Co., 404 U.S. 558, 559 n.2 (1972). An organic act is an act conferring powers of government upon a territory. *In re* Lane, 135 U.S. 443, 447 (1890).

18. The statute construed in both cases was Act of February 12, 1793, ch. 7, § 1, 1 Stat. 302 (current version at 18 U.S.C. § 3182 (1976)). Acceptance by the court of appeals of the definition of territory utilized in cases interpreting the extradition statute may not have been appropriate in this case. The text of 28 U.S.C. § 1738 (1976), the full faith and credit statute, includes the word "possession" which indicates a more inclusive reading should be given to it than to the extradition statute, 18 U.S.C. § 3182 (1976), which omits this word. *See* text & notes 32-34, 47-52 *infra*.

19. 20 F. 298 (W.D. Ark. 1883).

quest extradition under the statute.[20] The reasoning relied upon by the court in *Morgan*, however, has been substantially eroded by subsequent history. For example, the *Morgan* court stated that territories are comprised of citizens, which at that time did not include Indians.[21] In 1924, however, Indians were granted citizenship.[22] Another basis for the court's finding in *Morgan* was its assessment that the Cherokee Nation was not an organized government with an executive, legislative, and judicial system of its own.[23] This statement was, at best, questionable when made,[24] and is today totally inapplicable to the Navajo Nation.[25] Due to these significant changes in the political status of American Indians, the tribes are now arguably within the definition of "territory" as used by the *Morgan* court.

The other case relied on by the court of appeals to define territory is *Kopel v. Bingham*,[26] where the United States Supreme Court held that Puerto Rico was a territory for purposes of the extradition statute.[27] The Court in *Kopel* distinguished *Morgan* on the basis that the Cherokee Nation was not an organized government, with an executive, legislative, and judicial system of its own, but was exclusively under the jurisdiction of the United States.[28] As stated above, this distinction is not applicable to the Navajo Nation.[29] The Supreme Court also stated in *Kopel* that "[i]t is impossible to hold that Porto [*sic*] Rico was not intended to have power to reclaim fugitives from its justice, and that it was intended to be created an asylum for fugitives from the United States."[30] Congress also authorized establishment of the Navajo tribal government,[31] and it is just as unlikely that Congress intended to isolate the Navajo Nation from the federal criminal justice system.

Because of the similarities between the modern Navajo Nation

20. *Id.* at 305-06 (interpreting Act of February 12, 1793, ch. 7, § 1, 1 Stat. 302 (current version at 18 U.S.C. § 3182 (1976)). The court of appeals in *Brown* relied heavily on the *Morgan* precedent. "[F]or the purposes of our analysis, the observations made in Ex Parte Morgan, . . . are as valid today as they were in 1883, that is, that Indian reservations have never been considered as a 'territory' within the laws of the United States . . . ." 117 Ariz. at 197, 571 P.2d at 694.

21. 20 F. at 306.

22. Act of June 2, 1924, ch. 233, 43 Stat. 253 (current version at 8 U.S.C. § 1401(a)(2) (1976)).

23. 20 F. at 305.

24. *See* Mackey v. Coxe, 59 U.S. (18 How.) 100, 102 (1855); Mehlin v. Ice, 56 F. 12, 17-18 (8th Cir. 1893).

25. *See* Udall v. Littell, 366 F.2d 668, 670 n.1 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1007 (1967); text & notes 65-68, 72 *infra*. *See also* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 148 (1942).

26. 211 U.S. 468 (1909).

27. *Id.* at 476 (interpreting Act of February 12, 1793, ch. 7, § 1, 1 Stat. 302 (current version at 18 U.S.C. § 3182 (1976)).

28. 211 U.S. at 475. The Puerto Rican government had been organized pursuant to the Foraker Act, ch. 191, 31 Stat. 77 (1900).

29. See text & notes 24-25 *supra*.

30. 211 U.S. at 474.

31. *See* text & notes 65-68 *infra*.

and territories, as defined in *Morgan* and *Kopel*, the Arizona Court of Appeals' reliance on these cases is questionable.

The New Mexico Supreme Court decision in *Jim v. C.I.T. Financial Services Corp.* was based on the proposition that the term "territories" "does not have a fixed and technical meaning that must be accorded to it in all circumstances."[32] The United States Supreme Court decision *District of Columbia v. Carter*[33] clearly supports this proposition. In *Carter*, the Court concluded that "[w]hether the District of Columbia is a state or territory within the meaning of any particular statute depends upon the character and aim of the specific provision."[34] Therefore, in order to arrive at a proper interpretation of territory in the context of full faith and credit, it is necessary to examine precedents in that area.

Finding Indian tribes to be territories within the meaning of a particular statute is not without precedent.[35] The New Mexico court in *Jim* relied on *Mackey v. Coxe*.[36] *Mackey* involved the interpretation of a statute requiring letters of administration issued by the "United States or territories thereof" to be recognized in the District of Columbia court.[37] The Supreme Court concluded that the Cherokee Nation was sufficiently akin to a territory to come within the Act.[38]

32. 87 N.M. at 363, 533 P.2d at 752. The New Mexico Supreme Court adopted the reasoning of the dissent in the lower appellate court. See Jim v. C.I.T. Fin. Serv. Corp., 86 N.M. 784, 789-90, 527 P.2d 1222, 1227-28 (Ct. App. 1974) (Hernandez, J. dissenting).

33. 409 U.S. 418 (1973).

34. *Id.* at 420. The Court further explained that:

> [W]here the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law . . . .

Id. at 421 (quoting Atlantic Cleaners & Dryers v. United States, 286 U.S. 427, 433 (1932)). *Compare Carter*, where the Supreme Court held that the District of Columbia was not a state or territory within the meaning of 28 U.S.C. § 1983 (1976), *with* Embry v. Palmer, 107 U.S. 3, 10 (1882), *and* Reiter v. Universal Marion Corp., 299 F.2d 449, 453 (D.C. Cir. 1962), both holding the full faith and credit statute applicable to the District of Columbia.

Accordingly, the Supreme Court has found the term "territory" to have a more inclusive meaning when used in other contexts. In United States v. Standard Oil Co., 404 U.S. 558 (1972), for example, the Court held that under the Sherman Act, 15 U.S.C. § 3 (1976) "Congress intended to include all territories to which its power might extend." 404 U.S. at 560. This included territories not organized under acts of Congress. In this instance, American Samoa was found to be a "territory" within the meaning of the Sherman Act. *Id. Cf. In re* Lane, 135 U.S. 443, 447 (1890) ("territory" narrowly construed when used as an exception in a criminal statute which was given an inclusive interpretation).

35. *See* Mackey v. Coxe, 59 U.S. (18 How.) 100, 104 (1855); text & notes 37 & 38 *infra*. *Cf. In re* Lynch's Estate, 92 Ariz. 354, 356-57, 377 P.2d 199, 200-01 (1962) (Navajo tribal court must be treated the same as a court of another state or foreign country for purposes of ARIZ. REV. STAT. ANN. § 14-343 (1956) which provides for recognition of a will probated in another state or foreign country).

36. 59 U.S. (18 How.) 100 (1855).

37. *See id.* at 103 (construing Act of June 24, 1812, § 11, 2 Stat. 758).

38. 59 U.S. (18 How.) 100, 104 (1855). The Arizona court in *Brown* rejected reliance on this case because it dealt, not with the predecessor of 28 U.S.C. § 1738 (1976), but with recognition of letters of administration in a federal court. *See* 117 Ariz. at 196, 571 P.2d at 693. This rejection,

A series of decisions by the Eighth Circuit Court of Appeals held that judgments of courts of Indian nations, in cases within their jurisdiction, stand on the same footing with those of the courts of other United States territories and are entitled to the same faith and credit.[39] Recently, these cases, which are based upon the Supreme Court's holding in *Mackey*,[40] have apparently been approved by the Supreme Court.[41] However, since none of the cases discussed to this point have expressly required a finding that Indian tribes are "territories" for purposes of the full faith and credit statute,[42] it is necessary to examine that statute itself.

Full Faith and Credit to Indian Tribal Authority

Legislation to implement the full faith and credit clause was first enacted in 1790.[43] That Act provided the manner in which state acts and judgments should be authenticated.[44] In 1804 the Act was broad-

however, appears to be ill founded. Language of the Supreme Court indicates a broader holding in *Mackey*:

> A question has been suggested whether the Cherokee people should be considered and treated as a foreign State or territory. The fact that they are under the Constitution of the Union, and subject to acts of Congress regulating trade, is a sufficient answer to the suggestion . . . . The principle difference [between a territory under the Ordinance of 1787 and the Cherokee Nation] consists in the fact that the Cherokees [govern themselves]. This, however, is no reason why the laws and proceedings of the Cherokee *territory*, so far as relates to rights claimed under them, should not be placed upon the same footing as *other territories* in the Union.

59 U.S. (18 How.) at 103 (emphasis added). The essence of the *Mackey* decision, as it relates to the grant of full faith and credit to Indian tribes, is that a congressional act requiring recognition of an act of a territory was interpreted to include an Indian nation. 59 U.S. (18 How.) at 104. Thus, whether such recognition is required of a specific court, as in *Mackey*, or of courts in general is irrelevant to the present analysis.

39. *E.g.*, Cornells v. Shannon, 63 F. 305, 306 (8th Cir. 1894); Standley v. Roberts, 59 F. 836, 845 (8th Cir. 1894); Mehlin v. Ice, 56 F. 12, 19 (8th Cir. 1893). In *Mehlin* the court dealt specifically with the Cherokee Nation. In finding that the Cherokees should be treated as a territory, the court relied on the civilized nature of the tribe and the structure of its government, which resembled that of the states because it consisted of three separate branches. *Id.* at 17-18. Since the factor of civilization can no longer seriously be considered a relevant distinction, the reasoning of the court is now applicable to any Indian tribe that has adopted formal governmental institutions. Although the court did not mention the full faith and credit statute in these cases, the former enabling legislation for the full faith and credit clause did apply to territories at that time. Act of May 26, 1790, ch. 11, 1 Stat. 122, *as supplemented by* Act of March 24, 1804, ch. 56, § 2, 2 Stat. 298.

40. *See* Mehlin v. Ice, 56 F. 12, 18-19 (8th Cir. 1893).

41. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65-66 n.21 (1978). The Court acknowledged that tribal courts are appropriate forums for the exclusive adjudication of disputes affecting important personal and property rights of both Indians and non-Indians. *Id.* at 65-66.

42. See discussion at text & notes 37-39 *supra*.

43. Act of May 26, 1790, ch. 11, 1 Stat. 122.

44. *Id.* The Act of May 26, 1790 merely provided that faith and credit be given to records and judicial proceedings. The Act states in part:

> That the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: That the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States by attestation of the clerk, ... And the said *records and judicial proceedings* . . . shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.

ened to include "territories of the United States, and countries subject to the jurisdiction of the United States."[45] The present enactment[46] substituted the phrase "Possession of the United States" for the words "of any country subject to the jurisdiction of the United States."[47] This substitution may appear to narrow the scope of the statute,[48] yet the legislative history of the Act indicates that no substantive changes were intended by the revisors.[49] Moreover, the term "possession" is itself susceptible to an inclusive interpretation.[50] Given its ordinary meaning, "possession" would appear to include all land over which the United States asserts jurisdiction.[51] Thus, this definition would include Indian reservations.[52] In light of this language, the Act[53] would appear to require a broad inclusive interpretation.[54]

The purposes of full faith and credit have been variously described: to coordinate the administration of justice throughout the United States,[55] to provide for maximum enforcement of obligations or rights created or recognized by sister states,[56] and to bring finality to litigation.[57] The words "state," "territory," and "possession" show a congressional intent to unify all of the courts in our system of govern-

Id. (emphasis added).

45. Act of March 24, 1804, ch. 56, § 2, 2 Stat. 298. The Court in Embry v. Palmer, 107 U.S. 3, 9 (1882), concluded that the general judicial powers in article III of the Constitution were broad enough to allow Congress to extend the scope of the full faith and credit clause to the territories. *See also* Perkins v. Benguet Consol. Mining Co., 55 Cal. App. 2d 720, 742, 132 P.2d 70, 85 (1942), *cert. denied*, 319 U.S. 774 (1943).

By 1804, certain Indian tribes had been taken under the protection of the United States. *See* Treaty of August 7, 1790, with the Creek Nation, 7 Stat. 35. The appellant in *Brown* contended that by inclusion of the phrase "countries subject to the jurisdiction of the United States," Congress intended to provide a means for the orderly integration of these tribes into the federal judicial system, and that "countries" referred to what were later described as "domestic dependent nations." Reply brief for appellant at 2-3, Brown v. Babbitt Ford, Inc., 117 Ariz. 192, 571 P.2d 689 (1977). *Cf.* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831) (Cherokee Nation not a foreign state or territory).

46. 28 U.S.C. § 1738 (1976).

47. Revisor's Note, 28 U.S.C. § 1738 (1976).

48. The intent of this change may have been to exclude those countries occupied by the United States as a consequence of World War II. Reply brief for appellant at 4, Brown v. Babbitt Ford, Inc., 117 Ariz. 192, 571 P.2d 687 (Ct. App. 1977).

49. K. Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 MICH. L. REV. 33, 82 (1957).

50. *See* Vermilya-Brown Co. v. Connell, 335 U.S. 377, 386-88 (1948), where the Court found a United States leasehold on the British colony of Bermuda to be a possession of the United States within the meaning of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976).

51. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1770 (1965) defines possession as: "something owned, occupied, or controlled . . . . an area subject to a government but not fully integrated into the nation to which the government belongs . . . ."

52. *See* Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974); United States v. Kagama, 118 U.S. 375, 379-81 (1886).

53. 28 U.S.C. § 1738 (1976).

54. *See* note 45 *supra*. *See* text accompanying notes 56-59 *infra*.

55. Americana of Puerto Rico, Inc. v. Kaplus, 368 F.2d 431, 438 (3d Cir. 1966), *cert. denied*, 386 U.S. 943 (1967).

56. Hughes v. Fetter, 341 U.S. 609, 612 (1951).

57. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525 (1931).

ment.[58] The dispositive question thus becomes whether "territory" is properly applied to a dependency bearing the relation to the United States that is borne by the Navajo Nation.[59]

Development of Federal Indian Relations

The history of the Indian nations shows that they have been steadily integrated into the fabric of the American governmental system.[60] The Constitution distinguishes the Indian lands from both foreign countries and states.[61] The Court at an early date described the Indian tribes as domestic dependent nations.[62] In 1871, Congress ended any doubt that may have existed concerning the domestic status of Indians by providing that no Indian nation within the territory of the United States would be recognized as an independent nation.[63] In keeping with this trend of political integration, all Indians born within the jurisdiction of the United States are now citizens.[64] In addition, Congress has passed acts providing for the establishment of constitutional tribal governments.[65]

58. Americana of Puerto Rico, Inc. v. Kaplus, 368 F.2d 431, 438 (3d Cir. 1966), *cert. denied*, 386 U.S. 943 (1967); *cf.* Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 24 (1945), arguing that the full faith and credit clause should be interpreted in the manner that "best will meet the needs of an expanding national society for a modern system of administering, inexpensively and expeditiously, a more certain justice."

59. *See* Puerto Rico v. Shell Co., 302 U.S. 253, 257 (1937).

60. In *Brown*, the court purportedly based its decision on "the historical developments" associated with territories and Indian country. 117 Ariz. at 196-97, 571 P.2d at 693-94. From the discussion in the opinion, however, Indian history appears to have ended sometime prior to the beginning of the twentieth century. *See id.*

61. *See* U.S. CONST. art. I, § 1, cl. 3. Prior to adoption of the Constitution the Indian tribes were independent sovereigns. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). This status may have continued until sometime after the Constitution was adopted. Higgins, *International Law Consideration of the American Indian Nations by the United States*, 3 ARIZ. L. REV. 74, 84 (1961). Early congressional acts required passports for entering certain Indian lands. Act of May 19, 1796, ch. 30, § 3, 1 Stat. 470 (*reenacted as* Act of March 3, 1799, ch. 46, § 3, 1 Stat. 745, *and* Act of March 30, 1802, ch. 13, § 3, 2 Stat. 141, *repealed*, Act of June 30, 1834, ch. 161, § 29, 4 Stat. 734).

62. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 2, 16 (1831).

63. Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified at 25 U.S.C. § 71 (1976)) provides in part: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." Some Indian nations had been treated much like territories of the United States prior to this enactment. *See* J. Res. No. 18, June 15, 1860, 12 Stat. 116 (advocating supplying the Choctaw, Cherokee, and Chickasaw Nations with such copies of the laws, journals, and public printed documents as are furnished to the states and territories); Mackey v. Coxe, 59 U.S. (18 How.) 100, 104 (1855).

64. 8 U.S.C. § 1401(a)(2) (1976).

65. The Indian Reorganization Act, 25 U.S.C. §§ 461-479 (1976), provides Indians the right to organize and adopt constitutions and bylaws subject to the approval of the Secretary of the Interior. *Id.* § 476. Under this Act, elections held within a tribe pursuant to regulations prescribed by the Secretary are federal elections. Cheyenne River Sioux Tribe v. Andrus, 566 F.2d 1085, 1087-88 (8th Cir. 1977). The Navajo-Hopi Rehabilitation Act, 25 U.S.C. §§ 631-639 (1976) provides for the adoption of a constitution by the Navajo Nation. *Id.* § 636. These acts may properly be considered organic acts. Although through their inherent powers of sovereignty the tribes retain the right to govern themselves, these acts provide for the establishment of official governmental institutions and vest additional powers in the tribes.

Although the Navajo Nation has never adopted a formal constitution,[66] the Tribal Council was established under rules promulgated by the Secretary of Interior.[67] The courts of the Navajo Nation also operate under regulations promulgated by the Secretary of Interior.[68] Along with their own ordinances and customs, Navajo courts, in all civil cases, apply applicable laws of the United States and regulations of the Interior Department.[69] Even though the tribes retain a significant degree of sovereignty,[70] Congress' power over them is plenary.[71] As a result, the affairs of the Navajo Nation are generally subject to the jurisdiction of the Secretary of Interior.[72] These factors sufficiently establish the Navajo Nation as being an integrated part of the United States for full faith and credit purposes.[73]

Full Faith and Credit in Furtherance of Federal Indian Policy

The tribes still possess those aspects of sovereignty not withdrawn by treaty, statute, or by implication as a necessary result of their dependent status.[74] Federal Indian policy has sought to protect that sovereignty by encouraging and strengthening tribal self-government.[75] The

66. The Navajo Nation rejected the Indian Reorganization Act in 1934 by a narrow margin. R. YOUNG, THE NAVAJO YEARBOOK 377 (1961).

67. Rules for the Navajo Tribal Council were approved July 26, 1938, establishing the Council as the governing body of the Navajo Nation. NAVAJO TRIBAL CODE tit. 2, § 101 (1977) (historical note). Although the Tribal Council, when established, was largely an instrumentality of the federal government, it has become an effective instrument of the Navajo Nation, exercising the residual sovereign powers of the Nation. The Council is acting without the formal consent of the Navajo Nation in that it was not established pursuant to any mandate of the Navajo people, however, the Council's legitimacy is implied from the fact that the people elect the Council membership. *See generally* R. YOUNG, THE NAVAJO YEARBOOK 371-92 (1961).

68. NAVAJO TRIBAL CODE tit. 7, § 1 (1977) adopted the regulations in 25 C.F.R. § 2.1 to 2.20 (1978) relating to Indian offenses.

69. NAVAJO TRIBAL CODE tit. 7, § 204 (1977).

70. *See* United States v. Wheeler, 435 U.S. 313, 323 (1978); United States v. Mazurie, 419 U.S. 544, 557 (1975); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 580 (1832).

71. *E.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); Winton v. Amos, 255 U.S. 373, 391-92 (1921); United States v. Kagama, 118 U.S. 375, 379-80 (1886).

72. Udall v. Littell, 366 F.2d 668, 670 n.1 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1007 (1967).

73. In analogizing the Navajo Nation to the Commonwealth of Puerto Rico (which was considered a territory within the meaning of 28 U.S.C. § 1738 (1970) in Americana of Puerto Rico, Inc. v. Kaplus, 368 F.2d 431 (3d Cir. 1966), *cert. denied*, 386 U.S. 943 (1967)) Judge Hernandez, at the appellate level in Jim v. C.I.T. Fin. Serv. Corp., 86 N.M. 784, 527 P.2d 1222 (Ct. App. 1974), *rev'd*, 87 N.M. 362, 533 P.2d 751 (1975) stated in dissent:

> The inhabitants of both are citizens of the United States; both have the power of self-government. They each have the power to decide upon the number of branches of government, the extent of the powers of each branch, and the method of election and duration of terms of office of the members of each branch. "The government of the Commonwealth derives its powers not alone from the consent of Congress, but also from the consent of the people of Puerto Rico." The Navajo Tribe has the exclusive right of self-government over its internal affairs. This exclusive right of self-government is subject only to express acts of Congress and state actions which do not infringe upon their right of self-government.

Id. at 790, 527 P.2d at 1228 (citations omitted).

74. United States v. Wheeler, 435 U.S. 313, 323 (1978). See note 67 *supra*.

75. *See* notes 65-67 *supra*.

United States Supreme Court has held that a state court may not exercise jurisdiction in those cases where state action would infringe on the right of reservation Indians to make their own laws and be ruled by them.[76] The refusal of a state court to honor the public acts, records, and judicial proceedings of an Indian nation, in cases in which tribal authority would be applicable under a full faith and credit analysis, would appear to constitute such an infringement.[77] As a result, state courts arguably lack jurisdiction to adjudicate such cases. However, if the state court accepted and applied the controlling tribal authority, there would be considerably less infringement on the Indians' right to make and be ruled by their own laws. Accordingly, the application of tribal authority would, in many cases, permit the state court to exercise jurisdiction that would otherwise be denied.[78] Conversely, a refusal to apply applicable Indian authority, in cases affecting essential tribal relations, does constitute an infringement of the Indians' right of self-government.[79] As a result of this infringement the state court lacks jurisdiction.[80] The federal policy of promoting Indian self-government would therefore be furthered by the recognition, in appropriate cases, of tribal law by foreign jurisdictions.

Conclusion

The full faith and credit statute must be interpreted in light of its underlying policy of integrating the administration of justice. The Arizona Court of Appeals failed to do so and, as a result, erroneously applied an abstract definition of the term "territory." The policy of an integrated judicial system is best served when it includes all governments having a direct connection to the federal system. The relation-

76. Williams v. Lee, 358 U.S. 217, 220 (1959). In Chino v. Chino, 90 N.M. 204, 561 P.2d 476 (1977), the New Mexico Supreme Court listed three criteria to determine whether the application of state law would constitute such infringement on Indian self-government. These criteria are: (1) whether the parties are Indians; (2) whether the cause of action arose within the reservation; and (3) the nature of the interest to be protected. *Id.* at 207, 561 P.2d at 479.

77. *See* Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 101(d), 92 Stat. 3069 (to be codified in 25 U.S.C. 1911), where Congress specifically provided for full faith and credit to be given "to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings . . . ."

78. For example, in Williams v. Lee, 358 U.S. 217 (1959), suit was brought by a non-Indian creditor against an Indian debtor in connection with a transaction entered into on the reservation. The Supreme Court held that to allow the exercise of state jurisdiction would undermine the authority of tribal courts over reservation affairs and infringe on the right of the Indians to govern themselves. *Id.* at 223. This result may be altered, however, if the state court applies controlling tribal law. In such a case, there would no longer be as severe an infringement on the right of reservation Indians either to make their own laws or to be governed by them. The Court in *Williams* recognized that state jurisdiction has been allowed in cases where essential tribal relations were not involved and basic rights of Indians not jeopardized. *Id.* at 219.

79. *Cf. In re* Lynch's Estate, 92 Ariz. 354, 357, 377 P.2d 199, 201 (1962) (will probated in Navajo tribal court required to be treated the same as a will probated in another state or foreign country because of the exclusive jurisdiction of the Navajo Nation over its internal affairs).

80. *See* text & note 76 *supra.*

ship of the Navajo Nation to the United States evinces such a connection. Furthermore, precedents show a trend by courts to accept the proceedings of Indian courts as required by full faith and credit. This trend is in accord with the federal Indian policy of strengthening tribal self-government. The public acts, records, and judicial proceedings of the Indian nations should therefore be granted full faith and credit in state courts.

VII. INSURANCE LAW

A. SUBROGATION IN MEDICAL PAYMENT COVERAGE HELD INVALID

Subrogation is the process by which an insurance company, upon payment of benefits to the policyholder, takes over a portion of the claim the insured has against the party primarily responsible for the loss.[1] In the case of medical payments coverage, the insurance company, upon payment of medical expenses to the policyholder, takes over a portion of the insured's cause of action against the tortfeasor and can recover from the tortfeasor the amount paid to the insured under the medical expense coverage.[2] In *Allstate Insurance Co. v. Druke*,[3] the Arizona Supreme Court held that medical payment subrogation clauses amount to an assignment of a claim for personal injuries and are therefore void as contrary to public policy.[4]

Druke arose out of a class action filed by plaintiffs against their automobile insurer challenging the validity of a subrogation provision[5]

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1. *See* 16 G. COUCH, COUCH ON INSURANCE § 61:37, at 262 (2d ed. R. Anderson 1966). *See also* Homeowners' Loan Corp. v. Sears Roebuck & Co., 123 Conn. 232, 193 A. 769 (1937), where the court defined subrogation as:

> A legal fiction through which a person who, not as a volunteer or in his own wrong, and in the absence of outstanding and superior equities, pays the debt of another, is substituted to all rights and remedies of the other, and the debt is treated in equity as still existing for his benefit and the doctrine is broad enough to include every instance in which one party pays the debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by such other.

Id. at 238, 193 A. at 772.

2. Barry, *Subrogation of Medical Payments Claims*, 17 FED'N INS. COUNSEL Q., Summer 1967, at 46. Subrogation is a means of recovery for insurance companies. Insurance companies can take advantage of a number of sources to seek partial recovery of losses paid. Some of those sources may be salvage collections, refunds for overpayment, and contributions from other insurers or other parties such as governmental bodies and self-insurers. Coupled with subrogation, those sources represent the bulk of possible loss recovery. *See* R. HORN, SUBROGATION IN INSURANCE THEORY AND PRACTICE 19-21 (1964).

3. 118 Ariz. 301, 576 P.2d 489 (1978).

4. *Id.* at 304, 576 P.2d at 492.

5. The subrogation provision challenged was included in defendant Allstate's motor vehicle liability insurance agreement and provides in the General Conditions Section at Paragraph 10:

> *Subrogation*
>
> Upon payment under
>
> (a) Section I [Liability Protection] or Section III [Loss to the Automobile Protection], Allstate shall be subrogated to the extent of such payment to all of the insured's right of recovery therefor; and
>
> (b) Part I of Section IV [Medical Payments insurance], each insured shall repay Allstate out of the proceeds, if any, recovered in exercise of his rights against any person liable to the insured because of the bodily injury for which such payment was made.
>
> The insured shall do whatever is necessary to secure such rights and do nothing before or after loss to prejudice such rights.

See Allstate Ins. Co. v. Druke, 118 Ariz. 315, 316, 576 P.2d 503, 504 (Ct. App. 1977), *vacated*, 118

which required an insured to repay any medical expense benefits paid by Allstate out of any proceeds recovered by the insured from a tortfeasor.[6] Allstate filed a motion for summary judgment which was denied by the trial court.[7] Allstate then filed a special action petition in the court of appeals seeking to reverse the trial court's decision.[8] In reversing the trial court, the court of appeals upheld the validity of the subrogation clause and ordered the trial court to grant Allstate's motion for summary judgment.[9] The Arizona Supreme Court struck down the validity of the subrogation provision by holding that it was the legal equivalent of an assignment of the insured's cause of action for personal injury against a third party.[10]

This casenote will analyze the use of insurance subrogation in medical payments provisions of automobile policies. First, the differences between assignment and subrogation and their application to insurance law will be discussed. Next, the Arizona case law on medical payments subrogation will be analyzed. Finally, *Druke* will be analyzed along with its policy implications.

Principles of Subrogation and Assignment

Since insurance is an arrangement under which the insurer contracts to reimburse the insured upon the occurrence of a specified harmful contingency,[11] any situation in which the insured recovers an

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Ariz. 301, 576 P.2d 489 (1978). In furtherance of this subrogation provision, Allstate made it a practice to send a form letter to all policyholders who were involved in an automobile accident. The form letter provided in its pertinent parts:

> Did you incur medical expenses as a result of your recent accident?
> If so, and you desire to present the claim under the Medical Payments coverage, the enclosed form should be completed by you and your doctor and returned to us with your itemized bills.
> If the other party or his bodily injury liability insurance carrier makes a settlement with you, policy conditions applicable to the Medical Payments coverage require that you repay Allstate Insurance Company out of the proceeds of the settlement to the extent of the payments made under the Medical Payments coverage.
> In the event you do present a claim under Medical Payments coverage, we will notify the other party and his carrier of our interest and will request that Allstate's name be included on any settlement draft or check.

Id.

6. 118 Ariz. at 302, 576 P.2d at 490. Specifically, the plaintiffs alleged that they were members of a class which either:

1. were refused payment by Allstate of medical expense benefits due to their refusal to agree to repay Allstate out of any proceeds they might recover from the tortfeasor, or
2. did in fact reimburse Allstate out of the proceeds of their recovery from a tortfeasor in ignorance of the fact, known and concealed by Allstate, that Allstate had no legal right to obtain such reimbursement.

Id.

7. *Id.*

8. *Id.* at 303, 576 P.2d at 491.

9. *See* Allstate Ins. Co. v. Druke, 118 Ariz. 315, 319, 576 P.2d 503, 507 (Ct. App. 1977), *vacated*, 118 Ariz. 301, 576 P.2d 489 (1978).

10. 118 Ariz. at 304, 576 P.2d at 492.

11. R. KEETON, BASIC TEXT ON INSURANCE LAW § 1.2, at 3 (1971). Couch defines insurance as:

amount more than the specified loss incurred is contrary to the principle of insurance.[12] To ensure that an insured should not receive insurance benefits greater in value than the loss suffered, insurance companies employ a wide range of legal techniques[13] including subrogation.[14]

Under the doctrine of subrogation, the insurer is substituted for the insured by operation of law and can assert his rights.[15] However, one who voluntarily pays the debt of another may be denied subrogation.[16] As an example, if there is no legitimate reason for the insurance

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A contract to pay a sum of money upon the happening of a particular event or contingency, or indemnity for loss in respect of a specified subject by specified perils; that is, an undertaking by one party to protect the other party from loss arising from named risks for the consideration and upon the terms and under the conditions recited.

1 G. COUCH, *supra* note 1, §1.2, at 28.

12. R. KEETON, *supra* note 11, §3.1, at 88.

Insurance is a system for wide distribution of accidental losses. One aspect of this system is the transfer of loss from an insured to an insurer by means of an obligation upon the insurer to confer an offsetting benefit (the insurance proceeds). To speak of "transferring loss" or providing an "offsetting benefit" is to imply that the value of the benefit shall not exceed the loss. That is, insurance is aimed at reimbursement, but no more.

Id.

13. *Id.* §3.1, at 90. One such technique, known as the nonliability rule, provides that if enforcing the terms of the insurance contract would produce a net gain for the insured, then the insurer will have a full defense and will not be liable for any part of the stated benefits. *Id.* Another rule, known as the liability-for-net-loss rule, declares that the insurer will be liable up to the amount of the net economic loss suffered by the person designated to receive insurance benefits, but in no case for more. *Id.*

14. Subrogation appears to have its roots in the English equity courts. *See* Randal v. Cockran, 27 Eng. Rep. 916, 916 (Ch. 1748), where the King had issued general letters of reprisals, to be carried out against the Spaniards in retaliation for losses and unlawful seizures inflicted upon British vessels. The reprisals were carried out, and the ships were captured and brought before the Prize Commission. The insurance companies, having paid the British ship owners for their losses, believed that the vessels were theirs. The Prize Commission disagreed and ruled that the vessels should go to the ship owners. The insurance companies appealed the decision. Lord Hardwicke

was of the opinion, that the plaintiffs [insurance companies] had the plainest equity that could be. The person originally sustaining the loss was the owner; but after satisfaction made to him, the insurer. No doubt, from that time, as to the goods themselves, if restored in specie, or compensation made for them, the assured stands as a trustee for the insurer, in proportion for what he paid . . . .

Id.

Prior to *Randal v. Cockran*, when the doctrine was in its developing stages, English jurists linked subrogation to the equitable doctrine of contribution whereby one person, who has paid in a situation where another should have paid, is entitled to extract contribution from that person. *See* Morgan v. Seymour, 21 Eng. Rep. 525, 525 (Ch. 1637); Fleetwood v. Charnock, 21 Eng. Rep. 776, 776 (Ch. 1629); Anonymous, 21 Eng. Rep. 1, 1 (Ch. 1557). *See also* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 9.4, at 633 (1973). At least one author has attempted to trace subrogation back to Roman equity. *See* W. BUCKLAND, EQUITY IN ROMAN LAW 47-54 (1911).

In medical payments coverage, insurance companies have only recently provided for subrogation in automobile policies. The first provision for subrogation in medical payments coverage occurred in 1959 when the member companies of the National Bureau of Casualty Underwriters and the Mutual Casualty Insurance Rating Bureau included a subrogation provision in their Special Automobile Policy. *See* Katz, *Automobile Medical Payments Coverage—A Changing Concept?*, 28 INS. COUNSEL J. 276, 277 (1961). *See also* Barry, *supra* note 2, at 46. One justification given for subrogation was the possibility of duplicate coverage. Katz, *supra* at 277. Kimball and Davis reported that rising loss ratios and intense price competition also provided incentives for insurance companies to seek subrogation rights. Kimball & Davis, *The Extension of Insurance Subrogation*, 60 MICH. L. REV. 841, 842-43 (1962).

15. 16 G. COUCH, *supra* note 1, §§ 61.2, 61.4, at 239, 240.

16. W. VANCE, LAW OF INSURANCE 791 (1951).

company's intervention, the insurance company will be declared a volunteer and denied subrogation.[17] On the other hand, if the insurance company paid the debt for some legitimate reason, perhaps to protect the company's own interests, subrogation will be permitted.[18] Furthermore, when an insurance company becomes subrogated to the insured's cause of action against a third party, the insurer cannot recover more than the amount it paid to the insured.[19] Under no circumstances, however, will an insurance company be granted subrogation when the insured has not been fully indemnified for the loss.[20]

The concept of assignment, on the other hand, is distinct from subrogation and serves different functions in the insurance industry. When a person assigns a claim to another, the assignment generally refers to or connotes a voluntary act of transferring an interest.[21] This concept is unlike subrogation, which takes effect by operation of law without necessarily requiring the intention of the parties.[22] Also, an assignment transfers an entire claim while subrogation rights are limited to the amount which the insurance company has paid to the insured.[23] Assignments of personal injury claims involve dangers of champerty and maintenance,[24] while subrogation does not because the amount an insurance company can recover through subrogation is limited to the amount paid to the insured in the form of medical expense benefits.[25] Although the principles of assignment and subrogation are similar and often confused, the distinction between the two concepts remains significant.[26]

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17. D. DOBBS, *supra* note 14, §§ 4.3, 4.9, at 251, 298-309.

18. *Id.* § 4.3, at 251.

19. W. VANCE, *supra* note 16, at 790.

20. *Id.*

21. *See* DeCespedes v. Prudence Mut. Cas. Co., 193 So. 2d 224, 227 (Fla. Ct. App. 1966). *See also* Certified Collectors, Inc. v. Lesnick, 116 Ariz. 601, 603, 570 P.2d 769, 771 (1977) (the court stated that it was "hornbook law that in order to effect a legal assignment of any kind there must be evidence of an intent to assign or transfer.").

22. DeCespedes v. Prudence Mut. Cas. Co., 193 So. 2d 224, 227 (Fla. Ct. App. 1966).

23. Imel v. Travelers Indem. Co., 152 Ind. App. 75, 79, 281 N.E.2d 919, 921 (1972).

24. *See* Harleysville Mut. Ins. Co. v. Lea, 2 Ariz. App. 538, 541, 410 P.2d 495, 498 (1966). Courts have always viewed with disfavor any contract which tended to stir up unnecessary litigation. The early law took a particularly severe view of what were known as "maintenance" and "champerty." *See* Winfield, *The History of Champerty and Maintenance*, 35 L.Q. REV. 50, 51 (1919). Maintenance consisted of assisting another in litigation in which the one furnishing the assistance had no personal interest. The transaction was designated as "champertous" if it was accompanied by an agreement that the one furnishing the assistance should receive a part of the proceeds of the litigation. *See* J. MURRAY, JR., MURRAY ON CONTRACTS § 339, at 715 (2d rev. ed. 1974). *See also* RESTATEMENT OF CONTRACTS § 541 (1932).

25. *See, e.g.*, Travelers Indem. Co. v. Viccari, 310 Minn. 97, 100, 245 N.W.2d 844, 846 (1976); Geertz v. State Farm Fire & Cas., 253 Or. 307, 310, 451 P.2d 860, 862 (1969). *See* Kimball & Davis, *supra* note 14, at 867.

26. 16 G. COUCH, *supra* note 1, § 61.92, at 289-90. In Imel v. Travelers Indem. Co., 152 Ind. App. 75, 281 N.E.2d 919 (1972), the court stated:

> We agree with the majority of the jurisdictions which make a distinction between an assignment of a claim for personal injuries and subrogation of one's rights arising from a personal injury. A few of the distinctions are: subrogation secures contribution and in-

The Arizona Position on the Validity of Medical Payment Subrogation Clauses

Arizona courts have adopted the position that subrogation clauses, however worded, are invalid because they attempt to assign a cause of action for personal injuries.[27] In *Harleysville Mutual Insurance Co. v. Lea*,[28] the court tested the validity of a subrogation clause covering medical payments.[29] The court first determined whether the Arizona survivors' statute[30] allowed such a clause.[31] The court stated that at common law a claim for personal injuries did not survive the death of the injured person.[32] Prior to the enactment of the Arizona survival statute in 1955, the Arizona courts adhered to the principle of nonassignability of claims for personal injuries because such claims were said to be strictly personal and therefore could not survive the death of the injured party.[33] When states began to enact survival statutes providing for the survival of a cause of action for personal injuries, a few courts followed the rule that a claim for personal injuries was also assignable.[34] However, the Arizona Court of Appeals was of the view that a statute which provides for the survival of a cause of action does not necessarily authorize the assignment of that cause of action.[35] Therefore, the court held that although a cause of action for personal injury survives under the Arizona survival statute, such a claim is not assignable either in whole or in part prior to judgment.[36]

As a result of *Harleysville*, insurance companies began to reword medical payment subrogation clauses in an effort to secure subrogation

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demnity, whereas assignment transfers the entire claim; the consideration in subrogation moves from subrogor to subrogee, whereas in an assignment the consideration flows from assignee to assignor; assignment contemplates the assignee being a volunteer, whereas subrogation rests on a contractual duty to pay; assignment normally covers but a single claim, whereas subrogation may include a number of claims over a specific period of time; subrogation entails a substitution whereas assignment is an outright transfer.

Id. at 78-79, 281 N.E.2d at 921.

27. *See, e.g.*, Allstate Ins. Co. v. Druke, 118 Ariz. 301, 304, 576 P.2d 489, 492 (1978); State Farm Fire & Cas. Co. v. Knapp, 107 Ariz. 184, 185, 484 P.2d 180, 181 (1971); Harleysville Mut. Ins. Co. v. Lea, 2 Ariz. App. 538, 542, 410 P.2d 495, 499 (1966). *See* "Assignment to Insurance Carrier Held Invalid," 8 ARIZ. L. REV. 340, 342 (1967). The cases which invalidate subrogation clauses have been premised upon the argument that the clauses are in effect a prohibited assignment of a claim for personal injuries or constitute a splitting of a cause of action. Rinehart v. Farm Bureau Mut. Ins. Co., 96 Idaho 115, 117 n.1, 524 P.2d 1343, 1345 n.1 (1974).

28. 2 Ariz. App. 538, 410 P.2d 495 (1966).

29. *Id.* at 539-40, 410 P.2d at 496-97. *See* text & note 38 *infra*.

30. ARIZ. REV. STAT. ANN. § 14-477 (1956) (renumbered § 14-3110 in 1974).

31. 2 Ariz. App. at 539, 410 P.2d at 496.

32. *Id.* at 541, 410 P.2d at 498.

33. *See, e.g.*, Employers Cas. Co. v. Moore, 60 Ariz. 544, 548, 142 P.2d 414, 415 (1943); United Verde Extension Mining Co. v. Ralston, 37 Ariz. 554, 559, 296 P. 262, 264 (1931).

34. *See* Davenport v. State Farm Mut. Auto. Ins. Co., 81 Nev. 361, 364, 404 P.2d 10, 11 (1965); Motto v. State Farm Mut. Auto. Ins. Co., 81 N.M. 35, 36, 462 P.2d 620, 621 (1969).

35. Harleysville Mut. Ins. Co. v. Lea, 2 Ariz. App. at 541, 410 P.2d at 498.

36. *Id.*

rights. These efforts were examined by the Arizona Supreme Court in *State Farm Fire & Casualty Co. v. Knapp*.[37] In *Knapp*, the medical payment subrogation clause, although worded differently than the clause in *Harleysville*,[38] was struck down as an attempt to assign a cause of action for personal injuries.[39] No distinction was made between the clause in *Harleysville* and the clause in *Knapp*. The court merely concluded that subrogation amounts to an assignment, and a claim for personal injuries is not assignable.[40]

The difficulty with resting the validity of a subrogation agreement upon the determination of whether a cause of action for personal injuries is assignable is that it treats the subrogation agreement as an assignment. The distinction between assignment and subrogation is thus apparently not recognized.[41] Once a court chooses to label the subrogation agreement an assignment, the analysis ceases for then only a small step is required to state that the jurisdiction does not permit assignment of a cause of action for personal injuries.[42]

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37. 107 Ariz. 184, 484 P.2d 180 (1971).

38. The *Harleysville* subrogation provision was a traditionally phrased clause. It specified that upon payment of medical expense benefits to the insured, the insured assigned and transferred to the insurance company "all claims and demands" that existed against the tortfeasor. 2 Ariz. App. at 540, 410 P.2d at 497. In *Knapp*, the subrogation provision was worded so as to give the insurance company a right in the proceeds of any settlement or judgment that the insurer might obtain. 107 Ariz. at 184, 484 P.2d at 180. Some jurisdictions have held that a subrogation clause giving the insurer the insured's right for the recovery of medical expenses, a traditionally phrased subrogation clause, is invalid on the grounds that it amounts to an attempt to assign a personal injury claim. *E.g.*, Peller v. Liberty Mut. Fire, 220 Cal. App. 2d 610, 612, 34 Cal. Rptr. 41, 42 (1963); Wrightsman v. Hardware Dealers Mut. Fire Ins. Co., 113 Ga. App. 306, 307, 147 S.E.2d 860, 861 (1966); Travelers Indem. Co. v. Chumbley, 394 S.W.2d 418, 420, 423 (Mo. Ct. App. 1965). Assignments of personal injury causes of action are generally held invalid. *See, e.g.*, Employers Cas. Co. v. Moore, 60 Ariz. 544, 548, 142 P.2d 414, 415 (1943); Fifield Manor v. Finston, 54 Cal. 2d 632, 638-39, 7 Cal. Rptr. 377, 381, 354 P.2d 1073, 1077 (1960); Travelers Indem. Co. v. Chumbley, 394 S.W.2d 418, 423 (Mo. Ct. App. 1965); City of Richmond v. Hanes, 203 Va. 102, 106, 122 S.E.2d 895, 898 (1961). To circumvent this result some courts have held that an assignment of the proceeds of a settlement or judgment in a personal injury claim is valid because it is different from an assignment of the cause of action itself. *See* Lee v. State Farm Mut. Ins. Co., 57 Cal. App. 3d 458, 465, 129 Cal. Rptr. 271, 275 (1976); State Farm Mut. Ins. Co. v. Pohl, 255 Or. 46, 49, 464 P.2d 321, 323 (1970). In all probability that is why the insurance company in *Knapp* drafted its medical payment clause in terms of "proceeds of any settlement or judgment."

39. 107 Ariz. at 185, 484 P.2d at 181.

40. *Id.* The court in *Knapp* gave no independent legal reasoning for denying the validity of the subrogation provision. After citing *Harleysville* for the proposition that subrogation amounts to an assignment, the court stated that it agreed with a Missouri decision which struck down a subrogation clause on the grounds that to allow subrogation as to medical payments coverage would lift the lid on a "pandora's box crammed with both practical and legal problems." 107 Ariz. at 185, 484 P.2d at 181 (citing Travelers Indem. Co. v. Chumbley, 394 S.W.2d 418, 425 (Mo. Ct. App. 1965)). The problem with this reasoning, as well as that in *Harleysville* and *Knapp*, is that the courts do not specifically state the reasons for denying the validity of subrogation clauses but rather appear to rest their decisions on conclusory assumptions.

41. In *Knapp* the court merely cited the *Harleysville* opinion and concluded that "subrogation amounts to an assignment and that a claim for personal injuries is not assignable." 107 Ariz. at 185, 484 P.2d at 181. Evidence of the court's willingness to declare the two doctrines equivalent is prevalent throughout the *Harleysville* opinion. For instance, the court stated "[i]f the defendant Lea may not in law assign his cause of action to the plaintiff either in whole or in part, then his cause of action may not be subrogated." 2 Ariz. App. at 540, 410 P.2d at 497.

42. Numerous courts upholding subrogation clauses similar to the *Harleysville* clause recog-

There is support for treating the subrogation clause in *Harleysville* different from the one in *Knapp*. In a recent California case, a subrogation clause nearly identical to the one held invalid in *Knapp* was found not to be an assignment of a cause of action.[43] The California courts have, in effect, distinguished traditionally phrased subrogation clauses like that in *Harleysville*, which subrogate the insurance company to all rights of recovery the insured might have, from slightly different subrogation clauses which merely give the insurance company rights in the proceeds of any settlement or judgment obtained by the insured.[44] The traditionally phrased subrogation clause is an assignment of a cause of action for personal injuries; however, a clause which only gives the insurance company rights in the proceeds of any settlement or judgment is not an assignment.[45] Since the modified subrogation provision did not transfer a cause of action for personal injury to the insurer but merely required the insured to reimburse the insurer out of any recovery or settlement, the policy reasons against the assignment or subrogation of personal claims are inapplicable.[46]

Following *Knapp*, another attempt was made to restructure the medical payments subrogation agreement of automobile policies so that the clause would fall outside the *Harleysville* and *Knapp* prohibitions. This attempt was struck down by the Arizona Supreme Court in *Allstate Insurance Co. v. Druke*.[47] The clause struck down in *Druke* provided that each insured repay the insurance company out of any

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nize the differences between subrogation and assignment and refuse to label such clauses assignments. *E.g.*, Alabama Farm Bureau Mut. Cas. Ins. Co. v. Anderson, 48 Ala. App. 172, 176, 263 So. 2d 149, 153 (1972); DeCespedes v. Prudence Mut. Cas. Co., 193 So. 2d 224, 227 (Fla. Ct. App. 1966); Rinehart v. Farm Bureau Mut. Ins. Co., 96 Idaho 115, 117, 524 P.2d 1343, 1345 (1974).

43. Lee v. State Farm Mut. Ins. Co., 57 Cal. App. 3d 458, 466, 129 Cal. Rptr. 271, 276 (1976). California, like Arizona, for a number of years had declared that traditionally phrased subrogation clauses were an assignment of a cause of action for personal injuries. *See* Peller v. Liberty Mut. Fire Ins. Co., 220 Cal. App. 2d 610, 612, 34 Cal. Rptr. 41, 42 (1963). The court in *Peller* refused to recognize the distinction between subrogation and assignment concluding that such a distinction was "purely verbal in that the legal effect of the policy provisions is the same regardless of what term is attached to the procedure, since the result is to transfer the insured's cause of action against a third party tortfeasor, to the insurer." *Id.* at 611, 34 Cal. Rptr. at 42. However, in subsequent cases, California courts have held that modifications in the wording of subrogation clauses change the effect of such clauses. *See, e.g.*, Block v. California Physicians' Serv., 244 Cal. App. 2d 266, 268, 53 Cal. Rptr. 51, 52 (1966). Missouri appears to take a contrary position. *See* Travelers Indem. Co. v. Chumbley, 394 S.W.2d 418, 420, 423 (Mo. Ct. App. 1965) (traditionally phrased subrogation agreement was in legal effect an attempted assignment of a cause of action for personal injuries and therefore unenforceable).

44. West v. State Farm Mut. Auto. Ins. Co., 30 Cal. App. 3d 562, 565, 106 Cal. Rptr. 486, 488 (1973); Block v. California Physicians' Serv., 244 Cal. App. 2d 266, 272, 53 Cal. Rptr. 51, 54 (1966).

45. Lee v. State Farm Mut. Ins. Co., 57 Cal. App. 3d 458, 466, 129 Cal. Rptr. 271, 276 (1976). *Accord*, State Farm Mut. Auto. Ins. Co. v. Pohl, 255 Or. 46, 52, 464 P.2d 321, 324 (1970) (clause creates a right in proceeds, not a right against the tortfeasor); State Farm Mut. Ins. Co. v. Farmers Exch., 22 Utah 2d 183, 186, 450 P.2d 458, 460 (1969) (concurring opinion).

46. Lee v. State Farm Mut. Ins. Co., 57 Cal. App. 3d 458, 466, 129 Cal. Rptr. 271, 276 (1976).

47. 118 Ariz. 301, 304, 576 P.2d 489, 492 (1978).

proceeds recovered by the insured in exercise of his rights.[48] The court of appeals,[49] in examining this clause, believed that the justification behind the *Knapp* and *Harleysville* decisions was to prevent insurance companies from maintaining a suit against a third party tortfeasor.[50] The court adopted reasoning similar to that of the California courts[51] and held that the provision did not give the insurer any right to bring an action on its own behalf against a third party.[52] The only rights the insurance company had arose when and if the insured recovered from the tortfeasor.[53] If the insured did seek recovery from the tortfeasor and obtained damages, the insurance company would be required to seek reimbursement from the insured.[54]

In rejecting this reasoning, the supreme court stated that Allstate attempted, through the use of the subrogation clause, to create an interest in any claim the insured had against the tortfeasor.[55] The court held that regardless of the wording of the subrogation agreement, the effect was that the insurance company would be able to obtain rights in the insured's cause of action for personal injuries.[56] Therefore the creation of such an interest was "the legal equivalent of an assignment."[57] Despite the argument that subrogation and assignment are fundamentally different concepts which should be distinguished,[58] the court was convinced that the subrogation agreement was intended to grant the insurer "a legally enforceable interest in any claim that [the] insured might have against a third party tortfeasor" and was therefore void.[59] The court adhered to this view even though the *Druke* clause was not a "traditional subrogation agreement"[60] but merely a reimbursement clause requiring the insured to repay Allstate in the event he recovered from a tortfeasor.[61]

48. *Id.* at 302, 576 P.2d at 490.
49. Allstate Ins. Co. v. Druke, 118 Ariz. 315, 576 P.2d 503 (Ct. App. 1977), *vacated*, 118 Ariz. 301, 576 P.2d 489 (1978).
50. *Id.* at 318, 576 P.2d at 506.
51. See text & notes 43-46 *supra*.
52. 118 Ariz. at 318, 576 P.2d at 506.
53. *Id.*
54. *Id. Accord*, Lee v. State Farm Mut. Ins. Co., 57 Cal. App. 3d 458, 466, 129 Cal. Rptr. 271, 276 (1976).
55. 118 Ariz. at 304, 576 P.2d at 492.
56. *Id.* The court of appeals, in Gallego v. Strickland, — Ariz. —, 589 P.2d 34 (Ct. App. 1978), has recently extended *Druke* to strike down an uninsured motorist subrogation clause, even though it is the uninsured motorist who benefits rather than the insured. *Id.* at —, 589 P.2d at 36.
57. 118 Ariz. at 304, 576 P.2d at 492.
58. See text & notes 15-26 *supra*.
59. 118 Ariz. at 304, 576 P.2d at 492.
60. The *Druke* subrogation provision did not give a cause of action to the insurance company, an element which subrogation necessarily contemplates. See text & notes 1, 15 *supra*.
61. See text & notes 51-54 *supra*.

Policy Discussion of Druke

In reaching its conclusion, the court in *Druke* announced several policy justifications supporting the invalidation of subrogation of medical payments. The court stated that a victim's medical expense coverage does not provide full indemnity to the victim.[62] While this statement may be accurate, it does not justify the court's decision. Medical payments coverage in an automobile policy is designed to provide voluntary insurance to cover medical expenses of victims of automobile accidents.[63] Under such coverage, an insurance company does indeed provide full indemnity to the insured, at least to the extent of the policy, by paying the victim's medical expenses. The medical payments contract does not purport to extend coverage beyond the economic loss resulting from medical expenses, nor does the insured reasonably expect to receive an amount in excess of his medical expenses.[64] Medical payments coverage in automobile policies is in the nature of an indemnity contract.[65] Indemnity contracts seek reimbursement only of the insured's losses, and the amount paid under the contract usually depends on the amount spent by the insured for the care of his injuries.[66] Subrogation is a normal incident and corollary of indemnity insurance,[67] and there is no justifiable reason for denying its effect.[68]

Nevertheless, the court was fearful that other losses would remain

62. 118 Ariz. at 304, 576 P.2d at 492.

63. *See* Katz, *supra* note 14, at 276.

64. DeCespedes v. Prudence Mut. Cas. Co., 193 So. 2d 224, 226 (Fla. Ct. App. 1966). *See* Katz, *supra* note 14, at 280; Kimball & Davis, *supra* note 14, at 863.

65. R. KEETON, *supra* note 11, § 3.10, at 152. Keeton cites property insurance as an example of indemnity insurance since the policies are typically in amounts sufficient to provide full indemnity and the amount of the loss is readily evaluated. *Id.* However, life and accident insurance is not indemnity insurance since it does not provide full indemnification to the insured nor is the loss susceptible to precise determination. *Id.* With respect to medical payments coverage:

> The amount of recovery is usually dependent on amount of loss (in contrast with the designation of a fixed sum for death or scheduled sums for injuries and disabilities of specified types, in life and accident insurance). The losses are liquidated. In all these respects medical and hospitalization insurance contracts are more closely analogous to property and liability insurance than to life and accident.

Id. See also Barry, *supra* note 2, at 47; Katz, *supra* note 14, at 279; Kimball & Davis, *supra* note 14, at 857.

66. R. KEETON, *supra* note 11, § 3.1(a), at 88.

67. 16 G. COUCH, *supra* note 1, § 61:8, at 241; R. KEETON, *supra* note 11, § 3.10, at 153; W. VANCE, *supra* note 16, at 797.

68. Lee v. State Farm Mut. Ins. Co., 57 Cal. App. 3d 458, 466, 129 Cal. Rptr. 271, 276 (1976). In *Druke*, the court lists four policy reasons for denying subrogation in medical payments coverage. *See* 118 Ariz. at 304, 576 P.2d at 492. First, subrogation amounts to an assignment of a cause of action for personal injuries which is void under Arizona law. *Id.* Second, permitting subrogation in medical payments coverage denies the insured full compensation for his injury. *Id.* Third, to require an injured policyholder to return to his insurer the benefits for which he has paid premiums is to deny him the benefits of his thrift and foresight. *Id.* Fourth, subrogation is a windfall to the insurer since it plays no part in rate schedules and does not reduce premiums. *Id.* These policy reasons are assailable, however, and arguably should not apply where medical payments subrogation is used. *See* text & notes 62-67 *supra*, 69-84 *infra*.

uncompensated.[69] These losses were said to include other "out of pocket losses" such as loss of income and "non-economic losses such as physical pain and mental anguish."[70] In effect, the *Druke* court said that since medical expense coverage does not indemnify the insured for pain and suffering, loss of income, or earning power, medical payments subrogation would result in undercompensating the victim. This conclusion is flawed for two reasons. First, medical expense coverage does not seek to compensate the insured for these additional losses.[71] Second, losses for pain and suffering and lost income or earning power are compensable elements in a personal injury action against the tortfeasor[72] and should therefore not be awarded again in the form of insurance benefits under medical payments coverage.

A second policy reason the *Druke* court advanced for denying subrogation was that to require an injured policyholder to return the benefits for which he has paid premiums is to deny him the benefit of his thrift and foresight.[73] The thrift and foresight that a person exercises when purchasing medical payments coverage provides a hedge against the actual amount of the medical loss. It is not intended to provide a double recovery.[74] A person does not bargain for a double recovery when purchasing medical expense coverage. Furthermore, although the insured paid premiums for his insurance, he did not necessarily pay an amount equal to the benefits claimed,[75] nor did he pay alone, because the insurance fund was created by many individuals similarly situated.[76] The argument that the insured has paid for the benefits and is therefore entitled to recover them, regardless of the circumstances, is misplaced since the insured is part of an insurance pool where the amount of premiums does not necessarily equal the potential benefits.

Another reason the *Druke* court gave for denying subrogation is that it results in a windfall to the insurance company since subrogation recoveries play no part in rate schedules.[77] This contention may or may not be true, but it is not absolutely provable without supporting data.[78] In fact, a contrary argument can be made that subrogation does affect the rate structure and does not produce a windfall to the in-

69. 118 Ariz. at 304, 576 P.2d at 492.
70. *Id.*
71. *See* text & notes 63-64 *supra.*
72. D. DOBBS, *supra* note 14, § 8.1, at 540-43, 544-51.
73. 118 Ariz. at 304, 576 P.2d at 492.
74. *See* Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478, 1500 (1966). *See also* D. DOBBS, *supra* note 14, § 8.10, at 584.
75. D. DOBBS, *supra* note 14, § 8.10, at 584.
76. *Id.*
77. 118 Ariz. at 304, 576 P.2d at 492.
78. R. HORN, *supra* note 2, at 193.

surer.[79] Subrogation recoveries play a part in the rate structure by reducing the amount of losses paid by the insurance company.[80] A reduction of losses to the insurance company would presumably be reflected in the rate structure by a reduction, or at least a slower rise, in premiums.[81]

The *Druke* court also expressed the belief that the insured would never be fully compensated for his loss if subrogation were permitted because he would have to pay a portion of this tort recovery for attorney's fees and costs.[82] Under Arizona law a court has the discretionary power to award the successful party reasonable attorney's fees in contested contract cases.[83] Similarly, if an award of attorney's fees to the prevailing party is desirable in personal injury actions, then it should be done in an open manner by statute. Compensating the insured for attorney's fees should not be done by subverting valid contractual rights.[84]

The policy justifications advanced by the *Druke* court do not support the invalidation of medical payment subrogation, and the effects of denying subrogation may be adverse. One effect of denying subrogation of medical payments is to permit the insured a double recovery of his expenses since the insured can recover from his insurance carrier

79. *Id.* at 25. Horn states that subrogation recoveries do enter the rate structure by serving as a reduction in incurred losses. *Id.*

> Regardless of what specific class of insurance or actuarial technique is in question, the net losses (net of subrogation) will in some way be used as a basis for the premium structure. Therefore, it is difficult to agree with the proposition that subrogation is a windfall to the insurer.

Id.

80. *Id.* at 21.

81. *See* D. DOBBS, *supra* note 14, § 8.10, at 584-86.

82. 118 Ariz. at 304, 576 P.2d at 492. *See* Harleysville Mut. Ins. Co. v. Lea, 2 Ariz. App. 538, 542, 410 P.2d 495, 499 (1966), in which the court explained the problem of compensating the insured for attorney's fees in medical payments coverage cases by stating:

> In the instant case, we have a contract of insurance entered into prior to the accident providing for payments under the medical pay portion of the contract. The insured paid a premium for this policy and is entitled to the medical payments regardless of what further action he may take in bringing suit against the tort-feasor. Should he recover after suit and trial, he will have to pay a portion of this recovery for attorney's fees and costs, an expense which the appellant herein ignores in demanding the return of the full amount paid to appellee. To require the insured to subrogate these funds or to assign the amount to the insuror, especially when there is no way of apportioning the amount in the whole of the judgment or settlement, can only lead to further litigation, subterfuge and deceit.

Id. See also D. DOBBS, *supra* note 14, § 3.8, at 200-04, § 8.10, at 584.

83. ARIZ. REV. STAT. ANN. § 12-341.01 (1976).

84. A more satisfactory solution to the problem of compensation for the insured in medical payments subrogation situations is found in Lee v. State Farm Mut. Ins. Co., 57 Cal. App. 3d 458, 129 Cal. Rptr. 271 (1976). The court awarded the insured a pro rata share of the litigation costs and attorney's fees expended in procuring a settlement or recovery against third party tortfeasors. The court was of the view that if the insureds were not granted a pro rata share of their litigation costs, the insurance company, as a passive beneficiary, would be unjustly enriched by reimbursement of medical payments as required by the insurance contract. 57 Cal. App. 3d at 468, 129 Cal. Rptr. at 277.

and also from the tortfeasor.[85] Such a result is contrary to the principle of indemnity which holds that an insured should not be permitted to make a profit on a loss or to recover insurance benefits in excess of the amount of the loss sustained.[86] In medical payments coverage, the loss is susceptible to an objective financial determination. This situation is unlike other insurance contracts such as life, death, and health, where the feared loss is subjective and unsusceptible to precise financial determination.[87] To deny subrogation in a situation where the losses are liquidated is to permit the insured to recover his medical expenses twice or to make a profit on an accident.[88]

An additional important ramification of *Druke* may be its effect on automobile insurance rates. Permitting the use of subrogation in medical payments coverage may not result in a reduction of insurance rates, but the denial of subrogation would seem likely to result in increased rates since a denial of subrogation to an insurance company is a denial of a form of recovery to the company.[89] A strong possibility exists that the insurance company will not absorb these increased losses, but rather will increase premiums to reflect the fact that it cannot seek sub-

85. *See* R. KEETON, *supra* note 11, § 3.1(b), at 88-89; W. VANCE, *supra* note 16, at 102. Keeton lists three evils arising from an opportunity for net gain on an insurance contract: inducements to wagering, inducements to destruction of insured lives or property, and social waste. R. KEETON, *supra* note 11, § 3.1(b), at 88.

As a general rule, benefits received by the plaintiff from a source collateral to the tortfeasor may not be used to reduce the defendant's liability for damages. D. DOBBS, *supra* note 14, § 3.6, at 185. The theory of subrogation offers a device for vindicating the principle of indemnity by preventing double recovery while at the same time reallocating the burden of loss to the tortfeasor without, however, involving him in multiple liability. *See* Fleming, *supra* note 74, at 1498. Denying subrogation, therefore, permits the insured to gain a double recovery. *See* Consolidated Freightways, Inc. v. Moore, 38 Wash. 2d 427, 430, 229 P.2d 882, 884 (1951) (the primary purpose of the collateral source rule was said to be "to implement the insurance company's right to subrogation.").

86. R. KEETON, *supra* note 11, § 3.1, at 88-90. Consider the following anomalous situation which could conceivably occur under *Druke*. A is injured in a serious automobile accident. A is insured by XYZ Insurance Company under a standard automobile policy which includes medical expense coverage. B, the other party involved in the accident, is also insured by XYZ under a standard automobile policy. B is at fault. A suffers medical expenses in the amount of $1000 and makes a claim to XYZ under the medical expense coverage of the policy. XYZ pays A $1000. A then proceeds to file a tort claim against B for damages incurred as a result of B's negligence in the accident. A wins a judgment and collects his full tort damages. Under B's automobile liability coverage, XYZ is required to pay the judgment entered against B. Thus, as a result of a single occurrence, A receives two checks from his own insurance company reimbursing him for the identical loss and permitting him to recover his medical expenses twice. This hypothetical situation raises the question of whether A, at the time he contracted with XYZ for medical expense coverage, intended or reasonably believed that he would have an opportunity to recover his expenses twice. Perhaps more importantly, the above situation creates social waste as a result of premiums that purchase only a wager for fortuitous profits rather than a socially useful protection against fortuitous losses. *See* R. KEETON, *supra* note 11, § 3.1(b), at 89.

87. *See* DeCespedes v. Prudence Mut. Cas. Co., 193 So. 2d 224, 226 (Fla. Ct. App. 1966); R. KEETON, *supra* note 11, § 3.10, at 152.

88. DeCespedes v. Prudence Mut. Cas. Co., 193 So. 2d 224, 227 (Fla. Ct. App. 1966). When an insured is able to recover twice for his losses, the insurance contract is no longer in the nature of "insurance" but rather takes on the character of a speculative investment or an outright gamble. *See* R. KEETON, *supra* note 11, § 3.1, at 88-90.

89. *See* D. DOBBS, *supra* note 14, § 8.10, at 584-86.

rogation.[90]

One authority has argued that restricting subrogation will have no effect on the insurance rates since many subrogation actions are between two insurance companies.[91] In these instances, an insurer will represent the tortfeasor in a subrogation action as frequently as it will pursue a tortfeasor as a subrogee.[92] Thus, some argue there is little economic sense in permitting subrogation when insurance companies stand behind the parties to a lawsuit because the insurance companies will be merely trading losses.[93] However, not all tort recoveries are financed by insurance companies.[94] For example, a number of substantial recoveries are made from self-insurers, federal and state governmental bodies, and social insurance schemes.[95]

Where subrogation is permitted, ultimately only one insurance company will pay for the loss. The collateral source rule ordains that, in computing damages against a tortfeasor, no reduction is allowed on account of benefits received by the plaintiff from other sources even though they may have partially or wholly mitigated the loss.[96] Therefore, without subrogation and with the collateral source rule, there is a strong possibility that both insurance companies will be paying the same loss, or one insurance company will be paying it twice. Such overpayment is inconsistent with the notion that insurance is intended as indemnity against loss.[97]

Conclusion

The Arizona Supreme Court failed to recognize the numerous distinctions between the principles of subrogation and assignment in *Allstate Insurance Co. v. Druke*. *Druke* is the third Arizona decision which has held that medical payment subrogation clauses, however worded, are assignments of personal injury claims. The court is apparently content to adhere to the rule even though the *Druke* subrogation clause did not assign the insured's cause of action to the insurer, but merely required the insured to reimburse the insurer in the event the insured recovered from the tortfeasor. Though the court advanced several policy reasons for denying medical payment subrogation, those

90. *Id.*

91. Reed, *Insurance Subrogation in Personal Injury Actions: The Silent Explosion*, 12 AM. BUS. L.J. 111, 120 (1974).

92. *Id.*

93. *Id.*

94. R. HORN, *supra* note 2, at 106.

95. *Id.* In all these cases, however, the parties are able to distribute the costs of the judgment to taxpayers or consumers. *Id.* This ability is most evident with governmental bodies but exists for others as well. *Id.*

96. *See* Fleming, *supra* note 74, at 1478.

97. *See* text & notes 12, 86-88 *supra*.

reasons do not withstand analysis. Medical payment subrogation does not deny compensation to the insured but may result in a double recovery to the insured, contrary to fundamental insurance principles. Although the court in *Druke* attempted to do a service to automobile insurance policyholders, all it accomplished was to permit immediate plaintiffs to reap the benefits of a double recovery of medical payments. The remainder of automobile insurance policyholders will likely pay for the excess benefits bestowed, since insurance companies can be realistically expected to pass increased costs along to consumers.

VIII. JUVENILE LAW

A. DOUBLE JEOPARDY AND THE STATE APPEAL OF A JUVENILE PROBATION REVOCATION HEARING

The United States Supreme Court has observed that the double jeopardy clause[1] protects against multiple prosecutions and punishments for the same offense.[2] The principles supporting the protection against multiple punishments are those of fairness and finality.[3] The protection against multiple prosecutions is based on the belief that an accused should not be subjected to two attempts to convict him for the same crime.[4] To defend against the concerted efforts of the state requires the marshalling of costly resources, both physical and emotional, and therefore the state shall not be permitted the second attempt to convict.[5]

The Arizona Court of Appeals recently faced the contention by a juvenile, accused of violating the conditions of his probation, that the double jeopardy clause bars the state appeal of a juvenile probation revocation hearing.[6] The court held that it does not.[7]

The juvenile probationer in *In re Maricopa County Juvenile Action No. J-83341-S* was placed on probation in 1976, and in July 1977 he was accused of petty theft and robbery, violations of the conditions of his probation.[8] The trial judge[9] dismissed both counts. The dismissals

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1. "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

2. United States v. Wilson, 420 U.S. 332, 343 (1975).

3. United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977); United States v. Wilson, 420 U.S. 332, 343 (1975) (citing Green v. United States, 355 U.S. 184, 187-88 (1957)).

4. United States v. Wilson, 420 U.S. 332, 343 (1975). The double jeopardy clause guarantees that the State shall not be permitted to make repeated attempts to convict him "thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Id. (quoting Green v. United States, 355 U.S. 184, 187-88 (1957)). This principle does not include situations where the first state attempt was thwarted by defendant's successful motion to dismiss on grounds unrelated to guilt or innocence, or sufficiency of the state's evidence. United States v. Scott, 98 S. Ct. 2187, 2196 (1978).

5. United States v. Wilson, 420 U.S. 332, 343 (1975).

6. *In re* Appeal in Maricopa County Juvenile Action No. J-83341-S, 119 Ariz. 178, 580 P.2d 10 (Ct. App. 1978).

7. *Id.* at 182, 580 P.2d at 14.

8. *Id.* at 179, 580 P.2d at 11.

9. The petition alleging these probation violations was originally heard before a referee. *Id.* Pursuant to ARIZ. REV. STAT. ANN. § 8-231 (Supp. 1978-79), a referee may hear such a case and make recommendations as to its settlement. These recommendations can become final upon confirmation of the trial judge. *Id.* § 8-231(E). Alternatively, a rehearing may be requested by either

were based on the trial judge's holding that hearsay evidence is not admissible in a juvenile probation revocation hearing.[10]

The state appealed the dismissal of the petition,[11] contending that the hearsay evidence should have been admitted.[12] The court of appeals first decided that the fifth amendment's double jeopardy clause does not bar the state's appeal from a juvenile court determination that the conditions of the juvenile's probation were not violated.[13] The court then turned to the state's main contention and held that reliable hearsay evidence is admissible in a juvenile probation revocation hearing.[14]

This casenote will attempt to present *Juvenile Action No. J-83341-S* within its historical perspective. It will further outline the course of the decisions made regarding the applicability of the double jeopardy clause to juvenile probation revocation hearings, and will attempt to offer a plausible alternative line of reasoning that could yield a different result from the one actually reached. Finally, the court's holding that reliable hearsay is admissible in juvenile probation revocation hearings will be briefly discussed.

The Juvenile Justice System: A Historical Perspective

The decision of the court of appeals in *Juvenile Action No. J-83341-S* regarding double jeopardy should be viewed against the historical background of the juvenile court system. In the last several years there has been a shift from traditional juvenile justice standards toward invocation of adult standards for juvenile proceedings.[15] In *Juvenile Action*

party, if done so within seven days of the referee's signing of the recommendations. *Id.* § 8-231.01(A)-(B). In *Juvenile Action No. J-83341-S*, the referee found that the juvenile had violated the conditions of his probation and the juvenile secured a rehearing before the trial judge. 119 Ariz. at 180, 580 P.2d at 12.

10. 119 Ariz. at 180, 580 P.2d at 12. The trial judge heard the charges on stipulated facts, and initially dismissed count two (robbery) based on the inadmissibility of hearsay, but held the evidence sufficient to support count one (petty theft). The evidence in support of count one was "the eyewitness account of the police officer, and an admission which the juvenile made to the police." *Id.* The state subsequently informed the court that an error had been made in the stipulated facts. Specifically, the juvenile's admission to the police had not been presented before the referee. *See* note 9 *supra*. Upon learning of this error the trial court dismissed count one, holding that without the juvenile's admission to the police, "there was insufficient evidence to sustain the allegations." *Id.*

11. Pursuant to Juvenile Court Rules 24(a), "any aggrieved party" may appeal, to the court of appeals, any final order of the juvenile court. *See* ARIZ. REV. STAT. ANN. § 8-236(A) (1974) (granting the right of appeal from any final order of the juvenile court). Because there is no limitation imposed by the statute, the only limitation is assumed to be that imposed by the double jeopardy clause. *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 568 (1977).

12. 119 Ariz. at 180, 580 P.2d at 12.

13. *Id.* at 182, 580 P.2d at 14.

14. *Id.* at 183, 580 P.2d at 15.

15. *See, e.g.*, Breed v. Jones, 421 U.S. 519, 528-31 (1975); *In re* Gault, 387 U.S. 1, 29-31 (1967); Kent v. United States, 383 U.S. 541, 551-54 (1966). *But cf.* McKeiver v. Pennsylvania, 403 U.S. 528, 533-34, 545 (1971) (refusing to extend the right to trial by jury to a juvenile in the adjudicative phase of a delinquency proceeding).

No. J-83341-S adult constitutional and statutory standards were applied throughout the opinion.[16] The case can be viewed as an attempt to provide full adult-style safeguards and burdens to the juvenile accused.

The traditional juvenile court system[17] rode on a wave of avowed good intentions.[18] The doctrine of parens patriae[19] provided a vehicle for state intervention that was to save wayward children, the lawbreaker and the abused alike, from their detrimental environments.[20] The goal of removing the child-criminal from society's midst was sheathed in paternalistic ovations of salvation for the misguided.[21] The supposed benevolence[22] of the court fostered the view that an adjudication was not a criminal prosecution,[23] the resultant loss of liberty was not punishment,[24] and thus due process was not required.[25] However, the abuses[26] of a system that was not sufficiently equipped or properly

16. The Arizona Court of Appeals depended on adult constitutional standards embodied in United States v. Martin Linen Supply Co., 430 U.S. 564, 569-70 (1977) (delineating the standards required to animate the double jeopardy clause), *cited in* 119 Ariz. at 180-81, 580 P.2d at 12-13; United States v. Wilson, 420 U.S. 332, 336-39 (1975) (permitting appeals by the state where statutory authorization does not violate the double jeopardy clause), *cited in* 119 Ariz. at 180, 580 P.2d at 12. The court also relied upon the adult statutory standards embodied in ARIZ. R. CRIM P. 27.7(b)(3) (allowing admission of reliable hearsay evidence in an adult criminal probation revocation proceeding), *cited in* 119 Ariz. at 182, 580 P.2d at 14. Contrast these uses of adult standards with the approaches taken in cases cited notes 23, 30 *infra*.

17. The first juvenile court established in the United States was in Illinois in 1899. *See* A. PLATT, THE CHILD SAVERS 9 (1969).

18. *See* Parker, *The Century of the Child*, 45 CAN. B. REV. 741, 749 (1967). Professor Parker posits that "the philosophy of the court . . . that the child was 'misguided' rather than criminal with the court acting as a surrogate wise and kindly parent, strengthened the concept of a philanthropic rather than a penal body." *Id.*

19. The rather vague doctrine of parens patriae supports governmental actions that are parental or protective in nature. It began in England as the expression of the King's prerogative, as father and protector of his people, to protect certain dependent classes. Those classes included children, the legally incompetent, the retarded, and the mentally ill. American jurisprudence has adopted this concept. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tryant*, 25 DEPAUL L. REV. 895, 895-96 (1976).

20. *Id.* at 901-02.

21. *Id.* at 898-99; Parker, *supra* note 18, at 749.

22. A. PLATT, *supra* note 17, at 176. Platt argues that the reformers should not be considered libertarians or humanists. Their attitudes "were largely paternalistic and romantic," but they promoted correctional programs retentive of their conservative, middle class status quo, including "longer terms of imprisonment, long hours of labor and militaristic discipline, and the inculcation of middle class values and lower class skills." *Id.*

23. *See, e.g.*, Kent v. United States, 383 U.S. 541, 555 (1966); *In re* Maricopa County Appeal No. J-68100, 107 Ariz. 309, 311, 486 P.2d 791, 793 (1971); Arizona Dep't of Pub. Welfare v. Barlow, 80 Ariz. 249, 252, 296 P.2d 298, 300 (1956); Commonwealth v. Fisher, 213 Pa. 48, 52-53, 62 A. 198, 200 (1905); ARIZ. REV. STAT. ANN. § 8-207 (1974).

24. Commonwealth v. Fisher, 213 Pa. 48, 50, 62 A. 198, 198-99 (1905). The state's action was viewed as providing a substitute for parental care. The state was not punishing, it was providing for its children's salvation. *Id.*

25. *See id.* at 52-53, 62 A. at 200.

26. *See* Fox, *The Reform of Juvenile Justice: The Child's Right to Punishment*, JUV. JUST., Aug. 1974, at 3. Professor Fox notes that there have been far too many cases of abuse for anyone to deny the existence of the potential for abuse. The extent of the abuse possible in the "beneficent" juvenile system is well illustrated in the following observation by Mr. Justice Fortas:

> They [the probation officers] initiate the proceedings and file petitions which they verify, as here, alleging the delinquency of the child; and they testify, as here, against the child.

designed[27] to meet its inceptive ideal became overwhelming, prompting its characterization as a "kangaroo court."[28]

Recognition by the United States Supreme Court of the inequities in the functioning of the traditional system brought the beginning of a shift in procedural structure and provided the impetus for a philosophical reevaluation.[29] "There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[30] Seeking a balance between the "necessary flexibility"[31] of a juvenile delinquency proceeding, and the constitutional safeguards required to prevent possible abuses, the United States Supreme Court has extended certain due process rights to the juvenile. Among them are the right to certain procedural safeguards in a transfer hearing,[32] the right to timely notice of charges,[33] the right to counsel,[34] the right to confrontation and cross-examination of witnesses,[35] the privilege against self-incrimination,[36] the requirement that proof be beyond a reasonable doubt,[37] and the recognition that jeopardy attaches at a delinquency proceeding.[38] The

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And here the probation officer was also superintendant of the Detention Home. The probation officer cannot act as counsel for the child. His role in the adjudicatory hearing, by statute and in fact, is as arresting officer and witness against the child. Nor can the judge represent the child.

In re Gault, 387 U.S. 1, 33 (1967).

27. *See* Comment, *Children's Liberation—Reforming Juvenile Justice*, 21 KAN. L. REV. 177, 196 (1973). The writer concludes that the failure of the juvenile justice system is not a failure of motivation, but a failure in the use of the parens patriae doctrine as the philosophical underpinning. *Id.*

28. *See In re* Gault, 387 U.S. 1, 28 (1967). Mr. Justice Fortas observed that "the condition of being a boy does not justify a kangaroo court." *Id.*

29. Kent v. United States, 383 U.S. 541, 556 (1966).

30. *Id.* The shift in procedural structure is dramatically evidenced in the contrast between the respective opinions of the Arizona and United States Supreme Courts in *In re* Gault. The Arizona Supreme Court did not think that "due process requires that an infant have a right to counsel." *In re* Gault, 99 Ariz. 181, 191, 407 P.2d 760, 767 (1965). The "juvenile courts do not exist to punish children for their transgressions against society. The juvenile court stands in the position of a protecting parent rather than a prosecutor." *Id.* at 188, 407 P.2d at 765. The United States Supreme Court, noting that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," *In re* Gault, 387 U.S. 1, 13, (1967), and that a delinquency proceeding "is comparable in seriousness to a felony prosecution," *id.* at 36, held that the child has a right to counsel "at every step in the proceedings against him." *Id.*

31. *In re* Gault, 387 U.S. at 44. Flexibility and informality are considered necessary in a juvenile court proceeding because the court strives for individualized treatment and rehabilitation. Rigidity of disposition is viewed as counter to these goals. *See id.* at 25-26. *But cf.* Fox, *Juvenile Justice in America: Philosophical Reforms*, 5 HUMAN RIGHTS 63, 64 (1975) (positing that individualized treatment is unsound and even dangerous).

32. Kent v. United States 383 U.S. 541, 544 (1966) (before transfer to a criminal court, a juvenile has the right to a hearing with assistance of counsel and a statement of reasons why the juvenile court is waiving jurisdiction).

33. *In re* Gault, 387 U.S. 1, 33-34 (1967).

34. *Id.* at 35-41.

35. *Id.* at 57.

36. *Id.* at 55.

37. *In re* Winship, 397 U.S. 358, 368 (1970).

38. Breed v. Jones, 421 U.S. 519, 531, 541 (1975) (in an adjudicatory hearing a juvenile is

latter recognition set the stage for *Juvenile Action No. J-83341-S* to decide whether jeopardy attaches at a juvenile probation revocation hearing, thus barring state appeal of such a hearing as violative of the double jeopardy clause.

The Double Jeopardy Issue

In resolving the double jeopardy question in *In re Appeal in Maricopa County Juvenile Action No. J-83341-S*,[39] the court held that the double jeopardy clause did not bar a state appeal of a probation revocation decision.[40] The court started with the proposition that no jeopardy attaches at a probation revocation hearing; therefore, a rehearing of the same facts on remand would not constitute double jeopardy. No jeopardy attaches because the hearing is not part of the criminal proceeding against the juvenile in that there is no risk of conviction. The juvenile must already have been adjudicated a delinquent, and the probation revocation is not part of that adjudication but rather is a change "in the form or course of rehabilitation which had heretofore been ordered."[41]

The Arizona Court of Appeals depended on *Gagnon v. Scarpelli*[42] for the proposition that, because a probation revocation hearing is not a part of the criminal proceeding, jeopardy does not attach, regardless of the possible loss of liberty. However, this dependence upon *Gagnon* is questionable. The *Gagnon* Court, in discussing the due process requirements of a probation revocation hearing,[43] was referring to "a previously sentenced probationer" upon whom imposition of sentence was deferred until the time of probation revocation. The *Gagnon* Court

placed in jeopardy, so that a prosecution in superior court after an adjudicatory proceeding in juvenile court is barred by the double jeopardy clause).

39. 119 Ariz. 178, 580 P.2d 10 (Ct. App. 1978).

40. *Id.* at 182, 580 P.2d at 14.

41. *Id.* at 181, 580 P.2d 13. The quoted passage in the text is originally from *In re* Maricopa County, Juvenile Action No. J-72918-S, 111 Ariz. 135, 137, 524 P.2d 1310, 1312 (1974). In that case, the court analogized the juvenile probation proceeding to an adult probation revocation proceeding, and noted that although revocation of probation entails a loss of liberty, the accused is not subjected to a "full blown criminal trial," and the process of revocation is not part of the criminal proceeding against the accused. *Id.* The court depended on Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) for its holding that a probation revocation hearing is not a stage of the criminal prosecution. *Id.* The court in *Juvenile Action No. J-83341-S* noted in further support of that proposition that in a juvenile probation revocation hearing, the necessary standard of proof is a "preponderance of the evidence," rather than the "beyond a reasonable doubt" required in a criminal proceeding. 119 Ariz. at 181, 580 P.2d at 13. In further support of the holding that probation revocation is not part of a criminal prosecution is that evidence that a probationer has committed a crime is admissible in a revocation hearing even though the probationer was previously acquitted of that crime. *Id.*

42. 411 U.S. 778 (1973). *Gagnon* dealt with "whether a previously sentenced probationer is entitled to a hearing when his probation is revoked, and if so whether he is entitled to be represented by appointed counsel at such a hearing." *Id.* at 779. The *Gagnon* Court held that a hearing must be held, *id.* at 781-82, and that appointed counsel is not constitutionally required but should be provided under certain circumstances. *Id.* at 783-91.

43. *Id.* at 786.

specifically exempted from its holding the case of a probationer whose sentencing had been deferred to the time of his probation revocation.[44] The Court noted that the case of the probationer whose sentencing has been deferred until probation revocation was controlled by its decision in *Mempa v. Rhay*.[45] In *Mempa*, the Court held that sentencing is a stage of the criminal proceeding against an accused, even if that sentencing has been deferred until the time of probation revocation.[46] To determine whether the probation revocation hearing in *Juvenile Action No. J-83341-S* was part of the criminal proceeding under *Mempa*, or not part of the criminal proceeding under *Gagnon*, the question is whether appellee's sentencing was deferred, or whether only imposition of sentence was deferred until probation revocation. If the probationer was sentenced at the time of trial, then *Gagnon's* characterization of the revocation hearing as not part of the criminal proceeding applies.[47] However, if sentencing occurs at the probation revocation hearing, then it too is part of the criminal proceedings, and therefore the court of appeals' resolution of whether jeopardy attaches at that hearing was incorrect.[48]

The similarities between the deferred sentencing procedure[49] in *Mempa* and the probation revocation procedure in Arizona with its possible indeterminate commitment to the Arizona Department of Corrections[50] are striking. In *Mempa*, the petitioners were each convicted

44. *Id.* at 781.

45. 389 U.S. 128 (1967). The *Gagnon* Court began its discussion of the issues before it by noting that *Mempa* was one case that

> set the bounds of our present inquiry. In *Mempa v. Rhay*, . . . the Court held that a probationer is entitled to be represented by appointed counsel at a combined revocation and sentencing hearing. Reasoning that counsel is required "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected," . . . and that sentencing is one such stage, the Court concluded that counsel must be provided an indigent at sentencing even when it is accomplished as part of a subsequent probation revocation proceeding.

411 U.S. at 781 (citations omitted).

46. 389 U.S. at 134-37. See note 45 *supra*.

47. *See* 411 U.S. at 781.

48. *See* text accompanying note 42 *supra*. However, even if the Arizona Court of Appeals was wrong in casting the juvenile probation revocation hearing under *Gagnon*, there might arguably be no adverse effect in practical application. Although a hearing may be more properly cast under *Mempa*, the Ninth Circuit has held that the only additional right conferred by *Mempa* was the right to counsel. United States v. Segal, 549 F.2d 1293, 1298 (9th Cir.), *cert. denied*, 431 U.S. 919 (1977). This holding was in reference to the difference between confrontation rights that must be accorded a *Mempa* probationer as opposed to a *Gagnon* probationer. *Id.* at 1297-98. The question whether jeopardy attaches at a *Mempa*-type probation revocation hearing was not discussed in *Segal*. If it does attach it must be because it attaches anew at the probation revocation hearing or because jeopardy "continued," after once attaching, at the initiation of the criminal prosecution. The concept of "continuing jeopardy" was discussed in Breed v. Jones, 421 U.S. 519, 534 (1975), and the Court noted that that concept has never been embraced by a majority of the Court. For a discussion of the attachment of jeopardy, see text & notes 63-74 *infra*.

49. The deferred sentencing procedure in *Mempa* was, in form, simply a revocation of probation. 389 U.S. at 137.

50. ARIZ. REV. STAT. ANN. § 8-241(A)(2)(e) (Supp. 1977-78) and § 8-246(B) (1974) allowed

and placed on probation with conditions and with imposition of sentence deferred.[51] Subsequently, both allegedly committed crimes, had their probations revoked, and were sentenced to the maximum terms for their original crimes.[52] Within six months of imprisonment the Board of Prison Terms and Paroles would determine the actual "length of time to be served."[53]

The juvenile in *Juvenile Action No. J-83341-S* was adjudicated a delinquent[54] and placed on probation with conditions.[55] Subsequently, he allegedly committed crimes for which his probation could be revoked on rehearing.[56] If his probation were revoked, he might be committed to the Department of Corrections, without instructions,[57] until his twenty-first birthday. The actual determination of the term served would be at the discretion of the Department of Corrections.[58]

Unlike *Mempa* and *Juvenile Action No. J-83341-S*, *Gagnon* involved a conviction and a suspended sentence and probation in lieu of a sentence of fifteen years.[59] The probation was subsequently revoked for alleged crimes,[60] and the suspended sentence was activated.[61] Therefore, some question remains as to whether the Arizona juvenile probation revocation system[62] is a part of the criminal proceeding, as in *Mempa*, or whether it is a subsequent and distinct proceeding, as in *Gagnon*.

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for commitment of a juvenile to the Department of Corrections indefinitely until the committee attains the age of 21. See text & notes 57-58 *infra*.

51. 389 U.S. at 130-33.

52. *Id.* at 131-33.

53. *Id.* at 135.

54. The United States Supreme Court noted that a delinquency adjudication "is comparable in seriousness to a felony prosecution." *In re* Gault, 387 U.S. 1, 36 (1967).

55. 119 Ariz. at 179-80, 580 P.2d at 11-12.

56. *Id.* He was accused of committing petty theft and robbery. *See* text & notes 8-12 *supra*.

57. *See* ARIZ. REV. STAT. ANN. § 8-241(A)(2)(e) (Supp. 1977-78). The phrase "without instructions" means that the court, when committing a juvenile to the custody of the Department of Corrections, is officially powerless to prescribe length or nature of the commitment.

58. *See* ARIZ. REV. STAT. ANN. § 8-246(B) (1974); *Special Project, Juvenile Justice in Arizona*, 16 ARIZ. L. REV. 392, 394-96 (1974).

59. 411 U.S. at 779.

60. *Id.* at 780.

61. *Id.*

62. Regarding the nature of the probation revocation system, the prosecution in *Mempa* argued that "the petitioners were sentenced at the time they were originally placed on probation and that the imposition of sentence following probation revocation is, in effect, a mere formality constituting part of the probation revocation proceeding." 389 U.S. at 135. The Court impliedly rejected that characterization. *Id.* The Arizona Supreme Court's similar characterization of the juvenile probation revocation system seems equally suspect. In *In re* Appeal in Maricopa County Juvenile Action No. J-72918-S, 111 Ariz. 135, 524 P.2d 1310 (1974), the Arizona Supreme Court characterized the revocation of a juvenile's probation as presenting to the court the question of "whether there should be a change in the form or course of rehabilitation which had heretofore been ordered." *Id.* at 137, 524 P.2d at 1312. The court continued that "[s]uch a determination, while certainly affecting the liberty of the juvenile, could only occur after an original finding of delinquency which brings into action the attendant consequence of such a status." *Id.* The characterizations in that case and in *Mempa* are similar in that they both attempt to cast the incarceration of the probationer as only a subsequent change of form and not a change of substance.

The Arizona Court of Appeals cited *United States v. Martin Linen Supply Co.*[63] as providing a structure within which double jeopardy's applicability may be analyzed.[64] According to *Martin Linen*, there are two conditions necessary to trigger the "twice put in jeopardy" bar to a proceeding against an accused. The two conditions are that the accused must have actually been placed in jeopardy in the initial proceeding and that the government appeal of that initial proceeding must present a threat of successive prosecutions.[65] When coupled, these conditions form the heart of the double jeopardy bar: a government appeal should be barred if it would require a new trial, a repeated attempt to convict.[66]

In regard to the first condition, the Supreme Court held in *Martin Linen* that jeopardy attaches when "a jury is empaneled and sworn, or, in a bench trial, when the judge begins to receive evidence."[67] Jeopardy attaches if the presentation of such evidence by the state presents the risk to the accused of criminal punishment intended to vindicate the public's interest in justice.[68] The Court in *Breed v. Jones*,[69] in holding that jeopardy attaches at a delinquency adjudication,[70] stated:

> We believe it is simply too late in the day to conclude . . . that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years.[71]

This rationale could arguably be applied to the juvenile probation revocation system, especially if it was found to be part of the criminal proceedings against the juvenile under *Mempa*.[72]

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63. 430 U.S. 564 (1977).

64. 119 Ariz. at 180-81, 580 P.2d at 12-13.

65. *Id.* at 181, 580 P.2d at 13 (citing 430 U.S. at 596-70).

66. 430 U.S. at 569-70. Therefore, a government appeal that would result in a reinstatement of a guilty veredict would not be barred, because it would not require a second trial. *Id.* at 570.

67. *Id.* at 569.

68. Breed v. Jones, 421 U.S. 519, 529 (1975).

69. 421 U.S. 519 (1975).

70. *Id.* at 531. This proceeding should be distinguished from the probation violation hearing, which occurs only after an adjudication of delinquency.

71. 421 U.S. at 529. The context of this discussion in *Breed*, was, admittedly, an adjudicatory proceeding. Therefore the contention may be raised that jeopardy will attach at an adjudication but not at a probation revocation hearing. This position was adopted by the court in *Juvenile Action No. J-83341-S*, 119 Ariz. at 181, 580 P.2d at 13. *But see* State v. Simmerman, 118 Ariz. 298, 300, 576 P.2d 157, 159 (1978) (implying that jeopardy would attach at a probation violation hearing so that a second petition for revocation on the same facts and issues would be barred); State v. Rios, 114 Ariz. 505, 509, 562 P.2d 385, 389 (1977) (suggesting that jeopardy would attach at a probation revocation hearing if an issue of fact was resolved); *In re* Appeal in Maricopa County Juvenile Action No. J-75658-S, 26 Ariz. App. 519, 519-21, 549 P.2d 614, 614-16 (1976) (suggesting that jeopardy attaches when a judge makes a final order approving a referee's conditional finding regarding an alleged violation of a juvenile's conditions of probation).

72. For a discussion of *Mempa*, see text & notes 42-62 *supra*.

Following these guidelines, jeopardy arguably attached at the original probation revocation hearing in *Juvenile Action No. J-83341-S* because the trial judge heard the full presentation of evidence intended by the state to prove that the accused juvenile probationer had committed the acts charged.[73] The juvenile was subjected to the risk of loss of liberty if the state was successful.[74] Therefore, under the *Martin Linen* and *Breed* definition, jeopardy conceivably attached when the trial judge began hearing evidence intended to prove a criminal act, since that could entail a loss of liberty to the accused.

The second threshold condition identified in *Martin Linen* is that in order for the double jeopardy prohibition to arise, the government appeal must represent the threat of successive prosecutions.[75] To determine the applicability of this second condition, the court "must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[76]

If the juvenile probation revocation system were a stage of the criminal proceedings against the accused under *Mempa*,[77] then the government appeal in *Juvenile Action No. J-83341-S* could arguably represent the threat of successive prosecutions. The trial court held that the evidence presented was insufficient to sustain the allegations and so dismissed them.[78] Under *Martin Linen*, this represents the requisite resolution of the factual elements of the offense charged.[79] The appeal by the state could result, on remand, in a rehearing of the facts by the trial judge. Therefore, the appeal presented the threat of successive prosecutions.

Applying the foregoing analysis to *Juvenile Action No. J-83341-S*, jeopardy arguably attached at the initial hearing and the appeal represented the threat of multiple prosecutions. Under *Martin Linen*, the questions become whether the government appeal might result in a renewed attempt to convict, and whether the initial ruling of the trial judge represented any factual resolution, including a finding, correct or

73. 119 Ariz. at 179-80, 580 P.2d at 11-12.

74. *See* ARIZ. REV. STAT. ANN. § 8-241(A)(2)(e) (Supp. 1977-78), § 8-246(B) (1974), which taken together present the possibility of commitment of the juvenile to the Department of Corrections until the age of 21.

75. 430 U.S. at 569-70. See text & notes 63-66 *supra*.

76. 430 U.S. at 571. The *Martin Linen* Court concluded that the trial court's determination that the state's evidence was legally insufficient to sustain the allegations against the accused constituted such a resolution of factual elements. *Id.* at 572. For an even more recent restatement of this holding, see Burks v. United States, 98 S. Ct. 2141, 2147 (1978). *See also* State v. Simmerman, 118 Ariz. 298, 299, 576 P.2d 157, 158 (1978).

77. See text & notes 42-62 *supra* for a discussion of *Mempa* and its applicability to the juvenile probation revocation system.

78. *See* 119 Ariz. at 180, 580 P.2d at 12.

79. *See* 430 U.S. at 571.

not, of insufficiency of evidence.[80] If the answers to these questions are in the affirmative, then the state appeal is barred by the double jeopardy clause. In *Juvenile Action No. J-83341-S*, the trial judge heard the full presentation of the evidence, and correctly or not,[81] ruled that it was insufficient to sustain the allegations.[82] A rehearing of these facts would entail a second attempt to prove criminal transgressions that could result in a loss of liberty.[83] Therefore, the double jeopardy clause should have barred the state's appeal in *Juvenile Action No. J-83341-S*.

Upon finding that the double jeopardy clause did not bar the government's appeal because probation revocation is not part of the criminal prosecution,[84] the court turned to the hearsay issue. The court analogized to a Rule of Criminal Procedure allowing admission of reliable hearsay evidence in adult probation revocation hearings.[85] It held that there is no constitutional barrier to the admission of reliable hearsay evidence at a juvenile probation revocation hearing.[86] It further held that the trial court erred in not exercising its discretion as to the "reliability" of the hearsay evidence.[87] Therefore, the trial court's dismissal of the petition to revoke probation was reversed, and the case was remanded for further proceedings consistent with the opinion of the court of appeals.[88]

Conclusion

In re Appeal in Maricopa County Juvenile Action No. J-83341-S dealt with whether the state appeal of the dismissal of a petition to revoke a juvenile's probation was barred by the double jeopardy clause. The court held that the state appeal was not barred because a probation revocation hearing is not a stage of the criminal prosecution. Therefore, jeopardy never attached at the revocation hearing and a rehearing of the same facts on remand would not constitute double jeopardy.

80. *Id.* at 569, 571.

81. The court in *Juvenile Action No. J-83341-S* determined that the trial judge incorrectly found the evidence insufficient because he refused to admit hearsay evidence regardless of its reliability. 119 Ariz. at 183, 580 P.2d at 15.

82. *Id.* at 180, 580 P.2d at 12.

83. *See* 421 U.S. at 529. See text & notes 67-72 *supra*.

84. 119 Ariz. at 181, 580 P.2d at 13. See text & note 41 *supra*.

85. 119 Ariz. at 183, 580 P.2d at 15. The rule analogized to was ARIZ. R. CRIM. P. 27.7(b)(3). Rule 27.7(b)(3) allows the use of "any reliable evidence not legally privileged, including hearsay," in probation violation hearings.

86. 119 Ariz. at 183, 580 P.2d at 15.

87. *Id.*

88. *Id.*

Arguably, however, the revocation hearing is a stage of the criminal prosecution in the Arizona system of juvenile probation revocation. Had the court so decided, the state's appeal would have violated the double jeopardy clause's prohibition against multiple prosecutions.

IX. TORTS

A. ABSOLUTE PRIVILEGE OF EXECUTIVE BRANCH OFFICIALS FOR DEFAMATORY STATEMENTS

At early common law there was strict liability for defamatory statements.[1] Courts stated that the defamer was liable even though he never intended to refer to the plaintiff[2] and even though the publication was due to carelessness or mistake.[3] Moreover, there was a presumption that the defamer had a malicious intent.[4] The policy behind this strict liability was a strong interest in protecting an individual's reputation in the community.[5]

The doctrine of absolute privilege[6] for defamatory statements made by public officials developed in response to this rule of strict liability. The notion was that it would be burdensome to apply strict liability to those who found it necessary to make defamatory statements in the discharge of their public duties because it would put them in the dilemma of risking liability or not carrying out their duties.[7] The decision to grant the privilege to public officials represented a choice between the competing values of the protection of an individual's reputation from defamation and the unburdened exercise of public duties.[8] In granting the privilege to public officials, a determination was

1. *See* Taylor v. Hearst, 107 Cal. 262, 270, 40 P. 392, 394 (1895) (mistake is no defense in a libel action); Jones v. E. Hulton & Co., 2 K.B. 444, 452 (1909), *aff'd*, [1910] A.C. 20, 24 (newspaper publishers held liable for libel despite the fact that they intended to refer to a fictitious person). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 113, at 772-73 (4th ed. 1971).

2. *See* Switzer v. Anthony, 71 Colo. 291, 294, 206 P. 391, 392 (1922); Laudati v. Stea, 44 R.I. 303, 307, 117 A. 422, 424 (1922); Jones v. E. Hulton & Co., 2 K.B. 444, 452 (1909), *aff'd*, [1910] A.C. 20.

3. Taylor v. Hearst, 107 Cal. 262, 270, 40 P. 392, 394 (1895). "It is true [the libel] . . . was made to apply to him by mistake, but that did not justify or excuse the publication." *Id.* Upton v. Times Democrat Pub. Co., 104 La. 141, 144-45, 28 So. 970, 971 (1900). *See* Burton v. Cromwell Pub. Co., 82 F.2d 154, 155-56 (2d Cir. 1936).

4. McDonald v. Nugent, 122 Iowa 651, 654-55, 98 N.W. 506, 508 (1904). "Where slanderous words, whether oral or written, are actionable per se, proof of the speaking or publication is all that is required. Malice in such case is presumed." King v. Patterson, 49 N.J.L. 417, 419, 9 A. 705, 706 (1887). *See* W. PROSSER, *supra* note 1, § 113, at 772; Veeder, *History and Theory of the Law of Defamation*, 4 COLUM. L. REV. 33, 35-36 (1904).

5. *See* Veeder, *supra* note 4, at 35.

6. The terms privilege and immunity are used synonomously in judicial opinions and other works. *See* Petroni v. Board of Regents, 115 Ariz. 562, 565, 566 P.2d 1038, 1041 (Ct. App. 1977); Long v. Mertz, 2 Ariz. App. 215, 218, 407 P.2d 404, 407 (1965); W. PROSSER, *supra* note 1, § 114, at 782, 783. This casenote will also use them interchangeably.

7. Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463, 464 (1909).

8. *See* Barr v. Matteo, 360 U.S. 564, 565 (1959). In the plurality opinion, Justice Harlan stated that in deciding whether to grant an absolute privilege, the court would weigh two important but conflicting considerations:

made that the public good overshadows the harm suffered by victims of defamation by government officials.[9]

Absolute privilege was applied early in the development of the common law to the legislative[10] and judicial[11] branches. The application of the privilege to the executive branch is of comparatively recent development.[12] Unlike legislative branch immunity, which has a constitutional foundation,[13] absolute privilege in the executive branch is largely of judicial creation.[14] In developing executive branch immunity, courts have analogized to judicial immunity,[15] reasoning that the same policy considerations supporting an absolute privilege for judges apply to executive officials.[16] Today, the absolute privilege of executive branch officials for defamatory statements is imbedded in both state[17]

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[t]he protection of the individual citizen against pecuniary damage caused by . . . malicious action on the part of officials of the Federal Government; and . . . the protection of the public interest by shielding reponsible governmental officers against the . . . hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities.

Id. *See also* W. PROSSER, *supra* note 1, § 114, at 776; text & notes 62, 74, 89 *infra*.

9. *See* Barr v. Matteo, 360 U.S. 564, 574 (1959) (absolute privilege granted to Acting Director of the Office of Rent Stabilization for defamatory statements made to press); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (absolute privilege for false imprisonment granted to Attorney General of the United States, District Director of the Enemy Alien Control Unit of Department of Justice, and District Director of Immigration); Long v. Mertz, 2 Ariz. App. 215, 220, 407 P.2d 404, 409 (1965) (absolute privilege granted to state highway commission member for defamatory statements made to plaintiff and his wife); Montgomery v. City of Philadelphia, 392 Pa. 178, 188, 140 A.2d 100, 105 (1958) (absolute privilege granted to city architect and deputy commissioner of public property for defamatory statements made to press).

10. The absolute privilege of the legislative branch was recognized as early as 1399. Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L. REV. 131, 132 (1910). For a discussion of the historical origins of legislative branch immunity, see Tenny v. Brandhove, 341 U.S. 367, 372-76 (1951). Absolute privilege for the legislative branch has constitutional foundations. See note 13 *infra*.

11. Absolute privilege was applied to statements made by participants in a judicial proceeding as early as the sixteenth century. Veeder, *supra* note 7, at 474. *See also* Note, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*, 20 ARIZ. L. REV. 549 (1978).

12. In both the United States and England an absolute privilege was first afforded an executive official in the late nineteenth century. *See* Spalding v. Vilas, 161 U.S. 483, 498 (1896); Chatterton v. Secretary of State, 2 Q.B. 189, 191-92 (1895).

13. See U.S. CONST. art. I, § 6, cl. 1 (United States senators and respresentatives are privileged from arrest for any speech or debate in either house); ARIZ. CONST. art. 4, pt. 2, § 7 ("no member of the legislature shall be liable in any civil or criminal prosecution for words spoken in debate.").

14. Barr v. Matteo, 360 U.S. 564, 569 (1959). For a detailed analysis of the historical development of the grant of absolute privilege to executive branch officials, see Becht, *The Absolute Privilege of the Executive in Defamation*, 15 VAND. L. REV. 1127, 1128-48 (1962).

15. In two landmark decisions granting an absolute privilege to executive branch officials, the Supreme Court analogized to cases involving the immunity of judges. In Barr v. Matteo, 360 U.S. 564 (1959), the Court granted an absolute privilege to a lower level federal official who had issued a defamatory press release regarding subordinate officials in the same office. *Id.* at 574. In Spalding v. Vilas, 161 U.S. 483 (1896), the court granted an absolute privilege to an executive official who had sent letters to clients of an attorney, allegedly with malicious intent, which disrupted contractual relationships existing between the attorney and his clients. *Id.* at 486-87. In both *Barr* and *Spalding*, the Court cited and analogized to Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871) which concerned the immunity of judges.

16. *See* Spalding v. Vilas, 161 U.S. 483, 498 (1896); Handler & Klein, *The Defense of Absolute Privilege in Defamation Suits Against Government Officials*, 74 HARV. L. REV. 44, 52 (1960).

17. *See* Long v. Mertz, 2 Ariz. App. 215, 222, 407 P.2d 404, 411 (1965); McNayr v. Kelly, 184

and federal[18] law.

In *Grande v. State*,[19] Division One of the Arizona Court of Appeals held that officials of the Arizona State Tax Commission and State Attorney General's office were absolutely privileged for defamatory statements made within the scope of their official duties.[20] *Grande* involved a suit by a former tax collector for the Arizona State Tax Commission against officials of that agency for defamatory statements contained in a notice of dismissal they filed with the Arizona Personnel Board.[21] The notice was used at a hearing held by the personnel board on the plaintiff's termination as a tax collector.[22]

In dealing with absolute privilege for defamatory statements, the court in *Grande* faced issues similar to those addressed by other courts regarding the scope and application of the privilege. Courts have considered whether the immunity would be afforded all executive branch officials or limited to high echelon officials. Whether the privilege should apply when officials act pursuant to their statutory duties, within their discretionary authority, or within the scope of all their official duties, both statutory and discretionary, has also been discussed. This casenote will examine how the resolution of these issues by the Arizona courts has resulted in the creation of a broadly applied absolute privilege for Arizona executive branch officials who make defamatory statements. The rationale offered to support the grant of the

So. 2d 428, 433 (Fla. 1966); Shearer v. Lambert, 274 Or. 449, 454, 547 P.2d 98, 100 (1976); Montgomery v. City of Philadelphia, 392 Pa. 178, 188, 140 A.2d 100, 105 (1958); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 26.04, at 530 (1958); RESTATEMENT (SECOND) OF TORTS § 591, comment e at 182 (Tent. Draft No. 20, 1974).

18. *See* Barr v. Matteo, 360 U.S. 564 (1959). Recently there has been some doubt as to the continuing viability of *Barr* due to several decisions in which the Supreme Court granted only a qualified privilege to state executive officials in suits under 42 U.S.C. § 1983 (1976). *See* Wood v. Strickland, 420 U.S. 308, 322 (1975) (school board members entitled to qualified immunity in § 1983 suit); Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974) (governor, officers of state national guard, and state university president entitled to good faith privilege in § 1983 suit); Pierson v. Ray, 386 U.S. 547, 557 (1967) (police officers entitled to good faith immunity). The second circuit has interpreted these cases as representing an erosion of *Barr* and a trend towards granting only a qualified immunity to executive officials in common law actions. *See* Economou v. United States Dep't of Agriculture, 535 F.2d 688, 691-96 (2d Cir. 1976), *rev'd and remanded sub nom.* Butz v. Economou, 98 S. Ct. 2894 (1978). *But see* Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Inst., 566 F.2d 289, 293 (D.C. Cir. 1977) (suits under § 1983 are distinguishable from common law actions). A recent decision by the Court indicates that *Barr* is still viable and that the grant of qualified immunity to executive branch officials will be applied only in cases where the defendant's constitutional, and not common law, rights are involved. *See* Butz v. Economou, 98 S.Ct. 2894, 2911 (1978). The Court in *Butz* distinguished *Barr* on the grounds that it was not a case in which rights of constitutional dimension were violated, *id.* at 2905, nor did *Barr* provide an immunity to an official acting beyond the perimeter of his official duties. *Id.*

19. 115 Ariz. 394, 565 P.2d 900 (Ct. App. 1977).

20. *Id.* at 399, 565 P.2d at 905. At the trial level, the court granted the defendant-officials' motion for summary judgment based on their assertion of the defense of absolute privilege. *Id.* at 395, 565 P.2d at 901.

21. *Id.* at 395, 565 P.2d at 901.

22. *Id.* at 394-95, 565 P.2d at 900-01.

privilege will then be critically analyzed in the context of the court's opinion in *Grande*.

The Development of Absolute Privilege of Arizona Executive Branch Officials

The grant of an absolute privilege to executive branch officials[23] for defamatory statements made within the scope of their official duties provides them with an immunity from civil liability even though the statements were made maliciously.[24] In order to maintain an absolute privilege defense, the defamatory statement must be made on a privileged occasion,[25] and the substance of the statement must be relevant to that occasion.[26]

Arizona courts are firmly committed to absolute privilege for executive branch officials for defamatory statements.[27] This privilege has been broadly applied to both high and low level[28] executive branch

23. An executive branch official is an officer of the executive department of government. His duties are to execute the laws and to see that they are obeyed. BLACK'S LAW DICTIONARY 679 (4th ed. 1951).

24. *See* Long v. Mertz, 2 Ariz. App. 215, 218, 407 P.2d 404, 407 (1965); Mills v. Denny, 245 Iowa 584, 587, 63 N.W.2d 222, 224 (1954); Jones v. Trice, 210 Tenn. 535, 538, 360 S.W.2d 48, 50 (1962). Malicious statements are those made with an evil intent or motive arising from spite, personal hatred, culpable recklessness, or a wanton disregard of the rights and interests of the person defamed. Moore v. Greene, 431 F.2d 584, 593 (9th Cir. 1970) (quoting David v. Hearst, 160 Cal. 143, 157, 116 P. 530, 537 (1911)); Cherry v. Des Moines Leader, 114 Iowa 298, 300, 86 N.W. 323, 323 (1901); McDonald v. Brown, 23 R.I. 546, 548, 51 A. 213, 213-14 (1902). The privilege applies to actual malice. *See* Mills v. Denny, 245 Iowa 584, 587, 63 N.W.2d 222, 224 (1954). Actual malice is express malice or malice in fact. Eteepain Coop. Soc'y v. Lillback, 18 F.2d 912, 917 (1st Cir. 1927); Gee v. Culver, 13 Or. 598, 601, 11 P. 302, 303 (1885). This is distinguished from implied or constructive malice, which is malice that is inferred from acts. Glieberman v. Fine, 248 Mich. 8, 12, 226 N.W. 669, 670 (1929).

25. *See* Phoenix Newspapers v. Choisser, 82 Ariz. 271, 276, 312 P.2d 150, 154 (1957); Laun v. Union Elec. Co., 350 Mo. 572, 578-79, 166 S.W.2d 1065, 1069 (1943); Alexandria Gazette Corp. v. West, 198 Va. 154, 160, 92 S.E.2d 274, 281 (1956). Regarding executive branch officials, a privileged occasion is one within the scope of their authorized duties. W. PROSSER, *supra* note 1, § 115, at 784. See text & notes 40, 47 *infra*.

26. *See* Urchisin v. Hauser, 221 So. 2d 752, 757 (Fla. 1969); Mathis v. Kennedy, 243 Minn. 219, 224, 67 N.W.2d 413, 417 (1954); Lombardo v. Stoke, 18 N.Y.2d 394, 401, 222 N.E.2d 721, 724, 276 N.Y.S.2d 97, 102 (1966).

27. *See* Petroni v. Board of Regents, 115 Ariz. 562, 565, 566 P.2d 1038, 1041 (Ct. App. 1977) (privilege granted to board of regents and university faculty tenure committee); Grande v. State, 115 Ariz. 394, 399, 565 P.2d 900, 905 (Ct. App. 1977) (privilege granted to members of tax commission and attorney general's office); S.H. Kress & Co. v. Self, 22 Ariz. App. 230, 232, 526 P.2d 754, 756 (1974) (dictum); Bugarin v. Wilson School Dist. No. 7, 17 Ariz. App. 541, 545, 499 P.2d 119, 123 (1972) (immunity granted to school board members). *But see* Martinez v. Cardwell, 25 Ariz. App. 253, 257, 542 P.2d 1133, 1137 (1975), *overruled by implication*, Petroni v. Board of Regents, 115 Ariz. 562, 565, 566 P.2d 1038, 1041 (Ct. App. 1977) (conditional privilege granted to state prison warden). See text & notes 55-58 *infra*.

28. High echelon state executive officials are superior officers of state governments including the governor, the attorney general, and heads of state departments whose rank is the equivalent of cabinet rank in the federal government. RESTATEMENT (SECOND) OF TORTS § 591 (Tent. Draft No. 20, 1974). Some courts have not followed the Restatement definition. These courts have equated high level officials with officials having policymaking functions. *See* Stukuls v. State, 42 N.Y.2d 272, 278, 366 N.E.2d 829, 833, 397 N.Y.S.2d 740, 744 (1977); Montgomery v. City of Philadelphia, 392 Pa. 178, 188, 140 A.2d 100, 105 (1958). The officials named as defendants in *Grande* included both high and low level officials. The high echelon officials were the attorney

officials[29] acting within the scope of their official duties.[30] Furthermore, the privilege has been applied in all contexts comprising those duties.[31]

The development of the current position began in 1948[32] when the

general for Arizona, and the executive secretary for the Arizona Tax Commission. The lower level officials were an assistant attorney general for Arizona, the director of the Tucson office of the tax commission and three members of the tax commission. *See* Grande v. State, 115 Ariz. at 394 n.1, 565 P.2d at 900 n.1. For examples of states limiting absolute privilege to high level officials, see cases cited note 29 *infra*.

29. See cases cited note 27 *supra*. Arizona's application of absolute privilege to executive branch officials for defamatory statements is more extensive than that of other states. California, New Mexico, Pennsylvania, Washington, and Wisconsin grant the privilege only to high-ranking executive officials. *See* Sanborn v. Chronicle Publishing Co., 18 Cal. 3d 406, 412, 556 P.2d 764, 767, 134 Cal. Rptr. 402, 405 (1976) (privilege denied to county clerk); Saroyan v. Burkett, 57 Cal. 2d 706, 710-11, 371 P.2d 293, 296, 21 Cal. Rptr. 557, 560 (1962) (privilege granted to state superintendent of banks); Adams v. Tatsch, 68 N.M. 446, 456-57, 362 P.2d 984, 991 (1961) (privilege granted to state highway commissioner); Montgomery v. City of Philadelphia, 392 Pa. 178, 188, 140 A.2d 100, 105 (1958) (privilege granted to city architect and deputy commissioner of public property); Engelmohr v. Bache, 66 Wash. 2d 103, 107, 401 P.2d 346, 349 (1965) (privilege denied to special studies group appointed by the Securities and Exchange Commission); Ranous v. Hughes, 30 Wis. 2d 452, 464, 141 N.W.2d 251, 257 (1966) (privilege denied to school board members).

Massachusetts grants the privilege only in a "comparatively few cases." Vigoda v. Barton, 348 Mass. 478, 484, 204 N.W.2d 441, 445 (1965) (privilege denied to state hospital superintendent). New York has applied the privilege to high-ranking state officials and lower level officials performing duties specifically delgated by high level officials. *See* Ward Telecommunications & Computer Servs., Inc. v. State, 42 N.Y.2d 289, 292, 366 N.E.2d 840, 842, 397 N.Y.S.2d 751, 753 (1977) (privilege granted to employees of state audit division who prepared an audit for and on behalf of state controller); Stukuls v. State, 42 N.Y.2d 272, 278, 366 N.E.2d 829, 833, 397 N.Y.S.2d 740, 744 (1977) (privilege denied to acting state university president). *See* W. PROSSER, *supra* note 1, § 114, at 783 (most states have refused to extend an absolute privilege to subordinate state officers).

30. *See* White Mountain Apache Indian Tribe v. Shelley, 107 Ariz. 4, 7, 480 P.2d 654, 657 (1971); Grande v. State, 115 Ariz. 394, 399, 565 P.2d 900, 905 (Ct. App. 1977). See text & note 47 *infra*.

31. There are at least four contexts comprising the scope of an executive officer's official duties. They are: (1) formal statements before or by a governmental body exercising quasi-judicial or administrative powers, *see* Davis v. Littell, 398 F.2d 83, 83-84 (9th Cir. 1968) (statements made before tribal counsel); Wilson v. Hirst, 67 Ariz. 197, 198, 193 P.2d 461, 462 (1948) (termination of hospital employees); Grande v. State, 115 Ariz. 394, 395, 565 P.2d 900, 901 (Ct. App. 1977) (employee termination hearing); (2) internal communications from one public officer to another, *see* Petroni v. Board of Regents, 115 Ariz. 562, 564, 566 P.2d 1038, 1040 (1977) (statements made by and to university faculty tenure committee members); (3) all relevant statements contained in a communication made by an executive officer with reference to matters committeed by law to his control or supervision and directed to the particular person or persons specifically interested in such matters, Long v. Mertz, 2 Ariz. App. 215, 217, 407 P.2d 404, 406 (1965) (statements made to wife of person seeking contract bid envelope); and (4) communciations to the public, *see* Bugarin v. Wilson School Dist. No. 7, 17 Ariz. App. 541, 543, 499 P.2d 119, 121 (1972) (public statement concerning dissident teachers). The fact that Arizona courts have applied the privilege in all contexts comprising the scope of an official's duties is significant because it represents a broad application of absolute privilege.

32. Prior to 1948, Arizona courts granted only a good faith (conditional or qualified) privilege to state executive officials. *See* Conner v. Timothy, 43 Ariz. 517, 522, 33 P.2d 293, 295 (1934). A qualified or good faith privilege provides executive officials with an immunity only if the defamatory statement was made in good faith. *See id.* at 521, 33 P.2d at 294; Judge v. Rockford Memorial Hosp., 17 Ill. App. 2d 365, 376-77, 150 N.E.2d 202, 207 (1958); Stice v. Beacon Newspaper Corp., 185 Kan. 61, 64-65, 340 P.2d 396, 399-400 (1959). In considering whether to grant an absolute or conditional privilege to school board officials who made defamatory statements, the Arizona Court of Appeals in Bugarin v. Wilson School Dist. No. 7, 17 Ariz. App. 541, 499 P.2d 119 (1972), stated that its reading of *Conner* did not indicate that the supreme court had ruled out absolute privilege. *Id.* at 544, 499 P.2d at 122. The decision in Petroni v. Board of Regents, 115

Arizona Supreme Court granted an absolute privilege to state hospital board officials who were charged with acting maliciously in terminating eleven hospital employees.[33] The court held that officials acting in a quasi-judicial capacity were absolutely privileged for actions taken within their jurisdiction.[34] The grant of immunity was based on the rationale that it was necessary to achieve the fearless and unfettered discharge of an executive officer's official duties.[35]

The application of the privilege was expanded when the Arizona Court of Appeals applied absolute privilege to executive officers in *Long v. Mertz*,[36] a defamation case. The court held that a member of the Arizona Highway Commission was absolutely privileged for defamatory statements he made charging the plaintiff with not being a qualified contractor.[37] In addition to this being the first time that absolute immunity was granted to an executive branch official in Arizona for defamatory statements,[38] the holding represented an expansive application of the privilege in that it was applied to a lower level official.[39] However, the court did restrict the immunity to officials acting within the ambit of their statutory duties.[40] Officials acting not within the scope of their statutorily authorized duties but within the scope of their discretionary authority were entitled only to a qualified immunity.[41]

Absolute privilege was further expanded when a federal court interpreted Arizona law as applying an absolute privilege to public officials acting within the scope of their discretionary authority. In *Davis v. Littell*,[42] the United States Court of Appeals for the Ninth Circuit held that under Arizona law, an attorney for an Indian tribe was a public official, and that as a public official he was entitled to absolute immunity for defamatory statements made to the tribe's counsel.[43] This expanded application of absolute executive privilege was approved by the

Ariz. 562, 565, 566 P.2d 1038, 1041 (Ct. App. 1977), which implicitly rejected the rule of conditional privilege and granted an absolute privilege, indicates that the viability of *Conner* as an authority for the grant of a conditional privilege to executive officials who make defamatory statements is being questioned.

33. *See* Wilson v. Hirst, 67 Ariz. 197, 198, 193 P.2d 461, 462 (1948).

34. *Id.* at 201-02, 193 P.2d at 464.

35. *Id.* at 199-200, 193 P.2d at 462-63.

36. 2 Ariz. App. 215, 407 P.2d 404 (1965).

37. *Id.* at 222, 407 P.2d at 411. Here the privilege was applied in the context of a communication by an official with reference to matters within his control or supervision to a person specifically interested in such matters. See text & note 31 *supra*.

38. In Conner v. Timothy, 43 Ariz. 517, 521-23, 33 P.2d 293, 294-95 (1934), the Arizona Supreme Court granted only a conditional privilege to school board officials. See note 32 *supra*.

39. Arizona's current rule is that the duties of the office, not the title, determine the presence of absolute privilege. Bugarin v. Wilson School Dist. No. 7, 17 Ariz. App. 541, 545, 499 P.2d 119, 123 (1972). See note 29 *supra*.

40. Long v. Mertz, 2 Ariz. App. 215, 220, 407 P.2d 404, 409 (1965). For a comparison between scope of official duties test and statutory authority test, see text & note 47 *infra*.

41. Long v. Mertz, 2 Ariz. App. 215, 220, 407 P.2d 404, 409 (1965).

42. 398 F.2d 83, 84-85 (9th Cir. 1968).

43. *Id.* at 85.

Arizona Supreme Court in *White Mountain Apache Indian Tribe v. Shelley*.[44] This case involved allegations that the general counsel of an Indian tribe and the general manager of the tribe's corporation had maliciously induced the tribe to breach its contractual obligations with the plaintiff.[45] Relying on *Davis v. Littell*,[46] the court held the defendants were public officials and that they were entitled to immunity from suit for actions taken within the scope of their official duties.[47]

Recent decisions by Division One of the Arizona Court of Appeals have solidified and further expanded this development. In *Bugarin v. Wilson School District No. 7*,[48] the court applied an absolute privilege to executive officials in the additional context of defamatory statements made to the public[49] by granting immunity to school board officials who issued a defamatory report.[50] In 1974, the court indicated in dictum that executive officials were absolutely privileged.[51] The culmination of this trend is represented by *Grande v. State*[52] where the privilege was granted to members of the Arizona Tax Commission and State Attorney General's office.[53]

In contrast, Division Two of the Arizona Court of Appeals, in

44. 107 Ariz. 4, 480 P.2d 654 (1971).

45. *Id.* at 5, 480 P.2d at 655.

46. 398 F.2d 83 (9th Cir. 1968).

47. 107 Ariz. at 7-8, 480 P.2d at 657-58. Arizona adopted the scope of official duties test from Barr v. Matteo, 360 U.S. 564 (1959). "A public official is entitled to [absolute] immunity for actions taken by him within the scope of his official duties as a public official." White Mountain Apache Indian Tribe v. Shelley, 107 Ariz. 4, 7, 480 P.2d 654, 657 (1971) (citing Barr v. Matteo, 360 U.S. 564 (1959)). In discussing the occasions which comprise the scope of an official's duties, the Court said, "[T]he same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts at those levels of government where the concept of duty envelopes the sound exercise of discretionary authority." Barr v. Matteo, 360 U.S. at 575. Thus, the scope of official duties test encompasses both statutory and discretionary duties. *See id.*; Savarirayan v. English, 45 Ill. App. 3d 105, 108, 359 N.E.2d 236, 238 (1977). The more restricted statutory authority test, see text & note 40 *supra*, allows a privilege only if the occasion which gave rise to the defamatory statement was within the official's statutory duties. However, it is important to note that even under the restrictive "statutory duties" test an absolute privilege applies not only to statements made pursuant to expressly enumerated duties, but also to statements made pursuant to duties which arise by the implications of specific statutory language. *See* Long v. Mertz, 2 Ariz. App. 215, 220-22, 407 P.2d 404, 409-11 (1965).

Although the Arizona Supreme Court did not explicitly say that the scope of official duties test encompasses both types of duties, its adoption of the test as set down in *Barr* implies that Arizona also adopts this view. *See* White Mountain Apache Indian Tribe v. Shelley, 107 Ariz. 4, 7, 480 P.2d 654, 657 (1971). The adoption of the *Barr* test apparently invalidates the statutory authority test as set forth in Long v. Mertz, 2 Ariz. App. 215, 220, 407 P.2d 404, 409 (1965). See text & note 40 *supra*.

48. 17 Ariz. App. 541, 499 P.2d 119 (1972).

49. *See id.* at 543, 499 P.2d 121. In this case, school board officials issued a rebuttal to a letter circulated by a group of Mexican-American teachers. The rebuttal referred to these teachers as dissidents.

50. *See id.* at 544, 499 P.2d at 122.

51. *See* S.H. Kress & Co. v. Self, 22 Ariz. App. 230, 232, 526 P.2d 754, 756 (1974).

52. 115 Ariz. 394, 565 P.2d 900 (Ct. App. 1977).

53. *Id.* at 399, 565 P.2d at 905. See text & notes 19-22 *supra*.

Martinez v. Cardwell,[54] explicitly declined to follow *Long v. Mertz*[55] and applied only a conditional privilege to executive branch officials for defamatory statements made within the scope of their official duties.[56] However, in a recent case,[57] Division Two indicated that *Martinez* is no longer good law and that it will grant an absolute privilege to executive branch officials.[58] There is an indication that Division Two will continue to expand the application of the privilege because the court granted the privilege in the previously unrecognized context of intergovernmental communications.[59]

Policy Arguments Supporting the Grant of Absolute Privilege

Arizona courts have traditionally based their grant of an absolute privilege to executive branch officials on public policy considerations.[60] In supporting its grant of the privilege to upper and lower echelon executive officials, the court in *Grande v. State* advanced several policy arguments. The court reasoned that an absolute privilege was necessary to achieve the fearless and vigorous exercise of official duties by executive officers.[61] This rationale is based on the assumption that without such immunity, public officials will fear personal liability for actions taken within the scope of their official duties. It is argued that because of this fear, officials will not exercise honest and independent judgment when making official decisions, nor will they vigorously execute those decisions.[62] Furthermore, a conditional privilege is insufficient to achieve this goal because it will not provide officials with

54. 25 Ariz. App. 253, 542 P.2d 1133 (1975), *overruled by implication*, Petroni v. Board of Regents, 115 Ariz. 562, 565, 566 P.2d 1038, 1041 (Ct. App. 1977).

55. *Id.* at 256, 542 P.2d at 1136.

56. *Id.* at 257, 542 P.2d at 1137. A conditional privilege is defeated by actual malice on the part of the speaker. *See* Conner v. Timothy, 43 Ariz. 517, 521-22, 33 P.2d 293, 294-95 (1934); Stice v. Beacon Newspaper Corp., 185 Kan. 61, 65, 340 P.2d 396, 400 (1959); W. PROSSER, *supra* note 1, § 115, at 794. See text & note 32 *supra*.

57. Petroni v. Board of Regents, 115 Ariz. 562, 566 P.2d 1038 (Ct. App. 1977).

58. *Id.* at 565, 566 P.2d at 1041. In *Petroni*, the court granted an absolute privilege to university faculty tenure committee members who had issued a defamatory report regarding a professor who was seeking tenure at the university. *Id.*

59. *Id.* at 564, 566 P.2d at 1040.

60. Arizona's grant of absolute privilege to executive branch officials for defamatory statements made within the scope of their official duties is based on arguments advanced in the Supreme Court's plurality opinion extending an absolute privilege to lower federal officials. Barr v. Matteo, 360 U.S. 564 (1959). *See* White Mountain Apache Indian Tribe v. Shelley, 107 Ariz. 4, 7-8, 480 P.2d 654, 657-58 (1971); Grande v. State, 115 Ariz. 394, 396, 565 P.2d 900, 902 (Ct. App. 1977); Long v. Mertz, 2 Ariz. App. 215, 222, 407 P.2d 404, 408-09 (1965).

61. 115 Ariz. at 398, 565 P.2d at 904 (quoting Barr v. Matteo, 360 U.S. at 571). See note 74 *infra*.

62. *Id.* This rationale is applicable given the facts in *Grande*. ARIZ. REV. STAT. ANN. § 41-785 (Supp. 1978) provides that state employees who have been terminated have a right to a hearing and to be furnished with a notice of the reasons for their termination. Since these reasons would often be libelous, it would impose a burden on officials required by law to make possibly libelous statements under the threat of a lawsuit in which they would have the burden of establishing good faith. *See* Grande v. State, 115 Ariz. at 398, 565 P.2d at 904. Officials placed in such a dilemma might be deterred from honestly executing their official duties. *See* note 74 *infra*.

sufficient protection from liability due to the difficulties of proving good faith.[63]

The second policy argument advanced by the court in *Grande* was that the lack of absolute immunity would cause officials to conduct public business in secret sessions with no explanation of their actions.[64] An absolute privilege is said to counteract this by reducing the possible costs of open and honest administration of government business.[65]

In addressing the issue of which officials should receive the immunity, the court relied on the United States Supreme Court's plurality opinion in *Barr v. Matteo*[66] which reasoned that the policy considerations supporting the grant of the privilege applied equally to all executive officials.[67]

The use of the "scope of official duties" test to determine the applicability of the privilege was justified by relying on precedent established in *Barr*[68] and its subsequent approval by the Arizona Supreme Court.[69] The court also disposed of the plaintiff's argument that the action was not within the scope of the defendants' official duties if it included a defamatory statement[70] by reasoning that if this argument were valid, no absolute privilege could exist in any case involving allegations of malice because public officials are never authorized to act maliciously.[71] The court stated the issue to be "whether the underlying activity is within the scope or perimeter of the official's duty, and not the manner of its performance."[72]

63. *See* Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949); Handler & Klein, *supra* note 16, at 67.

64. 115 Ariz. at 396, 565 P.2d at 902 (quoting Long v. Mertz, 2 Ariz. App. at 222, 407 P.2d at 411).

65. *See* Barr v. Matteo, 360 U.S. 564, 577 (1959) (Black, J., concurring). Justice Black stated that having an informed public was essential to the effective functioning of government. In order to inform the public, public officials must be free to criticize the way public employees do their jobs. *Id.*

66. *Id.*

67. We do not think that the principle . . . can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of government activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.

Grande v. State, 115 Ariz. at 396, 565 P.2d at 902 (quoting Barr v. Matteo, 360 U.S. at 572) (footnotes omitted). See note 47 *supra*.

68. 360 U.S. 564, 573-74, 575 (1959).

69. *See* Grande v. State, 115 Ariz. 394, 398, 565 P.2d 900, 904 (Ct. App. 1977) (quoting White Mountain Apache Indian Tribe v. Shelley, 107 Ariz. at 7, 480 P.2d at 657). *See* note 47 *supra*.

70. The plaintiff in *Grande* argued that "declaring someone guilty of a crime he is merely under indictment for is not part of the defendants' duties." 115 Ariz. at 398, 565 P.2d at 904.

71. *Id.*

72. *Id.*

Analysis of the Rationale Supporting an Absolute Privilege

A weakness in the court's opinion in *Grande* is the failure to deal with the fundamental issue of whether the privilege is actually necessary. The opinion, as do many others,[73] uncritically accepts as a justification the largely unsubstantiated claims concerning the inhibitory effect on the administration of government of a denial of an absolute privilege.[74] The unsoundness of this unquestioning reliance is pointed out by commentators and members of the judiciary who have argued that there is no evidence showing that the privilege achieves its policy goals[75] and some indication that the more circumscribed conditional privilege would suffice.[76] It should be a central concern that immunity not be granted unless necessary because it leaves the victim of a mali-

73. *See* cases cited note 74 *infra*.

74. The classic statement of the rationale supporting the grant of an absolute privilege is found in Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), where Judge Learned Hand stated that "[t]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Id.* at 581. This rationale was the basis of the Supreme Court's grant of an absolute privilege in Barr v. Matteo, 360 U.S. at 571-72 (quoting Gregoire v. Biddle, 177 F.2d at 581). Many state courts have also unquestioningly adopted this rationale to support their grant of absolute privilege. *See, e.g.*, Long v. Mertz, 2 Ariz. App. 215, 222, 407 P.2d 404, 411 (1965); McNayr v. Kelly, 184 So. 2d 428, 431 n.7 (Fla. 1966); Schulz v. Board of Educ., 221 Kan. 351, 356, 559 P.2d 367, 372 (1977); Storch v. Board of Directors, 169 Mont. 176, 182, 545 P.2d 644, 648 (1976); Montgomery v. City of Philadelphia, 392 Pa. 178, 184 n.7, 140 A.2d 100, 104 n.7 (1958); *cf.* Noble v. Ternyik, 273 Or. 39, 44-45, 539 P.2d 658, 661 (1975) (absolute privilege for legislators).

It has been observed that judges have exhibited a tendency to be "mesmerized by resounding phrases" with respect to the argument that an absolute privilege is essential to achieve vigorous government administration and have overlooked the "fallibility of priori notions" about such psychological phenomenon as the fear of personal liability. Handler & Klein, *supra* note 16, at 50 n.24. Perhaps judges should treat such speculations with more trepidation. *See id.*

75. Dissenting in *Barr*, Justice Brennan called the fearless administration of government argument "a gossamer web self spun without one scintilla of support to which one can point." Barr v. Matteo, 360 U.S. 564, 590 (1959) (Brennan, J., dissenting). The argument has also been termed a "wry blend of fairy tale and horror story." Gray, *Private Wrongs of Public Servants*, 47 CALIF. L. REV. 303, 339 (1959). Becht, *supra* note 14, at 1167, calls the argument "unpersuasive." *See also* Martinez v. Cardwell, 25 Ariz. App. 253, 256, 542 P.2d 1133, 1136 (1975), *overruled by implication*, Petroni v. Board of Regents, 115 Ariz. 562, 565, 566 P.2d 1038, 1041 (Ct. App. 1977); Handler & Klein, *supra* note 16, at 50 n.24 (the judiciary has exhibited a tendency to accept the argument without an inquiry into its validity).

The argument that the privilege accomplishes the goal of open administration of public business has also been attacked on the ground that the immunity actually hinders commentary about the government because it leaves individuals who criticize the government susceptible to absolutely privileged malicious retorts by government officials. Barr v. Matteo, 360 U.S. 564, 584-85 (Warren, C.J., dissenting). *See* Stukuls v. State, 42 N.Y.2d 272, 278, 366 N.E.2d 829, 833, 397 N.Y.S.2d 740, 744 (1977) (to extend absolute privilege to those officers who have no need of it would tend to squelch criticism of the government).

76. *See* Barr v. Matteo, 360 U.S. at 586 (Brennan, J., dissenting); Economou v. United States Dep't of Agriculture, 535 F.2d 688, 696 (2d Cir. 1976), *rev'd sub. nom.* Butz v. Economou, 98 S. Ct. 2894 (1978); Martinez v. Cardwell, 25 Ariz. App. 253, 256-57, 542 P.2d 1133, 1137 (1975), *overruled by implication*, Petroni v. Board of Regents, 115 Ariz. 562, 565, 566 P.2d 1038, 1041 (Ct. App. 1977); Carr v. Watkins, 227 Md. 578, 585, 177 A.2d 841, 844-46 (1961). Prosser argues that in states recognizing only a conditional privilege, officials do not appear to be deterred from vigorously exercising their duties. *See* W. PROSSER, *supra* note 1, § 115, at 784. *See also* Stukuls v. State, 42 N.Y.2d 272, 278, 366 N.E.2d 829, 833, 397 N.Y.S.2d 740, 744 (1977) (unless official is principle executive of state or has executive policymaking responsibilities; policy considerations require that he be given only a conditional privilege); Ranous v. Hughes, 30 Wis. 2d 452, 466-67,

cious defamation by an executive branch official without a remedy[77] and provides no deterrent against officials making such statements.[78]

It has been argued that the scope and application of the privilege should be limited[79] and that restricting the privilege to high level officials would not hinder government operations.[80] In addition, some commentators would limit the application of the privilege to selected contexts.[81]

One rationale supporting the limitation of the privilege to cabinet level officials is that the duties of lower level officials are less important than those of high level officials.[82] This contention fails to take into account the Supreme Court's observation that due to the complexities of modern government, lower level officials often perform important duties which have been delegated to them by higher level officials.[83]

141 N.W.2d 251, 258 (1966) (conditional privilege is preferrable for all but the highest executive officials).

77. *See* Barr v. Matteo, 360 U.S. at 586 (Brennan, J., dissenting); Mills v. Denny, 245 Iowa 584, 587, 63 N.W.2d 222, 224 (1954); Timmis v. Bennet, 352 Mich. 355, 362, 89 N.W.2d 748, 751 (1958). Under a conditional privilege, no immunity exists if malice is present. *See* Conner v. Timothy, 43 Ariz. 517, 521-22, 33 P.2d 293, 294-95 (1934); Stice v. Beacon Newspaper Corp., 185 Kan. 61, 65, 340 P.2d 396, 400 (1959); W. PROSSER, *supra* note 1, § 115, at 794. See text & notes 56-58 *supra.*

78. *See* Stukuls v. State, 42 N.Y.2d 272, 278, 366 N.E.2d 829, 833, 397 N.Y.S.2d 740, 744 (1977); Handler & Klein, *supra* note 16, at 72 (absolute privilege in the executive branch lacks the restraints against malicious defamation inherent in the judicial system).

79. *See* notes 80, 81 *infra.*

80. Barr v. Matteo, 360 U.S. 564, 583 (1959) (Warren, C.J., dissenting).

81. Chief Justice Warren would have provided an immunity only for internal government communications. *Id.* at 583. Handler & Klein, *supra* note 16, at 62, suggest that the privilege is most appropriate in the quasi-judicial, administration hearing context. They state that a rationale often given by courts granting an absolute privilege to executive branch officials is that the circumstances which create the need for the immunity in the executive branch are analogous to those which support the well-established grant of the immunity to judicial officials. *Id.* at 53. It is argued that an executive branch official, like a judge, needs to exercise his authority independently, without fear of personal liability. *Id.* However, the judicial system possesses several characteristics which serve to minimize the risk of irresponsible conduct by judges vested with an absolute privilege. *Id.* at 54. For example, appellate review of judicial decisions serves as a deterrent against malicious remarks by judges. *Id.* Moreover, procedures exist to disqualify a biased judge prior to trial. *Id.* The judicial system also provides methods by which the defamed litigant can vindicate himself at trial. *Id.* For example, the litigant can introduce evidence showing the defamatory statements to be false. *Id.* Furthermore, the judicial process itself possesses qualities of formality and restraint which makes the incidence of irresponsible or malicious remarks by judges unlikely. *Id. But see* Note, *supra* note 11, at 555-63.

Handler and Klein conclude that "[t]he judicial analogy is most appropriate in the executive context when the defamation occurs in the course of a formal agency adjudicatory proceeding" because the restraints minimizing the risk of malicious defamation present in the judicial system are most likely also to be present in this context. *Id.* at 56. They go on to say that "[t]he greater the deviation from the formalities analogous to a judicial proceeding, the less operative the judicial-type restraints on the irresponsible officer and the more vulnerable the individual becomes." *Id.* at 62. *See* Engelmohr v. Bache, 66 Wash. 2d 103, 105, 401 P.2d 346, 347-48 (1965) (absolute privilege will not be extended to non-quasi-judicial administrative proceedings).

82. *Cf.* Barr v. Matteo, 360 U.S. 564, 582-83, 584 (1959) (Warren, C.J., dissenting) (not granting absolute immunity to lower level officials would in no way hinder the internal operation of government). Another justification for the position that immunity be limited to certain contexts is that defamatory statements are less harmful in certain contexts. *See* Barr v. Matteo, 360 U.S. at 583 (Warren, C.J., dissenting); Handler & Klein, *supra* note 16, at 62.

83. *See* note 67 *supra.*

Also, there is no basis for assuming that lower level officials will fear liability less than upper level officials.[84]

The proposal to limit the immunity to selected contexts is also based upon questionable assumptions. The fundamental goal of the immunity is to encourage executive officials to act openly, honestly, and independently in executing their official duties. Limiting the privilege to certain contexts involves the questionable premise that encouraging officials to communicate in some contexts is more important than encouraging them to communicate in others. It is debatable whether official statements in interdepartmental memos[85] or administrative hearings[86] are paramount in importance to statements made to the press or public.[87]

The decision to grant an absolute privilege represents a balancing of costs.[88] There are costs to society in having officials deterred from fully executing their duties due to fear of liability and costs to defamed individuals who are wronged but have no remedy. In granting an absolute privilege to executive officers, it was determined by the judiciary that the cost which would be incurred by society if there were no absolute privilege would be greater than the damage caused to defamed individuals if such a privilege were granted.[89]

Conclusion

The absolute privilege of executive branch officials in Arizona for defamatory statements has expanded in scope and application during the last thirty years. Though the privilege was first limited to officials acting in a quasi-judicial capacity, today the immunity is available to all executive officials who make defamatory statements within the scope of their official duties. Given the rectification of the split in the divisions of the Arizona Court of Appeals with regard to the absolute privilege of executive officials for defamatory statements, Arizona will

84. *See* Shearer v. Lambert, 274 Or. 449, 547 P.2d 98 (1976). "Although we would prefer to confine the absolute privilege to its narrowest possible application . . . we are unable to explain why [the policy reasons supporting the privilege] would not apply equally to inferior as well as to high-ranking officers." *Id.* at 454, 547 P.2d at 101.

85. See note 81 *supra.*

86. *Id.*

87. An argument in support of limiting the privilege to selected contexts is that immunity should not be granted for public statements because these communications reach larger audiences than do interdepartmental memos and thus involve a greater degree of harm. Barr v. Matteo, 360 U.S. 564, 583-84 (1959) (Warren, C.J., dissenting). This argument ignores the fact that inherent in the grant of absolute immunity is the value choice that the policy goal of public officials not being deterred in administering public business is paramount to the harm caused to individuals by defamatory statements. See text & notes 8-9 *supra* & 88-89 *infra.* Thus, in determining application of the immunity, the harm caused to individuals by granting the immunity is irrelevant.

88. See note 11 *supra.*

89. Barr v. Matteo, 360 U.S. at 576. *See* text & notes 8-9 *supra.*

likely continue to grant the privilege to these officials and give the privilege a broad scope and application, despite the fact that the policy arguments supporting an absolute privilege suffer from serious empirical weaknesses. If the privilege does accomplish the policy goal of the honest, vigorous, and independent administration of government business, then Arizona is justified in applying it broadly.

B. THE PHYSICIAN'S DUTY TO DISCLOSE RISKS OF TREATMENT

Courts have long acknowledged that every competent adult has the right to determine what should be done with his or her body.[1] Accordingly, courts have recognized a cause of action for battery when a physician operates upon a patient without that patient's consent.[2] Consent to treatment may be either actual or implied.[3] However, in circumstances where a patient consents to the treatment without having been informed of the material risks, courts are divided on whether the patient's cause of action is for battery or malpractice.[4]

In *Hales v. Pittman*,[5] the Arizona Supreme Court has apparently broken new ground regarding the law of informed consent. Plaintiff, Leland Hales, a boilermaker, suffered from tic douloureux, an excruciating facial pain that attacks in spasms.[6] As medication and other procedures proved unsatisfactory, defendant Pittman, a neurosurgeon,

1. Hales v. Pittman, 118 Ariz. 305, 309, 576 P.2d 493, 497 (1978); Martin v. Stratton, 515 P.2d 1366, 1369 (Okla. 1973); Scholendorff v. Society of New York Hosp., 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914).

2. Cathemer v. Hunter, 27 Ariz. App. 780, 782-83, 558 P.2d 975, 977-78 (1976); Miller v. Kennedy, 11 Wash. App. 272, 281-82, 522 P.2d 852, 860 (1974), *aff'd*, 85 Wash. 2d 151, 530 P.2d 334 (1975); Scholendorff v. Society of New York Hosp., 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914). In *Scholendorff*, the patient consented only to an examination under ether; nevertheless, the physician performed surgery. The court held that the operation constituted a battery. *Id.*

3. In contrast to those operations to which a patient gives explicit consent, emergency circumstances may render the patient unable to consent. For example, the patient may be unconscious. Under such circumstances, where immediate treatment is necessary consent is implied. *See* Canterbury v. Spence, 464 F.2d 772, 788-89 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972) (a leading case in the law of informed consent). The rationale is that a reasonable person would have consented under the circumstances. *See* Bang v. Charles T. Miller Hosp., 251 Minn. 427, 434, 88 N.W.2d 186, 190 (1958).

4. A majority of jursidictions appear to consider a physician's failure to disclose the material risks of treatment as negligence rather than an intentional tort. *See, e.g.*, Cobbs v. Grant, 8 Cal. 3d 229, 240-41, 502 P.2d 1, 8, 104 Cal. Rptr. 505, 512 (1972); Wilkinson v. Vesey, 110 R.I. 606, 620, 295 A.2d 676, 686 (1972); Miller v. Kennedy, 11 Wash. App. 272, 282, 522 P.2d 852, 860, *aff'd*, 85 Wash. 2d 151, 530 P.2d 334 (1972); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 18, at 106 (4th ed. 1971). *Contra* Belcher v. Carter, 13 Ohio App. 2d 113, 114, 234 N.E. 2d 311, 312 (1967).

5. 118 Ariz. 305, 576 P.2d 493 (1978).

6. *Id.* at 308, 576 P.2d at 496.

suggested surgery.[7] Hales informed Pittman that since his wife was an invalid and his children suffered from hearing deficiencies, he would not consent to any procedure that might leave him unable to support his family.[8]

Of the three procedures to cure this condition recognized at the time, the defendant performed the one involving the greatest risk of potential eye damage.[9] As a result of the surgery, the plaintiff developed anesthetic cornea, a condition which diminished his earning capacity as a boilermaker.[10] Hales brought suit both in battery and malpractice.[11]

Hales sought to prove that the failure of Pittman to inform him of adverse consequences of prior phenol injections fell below the standard of care of a neurosurgeon, and that had Hales known of these results he would not have consented to the operation.[12] Pittman had utilized this procedure upon four previous patients, two of whom developed anesthesia dolorosa, a constant facial pain which is sometimes worse than the condition which the operation is designed to eliminate.[13] The trial court did not permit Hales to introduce this evidence on the ground that it was irrelevant and immaterial, since Hales had not developed anesthesia dolorosa.[14]

Although the Arizona Supreme Court agreed that evidence of anesthesia dolorosa was properly excluded from the malpractice count,[15] the court held this evidence was relevant to the battery issue.[16] The

7. *Id.*

8. *Id.*

9. The recognized procedures were: subtemporal rhizotomy, a surgical severing of the second and third divisions of the fifth cranial nerve; injection of hyperbaric alcohol or phenol; and radio frequence coagulation, which involves a selective destruction of the nerve fibers by use of controlled heat developed from the radio frequency current. The defendant selected the phenol injection which carried a 23% probability of causing anesthetic cornea. *Id.* at 308, 576 P.2d at 496. Both the subtemporal rhizotomy and the radio frequency coagulation carry a five to seven percent probability of causing anesthetic cornea. *Id.* at 307-08, 576 P.2d at 495-96.

10. *Id.* Anesthetic cornea results from the destruction of the first, or ophthalmic, division of the fifth cranial nerve. The result is loss of sensation of the cornea. Hales also lost his blink reflex and tearing ability. *Id.* at 308, 576 P.2d at 496. As a boilermaker, Hales is exposed to dust particles. He alleged that due to anesthetic cornea, he cannot feel the presence of foreign matter in his eye, which may result in an injury going undetected. Opening Brief for Appellant at 6, Hales v. Pittman, 118 Ariz. 305, 576 P.2d 493 (1976).

11. 118 Ariz. at 308, 576 P.2d at 496. All actions in medical cases must now be brought in negligence, as ARIZ. REV. STAT. ANN. § 12-562(B) (1976) prohibits the battery action. However, the statute became effective subsequent to the institution of *Hales*. 118 Ariz. at 309, 576 P.2d at 497.

12. 118 Ariz. at 310-11, 576 P.2d at 498-99.

13. *Id.* at 310, 576 P.2d at 498.

14. *Id.*

15. The court uses the term "malpractice" to denote the cause of action for negligence which it seeks to distinguish from the battery action. Arguably, since both causes of action involve the breach of the physician's duty to properly inform his patient, each action constitutes professional malpractice. Nevertheless, this casenote will utilize the court's terminology. Therefore, malpractice means negligence.

16. 118 Ariz. at 311, 576 P.2d at 499.

court ruled that if the physician fails to inform the patient of the nature of the procedure attempted, the availability of alternative procedures, and the probabilities of various consequences, the operation becomes a battery.[17] The court reasoned that without such information, Hales' consent was not an informed one.[18] Without an effective consent, the operation constituted an unauthorized touching.[19] In addition, the court ruled that a patient is entitled to information concerning the treating physician's experience with the particular procedure.[20] The court reasoned that a jury, provided with this information, could have found that a reasonable patient, properly informed, would not have consented to the operation.[21]

Initially, this casenote will focus upon the distinctions between causes of action based upon battery and malpractice. Of particular interest will be the *Hales* court's apparent clouding of prior Arizona case law by shifting the focus of attention from the "results" of the operation to the significant "risks" or "probabilities of adverse consequences" in order to determine whether a battery action will lie. The results of the court's new test are anomalous when the causality issue is examined. Second, the alternative standards used to determine a physician's duty to disclose will be evaluated.

Theories of Liability: Battery and Malpractice

Prior to *Hales*, the Arizona courts carefully distinguished the battery action from one for malpractice.[22] Which cause of action was appropriate depended upon whether the consent was effective. In *Shetter v. Rochelle*,[23] the Arizona Court of Appeals held that a consent is effective if the patient substantially understands the nature of the procedure to be attempted and its probable results.[24] *Shetter* explicitly rejected the contention that a failure to warn of potential risks was actionable under the battery theory.[25] A clear case of battery would be present where there was no consent whatsoever,[26] or where the patient con-

17. *Id.* at 311-12, 576 P.2d at 499-500.
18. *Id.*
19. *Id.*
20. *Id.* at 312, 576 P.2d at 500.
21. *Id.*
22. Riedisser v. Nelson, 111 Ariz. 542, 544, 534 P.2d 1052, 1054 (1975); Cathemer v. Hunter, 27 Ariz. App. 780, 782-85, 558 P.2d 975, 977-80 (1976); Shetter v. Rochelle, 2 Ariz. App. 358, 366-70, 409 P.2d 74, 79-86 (1965), *modified on other grounds*, 2 Ariz. App. 607, 411 P.2d 45 (1966).
23. 2 Ariz. App. 358, 409 P.2d 74 (1965).
24. *Id.* at 370, 409 P.2d at 86.
25. *Id.* at 367, 409 P.2d at 83.
26. Scholendorff v. Society of New York Hosp., 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914). *Accord*, Cathemer v. Hunter, 27 Ariz. App. 780, 782-83, 558 P.2d 975, 977-78 (1976); Schulman v. Lerner, 2 Mich. App. 705, 707, 141 N.W.2d 348, 349 (1966).

sented to one operation, but the physician performed another.[27] Where a patient had given his or her consent to an operation, but had done so without being informed of its inherent risks, the consent was not thereby rendered ineffectual in the absence of fraud, at least where the risks were not "inordinately great."[28] Under the *Shetter* test, therefore, consent remained binding as long as the patient was made aware of the nature of the operation and the extent of the harm normally to be expected, which the court characterized as "probable results."[29] Implicit in the *Shetter* court's analysis is a distinction between consenting to the defendant's conduct rather than to its consequences.[30] Put another way, the distinction is between consenting to what will or should happen rather than to what may happen. Under *Shetter*, therefore, where the patient was informed of the nature of the procedure to be attempted and the probable results either intended or expected, but the physician failed to disclose the procedure's inherent risks, the action must be for malpractice.[31]

Bang v. Charles T. Miller Hospital[32] provides a clear example of the distinction between the risks inherent in an operation and those results either intended or expected in that operation. In *Bang*, the patient was not informed that the contemplated prostate operation would necessitate severing the patient's spermatic tubes.[33] Under the *Shetter* test, an action in battery would lie because the severance of the spermatic tubes was intended or expected and should have been disclosed. It was not a risk of surgery, or a condition that might occur, but a result the physician knew was going to occur.

Under the *Shetter* test, battery was found by determining what the patient's consent authorized and whether the procedures performed were included in that authorization.[34] An operation outside the scope of the patient's consent was a battery.[35]

However, under *Shetter*, the failure to disclose the recognized risks

27. Cathemer v. Hunter, 27 Ariz. App. 780, 785, 558 P.2d 975, 980 (1976). A classic example of such a case is Mohr v. Williams, 96 Minn. 261, 264-71, 194 N.W. 12, 13-15 (1905), where the patient consented to an operation on her right ear, but the physician, while the patient was unconscious, operated upon the left ear. Since there was no consent to an operation on that ear, a battery was committed.

28. 2 Ariz. App. at 370, 409 P.2d at 86.

29. *Id.* It is therefore clear that the *Shetter* court distinguished the results of an operation from its inherent risks. *Id.* at 369, 409 P.2d at 85.

30. *See* Shetter v. Rochelle, 2 Ariz. App. 358, 367, 409 P.2d 74, 83 (1965); Cathemer v. Hunter, 27 Ariz. App. 780, 783, 558 P.2d 975, 978 (1976); W. PROSSER, *supra* note 4, § 18, at 103.

31. 2 Ariz. App. at 367, 409 P.2d at 83.

32. 251 Minn. 427, 88 N.W.2d 186 (1958).

33. *Id.* at 429, 88 N.W.2d at 187.

34. *See* Cathemer v. Hunter, 27 Ariz. App. 780, 783, 558 P.2d 975, 978 (1976) (explaining the *Shetter* test).

35. *Id.*

of treatment presented a different cause of action.[36] A duty to disclose the risks of treatment was said to arise out of the fiduciary relationship between physician and patient.[37] Where a physician failed to inform a patient of a possible consequence of the proposed treatment, the proper action was one for negligence.[38]

In contrast to *Shetter*, the *Hales* court looked to consequences to determine the battery issue. After *Hales* a battery is committed if a reasonable person would not have consented to the operation had he been informed of the nature of the procedure to be attempted, the availability of alternative procedures, and the *probabilities of various consequences*.[39] The distinction between battery and malpractice is now posed as follows:

> [T]he law recognizes two theories for [the patient's] recovery in the event he is not adequately informed. First, if the patient would not have consented to the operation had he known the nature of the procedure, the alternative procedures and the probabilities of various consequences, then the operation is a battery. Second, if the patient would not have consented to an operation had he been warned of a consequence which actually occurred, then the action is for malpractice.[40]

In order to adequately inform the patient of the probabilities of various consequences, the physician must fulfill two requirements.[41] First, the physician must inform his patient of the general statistical probability of encountering the particular risks inherent in the procedure to be performed.[42] Second, the patient must be informed of the physician's prior experience with that procedure.[43] Such particularized information, the court reasoned, is essential in order for the patient to choose the most appropriate physician, since success rates for any given procedure will vary from physician to physician.[44] These additional

36. 2 Ariz. App. at 367, 409 P.2d at 83.
37. *Id.*
38. *Id.*
39. 118 Ariz. at 308-09, 314, 576 P.2d at 496-97, 502 (emphasis added).
40. *Id.* at 314, 576 P.2d at 502.
41. *Id.* at 312, 576 P.2d at 500.
42. *Id.*
43. *Id.*

For example, assume that as a reasonable medical probability only three percent of all patients die during a given procedure. The meaning of this procedure becomes quite another matter if Dr. "A" has never attempted the operation; Dr. "B" has performed 100 operations with a one percent mortality rate and Dr. "C" has encountered a 15 percent mortality rate in his 40 operations.

Id. The court has imposed a legal duty upon the physician to disclose to the patient his "batting average" for the particular procedure.

44. *Id.* at 312, 576 P.2d at 500. The court assumes such statistics will reflect the skill of the physician, Appellee's Motion for Rehearing at 4, Hales v. Pittman, 118 Ariz. 305, 576 P.2d 493 (1978), which is not necessarily correct. In the case of a physician who reports that no patient under his care has ever suffered a perforated appendix, such a statistic may mean to surgeons that the doctor had an extremely high incidence of removing normal appendices. *Id.* A layman, on

elements represent a significant departure from *Shetter*.[45]

The "probabilities of various consequences" test is essentially risk oriented; a failure to disclose certain material risks of treatment will give rise to both an action for battery and, where the risks actually come about, one for malpractice.[46] Prior to *Hales*, the operation constituted a battery only if the patient was not informed of the nature of the operation and its probable results; a failure to disclose medically recognizable risks of treatment was actionable only under the malpractice theory.[47] *Shetter* sought to distinguish those kinds of nondisclosure that would render the operation a battery, wrongful in itself, from those nondisclosures which merely constituted malpractice, a breach of the physician's fiduciary duty.[48] The results of the *Hales* "various consequences" test is that the malpractice action simply becomes a specie of battery, as the distinction between the two actions now depends merely upon the occurrence or nonoccurrence of the undisclosed risk.

The problem with the *Hales* test is most clearly revealed when the causality issue is examined. The plaintiff may establish a battery by proving that a disclosure of the risk would have resulted in a decision to forego treatment,[49] even though the risk did not materialize.[50] However, under the malpractice theory, the undisclosed risk that should have been revealed to the patient must materialize.[51] In essence, then, malpractice is merely an additional cause of action for those circum-

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the other hand, may interpret the statistic as indicating the physician's high level of skill. However, it is certainly possible that such statistical information would be helpful to the patient where the operation is particularly hazardous and complicated and where the method of treatment is in the experimental or developmental stage. Such may be the case in *Hales*. The defendant had attempted the procedure upon only four previous patients, two of whom developed anesthesia dolorosa. 118 Ariz. at 310, 576 P.2d at 498.

45. See text & notes 22-35 *supra*.

46. 118 Ariz. at 309, 314, 576 P.2d at 497, 502.

47. Riedisser v. Nelson, 111 Ariz. 542, 544, 534 P.2d 1052, 1054 (1975); Cathemer v. Hunter, 27 Ariz. App. 780, 783-85, 558 P.2d 975, 978-80 (1976); Shetter v. Rochelle, 2 Ariz. App. at 367, 409 P.2d at 83.

48. 2 Ariz. App. at 367, 409 P.2d at 83.

49. 118 Ariz. at 312, 576 P.2d at 500. *See* Canterbury v. Spence, 464 F.2d 772, 790 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972) (malpractice action). This test is an objective one: what a reasonably prudent person in the patient's position would have done. *Id.* at 790-91. It is agreed that expert testimony is not necessary to demonstrate whether a reasonable person would have consented, but it is required in order to identify the risks of treatment and the consequences of nontreatment. *Id. Accord*, Miller v. Kennedy, 11 Wash. App. 2d 272, 285-86, 522 P.2d 852, 862 (1974), *aff'd*, 85 Wash. 2d 151, 530 P.2d 334 (1975).

However, under the *Shetter* test, the plaintiff's burden under the battery theory was to prove that the consent was ineffectual. 2 Ariz. App. at 366, 409 P.2d at 82. A consent was ineffectual if the procedure performed by the physician was not within the scope of the patient's consent. Cathemer v. Hunter, 27 Ariz. App. 780, 783, 558 P.2d 975, 978 (1976). A failure to disclose risks of treatment did not render the consent ineffectual. Shetter v. Rochelle, 2 Ariz. App. at 366-70, 409 P.2d at 82-86.

50. 118 Ariz. at 309, 314, 576 P.2d at 497, 502.

51. *Id.* at 311, 576 P.2d at 499; *accord*, Canterbury v. Spence, 464 F.2d 772, 790 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972). Occurrence of the risk must also be harmful to the patient for the physician's negligence to be actionable. 118 Ariz. at 311, 576 P.2d at 499; *accord*, Canterbury v. Spence, 464 F.2d 772, 790 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

stances where the undisclosed risk proves harmful to the patient.[52] Under *Hales*, where an action lies for negligence, based on failure to disclose, an action for battery may also be available to the plaintiff.[53]

What is wrong with the *Hales* test is that a patient could recover damages resulting from the occurrence of a risk he had consented to because the physician failed to disclose a risk that did not occur.[54] All the patient would be required to prove would be that a reasonable patient would not have consented to the operation had the nonoccurring risk been disclosed. In essence, the physician is held strictly liable, under the *Hales* test, for any damage that occurs if he fails to disclose any risk that would have lead a reasonable patient to have foregone the treatment.

The *Hales* court's discussion of the battery theory is clearly intended to enhance the patient's right to control his or her physical integrity by expanding the nature of the physician's duty to disclose.[55] The patient, not the physician, should ultimately decide whether the operation ought to be performed.[56] However, the *Hales* court has not effectively accomplished this aim by its expansive definition of battery, especially now that the battery action has been eliminated by statute.[57] As a result, the new definition of a battery may have no effect whatsoever in accomplishing the court's objective. To enhance the patient's right to decide upon treatment, the court should have adopted a standard for the physician's duty to disclose which would accomplish that purpose.

The Physician's Duty to Disclose

Under the majority rule, often called the "medical standard," the physician's duty to disclose the material risks of treatment is determined by the standard practices of the medical profession.[58] To make out a cause of action, the plaintiff must first establish, through expert testimony, the existence of a community standard of disclosure, and

52. 118 Ariz. at 309, 314, 576 P.2d at 497, 502.

53. *Id.* Unlike malpractice, the battery cause of action is not predicated on the occurrence of the particular undisclosed risk. On remand, Hales would have to prove that a disclosure of Pittman's previous experience with phenol injections, along with his anesthesia dolorosa "batting average," would have resulted in Hales foregoing the operation. If so, then Hales conceivably could also recover under the battery action for the occurrence of anesthetic cornea, a risk the jury previously had found to have been disclosed by Pittman.

54. Although Hales had consented to the risk of anesthetic cornea, he had not been informed of anesthesia dolorosa. *Id.* at 309-311, 576 P.2d at 497-99.

55. *See id.*

56. *Id.* at 309, 576 P.2d at 497.

57. ARIZ. REV. STAT. ANN. § 12-562(B) (1976).

58. *See, e.g.*, Sawyer v. Methodist Hosp., 383 F. Supp. 563, 567 (W.D. Tenn. 1974); Riedisser v. Nelson, 111 Ariz. 542, 544-45, 534 P.2d 1052, 1054-55 (1975); Shetter v. Rochelle, 2 Ariz. App. 358, 366, 409 P.2d 74, 82 (1965); Nishi v. Hartwell, 52 Haw. 188, 195-96, 473 P.2d 116, 123 (1970); Govin v. Hunter, 374 P.2d 421, 424 (Wyo. 1962); W. PROSSER, *supra* note 4, § 32, at 165-66.

then, a breach of that standard.[59]

Several justifications have been offered in support of the medical standard. First, a physician must exercise medical judgment to decide whether a risk is so substantial that it ought to be disclosed to the patient.[60] Second, the physician must take into account how such disclosures will affect the psychological and physical health of the patient.[61] In essence, a physician must balance the need of the patient to be supplied with information required to make an informed decision with the prospect that overdisclosure may cause a patient to forego needed treatment. Ultimately, the issue in a malpractice case is one of determining an appropriate standard of care for the medical profession.[62] Thus, under the medical standard of disclosure, the decision of a physician either to inform the patient of the significant risks of treatment, or to withhold such information, is a matter of medical judgment. Any duty to disclose, therefore, must be established through expert testimony.

Decisions supporting the minority rule, referred to as the "legal" or patient-oriented standard of disclosure, emphasize that any definition of the scope of disclosure purely in terms of a professional standard conflicts with the patient's right to decide whether to undergo treatment.[63] Since each physician-patient relationship is unique, the nature of the disclosure should vary from patient to patient. Thus, a degree of subjectivity is inherent in the physician's decision concerning what to disclose to the patient.[64] As a result, an expert witness cannot adequately address the issue of disclosure without understanding the patient's position and circumstances.

Because patients are generally unlearned in the medical sciences, they depend upon and trust a physician's advice.[65] Since the patient generally has a right to decide whether or not to undergo treatment, adequate information for this decision must be provided by the physician.[66] The scope of the disclosure, therefore, must be measured by the

59. Govin v. Hunter, 374 P.2d 421, 424 (Wyo. 1962). The reason for the expert testimony rule is that, ordinarily, what is reasonable conduct for the professional is not within the knowledge of the layman. Getchell v. Mansfield, 260 Or. 174, 179, 489 P.2d 953, 955 (1971).

60. *See* Getchell v. Mansfield, 260 Or. 174, 179, 489 P.2d 953, 955 (1971).

61. Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 578, 317 P.2d 170, 181 (1957); Funke v. Fieldman, 212 Kan. 524, 531, 512 P.2d 539, 545-46 (1973). Since each patient is unique, the physician's decision to disclose the risks of treatment must be made in light of the mental, emotional, and physical condition of each patient. *Id.* at 531, 512 P.2d at 546.

62. *See* Nathanson v. Kline, 186 Kan. 393, 411, 350 P.2d 1093, 1107, *aff'd on rehearing*, 187 Kan. 186, 354 P.2d 670 (1960); W. PROSSER, *supra* note 4, § 32, at 165-66.

63. *See, e.g.*, Canterbury v. Spence, 464 F.2d 772, 786 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Cobbs v. Grant, 8 Cal. 3d 229, 242-43, 502 P.2d 1, 7-12, 104 Cal. Rptr. 505, 513-14 (1972); Wilkinson v. Vesey, 110 R.I. 606, 625, 295 A.2d 676, 688 (1972); Miller v. Kennedy, 11 Wash. App. 272, 283, 522 P.2d 852, 861 (1974), *aff'd*, 85 Wash. 2d 151, 530 P.2d 334 (1975).

64. *See* Wilkinson v. Vesey, 110 R.I. 606, 623, 295 A.2d 676, 687 (1972).

65. Cobbs v. Grant, 8 Cal. 3d 229, 242, 502 P.2d 1, 9, 104 Cal. Rptr. 505, 513 (1972).

66. *Id.* at 243, 502 P.2d at 10, 104 Cal. Rptr. at 514.

patient's need for adequate information upon which to make a decision.[67]

Given adequate information, a patient may decide to forego treatment. This right must be protected even if such a decision seems unwise in the eyes of the physician.[68] Therefore, a clash of values may be present. The *Hales* case provides an excellent example of such a clash. Hales informed his physician that he would not consent to any procedure that might leave him unable to financially support his family.[69] Apparently, Hales would have endured the pain of tic douloureux rather than submit himself to an operation that might leave him unable to support his family.

However, the legal standard is not inflexible. Where a physician can establish that sound medical judgment indicates that disclosure would pose a threat to the well-being of a particular patient, the physician is protected by a privilege of nondisclosure.[70] Moreover, there is no duty to inform the patient of those risks, such as infection, that are inherent in every operation.[71] Similarly, if the patient has already discovered the risk, or if the jury finds that the risk would have no apparent materiality to the patient's decision, the risk need not be disclosed.[72]

Thus, while the medical standard is based upon the justification that the disclosure of the recognized risks of treatment involves a medical judgment, the legal standard is premised upon the need of the patient to be sufficiently informed in order to adequately determine whether or not treatment is desired.

Although it appears that *Hales* has retained the medical standard both for the battery and malpractice actions,[73] the court's language is ambiguous. The court uses language that could be read to adopt the legal standard.

> [T]he scope of the disclosure required can be expanded by the patient's instructions to the physician. Although the probability of adverse result may seem slight to the physician, so long as that physician wishes to limit his liability for such results by placing the decision to operate in the hands of the patient, he cannot withhold information if it is relevant to that patient's ability to consent. Otherwise, by withholding necessary information the physician would

67. Canterbury v. Spence, 464 F.2d 772, 787 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).
68. *See* Wilkinson v. Vesey, 110 R.I. 606, 624, 295 A.2d 676, 687 (1972).
69. 118 Ariz. at 353, 576 P.2d at 496.
70. *See* Canterbury v. Spence, 464 F.2d 772, 788 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).
71. *Id.*; Cobbs v. Grant, 8 Cal. 3d 229, 244, 502 P.2d 1, 11, 104 Cal. Rptr. 505, 515 (1972).
72. *See* Canterbury v. Spence, 464 F.2d 772, 788 & nn. 88, 89 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).
73. "[W]ithin the broad standards we have established, we leave the precise parameters of the required disclosure for any particular case to be established by expert testimony in accordance with the applicable standard of medical care." 118 Ariz. at 311-12 n.4, 576 P.2d at 499-500 n.4.

usurp the patient's ability to form his own opinion . . . .[74]

The court then cited *Canterbury v. Spence*[75] and *Miller v. Kennedy*,[76] cases which adopted the legal standard of disclosure.[77] This language and authority is incompatible with the medical standard upheld by the court.[78] Under the medical standard, the focus is not upon what the patient needs in order to make an informed consent but upon what is dictated by standards of the profession regarding disclosure.[79] If the probability of an adverse result seems slight in the judgment of the medical profession, then it need not be disclosed.[80]

The *Hales* court should have adopted the legal standard. First, a more rigorous standard of disclosure would more effectively achieve the court's expressed interest in protecting the right of the patient to control his physical integrity than would any expansion of the battery action. Second, the legal standard is more sound analytically. Due to the average layman's lack of knowledge of the medical arts, the law has fashioned a duty to disclose on the part of the physician. Thus, it seems anomalous to define the scope of this duty to disclose upon what is customarily disclosed, rather than in terms of what a reasonable patient, under the circumstances, would need to know before making an informed decision regarding treatment.

Conclusion

Out of its concern for the rights of the patient, the Arizona Supreme Court has fashioned a definition of battery which emphasizes risks rather than results. The new test conditions causes of action on fortuitous results rather than substantive differences. Under *Hales*, whether a cause of action should be brought for battery or malpractice depends merely upon the occurrence or nonoccurrence of the undisclosed risk. Now that Arizona has eliminated the battery cause of action in medical cases[81] the court's expressed desire to protect the decisional rights of the patient is frustrated. A more effective method

74. *Id.* at 309, 576 P.2d at 497.

75. 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

76. 11 Wash. App. 272, 522 P.2d 852 (1974) *aff'd*, 85 Wash. 2d 151, 530 P.2d 334 (1975).

77. Canterbury v. Spence, 464 F.2d at 790-98; Miller v. Kennedy, 11 Wash. App. at 283-90, 522 P.2d at 861-64.

78. Although the language supporting retention of the medical standard is contained in a footnote, while legal standard language is contained in the text, the medical standard appears to be still alive in Arizona. First, specific language controls the general. Second, the legal standard language was employed by the *Hales* court as a justification of its expansion of the battery theory which is no longer a viable legal theory in Arizona.

79. *See* text & note 58 *supra.*

80. Getchell v. Mansfield, 260 Or. 174, 180-82, 489 P.2d 953, 956 (1971).

81. ARIZ. REV. STAT. ANN. 12-562(B) (1976).

to protect the patient's need for information would be to adopt the legal standard of disclosure.

C. PRODUCTS LIABILITY: THIRD PARTY MODIFICATION

Products liability is the liability of a seller or supplier of a chattel which causes physical harm to persons or property.[1] The liability may be predicated on any one of three different theories: negligence,[2] warranty,[3] or strict liability in tort.[4]

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1. D. NOEL & J. PHILLIPS, PRODUCTS LIABILITY, CASES AND MATERIALS 4 (1976); J. Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 5 (1965).

2. The landmark case for negligence in products liability is MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). In that case, the court held that the manufacturer of a defective automobile, by placing the car upon the market, assumed a responsibility to the ultimate purchaser. That responsibility rested upon the relation arising from the purchase; privity was not required. *Id.* at 389, 111 N.E. at 1053. *See also* Conner v. Great Western Sav. & Loan Ass'n, 69 Cal. 2d 850, 869, 447 P.2d 609, 619, 73 Cal. Rptr. 369, 379 (1969); Seely v. White Motor Co., 63 Cal. 2d 9, 15, 403 P.2d 145, 149, 45 Cal. Rptr. 17, 21-22 (1965). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 96, at 641 (4th ed. 1971).

3. Liability for a breach of warranty rests upon express or implied representations made to the consumer about the product. For an express warranty to apply, there must be a misrepresentation of fact made by the defendant with the intention that it will reach the plaintiff, and the plaintiff must rely on that representation in using the product. Baxter v. Ford Motor Co., 168 Wash. 456, 459, 12 P.2d 409, 412 (1932). *See also* Whitaker v. Farmland, Inc., — Mont. —, —, 567 P.2d 916, 921 (1977); Randy Knitware, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 11-15, 181 N.E.2d 399, 401-03, 226 N.Y.S.2d 363, 365 (1962). See Epstein, *Personal Injuries From Defective Products—Some "Dots and Dashes,"* 9 ARIZ. L. REV. 163, 169-72 (1967).

There may also be an implied warranty of safety running from the manufacturer to the consumer. The leading case involving implied warranty is Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), which held that the manufacturer and the dealer of a defective automobile were liable on an implied warranty of merchantability. *Id.* at 387, 161 A.2d at 99-100. *See generally* W. PROSSER, *supra* note 2, § 97, at 650.

4. Section 402A of the Second Restatement of Torts provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

The first case to apply strict liability in tort was Greenman v. Yuba Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). In *Yuba Products*, the plaintiff was injured when a defective power tool let a piece of wood fly into the air and strike him in the head. He brought the action under a warranty theory, but the court determined strict liability applied. *Id.* at 60, 377 P.2d at 900, 27 Cal. Rptr. at 700. *See* O.S. Stapley Co. v. Miller, 103 Ariz. 556, 559, 447 P.2d 248, 251 (1968); Slonsky v. Phoenix Coca-Cola Bottling Co., 18 Ariz. App. 10, 12, 499 P.2d 741, 742 (1972); *see generally* W. PROSSER, *supra* note 2, § 98, at 656; "The Unreasonably Dangerous Requirement in Arizona Products Liability Law," 19 ARIZ. L. REV. 684 (1977).

For a manufacturer to be liable for negligence, the plaintiff must show either that the chattel was negligently constructed, negligently designed, or that the manufacturer failed to warn adequately of dangers.[5] Generally, a manufacturer will be held liable for failure to warn of dangers even though there was no defect in the construction or design of the product.[6] In *Rodriguez v. Besser Co.*,[7] the Arizona Court of Appeals discussed the issue of whether a manufacturer of a product sold free from defect was negligent for failing to warn of dangers created by a third party modification of the product.[8]

Rodriguez involved an accident with a cement block cubing machine which Besser sold to Superlite in 1967.[9] The machine, which included an electrical mechanism called a Number Four Pattern Transfer [PTN 4], required an attendant to oversee its operations.[10] As designed by Besser, the platform where the attendant stood did not extend into the area of the PTN 4 and thus provided the attendant safe working conditions.[11] About two weeks after installation, however, Superlite, without consultation with Besser, installed a new platform which extended in front of the PTN 4.[12] Superlite contended that it made the modification in order to provide safer and easier access to the machine.[13] Besser received notification of the change from its representatives after the new platform was installed.[14] Thirty-two months after the platform alteration, the plaintiff, a Superlite employee, was severely injured while standing on the modified platform and leaning into the top of the PTN 4.[15] The plaintiff alleged that Besser had a duty to warn Superlite of the danger created by placing a man on the new platform in close proximity to the unguarded paddles of the PTN 4.[16] The trial court found in favor of the defendant, and the court of appeals affirmed, holding that no such duty to warn exists, even where the

5. Norton Co. v. Harrelson, 278 Ala. 85, 89, 176 So. 18, 21 (1965); Coakley v. Prentiss-Wabers Stove Co., 182 Wis. 94, 97, 195 N.W. 388, 391 (1923). *See* Comment, *Foreseeability in Product Design and Duty to Warn Cases—Distinctions and Misconceptions*, 1968 WIS. L. REV. 228, 228.

6. *See, e.g.*, Harp v. Montgomery Ward & Co., 336 F.2d 255, 259 (9th Cir. 1964) (necessity of grounding electric clothes drier installed in bathroom); Crane v. Sears Roebuck & Co., 218 Cal. App. 2d 855, 860-61, 32 Cal. Rptr. 754, 757-59 (1963) (flammable fabric); Note, *Manufacturer's Duty to Warn of Dangers Involved in Use of a Product*, 1967 WASH. L.Q. 206, 206 (1967).

7. 115 Ariz. 454, 565 P.2d 1315 (1977).

8. *Id.* at 459, 565 P.2d at 1320.

9. *Id.* at 456, 565 P.2d at 1317.

10. *Id.* at 458, 565 P.2d at 1319.

11. *Id.*

12. *Id.* The area around the PTN 4 had been left open by *Besser* because the attendant was not in a position that was exposed to any danger. *Id.* The new platform, however, destroyed the protection provided by the original platform and placed the attendant in close proximity to the moving paddles of the machine. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* Rodriguez suffered extensive brain damage and the loss of an eye. *Id.*

16. *Id.*

manufacturer is notified that a third party has modified its product.[17]

The *Rodriguez* court stated that the duty to warn is usually determined by the existence of foreseeable risks at the time a product is sold.[18] If no risk of harm can reasonably be foreseen from the normal use of the product when it leaves the manufacturer's control, there is no duty to warn of dangers involved in its use in an unlikely manner, such as an unforeseen modification.[19] The court held that to extend "a manufacturer's duty to warn to situations in which it is notified that a third party has modified its product after the product has left its possession and control and without consultation or participation . . . by the manufacturer, would place an intolerable burden on the manufacturer."[20] The court concluded that such a duty would force the manufacturer to become an insurer of a condition over which it had no control.[21]

This casenote will first discuss the duty to warn in negligence law, with particular emphasis on the determination of duty and foreseeability. Next, the duty to warn of third party modifications will be reviewed. Finally the unique situation created by the third party modification in *Rodriguez* will be analyzed, and the Arizona Court of Appeals' treatment of the problem will be discussed.

Breach of the Duty to Warn

Negligence in the context of a duty to warn, as in other negligence cases, depends upon a finding of a duty and a breach of that duty which causes damage to the plaintiff.[22] The duty to warn exists whenever the manufacturer has knowledge, either actual or constructive, that the product involves a danger to users.[23] Most courts that have decided the issue agree that the duty of the manufacturer to warn of

17. *Id.* at 460, 565 P.2d at 1321.
18. *Id.* at 459, 565 P.2d at 1320.
19. *Id.*
20. *Id.* at 460, 565 P.2d at 1321.
21. *Id.*
22. *See* Pease v. Sinclair Refining Co., 104 F.2d 183, 186 (2d Cir. 1939). *See generally* Noel, *Manufacturers' Liability for Negligence*, 33 TENN. L. REV. 444, 457 (1966).
23. Witt Ice & Gas Co. v. Bedway, 72 Ariz. 152, 155, 231 P.2d 952, 955 (1951) (reasonably prudent manufacturer should have discovered a defective regulator on a beer keg before placing it on market); Proctor & Gamble Mfg. Co. v. Superior Court, 124 Cal. App. 2d 157, 162, 268 P.2d 199, 202 (1954) (manufacturer had knowledge that some persons suffered allergic responses to detergent manufactured by defendant); Briggs v. National Indus., 92 Cal. App. 2d 542, 546, 207 P.2d 110, 112 (1949) (manufacturer had no actual or constructive knowledge of danger of hair processing which irritated plaintiff's skin). *See* Frey v. Montgomery Ward & Co., — Minn. —, —, 258 N.W.2d 782 (1977). *Frey* involved the issue of whether a manufacturer of a space heater was negligent in failing to warn a purchaser that use of a space heater in house trailers and other poorly insulated areas would be potentially dangerous. *Id.* at —, 258 N.W.2d at 786. The plaintiff had told the defendant's sales clerk that he intended to use the space heater in a house trailer. *Id.* at —, 258 N.W.2d at 785. The court held that the evidence was sufficient to establish a duty to warn against improper use of the space heater and to establish a breach of that duty based upon imputed knowledge of the danger of such use. *Id.* at —, 258 N.W.2d at 786-87.

The general framework followed by the majority of courts for determining whether the man-

latent dangers inherent in its product goes beyond the precise use contemplated by the producer and extends to all those uses which are reasonably foreseeable.[24] The maker of a chair, for example, has been held liable for a failure to expect that someone will stand on the chair;[25] the manufacturer of cologne has been required to anticipate that the cologne might be poured on a burning candle.[26] Generally, the user's character, special qualities, and knowledge will determine whether the use was foreseeable.[27] Consequently, the special training of the plaintiff in the use of the product may limit the manufacturer's duty to warn of dangers in such use.[28]

Since it would be unreasonable to require a warning against every injury which might occur from every conceivable use of the product,[29] there is no duty upon a manufacturer to warn of a product-connected

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ufacturer has been negligent in its failure to warn is set out in Restatement (Second) of Torts § 388:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous. .

See Hagens v. Oliver Mach. Mfg. Co., 576 F.2d 97, 104 (5th Cir. 1978); Griggs v. Firestone Tire & Rubber Co., 513 F.2d 851, 856 (8th Cir. 1975); Morris v. Shell Oil Co., 467 S.W.2d 39, 42 (Mo. 1971); R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY 2d § 8.2, at 146 (2d ed. 1974).

24. *See* Brizendine v. Visador Co., 437 F.2d 822, 827 (9th Cir. 1970); Gober v. Revlon, Inc., 317 F.2d 47, 51 (4th Cir. 1962); Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 83-84 (4th Cir. 1962). In *Spruill*, a 14-month-old infant suffered chemical pneumonia as a result of ingestion of a small amount of furniture polish manufactured by defendant. *Id.* at 81. The court held that the evidence supported a finding that the manufacturer gave insufficient warning of danger, since a manufacturer must anticipate that the home is a normal environment for the use of such a product. *Id.* at 83. *See also* RESTATEMENT (SECOND) OF TORTS § 395, comments j, k (1965).

25. Phillips v. Ogle Alum. Furn., Inc., 106 Cal. App. 2d 650, 654, 235 P.2d 857, 859-60 (1951).

26. *See* Moran v. Faberge, Inc., 273 Md. 538, 553-54, 332 A.2d 11, 20 (1975).

27. *See* Hall v. E.I. Du Pont De Neumours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972). *Hall* involved 12 separate accidents in which children were injured by blasting caps. *Id.* at 359. The plaintiffs alleged that the practice of the explosives industry of not placing any warning upon individual blasting caps created an unreasonable risk of harm. *Id.* The court found that there was evidence that the manufacturers could foresee that their detonators would be used by persons untrained in the handling of explosives. *Id.* at 364. The manufacturers, therefore, could also foresee that the explosives would be used in a manner that was never intended. *Id.*

28. *See* Katz v. Arundel-Brooks Concrete Corp., 220 Md. 200, 151 A.2d 731 (1954). In *Katz*, the plaintiff's knees had been severely burned when he knelt in cement while laying a floor. The court held that since the bulk of the cement was sold to experienced workers, the defendant was not bound to foresee that inexperienced persons would purchase and lay the cement. *Id.* at 203-05, 151 A.2d at 733-34. In *Katz*, therefore, the experience that the majority of users had with the use of the product tended to limit the manufacturer's duty to warn. *Contra*, Haberly v. Reardon Co., 319 S.W.2d 859 (Mo. 1958). In *Haberly* a father accidently dabbed a paint brush into his son's eye and the lime in the paint caused severe burns. The court held that the defendant should have anticipated that an ordinary consumer would not know that the paint would cause severe burns on contact with the eye. *Id.* at 863.

29. *See* Moran v. Faberge, Inc., 273 Md. 538, 546, 332 A.2d 11, 16 (1975).

danger which is obvious to the user of the product.[30] A seller of school incinerators, for example, has no duty to warn of the obvious fact that opening a door of the incinerator or admitting oxygen therein would cause sudden burning of refuse.[31] Similarly, a supplier of shoes is not liable for failing to warn that a woman knowingly wearing shoes that are two sizes too small will injure her feet.[32]

When a warning is necessary, it can be placed on a label on the product[33] or in literature which accompanies the product.[34] A warning to the original purchaser of the product will usually satisfy the duty to warn any user.[35] However, there is a split of authority in cases in which the original purchaser is an employer and the user of the product is his employee.[36]

Duty to Warn of Third Party Alterations

When a third party alters a product, the same elements of duty and foreseeability exist as in products liability cases generally.[37] The court must make a determination of whether the alteration of the product was foreseeable.[38] If the alteration was in fact foreseeable, the manufacturer has a duty to warn of the dangers involved.[39] In *Ward v. Hobart Manufacturing Co.*,[40] for example, a meat grinder was manufactured by the defendant and delivered to its original purchaser equipped with a guard-pan to preclude the insertion of a hand into the

30. *See, e.g.*, Hagens v. Oliver Mach. Mfg. Co., 576 F.2d 97, 104 (5th Cir. 1978); Bradshaw v. Blystone Equip. Co., 79 Nev. 441, 444-45, 386 P.2d 396, 397-98 (1963) (danger of open universal joint was obvious); Levis v. Zapolitz, 72 N.J. Super. 168, 178, 178 A.2d 44, 49 (1964) (manufacturer and wholesaler had no duty to warn a 12-year-old boy of dangers involved in the use of a plastic slingshot). *See also* W. PROSSER, J. WADE, & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 771 (6th ed. 1976).

31. Parker v. Heasler Plumbing & Heating Co., 388 P.2d 516, 518 (Wyo. 1964).

32. Dubbs v. Zak Bros. Co., 38 Ohio App. 299, 302, 175 N.E. 626, 627 (1931).

33. *See* Thomas v. Arvon Prods. Co., 424 Pa. 365, 369-71, 227 A.2d 897, 899-900 (1967). However, in situations where the container is likely to be discarded, the probability that a warning will reach the ultimate user is slight, and therefore the manufacturer must give other adequate warning commensurate with the risk of harm. McLaughlin v. Mine Safety App. Co., 11 N.Y.2d 62, 69, 181 N.E.2d 430, 434, 226 N.Y.S.2d 407, 412 (1962).

34. Beier v. International Harvester Co., 287 Minn. 400, 402, 178 N.W.2d 618, 620 (1970).

35. *See* Victory Sparkler & Spec. Co. v. Latimer, 53 F.2d 3, 5 (8th Cir. 1931); Parke, Davis & Co. v. Mayes, 124 Ga. App. 224, 224, 183 S.E.2d 410, 410 (1971).

36. Note, *supra* note 6, at 209. Some courts hold that warning to an employer is sufficient since it is reasonable for a manufacturer to expect that the employer will convey the warnings he has received to his employee. *Id. See, e.g.*, Weekes v. Michigan Chrome & Chem. Co., 352 F.2d 603, 607 (6th Cir. 1965); Bertone v. Turco Prods., Inc., 252 F.2d 726, 728 (3d Cir. 1958); Soto v. E.C. Brown Co., 283 App. Div. 896, 896, 130 N.Y.S.2d 21, 22 (1954). Other courts, however, hold that it is unreasonable to expect that the employer will relay the warning to the employee. *See, e.g.*, Montesano v. Patent Scaffolding Co., 213 F. Supp. 141, 143 (W.D. Pa. 1962); Orr v. Shell Oil Co., 352 Mo. 288, 294-95, 177 S.W.2d 608, 612 (1943).

37. Cepeda v. Cumberland Eng'r Co., 138 N.J. Super. 344, 351, 351 A.2d 22, 28-29 (1976).

38. *Id.*

39. *Id.*

40. 317 F. Supp. 841 (S.D. Miss. 1970), *rev'd on other grounds*, 450 F.2d 1176 (5th Cir. 1971).

machine's feed funnel.[41] The meat grinder was later sold to the plaintiff by an owner who had removed and kept the guard-pan, and the plaintiff was injured when the grinder began to operate during her attempt to clean the feed funnel.[42] The district court held that use of the grinder without the detachable guard-pan was reasonably foreseeable and, therefore, the manufacturer had a duty to warn of the danger involved.[43]

The Fifth Circuit reversed the district court by holding that the danger of using the meat grinder without the guard-pan was open and obvious.[44] Consequently, the Fifth Circuit found that even if the use of the grinder without the guard-pan was foreseeable to the manufacturer, it had no duty to warn of a danger which is obvious.[45] Similarly, in *Rodriguez* the court could have found that the modification was foreseeable and still have denied recovery, if the danger of modifying the platform was obvious to the purchaser.[46]

Other cases involving modifications, however, have found that the alteration was not foreseeable.[47] For example, in *Cepeda v. Cumberland Engineering Co.*,[48] the plaintiff lost four fingers while operating a machine manufactured by the defendant.[49] As designed by the defendant, the machine included a guard which protected the operator.[50] Prior to plaintiff's accident, the guard had been removed.[51] The appellate court ordered judgment in favor of the defendant, holding that since the guard served not only a safety function but was equally essential to the productive use of the equipment, "it would have been the extraordinary manufacturer who could have foreseen that an industrial purchaser, presumably concerned with productivity, would remove

41. *Id.* at 844.
42. *Id.* at 845.
43. *Id.* at 851. The court applied the Mississippi comparative negligence rules and awarded the plaintiff a recovery which was 50% lower than her proven damages, that percentage being the extent to which her own negligence in cleaning the grinder was determined to have contributed toward her injuries. *Id.* at 55-56.
44. Ward v. Hobart Mfg. Co., 450 F.2d 1176, 1188 (5th Cir. 1971).
45. *Id.*
46. *See* cases cited in note 30 *supra.*
47. *See, e.g.*, Swindler v. Butler Mfg. Co., 426 S.W.2d 78, 83 (Mo. 1968); Standhardt v. Flintkote Co., 84 N.M. 796, 804, 508 P.2d 1283, 1291 (1973).
The new Arizona products liability statute includes an affirmative defense for the defendant's failure to warn. The defendant must prove that "the proximate cause of the incident giving rise to the action was an alteration or modification of the product which was not reasonably foreseeable, made by a person other than the defendant and subsequent to the time the product was first sold by the defendant." ARIZ. REV. STAT. ANN. § 12-683 (1978). If the statute had been in effect at the time of the *Rodriguez* case, the defendant would have been successful in using this affirmative defense, since the jury did make a determination that the alteration of the cubing machine was not reasonably foreseeable. *See* 115 Ariz. at 460, 565 P.2d at 1321.
48. 138 N.J. Super. 344, 351 A.2d 22 (1976).
49. *Id.* at 347, 351 A.2d at 24.
50. *Id.*
51. *Id.*

such an essential part . . . ."[52]

In *Rodriguez*, therefore, as in all other third party modification cases, the central inquiry was foreseeability at the time of sale.[53] If the platform modification was foreseeable, then the manufacturer had a duty to warn of the dangers arising out of that modification.[54]

The Rodriguez Opinion

In the majority of third party modification cases, the manufacturer has no knowledge of the modification prior to plaintiff's injury.[55] The unique situation present in the *Rodriguez* case was that the manufacturer had knowledge of the purchaser's modification.[56] That fact alone, however, does not change the manufacturer's duty to warn since the duty rests on the foreseeability of danger at the time the product leaves the manufacturer's control.[57] Only at that time would it be reasonable to require the manufacturer to research the dangers created by the modification.[58] Because the jury found that Superlite's modification of the machine was not reasonably foreseeable to Besser at the time the machine left Besser's control, no duty to warn existed.[59] That determination would probably be followed by the majority of courts.[60]

A problem with the *Rodriguez* decision is not in the legal conclusion reached by the court, but in the way that conclusion was reached. The opinion does not attempt to describe the circumstances in which a third party alteration would be foreseeable. In *Rodriguez*, it is arguable that Superlite may not have recognized that the original position of the platform was designed to promote safe use of the product. In that situation, perhaps Besser should have had a duty to warn Superlite that the modification of the platform could result in a total loss of the protection that the original design was intended to accomplish, since it is foresee-

52. *Id.* at 351, 351 A.2d at 28-29. Even though this case was tried on a theory of strict liability in tort, the test for foreseeability would be the same as in a negligence case. For example, in O.S. Stapley Co. v. Miller, 6 Ariz. App. 122, 430 P.2d 701 (1967), the court held that when a manufacturer markets a product for a specific purpose and the product is used for a purpose not reasonably foreseeable, the manufacturer should not be held to strict liability in tort. *Id.* at 128, 430 P.2d at 707. That is the same test which would be applied in a negligence suit. See text & notes 22-28 *supra*. For a discussion of *Stapley*, see 11 ARIZ. L. REV. 61, 173 (1969).

53. 115 Ariz. at 460, 565 P. 2d at 1321.

54. *Id.* at 459, 565 P. 2d at 1320.

55. *See, e.g.*, Ward v. Hobart Mfg. Co., 450 F.2d 1176, 1188 (5th Cir. 1976); Swindler v. Butler Mfg. Co., 426 S.W.2d 78, 83 (Mo. 1968); Cepeda v. Cumberland Eng'r Co., 138 N.J. Super. 344, 348, 351 A.2d 22, 26 (1976).

56. 115 Ariz. at 458, 565 P.2d at 1319.

57. *See* Standhardt v. Flintkote Co., 84 N.M. 796, 508 P.2d 1283 (1973). In *Standhardt*, a roofing compound manufacturer had notice that an architect was deviating from the manufacturer's specifications. The court held that the manufacturer, after obtaining knowledge of the change, had no duty to warn of the possible dangers associated with this use of the product chosen by another whose actions it did not control. *Id.* at 803-05, 508 P.2d at 1290-92.

58. *Id.*

59. 115 Ariz. at 460, 565 P.2d at 1321.

60. See text & notes 47-52 *supra*.

able that a purchaser may not understand the importance of a safety feature.[61]

The *Rodriguez* court also suggested that imposing a duty to warn on the manufacturer would require the manufacturer to inspect the machine and research the effect of the safety device alteration on the operation of the machine.[62] However, such an extensive duty would probably not be required.[63] Though the adequacy of the warning ordinarily is a jury issue,[64] it is possible that a warning sign placed on the machine would have satisfied the manufacturer's duty to act reasonably.[65] That would not have placed an intolerable burden on the manufacturer, especially when balanced against the magnitude of the risk to the plaintiff.

Conclusion

The *Rodriguez* court followed the majority of courts in finding that the duty to warn is determined by the existence of foreseeable risks at the time the product is sold. The fact that the manufacturer received actual notice of a modification after the product left its control did not establish a duty to warn, if the modification was unforeseeable at the time of sale. The court's opinion should have discussed more thoroughly why this particular modification was not foreseeable, especially since the modification involved a safety device on a rather complex piece of machinery. The court should have also dealt with what type of warning would have been required in this situation, so that it would be easier to understand why the imposition of a duty to warn would have created such an "intolerable burden" on the manufacturer.

61. *See* Blim v. Newbury Indus., Inc., 443 F.2d 1126 (10th Cir. 1971). In *Blim*, mechanical drop bars on a piece of machinery designed by the defendant were removed by the plaintiff's employer prior to the plaintiff's injury. There was evidence demonstrating that the drop bars were ineffective prior to their removal. The court reasoned that removal of an ineffective safety feature could not have exacerbated the hazard involved and, therefore, the defendant was held liable. *Id.* at 1127-28. The court went on to state that the inherent danger in a piece of machinery may be that a user may not recognize that there is a critical relationship between several components in a piece of machinery that are designed to promote safe use. Not recognizing that relationship, the user may alter one of the component safety features, resulting in a total loss of protection. *Id.* at 1129. In that situation it may be reasonable to require the manufacturer to warn of the dangers of modifying the safety device, since the manufacturer could foresee at the time of sale that the purchaser would not understand the importance of the safety feature.

Perhaps the manufacturer should have a duty to warn of any dangerous modification which the manufacturer has actual knowledge of, even if the modification was not foreseeable at the time of sale. That duty would arise out of the manufacturer's special knowledge of its product, which puts the manufacturer in a unique position to evaluate the dangers of a modification.

62. 115 Ariz. at 460, 565 P.2d at 1321.

63. Perhaps a short letter to the purchaser explaining the possible dangers would have relieved the defendant's duty. *See generally* Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 Sw. L.J. 256 (1969).

64. *See* Crane v. Sears Roebuck & Co., 218 Cal. App. 2d 855, 859, 32 Cal. Rptr. 754, 756 (1963).

65. *See* W. PROSSER, *supra* note 2, § 96, at 646. Prosser states that "[t]he warning must be sufficient to protect third persons who may reasonably be expected to come in contact with the product and be harmed by it." *Id.* at 647. *See generally* Noel, *supra* note 63.

X. WATER LAW

A. THE LEGISLATIVE POWER TO LIMIT THE COURTS' USE OF INJUNCTIVE RELIEF

Increasing demands upon Arizona's diminishing groundwater resources[1] have recently stimulated legislative concern over the continued viability of our state's present system of groundwater resource management.[2] The focus of this concern involves the need for a modified system of allocation and distribution of groundwater between private landowners, expanding municipalities, and industry.[3] Initial measures were taken in 1977 by the state legislature to reform Arizona's groundwater distribution policies, but the legislature's response sparked controversy that culminated in the case of *Town of Chino Valley v. State Land Department*.[4]

Allocation of Arizona's groundwater resources has generally been accomplished not by state legislation,[5] but by the common law rule of reasonable use.[6] Under that rule of property,[7] the Arizona courts have recognized that landowners possess a substantive right to tap, pump, and utilize the waters beneath their lands for any reasonable and beneficial purpose.[8] Judicial decisions have protected the rights ac-

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1. *See generally* Clark, *Arizona Groundwater Law: The Need for Legislation*, 16 ARIZ. L. REV. 799 (1974).

2. Ch. 29, § 1, 1977 Ariz. Sess. Laws 67 provides: "The Legislature of the State of Arizona finds that strict application of existing law preventing the transfer of goundwater jeopardizes the economy and well-being of the people of this state and prevents certain necessary distribution of Arizona's groundwater resources." *See also* Town of Chino Valley v. State Land Dep't, 119 Ariz. 243, 244-45, 580 P.2d 704, 705-06 (1978).

3. Ch. 29, § 1, 1977 Ariz. Sess. Laws 67-68; *see* Clark, *A Proposed Water Resources Code or Statute: Arizona Water Resources Management Act of 1977*, 19 ARIZ. L. REV. 719, 724 (1977).

4. 119 Ariz. 243, 580 P.2d 704 (1978).

5. *See* ARIZ. REV. STAT. ANN. §§ 45-301 to 324 (1977) (enacted in 1948, the Groundwater Act designated certain areas throughout the state to be regulated by the State Land Commissioner); Mann, *Groundwater in Arizona*, 2 ARIZ. L. REV. 241, 252-53 (1960) (regulations imposed under the Groundwater Act were by and large ineffective to balance the distribution of our state's water supply). *See also* Clark, *supra* note 1, at 813-14.

6. Farmers Inv. Co. v. Bettwy, 113 Ariz. 520, 525, 558 P.2d 14, 19-20 (1976); Jarvis v. State Land Dep't, 104 Ariz. 527, 529, 456 P.2d 385, 386-87 (1969); Bristor v. Cheatham, 75 Ariz. 227, 237, 255 P.2d 173, 178-79 (1953).

7. Town of Chino Valley v. State Land Dep't, 119 Ariz. 243, 248, 580 P.2d 704, 709 (1978) ("[D]octrine of reasonable use . . . [has] become a rule of property and [is] entitled to protection as such."); Farmers Inv. Co. v. Bettwy, 113 Ariz. 520, 527, 558 P.2d 14, 21 (1976).

8. Farmers Inv. Co. v. Pima Mining Co., 111 Ariz. 56. 57, 573 P.2d 487, 488 (1974) ("The property right is a right to use the water rather than an absolute ownership interest in the corpus or source."). *See generally* Clark, *supra* note 3, at 727-28.

quired by the rule of reasonable use by enjoining the transportation and use of groundwater off of the basin area if other landowners overlying the water supply are thereby injured.[9]

In certain parts of Arizona, groundwater resources have been found insufficient to provide a reasonably safe supply of water for cultivated lands overlying the water basin.[10] Those regions have been set apart as "critical groundwater areas,"[11] the purpose of such designation being to preserve scarce supplies by restricting additional withdrawals of groundwater.[12]

The town of Chino Valley lies within the Granite Creek critical groundwater area basin. For a number of years the city of Prescott has been pumping groundwater from land it owns within the corporate limits of Chino Valley and transporting it off the groundwater basin to satisfy domestic and municipal consumption needs.[13] Inasmuch as Prescott's groundwater transfers take water from a designated critical area that by definition has insufficient supplies, the application of the judicial doctrine of reasonable use would normally enjoin the transfer practice to prevent irreparable injury caused by exhaustion of the water resource and the simultaneous destruction of all substantive rights to its use.[14]

Injunctive relief, however, is an extraordinary remedy that offers unsettling results for entities like Prescott that have historically relied on groundwater transfers to meet municipal water needs. Because of this, the state legislature became concerned about the devastating consequences strict application of the reasonable use doctrine would have on the economic growth and development of our state.[15] Conse-

9. *See* Farmers Inv. Co. v. Bettwy, 113 Ariz. 520, 527, 558 P.2d 14, 21 (1976) (no matter how beneficially used, groundwater may not be used off the lands from where it is taken if injury results to overlying owners); Neal v. Hunt, 112 Ariz. 307, 312-14, 541 P.2d 559, 564-66 (1976) (the Arizona Supreme Court sustained the trial judge's determination that a withdrawal of 300 gallons of groundwater for transportation off the groundwater basin would not injure the water supply of plaintiff who was a neighboring landowner overlying the common supply); *cf.* Jarvis v. State Land Dep't, 106 Ariz. 506, 508-10, 479 P.2d 169, 171-73 (1969) (where property owners transport groundwater off the land from which it is pumped, thereby impairing the property rights of other overlying landowners, the conveyance should be prohibited).

10. Jarvis v. State Land Dep't, 104 Ariz. 527, 530, 456 P.2d 385, 388 (1969); Mann, *supra* note 5, at 251-52.

11. ARIZ. REV. STAT. ANN. § 45-301(1) (1977) provides: "A critical groundwater area means any groundwater basin . . . not having sufficient groundwater to provide a reasonably safe supply for irrigation of the cultivated lands in the basin at the then current rates of withdrawal."

12. *See generally* Clark, *supra* note 3, at 727; Mann, *supra* note 5, at 251.

13. Town of Chino Valley v. State Land Dep't, 119 Ariz. 243, 245, 580 P.2d 704, 706 (1978).

14. *See* Farmers Inv. Co. v. Bettwy, 113 Ariz. 520, 527, 558 P.2d 14, 21 (1976) (lowering of water table in a designated critical groundwater area gives rise to irreparable injury justifying injunctive relief); Jarvis v. State Land Dep't, 104 Ariz. 527, 531, 456 P.2d 385, 389 (1969) (injunction has become the appropriate remedy for injurious groundwater transfers since damages can not avert eventual depletion of the water resource and the corresponding destruction of many productive uses of the overlying land).

15. The legislature's understanding of a need for new groundwater management solutions is

quently, to ensure that a dependable supply of water would remain available for Arizona's municipalities and industry,[16] the state legislature, in May of 1977, enacted amendments to Arizona's groundwater code.[17]

The overall effect of the amendments is to allow a water user to continue pumping and transporting groundwater away from its overlying land without danger of such use being discontinued. The new provisions proscribe the court's use of injunctive relief when "any individual, firm, political subdivision . . . or governmental agency"[18] who has been transferring groundwater prior to January 1, 1977, obtains approval from the state land department.[19] Generally, a conclusive presumption of injury will be recognized where water is withdrawn from critical areas,[20] but the remedy of damages has been substituted as the injured landowner's exclusive means of redress.[21]

Arguing that the 1977 groundwater code amendments subordinated the landowner's judicially protected right of reasonable use in favor of municipal water transfers, the town of Chino Valley and certain residents of that community brought a special action seeking to invalidate the groundwater code amendments and enjoin the state land commissioner's approval of Prescott's application for the right to continue transporting groundwater.[22] The amendments were attacked on

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reflected in the declaration of policy which was issued in conjunction with the 1977 groundwater amendments. *See generally* ch. 29, § 1, 1977 Ariz. Sess. Laws 67-68.

16. *Id.*

17. ARIZ. REV. STAT. ANN. §§ 45-317.01 to 324 (1977).

18. *Id.* § 45-301(14).

19. *Id.* § 45-317.01(A).

20. *Id.* § 45-317.04(B). *But see id.* § 45-317.03, excluding certain cities, political subdivisions, and public service corporations from the statutory presumption of injury and certificate of exemption requirement.

21. *Id.* § 45-317.04(A): "[N]othing in this Article shall limit the right of any person to recover damages for any transfer of groundwater within or from a designated critical groundwater area which causes . . . damage to his groundwater supply." *See also id.* § 45-317.04(B) (the statute gives the injured landowner the benefit of presumed damages except where water is transferred by public service corporations or political subdivisions under the provisions of ARIZ. REV. STAT. ANN. § 45-317.03 (1977)).

22. Town of Chino Valley v. State Land Dep't, 119 Ariz. 243, 245-46, 580 P.2d 704, 706-07 (1978). The plaintiffs also asserted that the amendments constituted an unconstitutional delegation of authority by the legislature because they instructed the state land commission to recommend and prepare legislation to Arizona's current groundwater laws. *Id.* at 246, 580 P.2d at 707; ch. 29, § 7(e)(3), 1977 Ariz. Sess. Laws 80. Those recommendations become law should the legislature fail to adopt and enact its own groundwater management code before the first Sunday in September 1981. *Id.* at 81-82. Since the implementation of the recommendations depends upon the legislature's failure to enact its own groundwater management code, an event that may or may not occur, the court determined that a theoretical state of facts combined with the mere threat of harm formed the basis of the plaintiff's delegation of powers claim. 119 Ariz. at 246-47, 580 P.2d at 707-08. Therefore, the court concluded that the issue regarding an unconstitutional delegation of power was prematurely raised. *Id.*; *see* United Pub. Workers v. Mitchell, 330 U.S. 75, 89-90 & n.22 (1945) (speculative claims presenting hypothetical threats of injury will not support an action for declaratory relief); Peters v. Frye, 71 Ariz. 30, 34, 223 P.2d 176, 180 (1950) (irrigation delivery district organization prematurely sought where present need was not established); Moore v. Bolin, 70 Ariz. 354, 358, 220 P.2d 850, 854 (1950) (declaratory action challenging statute forbidding an

the basis that the legislature could not constitutionally limit the court's power to grant injunctive relief without usurping the remedial authority of the judicial branch and taking away the only adequate remedy for harm caused by excessive pumping of groundwater.[23] The Arizona Supreme Court, in *Town of Chino Valley v. State Land Department*,[24] rejected those constitutional claims, holding that the injunction limitations merely represented an instance of the legislature's substantive lawmaking power and did not impermissibly intrude into the judicial arena.[25] With respect to the adequacy of the exclusive damages remedy, the court found that the plaintiffs had been afforded an effective measure of relief.[26]

This casenote will examine the arguments advanced by the Arizona Supreme Court to support the constitutionality of the legislature's interim groundwater plan. Particular attention will be given to the legislature's power to regulate substantive rights and its concomitant duty to provide remedies for the enforcement of private property rights.

Legislative Limitations on the Injunctive Remedy and the Doctrine of Separation of Powers

Based upon the principle of separation of powers, the Chino Valley plaintiffs asserted that the legislature's limitation on the court's authority to issue injunctions withdrew a power vested in the judicial branch by the state constitution.[27] Relying on article 3 of the Arizona Constitution,[28] which incorporates the fundamental notion that the legislative power shall be separate from the judicial, and article 6, section

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incumbent state officer in midterm from seeking a candidacy for another state office dismissed as premature).

In addition, the town of Chino Valley was adjudged an improper party to challenge the constitutionality of the groundwater amendments. As a municipal corporation formed under the laws of the State of Arizona, Chino Valley has no privileges or powers of self-government beyond those given under constitutional or statutory provision. 119 Ariz. at 246, 580 P.2d at 707. Since state legislation had not expressly granted Chino Valley (or any other municipality) the right to bring suit on its own behalf, and the municipality had not suffered harm to rights conferred by the state constitution, it was denied standing. *Id.*; *see* Williams v. Mayor of Baltimore, 289 U.S. 36, 40 (1933); City of Safety Harbor v. Birchfield, 529 F.2d 1251, 1254 (5th Cir. 1974); Town of Wickenburg v. State, 115 Ariz. 465, 468-69, 565 P.2d 1326, 1330-31 (1977).

Under the rules for special actions, the court denied a request for a class action involving all residents of Chino Valley, thus limiting representation to the specific individuals named in the petition for special action. 119 Ariz. at 246, 580 P.2d at 707.

23. 119 Ariz. at 247, 580 P.2d at 708.
24. 119 Ariz. 243, 580 P.2d 704 (1978).
25. *Id.* at 248, 580 P.2d at 709.
26. *Id.*
27. *Id.* at 247, 580 P.2d at 708.
28. Article 3 of the Arizona Constitution states:

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

18 of the Arizona Constitution,[29] which empowers the superior courts to issue injunctions, the plaintiffs argued that the restraints on injunctive relief unconstitutionally restricted the court's original power to grant a remedy indispensable to the preservation of their vested property rights.[30] The Arizona Supreme Court found otherwise, concluding that no unconstitutional intrusion into the powers and functions of the judicial branch resulted from enacting and enforcing the groundwater code amendments.[31] Its decision was based upon a construction of the challenged limitations as being within the power of the legislature to modify substantive rights and establish new remedies for their enforcement.[32]

Courts acknowledge that the legislature has plenary authority to enact any law it deems necessary for the public welfare,[33] except as that power may be limited by state and federal constitutions.[34] An important adjunct of that sweeping authority is the power to modify or even abrogate common law rules developed and applied through the judicial branch.[35] Revisory power over common law rights is an attribute of the legislative office designed to remedy imperfections that arise in the evolution and development of the common law.[36] To promote that power, the constitution gives the legislative branch expansive authority to alter rights and remedies as everchanging societal conditions re-

29. ARIZ. CONST. art. 6, § 18 provides:

> The superior court or any judge thereof may issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus on petition by or on behalf of a person held in actual custody within the county. Injunctions, attachments, and writs of prohibition and habeas corpus may be issued and served on legal holidays and nonjudicial days.

30. 119 Ariz. at 248, 580 P.2d at 709.

31. *Id.*

32. *Id.* at 248-50, 580 P.2d at 709-11.

33. Buckley v. Valeo, 424 U.S. 1, 131-32 (1976); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 415, 421 (1819) (broad grants of legislative power, such as the power to regulate property rights, necessarily entail the authority to use any reasonable means that will legitimately aid in the execution of that power); *see* Giss v. Jordan, 82 Ariz. 152, 159, 309 P.2d 779, 783-84 (1957) (legislative power includes the authority to enact substantive regulations regarding all aspects of civil government).

34. Kilpatrick v. Superior Court, 105 Ariz. 413, 415, 466 P.2d 18, 20-21 (1970); State v. Harold, 74 Ariz. 210, 218, 246 P.2d 178, 183 (1952); *see* Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 260-67 (1973). The constitutional validity of actions taken by the legislative branch is subject to review by the judicial branch. *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The courts are empowered to interpret and apply the mandates of the constitution to ensure that legislative enactments comport with constitutional guarantees. *Id.* at 389-91.

35. *See* Silver v. Silver, 280 U.S. 117 (1929), where the constitutionality of a Connecticut guest statute depriving passengers in an automobile of a negligence claim against the driver was challenged. Noting that the constitution did not preclude abolition of common law rights where legitimate legislative goals could be demonstrated, the Court concluded that the restriction on liability was a reasonable exercise of the legislature's power. *Id.* at 123; *see* S.H. Kress & Co. v. Superior Court, 66 Ariz. 67, 73, 182 P.2d 931, 935 (1947) (reasonable legislative changes in the common law are constitutionally permissible).

36. Second Employers' Liability Cases, 223 U.S. 1, 50 (1911); Troy Hills Village, Inc. v. Fishchler, 122 N.J. Super. 572, 580, 584, 301 A.2d 177, 182, 184 (1971).

quire.[37] A logical corollary arising from the legislature's broad control over substantive rights and remedies is that no individual can acquire a vested right in any rule of the common law.[38]

The *Chino Valley* court found that by limiting or modifying common law remedies that provide protection against harmful groundwater transfers, the legislature had merely redefined and demarcated the nature and scope of substantive water rights.[39] Thus, even though injunctive relief has traditionally been invoked to prevent injurious transfers of groundwater away from property overlying underground basins,[40] the legislature's abrogation of that remedial device in favor of damages reflects valid aspects of substantive regulation.[41] In the past, courts have determined that statutes proscribing injunctive relief represent instances where the state legislature has determined the rights of individuals by validly circumscribing the methods and means for the enjoyment of those rights.[42] Similarly, Arizona's new groundwater legislation accomplishes a redefinition of the common law right of an individual to our state's limited groundwater reserves vis á vis competing transferees. Since the power to select or withdraw remedies for private rights falls, as a matter of substantive law, within the realm of legislative power, the injunction limitations do not interfere with or encroach upon the powers of the judicial branch.[43]

37. Munn v. Illinois, 94 U.S. 113, 134, 136 (1876); *see, e.g.*, Bissen v. Fujii, 51 Hawaii 636, 638, 466 P.2d 429, 431 (1970) (legislative authority includes the power to adopt a comparative negligence statute abrogating the common law rule of contributory negligence); Hall v. Gillians, 13 Ill. 2d 26, 29, 147 N.E.2d 352, 354 (1958) (a state legislature may limit the amount of damages recoverable under a wrongful death statute); Brown v. Wichita State Univ., 219 Kan. 1, 9, 547 P.2d 1015, 1021-22, (1976) (governmental immunity previously abolished by the courts may be reimposed by the legislature).

38. Second Employers' Liability Cases, 223 U.S. 1, 50 (1911); Puterbaugh v. Gila County, 45 Ariz. 557, 562, 46 P.2d 1064, 1066 (1935).

39. 119 Ariz. at 247-48, 580 P.2d at 708-09.

40. Farmers Inv. Co. v. Bettwy, 113 Ariz. 520, 527, 558 P.2d 14, 21 (1976); Jarvis v. State Land Dep't, 104 Ariz. 527, 531, 456 P.2d 385, 389 (1969).

41. *See* Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 530 (1974). Inasmuch as the legal remedy gives meaning and content to the substantive right, the legislative power to modify remedies is construed as a feature of the power to regulate substantive rights. *Id.* at 529-30. The legislature's inherent authority to alter or even abrogate private property rights in groundwater is shown in Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 513 P.2d 627 (1973), where the court upheld state legislation requiring certain water users to discontinue the pumping and mining of groundwater reserves. *Id.* at 584, 513 P.2d at 636.

42. Restraints on the type of remedy available for protection and enforcement of existing property rights is well within the legislative power. Ray v. Rambaud, 103 Ariz. 186, 188, 438 P.2d 752, 754 (1968); Corbin v. Rogers, 53 Ariz. 35, 41, 85 P.2d 59, 62 (1938); *see* Modern Barbers College v. California Employment Stabilization Comm., 31 Cal. 2d 720, 727, 192 P.2d 916, 919-20 (1948) (the power to determine and regulate substantive property rights enables a state legislature to create new rights or provide that rights which have previously existed shall no longer arise, and it has full power to regulate and circumscribe the methods and means of enjoying the right).

43. *See* Speckels v. Hawaiian Commercial Sugar Co., 117 Cal. 377, 381, 49 P. 353, 354 (1897). Constitutional grants of original jurisdiction to issue the injunction remedy are "not intended as a limitation upon the power to legislate upon the rights of persons." *Id.* at 381, 49 P. at 354; *accord*, Ray v. Rambaud, 103 Ariz. 186, 188, 438 P.2d 752, 754 (1968); Brotherhood of Am. Yeomen v. Manz, 23 Ariz. 610, 616, 206 P. 403, 405 (1922): "We understand the rule to be that parties have no vested right in particular remedies . . . and that legislatures may change existing

The court in *Chino Valley* supports its conclusion that legislative authority has always included the power to prohibit injunctive relief by reference to other instances where statutes have limited judicial authority to restrain certain proceedings and conduct.[44] Both Arizona and federal courts have upheld statutory limitations upon the issuance of injunctive relief for tax assessments,[45] labor controversies,[46] and other special proceedings.[47] Interestingly, however, courts have traditionally observed and respected statutory limitations on equitable relief because

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remedies . . . provided an efficacious remedy remains . . . ." *See also* Denver Local 13 v. Perry Truck Lines, 106 Colo. 25, 32, 101 P.2d 436, 447 (1940); Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366 (1953).

However, limitations on the legislature's authority to modify common law rights exist. For example, when the legislature prohibits the court, through statutory enactment, from hearing a suit commenced under a statutorily created cause of action, the statute abrogating the cause of action effectively removes the claim and hence the jurisdiction of the court to decide the controversy. This is an invasion by the legislature of judicial power in violation of article 3 of the Arizona Constitution. Puterbaugh v. Gila County, 45 Ariz. 557, 564-65, 46 P.2d 1064, 1066-67 (1935).

Literally read, the statutory language contained in the groundwater amendments suggests that the court is absolutely prohibited from granting injunctive relief. *See* ARIZ. REV. STAT. ANN. §§ 45-317.01(A), 317.05(B) (1977). This raises the argument that the legislature has indeed attempted to withdraw entirely the court's constitutionally conferred jurisdiction to issue injunctive relief. *See* ARIZ. CONST. art. 6, § 16. State *ex rel.* Buckwalter v. City of Lakeland, 112 Fla. 200, 206, 207, 150 So. 508, 511, 512 (1933), illustrates that a legislative limitation on the court's use of injunctive relief can be construed as an unconstitutional curtailment of judicial power. In that case, a legislative enactment restricting the application of the court's constitutionally vested power of mandamus was held to be an invalid intrusion upon the power of the judiciary. *Id.* at 209, 150 So. at 512. Nevertheless, authorities are reluctant to agree whether a legislature can abolish or withdraw the constiutionally based jurisdiction of the courts. *Compare* Peterson v. Clark, 285 F. Supp. 700, 705 (D. Cal. 1968), *with* Lockerty v. Phillips, 319 U.S. 182, 187-88 (1943).

44. 119 Ariz. at 247, 580 P.2d at 708.

45. 26 U.S.C. § 7421(a) (1976); ARIZ. REV. STAT. ANN. § 44-204(B) (1977). *See* Enoch v. Williams, 370 U.S. 1, 6-7 (1962). Injunctive relief is generally unavailable in tax assessment proceedings. Rather, the claimant's remedy is to pay the tax and sue for its recovery. Only in the instance where it is beyond doubt that the government will not possibly prevail will the equity jurisdiction exist to grant injunctive relief. *Id.* at 7. Thus, a claim that collection of a tax, if valid, would destroy the claimant's business enterprise is insufficient to overcome the statutory injunction restraints. *Id. See also* Smotkin v. Peterson, 73 Ariz. 1, 5, 236 P.2d 743, 745 (1951) (if it is clear that taxing officials have imposed a tax under semblance of statutory authority, then the only remedy available to the taxpayer is to pay the tax under protest and file suit for its recovery); Wood v. Gray, 359 P.2d 951, 955 (Alas. 1961).

46. Norris LaGuardia Act, 29 U.S.C. § 101 (1976); ARIZ. REV. STAT. ANN. § 12-1808 (1956); Boys Markets v. Retail Clerks Union, 398 U.S. 235, 251 (1970) (the Norris La Guardia Act normally commands that interjection of the judicial branch into labor disputes be prohibited); Culinary Workers & Bartenders Local 631 v. Busy Bee Cafe, 57 Ariz. 514, 517-18, 115 P.2d 246, 248-49 (1941) (statute restraining use of injunctive relief in peaceful controversies between employer and employees is beyond constitutional attack). *See also* Denver Local 13 v. Perry Truck Lines, 106 Colo. 25, 101 P.2d 436 (1960). The anti-injunction statute manifests a policy that in labor disputes involving the rights of employees, injunctive relief, as a matter of substantive law, should not be provided. Rather, resolution of such disputes should be pursued through channels of open communications and free negotiation. *Id.* at 32, 101 P.2d at 447-48.

47. Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4, 9 (1940). Congressional policy expressed in the anti-injunction act limits the power of the federal courts to enjoin state court proceedings. The policy serving that restriction rests on the notion of comity; that is, federal courts should not produce needless friction with state courts by interfering with judicial proceedings. *Id.*; *see* Anti-Injunction Act, 28 U.S.C. § 2283 (1976). *See also* Hislop v. Rogers, 54 Ariz. 101, 113, 92 P.2d 527, 532 (1939) (purpose of Arizona statute is to prevent encroachment upon the lawful enforcement of statutes by the executive branch); ARIZ. REV. STAT. ANN. § 12-1802 (1956) (no injunction shall be issued to stay proceedings in federal and other state courts, nor shall a court enjoin enforcement of a public statute, breach of contract where performance would

the restrictions are bound up with well-developed principles and policies warranting judicial forebearance.[48] Suspension of the injunction remedy, therefore, has resulted only after maturation of strong "[c]onsiderations of policy or expediency which forbid a resort to [that] prohibitive remedy."[49] Consequently, even without legislative restrictions, important underlying policies have curtailed the use of the injunction remedy.

For example, actions arising out of labor controversies have historically demanded judicial self-restraint against injunctive relief.[50] Public policy favors resolution of labor disputes through peaceful demonstration, open communication, and freedom of contract.[51] Courts reason that freedom of expression and association, the foundation of the employer-employee relationship, should be free from judicial impediments.[52] However, in instances where conditions arising out of labor disputes threaten irreparable injury to persons or property, statutory limitations will not operate to disallow the injunction remedy.[53]

Additionally, strong equitable considerations have existed to inhibit injunctive relief restraining tax assessment and collection proce-

not be specifically enforced, the lawful exercise of a public or private office, or a legislative act by a municipal corporation).

48. *See* Crane Co. v. Arizona State Tax Comm'n, 63 Ariz. 426, 163 P.2d 656 (1945): "[I]t has always been the law that courts will not intefere to prevent the execution of a public statute by officers of the law. The [anti-injunction statute] is merely an affirmation of the general rule on the subject." *Id.* at 445, 163 P.2d at 664. *See* Loftis v. Superior Court, 25 Cal. App. 2d 346, 353, 77 P.2d 491, 495 (1938); Fenske Bros. v. Upholsterer's Internat'l Union, 358 Ill. 239, 254-55, 193 N.E. 112, 119-20 (1934). *See also* Redish, *Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717, 760 (1976).

49. J. POMEROY, 4 POMEROY'S EQUITY JURISPRUDENCE § 1338, at 935 (5th ed. 1941) ("The restraining power of equity extends, therefore, through the whole range of rights and duties which are recognized by law, and would be applied to every case of intended violation, were it not for certain reasons of expediency and policy which control and limit its exercise"). Thus, this fundamental convention will often be invoked to limit the availability of equitable relief.

50. Boys Markets v. Retail Clerks Union, 398 U.S. 235, 251 (1970); M. Restaurants v. San Francisco Local, 81 Cal. App. 3d 256, —, 146 Cal. Rptr. 436, 443 (1978); Fenske Bros. v. Upholsterer's Internat'l Union, 358 Ill. 239, 255, 193 N.E. 112, 119-20 (1934).

51. Boys Markets v. Retail Clerks Union, 398 U.S. 235, 251 (1970); Culinary Workers & Bartenders Local 631 v. Busy Bee Cafe, 57 Ariz. 514, 517-18, 115 P.2d 246, 248-49 (1941) (neither the common law nor statutes may enjoin peaceful picketing and the right of free communication); Denver Local 13 v. Perry Truck Lines, 106 Colo. 25, 32-35, 101 P.2d 436, 440-42 (1940) (injunction restraints serve important policy objectives and encourage resolution of labor controversies through peaceful bargaining).

52. Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938); Senn v. Tile Layers Union, 301 U.S. 468, 478 (1937); Culinary Workers & Bartenders Local 631 v. Busy Bee Cafe, 57 Ariz. 514, 517-18, 115 P.2d 246, 248-49 (1941).

53. Exceptions to the injunction limitations imposed under the Norris LaGuardia Act, 29 U.S.C. § 101 (1976), are found in 29 U.S.C. § 107 (1976); *see* Squillacote v. Local 248, Meat & Allied Food Workers, 534 F.2d 735, 744 (7th Cir. 1976) (prevention of labor violence will justify the issuance of injunctive relief notwithstanding the restrictions imposed by the Norris LaGuardia Act); *cf.* ARIZ. REV. STAT. ANN. § 12-1808(A) (1956) (The labor statutes do not absolutely preclude a court from granting injunctive relief. Where provocation arising out of a labor dispute threatens irreparable injury to property or property rights, the injunction may be issued.). *See also* McCleod v. General Elec. Co., 366 F.2d 847, 849 (7th Cir. 1966).

dures.[54] Since the legislative power to tax and collect revenue is indispensable to uninterrupted availability of governmental services, expedient policy has arisen to prevent disruption of that legislative function through injunctive relief.[55]

Thus, analysis of anti-injunction statutes used to support the *Chino Valley* court's resolution of plaintiff's separation of powers claim reveals that well-known legislative limitations have incorporated overriding public policy and self-imposed judicial restraints on the use of the injunction remedy.[56] Strong considerations of public policy have consistently buttressed statutes denying injunctive relief. Analogously, public policy reflects a need for adjustment of Arizona's groundwater management system which, until the new amendments, prevented the transfer and distribution of groundwater to supply expanding municipal and industrial water uses.[57] Inasmuch as the injunction limitations serve important public interests promoting the state's economic development through a supervised reallocation of Arizona's groundwater resources,[58] the validity of the legislature's restraints on injunctive relief would appear beyond question.[59]

Effectiveness of the Statutory Remedy

The groundwater amendments declare that the remedy of damages shall be substituted in lieu of injunctive relief as the injured land-

54. *See* Crane Co. v. Arizona State Tax Comm'n, 63 Ariz. 421, 163 P.2d 656 (1945), where it was noted that if limitations proscribing injunctive relief in tax assessment cases were not imposed, revenues required by statute to be exacted would remain uncollected in contravention of the law. *Id.* at 441, 163 P.2d at 662. The potential for incessant challenges to tax assessments prior to their collection would emasculate statutory taxing measures and frustrate the collection of revenue necessary for the continued operation of governmental services. State *ex rel.* Lane v. Superior Court, 72 Ariz. 388, 391, 236 P.2d 461, 462-63 (1951).

55. Enoch v. Williams, 370 U.S. 1, 7 (1961); Miller v. Standard Nut Margarine Co., 284 U.S. 498, 509 (1932).

56. Crane Co. v. Arizona State Tax Comm'n, 63 Ariz. 426, 441, 163 P.2d 656, 662 (1945) (common law has traditionally imposed restraints against injunctive relief for the collection of taxes). *See also* J. POMEROY, 1 POMEROY'S EQUITY JURISPRUDENCE § 69, at 94 (5th ed. 1941). Many doctrines and rules developed and recognized by equity courts to limit use of the injunction remedy have been brought into conformance with the law. C. WRIGHT, A. MILLER & E. COOPER, 12 FEDERAL PRACTICE & PROCEDURE § 4222, at 314 (1977).

57. Farmers Inv. Co. v. Bettwy, 113 Ariz. 520, 527, 558 P.2d 14, 21 (1976); Jarvis v. State Land Dep't, 104 Ariz. 527, 530, 456 P.2d 385, 388 (1969).

58. *See generally* ch. 29, § 1, 1977 Ariz. Sess. Laws 67-68.

59. Similar public policy constraints on injunctive relief existed to support the validity of the Milldam Acts, statutory water preference provisions enacted in the late nineteenth century to promote the efficient and advantageous utilization of stream waters. *See* Harnsberger, *Eminent Domain & Water Law*, 48 NEB. L. REV. 327, 356 (1969); Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615, 619-22 (1940). In view of the importance of developing water power to meet the energy needs of an expanding population, these statutes authorized the damming of riparian streams by private mill owners and restricted application of the injunction where upstream adjacent land was flooded. *Id.* The injured landowner was confined to an action for damages. These statutes, while allowing mill owners to essentially condemn private land, were upheld because public need for development of new energy resources outweighed the diminution of private property rights.

owner's exclusive means of redress.[60] The legislature has determined that injury caused by groundwater transfers away from critical basin areas shall raise a conclusive presumption of injury[61] justifying monetary compensation for all past, present, and future injury.[62] Additional remedial protection is afforded under the amendments by allowing the recovery of reasonable attorney's fees, expert witness expenses, and other court costs connected with groundwater transfer litigation.[63] Finally, prospective transfers of groundwater from designated critical areas will generally be limited to an amount equal to the greatest annual quantity of water used by the transferee within eight years preceding January 1, 1977.[64]

After examination of those statutory safeguards, the supreme court in *Chino Valley* rejected the petitioner's due process challenge that the substituted damages remedy given by the groundwater amendments was inadequate.[65] Due process standards for adequate remedies will be violated only when a claimant has been deprived of all remedies for the enforcement of a substantive property right.[66] Yet the availability of full statutory compensation[67] did not prevent the *Chino Valley* court from cautioning that statutory injunction limitations will not prevent the exercise of equitable authority in the event that available legal remedies, as a practical matter, prevent the claimant from obtaining the effective relief to which he is entitled.[68] In reserving authority to issue

60. ARIZ. REV. STAT. ANN. §§ 45-317.01(A), 317.04(A) (1977).
61. *Id.* § 45-317.04(B).
62. *Id.* § 45-317.04(C).
63. *Id.*
64. *Id.* § 45-317.01(B).
65. 119 Ariz. at 248, 580 P.2d at 709.
66. *Id.* "Generally legislation will not be declared unconstitutional unless a person has been deprived of all existing remedies for enforcement of a right." *Id. See also* Brinkeroff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 679 (1930). "A claimant may not be deprived of all existing remedies for the enforcement of a right, which the state has no power to destroy." *Id.* at 682; *accord,* Crane v. Hahlo, 258 U.S. 142, 147 (1921); Ray v. Rambaud, 103 Ariz. 186, 188, 438 P.2d 752, 754 (1968); Brotherhood of Am. Yeoman v. Manz, 23 Ariz. 610, 616, 206 P. 403, 405 (1922); Drachman v. Jay, 4 Ariz. App. 70, 75, 417 P.2d 704, 709-10 (1966).
67. H. MCCLINTOCK, MCCLINTOCK ON EQUITY §§ 46-47, at 110-13 (2d ed. 1948). It is a principle of equity that equity follows the law and will refuse to challenge or circumvent remedies provided by a specific statute defining and establishing the rights of parties. Jarvis v. State Land Dep't, 106 Ariz. 506, 511-12, 479 P.2d 169, 173-74 (1970); State v. Jacobson, 22 Ariz. App. 260, 265, 526 P.2d 784, 789 (1974); Sult v. O'Brien, 15 Ariz. App. 384, 388, 488 P.2d 1021, 1025 (1971). Though the damages remedy for groundwater transfers appears to pass muster under the imprecise "adequacy" test insofar as providing a requisite means of redress, the *Chino Valley* court offers three additional reasons for its finding that effective relief can be obtained under the groundwater amendments. 119 Ariz. at 248, 580 P.2d at 709. Those reasons are: (1) the temporary nature of the groundwater code amendments, *see* ch. 29, § 1, 1977 Ariz. Sess. Laws 68 (where the legislature declares that the groundwater amendments will lapse when a comprehensive groundwater management plan is enacted), (2) statutory limitations on increased or additional transfers of groundwater, and (3) the uncertain nature of plaintiff's injury. 119 Ariz. at 248, 580 P.2d at 709. Those reasons suggest that damages are not so great as to demand the injunction remedy despite the statutory limitations.
68. *See* Town of Chino Valley v. State Land Dep't, 119 Ariz. 243, 248, 580 P.2d 704, 709

the injunction when legal remedies are inadequate, the Arizona Supreme Court perceived circumstances when defects in the available legal remedies will require application of injunctive power to fulfill the law and vindicate a substantive right.[69]

An instance where the court has exercised its equitable injunctive powers despite legislative limitations on that remedy is found in the decision of *McCluskey v. Sparks*.[70] In that case, a taxpayer sought to enjoin property tax assessments that fixed the assessed value of his property at an amount grossly disproportionate to valuations made by the country assessor on similar properties.[71] The taxpayer complained that the assessor's method of valuation of his property was discriminatory in violation of section 1, article 9 of the Arizona Constitution and the fourteenth amendment of the United States Constitution.[72] The assessor asserted that the plaintiff had an adequate remedy at law insofar as statutory procedures provided an appeal to the superior court.[73] Moreover, he contended that injunctive relief was unavailable in view of the statutory provisions prohibiting the injunction remedy to prevent the collection of any tax imposed.[74] The Arizona Supreme Court decided, however, that statutory appeal procedures did not allow review of issues relating to discriminatory assessments.[75] Although subsequent to the *Sparks* decision the operative appeal statute was amended by the legislature to provide review of that constitutional issue,[76] the

(1978). "We reserve the right under our constitutional authority to act if in fact in a particular case no other adequate remedy but injunction is available." *Id.*

69. *Id.*; *see* Southern Pac. Co. v. Cochise County, 92 Ariz. 395, 403, 377 P.2d 770, 775-76 (1963) (statute prohibiting issuance of an injunction against state officer to enjoin tax collection did not preclude injunction against discriminatory assessments); Crane Co. v. Arizona State Tax Comm'n, 63 Ariz. 426, 445, 163 P.2d 656, 664 (1945) (although public officers may not be enjoined from executing a public duty under statute, the legislative injunctive restraints will not be construed to prohibit preventive relief where the officer acts beyond his power); Corbin v. Rogers, 53 Ariz. 35, 40, 85 P.2d 59, 61 (1938) (there are circumstances under which the court has not only jurisdiction but should, in the exercise of its discretion, enjoin even the enforcement of a public law); County of Maricopa v. Chatwin, 17 Ariz. App. 576, 581, 499 P.2d 190, 195 (1972) (certain factual circumstances may give rise to an exception from statutory injunction restraints and justify that extraordinary measure of relief); Drachman v. Jay, 4 Ariz. App. 70, 76, 417 P.2d 704, 710 (1966) (dictum) (the right to correct a taxing system that provides discriminatory rather than equitable tax assessment procedures will warrant injunctive relief though the legislature has expressly removed that remedy). *See also* Santa Fe Trail Transp. Co. v. Bowles, 62 Ariz. 177, 179-80, 156 P.2d 722, 723 (1945) (where there is no semblance of authority for imposition of a tax, an injunction may lie). *See generally* McClintock, *Adequacy of Ineffective Remedy at Law*, 16 MINN. L. REV. 233 (1932).

70. 80 Ariz. 15, 291 P.2d 791 (1955).

71. *Id.* at 17-18, 291 P.2d at 793-94.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 19-20, 291 P.2d at 794.

76. Today, taxes that have been collected and are discriminatorily excessive because of intentional and illegal activities may be challenged upon appeal to the superior court. County of Maricopa v. Chatwin, 17 Ariz. App. 576, 581, 499 P.2d 190, 195 (1972); Drachman v. Jay, 4 Ariz. App. 70, 75, 417 P.2d 704, 709 (1966). *See also* Department of Property Valuation v. Salt River Project Agric. Improvement & Power Dist., 27 Ariz. App. 110, 116-17, 551 P.2d 559, 563-64 (1976). The

language of the statute prior to amendment was read to provide only a limited examination of whether property was assessed according to its full cash value.[77] Since the statutory remedy in *McCluskey* was inadequate to vindicate the claimant's charge of discrimination, the court held that the bar to injunctive relief could not be construed to prohibit an injunction against disproportionate assessments clearly contravening state statutes and constitutional provisions.[78]

Where the groundwater transfers gradually deplete reserves, the statutory remedy of damages should, in most instances, provide complete and adequate compensation. Yet extraordinary circumstances, as in *Sparks*, may arise where the remedy at law is not practically adapted to rectify the impairment of a landowner's substantive legal right.[79]

Illustrative of that inadequacy concept might be a situation where an individual or municipal transferee, found liable under the statutory presumption of injury, is required by court decree or jury verdict to pay substantial damages for all past, present, and future injury resulting from harmful groundwater transfers. Proceeding with the supposition that the individual or municipality is financially incapable of satisfying the judgment, the normally sufficient statutory remedy would be unable to furnish the mode of adequate relief intended by the legislature.[80] A court's constitutionally derived equity jurisdiction would then be invoked to make whole the remedy given by positive law, and injunctive relief could be provided notwithstanding the legislative restraints.[81]

Conclusion

The decision in *Town of Chino Valley v. State Land Department* reflects a judicial judgment that comprehensive and effective supervision over Arizona's diminishing groundwater resources must be accomplished through legislative modification of common law doctrines. The Arizona Supreme Court upheld the injunction restraints as being within the legislature's broad powers of substantive regulation. It sup-

legislature now provides a forum in which issues of unconstitutional and discriminatory tax assessments can be heard. *Id. See* ARIZ. REV. STAT. ANN. § 42-204(C) (Supp. 1957-78).

77. 80 Ariz. 15, 19, 291 P.2d 791, 793 (1955).

78. *Id.* at 20, 291 P.2d at 796.

79. *See* Board of Regents v. City of Tempe, 88 Ariz. 299, 356 P.2d 399 (1960). Though ARIZ. REV. STAT. ANN. § 12-1802 (1956) states that a court cannot issue injunctive relief to restrain an officer from performing a duty under statute, that limitation will not preclude the equitable remedy enjoining an officer's act when the officer exceeds his authority while executing public law. 88 Ariz. at 302, 356 P.2d at 400-02.

80. *See* County of Maricopa v. Chatwin, 17 Ariz. App. 576, 499 P.2d 140 (1972). Notwithstanding the seemingly absolute injunctive restraints imposed by ARIZ. REV. STAT. ANN. § 42-204(B) (1978) on tax collection cases, the extraordinary remedy of injunction may still be made available "if the facts are such as to justify such relief." 17 Ariz. App. at 581, 499 P.2d at 195.

81. 17 Ariz. App. at 581, 499 P.2d at 195. See discussion notes 78-79 *supra.*

ported that proposition with reference to instances where legislative injunctive restraints have been upheld by the courts. Significant policy considerations, however, have always attended the legislature's circumscription of the injunction remedy. Whereas overriding groundwater management objectives can be correlated with the legislature's limitation on injunctive relief to prevent groundwater transfers, the *Chino Valley* opinion demonstrates that strong reasons implicating public interest must accompany a legislative withdrawal of an equitable remedy.

Moreover, the decision in *Chino Valley* indicates that while the remedy of damages is constitutionally adequate, particular factual circumstances may demand injunctive relief regardless of the legislative restraints on that remedy. The court is unwilling to establish judicial guidelines indicating under what circumstances injunctive relief is appropriate. Thus, until standards enunciated in future court decisions reveal when injunctive relief will be available, the landowner's substantive property right will be protected by the public faith that the legislature has provided an adequate measure of relief.